Judgment

The judgment of the High Court is reversed.

The appellee shall bear the costs of the appeal.

Reasons . . .

A. The Constitutional Principle of Separation of Religion and the State

Generally, the principle of separation of religion and the State has been understood to mean that problems of religion and belief have been considered matters of individual conscience that transcend the dimension of politics and are separated from the State, which, as the holder of secular authority, is not to interfere with religion. The relationship between religion and the State has differed in various countries in response to various historical and social conditions. Previously in Japan, Article 28 of the *Meiji* Constitution (1889) ostensibly guaranteed the freedom of religion, but actually restricted freedom of worship unless "(it was) not prejudicial to peace and order, and not antagonistic to the people's duties as subjects." Moreover, State *Shinto* was virtually established as the national religion, with belief therein made compulsory; other religious groups were subject to severe persecution.

[The Court then noted that the Allied Occupation issued directives (SCAPIN 93 of October 4 and SCAPIN 448 of December 15, 1945) which eliminated government involvement in *Shinto* and guaranteed equal legal treatment for all religions. Article 20 of the Constitution, promulgated on November 3, 1946, provides unconditionally for freedom of worship and established the principle of separation of religion and the State.]

Our country, unlike Christian or Moslem countries, has been living basically with religions developing one on top of the other and coming [over time] to co-exist. In these circumstances, an unconditional guarantee of religious freedom alone has not been enough to guarantee fully the freedom of worship. So as to eliminate all ties between the State and religion, it has also been necessary to enact rules providing for the separation of religion and the State. Thus, the Constitution can be interpreted as striving for a secular and religiously neutral State by taking as its ideal the total separation of religion and the State.

The separation of religion and the State, however, is only a systematic and indirect guarantee of religious freedom. It does not directly guarantee freedom of religion *per se*, it attempts to guarantee it indirectly by securing a system that separates religion and the State. On the other hand, the phenomenon of religion does not end with the phenomenon of individual belief; religion also has a multifaceted social side that brings it into contact with many aspects of social life including education, culture, social welfare, and folk customs. As a natural result of this contact, connections with the State become unavoidable as the State regulates social life or implements various policies to promote or subsidize education, social welfare, or culture. Thus, an actual system of government that attempts a total separation of religion and the State is virtually impossible.

Furthermore, to attempt total separation would inevitably lead to anomalous situations such as, for example, questioning the propriety of extending to religiously affiliated schools the financial assistance given to private schools in general, and of the assistance provided for the maintenance of architectural or artistic treasures owned by religious groups. Ironically, to deny such subsidies would impose a disadvantage on these entities simply because of their religious nature and would inevitably result in invidious discrimination because of religion. Similarly, in prisons, a policy forbidding all religious activity would result in a severe deprivation of inmates' religious freedom. Thus, from these examples, it follows that there are inevitable and natural limits to the separation of religion and the State. A State must, according to its own societal and cultural characteristics, accept some degree of actual relationship with religion, and what remains open to question is the extent to which such a relationship will be tolerated. From this perspective, the principle as enunciated in the Constitution demands the neutrality of the State, but does not prohibit all connection with religion. Rather, it should be interpreted as prohibiting conduct which leads to collusion between the State and a religion only when such activity exceeds reasonable bounds as determined with reference to the conduct's purpose and effects.

B. Religious Activity Prohibited by Article 20, Paragraph 3

Article 20, paragraph 3 of the Constitution provides that "The State and its organs shall refrain from religious education or any other religious activity." If this language is interpreted in the light of the above discussion on separation of religion and the State, it should not be taken to prohibit all contact with religion, but rather that which exceeds reasonable limits and which has as its purpose some religious meaning, or the effect of which is to promote, subsidize, or, conversely, to interfere with or oppose religion. The prime example is religious education which is explicidly prohibited in Article 20, paragraph 3, as are missionary work, proselytizing, propaganda, and so forth. Other religious activities like celebrations, rites, and functions which purport to propagate or suppress any religion are also proscribed, and should be viewed from the standpoint of their purpose and effect to determine if they too are prohibited. In determining whether or not a given religious act constitutes proscribed "religious activity," the external aspects of the conduct, whether the procedure is set by religion, and so on, should not be the only factors considered. The place of the conduct, the average person's reaction to it, the actor's purpose in holding the ceremony, the existence and extent of religious significance, and the effect on the average person, are all circumstances that should be considered to reach an objective judgment based on socially accepted ideas.

Furthermore, if one thinks of the relationships between paragraphs 2 and 3 of Article 20, both are provisions for religious freedom in its broad sense, but paragraph 2 means that no one can be compelled to participate in religious activity against his will. It therefore guarantees directly freedom of religion in the narrow sense as well; i.e., against deprivation of that freedom by the majority religion. Paragraph 3, on the other hand, directly prohibits a certain area of activity by the State and establishes a system of separation while only indirectly guaranteeing freedom of religion. As mentioned above, there are inevitable limits to this indirect guarantee of freedom of worship that should be interpreted in the light of a reasonable person's attitude. In this sense, the two paragraphs are of different purpose, motive, and scope and guarantee different freedoms; so that the interpretation of religious activity in each paragraph should proceed from different perspectives. Not all of the activities forbidden in Article 20, paragraph 2 are necessarily included in Article 20, paragraph 3. Even ceremonies and rituals that are religious in nature but would not be forbidden under paragraph 3 could be found violative of paragraph 2 if the State violated by coercion the freedom of worship of those who chose not to take part in activities they might consider alien to their religious beliefs. For that reason, the above interpretation of prohibited activities under Article 20, paragraph 3 does not immediately lead to fears for the freedom of belief of religious minorities.

C. The Nature of the Groundbreaking Ceremony in This Case

From this perspective, let us determine whether the groundbreaking ceremony in this case constitutes a religious activity as proscribed in Article 20, paragraph 3 of the Constitution.

It is clear from the trial court that the groundbreaking was a ceremony to pray for a stable foundation and accident-free construction. The form of the ceremony was religious. A professional *Shinto* priest in religious robes and following specific *Shinto* rituals prepared a particular place for the ceremony and used particular ceremonial equipment. Moreover, the priest who performed the service did so, one can assume, out of religious conviction and belief. This was undoubtedly a ceremony of religious nature.

However, although it is true that a *Shinto* groundbreaking ceremony has its origin in a religious ceremony intended to pacify the earth god (*tochi no kami*), and thereby to ensure a firm foundation for the building and safe construction, there can be no doubt that this religious significance has weakened gradually over time. Even though a present-day groundbreaking ceremony might feature some prayer-like behavior,

generally these affairs have become nothing more than ritual formalities in the construction industry almost completely devoid of religious significance. Most people would evaluate the ceremony, even when conducted in accord with established religious practice, as a secularized ritual without religious meaning. The groundbreaking in the case was conducted as a *Shinto* religious ceremony, but for most citizens and the mayor of Tsu City and others involved in sponsoring the groundbreaking, this was a secular event inasmuch as the function in question was no different from the standard ritual practiced over many years.

Furthermore, it is general practice today in the construction industry for the contractors to sponsor and attend a ceremony like the one in this case; those involved in the building, moreover, regard the ritual as indispensable for safety. Taking industry custom and public consciousness into account, the motive of the contractors in holding this ceremony is merely an extremely secular response to the demands for a customary groundbreaking ceremony from those involved in the building process. It is reasonable to assume that the motive of the mayor of Tsu City, the sponsor of the ceremony in question, was no different from that of those contractors who seek to ensure the safety of the building.

It is not unreasonable to say that the average Japanese has little interest in and consciousness of religion. Many people are believers in *Shinto* as members of the community and in Buddhism as individuals. Their religious consciousness is somewhat jumbled, and they feel no sense of contradiction even while using different religions on different occasions. Furthermore, one of the salient characteristics of *Shinto* is its close attention to ceremonial form and its converse lack of interest in external activities such as the proselytizing seen in other religions. With these factors in mind, it is unlikely that a *Shinto* groundbreaking, even when performed by a *Shinto* priest, would raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of *Shinto*. So the State in performing such a ceremony stands in the same position as a private citizen doing so. It is absolutely inconceivable that such a practice threatens to lead to the development of a special relationship between the State and *Shinto*, or the reestablishment of *Shinto* as a State religion, or to the loss of religious freedom.

Considering all the factors discussed above, we reach the following judgment. While it is incontrovertible that the groundbreaking in the present case is connected with religion, the purpose of conducting the ceremony was to ensure a stable foundation and safe construction. It was thus chiefly secular. It will not have the effect of promoting or encouraging *Shinto* or of oppressing or interfering with other religions. It therefore should not be considered as falling within the category of religious activities prohibited by Article 20, paragraph 3. . . .

Japan v. Nakaya*

(The Serviceman Enshrinement Case)

42 Saihan minshū 277

(Supreme Ct., June 1, 1988)

Translated by Frank O. Miller and Hiroshi Itoh

Editorial Note

In 1973 Yasuko Nakaya, widow of Takafumi, a deceased member of the Ground Self-Defense Force (SDF) who had died of injuries in a traffic accident while on active duty, sued to have rescinded his Shinto enshrinement (goshi) *at the request of the Yamaguchi Chapter, Self-Defense Forces Friendship Association* (Taiyukai; *hereinafter, the SDF Friends). The SDF Regional Liaison Office, a State agency, gave substantive cooperation and support. In 1972, the SDF Friends had petitioned the Yamaguchi* Shinto Gokoku *("guardian of the State") Shrine, a shrine for the war dead, for the "joint enshrinement" there of the spirit of her deceased spouse, along with the souls of twenty-six other deceased servicemen. Mrs. Nakaya, a Christian since 1958, opposed the enshrinement, arguing that the SDF Friends, as an auxiliary of the SDF, is bound by the constitutional norm of separation of religion and the State. She demanded retraction of the original petition for joint enshrinement, and asked for one million yen from the SDF Friends and the Government of Japan in compensation for violating her personal religious rights under the Constitution.*

The district court rejected Nakaya's demand for a rescinding of the petition for enshrinement, but awarded her damages to be paid by the SDF Friends and the State. The SDF Friends and the Government brought a kōsō *appeal against the adverse portion of the district court's judgment, as did Mrs. Nakaya in a supplementary appeal. On the constitutional question related to the enshrinement petition, the Hiroshima High Court affirmed the first instance judgment, [and held that] the SDF Friends does not qualify as a party in the case, and cannot therefore be held accountable for injury to Nakaya. The Government then brought a* jōkoku *appeal to the Supreme Court.*

Judgment

1. The original judgment and the first instance judgment are vacated. The case is dismissed.

2. All costs of the suit shall be borne by the appellee.

Reasons

Concerning the grounds for the *jōkoku* appeal of the appellant.

I. The facts established by the original judgment are as follows:

1. (a) The appellee was baptized at the Yamaguchi Shin'ai Church of the United Christians Church in Japan on April 4, 1958, and has believed in Christianity ever since.

(b) The appellee and Takafumi Nakaya (hereafter Takafumi), an officer of the Self-Defense Forces (SDF), were married in a ceremony involving no religious ritual on January 1, 1959, and spent their married life mainly in Morioka City. Takafumi was killed in a traffic accident on January 12, 1968 while on duty in Kamaishi City, Iwate Prefecture. . . .

(c) While living, Takafumi did not believe in any religion.

2. (a) In November, 1964, the Yamaguchi Prefecture Chapter of the SDF Friendship Association, a corporate juridical entity (hereafter, the SDF Friends), sponsored a memorial service at the Gokoku [guardian of the State] Shrine of Yamaguchi

*From Lawrence W. Beer & Hiroshi Itoh, eds., *The Constitutional Case Law of Japan, 1970 through 1990*, 496–500 (Seattle: University of Washington Press, 1966). Copyright © 1996. Reprinted by permission of the University of Washington Press.

Prefecture (hereafter Gokoku Shrine), a religious juridical person, for twelve SDF members from Yamaguchi who had died while on duty from the establishment of the SDF until March 1964. At the reception following the memorial service, some families of deceased SDF members expressed the desire to have the deceased jointly enshrined in the said shrine. Upon hearing this, President Hirotsu and Vice-President Fukuda of the SDF Friends asked the chief priest of the shrine, but the enshrinement was not endorsed and months and years passed.

(b) In the autumn of 1970, President Fukuda of the SDF Friends gained the impression from Chief Priest Nagao of the said shrine that a joint enshrinement would be possible. . . .

(c) When Fukuda reported on the progress of the enshrinement matter at a social gathering of the Chugoku and Shikoku Chapters of the SDF Friends in March that year by the Commander of the Thirteenth Division of the Ground SDF, the Commander agreed and asked that the enshrinement be promoted. . . .

(k) On March 31, 1972, the SDF Friends applied for joint enshrinement of twenty-seven persons, including Takafumi. . . . On April 19 of that year the shrine conducted the Enshrinement Ceremony (*Chinza Sai*) of these SDF members as Enshrined Deities (*Saishin*), and held the related feast (*Naorai-no-Gi*) and Great Memorial Service (*Irei Taisai*) the next day. . . .

3. (a) On April 5, 1972, the appellee told Administrative Officer Abu of the Regional Office, who had come to get the documents necessary for the enshrinement, that she did not wish Takafumi enshrined because of her religious faith. Immediately thereafter, finding a notice sent jointly in the names of Nagao of the Gokoku Shrine and Fukuda of the SDF Friends which announced the Enshrinement Ceremony and other affairs and inviting prayers, the appellee repeatedly told Abu by phone that she opposed the enshrinement.

(b) Although Fukuda received a communication about April 10 from Yasuda concerning the appellee's position, the application for joint enshrinement of Takafumi was not canceled.

(c) A document date June 1, 1972 from the chief priest of the Gokoku Shrine addressed to the appellee was delivered to her on July 5 by Yasuda. It read: "Offerings for the Sacred Eternal Prayer (*Eitai Kagura Ryō*) in memory of Shinto Deity Takafumi Nakaya are solemnly accepted. Hereafter, Memorial Services (*Meinichi Sai*) will continue to be held on January 12, forever."

II. Based on the above facts, the original judgment ordered compensation for damages to appellee, as follows:

1. The application, a prerequisite for the joint enshrinement by the Gokoku Shrine, was of a fundamentally religious nature; it promoted and practiced the religion of Gokoku Shrine and therefore was a religious activity.

2. The application for enshrinement was proposed and sponsored by the SDF Friends, and was initiated under its name. However, under the circumstances, the SDF Friends would not have filed the application had it not been for the cooperation of the staff of the Regional Office. The assumed reason for the active cooperation of the Regional Office staff was a strong desire for the joint enshrinement which would enhance the social status and morale of SDF members. The Regional Office and the SDF Friends planned and prepared the application together, and applied for the enshrinement under the name of the SDF Friends. So the application can be considered their joint action.

3. The actions of the Regional Office staff . . . were unlawful as a violation of public order in relation to individuals contrary to Article 20, paragraph 3 of the Constitution.

4. The joint enshrinement of Takafumi by Gokoku Shrine . . . infringed upon the appellee's legal interests in a peaceful religious atmosphere or her religious rights as a person.

III. However, the ruling of the court below cannot be accepted, for the following reasons:

1. The first issue is whether the application for the enshrinement should be regarded as a joint action of the Regional Office staff and the SDF Friends. Obviously, to enshrine someone as a *Shinto* deity relates to the shrine gods which are fundamental of *Shinto* shrines; thus, an enshrinement is conducted at the independent decisions of the shrines. . . .

Judging from these facts, the joint enshrinement of the twenty-seven dead SDF members, including Takafumi, in Gokoku Shrine was basically achieved through the efforts of the SDF Friends, acting on the requests from families of dead SDF members and negotiating with the shrine, and by the shrine's decisions for the joint enshrinement. Therefore, although it is true that the Regional Office cooperated with the SDF Friends by performing clerical work, the application under the name of the SDF Friends was filed independently in substance, and cannot be regarded as a joint action of the Regional Office staff and the SDF Friends, or as an application by that office staff. The original judgment assumed that the office intended to raise the social status and morale of SDF members; such an assumption does not affect this Court's ruling that the actual acts of staff did not go beyond those stated above.

2. Next is the issue of whether the cooperation of the Regional Office staff with the SDF Friends regarding the application constituted religious activity under Article 20, paragraph 3 of the Constitution.

Religious activity under the said article should not be construed to include any acts related to religion, but to mean only those acts whose purpose has religious meaning and whose effect is to promote, aid or support religion, or to suppress or interfere with religion. . . .

As noted above, joint enshrinements are conducted by the independent decisions of the shrines; so an application is not a prerequisite. In the instant case, the original judgment found that the Gokoku Shrine had already decided in principle to enshrine the dead SDF members in the fall of 1971. Thus, though it related to religion, the application in this case, in which they notified the shrine of names of the dead SDF members, of the fact that their deaths occurred while on duty, and of their desire for the enshrinement, should not be regarded as a legal prerequisite for enshrinement. The actual actions of the Regional Office staff in cooperation with the SDF Friends till the time of application. . . had an indirect relationship with religion and their purpose and intention were assumed to be to raise the social status and morale of SDF members. Hence, they had little religious consciousness and their actions would not be considered by the general public as having the effect of the State drawing attention to a particular religion, or sponsoring, promoting or encouraging a specific religion or suppressing or interfering with a religion. Thus, though they had a relationship to religion, the acts of the Regional Office staff cannot be considered religious activities.

Article 20, paragraph 3 of the Constitution provides for separation of religion and the State; it is known as providing a systemic guarantee, and does not guarantee religious freedom itself directly to individuals persons. Rather, it attempts indirectly to assure freedom of religion by setting forth parameters of acts in which the State and its organs may not engage. . . .Therefore, religious acts of the State or its organs which violate this provision should not necessarily be considered unlawful in relation to individual persons unless they directly infringe upon their religious freedom as guaranteed by the Constitution, for example, by imposing restraints on their exercise of religious freedom in violation of Article 20, paragraph 1, or by forcing individuals to engage in religious activities contrary to paragraph 2 of that article.

COMMENT

In its Judgment of August 6, 1952,[h] the Supreme Court held that a newspaper reporter cannot refuse to testify in court under oath even if he is asked to reveal the source of his information. It held that this was not a "due cause" for his refusal to testify.[i]

C. *Obscene Publications*

SUPREME COURT JUDGMENT, MARCH 13, 1957 [KOYAMA v. JAPAN—CHATTERLEY CASE]* *11 Keishū 997*

REFERENCE:

Penal Code, Article 175. A person who distributes or sells an obscene writing, picture or other object or who publicly displays the same, shall be punished by imprisonment with labor for a term of not more than two years or a fine of not more than 5,000 yen or a minor fine. The same applies to a person who possesses the same for the purpose of sale.

[Koyama Shoten, a publisher with a high reputation, published an unabridged translation of "Lady Chatterley's Lover" by a prominent novelist, Mr. Sei Itō. It became a best-seller (about 80,000 copies of the first volume and 70,000 copies of the second having been sold in about 10 weeks) in the spring of 1950. Then the public procurators' office brought a criminal prosecution against the president of the publishing company, Mr. Koyama, and the translator on a charge of violation of Article 175 of the Penal Code.

The court of first instance held that this book was not obscene in itself, and found the translator not guilty. However, the court found the president of the publishing company guilty on the ground that the way he advertised the book created a situation in which a great number of readers with only a prurient interest were attracted to the book, thereby conferring an obscene nature to the book. The sentence was a fine in the amount of ¥250,000.

h) 6 Keishū 974, *translated in* J. MAKI, COURT AND CONSTITUTION IN JAPAN at 38 (1964).

i) *See* Code of Criminal Procedure art. 161.

* The translation of the opinion of the court is one by Professor John M. Maki in J. MAKI, *supra* note *h*, at 3, 5–15.

Both sides appealed. The high court affirmed the judgment in relation to the president of the publishing company, but reversed in relation to the translator, and fined him ¥100,000.[j]

Both the accused appealed to the Supreme Court. Affirmed.]

I. *The Translation and Publication of Lady Chatterley's Lover and Article 175 of the Penal Code*

Lady Chatterley's Lover is a long novel by D. H. Lawrence, who is well known in the field of English literature. It is a work of considerably high repute from the artistic standpoint. The author's artistic talents can be judged from the development of the plot, the analysis and depiction of nature, society, and the personality of the characters, and the dialogue, rich in humor and irony, which also reveals the breadth of the author's culture. In addition, this novel also treats a number of problems relating to the criticism of ideas and civilization. In respect to these the author, generally speaking, frankly reveals his own rebellious and advanced ideals respecting traditional and, especially in England, dominant concepts.

The story begins with the life in midland Rugby of the young peer Clifford, who had lost his sexual powers as a result of a wound suffered during World War I, and his wife Connie, a life both unnatural and dull for her. Before long both love and carnal relations sprang up and grew between Connie and Mellors, a woodsman, separated from his wife and living on Clifford's property as an employee. Finally, the two shook off the restraints of society and entered into a new life based on love with the dissolution by divorce of a marriage considered to be unnatural. This is a rough outline of the structure of the novel, which is fleshed with themes dealing with thought, economics, and society. The ideas criticize the atmosphere of the aristocratic class, the destruction of the beauty of nature by industrialization, the influences on the lives of the people in farming villages, the tragic circumstances of workers in the coal mines, the desolation in men's minds, and the actualities of dehumanization. In addition, the novel also suggests the author's social ideas and what he himself regards as a life with true value. The most important themes, which run through the entire novel, are the primacy of the

j) By an Act for Temporary Measures concerning Fines (*Bakkin tō Rinji Sochi Hō*) (1948 c. 251), the maximum amount of the fine was to be multiplied by 50 at the time of this decision. Since July 1, 1972, such amount is to be multiplied by 200 according to the above Act as amended by 1972 c. 61.

complete satisfaction of sexual desire and the philosophy of life that recognizes in love the perfection of humankind and the significance of human life.

With this philosophy of life the author denies the traditional (or what he calls puritanical) code, morality, and concept of sex that are approved not only in his own country but all others as well, and affirms the freedom of extramarital sexual relations; but at the same time he is critical of the sexual tendencies in the erratic new age. That he also affirms a new sexual code and a morality that respects the harmony and equality of the spirit and the flesh can be inferred from the content of the present work, the author's own introduction, and his other writings and correspondence cited in the original decision. That the present book, viewed thus, is a work of art different in nature from pornography is recognized in the decisions of both the court of first instance and the court of appeal. However, whether or not the sexual code and world view advocated by Lawrence should be affirmed is a question relating to the areas of morality, philosophy, religion, education, and such matters, and even though the conclusion is reached that they are antimoral and unedifying, it is impossible for that reason alone under existing law to punish the sale and distribution [of the book]. This must be recognized as relating to the area of freedom of expression and publication. The problem is whether or not there are included in the present work elements that fall within the purview of "obscene writing" in Article 175 of the Penal Code. If it is so affirmed, then the acts of distribution and sale of the present book fall under the heading of the crimes set forth in Article 175 of the Penal Code.

Even so, what is the meaning of "obscene writing" (and "picture or other object") as set forth in the provision of the Penal Code previously cited? The precedent of the Great Court of Judicature[1] held as follows: ". . . It designates writings, pictures, or any other objects which stimulate or arouse sexual desire or could lead to its gratification, and, accordingly, such obscene objects necessarily are those that produce the sense of shame [or abashment] (*shūchi*) or disgust in human beings." In addition, the present Supreme Court has held that ". . . [obscene matter] is that which wantonly stimulates or arouses sexual desire or offends the normal sense of sexual modesty of ordinary persons, and is contrary to proper ideas of sexual morality."[2]

1) *E.g.*, Great Court of Judicature Judgment, June 10, 1918, 1443 Shimbun 22.
2) Supreme Court Judgment, May 10, 1951, 5 Keishū 1026.

Now, we recognize as proper the judgment below which was made in accordance with the above precedents of the Great Court of Judicature and of the Supreme Court, and we also approve these precedents.

In essence, according to the above precedents, in order for a writing to be obscene it is required that it cause the arousal and stimulation of sexual desire, or offend the sense of shame, or run counter to proper concepts of sexual morality.

As a general rule, the possession, irrespective of differences of civilization, race, clime, and history, of a sense of shame is a fundamental characteristic that sets man apart from the beasts. Shame, compassion, and reverence are the most fundamental emotions that man possesses. As man possesses the emotion of compassion for things on an equal footing with him and the emotion of reverence for things above him, so does he possess the sense of shame toward offensive things around him. These emotions constitute the foundation of universal morality.

The existence of the sense of shame is especially striking in respect to sexual desire. Sexual desire in itself is not evil; it is the instinct with which man is provided for the preservation of the species, that is, for the continuation and development of the family and of human society. That men possess this in common with other animals is a natural aspect of mankind. Consequently, the spirituality existent in man, namely, his dignity, is conscious of a feeling of revulsion toward it. This is, of course, the sense of shame. This emotion is not to be discerned in animals. There may be situations in which it is lacking or rare in certain spiritually undeveloped or ill individual human beings or in certain special societies, but it exists beyond question, if one observes humanity in general. For example, even in uncivilized societies the custom of complete exposure of the sexual organs is extremely rare and, again, there is no such thing as the public performance of the sex act. In short, the nonpublic nature of the sex act, which characterizes man alone, is a natural manifestation of the sense of shame that has its origin in human nature. This sense of shame must be respected, and any rejection of it as a form of hypocrisy runs counter to human nature. Thus, the existence of the sense of shame, in company with reason, controls the sexual life of man, which is difficult to restrain, so that it will not fall into licentiousness and, no matter how uncivilized a society may be, contributes to the maintenance of order and morality in respect to sex.

Because an obscene writing stimulates and arouses sexual desire

and clearly makes known the existence of the animal side of man's nature, it involves the sense of shame. It paralyzes conscience in respect to matters of human sex; it ignores the restraint of reason; it comports itself wildly and without restraint; and it contains the danger of inducing a disregard for sexual morality and sexual order. Naturally, law is not burdened with the duty to maintain all morality and good customs. Such a duty pertains also to the fields of education and religion. Law incorporates into itself only "the minimum morality," namely, the morality which alone possesses a considerable significance for the maintenance of the social order it is designed to achieve. What each provision of the Penal Code mentions as a crime is, in short, something that can be recognized as a type of conduct in violation of this minimum morality. Likewise, in respect to sexual morality it is the duty of the law to provide for the maintenance of that minimum. Thus, the prohibition of the sale and distribution of obscene writing, as crimes in Article 175 of the Penal Code, arises from this idea.

Then, does *Lady Chatterley's Lover*, which is the problem in the present case, fall under the heading of obscene writing as in Article 175 of the Penal Code? What must be made clear here as the preliminary issue is that the judgment to be made is one involving the interpretation of law, namely, that it relates to a legal value judgment and is not a question of determination of fact.

As for the facts of the distribution and sale of the literary work in the present case, and the cooperation of the translator, and such items as the number and method of publication and the motive for distribution and sale, there was suitable testimony from witnesses in relation both to the constituent elements of the crime and the circumstances relating thereto. Also, the hearing of the opinions of expert witnesses concerning the position of the author in the world of letters and the literary value of the work in question was both valuable and necessary. However, the judgment as to whether or not the work itself falls under the purview of Article 175 of the Penal Code as an obscene writing is not a problem of the establishment of fact in relation to the work in question but is a problem of the interpretation of law. The work in question actually exists, and the court need only interpret and apply the law. This matter differs in no way from instances involving the interpretation of provisions relating to the constituent elements of individual crimes set forth in each provision of the Penal Code. For this reason the court must find to what

extent this work stimulates or arouses [the sexual desire of] the average reader or awakens his sense of shame.

The standard for the court when it makes such a decision is the good sense operating generally through the society, that is, the prevailing ideas of society. These, as the original decision puts it, "are not the sum of the understanding of separate individuals and are not a mean value of such understanding; they are a collective understanding that transcends both. They cannot be rejected by separate individuals who hold to an understanding opposed to them." The judgment of what the prevailing ideas of society are is, under our present system, entrusted to judges. The fact that, as with separate individuals in society, there is no necessary unanimity of ideas among judges, either on different levels or on the same level among those who make up collegiate courts, is the same as in the other situation: the interpretation of law. This exists not only when there is a judgment as to obscenity in writing; hence, it cannot be denied that courts have the authority to determine what constitute the prevailing ideas of society. Accordingly, a judgment of whether the present book falls under the heading of obscene writing is unavoidable, even though it may not be in accord with the opinions of some of the nation's people. The fact that the judge in this situation must decide in accordance with his conscience what the prevailing ideas of society are does not differ from all situations in which the law is interpreted. Similarly, particular problems arise when there is to be interpretation of general clauses such as "public policy or good morals" or of the comprehensive concepts that used in laws and ordinances. In these situations the courts confront concrete cases and make judgments; the accumulation of these constitutes case law.

The prevailing social ideas in respect to sex generally differ according to time and place; changes take place even in the same society. In contemporary society, for example, pictures and sculptures may be exhibited which previously were banned from public display or, again, novels which earlier were not approved for publication may appear and not be generally regarded as unusual. Also at the present time freedom is widely recognized in respect to coeducation and social intercourse between men and women. As a result, a modification of the traditional concepts relating to the two sexes have become necessary. It is a fact that eventually taboos in existence since ancient times will gradually disappear. However, notwithstanding the fact that changes in such prevailing concepts regarding sex have taken

place or are taking place, it cannot be denied that in every society it is recognized that there are limits that must not be overstepped and that there are norms that must be generally observed. One is the previously described principle of the non-public nature of the sexual act. Only in respect to this point can it be admitted that there has not been such a striking change in the prevailing social ideas that what was previously regarded as obscenity is now not generally recognized as such. To yield a point for the moment, even though the ethical sense of a substantial majority of the people were paralyzed and truly obscene matters were not recognized as obscene, the courts would have to guard society against moral degeneration in accordance with the norms of the prevailing social ideas, which are the ideas of sound men of good sense. After all, neither the courts nor the law must always and necessarily affirm social realities; they must confront evil and corruption with a critical attitude and must play a clinical role.

Now on examining the translation in the present case, the portrayal of the sexual scenes therein, amounting to some twelve as pointed out by the public prosecutor, must be recognized as possessing artistic characteristics that differ from pornography, but, nevertheless, the portrayal is fairly bold, detailed, and realistic. These scenes run counter to the principle of the non-public nature of the sex act and offend the sense of shame to the extent that one would be reluctant to read them aloud in a public meeting, to say nothing of a family gathering. Also in respect to their effect on both individuals and society, it must be recognized that they are of an order to arouse and stimulate sexual desire and to run counter to good concepts of sexual morality. In short, the portrayal of sexual scenes in the present translation must be regarded as going beyond the limits recognized by the prevailing ideas of society. Accordingly the judgment below, which held that the translation in the present case is an obscene writing as set forth in Article 175 of the Penal Code, is proper; the points of the appeal that attack the court for disregarding the prevailing ideas of society and the verdict as having been determined by an arbitrary decision of the judges are improper.

Next we consider several points relevant to the decision whether or not the present translation is obscene.

The present book as a whole is work of art and ideas and as described above it has consequently enjoyed a rather high reputation in the world of English literature. The artistic nature of the present book is apparent not only in the work as a whole,

but also in those sections dealing with the depiction of sex, some twelve passages as pointed out by the public prosecutor. However, artistry and obscenity are concepts that have different dimensions; they can exist side by side. If it is said that obscene things cannot be called true art and that true art cannot be obscene, then we are faced with a question of concepts. This resembles the problem of whether we can recognize a bad law as law. As in cases where the content of positive law can be ethically evil, there are cases where what we ordinarily recognize as an artistic composition does possess the character of obscenity. The court of first instance held that because what is generally regarded as pornography is largely lacking in artistic qualities, the translation in the present case, having such qualities, cannot be recognized as pornography. However, the obscene character of the work cannot be denied on the grounds that it is an artistic composition and not pornography. The reason is that even though from the standpoint of art it is an outstanding composition, it is not impossible for it to be appraised as possessing obscenity from the legal and moral standpoints, which are of a different order. We cannot approve the principle of the supremacy of art, which emphasizes only the artistic nature of a composition and rejects criticism from the standpoint of law and morality. Even though a composition may have high artistic merit, it does not necessarily follow that its obscene nature is thereby dissipated. Though it be art, it has no right to present obscene matters publicly. The artist, too, in the pursuit of his mission must respect both the sense of shame and moral law, and he must not act contrary to the duties borne by the people at large.

Approximately the same circumstances can be recognized in regard to scientific and educational books dealing with sex as have been described above in respect to artistic matters. However, artistic creations differ from scientific works, which describe matters objectively and dispassionately; and because they appeal strongly to the senses and emotions, it cannot be said that obscenity is dissipated because they are artistic or, on the contrary, that the arousal or stimulation arising from them is not strengthened.

The existence of obscenity must be determined objectively and, in the final analysis, from the composition itself; it is not something that can be influenced by the subjective intent of the author. Counsel defines obscene writings as follows:

> Writings of evil intent dealing with sex that are designed exclusively to appeal to the curiosity of only adolescents whose

spontaneous powers of judgment are undeveloped, or that are designed to deny or make one forget the human function of sex as a racial instinct, or that make real the dissolute pleasures of the flesh, or that cause injury, difficult to repair, to the minds and bodies of the adolescent. . . .

and on the grounds that the translation in the present case is possessed of sincerity, he denounces the decision. However, according to this definition, any publication whatsover that possesses an artistic, academic, or other aim must be excluded from the category of obscene literature, no matter how extreme its obscenity, and obscene writing must be limited only to pornography. It does not follow that the sincerity of a work necessarily dissipates its obscene nature. Accordingly, we cannot accept this argument of the appeal.

Next, the counsel's argument asserts that the translation in the present case was made "with the aim of warning the world," denies the existence of criminal intent in the accused, and on those grounds assails the judgment below.

However, in respect to the establishment of *mens rea* in the crime set forth in Article 175 of the Penal Code, it is sufficient if there is a recognition of the existence of the passages in question and of their distribution and sale. Recognition that the writing containing such passages is obscene, as defined in the same article, is not necessary. For example, even though one sells a writing that one believes, subjectively, does not fall under obscene writing in Article 175 of the Penal Code, if it does objectively possess the character of obscenity, it must be said that that [subjective belief], as a legal mistake, does not rule out *mens rea*. Regarding obscenity, whether there was complete or only partial recognition of it, or no recognition at all, are only questions of circumstances under the provisos of Article 38, Paragraph 3 of the Penal Code[k] and are not related to the establishment of *mens rea*. Consequently, the original decision, which accepts this point, is proper, and the argument cannot be accepted.

The appellant's brief contends in respect to obscene writing that it is necessary that it appeal to the curiosity only of immature adolescents and that it cause injury, difficult to repair, to the adolescent mind and body. Because the spread of obscene literature has a bad effect on the adolescent mind and body,

k) "An ignorance of the law cannot be deemed to constitute a lack of intention to commit a crime."

its prohibition is naturally of very great significance as far as adolescents are concerned. However, the question of what constitutes obscene writing cannot be considered only in terms of the influences brought to bear on one specific class of readers. It is necessary that its influence on general readers throughout society be considered. The argument for appeal that holds that the relevant class of readers is limited only to adolescents is arbitrary and cannot be accepted.

II. *Article 175 of the Penal Code and Article 21 of the Constitution*

The appellant's brief (counsel Shōichi Tamaki) pleads as follows: The guarantee of freedom of expression in Article 21 of the Constitution is almost unrestricted; for example, even if restriction in the name of the "public welfare" is permissible, the basis for deciding permissibility must be clear before the fact. Accordingly, under the new Constitution, which prohibits a system of censorship, whether or not there may be a violation of the "public welfare" must be left to the independent judgment of each person. Thus, it is argued, because the original decision accepted an error of independent judgment in respect to the translation in the present case and held the accused guilty, it violated Article 21 of the Constitution.

However, because the basis for judging the permissibility of the translation in the present case lies in the prevailing ideas of society or in the good sense that is prevalent throughout society, it cannot be said that it was not clear before the fact. Also, whether there is an offense against the public welfare must be determined objectively; it is not something that can be entrusted to the independent judgment of each person. Consequently, it is impossible for this point to be used in the argument.

The appellant's brief argues that because there is no explicit provision concerning the possibility of restriction upon freedom of expression in Article 21 of the Constitution as in the case of the fundamental human rights set forth in Articles 22 and 29 of the Constitution, it is absolutely unrestricted and cannot be limited even for the public welfare. However, notwithstanding the fact that each provision of the Constitution does not expressly set forth the possibility of restriction of individual fundamental human rights in the Constitution, the present court has frequently held [eight citations omitted] that the abuse of such rights is prohibited by the stipulations of Articles 12 and 13 of the Con-

stitution, that they stand under restriction for the public welfare, and that they are not absolutely unlimited. If this principle be applied to freedom of publication and other expression—a type of freedom that is extremely important—it must nevertheless be recognized that it, too, can be restricted for the public welfare. Thus, because there is no room to doubt that the protection of a sexual code and the maintenance of a minimum sexual morality are to be considered parts of the public welfare, the original decision, which held that the translation in the present case should be regarded as an obscene writing and that its publication was against the public welfare, is proper. The argument is groundless. Moreover, the argument presented from the above standpoint, that if there are situations in which Article 175 of the Penal Code is to be applied, they must, from all points of view, involve both harmful and useless matters—for example only pornography—is also groundless.

. . . .

[Justices Mano and Kobayashi were of the opinion that the high court should have remanded the case for a new trial in the district court. Justice Mano also criticized the concept of obscenity adopted by the majority.]

SUPREME COURT JUDGMENT, OCTOBER 15, 1969
[ISHII v. JAPAN]
23 Keishū 1239

[One of the accused, a publisher, asked the other accused to turn in an abridged translation of the Marquis de Sade's book "Juliette" and published the translation in two volumes.

They were prosecuted on a charge of publishing an obscene book. The district court found them not guilty on the ground that the book was not obscene. The high court reversed. The accused appealed to the Supreme Court alleging constitutional grounds. The Supreme Court, in an 8 to 5 decision, affirmed.

The majority opinion reads as follows:]

The high court explicitly followed the precedent of our court—Supreme Court Judgment, March 13, 1957, 11 Keishū 997 (the so-called "*Chatterley Case*")[*l*]—and held as follows: artistry and obscenity are concepts that have different dimensions; a writing of artistic or intellectual value can still be obscene in the eyes

l) Page 744, *supra*.

of morality or law, and its sale or circulation can therefore be punished under Article 175 of the Penal Code. In the above decision, the Supreme Court also said: "Though it be art, it has no right to present obscene matters publicly. The artist, too, in the pursuit of his mission, must respect both the sense of shame and moral law, and he must not act contrary to the duties borne by the people at large." The present court believes that this view should be sustained.

According to this view, there is no reason why we should refrain from holding a writing obscene under the Penal Code even if it has value as an artistic work or as an expression of thought. Needless to say, there may be certain cases where such artistic value would decrease or moderate the sexual stimuli normally induced by descriptions concerned with sex, thereby avoiding obscenity in the work. . . . But otherwise, such artistic value will not negate the obscene nature of the writing. The court cannot follow the argument which suggests that any writing with artistic value cannot be punished as obscene or that the application of Article 175 of the Penal Code shall be decided by balancing the interest in protecting the public from obscene literature with the interest in having a work which is of value as an artistic work or as an expression of a certain thought.

. . . .

Freedom of expression and academic freedom are of vital importance as they serve as bases of democracy. However, as the above judgment of March 13, 1957 held, they are not absolute in the sense that there may be no restriction placed upon them at all. They should not be abused. They are subject to the restrictions imposed by the public welfare [Articles 12 and 13 of the Constitution]. Inflicting punishment upon publishers, writers and so on for a writing which has been found obscene, even if it has artistic or intellectual value, preserves order and good public morals concerning sex and therefore meets the interests of the people. Thus such punishments should not be regarded as contrary to Articles 21 and 23 of the Constitution.

[*Concurring opinion* by Justice Iwata held that the court must "weigh the interests which would be invaded by the obscenity of this book when published and the interests which society would receive in terms of the arts, thought, scholarship and literature." He found the former were greater than the latter.

Dissenting opinion by Justice Okuno, though based upon the same premise, reached the opposite result on the view that the latter were greater.

Dissenting opinion by Justice Masatoshi Yokota expressed the view that this book, looked at as a whole, was not obscene, and that its publication should be allowed under Article 21 of the Constitution in view of its value as an expression of a thought and as an artistic work, even if it were to be held obscene. The *dissenting opinion* by Justice Irokawa basically followed this line.

Dissenting opinion by Justice Jirō Tanaka reads as follows:]

The majority still stands on the premise which has been followed by the Supreme Court for many years, namely, that freedom of speech, press and other forms of expression or academic freedom can be restrained if "public welfare" so requires. I doubt the soundness of this premise.

I am not saying that there should be no limitation upon freedom of speech, press and other forms of expression or upon academic freedom. I, therefore, do not think that Article 175 of the Penal Code is in itself unconstitutional. I, however, have a different view of the significance of Articles 21 and 23 of the Constitution which guarantee these freedoms, and consequently of the extent of the restrictions which may be constitutionally imposed upon them. Freedom of speech, press and other forms of expression guaranteed under Article 21 as well as academic freedom guaranteed under Article 23 are different in nature from various other freedoms also guaranteed in the constitution, in that they are basic to democracy. . . . Thus, these freedoms should not be restricted by policy considerations in the name of the "public welfare." They differ from freedom to choose and change one's residence and to choose one's occupation which can be restricted by statutes if the public welfare so requires [Article 22 of the Constitution]. If freedom of expression, or academic freedom, or, more generally, freedom to read, hear, watch, be informed and learn, could be restrained easily by views held by the majority of the Diet or by the Government, it would be almost inevitable that the fundamental principles of democracy would be shaken from their roots, and development of culture and the search for truth would be suppressed.

This does not mean that there should be no restriction upon these freedoms. They are subject to inherent limitations. . . . What the scope of such inherent limitations is . . . cannot be answered by general and abstract standards. It is to be defined with reference to the policy underlying the constitutional guarantee of these freedoms. These freedoms, by their own nature, presuppose that those exercising such freedoms shall respect the freedoms of others . . . , that they should not be abused so as to

cause present danger to society, by violating the concept of justice and morals held by the general public. Limitations necessary for guaranteeing such freedoms to each individual shall be respected as inherent in them. To defy such limitations is tantamount to abuse of such freedoms. It is only these *inherent* limitations, and *none* of those set *externally* by policy considerations, that can be imposed upon such freedoms. The proper scope of such *inherent* limitations is to be ultimately defined by the court after an analysis of each instance. . . .

Article 175 of the Penal Code providing for punishment of obscene publications can be held constitutional only if its application does not exceed the scope of such inherent limitations. If it be applied also as a means of carrying out some "external policy considerations," such as "to preserve order and good morals concerning sex" . . ., it might exceed this constitutional limit. . . .

In view of the principle that a statutory provision must be construed so as to conform with the spirit of the Constitution, . . . the concept of "obscenity" must be construed strictly. . . .

[From this basic standpoint] I believe that . . . the concept of "obscenity" should be defined "relatively", [*i.e.*, taking into account the following: (i) the attitude of prospective readers, which may differ with time, place or character of such readers, (ii) the value of the writing as an artistic work or as expressing a thought, and (iii) the motive of the writer (which shall be objectively found through the writing itself) and the way in which it was sold, such as the manner of advertisement].

There is a great doubt whether this book, when read as a whole, can be labeled obscene. . . . Even if it has some element of obscenity, it is not an obscene publication in the sense of Article 175 of the Penal Code according to my views set out above. . . .

[*Concurring opinion* by Justice Shimomura, from the viewpoint of the majority, attempts to refute Justice Tanaka's opinion.]

Questions:

(1) Does relying on the phrase "public welfare" necessarily mean that more limitations will be held constitutional than relying on the notion of "inherent limitation" in the sense Justice Tanaka uses that term?

(2) Does the Constitution use the phrase "public welfare" in a consistent manner? For instance, does the phrase mean that the court should take a more permissive attitude towards

restrictions imposed upon "freedom to choose and change his residence and to choose his occupation" or upon "right to own or hold property" than upon "freedom to move to a foreign country," "freedom to divest themselves of their nationality," or "right of workers to organize and to bargain collectively?"

D. Censorship

(1) There is no prior censorship before publishing a book or other items of literature. The publication of an allegedly obscene book can be stopped only after a criminal charge is brought against its writer or its publisher.

This does not mean that groups such as publishers have not established organs to check objectionable forms of expression in certain areas.

For instance, every motion picture is submitted to a check by the Committee for the Maintenance of Ethics in Motion Pictures (commonly known as *Eirin*) before it is shown at a theater. However, this system is maintained by motion picture companies without any government participation.

(2) Article 21 of the Customs Tariff Act (*Kanzei Teiritsu Hō*)[m] provides as follows:

> (1) Any goods specified in any of the following items shall not be imported.
>
> ....
>
> (iii) Books, drawings, carvings and any other articles, which are likely to injure public safety or morals, . . .
>
> (3) In cases where there are any goods, with respect to which there is sufficient reason to show that item (iii) of Paragraph 1 is applicable . . . the "director of customs office" (*zeikan-chō*) shall notify the person who intends to import the said goods.
>
> ....
>
> (5) Upon receipt of the complaint provided for in the preceding paragraph, the director of customs office shall make a decision concerning the complaint after referring it to the Deliberative Council on Imported Motion Pictures, Etc. (*Yunyū Eiga tō Shingikai*), as prescribed by cabinet order and shall notify its decision in writing, to the person who filed the complaint.

Importation of a number of films has been disallowed, or

m) 1910 c. 54.

allowed only after the importer has deleted or "covered up"—by such methods as defocusing—portions thereof which were found objectionable.

Some attack this as "censorship by the customs office."

(3) Every textbook intended for use in a primary school or high school must receive the approval of the Ministry of Education before its publication. (This rule does not apply to supplementary readings.) The Ministry has a board which checks the drafts of textbooks. The official explanation is that the work of the board is simply to check the accuracy of the statements made, to prevent printing errors and to give advice. The Ministry of Education has tried to justify the practice on the grounds of its responsibility to maintain the quality of education. There are many who suspect that the board goes further and checks, from a particular point of view, the contents of proposed textbooks.

The problem has been most seriously felt in the field of social studies, and has given rise to *causes célèbres*. Textbooks on Japanese history for high schools written by Professor Saburō Ienaga of the Tokyo University of Education were found unacceptable in 1963, and conditionally acceptable (with suggestions for amendment on some 300 points) in 1964. Professor Ienaga first brought an action for damages. Then he brought another action seeking cancellation of a disposition of the Ministry of Education which held the 1967 edition of his textbook unacceptable on the grounds that there were six points which the board found objectionable.

These two cases were tried separately in two different chambers (*bu*) of the Tokyo District Court. Professor Ienaga won the second case (Tokyo District Court Judgment, July 17, 1970, 604 Hanrei Jihō 35). However, he lost the most important issue involved in the first case, though he won a partial victory (Tokyo District Court Judgment, July 16, 1974, 751 Hanrei Jihō 50). Both cases have been appealed to the high court.

The differences between the 1970 decision and the 1974 decision relate to:

(a) *The meaning of Article 26 of the Constitution.* The 1970 decision holds that this article guarantees the right of children to receive education as one aspect of their "right to maintain the standards of . . . wholesome and cultured living", and that this creates a duty on the part of the state to establish and maintain a system of public education. However, the decision held that Article 26 does not give power to the state to control or supervise the content of education. The 1974 decision holds that the state

erty over a thing of the above nature. This basic rule precedes such norms as "Private property may be taken for public use upon just compensation therefor" (Article 29, Paragraph 3 of the Constitution) or "Property rights shall be defined in law, in conformity with the public welfare" (*Id.* Article 29, Paragraph 2).

Justice Okuno, *concurring*, expressed his view that this ordinance was valid, as it provided standards to elaborate the basic policy of prohibiting the "abuse of right," which he believed to be drawn from Article 12 of the Constitution.

Dissenters (Justices Daisuke Kawamura, Sakunosuke Yamada and Masatoshi Yokota) believed that there should be a more specific authorization in an act of the Diet (other than Article 2 of the Local Autonomy Act) giving power to a local public entity to enact an ordinance regulating property rights.

Justice Yamada also believed that a local ordinance should have an explicit provision for awarding compensation. He also pointed out that under Article 29 of the Constitution it should be the Diet that demarcates the scope of restrictions to be justified as "inherent in the property right," and that the use of the bank of the reservoir in this case was not dangerous at all because the reservoir had been dug in a flat plain, the bank forming a very gentle slope, and had been used for agricultural purposes for centuries without causing any disaster.

Chiefly based on this latter fact, Justice Yokota held that the ordinance went beyond the scope which might be justified as a limitation inherent in property rights.]

COMMENT

The opinion in Justice Irie's concurring opinion was followed in the dictum of Supreme Court Judgment, November 27, 1968, 22 Keishū 1402. In this case, a governor of a prefecture designated the area in question as a "site adjacent to a river" on which digging of gravel was to be prohibited according to a statutory provision. The court said that compensation should be given for the actual loss suffered by the company which had maintained a gravel pit for years in that area before the designation, though no compensation was generally required for the loss of the future use of land.

Section 4 Social Rights

A. Introduction

The rights guaranteed under Articles 25 through 28 of the Constitution are usually grouped together as "social rights." Most of them just prescribe the government's duties. For instance, Article 25, Paragraph 2 reads as follows:

> In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security and of public health.

Article 27, Paragraph 1 reads:

> All people shall have the right and obligation to work.

It is clear that such provisions—commonly known as "program clauses"—are without legal effect until supplemented by statutes or administrative acts. (It does not seem that the provision for an "obligation to work" means anything more than a statement of a philosophy.)

Not all the provisions providing for "social rights," however, are merely of the nature of program clauses. See the following cases.

B. "Minimum Standards of Wholesome and Cultured Living" in Article 25

SUPREME COURT JUDGMENT, MAY 24, 1967
[ASAHI v. MINISTER OF HEALTH AND WELFARE]
21 Minshū 1043

[Mr. Shigeru Asahi was hospitalized in the National Okayama Sanatorium as a tuberculosis patient. He had neither income nor support. He therefore applied for medical assistance as provided under the Livelihood Protection Act (*Seikatsu Hogo Hō*),[a] and was granted assistance covering all his medical expenses, room and board, as well as ¥600 a month as a "commodity expense allowance."

a) 1950 c. 144.

Later it was found that his elder brother was alive. He began to receive ¥1,500 monthly from this brother.[b] In July 1962, the Director of Tsuyama Welfare Office, having been informed of this, ordered that the payment of the "commodity expense allowance" be terminated and that Mr. Asahi should pay ¥900 (the difference between the amount given by his brother and the commodity expense) to cover a portion of his medical expenses. Mr. Asahi filed his complaint asking for annulment of this order, first to the Governor of Okayama Prefecture, then, upon the denial of his complaint, to the Minister of Health and Welfare, who also upheld the order of the Director of Tsuyama Welfare Office.

Mr. Asahi thereupon brought a suit to have this decision by the Minister of Health and Welfare annulled, alleging that the ¥600 a month allowed him as "commodity expenses" was so small that he could not maintain "the minimum standards of wholesome and cultured living" as provided by Article 25 of the Constitution, and that he should be allowed to keep ¥1,000 a month for such expenses.

The district court found for the plaintiff. The high court reversed, finding that reasonable "commodity expenses" for an in-patient were ¥670, but holding that, since the difference between this amount and the amount actually allowed was only about 10% of the former, the deficiency was not a sufficient ground for holding the order unlawful.

Mr. Asahi then appealed to the Supreme Court, but he died on February 14, 1964, before the decision was given. Kenji Asahi, Shigeru's adopted son, and Kenji's wife, Kimiko, filed a motion to succeed Shigeru as the plaintiff in this action. (Kenji was adopted by Shigeru primarily for the purpose of succeeding to his cause of action after his death.)

The Supreme Court dismissed the action, holding that Mr. & Mrs. Kenji Asahi could not succeed to the original plaintiff's cause of action. However, the court went on further to give a long dicta on the merits.

The majority opinion reads as follows:]

It must be noted here that the benefits which the person in need receives under the provisions of the Livelihood Protection Act are not merely benefits given by the State as an act of grace or as a reflex interest [*i.e.*, by-product] of social policy. It is a

b) The currency rate at this time was ¥360 per dollar. The wage level in 1962 was about one-seventh of that in the United States in the same year and about 30% of that in Japan in 1974.

legal right, which may be termed the right to receive livelihood protection. This right, however, is a personal right which appertains exclusively to the individual to be protected, and is not transferable[1] or inheritable. Not only assistance for medical fees but also assistance for living expenses, where cash is directly paid to the protected person, is given with the aim of satisfying the need for a minimum standard of living. The money which the protected person receives should not be applied to any other purpose than the purpose contemplated by the Act. Therefore, the right to receive the payment of arrears of benefits during the lifetime of the protected person is extinguished by his death and is not inheritable. Kenji and Kimiko Asahi insist that they have a right to demand the payment of the sum which fell in arrears during Shigeru's lifetime on the ground of unjust enrichment [by the government]. Such a right for restitution, however, can only come into existence where there is a right to receive livelihood protection. Since we hold that a right to receive livelihood protection is not transferable nor inheritable, the alleged right for restitution accordingly is not inheritable either.

Consequently, it must be concluded that this suit was terminated upon Shigeru's death, and that it is not possible for his heirs, Kenji and Kimiko Asahi, to succeed to Shigeru's cause of action.

We wish to take this opportunity to express our opinion, as an addendum, on the propriety of the livelihood protection standards.

1. Article 25, Paragraph 1 of the Constitution provides that "All the people shall enjoy the right to maintain minimum standards of wholesome and cultured living." This provision merely proclaims that it is the duty of the State to set up a policy to enable all people to enjoy minimum standards of wholesome and cultured living. It did not vest in the individual person any concrete right.[2] Concrete rights accrued to the individual only after the Livelihood Protection Act was enacted to implement the objectives prescribed in the provisions of the Constitution. The Livelihood Protection Act provides that any person who satisfies "the requirements prescribed by this Act" is entitled to "the protection prescribed by this Act"[3] and such protection is given according to the standards set by the Minister of Health

1) *See* Livelihood Protection Act art. 59.
2) Supreme Court Judgment, September 29, 1948, 2 Keishū 1235.
3) Livelihood Protection Act art. 2.

and Welfare.[4] The concrete right which accrues is therefore a right to receive protection as prescribed in the standards which the Minister of Health and Welfare has found to be sufficient to maintain the minimum standard of living. Such standards should of course be set in accordance with the requirements enumerated in Article 8, Paragraph 2 of the Act and should provide for protection which is sufficient to maintain minimum standards of wholesome and cultured living as guaranteed by the Constitution. The concept of minimum standards of wholesome and cultured living is rather abstract and relative. Such standards will be improved as our culture and national economy develop. These standards can be determined only after taking into consideration all these and other variable elements. Therefore, the determination of what "minimum standards of wholesome and cultured living" actually means [under particular circumstances] is within the discretion of the Minister of Health and Welfare. His decision does not produce an issue as to the legality of the standards, although such a decision may produce an issue as to the propriety of the standards which may be discussed in terms of the political responsibility of the government in power. Only in cases where such a decision is made in excess of or by abuse of the discretionary power conferred by the law, so as to neglect [totally] the policy and objectives of the Constitution and the Livelihood Protection Act by ignoring the actual conditions of life and establishing extremely low standards, would such a decision be subject to judicial review of its legality.

. . . .

2. The livelihood protection standards in question were set in July 1953. The items of expenditure, as well as quantity and cost per unit of each item, which were used as bases for determining that ₹600 a month was the appropriate sum for livelihood assistance are shown in the appendix attached to the judgment in the court of the first instance.

The minimum standards of living guaranteed by the Livelihood Protection Act should be of such a level as would make it possible to maintain standards of wholesome and cultured living,[5] and the substance of the protection offered should be determined efficiently and properly with due consideration to the actual needs of the protected person himself and of his

4) *Id.* art. 8(1).
5) *Id.* art. 3.

family.[6] At the same time, the standard should not be more than is necessary to maintain the minimum standard of living.[7] In relation to an in-patient like the original appellant in this case we should also take into account the fact that there are certain qualifications which arise from his special situation such as long term hospitalization, and also from medical factors. In this instance, it cannot be denied that there is a certain co-relation between the amount of the commodity expenses provided under the Act and the effective cure of the disease; and that the shortage in the amount of assistance provided has a significant bearing upon the treatment of the patient. As a means for satisfying the minimum needs of patients and for effecting at the same time the proper operation of the protection scheme, the law prescribes the kind and scope of protection. . . . In-patients are afforded medical assistance which includes payment for meals in addition to livelihood assistance. These two kinds of assistance differ from each other both in their nature and in their operation. There is also a system of rehabilitation aid. Therefore, it is not proper [for the appellants] to attack the standards for livelihood protection as illegal on the ground that the bases which have been used for determining the amount of assistance do not include such expenses as are necessary to promote or effect a cure, for "filling the gaps in the present medical and nursing systems" or for assisting the situation of the patient after he has left the hospital.

The quantity of articles of daily necessities consumed by the patients, of course, depends on the degree of individual frugality and the quality of the articles. The type of articles needed also differs from patient to patient depending upon the seriousness of the illness. Among certain categories of patients, they may be used interchangeably. Consequently, whether the livelihood protection standards which are the general and abstract yardsticks used to measure the extent of the daily needs of the patients are appropriate in individual circumstances must be determined on the basis of a grasp of the whole picture, the consolidated whole, rather than by merely counting up items of expenditure as well as quantity and cost per unit of each item. Furthermore, the daily articles utilized by in-patients can be classified into those for ordinary needs and those for extraordinary needs, and it is left to the discretion of the Minister of Health and Welfare to determine whether to classify extraordinary expenditures under or-

6) *Id.* art. 9.
7) *Id.* art. 8(2).

dinary standards, under special standards, or under a temporary assistance or loan system.

Upon a consideration of the issue with the above points in mind, the Court holds that the determination by the Minister of Health and Welfare which found that the livelihood protection standards in question were sufficient to meet the minimum daily needs of the in-patient under the set of facts found by the trial court, cannot be said to have exceeded the discretionary power granted under the law or to be an abuse of such power.

[*Concurring opinion* by Justice Okuno—omitted.]

The *dissenting opinion* of Justice Jirō Tanaka[c] is as follows:

. . . .

There is room for argument as to whether the cause of action in question is inheritable. The recent trend in many other countries is a common movement toward loosening the requirements for bringing administrative litigation with the aim of opening the door to judicial relief as widely as possible. There is ample reason for this trend in view of the nature of administrative litigation (especially litigation involving an attack on an administrative act by a private citizen) which has as its purpose the provision of redress to the people against [abuse by] administrative power. In our country too, we should try to render judgment on the merits so long as it is theoretically possible and to avoid a type of trial which gives an impression of turning away the caller at the door. I believe that this is the basic attitude which should be taken by the court in serving the people.

When we review this case from such an angle, it is theoretically not impossible to recognize the inheritability of this cause of action. I therefore think it is a proper attitude for the court to consider the merits of the case and to give the opinion of this court on the points alleged in the appellants' brief. . . .

Should the decision of the Minister in the instant case be annulled, the government would be held to have unjustly suspended the monthly livelihood aid of ¥600 and to have improperly turned over the difference between the amount in the livelihood protection schedule set by the Minister and the proper amount to be set within the limit of ¥900 for Mr. Asahi's medical expenses. Of course, as will be stated hereinafter, the beneficiary Shigeru Asahi cannot be said to have the right to demand, *ipso facto*, protection under a proper livelihood aid schedule. Should

c) Though the court calls Justice Tanaka's opinion a dissent, he also voted for affirming the judgment of the high court, not on procedural grounds as in the majority but on substantive grounds.

this decision be annulled, the Minister of Health and Welfare would be bound to set a proper standard according to the aim of the provisions of the Constitution and the Livelihood Protection Act, and the government would be required to return the remaining profit to Shigeru Asahi to the extent mentioned above. That is to say, Shigeru Asahi would be allowed to claim the return of the said amount on the ground of unjust enrichment by the government. . . . The claim against the government for the return of unjust enrichment is not a claim for an award of a benefit under the livelihood aid schedule nor is it a demand for the payment of a livelihood protection allowance in arrears. It is a claim for the return of the money which Shigeru Asahi could have used of his own volition as he saw fit if he had survived. Therefore, it is my opinion that we can hardly purport to find a reasonable ground upon which to deny that such a right is transferable or inheritable.

If the claim for the return of the sum obtained by unjust enrichment in the sense mentioned above is to be admitted, the annulment of the decision which is the subject matter of this case is a prerequisite to the exercise of the appellants' claim. It is therefore reasonable to hold that Kenji and Kimiko Asahi, who succeeded to the right mentioned above, have a legal interest which they would have regained upon the annulment of the decision. . . .

On the grounds stated hereinabove, I hold that in this case, Kenji and Kimiko Asahi properly succeeded to the cause of action upon the death of Shigeru Asahi.

Since I believe that this cause of action is inheritable, I will proceed to give my opinion on the merits of the case.

Stating the conclusion first, I think this appeal should be dismissed.

I hold that it is not by the mere grace of the state nor as a reflex interest of social policy, but by a legal right . . . that those in need receive protection in sufficient amounts to maintain minimum standards of wholesome and cultured living. The epoch-making nature of the present Livelihood Protection Act lies in this fact. The question is what the legal basis of such a right is and what it contains.

Article 25, Paragraph 1 of the Constitution provides, "All people shall have the right to maintain the minimum standards of wholesome and cultured living." As stated in the precedents of this Court, however, this provision merely declares that it is a [political] duty of the government to establish as its policy the

guarantee of minimum standards of wholesome and cultured living to all people. It does not in itself grant any concrete right to an individual.[8] A concrete right came into existence only after the enactment of the Livelihood Protection Act in order to implement the policy of the above-mentioned constitutional provision. The Livelihood Protection Act states that those who satisfy "the requirements enumerated in this Act" shall be entitled to receive "the protection provided in this Act,"[9] and that the protection must be afforded according to the standards set by the Minister of Health and Welfare.[10] This means that the Act guarantees only the right to receive protection according to the standards which the Minister of Health and Welfare sets and recognizes as sufficient for maintaining the minimum standards of living. It does not presuppose the existence of minimum standards of living which could be ascertained objectively, that is, without the provisions of the Livelihood Protection Act. . . . The protection standards set by the Minister must of course be in compliance with the criteria provided in Article 8, Paragraph 2 [of the Act] and must be sufficient to maintain the minimum standards of wholesome and cultured living, as stated in Article 25, Paragraph 2 of the Constitution. However, "the minimum standards of wholesome and cultured living" is not a fixed or definite idea but is an abstract and relative concept whose substance improves constantly with the development of the culture and economy of the nation. This can be fixed only after taking many variable factors into consideration. It is hardly definable with mathematical accuracy even at a certain point of time. The Constitution should be understood as having no intention to guarantee the right to maintain minimum standards of living as something to be ascertained objectively, leaving no room for difference of opinions. . . .

It is therefore to be concluded that the determination of what constitutes the minimum standards of wholesome and cultured living is primarily left to the discretion of the Minister of Health and Welfare, a discretion which he should exercise reasonably, based upon special and technical knowledge relating to the matter. His misjudgment, as a rule, may only raise a question of the political responsibility of the government. . . . It does not in itself give rise to a question about the legality of his action. The standards set may be subject to judicial review only when

8) Supreme Court Judgment, September 29, 1948, 2 Keishū 1235.
9) Livelihood Protection Act art. 2.
10) *Id.* art. 8(2).

they are set in excess of, or in abuse of, the power of discretion entrusted by the law, as, for example, where the protection to be afforded is of an extremely low quality in view of the actual conditions of life so as to deny [completely] the policy and objectives of the Constitution and the Livelihood Protection Act. The Livelihood Protection Act limits the subject matter of complaints to "the disposition concerning the decision as to whether protection should be afforded to a particular person and the decision concerning the particulars of the operation of the protective scheme."[11] It does not mention the fixing of protection standards as being among the subject matter of complaints. I believe this is based on the view I have described above.

[Justice Tanaka then examined the quality of the assistance afforded under the standards set by the Minister of Health and Welfare, and found that it was very low, but not to the extent which would justify holding that the Minister had exceeded or abused the discretionary power which had been conferred on him by the Livelihood Protection Act. (This portion of Justice Tanaka's opinion is not very different from the dictum in the majority opinion.) He then continued:]

As pointed out above, the standards were revised in April 1957, only eight months after the order changing the content of protection was issued. On that occasion some new items were added, quantities of some items were increased, and the cost per unit of some items was raised. However, as the protection standards are to be improved to keep pace with the development of the cultural and economic situation of the nation, it is not proper to conclude on this ground that the livelihood protection standards in questions which were set three years earlier, were established arbitrarily by the Minister of Health and Welfare.

According to the facts found in the judgment below, our national economy did not show any significant change during the period between July 1953, when the standards in question were set, and the end of 1954. It grew rapidly in the 1955 fiscal year and in the fiscal year 1956, especially in the latter half of the year, attained a high level of growth which no one had anticipated. As a result, there was a rapid increase in national revenue and an improvement in the standard of living. It also brought about a significant rise in commodity prices. In August 1956, when the order in question was issued, the substance of the assistance under the livelihood assistance standards thus seems to

11) *Id.* art. 65(1).

have already been unsatisfactory as a guarantee of the minimum standards of wholesome and cultured living, since social conditions had improved. The standards, therefore, had to be revised sooner or later. As the judgment below has justly confirmed, the degree of insufficiency of the protection was not so great as to frustrate the very purpose of protecting the livelihood of the in-patients. We must also take note of the fact that it takes a considerable length of time to investigate the situation and then to revise the standards. . . . These facts reveal that the task of constantly adjusting protection standards set at a certain time to meet later changes in livelihood conditions is an extremely difficult task to fulfill. The gap between the standards and actual conditions of life must be tolerated as "an unavoidable evil" by the law so long as it does not exceed a certain limit. Since it is reasonable to set standards in operating livelihood protection programs, it follows that it is inevitable that there will be a gap between these standards and actual conditions.

As stated above, the livelihood assistance standards in question were set by utilizing a theoretical means of calculation called the "market-basket method," and cannot be said to be unreasonable. The extent of the gap between these standards and actual living conditions is described above. We admit that the "market-basket method" should be improved. We also admit that even a small deficiency in commodity allowances may have a significant effect upon patients. Still, though a ¥600 monthly livelihood allowance may be criticized as being too low to cover daily commodity expenditures, it is a matter of propriety which can be remedied by administrative action. Consequently we cannot do other than approve the conclusion of the judgment below that there is no illegality involved in this instance which justifies the award of judicial relief. In conclusion, I find no misinterpretation of the Constitution, laws and ordinances, as alleged. . . .

As a matter of legal argument, I have to reach the conclusion I have stated above. . . . [As a matter of policy, however,] I believe the government should try harder to [revise the standards so as to] more properly meet [the changes in] the actual conditions of life more promptly, by conducting constant research on various factors [which should be considered when fixing the livelihood assistance standards]. I also think that it is desirable to give wider discretion [to the administrators(?)] so that it may be easier to fill the gap between the standards and the actual conditions of life. . . . As I said above, the livelihood

protection system is not established as a matter of grace. It confers the right to such protection. However, if by calling it a right we create formalistic attitudes among the officials in their administration of this system, the achievement of its aim will become extremely difficult. The plaintiffs lose this case. The state which wins the case, however, must give deep thought to the fact that this judgment does not necessarily intend to approve the measures taken by the government as being appropriate, and that this court has only found that these measures fall short of the point where they could be held unconstitutional or illegal. I sincerely hope that the government and all those concerned in the administration of the livelihood protection system will give serious consideration to a more proper administration of the system, so that they may meet the people's expectations.

[Justices Matsuda and Iwata also wrote an opinion, in which Justice Kusaka joined, that this cause of action was inheritable. It continues:]

According to the opinion of the majority, this suit was terminated at Shigeru's death. This in turn means that this Court does not decide the issues on the merits. Each justice may and must express his opinion until a decision is reached. Once a decision is reached, however, he must obey such a decision. We, therefore, believe . . . that we should not express our views on the merits of this case. That would in effect mean that we consider the case on the assumption that this suit has not been terminated, contrary to the above decision of this Court. Even if we venture to express our views on the merits, such an opinion would be without any legal significance. . . .

Questions:

(1) Do you think the court should ever declare unconstitutional a statute which establishes a social security system?

(2) What do you think of the majority's expression of its views on the merits as an addendum to its opinion?

(3) Justice Tanaka talked about political morality at the end of his opinion. (It is by no means rare for a Japanese judge to preach on morality.) Do you think he should have refrained from making such a statement?

COMMENT

For an earlier case on Article 25, Paragraph 1 of the Constitution, see Supreme Court Judgment, September 29, 1948, 2

B. *Product Liability*

J. Mark Ramseyer

Products Liability Through Private Ordering: Notes on a Japanese Experiment*

144 *University of Pennsylvania Law Review* 1823, 1827–39 (1996)

II. Products Liability Law in Japan

A. Basic Products Liability

Until 1995, Japanese consumers bought products in a world governed by a general negligence regime. To sue on an accident involving a product, plaintiffs had to prove not just that the product had been defective but also that its manufacturer had been negligent. Effective July 1, 1995, the Japanese government changed the rule. With enormous hullabaloo, it substituted for negligence a strict liability standard for defective products. In fact, the change may have been less significant than the hullabaloo would suggest. In some spheres, Japanese courts had imposed standards close to strict liability already, and the concept of "defect" in the new law will probably still incorporate a cost-benefit approach resembling the classic Hand formula. . . .

B. The SG System

Unbeknownst to most Western observers for nearly two decades, many Japanese firms had already subjected themselves—voluntarily—to a strict products liability regime. In 1973, the Diet enacted the Consumer Products Safety Act and through it established the Product Safety Council. The Act itself explicitly authorized only a small mandatory regime. It authorized the Council to establish safety standards for a few hazardous categories of products and to ban those products that did not meet the standards. Within a short time, the Council had designated eight categories of such products: motorcycle helmets, baby beds, pressure cookers, baseball helmets, roller skates, mountain climbing ropes, carbonated soft-drink bottles, and bottle caps. Under the system, if a product met the safety standards, the Council let it use the "S" (for Safety) label. If the product failed to meet the standards, the Council forced it off the market.

Simultaneously, though, the Council began coordinating a separate, privately ordered products liability regime. Although the government had organized the Council, this second system was almost entirely extralegal. The 1973 Consumer Products Safety Act did not mandate it, and private firms did not need a statute to organize it. As noted below, firms in some industries have since organized similar systems completely independent of the Council.

This voluntary regime had four components: safety standards, testing, insurance, and a distinctive legal rule. Consider initially the first three components. First, the Council set safety standards for a variety of products. By 1994, it had established standards for 103 products, ranging from baby buggies, bunk beds, disposable lighters, and bicycles to pop bottles. . . .

Second, the Council tested products submitted to it by manufacturers. If a product met the safety standards the Council had just set, the firm could attach an "SG" (for Safety Goods) label. If the product failed the test, the firm simply sold it without the label. The firms involved paid the costs of these tests.

Firms had a choice of two types of tests. Most simply, they could submit a batch of the products to the Council. The Council would then test the batch, and if it passed, the firm could apply the SG mark to all items in that particular batch. More practically for mass-produced goods, the firm could ask the Council to inspect their product design and manufacturing processes. If a firm passed the test, it could apply the label to all of the items it produced using that design and process.

Within Japan, the Council retained several specialized testing organizations (for example, the Japan Electrical Appliance Testing Institute). At the outset, importers could use only the batch-testing process. By the mid-1980s, however, the Council had established testing arrangements with foreign testing organizations (for example, the Underwriters Laboratories). Foreign firms could have their designs and manufacturing processes certified as well.

Third, the Council insured those products for which it authorized the SG seal through a private carrier. It charged premiums that averaged about 0.5% of a product's retail price. As the mandatory S-label system provided no insurance, S producers who wanted to offer products liability coverage could also certify their products under the SG system. Many did, as the prominence of motorcycle helmets, pop bottles, pressure cookers, and roller skates [among the SG-certified products] attests.

Under the SG insurance, the Product Safety Council paid specified amounts to users injured by defective SG goods. Those firms that wanted to bundle a products-liability insurance contract with their goods could thus submit the products to the Council and pay a fee. The Council would test the products and, if they met its safety standards, would compensate users injured by them. Those firms that did not want to bundle products-liability insurance with their products could sell their wares independently. The rate of coverage varied by industry.

C. A Private Legal Regime

In effect, firms used the SG system to raise the legal standard by which they would be bound. Voluntarily, they replaced the negligence requirement in tort with a rule that allowed a user to recover if he or she could show three things: (1) that the product had been defective, (2) that he or she had been injured, and (3) that the defect had caused the injuries. For that process, the firms hired the Council to serve as judge, jury, and insurer.

Unfortunately, I lack the details on some of the program's more intriguing aspects. The Council apparently did not publish regulations or records of its decisions. We, thus, have only the rough outlines and second-hand accounts of some of its practices. Caveats about the lack of good data on some matters aside, the Council seemed to follow what for anyone but a lawyer would seem to be a straightforward approach: if a product broke in the course of normal use, the Council would pay damages; if it performed as a consumer should expect it to perform, or if a consumer ignored ordinary precautions, the Council would not. For example, if a little girl broke her leg because the wheels fell off her roller skates in normal use, the Council presumably would pay. If she broke her leg because it was her first time skating and she tried to skate down too steep a hill, the Council presumably did not. Consumers found the lack of detail acceptable because of the Council's—and the manufacturers'—interest in preserving future business.

By design, SG justice was cheap. The Council dispensed with much of the detailed proof courts demanded, and victims, therefore, could recover with less evidence either of a product's defect or of causation. From time to time, observers complained about the SG system, but usually they complained only that more products should be covered by the system. They rarely complained that the Council interpreted concepts like causation or defect too restrictively.

SG justice was also fast. The Council paid claims quickly. Sometimes, it even paid within a month. Indeed, if a claimant could show serious personal injury, unless he or she was clearly and exclusively responsible for the injury, the Council immediately paid ¥600,000 as interim aid. Even if the claimant later failed to prove his or her claim, he or she could still keep the ¥600,000. By contrast, . . . a claimant who sued in court commonly waited five years.

The Council capped its liability for personal injury at ¥30 million and paid no compensation for property

damages. The amount is low, but not egregiously so. It is the minimum coverage that automobile drivers must carry, and it lets most women and some men (particularly if they were comparatively negligent—Japan has a comparative negligence regime) collect the bulk of the amounts they could collect in court. . . .

In effect, the system coupled (1) broader coverage and cheaper claim procedures with (2) caps on damage awards. Two analogies come to mind. First, the system closely resembles the voluntary nineteenth-century workers' compensation systems: there too, the parties privately negotiated arrangements that combined broader coverage formulae with damage caps. Second, the system resembles many voluntary product warranties in the United States. Again, the warranties ease the process of proving claims, but in a variety of ways simultaneously limit the amounts recoverable.

Given its obvious appeal, the intriguing question may not be why Japanese manufacturers offered the SG system, as much as why American manufacturers do not—that is, why American warranties so often exclude personal injury claims. The answer probably lies (although the argument is speculative) in the hostility most American courts show toward disclaimers and liability caps. The SG firms could profitably offer the broader coverage in part because they could simultaneously limit awards. American firms can expand coverage, but cannot assume that courts will enforce any limits on awards they make pursuant to that broader coverage. Given the anticipated judicial hostility to damage caps, American firms cannot profitably broaden coverage.

. . . From 1974 to 1991, victims asserted 727 claims [under the SG system]. The Council recognized 339 complaints and paid aggregate compensation of about ¥156 million, or ¥460,000 per claim. . . . The most commonly recognized complaints involved disposable cigarette lighters. Others included baby buggies, swing sets, and step ladders.

Within a few years of the establishment of the SG system, firms in several industries outside the SG regime began similar but independent systems of their own. For instance, in 1974 the makers of large household items (for example, kitchen cabinets and integrated bathroom units) introduced the BL (Better Living) label. As of 1992, their system covered thirty-five products and paid up to ¥50 million per person and ¥500 million per accident. Toymakers now use the ST (Safety Toy) label and pay up to ¥10 million per victim for injuries from defective toys. The label covers about ninety percent of all toys sold. Fireworks manufacturers and importers began an SF (Safety Fireworks) label system in 1977 and pay up to ¥100 million per accident. The fireworks trade association has apparently used its clout to make coverage universal.

III. SG Claim Levels

There is a puzzle here. In nearly two decades, the Council has granted only 339 claims. [T]he harder puzzle[, however,] is not the number of claims paid; it is the number of claims filed. In nearly two decades, only 727 parties have asserted any claims. By contrast, in the United States (with roughly twice the population of Japan), claimants file 14,000 products liability claims per year in the federal courts alone.

Initially, three points seem relevant to this puzzle. First, the reason for the low claiming levels does not seem to lie with any dramatically restrictive policies at the Products Safety Council. True, if most potential claimants knew the Council demanded high levels of proof, then fewer people would file claims. Because only victims with the strongest claims would file, the forty-five percent success rate (339/727) would disguise how restrictive the Council has been. As noted earlier, however, in all of the controversy over the new Products Liability Act, few observers of any political stripe have claimed that the Council has been too restrictive.

Second, a few big tort disputes skew the American products liability data. Perhaps half of the recent cases have been asbestos cases. The Dalcon Shield and benedectin disputes stack the numbers higher still.

Third, the right benchmark by which to measure claiming levels is the number of victims, and for that purpose the 14,000 federal suits are notoriously misleading. Put somewhat polemically, the right benchmark is not how many people can plausibly file claims; it is not how many can convince juries that a manufacturer ought to pay their medical bills; it is not even how many people suffer product-related injuries. The right benchmark is how many people are injured each year by defective products (granted, the phrase hides a thousand sins), and there are precious few reasons to think that the American data track that benchmark much at all.

Instead of arguing before six novices culled from department of motor vehicle records, suppose American trial lawyers had to make their cases to engineers from the Underwriters Lab. That, after all, is pretty much what happens in the SG system. Probably, most observers would conclude that plaintiffs would file dramatically fewer claims. Probably, many would also conclude that outcomes would be more accurate. Perhaps—not to put too fine a point on it—claiming levels are high in the United States because juries sympathize with accident victims and are easy to fool. They are low under the SG system because the fact-finders know what they are doing.

Even given all this, the most important reasons that the Japanese SG claim figures fall far below the American products liability figures lie elsewhere: the reasons lie in the facts that the SG system (1) covers only a small segment of the Japanese economy and (2) disproportionately covers the safer products at that. After all, a total count of Japanese products liability claims would not just include SG claims; it would include the large number of claims against products not covered by the system. And there are many such claims. Firms in the health-care and recreational-products industries, for example, report over 200 claims a year. The Japan Federation of Bar Associations' Product Liability Hotline handles over 1000 calls annually. The Citizen Life Center—an organization heavily concerned with consumer affairs—handles nearly 1200 product-safety complaints a year. And in 1993 alone, the restaurant industry paid ¥22 million to over 8000 patrons.

Necessarily, moreover, the SG system will disproportionately cover the safest products. To see why, ask why Japanese consumers would want to pay for SG certification. They hardly want the insurance for its own sake. Japanese citizens are heavily insured: all Japanese are covered by the national health insurance system, and many carry elaborate life insurance policies in addition. Even if they wanted more insurance, why buy insurance tailored narrowly toward product-related accidents? Those Japanese consumers who want the SG certification are therefore relatively less likely to be consumers who need more insurance, than they are to be those who prefer safer products. For them, the value of insurance lies in the way it makes credible the manufacturer's assertions about safety. Effectively, by facilitating claims against the manufacturer, the SG system helps a firm "put its money where its mouth is." Effectively, it helps the manufacturers of the safest products make their promises about safety believable, and thereby gives them an advantage in the product market. And precisely because the SG system covers the safest products, it generates relatively few claims.

Ministry of International Trade & Industry
Guide to the Product Liability Law

1. *Introduction of the Product Liability System*

Through the rapid development of science and technology and aggressive innovation in economic activities, Japan has attained a society of mass production and mass consumption. On the other hand, because consumers use and consume high-tech and complicated products daily, their safety primarily depends on product manufacturers.

Therefore, in order to change the principle of liability for damages in product-related accidents from "negligence" to "defect," and [to] relieve the injured persons in a swift and appropriate manner, the Prod-

uct Liability Law shall come into force from July 1, 1995 . . .

2. *What Is Product Liability?*

(1) *Definition of Product Liability.* Product Liability shall be defined as liability for damages in such case as follows: (a) In the case where due to a defect in the delivered product, (b) a life, a body or property of another person (including a third party not using, or consuming the product . . .) is injured, (c) the person who manufactured, processed, imported or put his name, etc. on the product as business is liable for damages of the injured person.

(2) *Significance of Introduction of the Product Liability Law.*

(a) Previously in Japan, claims for damages have usually been made based on the Civil Code [§] 709 in case the injury is caused by a defect in the product. . . . [§] 709 employs the "fault-based liability (negligence) principle," and requires the "intention or fault" of the manufacturer, etc. as a condition for liability.

(b)The Product Liability Law takes the "defect in the product" as a condition for liability instead of the "intention or fault" of the manufacturer, etc. Therefore, after introduction of the Product Liability Law, the injured has only to verify the "defect in the product" for claiming damages. . . .

(3) *Point of the Product Liability Law* . . . . By definition, "product" means moveable property manufactured or processed. Therefore, incorporeal property such as services, information, software, electricity, etc. and immovables are not the object of the Law. Moreover, agricultural, forestal, marine and mineral products which are not processed artificially are not the object of the Law. . . .

[(4) *Definitions.*] A "defect" does not mean mere lack of quality of the product, but means lack of safety in the product which may cause the injury to life, body, or property. In the law, the term "defect" is defined as "lack of safety that the product ordinarily should provide," taking into account "the nature of the product", "the ordinarily foreseeable manner of use of the product," "the time when the manufacturer, etc. delivered the product," and other circumstances concerning the product. . . .

Meaning of "the nature of the product": This means the circumstances of the product itself, including factors such as the following, (i) representation of the product (instructions, warnings, etc. to prevent accidents); (ii) effectiveness and usefulness of the product (compared to its danger); (iii) cost vs. effect (the safety standard of products in the same price range); (iv) probability of occurrence of accident and its extent; (v) ordinary use period and durable period of the product . . . .

Meaning of "the ordinarily foreseeable manner of use of the product": This means the circumstances concerning use of the product, including factors such as the following, (vi) reasonably foreseeable use of the product; [and] (vii) possibility of preventing danger from occurring by the product user . . . .

SEVEN

Criminal Law

Japan is nothing if not safe. Rarely if ever does violent crime intrude into the lives of most ordinary middle-class Japanese (Bayley). Yet why Japan is safe and whether it is devoid of crime are different questions entirely. In the chapter that follows, we explore some of the issues involved in policing and prosecution. We examine organized crime (Milhaupt & West) and foreign criminals (Yokoyama). We explore the claim that low crime rates hinge on the way police integrate themselves into the community (Bayley). And we consider both (a) whether Japanese society does unusually well at re-integrating wrongdoers into the community (Haley), and (b) whether there is a "darker" side to public safety in the form of a potential political bias in policing (Ames) or large-scale investigative abuse (Foote, Miyazawa).