



Tokyo High Court Rejects Teachers' Claims to Freedom of Thought

Feb. 12, 2011

On January 28, a panel of the Tokyo High Court rejected the demands of approximately 400 Tokyo public school teachers for a court declaration that they not be forced to stand before the *Hinomaru*, Japan's national flag, and sing *Kimi ga Yo*, Japan's national anthem, at school ceremonies. The High Court ruling overturned a historic Tokyo District Court decision of September 2006 that favored the teachers based on constitutional language which declares "Freedom of thought and conscience shall not be violated."

For advocates of freedom of speech and thought, the 2006 District Court decision was a lighted candle flickering in the darkness. Hundreds of teachers had already been disciplined for refusing to salute Japan's national symbols and there was no sign that the Tokyo metropolitan government, led by flamboyant nationalist icon Ishihara Shintaro, would relent. Then Prime Minister Koizumi Junichiro, who ordered the first deployment of Japanese troops into an active war zone (Iraq) since 1945, and who repeatedly worshiped at the Yasukuni Shrine to the war dead, was preparing to hand the baton to Japan's leading neonationalist politician of the time, Abe Shinzo. Abe's self-declared mission was to push the nationalist agenda yet further, in particular by revising the Constitution to expand the scope of military operations and restrict individual rights, and by reshaping the education law into a tool to promote patriotism.

Then just as Mr. Abe was about to take office, front pages across the nation reported a startling judgment by a Tokyo court. Finding that the "*Hinomaru* and *Kimi ga Yo* were used as spiritual supports for imperialism and militarism," a panel of the Tokyo District Court led by Judge Namba Koichi held that "the beliefs of individuals who oppose use of these symbols must be accorded constitutional protection." The Court thus recognized claims by the 400 plaintiffs and many others that the rituals cause them great anguish due to the symbols' close relation to pre-war beliefs in imperial divinity, to militarism, and to Japan's aggression throughout Asia. Promoting respect for the flag and anthem was a fine thing, the Court said, but governments may not force people to act against their beliefs in the process. (See author's report on the 2006 decision [here](#).)

This judgment -- that government has no authority to coerce people to stand and salute its symbols -- was a slap in the face to Japan's rightist politicians and their neonationalist agenda. Tokyo Governor Ishihara immediately denounced the ruling and declared that he would appeal.

Four years went by. The Liberal Democratic Party (LDP), the conservative party of Koizumi and Abe, lost control of the national government in 2009 and these days there is little talk of revising the Constitution and even less of deploying Self-Defense Forces to the Middle East or other distant fronts. As the winds of change swept through Japan's political world, the wheels of justice quietly ground on. On January 28 the Tokyo High Court delivered its long awaited verdict, a complete vindication for Governor Ishihara. The District Court decision, which gave heart not only to the 400 teachers, but to supporters of Japan's democratic Constitution throughout the country, was swept away. On the day following judgment, a blaring headline in the conservative *Sankei Shinbun* quoted Ishihara, a hero to Japan's neonationalists, to declare the High Court judgment to be "quite appropriate" (*goku datou na hanketsu*).

The Ishihara victory at Tokyo High Court was no surprise. In light of a February 2007 Supreme Court decision that rejected a freedom of conscience claim in a similar case, the result in this one seems pre-ordained. The Supreme Court decision concerned a music teacher in a Tokyo suburb who refused to play accompaniment for *Kimi ga Yo* at an entrance ceremony for new students. School administrators had an audio tape ready, so the ceremony went off without a hitch, but they issued an official reprimand anyway. The teacher's suit to overturn the reprimand was finally decided by a five-judge Supreme Court panel. The majority held that the school principal's order to play did not violate any constitutional rights of the music teacher.

Justice Fujita Tokiyasu dissented, writing that whether or not there was a violation of "freedom of thought and conscience" (*shisou oyobi ryoushin no jiyu*) raised a question of fact concerning the inner feelings of the music teacher. He would have remanded the case back to a lower court for hearings expressly directed at this issue.

It seems very unlikely that courts in other constitutional democracies would agree with Ishihara, the Supreme Court of Japan and now, the Tokyo High Court. In the United States, as long ago as 1943 the Supreme Court held that state governments may not force students to recite the "Pledge of Allegiance," a standard American ritual. During the height of the Cold War, the U.S. Supreme Court also invalidated requirements that public school teachers sign "loyalty oaths." In Japan's case, the constitution unambiguously declares a right of freedom of thought and conscience. This protection would seem to be directed precisely at preventing governments from insisting that citizens make declarations of belief, whether they come in the form of pledges, oaths, or national anthems. But few justices on Japan's Supreme Court may think so.

Addressing the claims of the music teacher described above, in 2007 the Supreme Court found no cause for complaint. According to the Court, the teachers' feelings concerning the significance of the flag and anthem do not concern "freedom of thought and conscience" at all; they merely concern the teachers' "everyday beliefs in their sense of history and the world" (*rekishikan ya sekaikan, seikatsujono shinen*), and the order to perform did not violate or force them to change these beliefs. In other words, public school teachers are free to believe whatever they wish so long as they keep it to themselves and follow orders to take public actions which may directly contradict those beliefs.

It's tempting to dismiss the appellate court decisions in these cases as peculiar, driven by powerful emotions tied to Japan's unique history and pride in its heritage. Unfortunately, the problem is more serious.

Over the long span of the post-war era, Japan's Supreme Court has carved out a position for itself outside the mainstream of constitutional democracies in the realm of individual rights. Japan possesses one of the most progressive constitutions in the world, with broad declarations of individual rights and limitations on government power. Despite the beautiful words, however, when individual rights clash with government authority, the Supreme Court rules for the government.

Today courts in most constitutional democracies show special concern for primary constitutional rights like freedom of conscience and freedom of speech. Many apply a doctrine commonly known as "proportionality analysis" which requires courts to evaluate concrete harms to individual rights caused by government action and require governments to adopt measures calculated to produce the slightest degree of harm.

As illustrated by the teachers' cases, the prosecution of peace activists like the "[Tachikawa 3](#)" and others, Japan's Supreme Court refuses to apply such a clearly articulated doctrine. The Court prefers an ad hoc approach, leaving it free to select any government interest to justify its override of individual rights. Thus, for example, in more than sixty years of constitutional litigation, Japan's Supreme Court has not found a single case where the actions of the police have violated the free speech rights of anyone.

Meanwhile, Tokyo school ceremonies are conducted with the tight discipline preferred by Governor Ishihara and his allies. Teacher resistance has been gradually worn down by penalties that escalate from reprimands to fines to removals from the classroom. More than 200 teachers were disciplined for refusing to participate in flag and anthem rituals in spring 2004. This number dwindled to only seven in the spring of 2010. (See the [teachers' website](#) for specific punishments and other details.) The heavier penalties, the stress that accompanies any challenge to authority, and, finally, the cold response of Japan's Supreme Court, have taken a toll.

Note: The Japan Federation of Bar Associations statement concerning the January 2011 Tokyo High Court decision is [here](#).

Asia-Pacific Journal articles of related interest:

- John Spiri, [Sitting Out but Standing Tall: Tokyo Teachers Fight an Uphill Battle Against Nationalism and Coercion](#)
- Lawrence Repeta, [Politicians, Teachers and the Japanese Constitution: Flag, Freedom and the State](#)
- Nobumasa Tanaka, [Conscience and a Music Teacher's Refusal to Play the National Anthem](#)
- Nobumasa Tanaka, [High School Students Struggle Against National Anthem Enforcement](#)
- *Asahi Shimbun*, [The Flag and the Anthem: Enforcing Japanese Patriotism](#)
- *Asahi Shimbun*, [Compulsory Patriotism: Japan's National Flag and Anthem](#)

Written by Larry Repeta, professor in Tokyo's Meiji University faculty of law and a board member of Information Clearinghouse Japan, an NGO devoted to promoting open government in Japan (www.clearing-house.org).