# EQUAL PROTECTION OF THE LAW

HIDENORI TOMATSU*

## I

## INTRODUCTION

Until the entry into force of the new Constitution in 1947, Japanese law did not recognize the principle of equal protection of the law. The Meiji Constitution contained no provision for equal protection except for a clause guaranteeing equal opportunity to public officials.[1] Under the present Constitution, the Japanese people have had forty-three years' experience in pursuing the doctrine of equal protection, introducing its acknowledged values into the statutory system and striving toward equality in society. Today, a number of equal protection issues have emerged, both in the political process and in society as a whole. Court decisions have accumulated and have produced judicial doctrines, although they are not as well-developed as in the United States.

This paper will trace the development of the equal protection principle of the Japanese Constitution over four decades. It will also point out some significant tendencies, with an emphasis on major litigation.

## II

## THE CONSTITUTIONAL BACKGROUND

In advance of case analysis, it will be helpful to look roughly at the constitutional and statutory provisions related to the equal protection principle. Article 14, section 1, of the Constitution provides that all people are equal under the law and forbids discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin. The concept of equality is given more concrete expression than, for instance, in the fourteenth amendment of the U.S. Constitution. Sections 2 and 3 of Article 14 prohibit the institution of peerage and its accompanying privileges, which existed under the Meiji Constitution. Article 26 guarantees the right of individuals to receive equal educations corresponding to their abilities. Article 24 declares the equal rights of husband and wife, and the essential equality of the sexes in family life. Article 44 prohibits discrimination in the electoral process for representatives of the Diet, and provides that while qualifications of members of both houses and electors shall be fixed by law,



* Professor, Faculty of Law, Seijo University.

1. Article 19 of the Meiji Constitution provided that a Japanese subject would be appointed equally to civilian or military government service and be able to engage in official government business in accordance with eligibility provided by statutes and orders.

there shall be no discrimination because of race, creed, sex, social status, family origin, education, property, or income.

From all these provisions, it is clear that the Constitution has the intent to embed both the concept of equality and the equal protection principle deeply into all political, economic, and social relations, and to prevent legally permissible discrimination, which was allowed under the Meiji Constitution. After the new Constitution was drafted, the government began to enact and amend statutory laws in accordance with the Constitution's requirement of equality under the law: The civil law was amended and the sections dealing with family relationships and inheritance laws were completely changed;[2] Penal Code provisions that impaired the dignity of the individual were deleted;[3] the new Public Officials Election Act enabled all the people to participate equally in the electoral process;[4] and the Labor Standards Act was also established,[5] enjoining employers from discriminating against employees in wages, hours of labor, and other conditions because of their nationality, creed, or social status.[6] These are only major examples among many statutory enactments and amendments. Note, particularly, that the statutory process was not exhaustive. After these sweeping changes, there remained in the law provisions of questionable constitutionality under the equal protection principle. In addition, broad social change has repeatedly raised new problems relating to equality and has forced reconsideration of what were regarded as worthwhile statutory corrections.

Two other elements must be considered in viewing the development over time of the equal protection principle: (1) the insufficiency of postwar legislation to eliminate old laws incompatible with the equal protection principle of the new Constitution and (2) postwar social change. Court decisions provide considerable insight into the development of the equal protection principle.

The following section analyzes three discrimination issues. The first analysis deals with the ambiguity arising from suspect classifications related to "race, creed, sex, social status, or family origin" in Article 14. The second analysis involves fundamental rights or interests, especially in electoral reapportionment cases. The third analysis concerns welfare laws where the equal protection principle is linked to the right to maintain the wholesome and cultured life guaranteed in Article 25. The first two analyses use the terminology of United States Supreme Court decisions. The third analysis combines the first two analyses and adds arguments that are characteristic of Japanese constitutional law.

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2. MINPŌ (CIVIL CODE), Law No. 222, 1947.
3. KEIHŌ (PENAL CODE) was revised in 1947.
4. The Public Officials Election Act (Kōshku Senkyo Hō), Law No. 100, 1950.
5. The Labor Standards Act (Rōdō Hō), Law No. 49, 1947.
6. *Id.* art. 3.

## III

## JUDICIAL REVIEW OF DISCRIMINATORY LAWS AND POLICIES

### A. The Patricide Case

In the exercise of judicial review under Article 81 of the Japanese Constitution, the first Supreme Court decision that held a legislative act unconstitutional was the patricide case of 1973.[7] The Court denied the constitutionality of Article 200 of the Penal Code because it provided discriminatory penalties for different categories of murder. Article 200 prescribes the death penalty or life imprisonment for a person who kills a lineal ascendant, while Article 199 provides that other cases of murder may be punished by not less than three years' imprisonment. Similar discrepancies exist with respect to other offenses against lineal ascendants.[8] These clauses were not changed when the Penal Code, which provides more severe punishment for persons who inflict bodily injury resulting in the death of their own or their spouse's lineal ascendants, was amended after the new Constitution was promulgated and the clauses have since been challenged repeatedly.

In 1950, four years after the birth of the new Constitution, the Supreme Court had an opportunity to review whether Article 205, section 2, of the Penal Code was constitutional under the equal protection principle.[9] This clause provides that persons who inflict bodily injury resulting in the death of their own or their spouse's lineal ascendants shall be punished more severely than those who inflict similar bodily injury on nonascendants. The lower court held that the clause unconstitutionally violated the equal protection principle.[10] However, the Supreme Court dismissed the lower court decision, ruling that the clause relating to lineal ascendants reflected a moral postulate, and that the morality ruling relationships among family members involves a fundamental truth of universal human morality, and thus is in the realm of natural law.[11] The Supreme Court rejected the lower court's argument that the old morality governing family relationships was feudalistic and anti-democratic, a view that had developed in the early years of the new Constitution.

Nevertheless, the Supreme Court's 1950 decision gave a new construction to the meaning of the provision in the Penal Code regarding more severe punishment for the murder of ascendants. But the Court's construction was

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7. Aizawa v. Japan (The Patricide Case), 27 Keishū 265 (Sup. Ct., G.B., Apr. 4, 1973) (*aff'g* 1 Keisai Geppō 544 (Utsunomiya Dist. Ct., May 29, 1969) *and rev'g* 619 Hanrei Jihō 93 (Tokyo H. Ct., May 12, 1970)).

8. *See* PENAL CODE, art. 205, § 2; art. 218, § 2; art. 220, § 2.

9. 4 Keishū 2037 (Sup. Ct., G.B., Oct. 11, 1950) (*rev'g* 4 Keishū 2070 (Fukuoka Dist. Ct., Iizuka Br. Jan. 9, 1950)).

10. *Id.* at 2070.

11. *Id.* at 2126.

not persuasive. Criticism of the Court's decision[12] with respect to Article 200 was severe. The decision was handed down immediately after the Article 205 case in 1950 and was based mainly on the reasoning in that case. In the later case, the Supreme Court seemed so doubtful of the rationale for the severe difference of penalties between Articles 200 and 199 that it resorted to a skillful but weakly-based argument in order to avoid applying the more severe penalty of Article 200 to the accused.[13] Almost twenty-five years later, the 1973 decision appeared.[14]

The defendant in the 1973 case was a young woman who had been sexually abused by her father since she was fourteen. She had borne several children and was forced to continue the incestuous relationship even after she had the chance to get married. Driven by a feeling of hopelessness about the future, she choked her father to death while he was in a drunken sleep. She was indicted for patricide. The court of first instance held Article 200 unconstitutional and applied Article 199, but exempted her from penalty on the ground of justifiable self-defense.[15] On appeal, the higher court dismissed the district court's decision and sentenced her to three years and six months in prison.[16] The divergent views of the lower courts on the constitutionality of Article 200 arose from a difference in their attempts to reconcile the requirements of Article 200 to the defendant's tragic situation. The Supreme Court was obliged to seek an answer to this pressing question under the equal protection principle of the Constitution.

The Supreme Court was divided on the issue of the constitutionality of Article 200. The majority opinion stated that the Article's purpose was to punish more severely murderers of lineal ascendants and to deter such crimes because the murder of ascendants is more a violation of social morality than is the murder of a stranger; that respect for ascendants is the most fundamental of social mores and should be protected by the Penal Code; and that introducing this moral requirement into penal provisions is neither unreasonable nor an infringement upon Article 14, section 1, of the Constitution. However, the majority found unreasonable the provision of Article 200 that imposes the extreme penalty. It concluded that Article 200 of the Penal Code violated Article 14, section 1, of the Constitution because the penalty fixed by Article 200—death or life imprisonment—went far beyond the necessary bounds and was extremely discriminatory when compared to the penalties fixed by Article 199 in general murder cases.

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12. Criticisms of the decision are in case comments such as Takigawa, 200 JURISTO 104 (1960); Kakudo, *Juristo*, in KENPŌ HANREI HYAKUSEN 21 (1963); Kobayashi, *Jurisuto*, in KENPŌNO HANREI 14 (1966).

13. 4 Keishū 2037; *see also* 11 Keishū 824 (Sup. Ct., G.B., Feb. 2, 1957) (in which the Court said that a spouse's lineal ascendant in Article 200 meant a living spouse's lineal ascendant and applied Article 199 to the defendant whose husband was deceased when she committed the crime).

14. 27 Keishū 265.

15. 1 Keisai Geppō 544.

16. 619 Hanrei Jihō 93.

The concurring opinions written by Justice Jiro Tanaka and five other justices argued that the purpose of Article 200 was on its face unconstitutional as a violation of the equal protection principle. Justice Shimoda dissented from both positions and stressed that the determination of the penalty in the law was a matter of legislative policy, not a constitutional issue.

Soon after the decision, in 1974, a Petty Bench of the Supreme Court held that Article 205, section 2, of the Penal Code (providing a more severe punishment for murderers of ascendants) was constitutional.[17] The Petty Bench followed the majority interpretation of Article 200 in the previously discussed 1973 Grand Bench decision. Thus, the Supreme Court established a doctrine on the constitutionality of the Penal Code provisions that treat differently crimes against lineal ascendants. In brief, this doctrine reads as follows: The purpose of the provisions is constitutional (that is, to differentiate between ordinary murder and the murder of ascendants), but the penalty fixed by law for the murder of ascendants is unconstitutional if the penalty is extremely severe and disproportionate to that fixed for ordinary murder.

Legal scholars who agree with the concurring opinion in the 1973 decision criticize this doctrine. They state that the very purpose of the lineal ascendants murder provision conflicts with the present Constitution's principle of equality of every individual's value and dignity, since the law is rooted in the family morality of Confucianism and supports the prewar family system (Ie Seido).[18] They also contend that the legislature intended to maintain the authority-obedience relationship of the old family system between parents and children, and that the intent gave rise to penalties so extreme that they cannot be legitimized by the universal morality that the majority opinion acknowledges. Legal scholars state that the majority opinion is illogical because once the purpose of the provision was found constitutional, the choice of penalties should be entrusted to legislative discretion.

The basis for judicial review adopted by the majority opinion in this case is also not entirely clear. Since the appeal involved a challenge to the sentence imposed, the Court should have reviewed the constitutionality issue with a strict focus on the difference in the punishments for the two types of murder. According to some scholars, however, the majority seems to have resorted to an attempt to find a rational basis for differentiating between the two types.[19]

Under the 1973 Supreme Court decision, the solution of the problem of discriminatory punishment was left to the National Diet. The Diet seemingly had two options: to delete Article 200 from the Penal Code or to amend the penalties to eliminate the extreme penalties imposed on murderers of lineal

17. 28 Keishū 329 (Sup. Ct., 1st P.B., Sept. 26, 1974).

18. *See* 6 R. HIRANO, HŌRITSU JIHO 55 (1973); Kubota, *Sonzoku Satujin ni kansuru Kitei to Hōno Moto no Byōdo*, 565 JURISUTO 9 (1974); Kagawa, *Case Comment*, 700 HANREI JIHŌ 172 (1973); Otsuka, *Sonzoku Satsujin ni taisuru Iken Hanketsu wo megutte*, 532 JURISUTO 49 (1973).

19. *E.g.*, Munesue, *Sonzoku Jūbatsu Iken Jiken*, in HŌGAKU SEMINAR ZOKAN KENPŌ SOSYŌ 86-87 (H. Zokan ed. 1983); Kichi Yokota, *Gōrisei no Kijun*, in 2 KŌZA KENPŌ SOSYŌ 184 (N. Ashibe ed. 1987).

ascendants. So far, however, the Diet has not altered Article 200. The Diet's failure to act in accord with the Court's decision is primarily due to the difficulty of reaching a consensus among the Diet's members, especially those belonging to the ruling Liberal Democratic Party.

In practice, public prosecutors have adopted the policy that they will not prosecute under Article 200. As a consequence, the crime of lineal ascendant murder has effectively disappeared. The longer this situation continues, the more established becomes the practice that murder cases are limited to those of ordinary murder under Article 199. Whether the equal protection principle permits such a contradiction between statutory provisions and prosecutorial practice remains for the Supreme Court and the Diet to decide.

### B. Gender and Creed Discrimination

The cases discussed above have emerged in the development of the equal protection principle as it relates to the classification of suspects in the crime of murder. Other cases deal with discrimination according to gender and creed.

The most important case in which the Supreme Court adjudicated claims of gender discrimination is the Nissan Car Corporation case.[20] Nissan had a rule requiring women to retire five years earlier than men. Nine women employees were fired by the company for protesting the rule. The fired employees sued, alleging that the rule should be nullified because it conflicted with Article 90 of the Civil Code, which provides that any juristic act contrary to public policy or good morals is null and void. Both the district court and high court held that the rule violated Article 90. In 1981, the Supreme Court agreed, stating that the rule unreasonably affected women employees as a group, on the assumption that their capacity for work decreases earlier than that of men, without consideration of individual circumstances.

In this case, the plaintiffs did not directly allege violation of the equal protection principle because the issue involved relationships between private parties. However, the equal protection principle was used in order to interpret the meaning of public order or good morals mandated by Article 90 of the Civil Code. The Supreme Court announced in this case that the equal protection principle should be applied to matters of civil law. The Court thus established the doctrine that treatment based predominantly on the grounds of sex constitutes unreasonable discrimination.

Until this 1981 Supreme Court decision, the lower courts had often held that discriminatory labor conditions against women employees were illegal. But the Supreme Court's doctrine provided a broad, firm basis for application of the equal protection principle to matters of gender discrimination. It is not clear, however, whether this judicial doctrine will be applied to all legal actions in society, and to what extent judicial scrutiny will be applied to gender discrimination. Furthermore, it is not clear whether this doctrine applies to de facto discrimination as well as to legal actions.

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20. 35 Minshū 300 (Sup. Ct., 3d P.B., Mar. 24, 1981).

Discrimination against women has become a lively topic in Japan recently. For example, the Diet has passed several statutes, such as the Equal Opportunity for Employment Law[21] and amendments of the Nationality Law and the Family Register Law,[22] designed to require equal treatment for women. These enactments should strengthen the judicial doctrine of equality before the law.

The last case to be discussed in this context is also a civil suit, the Mitsubishi Jushi Corporation case.[23] A university graduate was employed by the Mitsubishi Jushi Corporation, a leading company in Japan. The company refused to appoint him as a regular employee after his three-month training period because he allegedly failed to record in his personal history his membership in a student political group. The student sued the company, claiming that its failure to employ him discriminated against him on the basis of his political beliefs. Although the lower courts ruled in his favor, the Supreme Court in 1973 overturned the high court decision. The Court held that the principle of private autonomy was controlling in private relationships where it was necessary to reconcile the economic freedom of a corporation with the constitutionally guaranteed fundamental freedom and equality of the individual. The Court indicated that the company enjoyed the freedom of contract and was therefore free, in the absence of statutory or other regulations, to determine whom it would employ, and under what conditions that employment would take place. Therefore, it could not be illegal and unconstitutional for the company to refuse employment to an individual because of his political beliefs. The Court supported its reasoning by holding that Article 14 of the Constitution did not directly apply to the private relationship involved, and that Article 3 of the Labor Standards Act,[24] which prohibits discriminatory treatment by a company because of an employee's nationality, creed, or social status, applies to labor conditions after employment but not to the act of employment itself.

This Supreme Court decision has provoked much discussion by legal scholars. Special attention should be paid to the Court's attitude toward gender and creed discrimination in private social relationships. In the two discrimination cases described above, the Court was more assertive in reviewing gender discrimination than creed discrimination. In the former case, the Court provided relief to the female plaintiffs even though the Labor Standards Law contained no provision regarding gender discrimination, except for a prohibition of wage discrimination against women. In the latter case, the Court intervened between the employer and the employee to the disadvantage of the latter, setting limits on the prohibition of creed discrimination in the Labor Standards Act. Because creed discrimination

21. The Equal Opportunity for Employment Law (Danjo Koyō Kikai Kintō Hō), Law No. 45, 1985.

22. The Law to Amend Parts in the Nationality Law and the Family Register Law (Kokuseki Hō oyobi Koseki Hō no Ichibu wo Kaisei suru Hōritsu), Law No. 45, 1984.

23. 27 Minshū 1536 (Sup. Ct., G.B., Dec. 12, 1973).

24. *See* Labor Standards Act, *supra* note 5.

cases may lead to controversies involving political ideology, the Court is apt to take a cautious attitude in disposing of such disputes. On the other hand, the Supreme Court took a relatively active attitude in gender discrimination cases and in the lineal ascendants murder cases, which did not immediately raise political issues. It may be that the Supreme Court recognizes changing social attitudes about gender and family, but not differences in political creed in the employment context.

## IV

## COURT ENFORCEMENT OF EQUAL PROTECTION IN THE POLITICAL PROCESS: THE REAPPORTIONMENT CASES

The realization of equality in the political process is one of the major requirements of the Constitution, as was indicated in the overview of constitutional provisions in Part I. There has been at least some progress in reapportionment cases.

The Supreme Court has delivered five decisions in apportionment cases involving both houses of the Diet; in two decisions, the Court held unconstitutional the apportionment for seats in the House of Representatives.[25] In the history of judicial review under the present Constitution, it is striking to note that, of the six cases in which the Supreme Court has held a legislative act unconstitutional, one-third of them involve reapportionment cases.[26]

The 1964 decision by the Supreme Court led the way for the later development of reapportionment cases.[27] In the 1964 case, voters claimed that in some House of Councillors election districts, it took four times the number of voters to elect one candidate than in other districts, and that this malapportionment violated the constitutional principle of equal protection. On that ground, the plaintiffs sought to have the election of July 1962 declared void. The Supreme Court affirmed the high court's holding that suits demanding nullification of elections on grounds of malapportionment were justiciable under Article 204 of the Public Officials Election Act, even though the Act did not originally anticipate that kind of suit. Upholding the constitutionality of the apportionment ratio established by law, the Supreme Court ruled that such matters were in principle entrusted to the discretionary power of the Diet as the sole lawmaking organ and that, in deciding such matters, the Diet could consider not only population, but also other elements, such as the size and history of electoral districts and the balancing of

25. Kanao v. Hiroshima Election Mgmt. Comm'n, 39 Minshū 1100 (Sup. Ct., G.B., July 17, 1985); Kurokawa v. Chiba Prefecture Election Comm'n, 30 Minshū 223 (Sup. Ct., G.B., Apr. 14, 1976).

26. The other four decisions are Hiraguchi v. Hiraguchi, 41 Minshū 408 (Sup. Ct., G.B., Apr. 22, 1987) (partition requirement for a forest owned in common under the Forest Law); Umehara v. Japan (The Pharmacy Case), 29 Minshū 572 (Sup. Ct., G.B., Apr. 30, 1975) (distance requirement under the Pharmaceutical Law); 27 Keishū 265 (the Patricide Case); 16 Keishū 1593 (Sup. Ct., G.B., Nov. 28, 1962) (confiscation of third party's property).

27. Koshiyama v. Tokyo Election Mgmt. Comm'n, 18 Minshū 270 (Sup. Ct., G.B., Feb. 5, 1964).

representation among local administrative districts. Later malapportionment cases have been based on these holdings.

The 1976 Grand Bench decision[28] held that an approximately one to five deviation in the ratio of voters between rural and urban areas per Diet member in the House of Representatives was constitutionally impermissible and beyond the limits of the legislature's discretionary power. The Supreme Court emphasized in its reasoning that the right to vote has great historical significance as a product of popular political struggle and that the constitutional provision for equal protection of the law was aimed at a thorough equalization of voting rights, so that the people should be equal in the enjoyment of their political values. Therefore, the Court asserted that the Constitution not only prohibits discrimination in qualifications for electors but also requires equality in the value of the vote of every elector. The Supreme Court shifted gears at the next step, however, stating that equality in the value of the vote cannot be determined in mathematical terms alone. Without proceeding to a strict scrutiny of the constitutionality of malapportionment, the Court recognized the discretionary power of the legislature in fixing the rate of apportionment. Allowing for those elements that the Diet could take into consideration, the Supreme Court judged that deviation was constitutionally impermissible only if it went beyond the limits of the legislature's discretionary power.

The Court's judgment also considered whether the Diet had corrected the malapportionment within a reasonable time. This analysis means that the apportionment challenged as unconstitutional is not to be so considered if a reasonable time for revision by the Diet had not yet elapsed. Because the rate challenged in this case had been in effect for more than eight years, the Supreme Court concluded that it was unconstitutional.

Furthermore, in this case, the Supreme Court devised a method called "circumstance decision" for announcing its decision. That is to say, the Court held only that the apportionment rate in question was unconstitutional but did not declare the election void because of the circumstances created by nullification of the election. This type of decision does not deal with the interpretation of specific statutes but is based only on the general principles of law.[29]

The judicial doctrines produced through those two Grand Bench decisions had considerable impact on subsequent reapportionment debates, both in society at large and in the political and judicial spheres. It is important that the Court opened the gate for additional suits challenging legislative apportionments. While the Diet has been reluctant to make drastic revisions of the apportionment rate, citizens have continued to challenge the rate in the courts. The Supreme Court's decisions produced no clear standard for

28. 30 Minshū 223.

29. Article 31 of the Administrative Cases Procedure Act stipulates the method of circumstance decision, but Article 219 of the Public Officials Election Act does not apply it correspondingly. Therefore, the Court relied upon the general principles of law.

determining constitutionally permissible differences in apportionment; as a result, confusion has occurred in the high court decisions. For instance, one court held constitutional a certain degree of difference and another held unconstitutional the same degree of difference.[30] Because the device of the circumstance decision does not immediately force the Diet to follow the Supreme Court's holding, unconstitutional violations of the equal protection principle in apportionment have been continuing.

Criticism of the Supreme Court's position was aroused when in 1983 it handed down a decision[31] holding constitutional the rate of apportionment on the grounds that a reasonable amount of time had not elapsed since the last revision, even though the Court acknowledged unconstitutionality inherent within the apportionment scheme. Five years had passed from the 1975 revision of the apportionment rate until the election of June 1980, which was at issue in this decision. Some critics felt that five years was more than enough time for the Diet to have made revisions. The Supreme Court remarked that the decrease of the rate of deviation in apportionment from the earlier rate of 1 to 4.83, to the later rate of 1 to 2.92 had eliminated the unconstitutionality of the situation. Some people wondered whether the Supreme Court had established that an approximately 1 to 3 deviation was constitutionally acceptable. It can be said at least that the Supreme Court was thinking of a less strict standard of deviation, for it did not accept the high court's assertion in this case that a deviation of more than 1 to 2 violated the equal protection principle.[32] Furthermore, the Court expressed a strong expectation that the Diet would revise as early as possible the deviation rate, which was 1 to 3.94 at the time of the decision. This was only an expectation, however, with no legally binding force.

Then, on July 17, 1985, a Grand Bench decision[33] came down, again holding the apportionment rate unconstitutional. On this day, the Supreme Court dealt with appeals from the high courts in Sapporo, Tokyo, Osaka, and Hiroshima, all of which had held the apportionment rate for members of the House of Representatives unconstitutional, relying on the device of circumstance decision. The deviation was 1 to 4.40 at the time of the election of December 1983. In light of precedents, the Supreme Court's decision was not regarded as a landmark. The Supreme Court expressed irritation at the Diet's slow reaction to the Court's holding in the form of a circumstance decision. Four justices joined in an opinion emphasizing that the Diet should correct the apportionment rate as soon as possible and warning that the Court

30. *See* decisions of Tokyo High Ct., Sept. 11, 1978.

31. Tokyo Metropolitan Election Comm'n v. Koshiyama, 37 Minshū 1243 (Sup. Ct., G.B., Nov. 7, 1983) (*rev'g* 984 Hanrei Jihō 26 (Tokyo H. Ct., Dec. 23, 1980)). For criticisms, see Koshiyama, Nonaka & Yoshida, *Shūin Teisū-Haibun Dai-Hōtei Hanketsu to Saikōsai*, in 2 HŌGAKU SEMINAR 16 (1984); Shinohara, Ashibe & Uchida, *Shūgiin Dai-Hōtei Hanketsu to Daihyōsei no arikata*, 806 JURISUTO 6 (1984); Takahashi, *Teisū Fukinko Sosyō no Hanrei Riron no Genkyō to Mondaiten*, 42 HOGAU KYŌSHITSU 95 (1984); Toshihiko Nonaka, *Shūgiin-Giin Teisū Dai-Hōtei Hanketsu no Igi to Mondaiten*, 806 JURISUTO 21 (1984).

32. 984 Hanrei Jihō 26.

33. 39 Minshū 1100.

might render a decision nullifying a future election if it were held without any correction in the apportionment rate. If the Court does so, it will have inspired a law. However, as it was anticipated at the time of this decision that the Diet would soon revise the apportionment rate, it was not expected that the Court would carry out its threatened action.

The decisions discussed above concern reapportionment cases for members of the House of Representatives. As to the cases involving elections of the members of the House of Councillors, no progress has been made by the Supreme Court. The Court has recognized very wide discretionary power in the Diet to determine apportionment in upper house elections. The Court's main reasoning centers on the different characters of the two houses. In its 1983 decision,[34] the Court declared that the establishment of electoral procedure for the House of Councillors is a matter of legislative policy. Therefore, the Court affirmed that the requirement of the equality of the value of the vote in elections for the House of Councillors was not as strong as in elections for the House of Representatives, which are based upon apportionment determined by population.

As a matter of fact, the nature of the House of Councillors has been controversial since the Constitution substituted it for the old House of Peers. The Supreme Court can be faulted, however, for not providing more persuasive reasoning to justify the 1 to 5 difference in apportionment that was at issue in the 1983 case.

It is interesting that the Supreme Court has ordered considerably tighter requirements in apportionment for the election of members of local government assemblies.[35] In such cases, the Supreme Court does not have to apply the equal protection principle directly to a malapportionment situation because Article 15, section 2, of the Public Officials Election Law provides that apportionment for local government assemblies should be fixed by ordinance in proportion to the population. It is clear that this provision is in accord with the Constitution's equal protection principle and that the Supreme Court is capable of affirming a statutory provision designed to realize the constitutional principle. However, the Court has taken a prudent attitude in applying the constitutional principle directly to such cases. Eventually, the Court will be obliged to indicate its own understanding of the constitutional issue involved. However, this reluctance to apply a constitutional principle directly to cases is a typical tendency of the Supreme Court in its exercise of judicial review.

34. Shimizu v. Osaka Election Comm'n, 37 Minshū 345 (Sup. Ct., G.B., Apr. 27, 1983).
35. *See, e.g.*, 38 Minshū 721 (Sup. Ct., 1st P.B., May 17, 1984).

## V

## THE APPLICATION OF THE EQUAL PROTECTION PRINCIPLE TO WELFARE RIGHTS

The right to maintain the minimum standards of "wholesome and cultured living" in Article 25 of the Constitution has been the subject of controversy among constitutional scholars since its adoption. The main issue in scholarly discussions is whether Article 25 sets forth only the government's responsibility for protecting the right or guarantees the substance of the right. The guarantee of the right, some think, depends on which view the Court holds when the constitutionality of welfare laws is challenged. However, there has been little discussion of how the equal protection principle relates to welfare cases. In other words, many scholars think that to question the constitutionality of certain welfare statutes is to ask the meaning of Article 25.[36]

The *Horiki* case of 1982[37] was the first case in which the Supreme Court tried to answer the question of how the equal protection principle applies to welfare rights. The plaintiff in this case challenged the constitutionality of a provision in the Juvenile Allowance Law[38] that denied an allowance to a mother who received welfare benefits for her physical handicap under the National Annuity Law.[39] The district court held this provision's ban on dual benefits unconstitutional,[40] stating that it violated the equal protection provisions of the Constitution because it discriminated against a family consisting of a mother and a child receiving welfare benefits for her physical handicap as compared to a three-member family including a father or a healthy mother with a child seeking the same benefit. This decision by the district court strongly influenced the Diet, which deleted the provision from the Juvenile Allowance Law. The Welfare Ministry, however, pressured the governor, who was in charge of welfare administration, to appeal the case. The nature of the case then shifted from the propriety of providing the indigent physically handicapped mother with a remedy under the equal protection principle to the general responsibility of the government to make real the right to "wholesome . . . living" guaranteed in Article 25.

Dismissing the district court decision, the high court focused its reasoning on the meaning of Article 25.[41] It determined that section 2 of Article 25, which covered the Juvenile Allowance Law, set forth the government's

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36. *See, e.g.*, A. OSUKA, SEIZONKEN RON (1984); Fujii, *Seizon to Jinken*, in 2 KENPŌ KŌGI 229 (A. Osuka ed., 1979); Nakamura, *Hō no moto no Byōdo to "Gōriteki Sabetsu,"* 45 KŌHŌ KENKYŪ 40, 45 (1983).

37. Horiki v. Governor of Hyogo Prefecture, 36 Minshū 1235 (Sup. Ct., G.B., July 7, 1982) (*rev'g* 23 Gyōshū 711 (Kobe Dist. Ct., Sept. 20, 1972) *and aff'g* 26 Gyōshū 1268 (Osaka H. Ct., Nov. 10, 1975)).

38. The Juvenile Allowance Law (Jidō Fuyō Teate Hō), Law No. 238, 1961, art. 4, § 3, n.3. Under Article 4, section 1, of the Juvenile Allowance Law, a divorced mother who brings up her children is entitled to the benefit.

39. The National Annuity Law (Kokumin Nenkin Hō), Law No. 141, 1959.

40. 23 Gyōshū 711.

41. 26 Gyōshū 1268.

responsibility for enacting affirmative policies to prevent poverty, while section 1 covered the government's responsibility to adopt specific, supplementary policies to relieve existing poverty. With this understanding, the court stated that it was not for judicial decision but for legislative discretion to determine the wisdom of the legal provision banning dual benefits, and concluded that, by enacting this provision, the legislature had neither departed excessively from its discretionary power nor abused its power.

Although the Supreme Court ignored the high court's doctrine regarding the difference between sections 1 and 2 of Article 25, it too granted the legislature wide discretionary power in determining welfare policies. The Court unanimously stated that the determination of how to take a particular legislative action under the intent of Article 25 was entrusted to the wide discretion of the Diet, and that it was improper for the court to review the Diet's action unless it was found to be extremely unreasonable and a clear departure from, and an abuse of, its discretionary power.

The Supreme Court in the *Horiki* case established for the first time a doctrine on the relationship between Article 25's guarantee of the right to wholesome living and the provisions of the welfare law. That is, the guarantee of Article 25 depends largely upon the legislature's wide discretion. But this doctrine could have been anticipated in light of the Court's obiter dictum in the *Asahi* case,[42] where the Court suggested that Article 25, section 1, of the Constitution did not directly guarantee a right to be enjoyed by each individual, but only set forth a government responsibility in the matter. Avoiding reference to the *Asahi* case, the Court in the *Horiki* case depended upon the Food Control Law case of 1948[43] as precedent for its doctrine. This precedent is questionable, however, because the Food Control Law case was a criminal case, not civil as in *Horiki*, and the Law's purpose was to distinguish between the people's economic activities and their welfare rights. Nevertheless, the Court's assertion in the *Horiki* case made it clear that the guarantee of Article 25 does not enjoy strong judicial protection. The only resort is judicial relief under the equal protection principle.

After its judgment on the right to wholesome living, the Supreme Court added remarks on the equal protection issue. It said that regarding the receipt of the juvenile allowance, even though the application of the provision banning dual benefits discriminated between a handicapped person such as the appellant and a nonhandicapped person, the discrimination could not be judged as without reasonable grounds under the total consideration of all factors that might be involved in such a case.

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42. Asahi v. Minister of Health and Welfare, 21 Minshū 1043 (Sup. Ct., G.B., May 24, 1967) (*rev'g* 14 Gyōshu 53 (Tokyo Dist. Ct., Oct. 19, 1960) *and aff'g* 21 Minshū 1043 (Tokyo H. Ct., Nov. 4, 1963)).

43. 2 Keishū 1235 (Sup. Ct., G.B., Sept. 29, 1948); *see also* The Food Control Act (Shokuryō Kanri Hō), Law No. 40, 1942.

Such brief statements are not sufficient to establish precise legal doctrines on the equal protection principle as applied to welfare cases. At least, however, the Supreme Court has admitted that alleged violations of the equal protection principle can be used as the basis for bringing welfare suits, whether or not violation of the Article 25 guarantee is involved. The Court also indicated in this case that the standard for judicial scrutiny should be no more than a rationality test. This test seems to be derived from the Court's finding of a classification under the Juvenile Allowance Law. As described above, the Supreme Court found that the classification involved in the law was the one between a nonhandicapped person and a person who, like the appellant, was handicapped and thus eligible for a benefit. This finding makes an interesting contrast with the district court's finding that discrimination existed between a family of a single-parent mother and child receiving welfare benefits for the physically handicapped mother and a two-parent, three-member family of a handicapped father receiving the benefit or a nonhandicapped single-parent mother who was bringing up a child receiving the benefit. The district court seems to have found gender discrimination in the law. This may represent a misinterpretation of the law, however; some commentators doubt whether the two-parent, three-member family mentioned is in the same class or category as the single-parent plaintiff of the case. It is worth asking, however, whether the Supreme Court would apply a stricter standard of scrutiny if it found gender discrimination in the welfare statute. Of course, the Court in the *Horiki* case did not refer to this question, which remains to be settled by future cases.

There is one lower court decision that involves gender discrimination in welfare cases. In the *Makino* case,[44] the plaintiff, Makino, was a housewife who was due to receive an old-age pension at the age of seventy, under the National Annuity Law.[45] Makino alleged that the married couple limitation clause of the law, under which her pension was reduced because her husband was already receiving a full pension benefit, was unconstitutional. The district court held the clause unconstitutional, stating that it could not find any reasonable ground for discrimination on the pension eligibility between the wife in a marriage and a single woman without considering their real situations. This provision of the law seemed to be based on the assumption that an old married couple would need a smaller pension than two single people. Consequently, the classification challenged in this case may not have directly involved gender discrimination. It is not impossible, however, to find an assumption behind the classification that the wife could exist on her husband's income and therefore should accept a smaller pension. This reasoning paralleled the reasoning in the *Horiki* case on the equal protection principle.

The *Makino* case ended at the district court level, because the Diet deleted the married couple limitation clause from the law, and the governor

44. Makino v. Japan, 19 Gyôshû 1196 (Tokyo Dist. Ct., July 15, 1968).
45. *See* National Annuity Law, *supra* note 39.

responsible for administering the law did not appeal the case. The same issue was decided contrary to the *Makino* case, however, by lower courts.[46] Therefore, the Supreme Court was expected to explain its opinion clearly enough so that the welfare law and the equal protection principle would be reconciled. That did not happen in the *Horiki* case.

Subsequent events have proved disappointing. The Supreme Court has used the *Horiki* case as a precedent to dispose of all welfare cases[47] and has taken a hands-off attitude toward welfare cases. At present, no new developments in the application of the equal protection principle to welfare cases can be expected.

## VI

## CONCLUSION

The discrimination decisions described above are confined to major cases. Other types of discrimination, such as discrimination against foreigners, in economic activities, and against taxpayers have also come under judicial scrutiny. The courts have handled them in ways indistinguishable from those in the major cases discussed here. Therefore, in the light of the three areas of discrimination described so far, I will summarize how the equal protection principle in the Japanese Constitution has had an impact on discrimination, and point out some problems to be solved.

Two elements in the development of the equal protection principle were mentioned in Part II of this Article. The first element, insufficiency of postwar legislative actions against laws incompatible with the equal protection principle of the new Constitution, is clearly revealed in the patricide cases. The Supreme Court took time to affirm the equal protection principle in the provisions of the Penal Code, but the result is unsatisfactory because the challenged provision still remains in the Penal Code.

The second element, which is social change, is closely related to the first. Typical examples are found in gender discrimination and reapportionment cases. In gender discrimination cases, the Supreme Court has rejected traditional antifemale assumptions, thus seemingly adopting society's changing consciousness of women's positions. In reapportionment cases, voters discontented with malapportionment arising from population changes in cities and rural areas called upon the Court to equalize the value of the vote. The Court responded more favorably than in other areas of discrimination. A full solution depends on action by the Diet to conform to the Court's decision.

Thus, the interrelationship between the judiciary, on the one hand, and the political divisions, that is, the Diet and the executive branch, on the other hand, will play a determining role in making the equal protection principle a

46. 27 Gyōshū 1836 (Osaka H. Ct., Dec. 17, 1976); 25 Gyōshū 1395 (Kobe Dist. Ct., Oct. 11, 1974).

47. Those decisions are not even registered in the Minshū.

reality. In reapportionment cases, the Supreme Court did not directly attack malapportionment. Instead, the Court recognized the Diet's discretionary power, established loose standards—such as a reasonable time for action and a 1 to 3 deviation rate in apportionment—and further created the device of "circumstance decision." In addition, the Court has expressed irritation with the Diet's slow compliance with its decisions.

In welfare cases, although the lower court decisions[48] required immediate compliance by legislative and administrative branches of government, the Supreme Court has been highly deferential to the government's welfare policies and has exercised restraint in its relations with government organizations. Its hands-off attitude has convinced indigent people that they cannot expect judicial remedies for their plight. Similarly, the Court relies fully upon the political process to eliminate malapportionment in the House of Councillors. All in all, the judiciary has been reluctant to assume leadership in projecting the values of the equal protection principle into the political and social relationships of society.

Against the background of this tendency, it is possible to analyze judicial doctrines regarding the equal protection principle. The Supreme Court employs the test of rationality, or mild scrutiny, in reviewing constitutionality in equal protection cases. It has never resorted to strict judicial scrutiny and has been reluctant to develop standards from which heightened judicial scrutiny might be derived. The Court recognizes that it would be very difficult to obtain compliance from the political divisions even if it took more drastic stands for the solution of equality issues. Thus, as demonstrated in the patricide and reapportionment cases, the equal protection principle in the Japanese Constitution is developing slowly and gradually.

Even so, the development of the equal protection principle has promoted the significance of human rights guaranteed in Chapter 3 of the Constitution. As mentioned above, three of six Supreme Court decisions that have declared laws unconstitutional invalidated statutory provisions relating to the equal protection principle. The Court also extended the equal protection principle to gender discrimination among private parties. This trend in the judiciary is expected to extend to other fields of constitutional litigation, especially freedom of expression and religious liberty.

48. *See, e.g.*, 984 Hanrei Jihō 26.