STAND FOR THE NATIONAL FLAG AND SING THE NATIONAL ANTHEM

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ABSTRACT

This paper uses a comparative law approach to review a national anthem case that is one of the most famous decisions coming from the Japanese Supreme Court. Public school teachers in Japan are required to stand up in front of the national flag and sing the national anthem during public school ceremonies. This paper reviews their constitutional rights.

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I. INTRODUCTION

In 2016, during a pre-season National Football League ("NFL") game, a player refused to stand during the national anthem,[1] challenging the well-established tradition to pay respect to the American flag and national anthem.[2] Instead, he sat as a protest against past racial discrimination.[3] The NFL rulebook, at the time, contained no provisions regarding what players could or could not do during the national anthem.[4] Former President Barack Obama defended this young football player, saying that his protest shows concern about legitimate issues.[5]

The Japanese Constitution of 1947 (the "Constitution") is modeled on the objectives of American democracy.[6] However, unlike the U.S. Constitution, the Japanese Constitution clearly states that "[f]reedom of thought and conscience shall not be violated."[7] Japan signed the International Covenant on Civil and Political Rights in 1978,[8] in which

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1 Nick Wagoner, *Colin Kaepernick Protests Anthem over Treatment of Minorities*, ESPN (Aug. 28, 2016), http://www.espn.com/nfl/story/_/id/17401815/colin-kaepernick-san-francisco-49ers-sits-national-anthem-prior-preseason-game.

2 *See* 26 U.S.C. § 301 (2012) ("[W]hen the flag is displayed . . . all . . . persons present should face the flag and stand at attention with their right hand over the heart, and men not in uniform, if applicable, should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart."); *see also* Erik Brady, *How National Anthem Became Essential Part of Sports*, USA TODAY (Sept. 26, 2017, 6:25 PM), https://www.usatoday.com/story/sports/nfl/2017/09/26/how-national-anthem-become-essential-part-sports/706243001 ("For decades, Americans have stood for the national anthem and then sat down for a ballgame.").

3 *See* Wagoner, *supra* note 1.

4 *See* NAT'L FOOTBALL LEAGUE, 2016 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE (2016). However, while there is no mention of required conduct during the national anthem in the rulebook, the NFL Game Operations Manual dictates that players shall stand during the national anthem. *See* Alex Fitzpatrick, *Does the NFL Require Players to Stand for the National Anthem?*, Times (Sept. 25, 2017), http://time.com/4955704/nfl-league-rulebook-a62-63-national-anthem-rule. (reporting that the Operations Manual dictates as follows: "During the National Anthem, players on the field and bench area should stand at attention, face the flag, hold helmets in their left hand, and refrain from talking. The home team should ensure that the American flag is in good condition. It should be pointed out to players and coaches that we continue to be judged by the public in this area of respect for the flag and our country.")

5 *See* Kim Hjelmgaard, *Obama Defends Kaepernick's National Anthem Protest*, USA TODAY (Sept. 5, 2016, 9:51 AM), https://www.usatoday.com/story/sports/nfl/2016/09/05/obama-defends-kaepernicks-national-anthem-protest/89879478.

6 *See* JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 77 (1999).

7 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 19 (Japan).

8 *Status of Ratification Interactive Dashboard,* U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER, http://indicators.ohchr.org (last visited Mar. 10, 2019) (information accessible under the "Select a treaty" dropdown menu).

Article 18 maintains that everyone shall have the rights to freedom of thought, conscience, and religion.[9]

Japanese public schoolteachers are threatened with punishment if they refuse to sing the national anthem in front of the national flag. In 2007, the Japanese Supreme Court rejected a music teacher's argument that the school principal's formal warning against refusing to follow his order to play the anthem infringed on her right of thought and conscience.[10] The Supreme Court explained that the principal's order to play music during the ceremony did not infringe on her historical viewpoint and the viewpoint of the world; it was a well-known fact that in public schools, students and teachers sing the national anthem and stand for the national flag.[11] The Court explained that the music teacher was expected to play the national anthem as part of her work as a public servant.[12]

Even after this decision, several similar cases went to the Supreme Court. The Tokyo Metropolitan Board of Education disciplined over 300 teachers according to the public notification in 2003.[13]Around eleven cases have been decided in the Supreme Court since the first decision in 2007. Several teachers allegedly argued that they were not rehired after retirement because they did not stand for and sing the national anthem.[14] Some decisions held that some of the punishments inflicted by the Tokyo Metropolitan Educational Board were too severe.[15]

Liberal professors have argued that the order to stand up and sing the national anthem restricts the right to thought and conscience.[16]

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9 International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

10 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (Japan).

11 *Id.*

12 *Id.*

13 *Nyūgakushiki, Sotsugyōshiki Nado ni Okeru Kokki Keiyō Oyobi Kokka Seishō no Jisshi ni Tsuite* [Notice for Implementation to Stand Up in Front of National Flag and Sing National Anthem in the School Entrance and Graduation Ceremony], TŌKYŌ-TO KYOĪKU IINKAI [TOKYO METRO. BD. OF EDUC.] (Oct. 23, 2003) http://www.kyoiku.metro.tokyo.jp/static/reiki_int/reiki_honbun/g1013587001.html [hereinafter *Tokyo Bd. of Educ. Notice*].

14 Saikō Saibansho [Sup. Ct.] May 30, 2011, Heisei 22 (gyo tsu) no. 54, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], http://www.courts.go.jp (Japan).

15 Saikō Saibansho [Sup. Ct.] Jan. 16, 2012, Heisei 23 (gyo tsu) no. 263, (gyo hi) no. 294, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], http://www.courts.go.jp (Japan).

16 Hiroshi Nishihara, *Kimigayo banso kyohi soshousaikousai hanketsu hihan* [Criticism Against the Supreme Court Decision on Refusal to Play National Anthem], 5 SEKAI [THE WORLD] 137 (2007); Toshio Uehara, *Kokki kokka kyōsei no ronten to mondaiten [The Controversy Over Forcing Teachers to Stand and Sing the National Anthem at School Ceremonies]*, 2 WAKO U.

Similarly, in the Edo era, the Edo government prohibited Christianity and forced citizens to step on plates adorned with Christian symbols.[17] This was done to prove that they were not Christians. This activity did not reach the Supreme Court as a case involving freedom of thought and conscience. Conservative professors have justified the Supreme Court decision, finding that since the teachers violated orders from their school principals, severe discipline is reasonable.[18]

This Article argues that in cases concerning the rights to thought and conscience, the international law perspective must be considered both in a Court's decision, and in analyses by law professors. Judges in Japan are obligated to interpret statutes, in concrete cases, under concrete judicial review. Furthermore, Japanese law professors are obligated to explain why some Japanese schoolteachers protest standing for their flag and singing the anthem, and they must also review the applicability of international law in their analysis. Thus, judges and law professors in Japan must consider international constitutional laws, particularly those of the U.S., when analyzing the rights to freedom of thought and conscience in Japan.

II. JAPANESE SUPREME COURT DECISIONS REGARDING ARTICLE 19

Unlike the U.S. Constitution, Article 19 of the Japanese Constitution provides that freedom of thought and conscience shall not be violated.[19] This provision was established because the Japanese government, under the previous Meiji Constitution, suppressed freedom of conscience.[20] The Special Higher Police controlled political thought and expression under the Maintenance of Public Order Act, otherwise known as *Chian Iji*

BULL. FAC. HUM. STUD. 103 (2009); Okuhira Yasuhiro et al., *'Kimigayo' piano bansō kyohi soshō saikōsaihanketsu ni taisuru hōgaku kenkyūsha seimei* [Statement of Constitutional Scholars Against the Supreme Court Decision], JCA-NET (Mar. 22, 2007), http://www.jca.apc.org/~kenpoweb/070322kimigayo_statement.html.

17 *See* SHŪSAKU ENDŌ, SILENCE (William Johnston trans., Picador Modern Classics 2015) (1969).

18 *See* Sota Kimura, *Gyosei Hanrei Kenky (540.845) Ongaku senka Kyoyu no Kimigayo piano banso kyohi ni taisuru kaikoku shobun torikesi sosho jokokusin hanketsu* [Administrative Law Case Review: Music Teacher Refusal to Order of Play National Anthem by Piano], 84 JICHI KENKYU 137 (2008) (arguing that this case is not related to Article 19; rather, the school principal's action relates to power harassment).

19 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 19 (Japan).

20 DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 8 (Japan).

Hou.[21] The police arrested socialists, and any other people who criticized the government's policies.[22]

Under the democratic system of the current Constitution, the government cannot dictate to society what to believe, nor can it impose any particular lifestyle.[23] Thus, people autonomously seek their own happiness.[24] Article 19 prohibits the government from discriminating against people for their ideas or conjectures.[25] Conscience of mind is absolutely protected unless it appears in action.[26] Constitutional freedom is protected so long as it does not infringe upon the rights of others.[27]

Article 20 states that freedom of religion is guaranteed to all;[28] therefore, the government cannot determine an individual's religious beliefs.[29] Its scope of protection overlaps that of Article 19.

Although some critics have said that the Constitution was forced upon Japan by the General Headquarters ("GHQ") and the Allied Powers,[30] the Japanese government and the governmental section of the GHQ worked together to draft and translate it.[31] The proposed amendment was passed and promulgated by the Imperial Parliament on November 3, 1946 under the Meiji Constitution.[32] On March 3, 1947 it came into force.

Japan and Germany lost in World War II, and the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*) was passed on May 23, 1949.[33] Under fortified democracy in the German Basic Law, ideas

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21 Chian iji hō [Maintenance of Public Order Act], Law No. 46 of 1925 (Japan). The Maintenance of Public Order Act is also sometimes called the Peace Preservation Law. *See* MOMŌ YAMAGUCHI & STEVEN BATES, WAEI NIHON NO BUNKA KANKŌ REKISHI KITEN [A JAPANESE-ENGLISH DICTIONARY OF CULTURE, TOURISM AND HISTORY OF JAPAN 504 (rev. ed. 2014).

22 *See generally* YASUHIRO OKUDAIRA, CHIAN IJI HO SHOSHI [A SHORT HISTORY OF PEACE PRESERVATION LAW] (1977).

23 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13 (Japan).

24 *See* Yuichiro Tsuji*, Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment*, 46 DENV. J. INT'L L. & POL'Y 159 (2018); *see also* NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTION] 119 (6th ed. 2015); KŌJI SATŌ, NIHONKOKU KENPŌ RON [JAPANESE CONSTITUTIONAL THEORY] 121, 168 (2011).

25 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 19 (Japan).

26 ASHIBE, *supra* note 24, at 150; SATŌ, *supra* note 24, at 225-226; TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI & KATSUTOSHI TAKAMI, KENPŌ I [CONSTITUTION I] 305–06 (2012); *see also infra* note 140.

27 *See* NONAKA, *supra* note 26, at 306-10.

28 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20 (Japan).

29 *Id.* art. 20, 21.

30 ASHIBE, *supra* note 24, at 27; SATŌ, *supra* note 24, at 66-69; Tsuji, *supra* note 24.

31 Tsuji, *supra* note 24, at 240-48.

32 Yuichiro Tsuji, *Constitutional Law Court in Japan,* 66 TSUKUBA J.L. & POL. 65 (2016).

33 *See National Parliaments: Germany*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/national-parliaments/germany.php (last updated Feb. 12, 2016).

and thoughts denying democracy were prohibited.[34] Unlike the German Basic Law, even thoughts denying democracy are protected under the Constitution.[35] However, the Japanese Supreme Court has not clearly delineated the protections for thought and conscience since 1947 when the Constitution was enacted.

The articles of the Civil Code were revised under the modern Constitution.[36] Article 723 provides that, "in defamation, the Court may, at the request of the victim, order a person who defamed others to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages."[37] The term "appropriate measure" is interpreted to include a court-ordered apology written in a publication.[38]

There was a case where Kiyomi Ohguri, a public candidate, expressed both on the radio and in a newspaper article, his concern about corruption during his rival's time in office as governor.[39] The former governor, Shigehito Kageyama, brought a defamation action against Kiyomi Ohguri.[40] The Tokushima District Court upheld the defamation claim and ordered that a notice of apology be written in a publication.[41]

Although the public candidate argued that the court-ordered apology infringed upon his constitutional rights under Article 19, the Supreme Court upheld the constitutionality of Article 723.[42] The majority opinion did not define the protected scope of thought and conscience.[43] Justice Kuriyama argued that thought and conscience refer to the religious belief protected by Article 20.[44] Justice Irie concurred with the majority opinion but opined that the court order gave rise to unconstitutionality if achieved through compulsory execution.[45]

Constitutional scholars are divided into two schools of thought regarding how to understand this decision. One narrows the scope of thought and conscience to the inner ideas of one's mind: world view,

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34 *See, e.g.*, *id.* art. 5(3), 9(2), 18, 20(4), 21(1)(2), 33.

35 *See* KŌJI SATŌ, NIHONKOKU KENPŌ RON [JAPANESE CONSTITUTIONAL THEORY] 217-19 (2011); *see also* NONAKA ET AL., *supra* note 26, at 312.

36 *See, e.g.*, Yuichiro Tsuji, *Decisions That Declared Laws Unconstitutional and Their Impact on Japanese Families,* 24 ILSA J. OF INT'L & COMP. LAW 139, 163-73 (2018).

37 MINPŌ [MINPŌ] [CIV. C.] art. 723 (Japan).

38 Saikō Saibansho [Sup. Ct.] July 4, 1956, Shō 28 (o) no. 1241, 10 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 785 (Japan).

39 *See id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

religious beliefs, and principles.[46] The other widens the scope to include judgment distinguishing between right and wrong as well.[47] If we take the former stance, then the court order is constitutional. If we take the wider view of thought and conscience, then the court order is unconstitutional. Presently, some constitutional scholars agree with Justice Kuriyama's concurring opinion that conscience and thought are separate, and that conscience is more strongly protected when categorized as religious belief. This is an attempt to maintain a strong protection of people's inner thoughts.[48]

A. The Music Teacher Should Play the National Anthem

The National Anthem Flag Law was passed in 1999.[49] Until 1999, there had been no provision defining the national anthem and flag. The Japanese national anthem, called "Kimigayo," was controversial in that it allegedly admires the Emperor and his imperialism by stating: "A thousand years of happy life be thine! Live on, my Lord, till what are pebbles now, By age united, to great rocks shall grow, Whose venerable sides the moss doth line."[50]

Its translation has been controversial, as some people argue that the translation of "My Lord" is an incorrect translation of the term "*Kimigayo*" in Japanese.[51] The Japanese government released an official statement in 1999 that "*Kimi*" refers to the Emperor who is the symbol of the state and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.[52] Thus, the government must think that the national anthem expresses hope for the long prosperity of Japan.

In 2007, the Japanese Supreme Court held that the formal warning given by the Tokyo Metropolitan Board of Education to a music teacher

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46 *See* SATŌ, *supra* note 35, at 217-19; NONAKA ET AL., *supra* note 26, at 306-09.

47 SATŌ, *supra* note 35.

48 Saikō Saibansho [Sup. Ct.] July 4, 1956, Shō 28 (o) no. 1241, 10 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 785 (Japan).

49 Kokki oyobi kokka ni kansuru hōritsu [Kokki kokka hō] [Act on National Flag and Anthem], Law No. 127 of 1999 (Japan).

50 NOBUO ODAGIRI, KOKKA KIMIGAYO NO KENKYŪ [Research on National Anthem and Flag] (1966).

51 *Id.*

52 *See* Kanpō [Government Gazette], 145th Diet (June, 29, 1999); *see also*, Toru Enoki, *'Kimigayo' piano bansō kyohi jiken ni miru shisō ryōshin'nojiyū to kyōiku no jiyū* [Freedom of Thought and Conscience and Freedom of Education in "Kimigayo" Piano Accompaniment Refusal Case], 44 SHAKAI KAGAKU-NENPO 82 (2010) (arguing that we now need to review again to seek meaning what Kimi means.).

who refused to follow the school principal's order to play the anthem, did not infringe upon her rights.[53] In this 1999 case, during the school entrance ceremony, the school principal ordered the music teacher to play the national anthem, and she replied that she could not.[54] She was seated in front of the piano for five to ten seconds, and then the school principal instead played a tape of the national anthem that had been prepared beforehand.[55] After the ceremony, the Tokyo Metropolitan Board of Education disciplined her by issuing a formal warning, which is the lightest of the possible disciplinary actions.[56] The potential disciplinary actions are ranked as follows: disciplinary dismissal, demotion, suspension, cut off, and formal warning.[57]

In this case, the Supreme Court affirmed the Tokyo High Court's support of the Lower Court's decision regarding the formal warning.[58] There are three reasons that the majority held the formal warning to be constitutional. First, the teacher believed that "Kimigayo" was strongly related to the Japanese invasion in Asia.[59] Her thoughts and conscience conflicted with the action of playing the national anthem on the piano during the ceremony.[60] Second, the action itself of playing the piano was not determined to be a form of expressing one's precise thoughts.[61] Third, she is a public servant who is required to observe her legal and professional duties, and the order she received was appropriate.[62]

The majority opinion held that a formal order neither obligated the teacher to express a specific thought, nor prohibited her from expressing specific thoughts.[63] She was not forced to confess her opinions or to teach specific thoughts and ideas to school children. The majority opinion admitted that standing in front of a national flag and playing the anthem on a piano is an indirect infringement of thought and conscience.[64] Further, the Supreme Court asked whether the order to make a public

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53 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (Japan).

54 *Id.*

55 *Id.*

56 *Id.*

57 Chihō komuin hō [Local Government Officials Act], Law No. 69 of 2014, art. 32, 33 (Japan).

58 Tōkyō Kotō Saibansho [Tokyo High Ct.] July 7, 2004, Heisei 16 (gyo ko) no. 13, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], http://www.courts.go.jp (Japan).

59 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (Japan).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

servant take a certain action was necessary and reasonable, thus making it permissible.[65]

Justice Tokiyasu Fujita wrote a dissenting opinion.[66] He argued that to play "Kimigayo" on the piano was painful, and the issue in this case was whether the principal's order forced the teacher to play.[67] If so, it was important to review not only the world and historical perspective of "Kimigayo" played negatively, but whether a public institute may obligate participants to take certain actions during a formal ceremony, and thus infringing upon one person's belief that one should not observe it.

Justice Fujita argued that even though he agrees with the majority's premise, the majority opinion should review again whether forcing certain actions upon someone against their beliefs and faith is permissible.[68] He argued that forcing a person to take a certain action during a public ceremony that is against his or her beliefs would be a direct suppression of his or her faith.[69] He admitted that a public servant must "complete work duties for the people" under Article 15 of the Constitution[70] and that his or her constitutional rights are inherently restricted.[71] Nonetheless, grounds that are so general may not simply restrict constitutional rights of public servants.

This case is related to McCarthyism during the 1950s in the U.S.[72] and the symbolic expression explained in *Tinker v. Des Moines Independent Community School District*[73] and in *United States v. O'Brien*[74] where the Supreme Court explained the following:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

65 *Id.*

66 *Id.* (Fujita, J.,dissenting).

67 *Id.* (Fujita, J.,dissenting).

68 *Id.* (Fujita, J.,dissenting).

69 *Id.* (Fujita, J.,dissenting).

70 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 15 (Japan).

71 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (Japan).

72 MOTO HIDENORI ET AL., KENPŌ KŌGI [A COURSE ON CONSTITUTION] 336 (2015).

73 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

74 United States v. O'Brien, 391 U.S. 367 (1968).

> restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[75]

The *Tinker* and *O'Brien* decisions became well-known in Japan for their legal principles, along with the *Sarufutsu* case from 1974.[76] In this decision, the court employed a balancing test between the interests gained and what was lost by these regulations.[77]

B. Notice of the Tokyo Metropolitan Ward and the Osaka Anthem and Flag Ordinance

In reviewing this 2007 decision, of particular relevance is the notice that the Tokyo Metropolitan Board of Education issued on October 23, 2003, called the "1023" (October 23) notice among Japanese public school teachers.[78] This notice alerted school teachers that teachers and school officials may be subject to discipline if they do not follow orders from the school principal, regarding standing for the national flag and national anthem.[79] It orders that the national flag shall be raised, and the piano played during the anthem and that the audience shall stand before the flag and sing.[80] Under the notice, those who do not follow orders from the school principal are subject to discipline.[81] Several teachers have brought actions to seek revocation of this administrative adjudication.[82]

The Osaka prefecture[83] passed an ordinance (the "Osaka Ordinance") with the purpose of encouraging children to respect tradition

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75 *Id.* at 377.

76 Saiko Saibansho [Sup. Ct.] Nov. 6, 1974, Shō 44 (a) no. 1501, 28, 9 SAIKŌ SAIBANSHO KEIJINJI HANREISHŪ [KEISHŪ] 393 (Japan) (the "Sarufutsu" case); *see also* Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan*, 19 OR. REV. INT'L. L. 223, 237–38 (2018).

77 Saiko Saibansho [Sup. Ct.] Nov. 6, 1974, Shō 44 (a) no. 1501, 28, 9 SAIKŌ SAIBANSHO KEIJINJI HANREISHŪ [KEISHŪ] 393 (Japan).

78 *Tokyo Bd. of Educ. Notice*, *supra* note 13.

79 Shigekazu Iwai, *'Kokki kokka jisshi shishin' ni motodzuku kyōshokuin shobun'nado ni kansuru iken* [Opinion on Discipline to School Teachers for National Flag and Anthem Policy], TOKYO BAR ASS'N, (Sept. 7, 2004), https://www.toben.or.jp/message/ikensyo/post-2.html (criticizing the Tokyo Board of Education order).

80 *Id.*

81 *Id.*

82 Tokyo Kotō Saibansho [Tokyo High Ct.] April 18, 2018, Heisei 29 (gyo ko) no. 314, 2835 HANREI JIHŌ [HANJI] 3 (Japan).

83 A prefecture is a "a political region or local government area." *Prefecture*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS, https://dictionary.cambridge.org/us/dictionary/english/prefecture (last visited Feb. 6, 2019). There are forty-seven prefectures in Japan. *See* PATRICK CATEL, JAPAN 22 (2012).

and culture, and to promote patriotism.[84] The Osaka Ordinance orders public facilities to raise the national flag in public spaces, and for teachers stand up to sing the anthem in public school ceremonies in Osaka.[85] It provides for no administrative sanctions.[86] In March 2012 in Osaka, a public-school principal ordered sixty teachers and officials to stand up to sing the anthem.[87] The principals watched the teachers carefully to ensure that their mouths were open to sing during the anthem.[88] After the song, he spoke to those whose mouths were not open, and even reported one of them to the Osaka Educational Board.[89] In several other schools, seventeen teachers received formal warnings for violating the Osaka Ordinance.

In 2016, the Osaka District Court held that the Osaka Ordinance was constitutional.[90] In this case, a teacher sought revocation of a pay cut that she received for not obeying a school principal's order to stand in front of the national flag and sing the anthem during a graduation ceremony.[91] The teacher did not obey the order, and instead brought a chair to the ceremony and sat during the anthem.[92] The Osaka District Court found that the pay cut was not an arbitrary and capricious use of discretionary power by the school principal.[93]

Teachers who retire are typically eligible for rehire at a lower wage until they reach around sixty years of age.[94] Retired teachers may lose this opportunity to get rehired if they refuse to follow a principal's

84 Osaka fu no shisetsu ni okeru kokki no keiyou oyobi kyoshokuin niyoru kokka no seisho ni kansuru jourei [Osaka Prefecture Ordinance for Public Facilities to Raise National Flag and Song Anthem], Osaka Ordinance No. 83 of 2011 (Japan).

85 *See id.*

86 *See id.*

87 Saul Takahashi, *Jinken to shite no kogi no kenri* [Human Right to Protest], HUFFPOST JAPAN (Sept. 17, 2016, 1:11 AM), https://www.huffingtonpost.jp/saul-takahashi/human-rights-national-anthem_b_11990374.html.

88 *See* J-cast news, Kimigayo seisho kyoshokuin no kuchi no ugoki chekku, osaka no koko yarisugi ka tozen ka [to check if school teacher really sings national anthem in Osaka high schools-too much or natural] (13, March, 2012) https://www.j-cast.com/2012/03/13125329.html?p=all; Osaka Chihō Saibansho [Osaka Dist. Ct.] April 16, 2007, Heisei 17 (gyō-u) no. 17, 1269 HANREI TAIMUZU [HANTA] 132 (Japan).

89 *Id.*

90 Osaka Chihō Saibansho [Osaka Dist. Ct.] July 6, 2016, Heisei 26 (gyō-u) no. 7, available at Westlaw Japan 2016WLJPCA07068001 (Japan).

91 *See id.*

92 *See id.*

93 *See id.*

94 Saikō Saibansho [Sup. Ct.] July 19, 2018, Heisei 28 (ju) no. 563, 440 HANREI TAIMUZU [HANTA] 51 (Japan). The Asahi Shimbun, Editorial, Kimigayo Hanketsu Kyosei no tsuinin de yoino ka [Editorial; The Supreme Court endorsed compulsion] (20, July, 2018) https://www.asahi.com/articles/DA3S13595828.html.

orders.[95] In one case, the school board admitted a rehire, but cancelled or did not renew the contract after one year.[96] The teacher challenged this decision, and sought revocation of this administrative disposition.[97] In fact, the teacher recently sought a mandamus action to the effect that the school board should make an original administrative disposition under Articles 3(6) and 37-2.[98] The Court typically rejects the teachers' claims.[99]

In July of 2018, the Supreme Court held that the Tokyo Metropolitan Board of Education has broad discretion in rehiring retired schoolteachers.[100] In this case, twenty-two schoolteachers sought damages and revocation of the administrative disposition to cancel or refuse reemployment of retired schoolteachers, due to the teachers not following a principal's orders.[101] This case was actively discussed in the newspapers.[102]

C. Justices of the Japanese Supreme Court

Before focusing on these Japanese Supreme Court decisions, it is necessary to understand the organization and function of the Japanese judiciary. The Supreme Court has fifteen justices: one president and fourteen associate justices.[103] In general, three petty courts hear appeals from lower courts.[104] There are no certioraris in the Japanese Supreme Court.[105] The Grand Bench consisting of all fifteen justices is rarely convened in Japan – only three or four times a year.[106] The Grand Bench

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95 Saikō Saibansho [Sup. Ct.] May 30, 2011, Heisei 22 (gyo tsu) no. 54, 65 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ]1780 (Japan).

96 Osaka Chihō Saibansho [Osaka Dist. Ct.] May 10, 2017, Heisei 26 (gyo u) no. 173, 1447 HANREI TAIMUZU [HANTA] 174 (Japan).

97 *Id.*

98 Tōkyō Kōtō Saibansho [Tokyo High Ct.] Jan. 28, 2011, Heisei 18 (gyo ko) no. 245, HANREI TAIMUZU [HANTA] 94 (Japan).

99 *Id.*

100 *Supra* note 95.

101 *Id.*

102 Okamoto Gen, *Kimigayo Fukiritsu de Saikoyo Kyohi* [Rejection of Reemployment], ASAHI SHIMBUN (July 19, 2018), https://www.asahi.com/articles/ASL7M51F4L7MUTIL049.html; *Kimigayo hanketsu* [Kimigayo Decision], YOMIURI SHIMBUN (July 30, 2018), https://www.yomiuri.co.jp/editorial/20180730-OYT1T50000.html.

103 Saibansho hō [Court Act], Law No. 59 of 1947, art. 5 (Japan).

104 *Id.* art. 9, 10.

105 Yuichiro Tsuji, *Article 9 and the History of Japan's Judiciary: Examining Its Likeness to American and German Courts*, 68 TSUKUBA J. L. & POL. 35, 51 (2016).

106 *Id.*

hears cases only for constitutional judgment or to change precedent.[107] Japanese constitutional scholars criticize the petty court's decisions, arguing that they are usually too simple by referring to precedent without identifying the differences between the precedent and the case before them.[108] Unlike the U.S. justices, some argue that Japanese justices are not positive about writing individual opinions.[109] Others argue that the justices should focus on concrete cases in front of them and refrain from writing beyond.[110]

The Japanese Supreme Court does not have certioraris and may dismiss appeals with reference to a precedent.[111] Japanese justices use the term that "it is clear from the meaning of precedent" and often do not explain in detail how a particular case is distinguished from precedent.[112]

In comparison with other general issues, a great number of cases are heard in the petty court of the Supreme Court regarding the national anthem and flag. It seems that the justices may think that the piano decision did not adequately solve other similar cases, and may be concerned about the severity of the disciplinary sanctions taken against teachers.[113] If a disciplinary sanction looks unreasonably severe, the petty court may hold it to be illegal by using the "arbitrary and capricious" standard exercised in concrete cases.[114] The Court may sustain the constitutionality of a principal's order, but will still have room to judge the legality of a specific fact.[115]

In deciding several cases, the Supreme Court has generally held that disciplinary sanctions are illegal only in very serious cases. However, of course, individual justices differ from one another in their opinions on the matter.

In deciding whether a disciplinary action is illegal, the Court will ask whether it was arbitrary and capricious, and will explore whether the

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107 Saibansho hō [Court Act], art. 10.

108 Yuichiro Tsuji, *Forced Sterilization and Abortion in Japan: Family and Constitution*, 2 BRATISLAVA L. REV. 61 (2018)

109 David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1461 (2011).

110 KATSUMI CHIBA, IKEN-SHINSA: SONO SHÔTEN NO SADAME-KATA [CONSTITUTIONAL REVIEW: HOW TO FOCUS ON ISSUES] 123-38 (2017). For this case, Justice Chiba argues that many litigations would be accumulated to gain persuasiveness, but repeated suits are fruitless. *See id.*

111 Yuichiro Tsuji, *Forgotten People: A Judicial Apology for 249 Leprosy Patients in Japan*, 19 OR. REV. INT'L. L. 223, 249 (2018).

112 Tsuji, *supra* note 36.

113 Saikō Saibansho [Sup. Ct.] Jan. 16, 2012, Heisei 23 (gyo tsu) no. 263, (gyo hi) no. 294, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], http://www.courts.go.jp (Japan).

114 *Id.*

115 *Id.*

violation itself was serious.[116] For example, a temporary suspension for refusing not to stand for the flag three times might be considered too severe.[117] However, if disciplinary actions accumulate throughout the school year, such as one from an annual entrance ceremony in April and another from a graduation ceremony in March, the degree of the disciplinary sanctions would become more serious, and the justices would focus on the increase in sanctions over a short period of time.[118]

Under a concrete case of constitutional litigation, the justices will request proof in individual cases.[119] Justices have expressed their beliefs that it is a music teacher's duty to play the national anthem on the piano[120], but they have yet to render a decision regarding the severity of disciplinary sanctions for not doing so.

Justices may avoid a constitutional analysis, and instead determine whether a punishment is arbitrary and capricious.[121] Justices have ruled that a school principal exercised arbitrary and capricious discipline only once for failure to follow orders[122] and three times during the past two years for refusing to stand for the flag.[123] At the same time, the justices have held that a disciplinary sanction was legal when a teacher intruded upon a ceremony and distributed a document criticizing a school principal.[124]

Justices show their perspectives through their individual opinions. Public school teachers want the Supreme Court to vacate the original decision that supported the discipline given by the school teacher in 2007.

In the case of the U.S. Supreme Court, the individual opinions of the justices do not change the outcome of a decision, unless they constitute

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116 Yuichiro Tsuji, *Freedom of Thought and Conscience: Recent Supreme Court Decisions*, 24 KENPŌ MONDAI 7 (2015).

117 Tokyo Kotō Saibansho [Tokyo High Ct.] May 28, 2015, Heisei 26 (gyo ko) no. 177, 2278 HANREI JIHŌ [HANJI] 21(Japan); Saikō Saibansho [Sup. Ct.] May 31, 2016, Heisei 27 (gyo tsu) no. 359, Heisei 27 (gyo tsu) no. 360, Heisei 27 (gyo hi) no. 360, available at Westlaw Japan 2016WLJPCA05316009 (Japan).

118 Tsuji, *supra* note 116.

119 Yuichiro Tsuji, *Nuclear Power Plant Reactivation in Japan: An Analysis of Administrative Discretion*, 7 LSU J. ENERGY L. & RESOURCES (forthcoming 2019).

120 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (Japan).

121 Tokyo Kotō Saibansho [Tokyo High Ct.] May 28, 2015, Heisei 26 (gyo ko) no. 177, 2278 HANREI JIHŌ [HANJI] 21 (Japan).

122 *Id.*

123 *Id.*; *see also* Tsuji, *supra* note 116.

124 Tokyo Kotō Saibansho [Tokyo High Ct.] May 30, 2001, Heisei 12 (gyo ko) no. 270, 1778 HANREI JIHŌ [HANJI] 34 (Japan).

the majority opinion.[125] Some justices write concurring opinions to make notes for different cases, or they may think that the reasoning behind a majority opinion is insufficient and in need of supplementary explanation.[126] These opinions show that not all of the justices have made up their minds. Since the justices of the Japanese Supreme Court have such varying interpretations of Article 19, there is still a lack of consensus on how to interpret the law.

III. JUDICIAL REVIEW OF INDIRECT RESTRICTION UNDER ARTICLE 19 IN JAPAN

A. The Koji Machi Entrance Admission Case

The *Koji Machi* case is taught in Japanese constitutional law classes as an example of the concept of "conscience and thought" in Article 19.[127] In this case, a junior high school student was working with a university student protest movement in the 1960 where he studied Karl Marx and Vladimir Lenin.[128] He distributed leaflets at his junior high school and called himself member of the "All-Campus Joint Struggle League."[129] The Japanese high school admission test includes a paper examination as well as a school report on the students' grades and conduct as reported by their class teachers.[130] His school report grade was a C, because he allegedly lacked a sense of public duty and self-control.[131] The report noted that the student: distributed leaflets, interfered with a festival by crying out to destroy it, and participated in a Marx and Lenin association of university students.[132] Due to the student's poor report grade, he failed his high school admission.[133] He sought damages under the State Redress Act from the Chiyoda ward and the Tokyo Metropolitan Government.[134] The Japanese Supreme Court rejected the student's appeal and held that

125 *See* Saibansho hō [Court Act], Law No. 59 of 1947, art. 11 (Japan); *see also* MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 318, para. 1 (Japan); KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 405 (Japan).

126 Saibansho hō [Court Act], art. 11, 75(2) (article 75(2) provides secret of justice conference).

127 Saikō Saibansho [Sup. Ct.] July 15, 1988, Showa 57 (o) no. 915, 1287 HANREI JIHŌ [HANJI] 65 (Japan) (the "Koji Machi" case).

128 *See id.*

129 *See id.*

130 *See id.*

131 *See id.*

132 *See id.*

133 *See id.*

134 *See id.*

the school report on his daily life and actions did not state or imply his ideas and thoughts.[135]

Some constitutional law studies are critical of this decision, explaining that his admission was subject to concrete fact ultimately and that it was easy for the high school to infer his ideas and thoughts from the report.[136] After this case, the student ran for a position as member of the House of Representatives and later became the mayor of Setagaya City in Tokyo.[137]

Under Japanese constitutional law, one's ideas and thoughts are absolutely protected by the law, but actions that are actually carried out are restricted in favor of public welfare.[138] Constitutional rights are not absolute and are protected only until they interfere with other constitutional interests.[139] Regarding Article 19, the issue of restriction is divided into the categories of either direct and indirect.[140] Direct restrictions pass through strict scrutiny, whereas indirect and incidental restrictions face more lenient review by the courts.[141] This line of analysis is similar to that employed by the U.S. Supreme Court in *United States v. O'Brien*.[142]

B. The Samurai Martial Arts Case

One of the most famous Japanese Supreme Court decisions regarding religious freedom is the Kendo case.[143] Kendo is one of the traditional martial arts in Japan. It is taught in Japanese public schools as a mandatory subject in physical education classes.[144] Students must pass

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135 *See id.*

136 SATŌ, *supra* note 35, at 220.

137 *Profile of Mayor Nobuto Hosaka*, NOBUTO HOSAKA, https://www.hosaka.gr.jp/profile/english (last updated Oct. 14, 2015).

138 ASHIBE, supra note 24, at 149; SATŌ, *supra* note 24, at 216-19; NONAKA, *supra* note 26, at 309.

139 Tsuji, *supra* note 32.

140 ASHIBE, supra note 24, at 152-53. SATŌ, *supra* note 24, at 222-24; NONAKA, supra note 26, at 315-16; *see also* Yoshiyuki Koizumi, *Siso ryoshin ni motoduku Gaibuteki koi no jiyu no hosho no arikata* [Freedom of Conscience and Its Restrictions], 634 HŌGAKU SEMINĀ [HOGAKU SEMINAR], 50, 51(2007).

141 ASHIBE, supra note 24, at 152-53; NONAKA, supra note 26, at 363. These professors introduce direct and indirect regulation of the U.S. in the chapter of freedom of expression.

142 United States v. O'Brien, 391 U.S. 367 (1968).

143 Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyō-tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

144 *Id.*; *see also Course of Study for Junior High School – Section 7: Health and Physical Education*, MONBUKAGAKUSHŌ [MINISTRY OF EDUC., CULTURE, SPORTS, SCI. & TECH.],

a physical education class to advance to the next year in Japanese public schools.[145] In the Kendo case, students who were Jehovah's Witnesses did not attend the physical education class because of their religious beliefs.[146] Some students gave up their religious beliefs and took the Kendo class.[147] The plaintiff did not enroll in the required physical education course, repeated the same year twice, and then was expelled under applicable school regulations.[148] He sought revocation of his expulsion under the Japanese Administrative Case Litigation Act (known as "JACLA" or *Gyousei Jiken Soshouhou* in Japanese)[149] and damages under the National Redress Act.[150] The plaintiff argued that expulsion in this case is unconstitutional according to Article 20 of the Constitution, and that the principal's discretion was exercised in an arbitrary and capricious manner because the school failed to provide an alternative to the physical education course, such as a report assignment in lieu of martial arts.[151] The school argued that it would be an unequal treatment to give some students a homework assignment while others had to enroll in the Kendo class.[152] The Japanese Supreme Court ruled that the school's disposition was illegal.[153]

This case demonstrates that the Japanese Supreme Court has partly followed the U.S Supreme Court's decisions. The use of a purpose and effect review in this case of religious freedom is similar to the reasoning used in *Lemon v. Kurtzman* by the U.S. Supreme Court.[154] The Japanese Supreme Court reviewed the purpose and effect to explain that a homework assignment would not have a religious purpose, would not suppress a certain religion, and would not encourage other religions.[155]

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http://www.mext.go.jp/component/a_menu/education/micro_detail/__icsFiles/afieldfile/2011/04/11/1298356_8.pdf (last visited Mar. 20, 2019).

145 *Id.*

146 Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyō-tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

147 *Id.*

148 *Id.*

149 *See id.*; *see also* Gyousei Jiken Soshō Hou [Administrative Case Litigation Act], Law No. 139 of 1962, art. 31.

150 Kokka Baishou Hou [State Redress Act], Law No. 125 of 1947, art. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan).

151 Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyō-tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

152 *Id.*

153 *Id.*

154 403 U.S. 602 (1971).

155 Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyō-tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

The Japanese Court focused on the sincerity and honesty of the plaintiff's adherence to his religious beliefs.[156]

C. Indirect Restriction is the Core of Article 19

Waseda University's Professor Nishihara explained that Japanese judges focus on reviewing how broad, indirect restrictions apply comparatively in other countries.[157] This distinction between direct and indirect restrictions was applied in the notorious *Sarufutsu* case in 1974, in which the Japanese Supreme Court held a public official guilty of political conduct that is prohibited under the rules and directives of the National Personnel Authority ("NPA") designated by the National Public Servant Act ("NPSA").[158] The NPSA prohibited political activity in general, but left unclear the exact kinds of activity that are banned.[159] The regulations and directives of the NPA provided a detailed list of prohibited activities.[160] In the *Sarufutsu* case, one postal officer pinned posters of a public candidate whom he supported on public signboards.[161] In the *Sarufutsu* decision, the Japanese Supreme Court used one particular distinction between direct and indirect restrictions to allow for discipline: they found that a postal officer's interest in expression and the indirect, incidental restriction thereof was caused by the prohibition.[162]

Professor Nishihara carefully reviewed the direct invasion and indirect restriction used in school disciplinary cases in 2011 in the Japanese Supreme Court, and argued that this dichotomy was also used in cases related to Article 19.[163] He criticized the interpretation used in several Japanese Supreme Court decisions about the national anthem and flag.[164] He argued that the "all things considered" approach falls under the category of indirect restriction.[165] The Japanese Supreme Court

156 *Id.*

157 Hiroshi Nishihara, *Siso Ryosin no Jiyu* [Freedom of thought and conscience], in Hoso jitsumu ni totte no kindai rikkenshugi [Constitutionalism today for legal practitioners] Hanrei Jiho [Hanji] no. 2344, pp. 25-46 (2017).

158 Saiko Saibansho [Sup. Ct.] Nov. 6, 1974, Shō 44 (a) no. 1501, 28, 9 SAIKŌ SAIBANSHO KEIJINJI HANREISHŪ [KEISHŪ] 393 (Japan)

159 Kokka kōmuin hō [National Public Service Act], Law No. 120 of 1947, art. 102, para. 1 (Japan).

160 Jinjiin kisoku [Rules of the National Personnel Authority] Nat'l Pers. Auth. Rule No. 14-7 of 1949 (Japan).

161 Saiko Saibansho [Sup. Ct.] Nov. 6, 1974, Shō 44 (a) no. 1501, 28, 9 SAIKŌ SAIBANSHO KEIJINJI HANREISHŪ [KEISHŪ] 393 (Japan)

162 *See id.*

163 Nishihara, *supra* note 157, at 28-33.

164 *Id.* at 31.

165 *Id.* at 30.

determined that limiting permissible conduct that expresses one's thoughts is a reasonable and necessary regulation.[166] For review of the reasonable and necessary justification, the Court indicated several factors, such as the purpose and content of the school principal's order and the extent of the restriction that it caused.[167]

Professor Nishihara pointed out that use of the proportionality test for judicial review is not uncommon for other constitutional rights.[168] He argued that the national anthem and flag cases fail to offer an explanation regarding how important the principal's purpose is and the degree of restriction in individual cases.[169] By using the expression "taking all into consideration," the Japanese Supreme Court dodged the task of identifying the factors for a necessary and reasonable review.[170] These factors are expressed by other scholars as well.[171]

One of Professor Nishihara's unique approaches to this subject was through his identification of incidental restrictions from European history.[172] In the sixteenth century, the religious freedom that is a core human right, was threatened by the oppression of religion through cruel punishments such as burning to death at the stake.[173] The burning of people at the stake was justified as saving their souls, and those who condemned them likely felt that it was acceptable because it was based on their religious beliefs.[174]

The critical issue to Professor Nishihara was that by seeing others receive cruel punishments, the observers might give up their religious beliefs.[175] His theory was that humans are autonomous and strong enough to take responsibility for choosing a religion that could lead to death.[176] He believed that intimidation by severe punishment could force people into a very uneasy state of mind that causes them to test whether their religious beliefs are correct.[177]

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166 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (Japan).

167 *Id.*

168 Nishihara, *supra* note 157, at 30.

169 *Id.*

170 *Id.*

171 SATŌ, *supra* note 35, at 223; NONAKA ET AL., *supra* note 26, at 314–16.

172 Nishihara, *supra* note 157, at 30.

173 *Id.*

174 *Id.* at 33.

175 *Id.*

176 *Id.*

177 *Id.* at 36.

Professor Nishihara argued that constitutional human rights are generally based on the concept of an autonomous and strong person, but also in part on the notion that human rights were cultivated for people who lost or confused in their lives.[178] Another article would be necessary to fully analyze the role of strong individuals under the Constitution.[179] However, it is clear that each individual justice in the Japanese Supreme Court wrote concurring as well as dissenting opinions throughout the series of national anthem and flag cases, which shows that justices may differ in their interpretations of Article 19.[180]

If Professor Nishihara's analysis is correct, the Japanese Supreme Court justices as a whole still maintain their interpretations of Article 19 in cases before them.

IV. COMPARISON OF JAPAN AND THE UNITED STATES

A. U.S. Constitutional Decisions from the Perspective of a Japanese Constitutional Law Scholar

Unlike the Japanese Constitution, there is no provision for ideas and thoughts in the U.S. Constitution. Article 19 regards ideas and thoughts, and Article 20 regards religious freedom; they are separately provided in the Japanese Constitution.[181] This does not, however, mean that the U.S. Constitution does not protect ideas and thoughts. Among the famous First Amendment cases decided by the U.S. Supreme Court was *Wisconsin v. Yoder*, which allowed Amish children not to participate in compulsory education beyond the eighth grade.[182] The U.S. Supreme Court invalidated a Wisconsin state law requiring that all children go to school until sixteen years of age, stating that it was "in sharp conflict with the

178 *Id.*

179 *See* KŌJI SATŌ, NIHONKOKU KENPŌ TO HŌ NO SHIHAI [JAPANESE CONSTITUTION AND RULE OF LAW] 159 (2002); Shigeki Nakajima, *Kenpō ni okeru ningen zō* [Constitutional Image on Human], 5 RITSUMEIKAN HŌGAKU 1916, 1918 (2010).

180 *See* Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] (Japan).; *see also* HIDEO TSUCHIYA, HINO MARU KIMIGAYO SAIBAN TO SISO RYOSIN NO JIY [JAPANESE FLAG CASES AND IDEAS AND CONSCIENCE] 193-195 (2007) (questioning that judges can decide which value is superior and religious or core of Article 19); Hiromichi Sasaki, *Jinken ron Siso Ryosin no jiyu, Kokka seisho* [Constructing and Individual Rights Argument of the Freedom of Thought and Conscience, and Its Implications on the Ceremonial Use of the National Anthem] 66 SEIJO HOGAKU 1 (2001) (arguing that it is unconstitutional if government compel an action that people act voluntarily).

181 ASHIBE, *supra* note 24, at 150-151; SATŌ, *supra* note 24, at 218, 250; NONAKA, *supra* note 26, at 309.

182 Wisconsin v. Yoder, 406 U.S. 205 (1972).

fundamental mode of life mandated by the Amish religion."[183] This case shows that without a specific provision for ideas and thoughts, the U.S. Supreme Court still protected religious beliefs.

The current Japanese Constitution declares a renunciation of war in Article 9 and gave up its army.[184] There is no conscription duty, unlike the previous Imperial Japanese Constitution.[185] In *Gillette v. United States*, the U.S. Supreme Court reviewed conscientious objection law.[186] The U.S. Supreme Court ruled that Congress intended to exempt persons who oppose participating in all wars and that people who object solely to participation in a particular war were not within the purview of the statute.[187]

Japanese public officials are required to state that they will observe the Constitution and other statutes before they are hired.[188] In constitutional law classes in Japan, textbooks explain that public officials are under the Constitution and the law, and thus, they are not required to employ a specific interpretation of the Constitution.[189] In 2015, the Japanese Cabinet changed the public interpretation of Article 9 of the Constitution to endorse collective defense power.[190] One Self Defense Force ("SDF") officer sought a declaratory judgment that he has no obligation to follow defense orders under the recent National Security Acts.[191] In January 2018, the Tokyo High Court vacated the district court's decision to dismiss for lack of a concrete possibility that a national defense order would be issued in reality.[192] The SDF officer declared that he would follow the law in 1993 when he started to work for the SDF, but would not follow the orders of a collective defense power.[193]

The U.S. Supreme Court has upheld the denial of an unemployment compensation claim because the counselors ingested an illegal drug,

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183 *Id.* at 218.

184 Yuichiro Tsuji, *Godzilla and the Japanese Constitution: A Comparison Between Italy and Japan,* 3 ITALIAN L. J. 451, 454 (2017).

185 DAI NIPPON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 20 (Japan).

186 Gillette v. United States, 401 U.S. 437 (1971).

187 *See id.*

188 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 99 (Japan).

189 SATŌ, *supra* note 35, at 45; NONAKA ET AL., *supra* note 26, at 310–11.

190 *See* Yuichiro Tsuji, *Amendment of the Japanese Constitution—A Comparative Law Approach*, 37 NANZAN REV. AM. STUD. Volume 51 (2015).

191 Tokyo Chihō Saibansho [Tokyo Dist. Ct.] March 23, 2017, Heisei 28 (gyo u), no.143, available at Westlaw Japan 2017WLJPCA03236022 (Japan).

192 Tokyo Kōtō Saibansho [Tokyo Dist. Ct.], Jan. 31, 2018, Heisei 29 (gyō-ko) no. 157, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], http://www.courts.go.jp (Japan).

193 *Id.*

peyote, and were fired from private drug rehabilitation.[194] The state government denied their application for unemployment compensation because their ingestion of the drug was considered to be misconduct.[195] The counselors argued that their conduct was protected under the First Amendment, and the U.S. Supreme Court held that religious beliefs are not exempt from the law.[196] The Court reasoned that a religious belief entails some physical performance that is restricted by the state government.[197] Justice Scalia, in writing the majority opinion, stated that it would be unconstitutional for the state to prohibit religious activity for the purpose of oppressing religious beliefs, and in this case, he explained that the prohibition of possession of peyote was permissible because of a neutral law of general applicability.[198]

If we apply the *Smith* case to the Kendo case in Japan, it could lead to controversies. The differences between the Kendo and *Smith* decisions are the government sanctions: expulsion from the school versus denial of an unemployment compensation claim. The Japanese Court stressed the lack of an alternative measure to achieve educational goals in lieu of Kendo, and used a kind of *Lemon* test.[199] In the Kendo case, the public school argued that such an assignment would be contrary to government neutrality, but the Japanese Supreme Court rejected that argument.[200]

The U.S. Supreme Court's constitutional decisions have had significant influence on Japanese constitutional law. The number of cases where a law is struck down for being unconstitutional is much greater in the U.S. than in Japan. The Japanese Supreme Court has seldom ruled freedom of expression cases to be unconstitutional.[201]

The arguments of Japanese constitutional scholars such as Professor Nishihara support Barack Obama's explanation that every citizen has the constitutional right to protest about serious social issues but request some explanation for Donald Trump's attitude.[202]

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194 Emp't Div. v. Smith, 494 U.S. 872 (1990).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 For use of the *Lemon* test by Japanese constitutional law, see ASHIBE, *supra* note 24, at 160-68; SATŌ, supra 24, at 235; NONAKA, supra note 26, at 326, 331.

200 Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyō-tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

201 Yuichiro Tsuji, *Constitutional Court in Japan*, 66 TSUKUBA J. L. & POL. 65 (2016).

202 Andy Borowitz, *Trump Demands that N.F.L. Players Stand During Russian National Anthem*, NEW YORKER (July 22, 2018), https://www.newyorker.com/humor/borowitz-report/trump-demands-that-nfl-aplayers-stand-during-russian-national-anthem.

B. International Law in Japan

Article 18(1) of the International Covenant on Civil and Political Rights ("ICCPR"), which the Japanese government signed in 1978, states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[203]

While one could assume that Japanese judges think that Article 19 is unique, when compared with Article 18(1) of the ICCPR, Article 19 is not so unique that requires having its own distinct interpretation. By bringing this provision into their interpretation of Article 19 of the Constitution, justices may begin conducting careful reviews of indirect restrictions in cases related to the national anthem and flag. For example, Article 20(2) of the ICCPR prohibits any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.[204] In Japanese free speech studies, as in the U.S.,[205] regulations that prohibit hate speech are very complex because the Constitution clearly prohibits censorship[206] and because hate speech targeting a certain group does not constitute defamation or libel.[207] Thus, the Japanese parliament passed hate speech statutes with no criminal sanctions and otherwise left it to local governments to pass their own ordinances if they so choose.[208] If Japanese constitutional rights experience stagnancy in their interpretation, the Court could look to the ICCPR as a resource for

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203 ICCPR, *supra* note 9, art. 18.

204 *Id.* art. 20.

205 Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977).

206 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 19 (Japan).

207 *Foreign Correspondents Share Opinions on Japanese Hate Speech Marches*, MAINICHI (July 10, 2013), http://mainichi.jp/english/english/newsselect/news/20130710p2a00m0na009000c.html [https://web.archive.org/web/20130928024630/http://mainichi.jp/english/english/newsselect/news/20130710p2a00m0na009000c.html].

208 Honpō-gai shusshin-sha ni taisuru futōna sabetsu-teki gendō no kaishō ni muketa torikumi no suishin ni kansuru hō [Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan], Law No. 68 of 2016 (Japan).

their analysis. The Japanese Supreme Court declared that the Japanese government is obligated to implement it on a domestic level.[209]

In a hate speech case (the "Hate Speech Case") against a Korean school, the Japanese Supreme Court rejected an appeal from a group that advocated the exclusion of Korean people living in Japan.[210] The Kyoto District Court announced that the defendant engaged in speech that is prohibited under Article 4 of the Racial Discrimination Convention on the Elimination of All Forms,[211] and the Osaka High Court sustained and found no public purpose for the defendant's speech.[212] This decision is innovative in that the judges in an inferior court recognized an international treaty and applied its norms in their interpretation of domestic law.[213] By rejecting the appeal, the Japanese Supreme Court prohibited activity in public spaces within two hundred meters of the Korean school and rewarded civil damages.[214] One city uses a website to publicly list groups that have expressed violent, racist speech.[215] The local governments recognize that criminal sanctions or administrative penalties involve prohibited censorship.[216]

Some local governments encouraged the national parliament to pass the Hate Speech Regulation Act ("HSRA"). The HSRA does not provide for criminal sanctions, but instead encourages judges to interpret and announce the illegality of a certain activity. The Hate Speech Case shows that judges would change the conventional interpretation by applying international human right laws as an alternative resource.

V. CONCLUSION

It is significant that the Japanese Constitution provides for freedom of thought and conscience. The Constitution reflects the suppression of thought and conscience under the previous constitution from World War

209 Osaka Kotō Saibansho [Osaka High Ct.] July 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHŌ [HANJI] 34 (Japan).

210 Saikō Saibansho [Sup. Ct.] Dec. 9, 2014, Heisei 26 (o) no. 1539, available at Westlaw Japan 2014WLJPCA12096002 (Japan).

211 Kyōto Chihō Saibansho [Kyoto Dist. Ct.], Oct. 7, 2013, Heisei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan).

212 Ōsaka Kotō Saibansho [Osaka High Ct.], July 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHŌ [HANJI] 34 (Japan).

213 Osaka Kotō Saibansho [Osaka High Ct.] July 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHŌ [HANJI] 34 (Japan).

214 *See id.*

215 *Heito Kisei Handan no Kousei sei Tanpo* [Keeping Fairness to Regulate Hate], KANAGAWA SHIMBUN (April 2, 2018, 4:00 AM), http://www.kanaloco.jp/article/321526.

216 Masato Ichikawa, *Hyōgen'nojiyū to heitosupīchi* [Freedom of Expression and Hate Speech], 2 RITSUMEIKAN HŌGAKU 122 (2015).

II. It is still questionable, however, whether this provision works well under the current Constitution.

The national anthem case is one of the most famous decisions of the Japanese Supreme Court and supported the Tokyo Metropolitan Board of Education.[217] The Japanese Supreme Court recognized the infringement on freedom of thought and conscience but found the restriction to be indirect.[218] The Court used the purpose and reasonableness of the regulation to achieve its goal.[219] Justice Fujita's dissenting opinion focused on the question of whether forcing a certain action against someone's belief and faith is permissible, and he argued that there should be a focus on fact finding.[220] In 2018, the Supreme Court's decision admitted broad discretion of the educational board to reemploy retired school teachers who objected to standing up in front of the national flag and singing the national anthem.[221]

While the Japanese Supreme Court has followed some of the reasoning by U.S. courts on constitutional questions, the number of unconstitutional decisions is much smaller than that of the U.S. Supreme Court. The justices in the national anthem and flag cases wrote concurring or dissenting opinions which reflect their individual perspectives.[222] These demonstrate show conflict among the justices. The duty of a justice is to justify their decision to the people. However, since the scope of judgments is so narrow, constitutional litigation is consistently being brought to the judiciary.

Classic cases of thought and conscience indicate that the effects of these rights have some limitations. Justices likely wonder how Article 19 should be interpreted in concrete cases, and without much precedent they have little guidance. One approach is for a justice to find that a school principal's order is constitutional, and then review the administrative decision and evaluate its severity. The other approach is for a justice to rely on an international treaty, if they find the use of an applicable statute or ordinance to be ineffective for their analysis. The *Samurai Martial Arts* decision shows that the Japanese judiciary carefully reviews whether the

217 Saikō Saibansho [Sup. Ct.] Feb. 27, 2007, Heisei 16 (gyo tsu) no. 328, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 291 (Japan).

218 *Id.*

219 *Id.*

220 *Id.* (Fujita, J.,dissenting).

221 Saikō Saibansho [Sup. Ct.] July 19, 2018, Heisei 28 (ju) no. 563, 440 HANREI TAIMUZU [HANTA] 51 (Japan).

222 *Id.*

disposition was arbitrary and capricious, and whether an alternative was available.[223]

Famous Japanese Supreme Court cases show that judiciary and constitutional studies have referred to the decisions of the U.S. Supreme Court, but the outcomes and reasoning are slightly different from the original decisions. For example, the *O'Brien* decision[224] influenced Japanese cases for public officials,[225] and Japanese scholars criticized its applicability to these cases.[226] The Japanese Supreme Court has not provided enough clarity regarding which factors are relevant. Scholars argue that indirect infringement requires judges to conduct careful judicial review, because observers change their religious beliefs when facing severe punishment.

The Hate Speech Case, the ICCPR, and local government ordinances such as the HSRA, all work together to encourage judges to refer to international human rights norms and policies. In the protection of ideas and thoughts, the Japanese judiciary should carefully review indirect restrictions, rather than depending on a general review that takes into account all factors. It may not be practical to expect Japanese justices to change their interpretations in some constitutional cases. Thus, instead, we may hope to introduce international norms to Japanese justices in cases of the indirect restriction of ideas and thoughts, because individual opinions show that justices are still unable to come to a consensus.

223 Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyo tsu) no. 74, 50 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan) ("Samurai Martial Arts" decision, in which the school expelled a student who was unable to participate in a mandatory martial arts class due to his religious beliefs).

224 United States v. O'Brien, 391 U.S. 367 (1968).

225 *See supra* notes 76-77 and accompanying text.

226 Saikō Saibansho [Sup. Ct.] Nov. 6, 1974, Showa 44 (a) no. 1501, 28 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 393 (Japan); ASHIBE, *supra* note 24, at 282.