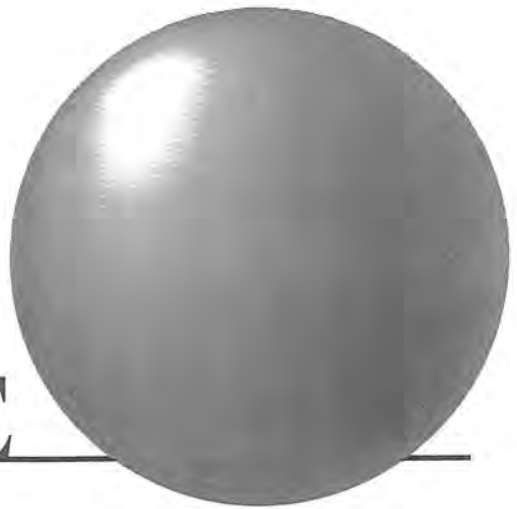


UNIVERSAL PRINCIPLE



*—Human Rights Newsletter from
Japan Civil Liberties Union—*

featuring—

Return of Thalidomide

Muto vs. Japan: Fighting to Expand the Scope of Information Disclosure

2005年3月30日

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前 略

先日は「人権新聞」の記事の翻訳および翻訳記事の編集にご協力いただき、ありがとうございました。おかげさまで英文ニュースレター「Universal Principle」第12号を完成させることができました。

本来なら相応の翻訳料なりを支払うべきところですが、財政困難のため現物を一部支給ということでご了承頂ければ幸いです。

なおこのニュースレターは、JCLU と付き合いのある海外の NGO や諸機関に発送しています。また全ての記事は当協会ホームページに掲載する予定です。

今後も継続して「人権新聞」の翻訳は続けていきますので、引き続きご協力頂きますようよろしくお願い申し上げます。

草々

Universal Principle (UP News) is a compilation of articles and excerpts from JCLU's Japanese-language newsletters "Jinken Shimbun". UP News is edited by the Universal Principle Committee and published by the Japan Civil Liberties Union.

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Return of Thalidomide



The drug Thalidomide was prescribed as a sedative in the late 1950s and early 1960s. Many pregnant women were given it to help them sleep and to combat nausea. They were not informed that it would cause harmful side effects to their developing fetuses. The most famous side effect of the drug is Phocomelia, a condition in which hands and or feet start immediately at the shoulder or hip. However, side effects are very various, spanning from deafness to improper formation of internal organs.

In Japan, approximately 300 people have been officially recognized as victims of Thalidomide side effects. However, the actual number is believed to be more than triple due to the fact that many parents concealed their children's sufferings to avoid facing severe discrimination against people with disabilities. In the first article of this feature, two victims talked about their experience of discrimination. As a result of the litigation and protests by victims, production and sale of the drug was banned in 1962 in Japan. But recently Thalidomide has been privately imported for the purpose of treating multiple myeloma. The second and third articles detail the current situation and legal backgrounds of the drug distribution.

Thalidomide Patients for 30 Years: 30-Year Anniversary for Ishizue



[Jinken Shimbun, November 30, 2004, No.351]

Thalidomide welfare centre, the Ishizue foundation, recently celebrated its 30-year anniversary with a memorial symposium and displays on October 10, 2004. Many members of JCLU, which has supported victims of Thalidomide side effects in lawsuits for the last 10 years, and victims themselves also attended.

Most of the Thalidomide patients are now over 40 years old. While they struggle with health problems and anxiety about their future, they are part of our society.

Here are two hopeful speeches made by Thalidomide patients in attendance.

Supported By a Lot of Love

Kaori Yamaguchi

I was born in May of 1963, as the daughter of parents who owned a hand bag manufacturing business. I was born a little smaller than normal and given bottled milk.

Just after my birth, my father realized that I didn't react to any sounds and took me to a couple of hospitals. My parents were told that my ears were not working and

that there was no cure. My parents used their energies to find a great place to give me a special education. At the Nihon Rou Gakko, Japan School for the Deaf, I received speech training. Also when I was two years old, I appeared on the TV show "NHK Educational TV Program for the Deaf." I learned the techniques to recognize mouth movements for creating sounds and to pronounce words. Even at home, I practised with my mother until late at night everyday. It was very tough, but it was well worth the effort. Finally I learned to speak when I was three years old.

Later I studied at Kyoikudai Fuzoku Rou Gakko as a kindergartner and first grader, before my strong willed parents sent me to the regular elementary school. It was not easy, but I made a lot of friends soon. My parents and support from many other people caused this to happen for me.

When I was eight years old, the famous Dr. Lentz revisited Japan from West Germany, announcing that Thalidomide causes deafness. I was tested at Teikyo University hospital and certified as a Thalidomide patient. At this time I first learned what kind of disease Thalidomide caused and how terrible it is. After that I joined the events organized by the Ishizue foundation and had a nice time with other patients. I have many great memories with them, such as crying together and laughing together. After graduating high school, I went to art school. I met my husband in the sign language school. Now I have two children, a son in his third year of high school and a daughter in her second year of junior high school. In our family, we use verbal language to communicate with each other. I have learned a lot of things by raising my children, and I would like to keep growing with them.

Medical science has developed quickly and I hope in the 21st century serious side effect disasters, like the one caused by Thalidomide, do not happen and the next generation will not have to face any such tragedies.

My Treasure

Mutsumi Shinosawa

I was born in Hokkaido in 1962. When my mother was pregnant, her morning sickness was severe. The pharmacy recommended the drug "Isomin" to her, and it worked very well for her. She took it until a couple of months before giving birth. My mother didn't see me until one week after my birth because of my appearance caused by Thalidomide.

I was not allowed to go to elementary school and junior high school because of the disease. My parents didn't want to send me to school as they believed other children would bully me. So my grandmother taught me how to read and write.

When I was a small child, my parents didn't let me go outside. I don't have any memories of playing with other children. After dark no kids were around the park, so it was my time to play on the swings. My house was very small with just one room, so when we had company over, I had to be hidden in the closet until after the company left, even in the hot summer. Sometimes the visitors stayed long and I had to wait to go to the bathroom until they were gone. When I was seven years old, we moved to a larger house and I had my own room. But I was still hidden in my room and had to be very quiet when someone came.

When I was in my teens, I spent everyday with anxiety about the future. "Will I have to live in this house forever?" "What will I be for my parents?" "I am a human, but do I have to live as a 'non-existent' person forever?" However, I could not ask these questions to my parents and sister because I thought these questions would hurt their feelings. When I was 24 years old, I heard about a test to receive a junior high school diploma. I was asked if I wanted to go to Tokyo for it. The next year I decided to go to Tokyo by myself.

I started preparing for the test at the Tokyo Shinshosha Centre. This place was originally intended for providing skills to get a job, and I was the only person that studied Math, Japanese and English there. I had the impression that my teacher was very strict, so I was very

surprised to see he was extremely happy, like my parents when I passed the test. "You came to Tokyo from Hokkaido by yourself and did a great job!" I cannot forget his happy face even now.

I passed the test when I was 26 years old. I immediately sent a copy of the certificate to my parents, and they were very happy, too. It gave me a little bit more confidence. I wanted to stay in Tokyo more and make money by myself. So I found an apartment and a job. The job was working in an accountant department. When I got the first pay check, it made me extremely happy. I sent some of it to my parents to share my happiness. Six years later I married a man, who worked with me as a part-timer there.

When I was 34 years old, I decided to get a high-school education at NHK Gakuen. That school offers home schooling. I basically studied at home by listening to the radio programs and watching the TV programs, except for going to school in Kunitachi city a couple of days a month. My classmates varied from 15 to 70 years old. I made friends there. It was very exciting that we had a cafeteria, gymnastic festivals, regular tests, clubs, and even a school song, like regular schools do. My dream finally came true to have a school life. The time I spent at school is one of my treasured memories. I sent the graduation certificate to my parents when I was 37 years old, which was the third time that I could send them something, after the junior high school diploma certificate and some of my first pay.

I have lived in Tokyo for seventeen years now. All of my memories here are treasured. My most important memory is when I went to the Tokyo Shinshosha Centre the very first time. I bought onigiri (rice balls) and a bottle of juice at the convenience store near there. At the moment I chose what I wanted and made the payment for it by myself. I felt that I existed as a human. I thought "I am doing, like other people simply do!" Since then, I like these simple things.

In the last seventeen years I've also learned that it's never too late. I will be even happier now than any time in the past.

Translated by Harumi Douglas

Symposium on The Return of Thalidomide

[Jinken Shimbun, March 28, 2003, No.341]

The governmental approval of the sale and production of Thalidomide to pharmaceutical companies was revoked in Japan in 1962 in response to the serious malformations it caused in new born children during the 1950s and 60s, when prescribed to pregnant women. Since that time Thalidomide has not been produced in Japan. Recently however, it has been imported from abroad privately by doctors and multiple myeloma patients for the purpose of treatment of such patients.

In response to this renewed use of the drug, the JCLU sponsored a symposium on the danger of Thalidomide was held on February 16, 2004 by the Ishizue Foundation, an organization established in 1974 for the support and welfare of victims of Thalidomide's side effects. The Foundation is concerned that the return of Thalidomide may cause a repeat of the Thalidomide tragedy and requests the Ministry of Health, Labour and Welfare to establish safety measures and to properly control the use of the drug.

JCLU members represented Thalidomide victims in lawsuits against pharmaceutical companies and the Japanese government for remedy. The symposium's opening address was made by a Thalidomide victim, who stated that "Thalidomide caused serious suffering to us and our families. We request the Ministry of Health, Labour and Welfare to take quick measures and to provide patients and the general public with proper information and education regarding danger of the drug in order to prevent anyone from suffering damage."

A multiple myeloma patient, who successfully returned to work as a result of taking Thalidomide, then requested both the Ministry of Health, Labour and Welfare and pharmaceutical companies make better arrangements for the use of the drug so that multiple myeloma patients could use Thalidomide safely. A doctor, who had used Thalidomide for treatment of multiple myeloma, reported benefits as well as adverse effects of

Thalidomide in a limited sample group. The doctor also disclosed the fact that in some cases, his patients had given Thalidomide to acquaintances and the patients' families had taken Thalidomide as a sleeping pill. He pointed out the difficulties in managing the drug out of reach of the Pharmaceutical Affairs Law.

In response to these presentations, an officer of the Ministry of Health, Labour and Welfare made comments that the Ministry organized a study group because it was important to learn about the actual situation. He also stated that the government was preparing a report on a survey about use of Thalidomide by doctors and hospitals and that the government was responsible for patients' best interests.

Finally, Mr. Yoshihiko Fuketa, one of the lawyers who represented the Thalidomide victims in the lawsuits, made his presentation. He expressed an understanding that multiple myeloma and cancer patients were eager to use Thalidomide. However, he went on to emphasize the importance of the lessons learned from the Thalidomide tragedy in the past and stressed that the people concerned must deal with the issue of Thalidomide's adverse side effects seriously.

Translated by Yasue Mochizuki

Thalidomide's Comeback: How is the Ministry of Health, Labour and Welfare carrying out its responsibility to control Thalidomide?

[Jinken Shimbun, March 28, 2003, No.341]

Contributed by Yoshihiko Fuketa

(One of the legal counsels who represented
Thalidomide victims in the lawsuit.)

Large quantities of Thalidomide privately imported from abroad are prescribed to multiple myeloma patients in Japan. I can understand the feelings of multiple myeloma patients and that they desperately want to try "a new drug." However, whether this new drug is treated as a medical drug approved by the Ministry of Health, Labour and Welfare (MHLW) has to be examined from the viewpoint of both effectiveness and safety. Side

effects of this chemical matter are by no means unknown. It is evident that Thalidomide causes significantly grave deformity of various body parts to developing fetuses if taken during early pregnancy.

Dr. Lenz of West Germany warned that Thalidomide needed to be withdrawn from the market as certain malformations were associated with intake of the drug during early pregnancy. After Dr. Lenz's warning, countries that imported, produced or sold Thalidomide collected every single tablet of Thalidomide, wiping it out of circulation. That is the history of Thalidomide. Given this history, I am terrified by the current situation in which Thalidomide is being prescribed to, and used by, not only patients in hospitals but also patients at home.

To determine the future of Thalidomide, we should look back to the past and learn from valuable lessons.

The lawsuits filed by Thalidomide victims in Japan were concluded by settlements, not judgements. The Ministry of Health and Welfare (MHW) and pharmaceutical companies admitted that there was a causal relationship between the consumption of Thalidomide during pregnancy and certain malformations and that they were responsible for the approval, production and sales of the drug. As a result of the settlements, they first paid compensation to the victims. Second, the MHW organized a review committee of doctors which distinguished children with malformations caused by Thalidomide and children with malformations from other causes. If the committee decided that malformations were caused by Thalidomide, children with such malformations, who were not the plaintiffs in the settled lawsuit, received remedies equal to those received by the plaintiffs. Third, the foundation Ishizue, meaning cornerstone, was established for the purpose of promoting Thalidomide victims' welfare and preventing the occurrence of harmful effects of medicine.

At present, the MHLW seems to be in a position where it cannot control Thalidomide, since the drug is not approved by the MHLW under the Pharmaceutical Affairs Law.

The law provides that a medical drug means a material used for therapy of people with disease. As long as Thalidomide is used for therapy of multiple myeloma patients, there is no doubt that Thalidomide is a medical drug under the Pharmaceutical Affairs Law. In consideration of the risks of medical drugs, it is arguable that the law can be applied to Thalidomide even though not being approved by the MHLW and that Thalidomide has to be under strict control of the law.

Moreover, Thalidomide was once a medical drug approved by the MHLW for production and sales. The MHLW made pharmaceutical companies withdraw their applications for the approval. Under the revised law now in force, the MHLW has the power to revoke its approval when a medical drug benefits are not clear or when a drug's adverse side effects outweigh its benefits. The law also provides that the MHLW may order a pharmaceutical company to discard or collect such drugs after revocation of approval.

The MHLW has not done anything to establish control over Thalidomide, saying that it has no authority to order anyone to discard a non-approved medical drug. But the MHLW's interpretation of the law is strictly formal. The MHLW should at least order the taking of a measure to prevent risks to public health.

In addition, under the law, the minister of the MHLW may designate a highly toxic drug to be a poisonous drug. To meet the standard of designation as a poisonous drug or powerful drug, it is required that a drug be fatal, that the frequency of occurrence of side effects be high, or that a drug cause grave side effects. If a drug is designated to be a poisonous drug, it is strictly regulated under laws so that sales and assignment of the designated drug shall be restricted. Bottles or packages of the designated drug shall show the words "poisonous drug" in white letters on a black label. It is also forbidden to give poisonous drugs to those who do not observe the safe handling and application of such drugs. It is also forbidden to store or display poisonous drugs. Those who violate the above regulations may be subject to criminal sanctions including imprisonment. Both doctors prescribing a poisonous drug and traders importing it must therefore be prudent in the handling

and application of such a drug.

Thalidomide is teratogen which causes grave deformity to the human body. Thalidomide is highly toxic and must be designated as a poisonous drug.

If Thalidomide cannot be designated as a poisonous drug, there is another measure to designate Thalidomide as a medical drug requiring special attention. A medical drug requiring special attention is subject to restricted sales and written record of the administration of the drug.

Designation by the minister of the MHLW would protect patients who are prescribed Thalidomide, patients with possibilities of pregnancy, families of such patients, and people surrounding the patients and the families who accidentally take this drug. The designation of Thalidomide as a poisonous drug would be a symbolic and effective measure which would awaken people to the dangers of the drug. When it is necessary to protect life and health, the minister needs to take action by virtue of his authority without waiting for a pharmaceutical company's application.

A Brazilian mother who gave birth to a seriously deformed baby stated that Thalidomide was a kind of "explosive." The minister should not wait for an application from a producer or importer of Thalidomide in order to let the public know of its risks.

It is also important to provide doctors with information, to give guidance and direction. Doctors have broad discretion for medical treatment. They may prescribe a harmful chemical matter to their patients if it is expected to hold a benefit for the patient. However, not all doctors prescribing Thalidomide are highly qualified with regard to professional responsibility and ability. Accordingly, the minister should give doctors necessary directions on the handling of this dangerous drug.

In the United States, a program called System for Thalidomide Education and Prescribing Safety (STEPS) was created under the Food and Drug Administration's control. STEPS provides carefully considered and strict

standards in terms of registration of doctors and drug stores dealing with Thalidomide, procedures of prescription, supply, and preparation of medicines. We must follow the United States, which has prevented suffering from Thalidomide in the past. Measures such as the designation as a poisonous drug or a drug requiring special attention and direction to doctors may be equal to measures under STEPS.

In West Germany, it took ten days for the government to start its appeal to the public to discard stocks of Thalidomide. On the contrary, Japan spent nine months appealing to the public to discard the drug. Dr. Tadashi Kajii first reported on severe side effects caused by Thalidomide in Japan in the medical journal "Lancet." Dr. Kajii testified that half of the victims would not have suffered malformation caused by Thalidomide if the MHLW had taken quick action after Dr. Lenz's warning.

The MHLW would violate the confirming letter in the settlement if it learned nothing from this valuable lesson. The measures stated above must be taken immediately. If the current laws cannot regulate the situation surrounding Thalidomide sufficiently, a new law should be prepared as soon as possible.

I strongly urge the MHLW to contend with this difficulty with a sense of mission that it is charged with the promotion of the people's health.

Translated by Ikuko Komachiya

JCLU Demands Regulation of Thalidomide

[Jinken Shimbun, September 26, 2003, No.344]

The Japan Civil Liberties Union, long familiar with the dangers of Thalidomide, cannot overlook the recent use of the drug in Japan without any sort of regulation at all. In light of Thalidomide's risks, the JCLU has made an emergency proposal for the regulation of the drug.

The proposal requesting the regulation of the drug Thalidomide, addressed to the Minister of Health, Labour and Welfare, asks the Ministry to take the following steps:

- 1) conduct a study that examines the current state of imports, lists importers of the drug, determines the conditions under which Thalidomide is used in Japan, and evaluates the quality of imported Thalidomide;
- 2) carry out regulation that is possible under existing law such as designating Thalidomide as a "poisonous drug" under the Pharmaceutical Affairs Act, ordering measures to prevent the occurrence of dangers and regulating advertisement and promotion of the drug;
- 3) conduct educational and informational activities about the risks of Thalidomide and establish a research group to supervise these activities.

We believe that there should not be even one new victim of the importation, sale, or use of Thalidomide, whose sale had been suspended in the past because of the tremendous damage the drug had caused. The JCLU therefore declares that the government has a duty to, and indeed must, immediately take the steps possible under existing law to prevent injury from Thalidomide. We have made a concrete, detailed proposal to achieve that end.

Translated by Jonathan Marshall

MUTO vs. JAPAN

Fighting to Expand the Scope of Information Disclosure



The Background

Mr. Hisashi Muto, a member and director of the Japan Civil Liberties Union (JCLU), is currently fighting two law suits against the state. In both cases, Mr. Muto's attorneys are also members of the JCLU. One of the cases involves the refusal by the Supreme Court to disclose records of judicial conferences, and the other case involves the refusal on the part of the Prosecutor's Office to allow copies to be made of the trial records in a criminal case that had already been finalized. While both cases take the form of a claim for compensation for damages against the state, Mr. Muto is not in it for the money: he filed suit in order to demand the reform of Japan's inadequate information disclosure systems.

It is documents connected with the "Lockheed Case" that are the subject matter of both of the lawsuits filed by Mr. Muto. In the Lockheed Case, the then Prime Minister of Japan, Kakuei Tanaka, and others were accused of accepting bribes in connection with orders for aircraft made by America's Lockheed Corporation, and even now it is said to be the largest bribery scandal in the postwar period. From the time that he was a university student, Mr. Muto has investigated and studied both the facts behind this case as well as its effect on society by attending trial hearings and other means, but in an age without information disclosure systems, citizens were not provided with adequate materials for examination.

Japan's Information Disclosure Law was enacted in 1999. Twenty years prior to the enactment of that law, in 1979, the JCLU published a proposal for an information disclosure law, and from that time on it has been working towards the realization of information disclosure systems through activities such as the creation of model ordinances. While citizens use the enacted law based on their understanding that it gives concrete form to the citizens' "right to know" that is based upon Article 21 of Japan's Constitution, the state claims that this law does not give concrete form to a constitutional right, but that it is no more than the institutionalization by law of accountability (duty to explain) on the part of the government.

However, the Information Disclosure Law that was enacted in 1999 only covers the administrative branch of government. Thus, there still is no legal system for the disclosure of information concerning the administration of the judiciary that is conducted by the courts, i.e., the management, etc. of the courts. Furthermore, in Japan the Prosecutor's Office is responsible for maintaining custody of the records in finalized criminal cases, and while it would appear that the Prosecutor's Office would be subject to the Information Disclosure Law because it does make up one part of the government's "administration," the Information Disclosure Law itself clearly exempts from its coverage all "criminal case records." This is explained as being due to the fact that the Finalized Criminal Lawsuit Records Law, which provides for rules concerning disclosure and making of copies of criminal lawsuit records, was enacted prior to the Information Disclosure Law. However, the Finalized Criminal Lawsuit Records Law gives the Prosecutor's

Office wide decisional authority and its structure does not allow the freedom to make copies of essential information.

In 2000 and 2001, following the enactment of the Information Disclosure Law, the JCLU published proposals for laws concerning the disclosure of information held by the courts and the houses of parliament. Furthermore, in 2002 the JCLU Information Disclosure Committee called for the enactment of a new law concerning the disclosure of criminal records. These proposed laws cite many provisions of the 1999 Information Disclosure Law, and it is clear that they could be quickly enacted into law. However, the government and the parliament will not begin legislative work based on these proposals alone. That is why it was necessary to draw attention to these issues by suing the state. As introduced in this article, the lawsuits are still proceeding, and the state will not easily let us win. However, the lawsuits received wide coverage in newspapers and other media when they were filed and when judgments were handed down, and it was possible to make the inadequacy of the current legal system known to ordinary people. If the judges understand that Japan's information disclosure systems lag behind those of other countries, it is possible that Mr. Muto may receive winning judgments. We look forward to receiving support from abroad.

Non-disclosure of Supreme Court Conference Minutes on Lockheed Case

[*Jinken Shimbun*, May 23, 2003, No.342 &
July 28, 2004, No.349]

When the Lockheed Case went to trial over 25 years ago, in order to have authorities in the U.S. take the deposition of witnesses connected with the party that paid bribes to Japanese politicians, the Supreme Court, in a procedure that is not recognized institutionally in Japan, issued a document titled "Declaration" in which it declared the deposed parties immune from criminal liability in Japan.

Upon the coming into force of the Information

Disclosure Law in April 2001, the JCLU created an "outline for the clerical handling of the disclosure etc. of judicial administrative documents held by the Supreme Court," and on May 7, 2001, Mr. Muto (a member of the JCLU's Information Disclosure Committee) demanded that the Supreme Court disclose 3 kinds of documents.

The disclosure request was for (i) meeting minutes of judicial conferences of the Supreme Court regarding the issuance of the "Declaration" for July 14 and 24, 1976; (ii) records of negotiations and reports for the occasion in July 1976 when officials of the criminal division of the Supreme Court's general affairs division traveled to the U.S. to meet with Judge Ferguson and others of the U.S. District Court, Central District of California, as well as documents, etc. that were brought along; (iii) records, etc. of talks and preliminary discussions held between the Ministry of Justice, the Prosecutor's Office, the U.S. court, and Judge Ishida of the Tokyo District Court during the period from which consideration of the "Declaration" began to the time that it was issued.

However, Article 8 of the Supreme Court's Regulations Concerning the Minutes of Judicial Conferences provides that meetings of the Supreme Court justices are closed to the public, and based on this, the Supreme Court did not disclose the portions of the meeting minutes that set out the judicial conference proceedings. Furthermore, the Supreme Court did not disclose any documents in the other two categories of requested documents on the basis that such documents do not exist.

In response to this, Mr. Muto and five attorneys who are members of the JCLU's information disclosure Committee filed suit against the state at the Tokyo District Court on May 22, 2002, seeking state compensation for mental distress due to violation of the right to know, and the JCLU supported this suit.

The first instance judgment held that it cannot automatically be concluded that because the judicial conferences are closed to the public the meetings of those judicial conferences should not be disclosed, and the court ordered that Mr. Muto be paid 60,000 yen in

compensation (50,000 yen as a solatium, 10,000 yen in attorneys fees). In this respect, it was concluded that the Supreme Court had committed an unlawful act (a tort). On the other hand, the other claims made by Mr. Muto's side were not recognized. Both Mr. Muto and the state appealed that judgment.

The second instance judgment reversed the first instance judgment and completely rejected Mr. Muto's claims. This judgment found that the purport of Article 8 of the above-mentioned regulation includes not only the closing of judicial conferences to the public, but also the non-disclosure of meeting minutes.

That the closing to the public of meetings and the non-disclosure of meeting minutes are separate matters is provided for in both paragraph 2 of Article 57 of the Constitution and Article 63 of the Parliament Law, and even where the parliament holds a secret meeting, other than those matters that are specifically deemed to be secret, the meeting minutes should be disclosed. Furthermore, according to a large number of judicial precedents dealing with information disclosure, it is no longer even disputed that in regard to administrative documents, the closing of a meeting to the public does not directly mean that the meeting minutes are not to be disclosed. Also, it cannot be that absolutely no records and documents were made in connection with the gathering of evidence concerning the largest postwar corruption case in which a former prime minister was indicted.

Nevertheless, the second instance judgment interprets Article 8 of the above-mentioned regulations

as though judicial administration is different from regular administrative operations. Based upon its understanding that the judiciary alone is special and different from other authorities, it can only be said that the court, lacking sensibility, has lapsed into self-righteousness and is unjustly trying to conceal the court's internal information. Accordingly, in February the plaintiff appealed this case to the Supreme Court.

Rejection of Photocopying Finalized Criminal Record on Lockheed

[Jinken Shimbun, January 30, 2004, No.346 & November 30, 2004, No. 351]

On January 15, 2004, Mr. Muto filed a lawsuit demanding compensation by the state for damages arising from the refusal of the Tokyo District Prosecutor's Office to provide him with a copy of the trial record in the so-called Lockheed Marubeni Route Case. Mr. Muto had originally submitted a request under the Finalized Criminal Lawsuit Records Law that he should be allowed both to inspect and to receive a copy of the trial record, and although the Prosecutor's Office did allow him to inspect the record, his request for a copy of the record



Mr. Muto (3rd from right) and his lawyers rejoicing the victory at the first instance judgement on their "Declaration" lawsuit (June 2004).

was refused. Thus, in order to bring to light issues associated with the provision of copies of trial records in criminal cases, he demanded that the state compensate him for emotional damage that arose from the refusal by the Prosecutor's Office to provide him with a copy of the trial record.

From the very beginning, Mr. Muto's primary purpose was to obtain a copy of the trial record. To that end, in January 2001 he filed a quasi-appeal with the Tokyo District Court against the disposition refusing him permission to receive a copy of the records, and after this was dismissed in September 2001, he filed a special appeal that same month. However, that appeal also was dismissed in June 2002. As an ultimate expedient, he filed the above-mentioned suit under the State Compensation Law.

In the Lockheed Marubeni Route Case, it was necessary to introduce as evidence the testimony of witnesses who were living abroad, and because there was a risk that the witnesses' testimony would be self-incriminating, an exceptional procedure was used by which questioning was undertaken by the authorities abroad in return for a declaration that the witness would not be prosecuted. The record that Mr. Muto sought had great significance in terms of verifying the procedure used in carrying out the questioning of the witness as well as issues associated with guarantying appropriate procedures (due process) and the weight and sufficiency of the evidence.

The Law Concerning Disclosure of Information Held by Administrative Organs ("Information Disclosure Law") came into effect in April 2001 as a system for the disclosure of information held by administrative organs, including the prosecutor's office, and under this law, disclosure takes place "either by inspection or by the provision of a copy" (Art. 14, Information Disclosure Law). Both inspection and provision of a copy are handled in the same manner. However, the Information Disclosure Law does not apply to finalized criminal lawsuit records (Art. 53-2, Code of Criminal Procedure) because the Finalized Criminal Lawsuit Records Law is deemed to be a complete system in itself as regards the disclosure of such records. Thus, even though the

Information Disclosure Law does not apply to such records, that is not meant to specially exempt such records from treatment similar to that which would be required under the Information Disclosure Law.

However, the term "copy" is not found in the Finalized Criminal Lawsuit Records Law. Thus, limited only to a formal literal interpretation, there was room to conclude that there is no guaranty of the right to receive a copy of the requested records. The court that heard Mr. Muto's case for state compensation only interpreted the law in such a formal manner, and the first instance judgment (September 2004) was handed down against Mr. Muto. However, the inspection of records is carried out in order to obtain an accurate grasp of the contents of those records. The means to most accurately gauge the content of the records in question is to have in hand records that have the same content as the subject records and to be free to review those records to the degree necessary to accurately understand their content. Inspection and copying are two sides of the same coin. Indeed, the volume of the records for which Mr. Muto requested disclosure was enormous, totaling approximately 1,700 pages, and it was nearly impossible to gauge their content and study them simply by inspecting them and taking notes. It was essential to be allowed to make copies to carry away.

It should be noted that under the Finalized Criminal Lawsuit Records Law, causes for restricting inspection are listed as including cases "where it is deemed that there is a risk of harm to public peace or good public morals," "where it is deemed that there is a risk that allowing inspection of the records will markedly harm the reformation and correction of a criminal offender," and "where it is deemed that there is a risk that allowing inspection of the records will markedly harm an associated person's reputation or tranquility of life." However, because Mr. Muto was indeed allowed to inspect the trial records, his inspection of the records must once have been deemed not to have fallen under any of these causes for restricting inspection. Going one step further and providing a copy of the records should not have caused these harms to occur. Would it then be said that by providing a copy it would have resulted in other harms? That cannot be. There is no

reason for the refusal of permission to receive a copy.

As it happens, in actual practice copies are provided in respect to 99.9% of requests. The refusal to provide Mr. Muto with a copy clearly constitutes unequal treatment.

While on one hand the Tokyo District Court pointed out that there was insufficient consideration on the part of the prosecutor, stating, "when considering the actual circumstances where there is partial provision of copies, adequate consideration should have been given when not allowing any copy whatsoever of the present records," the court still found that not providing a copy was within the prosecutor's scope of discretion. However, the guaranty of the right to know is a corollary to the guaranty of freedom of expression. The discretion to limit copies, which are a means for realizing the right to know, should be used with restraint. In order to further bring to light the unsatisfactory operation of the current Finalized Criminal Lawsuit Records Law, Mr. Muto filed an appeal in October 2004. However, even on appeal the examination of the issues was insufficient; arguments were heard only at one hearing on February 8, 2005, and judgment in the appeal is scheduled to be handed down on April 15. Based on the progress of the appeal, because the appeals court rejected Mr. Muto's petition for a court inspection to verify that there would be no harm caused by the actual copying of the documents for which he demanded copies, and because the court rejected Mr. Muto's request to hear testimony from his witness (a scholar), which testimony had also been rejected in the first instance, there is a high possibility that the appeals court will hand down the same judgment as the Tokyo District Court. The inspection and copying of records is not something that is subject to the benevolence of the authorities, but is a part of the people's inherent right to know. It is not easy to break through the obduracy of the prosecutor's office and the courts.

Translated by David M. Schultz

JUDICIAL SYSTEM

Graduate Law School and Role of NGO 14th Kubota Memorial Symposium

[Jinken Shimbun, December 5, 2003, No.345 &
January 30, 2004, No.346]

The JCLU-sponsored annual Kubota Memorial Symposium took place at Tokyo's Waseda University on November 29, 2003. In his opening remarks, the JCLU representative director, Jun'ichiro Hironaka explained the origins and development of the Kubota symposium, and the activities of the JCLU up until the present. Fourteen years ago, at the time when You Kubota, as a United Nations staff member, was wrestling with human rights problems, the JCLU did almost no international work. Now, however, it is concerned with human rights issues regardless of whether they are domestic or international. Internationally, there is now a broader arena for action.

In his greeting, the JCLU director noted that human rights as a keyword in the new graduate law schools will reconfirm that they are a fundamental aspect of the legal profession. He noted his desire that the graduate law schools be made places for discussion about these issues.

In a message from Mrs. Fiona Kubota conveyed by Yasushi Higashizawa, general secretary of the JCLU, she expressed her feeling that, were You Kubota still alive, he would have been extremely happy at the choice of the symposium theme. She also noted that the establishment of law schools with human rights as an element of the curriculum was an exciting perspective.

The symposium began with keynote reports by JCLU director Mr. Akira Nakagawa, and by Mr. John Tobin, former administrative director of Harvard Law School's Human Rights Program. These were followed by a discussion by four panellists from NGOs and by the

presentation of the results of a survey questionnaire distributed to graduate law schools planning to start operation. All this added up to a very rich and fruitful symposium.

For details on the results of the questionnaire survey, interested readers should contact the JCLU secretariat concerning the separate written report.

Fostering Imagination About Human Rights

Akira Nakagawa

First, Mr. Akira Nakagawa, a former professor at Hokkaido University, gave a keynote report on subjects needed in the new graduate law schools based on his experience with lectures and exercises at Hokkaido University. Former Professor Nakagawa expressed the view that "in addition to mastering legal technique, students intending to become legal professionals must place importance on knowledge of the facts that serve as the premises of legal technique. Also important is an interest in people's daily lives and in human relations." Mr. Nakagawa asserted that what needs to be discussed from now on is legal education that is not limited solely to legal technique. "Facts in textbooks, facts appearing in court decisions for the purpose of guiding legal reasoning, and facts in scholarly opinions which are conveniently trimmed to the necessary extent, are often remote from reality. Again, human rights must be grasped in a way that activates our imagination. For this it is necessary to stand in the shoes of the weak and of minorities, and by constructing a narrative of the facts of injury and discrimination, to re-experience them." Putting a high value on facts, and thinking of law school as a process, it is important to devise lectures and exercises that stimulate the imagination, he indicated.

Mr. Nakagawa further noted that, "in order to foster imagination regarding human rights in a limited time, lectures should be given by people actually involved in NGO activities, and students should be sent to the sites of NGO work, and should be allowed to think about problems together with NGOs, even if for only a short time." Mr. Nakagawa proposed that what is needed in graduate law schools is an education that elicits

imagination about human rights and a feeling for human suffering.

The Basics Of A Practical, Clinical Education Program

John Tobin

Next, Mr. John Tobin offered a report on the historical development of systematic links between American law schools and NGOs/NPOs dealing with human and civil rights. According to Mr. Tobin, the development of systematic links between American law schools and NGOs had its origin in the emergence of "public interest law," in the 1960s, aimed at serving the poor. "Clinical legal education also emerged out of this period. The basic idea of clinical education is that legal education should not be simply classroom education. Law students should learn "lawyering" skills—those skills that good practising lawyers possess—in a practical setting, by doing what lawyers do, under the supervision of experienced practitioners."

Mr. Tobin noted that there are three models of clinical legal education: the in-house clinic, in which the law office is a part of the law school; the externship program, and simulations. For example, at Harvard Law School's Human Rights Program, students work in in-house clinical courses on projects suggested by human rights NGOs. The Program also has an externship component, providing funding for law students to work at NGOs or IGOs for several weeks as summer interns. Three years ago, there was a Harvard summer intern working at the JCLU through this summer internship program. Mr. Tobin discussed the importance of integrating students' work at NGOs with their coursework at law school.

Great Advantages, But Also Problems

Michiya Kumaoka

The panel discussion was begun by Mr. Michiya Kumaoka, representative of the Japan International Volunteer Center. He noted that in graduate school one can have very concrete discussions about the actual content of NGO activities, and through them, about the faces, voices and situation of local people. One can thus respond to demand to a certain extent. "Our home office

is hosting quite a few interns. By working there they can not only obtain information on some 10 countries in which activities are being carried out, but also have a chance to directly hear what the staff has to say. Participating in various study tours, usually for one year, can be a very fruitful learning experience. There are also interns who are on-site abroad for a long period of one to two years. For the local staff, the presence of an intern means an increase in person-power to carry out activities. For the intern, on the other hand, the ideal is the ability to improve his or her capacities. In actuality, however, there are big gaps between the expectations of both sides (on the one hand the intern's desire for training and study, on the other the NGO'S need for persons with specific, useful abilities). Conflicts and problems often occur. If things go well, the internship makes sense, but it's a fact that problems can easily arise."

Active Participation in Civic Groups

Toshiya Hirose

Mr. Toshiya Hirose, general secretary of the Citizen Legislation Organization explained that "our NGO is really very short of persons who can work during the day. For this reason, the participation of young people is important." "It is good to be able to have the assistance, as a part of our program and our practical activities, of law school students, who can participate and help with actual legislative activities as training. This assistance is provided to citizens' groups in various regions aiming at legislative activities concerning problems which citizens are confronting. A kind of legislative literacy, legislative technique should be a part of the law school curriculum. Presently, when each local government assembly has become involved in creating various local ordinances, at the local level there should be many opportunities to be active for people who have learned about legislative technique. It is very important that they participate in these local efforts."

Active Adoption of Externships

Jeong-ok Kim

Mr. Jeong-ok Kim, head of the Center for the Protection of the Rights of the Disabled and the Japan Committee of Disabled Peoples International (DPI), noted

that the situation of the disabled hasn't been thought about as a human rights issue. "Disability has been discussed in the same context as diseases that must be cured. Recently, however, it is finally becoming recognized as a human rights issue. With respect to the relationship of disability to human rights education, it is important to create a system, based on a human rights standpoint, that is committed to a process in which the disabled become able to assert their rights on their own. In this sense participatory or experiential human rights education has great significance, and it should be adopted in discussions about externships. While grappling with activist human rights education in law schools, if there is a program, it is also necessary for NGOs actively to define their work as being a part of human rights education, and struggle to make their own work a part of such education."

Knowing NGO Technique is Essential

Makoto Teranaka

In the case of interns who come to Amnesty also, conflicts occur because of the complex procedure of the secretariat, noted Mr. Makoto Teranaka, general secretary of the Japan section of Amnesty International. But this is a baptism that, if overcome, can result in the creation of a genuine activist. People who arrive as interns or volunteers can become useful at the quickest in one month. It usually takes over three months, and for some it takes a year. There are many internships that are less than two weeks. Internships with such a short term could be a nuisance, and had rather be discontinued. They just give rise to conflicts. Teranaka noted with some severity that such internships satisfy no one's demands. "It is essential that graduate law schools know NGO technique. I would like them to know how human rights groups set up their campaigns, the technique of the process. I think externships and internships are good tools, but there are insufficient prerequisites. It's doing work in defence of human rights, but the actual work is campaigns which aim at a severe reality. It is necessary first to change consciousness about this part of NGO activity."

Translated by John Tobin

Prisoners' Rights in Japan

Richard W. Boucher, JCLU Intern*

Japan is famous for its low incarceration rate; Japan is also as famous for its prison system. International and domestic organizations alike call ardently for reforms in the system. Change, however, is somewhere between stalled and sluggish.

With this stunningly low amount of prisoners, Japan has still managed to maintain heavily outnumbered guards and heavily inadequate treatment systems in its overcrowded prisons. Even after the very well publicized events in Nagoya prison two years ago where inmates were seriously injured as a result of outdated leather restraints and a prisoner died after a guard directed a high pressure hose at his anus, reform has been slow.

As an American, I understand why prisoners' rights are a difficult issue. Reform of criminal law is often seen as being overly lenient to criminals. Sometimes, they are just tragically ignored. Victims want revenge. Society wants criminals restrained.

But with leather handcuffs? Recently banned, Maiko Tagusari of the Center for Prisoners' Rights described the replacement as "a little bit better" after demonstrating the pose prisoners whose hands were strapped to their waists would find themselves in. Tagusari complained that the prison law and prison rules are both so strict and so vague that arbitrary abuse is too easy. The maximum stay in solitary confinement is sixty days; however, to punish prisoners they do not like, guards often let a prisoner out for a week and then return him for the next sixty days.

Apologizing for her English (which was quite good) and inundating me with material on the state of the Japanese prison system, Tagusari showed a great deal of disappointment, bringing out a 1998 report and pointing out here or there where things have gotten "a

little bit better." Her interest in educating me, this poor American, on why changes are stalled completely diverted her attention from her coffee, which was cold and untouched throughout the whole of the interview.

The Center for Prisoner's rights was established 10 years ago with the purpose of giving prisoners a way to find redress for their complaints. Tagusari joined in its second month of existence, her first month as a *bengoshi* (Japanese lawyer).

"The most essential matter is the prison's policy of secrecy," Tagusari explained. Prison correspondence is censored, and restricted to immediate family members and lawyers. Tagusari receives mail addressed to her personally because a prisoner is simply not allowed to communicate with the Center for Prisoners' Rights, since the organization is neither a lawyer nor a family member.

On top of that, the embarrassment of being a prisoner is so great that families are reluctant to complain of maltreatment. "In Japan, prisoners are not really human," Tagusari lamented. She explained that the Japanese were disinterested in prisoners' rights, and sometimes human rights at all, because they simply did not "realize that they are their rights."

If a prisoner complains formally, they are immediately placed in solitary confinement for "treatment," according to Tagusari. This response is practically automatic. In solitary confinement, there is no reading, and the work they are allowed to do pays even less than the meagre 3000 yen a month they are already restricted to.

She reports that many people respond to the demand for more prisons and higher prison budgets, but just having a higher budget "only means they can incarcerate more prisoners," Tagusari responds. She says that the press would have had no interest in prisoners' rights if it were not for 2002's incidents of violence in Nagoya prison. She complained that in order to be heard, prisoners' rights groups have to use the foreign media.

* The author served as a JCLU intern in summer 2004 and all of the survey and the interview appeared in this article and his writing were done under the total coordination of JCLU.

Due to negligible domestic pressure from the Japanese public, international pressure and pressure brought by Japanese NGO's are not enough to bring about change.

Makoto Teranaka of Amnesty International agreed that low budgets were a major concern. There was just no more money for prisons, he had been told by a government employee. Amnesty International's Tokyo office looks like an NGO office might be expected to look like: stacks of books, tables with elementary school chairs surrounding them, and oddly placed coffee makers. Standing at the end of one of those tables was Teranaka and a whiteboard. With a flurry of coloured markers he diagrammed the basic structure of the prison system.

Prisons and prisoners are divided into categories. B prisons hold class G prisoners. Class G prisoners are recidivists. They have been to prison frequently, some up to thirty times. "Most prisons are B/G prisons," Teranaka said. "If they worked, they wouldn't be there." The goal of the Japanese prison system is reform, but the irony of most prisons holding recidivists did not escape me.

Teranaka was confident that the Meiji-era prison law would be reformed, but was more concerned with the practice inside the prisons than the rules that governed them. "The problem is prison guards have all the authority," Teranaka concluded. There is a buffer between the politicians, the career bureaucrats, and the guards.

"Prison guards live in a very small world," Teranaka explained that almost all prison personnel live on the prison campus. The prison guards form almost their own aristocracy as well, generally descending from fathers who were prison guards. Teranaka also explained that while many prison guards study criminology at university, "they only really want to do martial arts," he said while emphatically doing a push-up motion in the air.

Since the guards have the authority, and the guards are isolated both from public life and from government regulation, they are really unable to develop

the demanding social skills required to treat chronic offenders. Treatment officials number in the hundreds while guards number in the tens of thousands. The understaffed and under qualified force serves no useful role beyond restraining prisoners. Since the vast majority of recidivists are thieves, they suffer from exactly the social and psychological problems that respond well to treatment and poorly to extremely rigorous restraint.

The companies that have goods manufactured in prisons and prison budgets themselves will have to do something that is not in their own best interest: reduce work hours to increase treatment, Teranaka says. In my own visit to Fuchu prison, I saw the commitment to treatment up front. Classrooms have been converted into cells. The budget does not permit the completion of renovation of many prison buildings, so the only way to accommodate the new inmates is by cramming them in to already crowded rooms and converting other rooms.

Teranaka realized that the budget increase required to reform the practice in prisons would be dramatic. However, treatment officers and prison guards don't even speak the same language, he said, when discussing a prisoner's psychological and social background. More officers are necessary, and more skilled officers are necessary. Existing guards would need to develop a more complete background in sociology, psychology, and criminology. Work hours would be reduced, so money flowing in would be less. The costs would be high.

Although, I think, the costs might not be as high as the Japanese people may think. An effective criminal justice system reduces the amount of criminals in it. So, while the costs of reform may be high, the system is really an investment, which reaps the future benefits of fewer repeat offenders. This system reduces its own cost as prisoners leave the system, and benefits society both by reducing the stigma of prisoners and allowing them to return to work, which they are qualified to do as a result of prison treatment programs, and by reducing the amount of repeat crime, which is mostly property crime.

Secondly, a harder task must be completed. Prisoners' rights must be considered in a different light. Prisoners' rights are human rights and human rights

belong to everyone, and should be supported by all. There are many crimes that can be committed by a person who is not evil. Imagine your child imprisoned for possessing amphetamines. Would you prefer treatment or would you prefer restraint at all costs? Would you approve of your child's interests in treatment subjugated to the interests of companies manufacturing goods for sale in prison factories?

Admittedly, I am just an outsider with little experience living the Japanese lifestyle. However, in my short stay here I have been able to learn much about the Japanese prison system. At the very least, I urge you to do the same, despite the lack of press coverage since the Nagoya incidents, despite the shame associated with being a prisoner, and despite the lack of political concern.

JCLU Demonstrates the Desirability to Expand Standing to Sue beyond Natural Persons in Administrative Litigation

[*Jinken Shimbun*, September 26, 2003, No.344]

On August 7, 2003, the JCLU presented its opinion paper on standing to sue to Gyousei Sosyuu Kentoukai, an entity in charge of administrative litigation reform as a part of the on-going Government Judicial Reform Project. In its paper, the JCLU recommended an amendment to the present Administration Case Litigation Act which limits standing to those whose legal rights and interests have been directly infringed upon by an administrative action, so that a new provision would allow courts to exercise their discretion to expand plaintiffs' standing to non-profit organizations with certain expertise and experience, particularly in fields of consumer protection, health, safety, environmental protection, conservation, and welfare.

The purpose of the present statute is to give remedy to those individuals whose legal rights and interests have been violated by an administrative decision. Thus, standing to sue, as well as rights and interests to be redeemed, is narrowly defined, preventing the statute from being an useful measure to check the legality of administrative actions and to question

administrative agencies whether they have acted *intra vires*, within their discretionary power. Because judicial review is rare, some believe that administrative agencies are prone to exceed their powers and those states of illegality have not been properly addressed.

The paper is based on the reality of Japanese society in which many public interest groups have accumulated necessary expertise and sufficient experience and have gained the status as legal entities. These NPOs are now fit, not only to provide their knowledge and help to the betterment of the society, but also to function as watch-dogs to monitor administrative agencies and make sure they comply with relevant laws. In other words, NPOs' function should not be just limited to petitioning the government whenever the need arises. JCLU's proposal is that now is the time to acknowledge the important functions of these NPOs as public interest groups and to allow them to actively participate in relevant fields, through courts' discretion. Public interest groups' knowledge and ability will be well employed, public interests will be better served through their participation, and Japan will be guaranteed rule of law in its proper sense of the word.

RIGHTS OF FOREIGNERS

Statement to Request the Immediate End to Internet Reporting of Information Concerning Foreigners by the Ministry of Justice

[*Jinken Shimbun*, March 26, 2004, No.347]

The Japan Civil Liberties Union (JCLU), through its Foreigners Rights Committee, researches, publishes, and advocates on behalf of foreigners' human rights in Japan. Since February 16, 2004, the Immigration Control Bureau of the Ministry of Justice has begun an Internet reporting system concerning "overstaying foreigners" on its website. This system, however, for reasons listed below, risks creating unnecessarily tense relations

between Japanese and foreigners, and violates the basic human rights of foreigners, such as protection from racial discrimination. In addition, such a system not only infringes on the principles of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which Japan ratified in 1995, but also violates Japan's obligation to CERD as a state party. JCLU, therefore, demands the immediate end to direct Internet reporting concerning overstaying foreigners.

The Internet reporting system uses a form with specific columns on "information concerning illegal or seemingly illegal foreigners," "information on workplace or appearance in other areas concerning illegal or seemingly illegal foreigners," "information on housing concerning illegal or seemingly illegal foreigners." Since senders "who prefer anonymity do not have to input their names," there is a danger of irresponsible reporting. In addition, there is a whole range of choice concerning "the motivations of reporting:" neighbourhood nuisance, insecurity, conflict of interest, victim hood, sympathy, inexcusable behaviour of employers, inexcusable behaviour of brokers, dismissal due to illegality, unemployment due to visa status, inexcusable behaviour of violators, others, and unknown. This last column may lead citizens to casual reporting of foreigners due to simply an "uncomfortable feeling."

While there are many issues regarding this reporting system, the main ones can be summarized as follows:

First, the information requested in the reporting form deviates from the definition on reporting stipulated in Article 62 of the Immigration Control and Refugee Recognition Act (the reason for forced repatriation (Article 24)). Instead of ruling according to the established criteria, forced repatriation could be conducted which will then be based solely on the information submitted on the "seemingly suspicious individual." Critique is inevitable that such a system leads citizens to hold unnecessary suspicion towards foreigners or seemingly foreign persons. There is no careful consideration of the risk of human rights infringement.

Second, the modality of reporting and the targeting in view of reporting might infringe on privacy. In other words, citizen may report on information concerning the private lives of foreigners that he/she happens to know. This kind of reporting will infringe on privacy. Further, in the process of collecting information to report, intentional privacy infringement is highly likely to occur.

Third, though the reporting system is limited to "illegally staying foreigners," Korean residents, foreigners who have become naturalized Japanese, and other legal foreign residents may be mistakenly targeted. The same applies to returnees from China or others who do not look Japanese but who nonetheless hold Japanese nationality. Legal foreign residents are not subject to investigation by the Immigration Control Bureau, however, if they become subjects of investigations due to this system, they may face social pressures and unfavourable treatment.

Fourth, such a system will lead Japanese to have discriminatory perspective toward foreigners. and hence might encourage racial discrimination. The CERD Committee, in its judgement on racial discrimination, "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin" (general recommendation 14, 1993). The Internet reporting system by the Immigration Control Bureau is tantamount to "having an unjustifiable disparate impact."

In this sense, the Internet reporting system by the Immigration Control Bureau can be said to violate CERD, and therefore the government fails to uphold Japan's obligations to CERD as a state party. Precisely, it violates Article 2(1) that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races;" Article 2(1a) that "each State Party ... ensure[s] that all public authorities and public institutions, national and local, shall act in conformity with this obligation;" and Article 2(1e) that

"each State Party ... discourage[s] anything which tends to strengthen racial division." In particular, the government must pay attention to Article 4(c) that "shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

Currently, there are more than 1,850,000 registered foreigners living in Japan (end of 2002). Last year, we realized the plan to have 100,000 foreign students, which took twenty years to achieve. Despite the various issues, Japanese society is moving towards a multinational, multi-ethnic, and multicultural society. Many of the foreigners work in areas disdained by Japanese. Whether it is in the production lines of small scale enterprises, construction sites, or food establishments, Japanese society depends on foreign workers. Today, we can think of foreigners as coexisting neighbours and as indispensable members in Japanese society. In such a multicultural, multinational society, we need to recognize and respect our mutual difference, and promote a consciousness of mutual tolerance. The Internet reporting system goes against the objective of an coexisting society and, on the contrary, creates a large obstacle in realizing this goal.

Furthermore, if the encouragement of reporting becomes generalized and Japan becomes a society of surveillance where private denunciation is rampant, based on freedom and democracy, the foundation of Japanese society, for Japanese and foreigners alike, is at the risk of eroding.

Based on the reasons above, JCLU, therefore, demands the end to direct Internet reporting concerning overstaying foreigners.

December 23, 2003
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Translated by Jennifer Chan-Tiberghien

Are Media Reports on Crimes Committed by Foreigners Telling the Truth?

[Jinken Shimbun, March 26, 2004, No.347]

On January 22, the JCLU Foreigners' Rights Committee held a public study meeting entitled, "Do media reports of crimes committed by foreigners tell the truth?" The meeting, attended by over 30 people, included a lively discussion. Akira Hatate, a Committee member, presented a report and various groups expressed opinions.

The following points were addressed:

(1) How did the problem originate?

The controversy regarding foreigners and crime began in July 2003, with discriminatory comments by Congressman Etoh, Tokyo Metropolitan Governor Ishihara, and others. The controversy was further inflamed when the Tokyo Metropolitan government, Tokyo Metropolitan Police Agency and Tokyo Metropolitan Immigration Bureau presented a joint declaration enforcing policies against illegal immigrants in October 2003. Soon after, the Cabinet created an action plan to strengthen Japanese society against crime, which included a section on cutting the number of illegal immigrants in half. In Tokyo, the Metropolitan Police Agency created a crime map of each district and set up surveillance cameras. Such policies encountered limited public resistance.

(2) What are the real statistics on crimes committed by foreigners?

While reports by the National Police Agency, media, and others claim there has been a sharp rise in crimes committed by foreigners – and that such crime is increasingly violent, organized, and widespread – objective analysis reveals otherwise. Current statistics on foreign crime inappropriately include violations of immigration law, which account for 80% of criminal cases in violation of laws other than the Criminal Code (*tokubetsu hou-han*) committed by foreigners who are

not long-term residents in Japan ("new comers") and should be excluded when making comparisons to crime committed by Japanese nationals. Current data is also often interpreted in terms of the number of crimes committed by foreigners, as opposed to the more reliable statistic of the number of foreign criminals. For example, in 2002 there were 4,272 charges for crimes committed by Turkish nationals in Japan, but only 26 Turkish nationals were charged for all of these crimes -- an average of 164 crimes per person. It is quite doubtful that the police could find so many charges per person.

In addition, the foreign crime rate has actually decreased. While the number of foreigners entering Japan increased 50% from 1993 to 2003, the number of charged new comers increased only 20% -- from 7,276 in 1993 to 8,725 in 2003. Furthermore, new comers made up only 2.2% of all criminals in violation of the Criminal Code (*keihou-han*) charged in Japan.

Despite the media's characterization, it is not true that foreigners are committing a larger percentage of violent crimes. In 2002, 353 new comers were charged for violent crimes (murder, burglary, arson, and rape), a decrease of 12.4% from the previous year. Violent crimes by new comers constituted only 4.6% of all violent crimes in Japan.

(3) Discrimination against foreigners continues.

Recent examples of discrimination against foreigners include a poster in front of Ueno station stating, "Expel the delinquent foreigners" and a Koujimachi police station's leaflet stating, "If you see a group of 2-3 suspicious foreigners, contact us." Another example is an attempt to develop technology (an "ethnic identity code") that can determine ethnicity based on a fingerprint, thereby identifying crimes committed by foreigners.

Mr. Hatate concluded his report by emphasizing the need for a network opposing discrimination against foreigners.

Translated by Mari Calder

"No-Pension Suit" Brought by Disabled Foreigners

[Jinken Shimbun, December 5, 2003, No. 345]

On day two of the JCLU's training retreat which took place on November 8 and 9, 2003 in Kiyosato, Yamanashi Prefecture, Mitsuko Ohsugi (attorney and Deputy Security General of the JCLU Kyoto Branch) delivered a report concerning "Pension Suit for Disabled Foreigners Living in Japan" under the moderation of JCLU Director Masayoshi Iida.

Loopholes in the Law and Disabled Foreigners

Ms. Ohsugi provided an explanation concerning why the seven Korean plaintiffs of the pension suit [REDACTED]

[REDACTED] were not eligible to receive pensions, although they lived in Japan and suffered from hearing disorders. The National Pension Law (enacted in 1959) prescribed nationality as a requisite for eligibility, and as such, all foreigners were excluded from receiving a pension. However, as Japan ratified in 1981 the Convention Relating to the Status of Refugees which affirms the principle of equality between nationals and non-nationals in connection with labor laws and social security laws, in 1982 the nationality requirement was removed from the National Pension Law, and foreigners became eligible to receive pensions. As such, if a foreigner suffers a disability which is recognized as a Class 1 or Class 2 disability prior to the age of 20, or is initially examined prior to the age of 20 and the disability is recognized at a date subsequent to his or her 20th birthday, the foreigner should be eligible to receive a Disability Basic Pension (approximately 80,000 yen per month for a Class 1 disability) from the recognition date of the disability (or from their 20th birthday if the disability is recognized prior thereto).

Despite this fact, the plaintiffs were not being paid their Disability Basic Pensions. The reason for this was that the plaintiffs were not eligible to receive payments since they were foreign nationals as of the disability recognition dates or the time of their 20th

birthdays. When amending the law, the Diet debated the need for interim measures which gave retroactive eligibility to foreigners residing in Japan, and the Minister of Health and Welfare at that time replied that he would consider such interim measures immediately. Yet, despite this fact, nothing has been done.

Next, Ms. Ohsugi provided an explanation concerning the interim measures adopted for Japanese nationals to prevent the loss of pensions. When the National Pension Law was enacted, a welfare pension system was established as a special interim measure for Japanese nationals who already suffered disabilities, and measures were also adopted upon the return of Okinawa and the Ogasawara islands, and the return of Japanese orphans abandoned in China, so that everyone would receive pensions. This indicates that there is no real difficulty in establishing interim measures when enacting a law.

In addition, Ms. Ohsugi introduced the fact that the no-pension issue was not a question limited to disability pensions. Currently, foreigners over the age of 77 who reside in Japan are not eligible for old age pensions because they are unable to satisfy the participation period of 25 years, and no interim measures have been adopted. The elderly Koreans presently living in Japan have been inspired by this no-pension lawsuit brought by the disabled foreigners living in Japan, and are planning to bring their own suit. *[Editor's note: Five elderly Koreans living in Japan filed a lawsuit in the Kyoto District Court in December 2004, seeking damages for being excluded from national pensions.]*

Current Status of "No-Pension Suits"

The report then switched to the actual course of events in the current no-pension lawsuit. The Plaintiffs brought their action in the Kyoto District Court on March 15, 2000. Three points were disputed at trial: (1) whether the nationality clause of the former National Pension Law violated the International Convention Relating to the Status of Refugees or the Constitution; (2) whether the failure to establish interim measures upon the elimination of the nationality clause violated the International Convention Relating to the Status of Refugees or the Constitution; and (3) whether the

legislative act that established the nationality clause or the failure to enact interim measures was illegal under the State Redress Law. At trial, the plaintiffs, through a sign language interpreter, testified of the difficulties in their lives - how they came to suffer their disabilities, their lives up to that point in time, and how they are suffering because they cannot receive disability pensions.

Nonetheless, on August 26, 2003, the court dismissed the claims in line with the Supreme Court decision in the Shiomi case. Ms. Ohsugi criticized this decision for not taking into account the circumstances in which the plaintiffs had been placed, the historical background, and the actual suffering of the disabled.

Ms. Ohsugi then shifted to a discussion of the current status of actual administration. While some special benefits are being paid on a local level (in seven prefectures on a prefectural level and in nearly all municipalities in Hyogo and Shiga Prefectures on a municipality level), there are variances in whether payments are provided and in the amounts thereof depending on where one lives, and the need for national social security was emphasized. In addition, recently a proposal that will adopt special legislation calling for some sort of solution that includes welfare measures for disabled persons who are not receiving pensions has been discussed (the private proposal of Mr. Sakaguchi, Minister of Health, Labour and Welfare). The background for this private proposal appears to be relief for Japanese nationals who are not receiving pensions (persons who did not engage in enrolment procedures when it was optional for students, and whom have subsequently suffered disabilities). Ms. Ohsugi emphasized that, if relief is to be provided to Japanese nationals who opted not to enrol in the system or Japanese nationals who failed to pay the required premiums, then it should naturally be made available also to foreigners living in Japan who want to enrol in the national pension but were unable to.

In summary, Ms. Ohsugi identified the issue of not receiving national pensions as one social security problem for the foreigners living in Japan which is yet to be resolved. Ms. Ohsugi stated that, while foreigners

who have recently come to Japan are able to receive social security under the amended National Pension Law, Koreans who have been residing in Japan are excluded from social security. She further argued that, since these Koreans are former colony residents and their descendants, and have actually lived, worked and paid taxes in Japan, and are not different from Japanese nationals as members of the Japanese society, at the very least, they should be afforded the same treatment as Japanese nationals.

Currently, this case is being appealed to the Osaka High Court, and the first oral arguments are scheduled to take place in the beginning of 2004. [Editor's note: The appeal case is pending in Osaka High Court as of March 2005.]

After the report, a discussion took place concerning the specific details of Mr. Sakaguchi's private proposal, the number of Japanese who have received pensions under the interim measures and the number of

foreigners living in Japan who do not receive pensions, the internal effect of international human rights treaties, the concept of right to equality, how to structure the plaintiffs' rights, and other lively questions and responses. Of these, the imaginative suggestion of rethinking the right to receive 80,000 yen as a liberty perceived as a property right was highly interesting, in that it may make it possible to overcome the "progressive" nature of the stipulation of social rights.

Translated by James M. Cohen / Mie Fujimoto

Editor's Note: In 2004, two district court decisions acknowledged that the discriminatory treatment of certain groups of disabled people resulting from insufficient legislation was unconstitutional. A special law was enacted in December 2004 to address this issue. However, the people relieved by this law were limited to disabled students and housewives; no measures have been taken to provide relief to disabled foreigners or elderly Koreans living in Japan.



On November 23, 2003, JCLU members stayed in a study camp in Kiyosato of Nagano prefecture.

COUNTER TERRORISM

Counter-Terrorism Measures and Human Rights

Recent Legislation, Policies, and Practices in Japan: Serious Contradiction between "Contribution to the International Society" and Renunciation of War under the Constitution

Ikuko Komachiya*
Secretary General
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September 11 has altered the basic concept of national security in Japan. Since then, Japan has enacted several laws aiming at counter-terrorism. It is necessary to re-examine these laws from a standpoint of whether or not these laws place excessive restrictions on human rights under the pretext of combating terrorism. This report first surveys the operation of such legislations.

Second, this report explains a history of the renunciation of war clause of the Japanese Constitution and points out problems occasioned by the dispatch of the Self Defense Forces to Iraq.

Third, this report introduces several incidents where police intervened in citizens' movements protesting such dispatch to and war in Iraq.

Legislation for Counter-Terrorism or Legislation Restricting Human Rights?

(1) Suppression of the Financing of Terrorism

Two measures were passed by the Diet in June 2002. The first measure is a ratification draft of UN treaty The International Convention for the Suppression of the Financing of Terrorism. The second, a piece of domestic legislation, is The Law on the Punishment of Financing Criminal Acts Intended to Intimidate the Population. In neither of these measures, however, is the term "terrorism" precisely defined. The law lacks a requirement

that there be a specific connection between the provision of funds and a terror plan, and the definition of an act of terror is unclear. Moreover, the treaty—unlike the anti-terrorism treaty of the Organization of the Islamic Conference—fails to distinguish between terror and force associated with a movement aimed at achieving independence of a people. Also since the law leaves the decision as to whether something is "terror" up to the investigative agencies, as public order legislation it contains the danger that it will stir up rage.

On April 3, 2002, the JCLU submitted a written opinion** on the ratification of the treaty and enactment of the bill. In essence, the JCLU pointed out that both measures contravene the principle of legality, and constitute an infringement of freedom of thought and conscience. The JCLU opposes hasty ratification of the treaty draft and passage of the bill, explaining that there is a danger that the measures will restrict humanitarian assistance for victims of war abroad and other calamities. In addition to urging that these problematic aspects be reconsidered, the JCLU will itself make efforts to improve the legislation.

(2) The Bill Concerning Crime of Conspiracy

The Japanese government submitted a bill entitled "Bill to Partially Amend the Criminal Law to Deal with Internationalized and Organized Crime". The definition of the crime of "conspiracy" in the bill contains no element of extension beyond national borders, or involvement of an organized criminal group. According to the bill, it is sufficient that there exists a conspiracy to carry out a crime. There is no other requirement that there be preparatory conduct based on an agreement. The bill is applicable to a broad range of and a variety of crimes, and thus will expand the application of "conspiracy."

On June 23, 2003, the JCLU released a statement opposing the bill*** from the standpoint of protecting fundamental human rights. Under the bill, the people would be easily punished in the name of prevention of international and organized crime or terrorism.

* This paper was prepared for the Biennial conference of the International Commission of Jurists in Berlin, 27-29 August, 2004

** For the details, see Universal Principle No. 11 or http://www.jclu.org/katsudou/universal_principle/articles/336terror.html.

***For the details, see Universal Principle No. 11 or http://www.jclu.org/katsudou/universal_principle/articles/343conspiracy.html.

(3) The War-Contingency Legislation

A set of three laws was enacted in June 2003. The laws were designed to fortify operation of the Self Defense Forces (SDF) in the event Japan comes under attack. The laws have become the first ones which defined Japan's response to a military attack since the end of World War II.

The three laws are merely the beginning of creating a set of laws for emergency security. In June 2004, seven laws, part of the so-called war-contingency legislation (Yuji-Hosei), were enacted. Critics point out that legislation allows the government wide and arbitrary interpretation of an emergency situation.

The legislation would allow closer cooperation between the Self-Defense Forces and US forces in Japan in jointly defending the country from attacks. US military will be permitted to use private land and buildings upon the approval of the prime minister. The SDF and the US forces will be able to share weapons, ammunition and so on.

The legislation also allows the Maritime Self Defense Force to inspect foreign ships suspected of carrying equipment of a military nature in and around Japan's territorial waters.

Above all, the Citizen Protection Law is problematic. The law defines evacuation of people and

rescue procedures during an emergency situation to be carried out by the government. This could lead to excessive restrictions of people's rights and easy government occupation of private properties. Moreover, the Law encourages people to cooperate on a regular basis with the government, even in peacetime. This could lead to people feeling obligated to cooperate with the government. The Law reminds us of the past wartime where the central government had powerful control over the people and encouraged citizen's cooperation in the local communities.

(4) Port-Call Ban

In June 2004, the Diet enacted another law to empower the government to ban port calls by ships deemed to pose a security threat. The law mainly targets North Korean vessels. Recently five Japanese abductees returned to Japan after being held in North Korea. The government will observe North Korea's response to the demand for information concerning other abductees. Depending on how the situation develops, the government might impose sanctions on North Korea. It is needless to say that abduction is absolutely unacceptable and severely blameable. Some even consider abduction as terrorism. Until now, however, Japan has not carefully and closely considered the reasons why such abduction (terrorism) occurred. Mere legislation imposing sanctions would not eradicate terrorism.

Abduction of Japanese Nationals to North Korea

Several Japanese nationals went missing without any reasons between 1968 and 1991. They are considered very likely to have been abducted to North Korea. The Japanese government recognizes 15 nationals as having been abducted to North Korea. Last year, North Korea admitted that its agents had abducted 13 of the missing people to North Korea, and that eight have since died. The five remaining, two couples and one female, returned to Japan in October 2002.

The families of the eight reported dead have serious doubts about the information of the eight's death and demand the government to press North Korea for more detailed information and reinvestigation.

Moreover, the families of other missing people whom the government does not recognize as victims of abduction have asked the government for a review of the cases.

Dispatch of Self Defense Forces to Iraq and Renunciation of War under the Constitution*

Japan has the world's oldest un-revised constitution (Kempo). Perhaps the most remarkable provision in the Constitution of Japan is Article 9, the renunciation of war clause. As part of Japan's response to September 11 and the war in Iraq, the trend toward revision of Article 9 is gaining momentum.

(1) Pacifism and Renunciation of War

The Constitution was drafted within months of the end of the war when people strongly desired to prevent a similar terrible experience. Therefore, the Constitution adopted pacifism as one of its principles.** It is most clearly expressed in the Preamble and Article 9. The Preamble prescribes:

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationships, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honoured place in an international society striving for the preservation of peace.... We recognize that all peoples of the world have the right to live in peace, free from fear and want.

Article 9 provides:

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 a means of settling international disputes.

2. 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.

The majority of constitutional scholars have read Article 9 as a total renunciation of war. Paragraph 1 renounces war only as a means of settling international disputes; however, section 2 denies the right of belligerency. Moreover, by Paragraph 2, Japan cannot have any kind of armed forces.

(2) Establishment of the Self Defense Forces

After the establishment of the Constitution, the situation surrounding Japan drastically changed: the Cold War had developed, the People's Republic had won the civil war in China, and the Korean War broke out next door. In September 1951, Japan concluded a Peace Treaty with the United States and other members of the United Nations and in 1952 the occupation ended. At the same time, Japan concluded a Security Treaty with the United States which allowed the stationing of US troops in Japanese territory. The Security Treaty also prescribed that the United States expected Japan to gradually become responsible for its own defence. Within days of the outbreak of the Korean War in 1950, General Douglas MacArthur, Supreme Commander for the Allied Powers, authorized the Japanese government to create the National Police Reserve (NPR, Keisatsu-Yobitai), a lightly armed paramilitary force. In 1952, as a result of the end of the occupation, the NPR became the Security-Keeping Corps (SKC, Hoantai), a stride toward becoming a regular military system. Two years later the SKC was converted into the Ground, Sea, and Air Self-Defense Forces (SDF, Jieitai).

According to the SDF Act, the main aim of the SDF is "to defend our country against direct and indirect invasion." In order to attain this aim, the SDF were empowered to undertake defence action, maintenance of order and security, disaster relief, and so on. The SDF are also allowed to use armed force in a defensive action. All three steps from NPR to SDF were bitterly opposed by many in Japan because they could again lead Japan

* The discussion in this section is relied on the following article and book: Toshihiro Yamauchi, "Constitutional Pacifism: Principle, Reality, and Perspective," Yoichi Higuchi, ed., *Five Decades of Constitutionalism in Japanese Society* (Tokyo: University of Tokyo Press, 2001) 27 and Lawrence W. Beer & John M. Maki, *From Imperial Myth to Democracy* (Boulder: University Press of Colorado 2002).

** There are three principles in the Constitution: the sovereignty of the people, respect for fundamental human rights, and Pacifism.

into war and the opposed saw these measures as violating the letter and spirit of the Constitution.

Gradually the general public has come to consider the SDF constitutionally acceptable as long as it does not fight abroad and has a relatively modest capacity.

(3) The End of Cold War and Japan's Contribution to the World Community

The end of the cold war, as symbolized by the fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in 1991, had a major impact on the SDF. During the Persian Gulf Crisis, Japan failed to join the Coalition Forces. Instead, Japan made a generous financial contribution to the Coalition Forces, which was received unfavourably by the participating countries. Japan suffered from accusation of chequebook diplomacy. After fierce and long debate occasioned by such a "humiliating" experience, in 1992 the UN Peace-Keeping Operation Cooperation Law (PKO Law) passed the Diet. The law enabled the SDF personnel to go abroad under some conditions*: One being that a cease-fire agreement must be in effect. Another being that Japanese use of weapons must be limited to the minimum necessary to prevent injury or death. In September 1992, Japan dispatched the SDF forces to Cambodia to assist with peace-keeping operations of UNTAC. Since then it has become common for the SDF to go abroad for peace-keeping operations or for humanitarian assistance.

The debate did open a continuing discussion on how Japan might best contribute responsibly to the world community in circumstances of crisis while continuing to honour Article 9.

(4) After September 11 and Dispatch of the SDF to Iraq

In October 2001, as part of Japan's response to the September 11 bombing of the World Trade Center, the Diet passed a new law concerning Special Measures against Terrorism. The law allowed SDF personnel to

use arms not only to defend themselves but to protect those "under their care" such as refugees and wounded foreign troops.

In October 2001, amendments of the SDF Law during the war on terrorism allowed Japanese ships and C-130 transport planes to provide intelligence, fuel, food, and logistical aid to US forces operating out of Diego Garcia in the Indian Ocean, Arabian Sea, and Persian Gulf, as well as bring humanitarian relief to refugees and other war victims in Afghanistan and Pakistan. In December the Diet further amended the SDF Law to lift the ban on monitoring cease-fires, disarming local forces, patrolling demilitarized zones, inspecting the transport of weapons, and collecting and disposing of abandoned weapons—all as participation in UN peace-keeping operations. On a case-by-case basis, Japan has expanded the range of its non-combatant international activities while affirming commitment to Article 9. Many people see serious contradiction between these governmental actions and the Peace Constitution.

After the war in Iraq had begun, in the summer of 2003, the Diet passed a new law, the Iraqi Reconstruction Special Measures Law, despite fierce opposition by the general public and opposition political parties. The law allowed Japan to engage in humanitarian assistance to support reconstruction of Iraq. The troops are deployed to areas where no fighting is taking place. They will engage in tasks such as improving water supply, providing medical services and rebuilding damaged schools. Then in December 2003, the cabinet of Prime Minister Jun'ichiro Koizumi approved a plan to send ground troops to south-eastern Iraq. This is the first time in post-war history that heavily armed Japanese troops have been dispatched to a war zone.

(5) JCLU's Opposition to Dispatch of the SDF to Iraq

The JCLU sent its statement** to the government in December 2003 to express opposition to the decision to send the Self Defense Forces to Iraq. In the statement, JCLU specified the following four points:

* Other three conditions are as follows. The parties in conflict must approve Japan's peace-keeping mission. The peace-keeping operation must be neutral. Japan's units will withdraw if any of the above conditions is not met.

** For the details, see Universal Principle No. 11 or http://www.jclu.org/katsudou/universal_principle/articles/346iraq.html.

- i) Dispatch of the SDF to Iraq would be against both domestic and international laws and thus cannot be justified in any way. The dispatch goes beyond the SDF's main role of "defending the country", which is specified under the SDF Law and limited by Article 9 of the Constitution in Japan.
- ii) It would mean that Japan takes part in the U.S. occupation policy in Iraq without general acceptance by the international community and it would change the nature of humanitarian aid and reconstruction support that has been provided based on Japanese neutrality.
- iii) It is doubtful if the decision was taken after sufficient examination and analysis of the situation (e.g. the possibility that the SDF would be involved in armed conflicts.)
- iv) The government should not take any measures against anticipated retaliation that would threaten the civil liberties of the Japanese or foreign residents in Japan such as Muslims and Muslim communities.

(6) Toward Revision of the Constitution

In June 2004, the Koizumi administration approved a policy that SDF troops would join the multinational forces, without giving sufficient explanation to the public as well as Diet members. The SDF personnel will be placed under the command of the Japanese government instead of the commander of multinational forces, to avoid being involved in collective self-defence arrangements that use force.

Since the dispatch of the SDF to Iraq, the gap between the Constitutional and the political realities of the SDF has grown larger and larger. Both Japan's ruling political party, the Liberal Democratic Party and the major opposition party, Democratic Party, have proposed that Article 9 be revised in the name of making a contribution to international society. Article 9 stands at a crossroad; either it will disappear from the Constitution, or its normative power will be revived.

Infringement on Human Rights

New practices as well as above said legislation was altered citizens' daily life. The followings are some concrete examples.

"Opposition to Dispatch of the SDF to Iraq. Think Together and Raise your Opposition Voice."

"Neither Bush nor Koizumi go to the battlefield."

Three citizens, members of a citizen's group called the Camp Village to Watch the SDF in Tachikawa, distributed flyers printing the above phrases in the Tachikawa accommodation for Defense Agency officers. The citizens were arrested by the police on charge of trespassing and were in custody for 75 days. The three were indicted and are on criminal trials*. During the past 20 years, the citizen's group members had distributed flyers to officers of the SDF and such distribution was never taken up as a criminal stage.

Recently there are several criminal cases in relation to anti-war movements. A citizen opposed the US government in front of the US embassy. His house and workplace were searched on charges of assault. An officer of the Social Insurance Agency distributed a bulletin of the Japan Communist Party on a weekend and he was arrested and indicted on charges of violation of the National Public Service Law. Three citizens who marched in a parade for anti-war were arrested on charge of obstruction of the performance of official duties.

These citizens' activities are normal forms of free speech and must be guaranteed under the freedom of speech guaranteed by the Constitution. Excessive intervention by the government in citizens' movement will cause chilling effects to freedom of speech.

In addition to infringements upon freedom of speech, Japan is also inclined to inspect foreign people for reasons of terrorism or crime. For instance, a male living in Japan from the People's Republic of Bangladesh was interrogated by the police as a suspected member

* In December 16, 2004, all of them were acquitted, but the public prosecutor's office appealed to the Tokyo High Court. Now trial of the second instance is ongoing.

of the Al Qaida. A few times he communicated with one of the leaders of Al Qaida who once lived in Japan, but the communication was for business reasons only and it turned out that he had nothing to do with Al Qaida.*

Moreover, a new Internet reporting system being initiated by the Immigration Control Bureau of the Ministry of Justice risks creating unnecessarily tense relations between Japanese people and foreigners. The reporting system collects information concerning illegal or seemingly illegal foreigners from anonymous citizens via the Internet.** Japan seems to be heading to a "surveillance" society.

September 11 and the war in Iraq have altered the basic concept of national security and Japan is struggling with serious contradictions between the Constitution and political realities. Due to the current situation, unfortunately it is an inevitable duty of the Japanese citizens to face discussion of revision of Article 9 of the Constitution. It is also necessary to be careful excessive restrictions of human rights in the name of national security.

CONSTITUTION

Issues Concerning the Protection of Human Rights under Japan's Constitution

[Jinken Shimbun, March 26, 2004, No.347]

On March 9, 2004, Toshiyuki Munesue, professor of Law at Seijo University, gave a lecture on the protection of human rights at a regular meeting of the Japan Civil Liberties Union, held at the Japan Federation of Bar Associations Hall. His lecture, hosted by JCLU, referred to several problems that are expected to be resolved by Japan's current constitution (the "Constitution").

Inadequate Protection of Human Rights

In addition to calls for amendments to Article 9 and the Preamble to the Constitution, over the past few years many critics have begun to argue that the Constitution should also address human rights issues, such as environmental rights and privacy rights, which are not explicitly enumerated in the Constitution in its present form.

Although the Constitution itself does not lack focus on the protection of human rights, it is not applied creatively enough. If there is a problem with insufficient protection of human rights, it is in the way in which the Constitution is applied, not with the text itself.

Excessive Protection of Human Rights

On the other hand, there are some who argue that the Constitution in its present form overemphasises the protection of human rights. This too is not because of problems with provisions like the right to maintain the minimum standards of wholesome and cultured living, which is often criticized for being overly broad, but simply because these provisions are excessively interpreted and applied. While it may be possible to put an end to interpretations of the Constitution that distort its intended meaning by having the courage to go ahead and amend certain provisions, we should be looking at the many problems that call into question the government's duty to protect the rights of its citizens.

No Effective System or Procedures to Protect Human Rights

Japan needs a Constitutional Court that would benefit the entire population by being able to objectively hear cases on constitutional issues. At the moment, courts hearing cases concerning human rights often justify their decisions by simply expressing empathy for the victim. It is important, however, to clearly establish objective standards under which judges can easily justify decisions that hold governmental actions

* Mainichi Shimbun, "Bangladesh male made a petition for human rights relief before the Japan Federation of Bar Associations" July 28, 2004.

** For details, see Universal Principle No. 11 or http://www.jclu.org/katsudou/universal_principle/articles/347internet-reporting.html.

unconstitutional.

Constitutional Law Issues in the Protection of Human Rights

While in practice we have seen the protection of individual human rights relating to specific issues on a day-to-day level, constitutional law academics are not addressing such minor constitutional issues because doing so would narrow the study of constitutional law. Instead, they are taking a stance of adopting the broad constitutional issue of universal human rights. Practically, the effective protection of human rights is proceeding, with little emphasis being given to ideology. The academic world's is concerned about the nature of this development demonstrates, that where there is a gap between the practical side and the theoretical side of the protection of human rights.

The JCLU opposes dispatch of SDF to Iraq

[Jinken Shimbun, January 30, 2004, No.346]

The JCLU sent a statement to the government in December 2003 to express opposition to the decision to send Self Defense Forces to Iraq. In the statement, JCLU specified the following four points:

1. Sending the SDF would be against both domestic and international laws and thus can not be justified in any way; it goes beyond the SDF's main role of "defending the country", which is specified under the SDF Law and limited by Article 9 of the Constitution in Japan.
2. It would mean that Japan takes part in the U.S. occupation policy in Iraq without general acceptance by the international community and it would change the nature of humanitarian aid and reconstruction support that has been provided based on Japanese neutrality.
3. It is doubtful if the decision was taken after sufficient examination and analysis of the situation, e.g. the possibility that the SDF would be involved in armed conflict.

4. The government should not take any measures against anticipated retaliation that would threaten the civil liberties of the Japanese or foreign residents in Japan such as Muslim and Muslimah communities.

Translated by Naomi Doi

FREEDOM OF EXPRESSION

Symposium on Scandal Reporting and Media Preparedness – Focusing on the Weekly Bunshun Magazine Injunction Case

[Jinken Shimbun, July 28, 2004, No.349]

A brief description of the Weekly Bunshun magazine injunction case:

Weekly Bunshun is a news magazine known for its investigative reports. The March 25, 2004, issue of Weekly Bunshun, which went on sale on March 17, included an article about the divorce of Makiko Tanaka's eldest daughter (Makiko Tanaka is the daughter of former Prime Minister Kakuei Tanaka, and she herself, as well as her husband, is a member of Japan's parliament). A petition was made to enjoin publication of the magazine based on violation of privacy, and the Tokyo District Court handed down a provisional disposition ordering a halt to sales of the magazine. Weekly Bunshun's appeal was at first dismissed, but the order was then overturned and annulled by the Tokyo High Court. To obtain a prior injunction against publication for reason of a violation of privacy, the following three conditions must be met: (i) the written contents must not be related to the public interest; (ii) it must be clear that the article is not being published/carried for the purpose of the public good, and; (iii) there must be a risk that if the article is published, grave and markedly irrecoverable harm will result. While the Tokyo District Court found that all three of these conditions were satisfied, the Tokyo High Court found that the third element, "that there is a risk that if the article is published, grave and markedly irrevocable harm will result," was not satisfied, and the court annulled the

provisional disposition prohibiting sales of the magazine.

Comments: In principle, courts should not grant prior injunctions against publications

Yoichi Kitamura

First, Mr. Kitamura started off the discussion with the topic of whether or not the Weekly Bunshun article is related to the public interest, which is one of conditions for deciding whether or not an injunction may be ordered against publication. Mr. Kitamura is Weekly Bunshun's attorney, but he said that he would express his own personal views, and he stated that he thinks that the article in question is related to the public interest and that the provisional disposition order enjoining sales was a mistake from the outset.

"The petitioner claimed that even if Makiko Tanaka is a public figure, her daughter is a private person, the divorce has no connection to other persons, and such reporting has no relation to the public interest. I think that there are different views as to whether or not Makiko's eldest daughter is a public person, whether she is a quasi-public person, or whether she is a private person. However, Makiko Tanaka herself has made clear that her successors are to be her daughters, and both her eldest daughter and her second daughter have not even once said publicly that they will not become politicians. While it does not necessarily follow that because the parents are politicians the daughters will also become politicians, when Makiko was head of the Science and Technology Agency, her eldest daughter, who was a college student at the time, accompanied her, and naturally, as she was the recipient of various benefits affecting politicians, she has acted as a member of a politician's family."

"Makiko also has stated publicly that it is only the family that can defend the Tanaka family interests, and in that family the one who has the greatest possibility of becoming a politician is this eldest daughter and her spouse. Therefore, from the point of view of who will become successor to the Tanaka family, which is a family of politicians, I believe that it is necessary to report on her marriage and divorce."

Mr. Kitamura also touched on the element of

violation of privacy, and said, "while people's opinions are divided over whether or not this article is an invasion of privacy, I do not believe that it is. The biggest issue is, even supposing that it is a violation of privacy, whether or not a prior injunction may be brought against it. A typical invasion of privacy is where the authorities directly interfere with an individual and excessively limit that person's way of life. While it is true that divorce is a personal matter, divorce itself is approved of as an institution, and it has no link to criticism or praise of the parties' characters. Even supposing that this has no connection with the public interest, I think after all that it is strange to conclude that unless the publication is enjoined the parties will meet with grave and irrecoverable harm."

"A prior injunction against publication, not allowing in any way an opinion to be circulated to the world, is the most severe measure among so-called regulations of the press. In this case, where it is not possible to say with complete clarity whether or not the article's contents are not related to the public interest, I do not believe that we should move down the road of using a prior injunction, which is exceptional relief."

There should not be zero injunctions based on violations of privacy

Masayoshi Iida

In response to this, Mr. Iida expressed his personal opinions from the point of view of the one being reported on. "Regarding this particular case, I believe that the injunction should have been upheld. I think that Makiko Tanaka's eldest daughter is a private person, reporting on a private person's divorce is a violation of privacy, and it was not in the public interest. A politician is different from the politician's family. Even among politicians, if, for example, a person gives advance notice of her intention to run as a candidate for the upper house of parliament, stating her intentions and acting as a politician, because this person strongly takes on the nature of a public person the public interest increases, but Makiko Tanaka's daughter has not yet said that she is a candidate for public office and she is not acting as a politician. From that point of view, even if it is a politician's family, isn't it strange to treat her the same as a politician?"

Also, "while the scope of injunctions based on violations of privacy may be disputed, I wish it to be understood that there are very rare cases in which such injunctions are recognized, in other words, it is not that there are zero injunctions based on violations of privacy. I raised my voice in this case because I felt threatened by the way the mass media, by cheering on freedom of expression, reported that there is virtually close to zero legal relief available for violations of privacy. Standing in the position of a victim of news reporting, I want to emphasize that there is a large difference between the nature of a violation of privacy and the nature of defamation."

"Where there is a violation of privacy by news reporting, while there is the argument that it should be left to ex post facto reparations for damages, the reality is that a private matter, having been made known by news reporting itself, is not something that can be recovered. In the case of defamation, it is possible to argue that a lowered social estimation and reputation can be recovered through the payment of damages or published apologies. However, concerning violations of privacy, once the fatal damage has been wrought, it is absurd to restore privacy through, for example, monetary methods. From the point of view of the person who is written about, that is too late. Where even after the parties have negotiated among themselves the article cannot be stopped, a prior injunction is demanded as the last resort in order to prevent the damage. There is nothing left to say if it is not possible to win an objection at court, which is the last stronghold of protection. All that is left is either to silently accept it or, as in past cases, to arrive at an extreme resolution based on the use of force. I wish everyone to understand that legal relief is possible."

Concern about strengthening of control over the media

Yasunori Okadome

Next, Mr. Okadome took the microphone and said that the reason that the publication "The Truth of Rumour" (Uwasa-no-shinso), at which he was chief editor, was suspended this past March at the time of its 25th year of publication, was that the circumstances surrounding the media have become extremely bad.

"For example, the Personal Information Protection Law is meant to avoid the illegal distribution of information about individuals through the national resident registry network, but instead of information spread by the authorities, it is used to strictly control the leaking of personal information spread by private businesses. At the same time, information about public persons and private persons is equally treated as personal information. Because politicians, as individuals, are subject to protection under the Personal Information Protection Law, I think it is actually the politicians who gain most from the law. Also, damage awards for defamation have been rising, and while before they were approximately one million yen, now awards of ten or twenty million yen have been handed down."

"At The Truth of Rumour there has been an indictment in a criminal case by the Tokyo Special Prosecutors Division that is now being appealed to the Supreme Court, and there are moves to impose criminal penalties on the media. Realizing that the circumstances surrounding the media are plunging into a dark age, we discontinued publishing The Truth of Rumour, but there are also cases where a weekly magazine of a large publisher such as Bunshun is enjoined by a provisional disposition, and I think this really underscores the dark age that we are now in."

"This time, if the provisional disposition had been upheld, not only would all the other articles of the same issue have gone unread, but in the case of Bunshun, per issue profits of at least fifty million yen would be gone. If it comes to that, weekly magazine news reporting will completely atrophy. I do not think this injunction should be allowed, and I feel as though it goes entirely too far."

Regarding whether or not the Bunshun article was in the public interest, Mr. Okadome said, "I don't think that Makiko Tanaka's daughter is either a private individual or a public person. There are many of that kind of grey zone people. For example, Prime Minister Kioizumi's divorce was taken up by the various media and weekly magazines, and even his wife and son were reported on. I think that for the voters, information about a politician's family is within the scope of information that should be disclosed. In the case of America, there is

no problem with this. That eldest daughter got a job at the Nikkei Newspaper through Makiko's connections, and the Nikkei Newspaper, as though it is fencing in a politician, is naturally happy to accept her upon the request of the politician Makiko Tanaka. It is because she is in the position of a public person that the eldest daughter got a job, and if it's said that she's completely a private individual, then it is not possible to report on her, and it is no longer possible to provide effective information to the voters."

"Recently pressure on and control over the media has become increasingly strong, and the threat to not allow Nihon TV news to accompany Prime Minister Koizumi on his visit to North Korea is also fresh in my memory. In this day when the authorities and politicians are increasingly strengthening controls on the media, the most important thing is freedom of the press as set out in the constitution. If this right is not held as superior, Japan will quickly go wrong. Privacy is important, but if it is claimed too strongly the authorities will take away freedom of the press."

Controls are necessary on forceful news reporting against individual citizens

Kazuyoshi Miura

Next, Mr. Miura gave his opinions based upon his personal experience as a victim of news reporting. "I have no objection to the superiority of freedom of the press and freedom of expression as stated by Mr. Okadome. I think that the strength of the media has been a great support for the postwar democratic society and in that respect it can be praised. However, in the case of this reporting on divorce, I think that at both the first instance and on appeal it was only natural that it was not accepted that it was in the public interest or that it was for the purpose of the public good. Makiko Tanaka's daughter has not said that she herself will run for office and she has made no political statements. While making a campaign speech she may have said something like 'please help out my parents,' but just because of that I don't think she becomes a purely public person or a quasi-public person. Just because her parents are politicians, I don't understand the reason why something that I don't want to know about and she doesn't want published must be put into print. Mr. Kitamura and Mr.

Okadome both said that they read the article and found the contents to be insignificant, and I also read the article and felt as though it only said that she had divorced and that it wasn't significant. Still, generally in Japanese society divorce is often looked down upon. In those circumstances, after all, if it is reported nationally it wounds the heart. Even if it's a trivial article, I have grave doubts as to whether or not it is freedom of the press and freedom of expression to write something that the subject does not want reported. If this is allowed, it is of a completely different nature and on a different level than the role played by the media in the postwar democracy."

Mr. Miura went on to argue that the media should be more sensitive to the pain and the weakness of those that are reported on. "In the past all sorts of things were written about me such as that I'm a murderer or that I had illegal firearms. The magazine Weekly Shincho even went so far as to write that I was the culprit in the 300 million yen case, but it was almost all a pack of lies. When I mentioned a reporter by name, writing just the facts in an article, there were strong protests that this was a violation of privacy. Even though when I write something about them they hate it, the media is extremely insensitive to the pain of people. From the time of the reporting on the Los Angeles case to the present day, the substance of that insensitivity has not changed for the past twenty years. For example, there's the Matsumoto sarin case and Mr. Kono, and there's the excessive reporting on the Wakayama curry case – this malicious, violent, irreparable excessive reporting goes on everyday in the media as though it were nothing unusual."

"Mr. Okadome says that controls on the media have been strengthened, but on the other hand, it is a fact that it is a system of force. I would like to see more of those kinds of media controls. Every individual citizen is at risk of being treated as I was, having lies published about oneself, having one's privacy violated, and not being able to walk out in the open. When thinking about the media versus the individual and the media versus one citizen, I would like you to consider that there are thousands or tens of thousands of people who are crying in silence."

Ex post facto relief is also the principle for violations of privacy

The moderator, Mr. Yamada, said, "having heard each person talk, I think we understand the basic positions and the points of debate have been made clear." He then set out the core themes of the discussion: "where there is defamation or a violation of privacy, to what degree should injunctions be recognized, what kind of concrete conditions are necessary for prior injunctions, how should 'scandal reporting' be accepted, and how should the media be prepared to report news in the future?"

Mr. Kitamura said, "the question differs for periodicals such as books published in volumes and weekly magazines, but as a condition for obtaining a prior injunction against publication, the victim must prove to the point that the news media cannot dispute it that there clearly is no connection with the public interest or that there is no public purpose such as the case in which a publication is intended to ridicule its subject as a pretext for obtaining money. There are various cases that would meet the condition that there is a risk that grave and markedly irrecoverable harm will result and it is difficult to say exactly what this means, but it would be necessary that there be a high inevitability and that it be predicted with certainty that the harm will arise in the immediate future."

Further, in regard to Mr. Iida's comment that defamation and violation of privacy differ, with relief for defamation being in the form of the payment of money and published apologies, he responded, "it's not as though payment of money really redeems one after one is socially defamed, but in our society, in principle, we do not use prior injunctions against defamation, and relief is based upon ex post facto relief."

Establishment of the media's own system for relief of victims

In response, Mr. Iida said, "because the three conditions raised by Mr. Kitamura are the conditions used in limited cases such as the 'Hoppo Journal Case,' which involves the defamation of a politician, it is wrong

to apply them in the same manner to a violation of privacy where the very act of releasing the information to the public is very damaging. Weekly Bunshun emphasized the difference between a violation of privacy and defamation, but wouldn't it have been better to think of independent conditions. The conditions for injunction should differ for public persons and private persons, and within the realm of privacy, different conditions should be considered for neutral information and information that is fatally damaging."

Mr. Iida went on to comment that, "while Mr. Okadome says that controls over the media have been strengthened, the people's distrust of the media due to its overreaching reporting is very strong, and it can be said that the authorities are making good use of that. There is discussion about the creation of a system of substantive relief for victims of reporting that, through the Attorneys Network for Relief of Damages Due to News Reporting, takes a short time at little cost, and that does not use legal measures such as provisional dispositions and the courts. Looking at the media's own systems of damage relief, while the newspapers and television have made some progress, there are no public announcements of what progress if any the magazines have made. In order that the people's distrust not be used by the authorities, I think that where there is erroneous reporting, along with setting things right, there should be adequate follow-up."

Technique on the part of the media is also necessary

Mr. Okadome observed that with strengthening criticism of the media, news organizations are becoming quite cautious and publish material only after considering whether or not the article will stand up in court. "Even at Weekly Bunshun, in the case of a risky article, attorneys probably review the proofs and give advice. Now, because the media outlets have become quite cautious, I don't think that articles are as sloppily written as in the past. With that alone, because a system of censorship will lead in the direction of the pre-war Maintenance of Public Order Act, it is a very scary thing. In the present case, I don't think that it can be said that Bunshun thought that there was absolutely no problem with the article. It feels as though Weekly Bunshun was lacking in

consideration for sentence structure and approach. If it had emphasized the public interest a bit more, or if it had put Makiko Tanaka at the forefront, depending on how it is done, they could have made a more convincing case that the article was in the public interest." Mr. Okadome emphasized that depending on the technique used by the media in writing articles, it should be possible to avoid violations of privacy.

Kinder towards the weak, bolder towards the authorities

On the other hand, Mr. Miura pointed out that the media, and particularly magazines, have not adopted adequate means for avoidance of and relief for violations of privacy. "Newspapers and broadcasters have created means for checking their output, for example, the national newspapers have created various committees to discuss the contents of news reports carried by the papers. In addition, with local papers included, 40 to 50 ethics committees have been established throughout Japan. However, not one of the committees includes a member who is a victim of reporting. I read the articles written by the Asahi Shimbun's committee, but the members, such as a former attorney, a former university professor, and a former Asahi Shimbun employee, defer to the newspaper in their comments. I wonder what use this kind of committee can have. It is completely different to know the real pain of someone who is a victim of reporting and, viewing that pain from the outside, to say 'that was terrible wasn't it.'"

"Because it violates all the other authors' freedom of expression, I have great doubts as to whether enjoining publication of a whole issue for just one four page article, as happened in this Weekly Bunshun case, is the correct way to go about it. However, the reality is that the victims of reporting or those that have their privacy violated are almost all individual citizens, and the current system in Japan does not help them. The media should be more respectful towards the weak and bolder towards the authorities and public figures. Furthermore, I would like to see the media itself having the consciousness that it should create a means for providing relief to victims of reporting."

Translated by David M. Schultz

Pornography and the Freedom of Expression

[Jinken Shimbun, December 5, 2003, No. 345]

On the 8th and 9th of November, 2003, the JCLU convened its first training retreat in two years in Kiyosato, Yamanashi Prefecture. 23 participants came from throughout Japan.

The "Misshitsu" Case

Report by Takashi Yamaguchi

On day one, the first training session was held on the theme of "Pornography and the Freedom of Expression in the "Misshitsu" Obscenity Case," under the moderation of JCLU Director Shun Hashiba. To start, Mr. Takashi Yamaguchi (attorney and JCLU member) gave a report on the adult comic book "Misshitsu" obscenity case (violation of Article 175 of the Criminal Code) which he defended.

The "Misshitsu" case began with the arrest of the president of the publishing company, editor and comic artist for the illegal distribution of obscene drawings. The publishing company regularly published adult comics that were not considered excessive by industry standards, and thus the president of the company published the comic book at issue without considering questions of obscenity. The defence identified the ambiguity between the legal interest protected under Article 175 of the Criminal Code and the course of enforcement, and alleged violations of both freedom of expression and due process. Among the points at issue, of particular interest was the prosecution's allegation of the sound upbringing of youth as the basis for regulating obscene drawings, and the defence's counter-argument that different legal interests are protected respectively by the Article 175 of the Criminal Code and youth protection ordinances, and that these two were being confused by the prosecution. The comic book at issue had been designated an adult comic book, which meant that it was sealed in a plastic bag and sold on a shelf with a sign that expressly stated "adult comics." This, it was asserted by the defence, provides zoning that protects the interests of young people and

those who do not want to see such books. In other words, under the zoning of the youth protection ordinances, adults who wish to view such materials are able to collect information and make their own decisions.

Conversely, Article 175 of the Criminal Code completely eliminates obscene materials from the market, and as a result thereof citizens are unable to openly debate the propriety of decisions made by authorities that regulate and ban certain materials. Thus, the youth protection ordinances that allow for the limited flow of information are better from a viewpoint of the public interest.

With regard to this last point, Mr. Yamaguchi himself questioned the concept of the youth protection ordinances, and emphasized that the defence's arguments were adopted as a strategy for litigation. The floor expressed concerns over the recent trends in the expansion of public authority into the private realm and the paternalism of the youth protection ordinances.

Mr. Yamaguchi also introduced some interesting litigation methods employed by the defence, including a study by Shinji Miyadai showing that only 1 in 3,500 high school students who viewed adult videos committed a sexual offence, and the expert testimony of comic critic Yurika Fujimoto which denied the obscenity of the comic at issue.

The randomness of obscenity regulations was strongly felt by the fact that police investigators had not been trained in any manner concerning artistic issues, and knew nothing of the "Lady Chatterley" ruling, the "Yojouhan Fusumano Shitabari" case decision or the existing body of law. The blatant arbitrariness of the enforcement authorities in itself seems to conflict with the concept of the rule of law.

"Obscenity" Regulations and Freedom of Expression

Keynote Address by Yasuhiro Okudaira

The person who emphasized this point was Professor Yasuhiro Okudaira, who served as an expert witness in the case. Deference must always be given to Prof. Okudaira's persistent enthusiasm in the protection

of civil liberties.

Prof. Okudaira first discussed the implication of the Chatterley case. At that time, the control of obscene literature was understood solely as an issue of interpreting the constituent elements of Article 175 of the Criminal Code. Nevertheless, Prof. Okudaira restructured the issue from the viewpoint of the constitutional right of freedom of expression. In particular, the Chatterley case differed from the regulation of pulp magazines in the immediate postwar era, in that the subject was a widely acclaimed literary work and there was tension among the authorities themselves in labelling it as obscene. This was the first opportunity for lawyers to come face to face with the regulation of obscenity in the postwar constitutional system. In the pre-war era, sales and distribution prohibitions under the Publishing Law and Newspaper Law had all but rendered the obscenity restrictions of Article 175 of the Criminal Code meaningless. In other words, the enforcement agencies were able to easily deal with the problem texts through administrative dispositions prior to the release of the texts to the general public. From this perspective alone, the significance of the new, postwar constitution is evident, but unfortunately the constitutionality debate did not intensify, and the three requisite standards for obscenity as construed under the Criminal Code based on rulings issued by the Great Court of Cassation have persisted. Prof. Okudaira questioned whether the police, prosecutors and judges in the system have come to believe that the traditional practice is correct and are handling these issues mechanically, and emphasized the importance of realizing and exposing history and ideas behind traditional culture as "post-traditional" thinking.

Prof. Okudaira himself realizes that his perspective is "liberal," if "liberal" is taken to indicate belief that the state must be limited in its regulation of the market and that special handling should be afforded especially to matters related to freedom of expression. In other words, Prof. Okudaira's position recognizes the pre-eminence of the freedom of expression, and only allows for the restriction of that freedom when the expression causes actual harm. The question was posed as to whether the work of identifying the harm was being properly carried

out in the context of the obscenity regulation. Unfortunately, the "actual harm" theory has not been developed in Japan, and reference must be made to the history thereof in the United States.

The 1942 "Chaplinsky" ruling pronounced a two-tier theory whereby defamatory writings, obscene texts, and the like have been traditionally prohibited and are outside the scope of constitutional protections. Even after the advancement of the "clear and present danger" legal principle, it remains important to frankly accept the fact that not all expressions are protected under the constitution. The history of the freedom of expression in the United States is the history of overcoming this two-tier theory (for details, see Yasuhiro Okudaira, "In Pursuit of 'Freedom of Expression' - Tracing the Acquisition of Rights in America" (Iwanami Shoten 1999)). In particular, the theory of actual harm must be examined under the liberal principles of self-choice, self-expression and self-determination. This differs from a simple "market theory." It is concluded that respecting the rights of the people who want to read such material - including the right to burn in hell should they so wish - is imperative.

Nonetheless, in the 1980s the liberalist assertions concerning the issue of obscenity were challenged by feminists. The allegation that pornography should be prohibited, not in order to maintain morals, but in order to eliminate discrimination against women, pressed for a significant change in legal thinking. Nonetheless, concerns over the realization of equality between men and women through censorship by authorities cannot be eliminated. (The floor indicated that since the concept of violence committed against women has recently changed, the "actual harm" theory needed to be reconsidered from a new point of view.)

This keynote address by Prof. Okudaira explored a variety of points, including the level of paternalism, the expansion of women's rights and the use of the courts as a means therefore, the re-examination the strong image of the individual as a premise for constitutionalism, and the ability to imagine beyond a self-sustaining legal system.

Translated by James M. Cohen / Mie Fujimoto

PERSON WITH DISABILITY

The Mito Case: Abuse of Mentally Retarded Employees in the Workplace

Wakana Kashio

[Jinken Shimbun, May 21, 2004, No.348]

I am pleased to report that the Mito District Court acknowledged the credibility of mentally retarded plaintiffs as witnesses and held that the defendant was liable. The Mito case was civil case against the president of Akasu Paper-ware Inc., a company in Mito City, Ibaragi Prefecture, specializing in corrugated cardboard processing. The defendant had illegally received subsidies for employing mentally retarded people. He also physically and sexually abused those he had employed. At the time the incident came to light in 1996, these mentally retarded employees were not only working at Akasu Paper-ware Inc., but were also living within the premises.

In this case, the defendant denied almost all wrongdoings. In the current state of justice, mentally retarded persons face extreme difficulty in terms of their credibility as witnesses. In fact, only parts of the criminal original complaints filed by the employees were prosecuted. This was possibly due to prejudices against mentally retarded people which led investigators to pay insufficient attention to the proper accommodations required for mentally retarded witnesses. Courts in the criminal case eventually found the defendant guilty on a very small number of incidents and declared his sentence suspended. Out of the numerous employees who initially alleged abuse, only three women were able to file the civil case seeking damages.

The most crucial issue here was the credibility of the plaintiffs as witnesses in light of the fact that the defendant denied most of the charges of physical and sexual abuse. The plaintiffs' counsel presented to the court (1) the difficult situation of mentally retarded people and their families in Japanese society, (2) the needs for accommodating the special need of the plaintiffs when hearing their testimony so that they would be able to

testify appropriately, and (3) the methodology to properly assess the credibility of plaintiffs' testimony.

The Mito District Court agreed to provide the necessary environment in which plaintiffs could give testimony and on March 21, 2004, found almost all the facts for the plaintiffs. The decision stated that, it is extremely difficult for mentally retarded people to find work in normal circumstances and therefore these people are psychologically unable to resist even outrageous treatments out of fear of being fired. The court found that, under these circumstances, it is unthinkable for plaintiffs to raise complaint without any factual basis and proceeded to give credibility to the testimony because (1) the plaintiffs have expressed strong sense of fear, loathe, humiliation and shame accompanying the incidents, (2) the essence of the complaint has been consistent in how they have perceived the incidents, and (3) the problem of not being able to specify dates, places, number of occurrence and other details is one of the characteristics of memory structure and manner of discourse of mentally retarded people and should not affect the credibility of the plaintiffs' testimony in this case.

It has always been difficult for mentally retarded people to express what has happened to them, and unfortunately many have been taken advantage of it. It is also true that relief by the court have been far from adequate. I hope that this decision will be appreciated as it illustrated ways to properly assess and acknowledge the credibility of mentally retarded people.

The defendant appealed the decision and the case is now pending at Tokyo High Court. We are doing our best so that we will be able to win again. I would like to express my deepest gratitude to the JCLU for supporting us throughout the difficult times, and to ask for continued support until we win at the High Court.

Translated by Sachiko Tankei

Editor's Note: In July 2004, Tokyo High Court upheld the the district court decision and plaintiffs gained full victory.

JCLU issues a warning about the leak of the psychiatric examination results of the Ikeda Elementary School Case

[Jinken Shimbun, May 21, 2004, No.348]

On April 21, the JCLU released a statement condemning the disclosure of the psychiatric examination result of the Ikeda Elementary School Homicide Case defendant to mass media and demanded the establishment of firm policies on confidentiality obligations of psychiatrists.

The forensic psychiatrist who examined the accused, Mamoru Takuma, disclosed the examination details in detail and explained his analysis in an interview on a TV program. This interview was cited by some newspapers. JCLU contacted the doctor to clarify the situation from the perspective of human rights protection.

In his reply to the JCLU, the doctor explained that the examination details were already disclosed in open court. However he did not ask consents from the accused or the court to disclose the information. He also insisted that his remarks were to ensure accuracy of the information by disclosing his analysis himself instead of having unrelated doctors state what they believed his analysis was.

In this regard, the JCLU pointed out in its statement that a physician may be discharged from his/her confidentiality obligations only when his/her patient agrees to the disclosure or when there are clear provisions in the laws allowing such disclosure. JCLU stated it is a serious violation of the physician's confidentiality obligations to disclose the contents of patients' examinations to third parties with massive dissemination power, such as the mass media.

According to the JCLU's inquiry, examination reports are easily copied and circulated outside of the court at, for example, physicians' seminars, where they are used as case studies.

In conclusion, the JCLU demanded that forensic

psychiatrists and the mass media not disclose such information, that the academic society of psychiatry establish detailed independent guidelines regarding detailed confidentiality obligations of psychiatrists appointed as expert witnesses and that mass media also establish their own internal rules regarding coverage of psychiatric examinations.

Translated by Satoshi Ueno

WOMEN

Indirect Gender Discrimination in the Workplace

Joji Takahashi

(JCLU Osaka/Hyogo Branch, University Lecturer)
[Jinken Shimbun, July 28, 2004, No.349]

The featured lecture on the occasion of the Branch General Assembly, held on May 22, 2004, examined the Sumitomo Electric Industries, Ltd. gender discrimination case. Ms. Mitsuko Miyachi, the attorney who handled the case and Ms. Eiko Shirafuji, one of the plaintiffs, discussed the case and their involvement in it.

This case was submitted to the Osaka District Court in August 1995 by Ms. Katsumi Nishimura and Ms. Eiko Shirafuji, female employees of Sumitomo Electric Industries. The plaintiffs brought suit over large salary discrepancies and highly disadvantageous conditions for promotion in comparison to male employees. They also sued the Japanese Government because their request to the Osaka Women and Young Workers Office for arbitration based on the Equal Employment Opportunity Law had been turned down prior to the trial. The District Court rejected their claim, but in November 2003, the Osaka High Court recommended a settlement including not only payment of damages by the company but also promotion for the plaintiffs, to which the parties agreed. The settlement was in substance a victory for the plaintiffs, as the High Court referred to the need to consider indirect forms of discrimination and demanded that the Government monitor industry so that recruitment and management according to career tracks did not result in what was in effect management according to sex.

Ms. Miyachi described in detail the process prior to and during the trial, as well as the content of the decision at the District Court and the settlement at the High Court. Ms. Shirafuji said she gained confidence as she participated in lectures on the implementation of the Equal Employment Opportunity Law and lobbied at the UN Committee on the Elimination of Discrimination Against Women.

Ms. Miyachi's analysis of the issues in the trial and the Courts' decisions are very important. For more detail, see the website of the Working Women's Network (WWN), an organization that promotes the equality of men and women at the workplace (<http://www.ne.jp/asahi/wwn/wwin/>).

This trial ended in a satisfactory manner for the plaintiffs, but similar ongoing lawsuits in various parts of Japan may not necessarily bring positive decisions. Much depends on the individual beliefs of the judge, and it remains difficult to have the courts view indirect discrimination such as separate course systems, as illegal discriminatory practices, as such systems become more and more sophisticated.

Translated by Masako Ikeda

PATIENTS' RIGHTS

JCLU Requests Revisions to Infectious Disease Prevention Act

[Jinken Shimbun, May 23, 2003, No.342]

Under the supplementary provisions of the Act Concerning the Prevention of Infectious Diseases and the Treatment of Infectious Disease Patients (effective April 1, 1999) a review of the Act within five years of its implementation date is required, the JCLU submitted its written opinion on such revisions to the Minister of Health, Labour and Welfare on May 21, 2003.

Supplementary Provision 2.1 of the current law states that the government "shall, within five years from the implementation of this Act, study the spread of

infectious diseases, changes in the progress of medical treatment, development of international exchange, diffusion of knowledge concerning infectious diseases, and other issues, in light of the ongoing state of implementation of this Act, and shall adopt the measures deemed necessary." Supplementary Provision 2.2 of the current Act states that the government shall study the classification and scope of the infectious diseases stipulated in Section 6 of the current Act "in light of changes in the progress of medical treatment and in light of the development of international exchange, and shall adopt the measures deemed necessary."

The JCLU's written opinion notes the following six problem areas in the current law:

- 1) prevention of social discrimination and respect for the right not to be subject to improper restraint;
- 2) protection of individual privacy in conducting the surveillance necessary to prevent HIV infection;
- 3) the right to receive medical treatment, including treatment of, and provision of information to, foreigners (especially those who have overstayed their visas);
- 4) protection of the right to get information and to choose to give birth for women infected with HIV and adoption of measures to ensure safe childbirth and social acceptance of families with HIV;

- 5) creation of a concrete program of education about infectious diseases;
- 6) establishment of an agency for ongoing supervision of the Act's implementation.

The written opinion suggests four topics to be investigated for future legislation:

- 1) establishment of a Disease Management Organization (provisional name)—an agency that conducts epidemiological studies and research and has the authority to issue recommendations;
- 2) development of guidelines for responding to diseases in addition to those specified in the current Act;
- 3) protection of individual privacy in any system for reporting epidemiological statistical data;
- 4) revision of typologies and classifications of infectious diseases.

The JCLU's written opinion requests that the government take all necessary measures to realize these changes.

Recently the government has had to respond to new infectious diseases like SARS. The JCLU particularly wants the government, when it revises the current Act, to conduct a measured debate that focuses on preventing infection and that ensures that the rights of patients are not overly restricted.

Translated by Jonathan Marshall

AWARD

Prof. Tanaka received Tokyo Bar Human Rights Award

[Jinken Shimbun, January 30, 2004, No.346]

On January 8, 2004, The Tokyo Bar Association awarded its 18th Human Rights Award to Prof. Hiroshi Tanaka, a Representative Director of the JCLU. The association praised Prof. Tanaka for his dedication to human rights of foreigners in Japan for over 40 years.

Prof. Tanaka's various achievements include the amendment of Nationality Law, the elimination of foreign residents' fingerprinting, the employment of foreign teachers at public schools and the enhancement of university entrance exams qualification for ethnic school graduates among other contributions. Furthermore, with the JCLU, he successfully fought to enable foreign nationals to receive legal training and register as lawyers.

A few months following the Tokyo Bar Association's award ceremony on March 25, the JCLU, other human rights organizations and individuals hosted a party to celebrate his award. The party participants reflected the diversity of ethnic minorities and Japanese nationals who are committed to the cause of the ethnic rights movements.

Currently Prof. Tanaka is giving lectures on foreigners' rights at Ryukoku University. He is also very active in movements working towards the establishment of an independent national human rights commission and establishing ethnic education rights.

Translated by Satoshi Ueno



The JCLU celebrated Prof. Tanaka's (Center) award with its friends on March 25, 2004.

ABOUT JCLU

The Japan Civil Liberties Union (JCLU) is an independent non-profit organization which aims to protect and promote human rights for all persons regardless of beliefs, religion or political opinion. JCLU's work is conducted in accordance with internationally recognized human rights principles, namely the Universal Declaration of Human Rights. The JCLU was founded in 1947, the year the new Constitution of Japan was promulgated. The American Civil Liberties Union (ACLU) played an important role in founding the JCLU. The JCLU is affiliated with the International Commission of Jurists (ICJ) and the International League for Human Rights (ILHR).

Membership is open to anyone who agrees with the JCLU's purposes and is willing to work for the improvement of human rights situations. The JCLU currently has about 800 members, 60% of whom are lawyers engaged in private practice, and others include citizens of various professions such as scholars, journalists, and students. The JCLU is financed by membership dues and unconditional donations from its members and outside supporters. The Board of Directors is comprised of 46 members. Currently, the JCLU is comprised of 18 committees, and has a chapter in Osaka.

The JCLU frequently issues advice, memoranda, and opinions on specific human rights cases relating to activities of the national and local government, the Diet, and the courts of Japan. In addition, it has acted as a leader in movements for new domestic legislation and ratification of the international human rights treaties by the Japanese Government. Member attorneys are active in a broad range of human rights litigations involving the freedom of religion, freedom of information, postwar compensation, environmental pollution, refugees, and serious criminal cases. Recent activities include work on foreigner's rights, sending of a fact-finding mission to Cambodia, and freedom of information. The JCLU organizes seminars, meetings and symposiums, conducts research, and publishes reports, books and newsletters.

JCLU Officers : Representative Directors: Jun-ichiro Hironaka, Masako Kamiya, Hiroshi Tanaka, Shoichiro Niwayama ; Secretary-General: Ikuko Komachiya; Deputy Secretary-General: Haruhide Furumoto

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This publication was sponsored by the Unno Memorial Fund.

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