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Politicians, Teachers and the Japanese Constitution: Flag, Freedom and the State

By Lawrence Repeta

On September 21, 2006, a Tokyo District Court panel issued a sharp rebuke to nationalist politicians who seek to use the nation's public schools as tools to promote their romantic vision of Japan. The suit was filed on behalf of 401 Tokyo public school teachers in order to challenge an October 2003 order requiring them to stand before the Hinomaru flag and sing "Kimi ga Yo" at entrance and graduation ceremonies. The court not only found this order to be an unlawful violation of Japan's Fundamental Law of Education and the constitutional guarantee of "freedom of thought and conscience," it also ordered the Tokyo Metropolitan government to pay each plaintiff 30,000 yen in compensation for emotional suffering.

Teachers and their supporters celebrate their victory in front of the Tokyo courthouse on September 21, 2006.

The dispute squarely places champions of Japan's democratic Constitution on one side and those who see it as an obstacle to Japan's greatness on the other. The timing of the court's decision itself highlighted the conflict. Tokyo Judge Namba Koichi electrified a courtroom packed with more than one hundred teachers and sympathizers by reading aloud long excerpts from his decision the day after Abe Shinzo was elected president of the Liberal Democratic Party. Abe has repeatedly declared that revising the Constitution is among his highest priorities as prime minister. Lest the political significance of the court decision be missed, Japan's Minister of Justice made a "personal statement" attacking it the following day.

The order itself was issued on October 23, 2003, by Yokoyama Yokichi, Tokyo's education chief, to the principals of Tokyo public schools (thus, it is known to its opponents as the "October 23 Order"). It provides a set of instructions to be followed at school entrance and graduation ceremonies, including requirements that the Hinomaru flag be displayed above the center of a stage at the front of the auditorium and that all teachers and school employees rise from their seats in response to announcement of the singing of the national anthem, face the flag and sing.

Students and faculty face the Hinomaru and sing "Kimi ga Yo" at a high school graduation ceremony in Tokyo, as required by the city government.

The Order represents an escalation in the political campaign to require obeisance to Japan's nationalist symbols. Legislation adopted by the national parliament in 1999 formally made the Hinomaru the national flag and "Kimi ga Yo" the national anthem. "Kimi ga Yo," commonly translated as "Your Majesty's Life," was adopted as Japan's anthem during the Meiji Period and served as such until the end of World War II. Passage of the 1999 law was highly controversial due to the anthem's close association with the belief in the divinity of the emperor, which prevailed until the early postwar period. In an effort to defuse the controversy surrounding the 1999 law, then-Prime Minister Obuchi and other government spokesmen declared that they had no intention to make anthem and flag ceremonies mandatory. That was then.

The October 23 Order did more than set the new rules; it also required principals to inform teachers and staff that if they do not follow them, they would be held responsible. When hundreds of teachers throughout Tokyo refused to comply, the Tokyo education department imposed penalties ranging from reprimand letters and pay cuts all the way to "re-education" sessions and removal from classrooms. This has led to a number of court cases.

The September decision is especially important for several reasons. The first is that it concerns the largest and most populous educational district in the country. Media coverage and public interest are at their peak. Moreover, the court's decision serves as a reprimand to Ishihara Shintaro, the flamboyant nationalist and popular writer who has served as Tokyo's governor since 1999. It was Ishihara who appointed the Board of Education members who approved the October 23 Order and it was Ishihara who held a press conference on the day after the court's decision to announce that Tokyo would appeal. Above all, the importance of the decision lies in its clear and confident analysis of the key constitutional question at the heart of the case. In the words of Tsukuba University professor Tsuchiya Hideo, "More than anything, as the very first victory based on constitutional theory in a 'Hinomaru – Kimi ga Yo' case, the significance of this case is very great."

Oyama Hiroshi, lead counsel for the plaintiffs, addresses a crowded press conference on the day of the historic court decision holding that government may not compel individuals to stand and sing the national anthem.

Article 19 of the Constitution declares, "Freedom of thought and conscience shall not be violated." At the core of the court's decision lies this critical finding: "It is hard to deny the historical fact that from the Meiji Period through the end of World War II the Hinomaru and Kimi ga Yo were used as spiritual supports for imperialism and militarism. Even now, after the Hinomaru and Kimi ga Yo have been designated as the national flag and national anthem, we must recognize that they have not attained a status of political and religious value neutrality among the people." The court concluded that the beliefs of individuals who oppose use of these symbols must be accorded constitutional protection and that orders to stand and sing the anthem before the flag and to play musical accompaniment constitute a "restriction on freedom of thought and conscience." The court then explained that such a restriction could be upheld only if necessary to achieve a lawful government purpose and if the government action is tailored to cause the "minimum restriction on individual rights necessary" (*hitsuyo katsu saisho no gendo no*

seiyaku).

What was the purpose of the October 23 Order? According to government lawyers, flag and anthem rituals at school ceremonies are "important in order to give students a correct understanding of the national flag and national anthem and to cultivate an attitude of respect toward them, thereby developing students' self-awareness as Japanese, cultivating hearts with love of country and enabling them to grow up to be Japanese persons who are respected and trusted in international society…" (Governor Ishihara expressed the Order's purpose more simply at a press conference, declaring that high schools he has visited are "in total chaos," and "teaching students to pay respect to the flag and anthem is one way to restore discipline and order.")

In his landmark decision, Judge Namba agreed that schools *should* cultivate respect for the national flag and anthem, but held that requiring individuals to follow the dictates of the October 23 Order despite their personal beliefs is beyond the scope of government action allowed by the Constitution.

In addition, the court found that enforcement of the Order constituted "improper control" of education, prohibited by Article 10 of the 1947 Fundamental Law of Education ("Education Law"). Alongside revision of the Constitution itself, amending this law has long been a major objective of the LDP leadership. As the latest step in its nationalist campaign, the LDP achieved this goal with passage of a full-scale revision in December. In reaction to the pre-war emphasis on sacrifice for the nation, the 1947 law stressed respect for the individual as a prime objective of public education. The new law shifts this emphasis away from the individual and toward patriotic love of country. Critics say this change is intended to encourage indoctrination of school children in a nationalist political agenda. Specific language calls on schools to "cultivate an attitude of respect for culture and tradition and love for the home country." Critics say this change is intended to encourage indoctrination of school children in a nationalist political agenda.

Another key change applies directly to the provision cited by Judge Namba in September. Although the new education law retains the ban on "improper control" of education, it has appended language declaring that education shall be conducted in accordance with this law and other laws passed by the Diet. Many interpret this to mean that the scope of "improper control" will be narrowed and administrative authorities such as Governor Ishihara and his appointees will be empowered to intervene more directly in the content and conduct of education.

How will all this affect teachers who are opposed to the flag and anthem rituals? Under Japan's administrative law, the September decision is not binding until all appeals are exhausted. The Tokyo government has firmly expressed its resolve to ignore it. So the decision itself provides no immediate relief. At the same time, the newly revised Educational Law is likely to

embolden administrators to be more aggressive.

Meanwhile, debate over revising the Constitution continues. Most reporting focuses on proposals to revise Article 9, in which Japan renounces war and declares that it will not maintain military forces. But another consistent theme concerns the protection of individual rights. Chapter III of the 1947 Constitution guarantees a long list of individual rights, including freedom of religion, freedom of speech and others associated with the Universal Declaration of Human Rights and democratic principles all over the world. Just as the leaders of the LDP have been unhappy with the 1947 Education Law's stress on individuality, so they frequently decry the constitutional emphasis on individual rights, complaining that too much freedom has undercut the structure of Japanese society. They seek to remedy this problem with new constitutional language emphasizing that individual "rights" are balanced by corresponding "duties" to the country. No one knows how such language would be applied in specific cases, but the clear intent is to tilt the balance in favor of governmental power over individual rights.

Oyama Hiroshi, the venerable constitutional lawyer who leads the plaintiffs' team in the ongoing litigation, published an article this month in a leading law journal to rally his forces. He stresses the importance of going to court to defend individual rights and cites the famous 1943 U.S. Supreme Court decision which held that the constitutional guarantee of free speech prohibits government from compelling students to recite the "Pledge of Allegiance."

Regarding the revision to the Education Law and the recalcitrant attitude of the Tokyo administration, Oyama reminds his readers that the Constitution is the nation's supreme law and the command of Article 19 and the September decision are clear. He also explains that the September decision fits well with a key 1976 Japan Supreme Court precedent that warns of "the danger that political influence will penetrate deeply" into education and declares that the Constitution recognizes the autonomy of education so that it is not ruled by "factional and political beliefs and interests." For the time being, Oyama and his allies take comfort in the thought that although Abe and the LDP have parliamentary majorities needed to pass legislation, they do not appear to have the political strength to change the Constitution itself.

Schoolteachers march to the Tokyo District Court on February 9, 2007.

We can expect movement on many fronts in this battle over individual conscience and constitutional rights. On February 10, 173 Tokyo teachers who have suffered under Ishihara's punishments filed a new suit demanding total compensation of more than 90 million yen and other relief. The great majority of these teachers are also plaintiffs in the ongoing constitutional litigation.

Another school ceremony season will arrive in March. Once again, monitors will be dispatched to schools all over Tokyo to ensure that they follow the October 23 Order. Once again, students and teachers who believe there is something wrong about honoring the flag that was held aloft by Imperial forces as they launched disastrous invasions throughout East Asia and who do not wish to sing words selected to honor a divine emperor will face a difficult choice.

Years will pass before the litigation is finally resolved and a new consensus achieved.

There is no guarantee that the September decision will be upheld by appellate courts. The only certainty is that the survival of rights to freedom of thought and conscience will continue to rely on the courage of the small number of individuals committed to defending them.

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