

ALTERNATIVE REPORT  
TO THE FIFTH PERIODIC REPORT OF JAPAN  
ON THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

【 Annex 】

JAPAN FEDERATION OF BAR ASSOCIATIONS  
(JFBA)

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## Annex 1

### Number of Refugee Recognition Applications and Number Processed

Year	Applicants	Recognized	Not recognized	Withdrawn applications	Humanitarian residence
1982	530	67 ( )	40	59	
1983	44	63 ( )	177	23	
1984	62	31 ( )	114	18	
1985	29	10 ( )	28	7	
1986	54	3 ( )	5	5	
1987	48	6 ( )	35	11	
1988	47	12 ( )	62	7	
1989	50	2 ( )	23	7	
1990	32	2 ( )	31	4	
1991	42	1 ( )	13	5	7
1992	68	3 ( )	40	2	2
1993	50	6 ( )	33	16	3
1994	73	1 ( )	41	9	9
1995	52	2 (1)	32	24	3
1996	147	1 ( )	43	6	3
1997	242	1 ( )	80	27	3
1998	133	16 (1)	293	41	42
1999	260	16 (3)	177	16	44
2000	216	22 ( )	138	25	36
2001	353	26 (2)	316	28	67
2002	250	14 ( )	211	39	40
2003	336	10 (4)	298	23	16
2004	426	15 (6)	294	41	9
2005	384	46 (15)	249	32	97
2006	954	34 (12)	389	48	53
Totals	4,882	410(44)	3,162	523	434

Note 1 Parenthetical figures in the “Recognized” column are those people who were refused refugee recognition and who were later recognized after they filed appeals. They are included in the totals.

Note 2 “Humanitarian residence” means the number of people denied refugee recognition but granted residence for humanitarian reasons. Includes both permission for changing residence status and permission for renewing residence period.

## Annex 2

October 4, 2001

For Trainees in the Special Course on Lawful and Proper Investigative Techniques

### Guidelines for the Interrogation of Suspects

1. Thoroughly familiarize yourself with the case in advance.
  - Personally inspect the crime scene and put it firmly in your mind.
  - Peruse the investigation record until you've fully understood it.
  - If you have problems or doubts, always resolve them.  
(Interrogators get misled here if they have not done their homework well enough.)
2. Find out everything about the suspect.
  - Find out as much as you can about the suspect including personal history, personality, level of intelligence, home environment, household circumstances, personal circumstances, and interests.
  - The more knowledge gained about the suspect, the more of an advantage the interrogating officer has.
  - It is also important to get information about the suspect from interrogating officers who were involved with the suspect's previous convictions.
  - It is also important to imply to the suspect that you are somewhat different from other interrogating officers.
3. Interrogators must have the drive to always get a confession with persistence and tenacity.

Interrogators must be motivated by drive replete with the self-confidence and tenacity which can "definitely get a confession."
4. Don't leave the interrogation room until you get a confession.
  - If you start wondering that the suspect speaks the truth or if the investigation is getting nowhere, you will want to call it quits, but if you leave the room then, you'll have lost.
  - Both suspect and interrogator find it tough going, so you must never give up.
5. Never take your eyes off the suspect during questioning.
  - Keep watching the suspect's eyes during questioning. Never turn your eyes away.
  - Boldly confront the suspect and take control. If the opposite happens, you've lost.
6. Quickly get into the suspect's head (develop mind-reading skills).

It's a one-to-one contest in which suspect and interrogator are trying to figure each other out. If you get into the suspect's head quickly, your victory will be that much sooner.

7. Don't use deception or make deals.

You must speak the truth. Lies and deception will always be discovered later, and consequences are irrevocable.

8. Always be careful about your manner of speech.

Never use insulting or contemptuous language toward the suspect. Though it may seem like nothing to you, it could be what the suspect hates most.

9. You must also earnestly listen to what the suspect says.

- Listen seriously to anything the suspect says, whether about family or relatives, even if it has nothing to do with the case.
- You must also be sympathetic.

10. Interrogators must also bare themselves.

- Interrogators can show that they too are human beings and build feelings of empathy by talking about their own origins, school life, private life, and other personal matters.
- Although interrogators must always maintain dominance, they must sometimes in a sense play the fool.

11. Greet and talk to the suspect.

Always greet the suspect at times such as cell inspection.

12. Put the suspect in the interrogation room as much as possible.

- Just because the suspect won't confess, leaving him in the cell will only make matters worse. In the process of talking you can get into the head of any suspect, and the suspect will also open up. Therefore you should have as much contact with the suspect as possible.
- If a suspect denies the charges, put him in the interrogation room and keep questioning from morning until night (this also weakens the suspect).
- Interrogators must always keep themselves spiritually and physically strong.

13. Have close communication with assistants.

- Interrogators and assistants must have good rapport. Sometimes if their timing is just right, it will trigger a confession.

Sometimes suspects will lower their guard and casually say things to assistants that they would not say to interrogators.

### Annex 3

#### Recent Examples of Harm by *Daiyo Kangoku*

##### I. Coercion of False Confessions by Violence

###### Example 1

Ca. 2002, Osaka Prefectural Police (March 17, 2003 Osaka District Court decision)

A case in which two suspects possessed about 700 g of stimulants in collusion. The court rejected both defendants' confessions because the court "recognizes that from arrest and detention to interrogation, [defendants] were subject to continuous violence." Suspects claimed they "were subjected to considerable violence," which the police officer denied by saying it was "to control them." Acquitted.

###### Example 2

April 2003, Kameoka Police Station (Kyoto Prefecture) (April 22, 2004 Kyoto Bar Association warning)

During interrogation, police applied restraining devices to suspect's wrists, ankles, and abdomen, stepping on him and pushing him down with their knees.

##### II. Forcing Confessions by Providing Favorable Treatment

###### Example 3

June 1994, Nagata Police Station (Hyogo Prefecture) (January 6, 1999 Hyogo Prefecture Bar Association request)

A detainee was given various favors: allowed to smoke in the detention facility, horse racing bets placed, sushi and fruit purchased and made available in interrogation room, whiskey and other treats purchased for partying in detention facility, sex with female detainee in his cell, etc. Defense attorney objected that confession was not voluntary. Prosecutor did not prove voluntariness of confession and retracted the request for the examination of the confession document.

###### Example 4

January 1996, Koriyama Police Station (Nara Prefecture) (February 10, 1998 Osaka Bar Association warning)

Interrogator slugged suspect in the side and back for protesting during interrogation that the interrogator did not hold up his end of a bargain in which suspect would provide a false confession of theft in return for "police not searching his relatives' homes or the crime syndicate office he frequented, and favors including allowing him to write two letters daily, and meals."

### III. Using Cellmates

#### Example 5

April 2004, Higashi Police Station (Fukuoka Prefecture) (April 20, 2004 written request by defense attorney)

The case detective obtained a forced confession by telling the suspect's cellmates and detainees in neighboring cells that "there are other charges against the suspect, so if he doesn't stop resisting and tell us the truth, the interrogation could last a long time," "We'll arrest him over and over again," and "The defendant is going to prison," which the other detainees told the suspect.

#### Example 6

July 2004, Yawata-Nishi Police Station (Fukuoka Prefecture) (*Freedom and Justice*, September 2005 issue)

Police transferred suspect, who denied charges, to a detention center and asked his former cellmate to cooperate with police in the investigation. Police obtained a written statement by the cellmate describing the suspect's actions in his cell, then re-arrested suspect and his cellmate, and put them all in the same cell in Yawata-Nishi Police Station. From that day forward, police questioned the cellmate about suspect's actions in the cell, and recorded in the form of written statements. During this time period, suspect was hardly interrogated. Documents recording cellmate's statements said that suspect had confessed to the cellmate, and suspect was prosecuted using these documents and others as evidence.

#### Example 7

December 2000, Totsuka Police Station (Metropolitan Tokyo) (JFBA symposium on February 24, 2006)

Falsely accused of groping. Person from personnel department of suspect's employer came for interview, and suspect was pressured to write resignation in presence of five or six guards, even though usually there is only one guard. Suspect requested presence of defense counsel, who had just come for meeting, but guards refused, claiming no connection to case. Police document contained statements the suspect had not made, on the basis of which interrogator heaped abusive language on suspect. Suspect had been pressured by *Daiyo Kangoku* cellmate, who repeatedly told him, "It's no use denying the charges." Acquittal was confirmed, and former suspect got his job back.

### IV. Confessions Obtained by Coercion with Long Interrogations

#### Example 8

November 2002, Tsu Police Station (Mie Prefecture) (November 19, 2002 Tsu District Court decision)

Suspect was changing statement, denied charges during remand procedure presided over by judge, interrogation lasted until 12:20 a.m. one night and 12:15 a.m. the next night, and suspect told lawyer that interrogator had said, “Unless you do the right thing, your house will be in danger. If there’s something you want to tell your mother, I’ll arrange it. And I’ll make arrangements so that you get your civil suit documents in jail. If you don’t do that, you’ll lose your house. I’ll help you if you write a statement saying you committed murder.” The court decided to transfer suspect from Tsu Police Station to Mie Detention Center on the grounds that a confession could have been forced.

#### Example 9

April 2003, Kagoshima-chuo, -Minami, -Nishi, Kokubu, and Kajiki police stations (Kagoshima Prefecture) (the so-called Shibushi Case) (JFBA symposium on April 9, 2005)

Suspect was questioned for long periods nearly every day from 9 a.m. to 9 p.m. Suspect’s lawyer told suspect to write descriptions of interrogations in notebook, but detention personnel hampered this by, for example, not giving him a pen and limiting writing time. Interrogator said to suspect, who was not permitted contact with any outside people except his lawyer, “If you write a letter to your wife I’ll be nice and mail it for you. Write that you spent the bribe money you got on pinball, say that it’s true, and say that you’re telling the detective that.” Suspect wrote a letter to his wife as told. The letter was not mailed to suspect’s wife. Instead, the prosecutor submitted it to the court as evidence.

Further, there were interrogations in which another suspect was forced to step on a piece of paper on which were written the names of his family members. Concerning this matter, Kagoshima District Court handed down a decision on January 18, 2006 ordering Kagoshima Prefecture to pay 600,000 yen because “the interrogation deviated from normal methods and insulted the plaintiff by taking advantage of public power, thereby causing great emotional suffering.”

This incident was a violation of the Public Offices Election Law involving cash paid for votes in a prefectural assembly election in Kagoshima Prefecture, but on February 23, 2007, all 12 defendants charged were acquitted by the Kagoshima District Court, and the decision became final.

The court recognized, for example, that during their detention the defendants were subjected to high-pressure, pushy, quite severe interrogation by investigators, making it likely that false confessions were elicited. In this case, it was found that false confessions were maintained in the court because, for example, a defendant who had received an IV in the hospital owing to poor health and could not even sit up underwent long interrogation while having to lie on a cot, even though it was claimed the interrogations were voluntary, while another defendant was quite exhausted both

physically and mentally due to the long detention and interrogations.

Despite this, the police responsible for those investigations have not been disciplined at all, claiming that there has been no misfeasance. Although the director-general of the National Police Agency issued a stern written warning to the person who headed the Kagoshima Prefectural Police at the time, said warning was merely procedural guidance, not a disciplinary action under the National Civil Service Law. For the interrogation forcing the suspect to step on pieces of paper with the names of family members, the interrogator was indicted but not taken into custody on September 19, 2007 for the crime of violence and cruelty by a special public office.

## V. Psychological Pressure

### Example 10

February 2001, Miyakojima Police Station (Osaka Prefecture) (*Criminal Defense Quarterly* no. 35, November 27, 2002 and Osaka District Court judgment)

In a case of false accusation of groping, interrogator yelled at detainee and made statements such as, “If you admit you did it, you’ll get off with a 100,000 or 150,000 yen fine, but if you don’t admit it, you’ll be in here a long time.” Interrogator brought up the traffic-accident death of suspect’s son three years earlier and tried to force a confession by saying, “Your son’s spirit is here in this room, so tell the truth.” Acquitted.

### Example 11

February 2004, Metropolitan Police Department Tama Branch (Metropolitan Tokyo) JFBA symposium on February 24, 2006)

An incident in which people were arrested in connection with leafleting by the anti-war group Tachikawa Tent Village. Because a female suspect maintained silence, communication with everyone except lawyers was banned to psychologically back suspect into a corner. Suspect was subjected to abusive language such as, “I’ll smash your group.” “You’re an iron woman with a dual personality. You’re a parasite. You’re a street urchin of Tachikawa City.” Interrogator lied to woman, telling her the people arrested with her would pin all the blame on her, and in other ways tried to force a confession. Acquitted by district court, but fined by appellate court. Now appealing to the Supreme Court.

## VI. Indecent Acts

### Example 12

June 2005, Metropolitan Police Department Kikuyabashi Branch (Metropolitan Tokyo) (December 5, 2005 Jiji Press story)



During interrogation in stimulant case, assistant inspector in Metropolitan Police Department Organized Crime Division Section 5 allegedly subjected female defendant to indecent acts and was charged with violence and cruelty by a special public official. Tokyo District Court called it “a bold and incredibly shameless criminal act,” and handed down a sentence of three years imprisonment (five years sought by prosecutor).

## Annex 4

### Public Offices Election Law (Excerpts)

#### Chapter I General Provisions

##### Article 1 Purpose of Law

The purpose of this law is to establish an election system, based on the spirit of the Japanese Constitution, for the public election of the members of the House of Representatives and House of Councilors, and the members and presidents of local assemblies, to assure that said elections are conducted in an open and appropriate manner based on the freely expressed will of the electorate, and thereby provide for the sound development of democratic politics.

#### Chapter 13 Election Campaigns

##### Article 138 Door-to-Door Canvassing

1. No one may conduct door-to-door canvassing to obtain, allow to obtain, or not allow to obtain votes.
2. No matter what method is employed, to go door to door announcing the holding of a political speaking event or political speech, or naming a particular candidate, political party, or other political group for the purpose of an election campaign shall be regarded as prohibited acts specified in Paragraph 1.

##### Article 142 Distribution of Written Materials and Images

1. In elections other than those for members of the House of Representatives (proportional representation), written materials and images used for election campaigns may not be distributed, except for the regular postcards specified in the items below and the leaflets specified in Item 1 and Item 2 below. Leaflets may not be scattered.

(1) In elections for members of the House of Representatives (small electoral districts), the numbers per candidate are 35,000 regular postcards, and 70,000 leaflets of no more than two kinds that have been submitted to the election administration commission which handles the administrative duties for that election.

(1-2) In elections for members of the House of Councilors (proportional representation), the numbers per person listed on the House of Councilors roster, who are candidates for public office, are 150,000 regular postcards, and 250,000 leaflets of no more than two kinds that have been submitted to the Central Election Administration Commission.

(5) In elections in government ordinance cities, the number of regular postcards allowed in elections is 35,000 per candidate for mayor and 4,000 per candidate for city assembly.

(6) In elections in cities other than government ordinance cities, the number of regular postcards allowed in elections is 8,000 per candidate for mayor and 2,000 per candidate for city assembly.

## Chapter 16 Penalties

### Article 239 Violations of Restrictions on Door-to-Door Canvassing

1. A person committing any of the following violations shall be imprisoned for no more than 1 year or be fined no more than 300,000 yen.

(3) A person who conducted door-to-door canvassing in violation of the provisions of Article 138.

### Article 243 Violations of Restrictions on Distributing Written Materials and Images

1. A person committing any of the following violations shall be imprisoned for no more than 2 years or be fined no more than 500,000 yen.

(3) A person who distributed written materials and images in violation of the provisions of Article 142.

### Article 251 Invalidation of Election

Any winner of an election shall have his or her victory invalidated in the event that said winner is punished for committing any of the crimes specified in this chapter in relation to that election.

### Article 252 Disenfranchisement

Any person fined for committing crimes specified in this chapter shall be deprived of the right of suffrage and the right to election for public office as specified hereunder for the period of five years from the day the court decision is finalized.

## Annex 5

Report to Human Rights Committee  
June 18, 2007

I compiled this table of the numbers of cases in which people were booked, and the numbers of people, for crimes of violating restrictions on door-to-door canvassing and distributing written materials and images, for various years and elections, based on crime reports obtained from the National Police Agency through the court in the trial on the Oishi Case.

Zenichiro Kono, Attorney

Numbers of Cases in which People Were Booked, and the Numbers of People, for Crimes of Violating Restrictions on Door-to-Door Canvassing and Distributing Written Materials and Images from 1946 to 2003

Abbreviations

HC: House of Councilors

HR: House of Representatives

	Year and election type	Violations involving door-to-door canvassing		Violations involving distributing written materials and images	
		No. of cases	No. of people	No. of cases	No. of people
1	1946, HR	397	509	229	412
2	1948, board of education	295	390	738	733
3	1948, HR	1,067	1,405	1,098	1,314
4	1951	2,419	3,276	1,892	2,176
5	1952, HR	2,210	2,764	1,005	1,362
6	1952, board of education	72	104	37	71
7	1953, HR, HC	1,764	2,219	1,240	1,679
8	1955, HR	1,322	1,708	854	1,202
9	1955, local elections	2,214	3,259	796	1,253
10	1956, HC	2,277	2,789	1,777	2,447
11	1958, HR	942	1,358	847	1,273
12	1959, HC	700	908	3,628	4,764
13	1960, HR	902	1,273	1,586	1,959

14	1962, HC national constituency	2,097	2,373	2,690	2,976
15	1962, HC prefectural constituency	552	581	1,112	1,298
16	1963, HR	1,233	1,197	1,592	1,893
17	1967, HR	1,306	1,351	989	1,243
18	1967, local elections	1,320	2,022	824	1,136
19	1967, HR/HC special elections	177	264	108	180
20	1968, HC	1,130	1,473	2,028	2,463
21	1968, HR/HC special elections, etc.	112	209	91	118
22	1969, HR	808	1,094	474	834
23	1969, local elections	142	240	142	291
24	1970, local elections	123	235	75	118
25	1971, HC	210	242	1,965	2,750
26	1971, local elections	85	135	48	83
27	1972, HR	322	541	501	768
28	1972, local elections	56	90	59	99
29	1974, HC	347	517	1,073	2,430
30	1974, HR/HC special/local	64	115	86	180
31	1975, HR/HC special/local	80	99	126	143
32	1975, local elections	408	857	385	606
33	1975 (other than nationwide local)	45	112	48	76
34	1976, HR	289	565	337	576
35	1976, local elections	33	52	37	96
36	1977, HC	285	391	704	1,045
37	1977, local elections	42	70	22	10
38	1978, local elections	39	130	53	101
39	1979, HR	242	466	316	606
40	1979, nationwide local elections	250	483	219	462
41	1979, HR special/local elections	22	85	24	61
42	1980, HR	228	416	356	855
43	1980, HC	211	407	495	801
44	1980, local elections	6	12	28	33
45	1981, local elections	29	22	25	28
46	1982, local elections	13	34	40	69

47	1983, HR	169	345	202	423
48	1983, HC	65	118	115	429
49	1983, nationwide local elections	177	435	177	519
50	1983, HR/HC special/local	18	49	16	42
51	1984, local elections	2	5	10	23
52	1985, local elections	10	12	27	67
53	1986, HR	198	409	225	592
54	1986, HC	12	24	40	100
55	1986, local elections	14	33	29	54
56	1987, local elections	0	0	10	11
57	1988, local elections	3	16	20	52
58	1989, HC	58	131	68	187
59	1989, local elections	4	12	15	19
60	1990, HR	109	260	178	372
61	1990, local elections	3	6	4	14
62	1991, nationwide local elections	76	224	93	209
63	1992, HR/HC/nationwide local	39	80	62	171
64	1993, HR/nationwide local/local	118	328	148	353
65	1994, HR/HC/local, etc.	3	33	13	26
66	1995, HC/nationwide local/others	20	61	124	238
67	1996, HR/nationwide local/others	9	60	29	82
68	1997, HR/local elections	1	4	10	11
69	1998, HR special/HC/ local	20	35	35	89
70	1999, nationwide local/local	8	9	26	70
71	2000, HR/local elections	23	62	39	97
72	2001, HC/local elections	22	60	67	149
73	2002, HR special/local elections	3	5	4	8
74	2003, HR/nationwide local	16	39	42	112
	Totals	30,087	41,697	35,257	49,592

## Annex 6

### **Precedents of the Supreme Court of Japan Concerning Door-to-door Canvassing and Distribution of Documents**

#### Document 1

#### **Case of Penal Violation in Board of Education Committee Member Election**

(Grand Bench Decision of September 27, 1950; Keishu 4-9-1799)

#### **Formal Judgment**

This appeal is dismissed.

#### Reasoning

Because door-to-door canvassing as an election campaign activity causes various adverse effects, it is prohibited by Article 98 of the House Of Representatives Member Election Law, Article 72 of the Local Autonomy Law, Article 28 of the Board of Education Law and so on. Consequently, freedom of speech can be restricted to a certain degree.

However, Article 21 of the Constitution does not guarantee absolutely unrestricted freedom of speech. We think that Article 21 contemplates that there naturally are reasonable restrictions on the time, place and manner of speech for the public welfare. Therefore, even if prohibiting door-to-door canvassing to promote electoral fairness results in restrictions on freedom of speech, these prohibitions cannot be found to violate the Constitution as asserted here.

Based on the foregoing reasons, judgment is as set forth in the Formal Judgment in accordance with former Code of Criminal Procedure Article 446.

This judgment is the unanimous opinion of all this court's justices.

#### Document 2

#### **Case of Violation of the Public Offices Election Law**

(Grand Bench Decision of April 6, 1955; Keishu 9-4-819)

#### **Formal Judgment**

This appeal is dismissed.

#### Reasoning

Regarding the gist of Defense Attorney Shunichi Suginozawa's appeal:

The point of the argument is that Article 142, Article 143 and Article 146 of the Public Offices Election Law are invalid as violative of Article 21 of the Constitution.

However, Article 21 of the Constitution does not guarantee absolutely unrestricted freedom of speech and publication. This court has held that in a situation where it is necessary for public welfare, there naturally are reasonable restrictions on the time, place and manner of speech (see No. 2591 (re) 1949; Grand Bench Decision of September 27, 1950). Further, as for Article 142, Article 143 and Article 146 of the Public Offices Election Law, we find that allowing unrestricted distribution and posting of literature and drawings with respect to public offices elections may invite unfair competition in election campaigning, causing on the contrary, harm to the freedom and fairness of elections and difficulty in maintaining the impartiality thereof. The above articles impose certain regulations on the distribution and posting of literature and drawings only during the period of the election campaign in order to prevent such adverse effects. We construe this degree of regulation as necessary and reasonable restriction permissible under the Constitution for the public welfare. Therefore, the appellant's argument is without good cause.

Accordingly, based on the unanimous opinion of all this court's justices, judgment is as set forth in the Formal Judgment in accordance with former Code of Criminal Procedure Article 408.

Document 3

### **Case of Violation of the Public Offices Election Law**

(Grand Bench Decision of November 18, 1964; Keishu 18-9-561)

#### **Formal Judgment**

This appeal is dismissed.

#### Reasoning

Further, the appellant's argument asserts a violation of Article 21 of the Constitution. However, Article 21 of the Constitution does not guarantee absolutely unrestricted freedom of speech, publication and other expression. The precedents of this court have long recognized that there naturally are necessary and reasonable restrictions on those freedoms for public welfare, (No. 2591 (re) 1949; Grand Bench Decision of September 27, 1950; Keishu 4-9-1799). Incidentally, allowing unrestricted distribution, etc. of literature and drawings with respect to public offices elections may invite unfair competition in election campaigning harm to the freedom and fairness of elections and difficulty in guaranteeing the appropriateness and impartiality thereof. Enacting regulations that restrict or prohibit the distribution of literature and drawings within the scope found necessary and reasonable to prevent these sorts of adverse effects is an unavoidable measure to ensure the appropriateness and impartiality of elections for the public welfare. Therefore, we find that the provisions of Article 142 of the Public Offices Election Law that permit such measures are not violative of Article 21 of the



Constitution. Consequently, we find the lower court decision judging the defendant by application of the above provision to be proper and not subject to criticism as unconstitutional.

Accordingly, based on the unanimous opinion of all this court's justices, judgment is as set forth in the Formal Judgment in accordance with former Code of Criminal Procedure Article 408.

Document 4

### **Case of Violation of the Public Offices Election Law**

(Grand Bench Decision of April 23, 1969; Keishu 23-4-235)

#### **Formal Judgment**

This appeal is dismissed.

#### Reasoning

1. Regarding the argument concerning Article 138 and Article 142 of the Public Offices Election Law

The precedents of the Grand Bench of this court have made clear that certain regulations, such as the prohibition on door-to-door canvassing set forth in Article 138 of the Public Offices Election Law and the restriction on the distribution of literature and drawings set forth in Article 142 of the same law do not violate Article 21 of the Constitution (No. 2591 (re) 1949, Grand Bench Decision of September 27, 1950, Keishu 4-9-1799; No. 3147 (a) 1953, April 6, 1955, Keishu 9-4-819). We find no need to change this line of precedents now. Accordingly, the argument concerning Article 138 and Article 142 of the Public Offices Election Law is without good cause.

2. Regarding the argument concerning Article 129 of the Public Offices Election Law

The aforementioned precedents of the Grand Bench of this court make clear that there naturally are necessary and reasonable restrictions on the freedoms of speech, publication and other expression guaranteed by Article 21 of the Constitution for public welfare. Incidentally, always allowing the conduct of election campaigning in public offices elections may invite unfair and unnecessary competition, which if unregulated may cause harm to the fairness of elections due to the occurrence of corrupt practices. Not only this, but wasteful expenses and labor would escalate, leading to unfair results due to differences in financial ability. This may result in the corruption of elections. In order to prevent these sorts of adverse effects and ensure the fairness of elections, it is necessary to restrict election campaigns to reasonable and not over-long periods and fix the starting time so that election campaigns are conducted under conditions that every candidate can meet. The prescription in

Article 129 of Public Offices Election Law — that candidates shall not engage in election campaigning except from the date of notice of standing for election until the day before the appointed date of said election — arose with the purpose of dealing with the above issues. The reason to guarantee the fair conducting of elections is to maintain the public welfare. That is why we can say that restricting the period for election campaigning and prohibiting campaigning before said period amounts to a necessary and reasonable restriction on the constitutionally protected freedom of expression. This court finds that Article 129 of Public Offices Election Law does not violate Article 21 of the Constitution and thus the appellant's argument is without good cause.

Accordingly, based on the unanimous opinion of all this court's justices, judgment is as set forth in the Formal Judgment in accordance with former Code of Criminal Procedure Article 408.

Document 5

### **Case of Violation of the Public Offices Election Law**

(Second Petty Bench Decision of June 15, 1981; Keishu 35-4-205)

#### **Formal Judgment**

The lower court decision is reversed.

The case is remanded to the Hiroshima High Court.

Reasoning

Regarding the gist of the Prosecution's appeal:

1. The gist of the facts in the indictment (with respect to Defendant Juri Yada, the facts after amendment of the charges) is as follows. On or around December 3, 1976, on the occasion of the December 5, 1976 general election for seats in the House of Representatives, Defendant Juri Yada, with the intent to obtain votes for Yoshiko Nakabayashi, a candidate for election from the Shimane Prefecture electoral district, individually canvassed the homes of five voters and asked for their votes for the same candidate. During the period from December 1 through December 4, Defendant Hiroko Ueda, on the occasion of the same election, with the same intent, individually canvassed the homes of seven voters in the same electoral district and asked for their votes for the same candidate. Thus, both defendants engaged in door-to-door canvassing.

The lower court decision found that both defendants engaged in door-to-door canvassing. However, because it did not consider the prohibition of door-to-door canvassing was a reasonable and unavoidably necessary regulation of the level permitted by the Constitution, the court found the provisions of Article 138,

paragraph 1 of the Public Offices Election Law that uniformly prohibited such conduct violative of Article 21 of the Constitution. In so doing, it upheld the decision of the court of first instance, which had found the defendants not guilty on the same reasoning, and dismissed the prosecution's appeal.

The gist of the Prosecution's appeal is the assertion that the lower court decision made a mistaken interpretation of Article 21 of the Constitution and contravened precedents.

2. The precedents of this court state that the provisions of Article 138, paragraph 1 of the Public Offices Election Law are not violative of Article 21 of the Constitution (see Supreme Court No. 2265 (a) 1968, Grand Bench decision of April 23, 1969, Keishu 23-4-235 and Supreme Court No. 2591 (re) 1949, Grand Bench Decision of September 27, 1950, Keishu 4-9-1799).

The prohibition of door-to-door canvassing is not intended to restrict the expression of opinion per se. Rather, it is intended to prevent the adverse effects caused by a means of expression of opinion. That is, it prohibits the adverse effects of door-to-door canvassing. For example canvassing can easily become a hotbed of vote buying and interest-manipulation while disturbing the tranquility of voters' lives. Moreover, if left to take its own course, door-to-door canvassing could compel candidates to pay high expenses out of concern over competing in terms of number of visits. In addition, voting may be controlled by personal considerations. By preventing these ills, the prohibition ensures the freedom and fairness of elections. (See Supreme Court No. 1464 (a) 1967, Third Petty Bench decision of November 21, 1967, Keishu 21-9-1245; No. 56 (a) 1968, Second Petty Bench decision of November 1, 1968, Keishu 22-12-1319). The above goal is proper, and when such adverse effects are considered in sum, we can say that there is a reasonable relationship between the uniform prohibition of door-to-door canvassing and the purpose of the prohibition. As for the benefit lost through the prohibition of door-to-door canvassing, it is true that the freedom to express opinions by means of door-to-door canvassing is restricted. However, on this point, of course freedom to express opinions by methods other than door-to-door canvassing is not restricted, and the canvassing restriction is nothing more than an indirect and incidental restriction that simply prohibits a method. On the other hand, the benefit gained through the prohibition is that the freedom and fairness of elections is ensured through prohibiting the adverse effects caused by door-to-door canvassing. Therefore, we can say that the benefits gained are clearly greater than those lost. Based on the above, the uniform prohibition on door-to-door canvassing set forth in Article 138, paragraph 1 of the Public Offices Election Law is not found to exceed a reasonable and unavoidably necessary level and therefore does not violate Article 21 of the Constitution. Accordingly, the question of whether to uniformly prohibit door-to-door canvassing is exclusively an issue of legislative policy from the

standpoint of ensuring the freedom and fairness of elections, and policies the legislature determines within the scope of such discretion must be respected.

Such an interpretation is consistent with later cases that issue holdings on the compliance with Article 21 of the Constitution of legislation restricting means of expression of opinion (Supreme Court No. 1501 (a) 1969, Grand Bench decision of November 6, 1974, Keishu 28-9-393), and the aforementioned Grand Bench decision of April 23, 1969 remains valid to this day.

3. Thus, the lower court decision makes a mistaken interpretation of Article 21 of the Constitution and contravenes the precedents of this court. Because it is clear that this mistake affected the judgment of the case, reversal cannot be avoided. The appellant's argument has good cause.

Consequently, the lower court decision is reversed under the text of Article 410, paragraph 1 of the Code of Criminal Procedure, the case is remanded to the Hiroshima High Court in accordance with the text of Article 413 of the same law, and based on the unanimous opinion of all this court's justices, judgment is as set forth in the Formal Judgment.

## Annex 7

- Interpretation on Article 19,25 of the International Covenant on Civil and Political Rights by the Hiroshima High Court. 28

April 1999 -

(Case of Houru Kazuyuki)

[P. 92] Regarding the claim that the provisions of Article 138, Paragraph 1, Article 142, Paragraphs 1 and 2 and Article 146, Paragraph 1 of the Public Offices Election Law violate the International Covenant on Civil and Political Rights (hereinafter referred to as “Covenant B”)

[P. 93] This argument, in effect, is as follows:

(1) The lower court decision was unlawful for failure to cite any justification for the decision, in that although defense counsel alleged that Article 138, Paragraph 1, Article 142, Paragraphs 1 and 2 and Article 146, Paragraph 1 of the Public Offices Election Law are void as violative of Covenant B, the court issued no judgment on this allegation.

(2) Article 25 of Covenant B guarantees the right to free elections, and related articles of the Covenant, such as Articles 18, 19, 21 and 22 also guarantee political freedoms. The provision of Article 138, Paragraph 1 of the Public Offices Election Law prohibiting door-to-door canvassing and those of Article 142, Paragraphs 1 and 2 and Article 146, Paragraph 1 of the same law prohibiting the distribution of documents infringe the right to the freedom of election activities guaranteed by the above-referenced provisions of Covenant B, and are void as violative of these provisions.

Therefore, the lower court decision reaching a guilty verdict through the application of Article 138, Paragraph 1, Article 142, Paragraphs 1 and 2 and Article 146, Paragraph 1 of the Public Offices Election Law contained a clearly erroneous application of law that affected the decision.

Below we will consider this argument.

[P. 94] (i) In the lower court, defense counsel did not allege that the above-referenced provisions of the Public Offices Election Law violated Covenant B as a fact that should be adjudicated in the guilty verdict, so

there is no legal basis for finding the lower court decision's silence on this point unlawful.

(ii) Regarding Covenant B's status as a domestic law and self-executing nature

By the way, Covenant B was ratified with the approval of both the upper and House of Representatives in June 1979, published on August 4 and went into effect on September 21 of the same year. Article 98, Paragraph 2 of the Constitution of Japan provides that treaties concluded by Japan and established laws of nations shall be faithfully observed. Since Covenant B went through publication procedures including approval by the Diet as a Covenant, it is construed to have status as a domestic law due to its publication; i.e., without requiring any other special legislative measures or the like. Constitutional interpretation holds that treaties take precedence over laws and are superior to laws. Moreover, the contents of Covenant B specifically provide that persons

[P. 95] all equally hold inherent rights and freedoms. The form of these provisions, like that of the provisions on rights on civil liberties in the Constitution, is one that permits judicial application and realization. Based on the fact that each state party promises in Article 2 of Covenant B to respect and to ensure the rights recognized in the Covenant, to take the necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant and to ensure that any person whose rights or freedoms recognized under the Covenant are violated shall have an effective remedy, each state party is understood to have a duty to implement the Covenant immediately. Therefore, the Covenant is understood to be self-executing and be interpretable and applicable by the courts (*See* October 22, 1977 Decision of the First Petty Bench of the Supreme Court, 35-7 KEISHU 696). However, Article 25 of Covenant B provides for the political rights not of people but of citizens, and some distinction is made between rights on civil liberties. Still, when we consider that these political rights are provided for as the individual's right to demand participation in political processes based on the principle of the sovereignty of the people, they may be interpreted in the same way as rights on civil liberties.

[P. 96] Further, this argument asserts compliance with the general principles of treaty interpretation prescribed in Article 31 of the Vienna Convention on the Law of Treaties, which became effective after the Covenant B was enacted, in interpreting Covenant B. However, these principles of interpretation are considered to have a theoretical basis generally

respected in the interpretation of statutory law as well. Therefore, this court will utilize these principles and respect the object of Article 32 of the same convention. The General Comments, etc. adopted by the Human Rights Committee (established pursuant to Article 28 of the same covenant) under Article 40, Paragraph 4 of the same covenant are supplemental means for confirming the meaning obtained through the application of the provisions of Article 31 of the same convention.

(iii) Regarding Article 25 of Covenant B and whether there is a guarantee of freedom of election activities

Article 25 of Covenant B provides as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

[P. 97] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

This article is interpreted as approving and guaranteeing the right of citizens to take part in the conduct of public affairs, the right to vote (voting right), the right to be elected (the right to be elected or the right to be a candidate) and the right to have access to public service. In particular, item (b) guarantees the enjoyment of and the opportunity to exercise the rights to vote and to be elected, by deeming the right to universal elections, the right to equal suffrage, the secret ballot and elections featuring the free expression of the will of the electors as conditions of the rights to vote and to be elected and thus guaranteeing institutionally..

Let us first examine the argument that Article 25 of Covenant B guarantees the right to conduct election activities. Defense counsel sometimes used the term “election campaign,” but mainly used the term “election activities.” This court will employ the term “election campaign” in accordance with legal terminology universally used in Japan.

[P. 98] Together with other provisions of Covenant B that provide for the basic rights on civil liberties of people, which are called civil rights, Article

25 thereof provides particularly for the political rights of citizens. However, the former relates to individual rights, whereas the latter recognizes and guarantees rights that have a public characteristic for individuals. Looking particularly at items (a) and (b), which are at issue here among the provisions of this article, based on its context and ordinary meaning to be given to its terms, the right to take part in the conduct of public affairs, the right to vote and the right to be elected are construed as guaranteed within the strict meaning of political rights. Further, the right to take part in the conduct of public affairs is generally used to indicate the voting right and the right to be elected, and this right is distinguished from the freedom of public affairs activities (defense counsel requested exhibit numbers [hereinafter referred to as “Defense Exhibit”] 76 and 86). Accordingly, Article 25 of Covenant B cannot be construed as guaranteeing, as this argument asserts, the freedom of election activities as a right. If election activities are conducted by means of an expression of political

[P. 99] views, they would be construed, according to means and forms thereof, as guaranteed Articles 19, 21 and 22 of Covenant B as exercises of the right to freedom of expression, the right of peaceful assembly and the right to freedom of association with others.

This argument alleged in the Statement of Grounds for Appeal and the Supplemental Statement (No. 4) thereof that the text of item (a) of Article 25 of Covenant B referring to the right “to take part in the conduct of public affairs, directly or through freely chosen representatives” prescribes free elections. However, counsel later asserted in pleadings that the text of item (b) of the same article referring to the right “to ... suffrage ... guaranteeing the free expression of the will of the electors” prescribes free elections. Thus counsel alleged that the above provision for free elections guarantees both the freedom of public affairs activities and the freedom of election activities; however, the subject of both “freely chosen” in item (a) and “the free expression of the will of the electors” in item (b) is clearly the elector. Therefore, it is clear that no guarantee of a right to freedom to campaign for election for candidates or groups can be derived directly from the above texts.

[P.100] General Comment 25 of the Human Rights Committee (Defense Exhibits 9 and 10, [hereinafter referred to as “General Comment”]), which this argument particularly relies on, asserts that the citizens’ participation in public affairs is preserved through ensuring freedoms of expression, peaceful assembly and association with others; it does not say that the right to take part in the conduct of public affairs extends to



include the above freedoms. The General Comment states that “[f]reedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.” This argument points to the text as if Article 25 of Covenant B itself preserves these freedoms as rights. However, it is clear from the reference to “essential conditions” that a prerequisite to the effective exercise of the right to vote is the complete preservation of freedom of expression, assembly and association, which are already protected as civil rights. According to the draft of General Comment 25 (Defense Exhibits 30 and 31), in the drafting process Paragraph 24 referred to the importance of freedom of expression as a right and freedom relating to Article 25 of

[P.101] Covenant B and explained that public affairs activities, political expression and election campaigns free from unreasonable restriction are necessary for the rights prescribed by Article 25 of Covenant B. The General Comment that formally adopted this explained in Paragraph 25 thereof require the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity, freedom of political expression, freedom to campaign for election in order to ensure the complete enjoyment of rights under Article 25 of Covenant B. In effect, this explanation is arguing that freedom to engage in political activity, freedom of political expression and the like are included in the rights prescribed in articles 19, 21 and 22 of the Covenant and not that they are rights on civil liberties guaranteed under Article 25 of Covenant B.

On this point, Witness Kimio Yakushiji testified at Hearing No. 7 herein that the text of item (b) of Article 25 of Covenant B referring to “genuine ... elections ... guaranteeing the free expression of the will of the electors” not only guarantees the right to vote based on voters’ free will but also guarantees the right of candidates, political parties and other election campaign groups to conduct election publicity as a human right.

[P.102] Moreover, this argument alleged in the Statement of Grounds for Appeal (No. 3) that the Constitution expressly prescribes universal, equal and free elections by secret ballot as a institutional guarantee of voting rights. However, the same witness emphasized at Hearing No. 8 herein that the Constitution contained no principle of free elections, but testified that the principles of free elections and genuine elections prescribed in item (b) of Article 25 of Covenant B guaranteed the right to conduct election publicity as the crux of the citizens’ political rights. However, heretofore freedom of elections has been based on the

freedom to vote, and there is no reason to automatically construe that a right to freedom of election campaigning is also guaranteed within this electors' freedom of elections. Of course, the electors' genuine freedom of elections includes freedom to establish the electors' will, and sufficient information must be conveyed in order to establish freely the electors' will. Thus, election publicity activities are necessary as a means to convey information regarding an election; in order for electors to receive this information in advance, these activities must be respected; from the perspective of the right to be elected and the freedom to be a candidate, the freedom of candidates to engage in election campaigns must be protected. However, this does not mean that the guarantee of the voting right and the right to be elected guarantee the freedom to campaign for election as a right. Even Novak's commentaries, on which this argument relies, state that the principle of free elections is closely related to the political freedoms provided for in Articles 18, 19, 21 and 22 of Covenant B; the free establishment of the electors' will is guaranteed only by free election publicity—one part of the above political freedoms—engaged in by various groups and candidates, and particularly by the media; the principle of free elections protects the voters rights and the rights of election campaign groups and candidates to conduct election publicity; that is to say that in order to have free expression of the will of the electors, the rights of candidates too are protected, and Article 25 of Covenant B itself does not guarantee a right to freedom of election campaigning.

[P. 104] Further, defense counsel asserted in subsequent pleadings that the principle of free elections is closely related to the political freedoms provided for in Articles 18, 19, 21 and 22 of Covenant B; freedom of political expression was guaranteed as a right that integrates item (b) of Article 25 of Covenant B (which prescribes the right to vote and be elected) with Article 19, Paragraph 2 of the same covenant (which prescribes freedom to receive and impart information and ideas); and the principle protects the right of candidates and political groups to engage in election publicity. This assertion relies on the testimony of Witness Kimio Yakushiji at Hearing No. 12. However, when this testimony is matched with the summary of Witness Kimio Yakushiji's supplemental testimony (Defense Exhibit No. 118) we see that the above testimony is reasoned by the judgment of the European Court of Human Rights, which appears to base its reasoning in part on the use of the phrase "in conjunction with" regarding the connection between the right to take

part in the conduct of public affairs and the right to freedom of expression, association with others and peaceful assembly. Because this justification is insufficient, the above testimony cannot be employed, and there is no justification for changing the above interpretation that was supplemented by the General Comment.

[P. 105] In other words, the gist of item (b) of Article 25 of Covenant B is to respect and to ensure candidates' freedom to campaign for election in order to provide the opportunity for the effective exercise of the right to vote and be elected, and particularly in order to implement elections that guarantee the free expression of the will of the electors. However, this provision does not guarantee freedom to campaign for election as a right.

(iv) Regarding Article 25 of Covenant B and restrictions on freedom to campaign for election

Incidentally, the main text at the start of Article 25 of Covenant B (i.e., the portion other than the listed items) states that every citizen shall have the right and the opportunity to do the following "without any of the distinctions mentioned in article 2 and without unreasonable restrictions." That is, it prohibits distinctions and unreasonable restrictions with respect to having and exercising the rights set forth in items (a), (b) and (c). The argument alleged in the Statement of Grounds for Appeal that the term "without unreasonable restrictions" applied only to matters concerning the granting of voting-right qualification and that reasonable restrictions too were

[P.106] prohibited regarding other activities. Witness Kimio Yakushiji also testified along this line at Hearing No. 7, stating that the term "without unreasonable restrictions" is not recognized as a ground for direct restriction of the right to political publicity or election publicity. The above limitation clause is principally an issue with respect to the granting and divesting of voting-right qualification, but it is clear that under the wording of the article, it is not limited to this (Defense Exhibits 78 and 86). This argument recognized in the Statement of Grounds for Appeal, Supplemental Statement (No. 4) that the "without unreasonable restrictions" limiting clause applied only when imposing limitations on all of the rights prescribed in Article 25 of Covenant B. This is clear in light of the following:

[a] The General Comment, which this argument relies on, states: Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. ...The exercise

[P.107]

of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable,” and “the right to vote at elections ... may be subject only to reasonable restrictions”, and mentions specific provisions concerning elections, candidate nomination dates, deposits campaign expenditure.

[b] Novak’s commentaries [1] state that “the main text at the start of Article 25 of Covenant B prohibits the imposition of unreasonable restrictions on political rights. This limiting provision principally (mainly) relates to issues concerning the granting of voting-right qualification”; [2] raise the issue of reasonable restrictions in paragraphs on the right to equal suffrage, the secret ballot and free elections; [3] set the prerequisite that political rights must be guaranteed without unreasonable restrictions; and [4] raise the issue of the standard for determining the reasonableness of various specific restrictions on political rights.

[c] Nisuke Ando, a member of the Human Rights Committee, also states that “the right to take part in the conduct of public affairs is subject to reasonable restrictions” (Defense Exhibit 32).

The above-referenced testimony of Witness Kimio Yakushiji is his personal opinion and cannot be employed.

(v) Regarding grounds for restriction of the freedom of expression prescribed in Article 19, Paragraph 3 of Covenant B and the restriction and prohibition of election campaigning

[P. 108]

It is clear that the freedom to campaign for election, which should be respected and protected from the perspective of the free form of the electors’ will and the freedom to be a candidate, is subject to the reasonable restrictions prescribed in the same article because it falls within the category covered by Article 25 of Covenant B. On the other hand, to the extent it falls under freedom of expression as a representation of political views, the freedom to campaign for election must satisfy the restrictions prescribed in Article 19, Paragraph 3 of Covenant B, which is deemed to prescribe stricter grounds for restriction than Article 25.

In their pleadings defense counsel asserted that the interpretation that freedom of political expression in elections was guaranteed by both Article 25, item (b) and Article 19, paragraph 2 of Covenant B taken together (the assertion that the freedom of election activities was guaranteed by Article 25, items (a) and (b) is considered retracted) and changed to the assertion that the grounds for restriction prescribed in

Article 25 of the Covenant should not apply and that the grounds for restriction prescribed in Article 19, paragraph 3 thereof should be applied through a very limited interpretation.

Now we come to consideration of whether regulations of the Public Offices Election Law that uniformly prohibit door-to-door canvassing and regulations that restrict or prohibit the distribution of election campaign documents not prescribed by law and documents that evade the law satisfy the grounds for restriction prescribed in Article 19, paragraph 3 of Covenant B.

[P.109] Article 19, paragraph 3 of Covenant B prescribes, as grounds for restriction of the right to freedom of expression, the following:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

Incidentally, Article 19, Paragraph 1 of the Covenant prescribes that everyone shall have the right to hold opinions without interference, guaranteeing it as an absolute right not subject to restriction. The freedom of expression prescribed in Paragraph 2 of the same article is a right instrumental to the right to hold opinions, and differs in that it protects specific external actions. Therefore, the aforementioned grounds for

[P.110] restriction are established. Further, it goes without saying that in a democratic system, it is of utmost importance that people can freely hold political views and freely express them. There is generally no argument that among rights to take part in the conduct of public affairs, [a] the voting right is guaranteed as the right of citizens to freely express freely formed political views and take an active part in political processes and [b] free and fair elections are a basic element that should be ensured in a democratic system (Defense Exhibits 19 and 20). Therefore, the core of an election is for the electors to freely and equally form political views. To that end, accurate, unbiased and responsible information—especially via newspapers and other news organizations (mass media)—should be impartially conveyed so citizens can freely select their information and freely expressed the opinions thus formed. The opinions of these electors are exercised by the selection from among multiple candidates. The freedom to be a candidate is guaranteed

in order to ensure the freedom of this choice. Further, election campaigns are means of free and genuine elections. However, they are not simple

[P.111] public affairs activities conducted with the aim of promoting, supporting or opposing political doctrines or measures. Because they have the goal of securing public employment for particular candidates for fixed terms, these activities go along with specific interests and can have harmful effects. Therefore, policies to ensure electoral fairness become necessary. The grounds for restriction prescribed in Article 19, paragraph 3 of Covenant B must be interpreted in light of this purpose.

The assurance of electoral freedom and fairness is as explained regarding the mistaken application of law in 1 and 2 above that was asserted based on breach of the Constitution. In addition, the General Comment on which this argument relies states as follows:

[P.112] [E]lections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. ... Persons must not receive any undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. ... Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. ...

That is to say, the Comments recognize that the free choice of voters may be distorted not only by direct harm to the voters freedom but by election activities involving expenditures. From this perspective, the Comments recognize that reasonable limitations on campaign methods may be justified. The Comments further point to electoral fairness by stating that conditions relating to candidates should be reasonable and not discriminatory.

Because the regulations of the Public Offices Election Law that uniformly prohibit door-to-door canvassing and regulations that restrict or prohibit the distribution of documents were established to ensure electoral freedom and fairness , including the above considerations, they comprise important shared benefits that should be protection for electoral freedom and fairness , public welfare under the Constitution— in other words, for all of the people. The protection of these benefits, the protection of the public order of the election system and the protection of free expression of the will of the electors, which is the most central of these protections, maintain the democratic

[P.113] public order. Therefore, as protections of the public order under Article 19, paragraph 3 of Covenant B these regulations must be said to be grounds for restricting the exercise of free expression.

Restricting the permitted methods of election campaigning for the purpose of freedom of elections does involve restricting the means and methods of expression of political views. However, the benefit gained through thereby ensuring electoral freedom and fairness exceeds the benefit lost through the restriction.

Article 19, paragraph 3 of Covenant B enumerated the grounds for restriction. Among these, the “protection of public order” does not correspond directly with public welfare under the Constitution of Japan. However, the enumerated grounds for restriction in this paragraph are aimed at preventing the infringement of the human rights of others through the exercise of the right to freedom of expression and preventing the infringement of the national and public benefit, including public health protection; that is, they endeavor to balance the exercise of human rights with other benefits. In this sense, the grounds for restriction under Article 19, paragraph 3 can be construed as having commonality with public welfare, which is the principle whereby, under the Constitution, our nation adjusts contradictions and conflicts among human rights and

[P.114] promotes substantial fairness. On its text, there is room to interpret the covenants of Article 19, paragraph 3 as being broader than those under the public welfare provision of the Constitution (Defense Exhibit 51).

Therefore, for the same reasons that the provisions of Article 138, Paragraph 1, Article 142, Paragraphs 1 and 2 and Article 146, Paragraph 1 of the Public Offices Election Law do not violate the provisions of Article 21 and Article 15, Paragraph 1 of the Constitution, they are found not to violate Article 25, Article 19 etc. of Covenant B, and this argument cannot be employed.

This point is not justified.

## Annex 8

### Supreme Court Decision in the Houru Case

Case Concerning the Charge of Violating the Public Offices Election Law (September 9, 2002, First Petty Bench Decision)

Defendant: Kazuyuki Houru

### Formal Judgment

The appeal is dismissed.

### Reasoning

Regarding the reasons for appeal given by counsel for the accused Yuken Hattori and 23 others and by the defendant himself, among them violations of Articles 15 and 21 of the Constitution, the fact that Articles 138.1, 142.1, 142.2, and 146.1 of the Public Offices Election Law (pre-amendment Law no. 2 of 1994; same hereafter) does not violate the aforesaid provisions is clear in light of decisions by the Grand Bench of this court (Case no. 3147 of 1953 (*a*), decision on April 6, 1955, *Supreme Court Reports on Criminal Cases*, vol. 9, no. 4, p. 819; Case no. 2265 of 1968 (*a*), decision on April 23, 1969, *Supreme Court Reports on Criminal Cases*, vol. 23, no. 4, p. 235), and the argument therefore cannot be justified (see Case no. 874 of 1980 (*a*), Second Petty Bench decision on June 15, 1981, *Supreme Court Reports on Criminal Cases*, vol. 35, no. 4, p. 205). Concerning the claims that Articles 31, 39, and 98.2 of the Constitution were violated, it is the Court's understanding that the aforesaid provisions of the Public Offices Election Law do not violate Articles 19 and 25 of the International Covenant on Civil and Political Rights. For that reason the argument lacks a basis and is not a lawful grounds for appeal...

Therefore, it is the unanimous opinion of the judges that the above formal judgment be handed down in accordance with Article 408 of the Criminal Procedure Code.

Chief Justice	Takehisa Fukazawa
Justice	Kazutomo Ijima
Justice	Masao Fujii
Justice	Akira Machida
Justice	Kazuko Yokoo



## Annex 9

[P. 1] Judgment issued January 12, 2006; Clerk of the Court: Gotou Yukio

2003 (wa) No. 188

### JUDGMENT

Occupation: Member of the Bungotakada City Council

Tadaaki Ooishi

This Court has tried the case of violation of the public offices election law against the above-referenced person in the presence of Public Prosecutor Tatsuya Kaneko, Public Prosecutor Atsuo Yazaki, Defense Attorney Zenichiro Kouno (chief counsel, privately appointed), Defense Attorney Masaatsu Okamura, (privately appointed), Defense Attorney Kunio Furuta (privately appointed) and others; and hereby renders judgment, as follows.

#### Formal Judgment

Defendant is sentenced to a fine of 150,000 yen.

If Defendant cannot completely pay the fine, he shall be detained in a workhouse for a period of days calculated at a rate of 5,000 yen per day.

Defendant shall be liable for all litigation costs.

The period for suspension of the election right and the right to be elected, prescribed in art. 252, para. 1 of the Public Offices Election Law, shall be shortened to three years as applied to Defendant.

#### Reasoning

##### (Facts Constituting the Offense)

On the occasion of the election for city council of Bungotakada City held on April 27, 2003, the Defendant had decided to stand as a candidate in this election. With the aim of obtaining votes and winning the election, on April 12th (before filing notice of candidacy), the Defendant canvassed the residence of Tomihiro Ando, Oaza Mitama 241, Bungotakada City, Oita Prefecture and 17 others (as described in the attached list). He distributed to Shigemi Ando, an voter of the same election, and 17 others a one-page

election campaign document stating the following: "Please ask your family members, acquaintances and friends right away to vote for Oishi," "Please let me continue to serve," and "We are late in our efforts for this election. [continued next page]

[P. 2]

I ask for your support." He asked for votes for himself, thus engaging in door-to-door canvassing, the distribution of election campaign documents not prescribed by law and election campaigning widely before filing notice of candidacy.

[Text omitted]

[P.14]

II. Regarding the allegations of violation of the Constitution and of the International Covenant on Civil and Political Rights (the "Covenant")

1. Regarding the allegation of violation of the Constitution

(1) Allegations of defense counsel

The provision of art. 138, para. 1 of the Public Offices Election Law prohibiting door-to-door canvassing and the provision of art. 142 of the same law restricting the distribution of documents are regulations without proper purposes and at a minimum are overbroad. Therefore, both provisions violate the protection of freedom of expression guaranteed by art. 21, para. 1 of the Constitution. Next, the provision of art. 129 of the Public Offices Election Law prohibiting campaigning outside of the official campaign period is a regulation without a proper purpose and at a minimum is unnecessary. Therefore, it violates art. 21, para. 1 of the Constitution. Further, although it is not possible to clearly distinguish the election campaigning referred to in art. 129 of the Public Offices Election Law from ordinary political activities, the provision of art. 239, para. 1, no. 1 of the same law which penalize this behavior lack definiteness and therefore violate the principle of definiteness prescribed in art. 21, para. 1 and the principle of legality prescribed in art. 31 of the Constitution. Further, the provisions of Public Offices Election Law art. 239, para. 1, no. 1, art. 239, para. 1, no. 3, and art. 243, para. 1, no. 3 of the Public Offices Election Law, which penalize campaigning outside of the official campaign period, door-to-door canvassing and distribution of election campaign documents not prescribed by law, as well as the prescription of art. 251 of the same law, which permits the nullification of the election concerned, materially lack equality under the law and therefore violate art. 21, para. 1 and art. 31 of the

Constitution. Consequently, the above-referenced provisions of the Public Offices Election Law are all invalid.

[P. 15]

(2) Regarding the prohibition and punishment of door-to-door canvassing

Article 21, para. 1 of the Constitution Article 21 of the Constitution does not guarantee absolutely unrestricted freedom of speech and publication. In a situation where it is necessary for public welfare, there naturally are reasonable restrictions on the time, place and manner of speech (Supreme Court of Japan, Grand Bench Decision of September 27, 1950; Keishu 4-9-1799).

The prohibition of door-to-door canvassing is not intended to restrict the expression of opinion per se. Rather, it is intended to prevent the adverse effects caused by a means of expression of opinion. That is, it prohibits the adverse effects of door-to-door canvassing. For example canvassing can easily become a hotbed of vote buying and interest-manipulation while disturbing the tranquility of voters' lives. Moreover, if left to take its own course, door-to-door canvassing could compel candidates to pay high expenses out of concern over competing in terms of number of visits. In addition, voting may be controlled by personal considerations. By preventing these ills, the prohibition is introduced with a purpose to ensure the freedom and fairness of elections. The above goal is proper, and when such adverse effects are considered in sum, we can say that there is a reasonable relationship between the uniform prohibition of door-to-door canvassing and the purpose of the prohibition. As for the benefit lost through the prohibition of door-to-door canvassing, it is true that the freedom to express opinions by means of door-to-door canvassing is restricted. However, on this point, of course freedom to express opinions by methods other than door-to-door canvassing is not restricted, and the canvassing restriction is nothing more than an indirect and incidental restriction that simply prohibits a method. On the other hand, the benefit gained through the prohibition is that the freedom and fairness of elections is ensured through prohibiting the adverse effects caused by door-to-door canvassing. Therefore, we can say that the benefits gained are clearly greater than those lost. Further, the statutory punishment for the crime of door-to-door canvassing is one year of less of imprisonment or a fine of 300,000 yen or less. When the importance of the legally protected interest and the degree of illegality is taken into consideration, we cannot say that the balance between the crime and the punishment is lost.

[P.16]

According to the above, the provisions of Public Offices Election Law, art. 138, para. 1, and art. 239, para. 1, no. 3, which uniformly prohibit and penalize door-to-door canvassing, cannot be found to exceed a reasonable, necessary and unavoidable degree, and so do not violate art. 21, para. 1 and art. 31 of the Constitution. (*See* Supreme Court, Grand Bench Decision of April 23, 1969, Keishu 23-4-235; Second Petty Bench Decision of June 15, 1981, Keishu 35-4-205; Third Petty Bench Decision of July 21, 1981; Keishu 35-5-568; Third Petty Bench Decision of February 21, 1984; Keishu 38-3-387.)

(3) Restriction on and punishment of the distribution of documents

Allowing unrestricted distribution, etc. of literature with respect to public offices elections may invite unfair competition in election campaigning, causing thereby, harm to the freedom and fairness of elections and difficulty in maintaining the propriety and impartiality thereof. Therefore, enacting regulations that restrict, punish, etc. the distribution of literature and drawings within the scope found necessary and reasonable to prevent these sorts of adverse effects is an unavoidable measure to ensure the propriety and impartiality of elections for the public welfare. Further, the statutory punishment for such violation, being two years or less of imprisonment or a fine of 500,000 yen or less, cannot be said to cause the loss of the balance between the crime and the punishment.

Accordingly, the provisions of Public Offices Election Law, art. 142, art. and art. 243, para. 1, no. 3, do not violate art. 21, para. 1 and art. 31 of the Constitution. (*See* Supreme Court, Grand Bench Decision of April 6, 1955, Keishu 9-4-819; Grand Bench Decision of November 18, 1964, Keishu 18-9-561; Second Petty Bench Decision of May 27, 1966, Saibanshu keiji 159-81; the above-referenced Grand Bench Decision of April 23, 1969; Third Petty Bench Decision of March 23, 1982, Keishu 36-3-339; Second Petty Bench Decision of February 3, 1984, Saibanshu keiji 234-269.)

(4) Restriction on and punishment of campaigning outside of the official campaign period

always allowing the conduct of election campaigning with respect to public offices elections may invite unfair and unnecessary competition during that period, which may cause harm to the fairness of elections due to the occurrence of difficult to control, corrupt practices. Not only this, but wasteful expenses and labor would escalate, leading to unfair results due to differences in financial ability. [continued next page]

[P.17]

This may result in the corruption of elections. In order to prevent these sorts of adverse effects and ensure the fairness of elections, it is necessary to restrict election campaigns to reasonable and not over-long periods and fix the starting time so that every candidate can engage in election campaigning under identical conditions. The prescription in Article 129 of the Public Offices Election Law that candidates shall not engage in election campaigning except from the date of notice of standing for election until the day before the appointed date of said election, and the prescription in art. 239, para. 1, no. 1 the Public Offices Election Law that punishes a person who engages in campaigning outside of the official campaign period with a year or less of imprisonment or a fine of 300,000 yen or less arose with the purpose of dealing with the above issues and guarantees the fair conducting of elections to maintain the public welfare. That is why we can say that restricting the period for election campaigning and prohibiting and punishing campaigning before said period amounts to a necessary, reasonable and unavoidable restriction on the constitutionally protected freedom of expression and we cannot say that the balance between the crime and the punishment is lost. Accordingly, this court finds that the provisions of art. 129 and art. 239, para. 1, no. 1 of Public Offices Election Law do not violate art. 21 or art. of the Constitution. (*See* Supreme Court, Grand Bench Decision of April 23, 1969; the above-referenced Third Petty Bench Decision of July 21, 1981; the above-referenced Second Petty Bench Decision of February 3, 1984.

Further, election campaigning under the Public Offices Election Law is understood to mean, to directly or indirectly exert favorable influence, solicit, induce or engage in various other acts to obtain votes or cause another to obtain votes with the purpose of causing a particular candidate or expected candidate to obtain electoral victory with respect to a certain public office. If so, then it cannot be said that the meaning of election campaigning under the Public Offices Election Law is unclear. Because art. 129 of this law allows such election campaigning to be conducted only during certain periods and art. 239, para. 1, no. 1 the Public Offices Election Law that punishes a person who violates this prohibition, it cannot be said that the constituent elements of the crime of campaigning outside of the official campaign period lack definiteness. Accordingly, the provisions of art. 129 and art. 239, para. 1, no. 1 the Public Offices Election Law are not in violation with art. 21, para. 1 or art. 31 of the Constitution in this meaning either (*See* Supreme Court, Third Petty Bench Decision of October 22, 1963, Keishu 17-9-1755).

[P. 18]

(5) Regarding nullification of electoral victory

The nullification by art. 251 of the Public Offices Election Law of the electoral victory of a winner who committed an electoral crime of door-to-door canvassing, distribution of election campaign documents not prescribed by law, campaigning outside of the official campaign period or the like and was sentenced to punishment ensures that elections for public office are conducted impartially and properly through the free expression of the will of the voters and has the purpose of ensuring that electoral victory is the result of impartial and proper elections. Thus, in a situation in which a candidate or prospective candidate engages in an electoral crime such as the above, such criminal conduct is inferred to have a substantial impact on the candidate's electoral victory and such it is difficult to say that the votes obtained thereby are the result of the free will of the voters. It follows that, because such electoral victory cannot be described as the result of a fair election, the nullification of such electoral victory is consistent with the principal purpose of the electoral system.

According to the above, the provisions of art. 251 of the Public Offices Election Law cannot be described as violative of art. 21, para. 1 or art. 31 of the Constitution.

#### (6) Conclusion

Accordingly, the various provisions of art. 138, para. 1, art. 239, para. 3, no. 3, art. 142, art. 243, para. 1, no. 3, art. 129, art. 239, para. 1, no. 1 and art. 251 of the Public Offices Election Law are not violative of art. 21 or art. 31 of the Constitution. Therefore, defense counsel's above-referenced allegations cannot be adopted.

### 2. Regarding the allegation of violation of the Covenant

#### (1) Allegations of defense counsel

(1) Even if the conduct of the Defendant is interpreted as election campaigning, complete freedom is guaranteed as the right of election campaigning based on the freedom of speech and freedom of expression in the election process protected by the combination of art. 19 and art. 25 of the Covenant. In addition, the provisions of Public Offices Election Law, art. 138, para. 1, art. 239, para. 1, no. 3, art. 142, art. 243, para. 1, no. 3, and art. 251 which prohibit, restrict and penalize door-to-door canvassing and the distribution of documents as well as permit the nullification of the election concerned exceed the scope of the restrictions allowed under art. 19 and art. 25 of the Covenant. Further, the provisions of Public Offices Election Law, art. 129, para. 1, art. 239, para. 1, no. 1, and art. 251 which prohibit and penalize campaigning outside of the official campaign period and permit the nullification of the election concerned cannot be said to serve legitimate purposes permitted by art. 19 and art. 25 of the Covenant, and so the restrictions lack necessity and reasonableness. [continued next page]

[P. 19]

Further, regardless of the contents, degree or results of the Defendant's conduct, the provision of Public Offices Election Law art. 252, which permit the suspension of the election right and the right to be elected materially lack proportionality under the Covenant as restrictions of rights. Consequently, the above-referenced provisions of the Public Offices Election Law are all invalid.

(2) Regarding the allegation of violation of Article 25 of the Covenant

Article 25 of the Covenant provides as follows.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the voters;

(c) To have access, on general terms of equality, to public service in his country.

These provisions guarantee the rights to take part in the conduct of public affairs, the right to vote (the right to elect), the right to be elected (the right to be elected, the right of candidacy) and the right to have access to public service. Among these, the rights to vote and be elected are rights based on the assumption that they can be exercised in genuine, periodic elections that guarantee universal suffrage, equal suffrage, secret ballots and the free expression of the will of the voters. And the freedom of electoral activities can be said to have a close connection to the right to be elected based on the free expression of the will of the voters; however, in light of the context of the provision and the ordinary meaning of the phrase "be elected," art. 25(b) cannot be construed as directly guaranteeing the freedom of electoral activities.

Further, General Comment 25 of the Human Rights Committee prescribed in Article 28 of the Covenant states: "Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected" (Paragraph 12); and, "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. ... [continued next page]

[P. 20]

It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas" (Paragraph 25). Specifically, in order to ensure the rights guaranteed by art. 25, particularly the right to vote, respect for the right to freedom of expression, etc. guaranteed by art. 19 of the Covenant is indispensable, and the freedom of electoral activities is listed as one example of "the rights guaranteed in articles 19, 21 and 22 of the Covenant." If so, then the freedom of election campaigning is respected as one indispensable condition in order to ensure the rights guaranteed by art. 25 of the Covenant. However, the freedom of election campaigning is respected as one indispensable condition for the purpose of ensuring rights guaranteed under art. 25 of the Covenant. However, this freedom is construed to be guaranteed, depending on the method, format, etc. of the election campaign, as the right to freedom of expression (Covenant, art. 19), the right of peaceable assembly (Covenant, art. 21) the right to freedom of association with others (Covenant, art. 22), and is not again guaranteed by Covenant, art. 25.

Consequently, the regulations that prohibit, restrict and penalize door-to-door canvassing and the distribution of documents conducted as election campaigning as well as campaigning outside of the official campaign period do not violate art. 25 of the Covenant. (*See* Supreme Court, Second Petty Bench Decision of July 5, 2002, Saibanshu Keiji 281-705; First Petty Bench Decision of September 9, 2002, Saibanshu Keiji 282-5; Third Petty Bench Decision of September 10, 2002, Saibanshu Keiji 282-251)

(3) Regarding the allegation of violation of Article 19 of the Covenant

a. Article 19, paragraph 3 of the Covenant provides as follows with respect to the grounds for restriction the right to freedom of expression (art. 19, para. 2):

"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

[P. 21]

(a) For respect of the rights or reputations of others;



(b) For the protection of national security or of public order, or of public health or morals."

Further, General Comment 10 of the Human Rights Committee states: "[W]hen a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. ... the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes" (para. 4).

b. (a) When this is applied to this case, the regulations that prohibit, restrict and penalize door-to-door canvassing, the distribution of documents and campaigning outside of the official campaign period are restrictions on rights regarding freedom of expression. However, these are prescribed under "law"; namely, the Public Offices Election Law.

Further, as set forth above, because that regulation has as its purpose the assurance of free and fair elections, it is found to be a law for the protection of "public order." The fact that General Comment 25 of the Human Rights Committee states that "elections must be conducted fairly and freely on a periodic basis" (para. 19) is consistent with the interpretation that the freedom and fairness of elections affect "public order."

(b) Next, a review of the necessity of restriction shows that these actions bring with them adverse effects as described above, which could harm the freedom and fairness of elections. Moreover, the freedom and fairness of elections have great significance because they are indispensable for democracy in the [city] council system. We find it necessary to have regulations that prohibit, restrict and penalize these actions in order to ensure this and guarantee the free expression of the will of the voters. Further, setting reasonable methods and periods for election campaigning promotes correction of inequalities between persons with financial means and those without as well as between those who can field staff in the election and those who cannot. These regulations are considered necessary to render election campaigning among candidates materially fair.

[P. 22]

Further, it is inappropriate to permit persons who have been punished for any of these electoral crimes to participate in elections. Therefore, it is proper to exclude such persons from participating in public elections for a certain period and thereby ensure the fairness of elections while encouraging such persons to reflect on their actions. Consequently, it is necessary to suspend the election right and the right to be elected with respect to such persons.

In addition, as described above, door-to-door canvassing can easily become a hotbed of vote buying. When the situation of our nation, in which pernicious electoral crimes such as vote buying show no signs of decreasing, is taken into consideration, we can construe that it is necessary not only to control vote buying and the like after the fact but also to prevent these pernicious electoral crimes beforehand by prohibiting door-to-door canvassing. (Among vote-sellers, there are those who accept money or other valuables without resistance; however, there are also persons among them who reluctantly accept such consideration, due to a sense of obligation toward the vote-buyer or a reluctance to risk being seen as not supporting the vote-buyer for not accepting the money or other valuables {July 28, 2005 judgment of this court}. If door-to-door canvassing were completely allowed, the outward restrictions on visiting the homes of the voters during the election period or times close to the elections; mutual monitoring, etc. among candidates would cease to function; psychological resistance to the vote-buying enticements of candidates would diminish, and it cannot be denied that there would be the risk of an increase in the latter sort of vote-sellers.) Further, we also find it necessary to prohibit door-to-door canvassing from the standpoint of promoting the correction of inequalities between persons with financial means and those without as well as between those who can field staff in the election and those who cannot and thus rendering election campaigning among candidates materially fair.

General Comment 25 of the Human Rights Committee also states, with respect to the rights to vote and be elected prescribed in art. 25(b) of the Covenant, "Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the voter's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. [continued next page]

[P. 23]

Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party" (para. 19). That is, the purpose of this is to eliminate all types of improper influences, etc. on the free expression of the voter's will. An example of such improper influence would be to expend an unreasonable amount on election campaigning, which points out the justifiability of necessary and reasonable restrictions on such conduct. Because door-to-door canvassing, the distribution of election campaign documents not prescribed by law and campaigning outside of the official campaign period exert an

improper influence on the free expression of the will of the voters, there is a need to regulate these activities, and such restrictions are justified within a reasonable scope.

(c) When we consider whether such regulations are justified as reasonable, we see that the prohibition of door-to-door canvassing only prohibits one means of expression of opinion. However, it does not in any way restrict the freedom to express opinions by methods that do not amount to door-to-door canvassing, such as, for example, individual interviews, visits to business offices and telephone. Moreover, it is possible under certain conditions to hold individual speech meetings and make speeches for the purpose of election campaigning or conduct street speeches for the purpose of election campaigning (*See Public Offices Election Law, art. 161 through art. 166*).

Next, the restriction on the distribution of documents as well only prohibits one means of expression of opinion. Since it is possible to distribute a considerable number of ordinary postcards, etc. (in the election at issue, 2,000 ordinary postcards represented as for electoral purposes) by mail, the restricted literature is limited to that such as is used for the purpose of election campaigning. That is, there is no restriction on the freedom of expression of opinion through literature generally. Moreover, the prohibition of campaigning outside of the official campaign period only restricts the period for election campaigning. Along with the dissemination of information by means of expression of opinion by candidates, etc., a necessary and proper period (in the case of this election, seven days) is ensured according to the scope of the election in order to promote fairness among candidates. [continued next page]

[P. 24]

Moreover, it does not in any way restrict the freedom of political activities such as expression of opinion that does not amount to election campaigning conducted outside of the official campaign period, and the freedom of individuals to engage in political activities during that period is not in any way restricted (*See Public Offices Election Law, Chapter 14-3*). For example, the expression of political opinions by a candidate or prospective candidate in newspapers, magazines, speech meetings and the like is free regardless of whether during or outside of the official campaign period. In fact, the Defendant has for many years been publishing and distributing each week a document entitled, "Everybody's Takada," which contains reports on the Defendant's own council activities, political opinions and the like (hereinafter referred to as "Everybody's Takada"), but this conduct is not restricted in any way and no investigative agency has found fault with this. Further, the two documents including Everybody's Takada that were distributed at the same time as the News, which is the subject of the indictment in this case, were not specified in the indictment. Thus, it can be inferred that in order to avoid unjustly harming the freedom to engage in political activities, the Public Offices

Election Law imposes individual, concrete and specific regulations on election campaigning to check the abuse of public authority, and to that end the restrictions of the Law are applied prudently. Thus, the result of candidates, etc. using the various methods described above to express their opinions is to enable voters to make independent decisions as to the selection of suitable representatives and to freely and effectively exercise the election right.

In addition, as set forth above, the punishments for acts of door-to-door canvassing, distribution of election campaign documents not prescribed by law and campaigning outside of the official campaign period are not unjustly heavy. In a situation in which imprisonment would lead to a harsh result, such severity can be avoided by the selection of a monetary penalty. The statement of the prosecution's opinion regarding suitable punishment in this case specifies monetary penalty, and the persons for whom summary orders were requested as described in Section 1-2(9) above were also sentenced to monetary penalties (Government's Exhibit Nos. 104 through 110).

[P. 25]

At the same time, because representatives elected by the voters are in positions that involve substantial job responsibilities with responsibilities to fulfill, such as restricting the rights of citizens and residents – including those of the voters – through the enactment of laws and ordinances, suitable persons should be elected for such positions through genuine elections based on the free expression of the will of the voters. Thus, persons running for public office must conduct fair election campaigning so as not to exert an unjust influence on the free expression of the will of the voters. Moreover, when the position of representative described above is taken into consideration, the fairness in election campaigning demanded of candidates themselves is greater than that demanded of persons who are not candidates. Therefore, it is reasonable the sanctions against persons who win elections by personally engaging in unfair election campaigning are stricter than those in the case of the so-called "guilt-by-association system" in which persons other than the candidates themselves engaged in similar conduct. Accordingly, in a situation in which an election winner himself exerted an unjust influence on the free expression of the will of the voters through unfair election campaigning, that electoral victory is nullified as a matter of course because it is not the result of a genuine election; and it cannot be helped if the subject electoral crime is not restricted to malicious crimes such as vote-buying (*See* Public Offices Election Law, art. 251 through art. 251-5, art. 210 and art. 211).

Moreover, with respect to the suspension of the right to vote and the right to be elected, it is possible for the court to relax how these matters are dealt with depending on the specific case. For example, a court may decide to withhold application of the provision

on suspension or shorten the period of suspension based on the circumstances of the crime or other circumstances (Public Offices Election Law, art. 252, para. 4).

Therefore, because the regulations prohibiting, restricting and penalizing the conduct of door-to-door canvassing, the distribution of documents and campaigning outside of the official campaign period are all reasonable; cannot be described as provisions that cause the loss of the essence of the right; and can be justified as necessary for Japan to achieve the purposes described above, they are construed as not in violation with art. 19 of the Covenant (*See* Supreme Court, Second Petty Bench Decision of July 5, 2002; First Petty Bench Decision of September 9, 2002, cited above; Third Petty Bench Decision of September 10, 2002, cited above).

[P. 26]

### 3. Regarding the assertion of strict interpretation

Defense counsel assert that the elements of the crime of door-to-door canvassing, the crime of distribution of election campaign documents not prescribed by law and the crime of campaigning outside of the official campaign period should be given strict interpretation so as to be compatible with the Constitution and the Covenant; and that the Defendant's conduct does not come under the purview of such elements once they are given such strict interpretation.

However, as set forth in 1 and 2 above, even without giving these elements such strict interpretation, applying the crimes involved does not violate the Constitution or the Covenant. Therefore, because the premise of defense counsel's assertion is lacking it cannot be adopted.

[Text omitted]

## Annex 10

### Comment on the Oishi case

I have read the Oita district court's decision of January 12, 2006, in the Oishi case. In my opinion, the court has erred in its interpretation and application of articles 19 and 25 of the International Covenant on Civil and Political Rights.

#### *Misinterpretation of the Covenant*

The court has both misunderstood and misapplied the test required under paragraph (3) of article 19 of the ICCPR to determine whether restrictions on freedom of expression are necessary. The court has found that certain restrictions on freedom of expression are "necessary" without considering whether those restrictions are proportionate to their purpose or goal, and without considering whether the purpose served by the restrictions could be attained by lesser means. It has failed to consider the requirement that restrictions must not put in jeopardy the right itself.

In adopting that approach, the Court has given no weight to the interpretations placed on the Covenant by the Human Rights Committee, but has instead has treated the principles of the Covenant, especially those which deal with permissible limits on freedom of expression, as if they were similar to the Constitutional principle, which allows for reasonable limits on rights in the name of public welfare.

The unsatisfactory reasoning adopted by the Court failed to establish that the application of the Public Offices Election Law in this case was compatible with the Covenant. Their application was an unjustified restriction on freedom of expression and on democratic rights.

The Human Rights Committee has pointed out that the terms used in the Covenant are to be interpreted and applied quite independently of their interpretation, meaning or application in any particular legal system: (*Gordon C. van Duzen v. Canada* 50/1979, views of 7 April 1982.) The Committee is the only international body with a specific role to interpret and apply the Covenant. Its view is that any restriction of the right to freedom of expression must be subjected to the rigorous application of the test of necessity set out in paragraph (3) of that article. (*Gauthier v Canada* 633/1995, views of 7 April 1999). This test is far stricter than the constitutional principle referred to. In 1998, the Committee expressed its concern that the "public welfare" limitation of articles 12 and 13 of the Constitution would not be applied in conformity with the Covenant. (Concluding Observations on Japan, November 1998).

#### *Article 25*

Article 25 of the Covenant provides as follows.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The court determined that there was no violation of article 25, since the freedom of election campaigning is guaranteed, depending on the method, format, etc. of the election campaign, as the right to freedom of expression (Covenant, art. 19), the right of peaceable assembly (Covenant, art. 21) the right to freedom of association with others (Covenant, art. 22), and is not again guaranteed by Covenant, art. 25.

This determination misconstrues the scope of article 25. It is mistaken, in that it fails to recognise that a violation of article 19 in relation to an election campaign necessarily involves a violation of the right to stand for election, and the right to free and fair elections protected by article 25. The court appears to have taken the view that a right can be protected only by one provision of the Covenant. That is not correct, for reasons explained below.

### **the connection between free elections and freedom of communication is indispensable**

Freedom of expression and communication in relation to political and public affairs are indispensable to the exercise of democratic rights and representative government, which are protected by article 25 of the Covenant. Democratic rights and the participation by all citizens in public affairs and in free elections would be ineffective without freedom of expression and communication in relation to political and public affairs.

The strong connection between these rights is recognized by many domestic and international decisions. Thus it has been held by the Canadian and British courts that freedom of expression is a fundamental concept upon which representative democracy is based [*RWDSU v Dolphin Delivery Ltd* (1986) DLR (4th) at 183; *The Observer & The Guardian v UK* (1992) 14 EHRR 153, 178].

“Freedom at election time to praise the merits and policies of some candidates and to decry those of others is an essential of parliamentary democracy” *National Citizens’ Coalition Inc v Attorney-General for Canada* (1984) 11 DLR (4th) 481, 492.

Although there have been many cases claiming violation of the right to freedom of

communication in relation to the democratic process, few of these have involved the question whether there was also a violation of the right to free elections. Nevertheless, it is clear that freedom of expression and democratic rights and freedoms are two sides of one coin. When the freedom of election campaigns is at issue, one right cannot be considered in isolation from the other. The close connection between these rights is illustrated by the fact that in this case, the penalties imposed for violating laws which restrict freedom of expression is the suspension of democratic rights.

### **each right has its independent operation**

The principles of interpretation applied by the Human Rights Committee require that each right be considered independently, and given its full scope, regardless of any overlap with another right. For example, the provisions relating to non-discrimination and equality in enjoyment of rights in articles 2 and 3 of the Covenant overlap the requirements of article 26 to prohibit discrimination and to guarantee equal protection of the law.

12.3 . . ."The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2." [*S.W.M. Broeks v The Netherlands*, 172/1984 views adopted 9 April 1987; *F.H.Zwaan-de Vries v. the Netherlands* 182/1984, views adopted 9 April 1987, para 12.3]

Inhuman treatment of persons in detention has been found in some cases to violate both article 7 of the Covenant (prohibiting torture and inhuman treatment) and article 10 (requiring humane treatment). [Eg, *Victor Francis and Jamaica Linton v Jamaica* 320/1988 Adopted march 1993; *Villacres Ortega v Ecuador* 481/1991, HRC 1997 Report, vol II, p 1.]

The imposition of the death penalty without a fair trial may violate both article 14 of the Covenant (fair trial) and article 6 (2) (which limits the death penalty to cases where there has been a final judgment by a competent court). [See, for example, *Kurbanov v. Tajikistan*, Communication No. 1096/2002, Views adopted on 6 November 2003, paragraph 7.7.].

In addition, the Human Rights Committee considers that the anti-discrimination provisions of article 26 of the Covenant may be violated, even if the discrimination relates to a right not protected directly by the Covenant, but under a different international instrument. [*S.W.M. Broeks v The Netherlands* 172/1984, views adopted 9 April 1987; *F.H.Zwaan-de Vries v. the Netherlands* 182/1984, views adopted 9 April 1987].

### **article 25 implies a right to freedom to campaign**

The high value placed on freedom of expression, and the importance of its role in free and democratic processes, supports the view that article 25 necessarily implies protection of freedom of expression in regard to election campaigns, quite



independently of article 19.

The ability of the people to make informed choices among candidates for political office is fundamental because the identity of those who are elected will shape the nation's destiny [*Buckley v Valeo* (1975) 424 US 1 at 14-15.]

On this view, even if article 19 did not apply, freedom of communication in respect of public affairs and election campaigns would necessarily be protected under article 25. The Human Rights Committee has itself determined that “the rights under art 25 should also be read to encompass freedom to engage in political activity individually or through political parties, to debate public affairs, to criticise the Government and to publish material with political content.” [*Adimayo M Aduayom and others v Togo* 422-424/1990, views adopted 12 July 1996, Report for 1996, vol II, p 17, para 7.5. (para 7.5)].

The connection between democratic rights and freedom of expression is so strong that the High Court of Australia implied a constitutional right to freedom of communication in respect of public affairs. Even though freedom of communication is not expressly mentioned in the Constitution, the right was derived from the constitutional guarantee of democratic rights.

“The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation.” [*Aust Capital TV/PL v Commonwealth No 2*, {1992} 66 ALJR, 695, per McHugh, J. 743].

To summarise, the right under article 25 to be elected in genuine elections which freely express the will of the people, implies the right to campaign for election. The free choice of voters necessarily implies informed choice, and the right of the candidate and the voter to impart and to receive information. This protection extends to the right of the candidate to canvass for votes and to distribute materials for this purpose. Without these rights, the right to be elected in genuine elections could be rendered meaningless. As Nowak said in his study of the Covenant:

Free formation of voter will is guaranteed only by free – i.e., uncensored and, at the same time, not manipulative – campaign advertising by the various parties and candidates, particularly in the mass media. The principle of free elections thus protects the right of eligible voters not to be pressured or impermissibly

influenced in forming and expressing their will and the right of campaigning parties and candidates to unimpaired campaign advertising.<sup>1</sup>

**in either case, limitations can apply**

Freedom of political discourse can be limited or regulated only to the extent that the regulation is reasonable and appropriate to achieve some legitimate purpose. The restrictions permissible under article 25 are, in general, similar to those permissible under article 19 (3). For example, laws which seek to achieve an honest and fair election, ie to prevent fraud, intimidation, corruption and misleading information are permissible to the extent that they go no further than is necessary to achieve that purpose and do not extinguish or unreasonably limit the right.

In practice, however, the right to campaign and restrictions on freedom of expression and communication are generally considered under article 19. The rights protected by article 19 have been more fully interpreted by the Human Rights Committee in communications and in General Comments. Particular care must be taken in applying the restriction provisions in paragraph (3) of article 19 in cases in which the democratic rights protected by article 25 are involved,.

***Compatibility of the decision with Article 19***

Article 19 (2) and (3) of the International Covenant on Civil and Political Rights provide that

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

In the present case, the Court concluded that “the regulations that prohibit, restrict and penalize door-to-door canvassing, the distribution of documents and campaigning outside of the official campaign period” are restrictions regarding the right to freedom of expression. The Court concluded further that these restrictions are prescribed under

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<sup>1</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights; CCPR Commentary*, Engel, 1993, p 449.

"law" namely, the Public Offices Election Law.

The central finding of the court was that the restrictions were necessary, in accordance with paragraph 3 of article 19, to protect public order, by ensuring the freedom and fairness of elections and the free expression of the will of the electors. The court's reasoning appears to be that it is necessary to regulate the activities proscribed by the law, because they exert an improper influence on free elections, and that the prohibitions in question were justified as reasonable and not harmful to the substance of rights.

The court does not explain how the actions restrained, and in particular the actions of Mr Oishi, could or were likely to have an improper influence on the free expression of the will of the electors, nor does the court consider whether the restrictions are proportionate to the likelihood of harm, ie whether they go no further than necessary to deal with that harm.

These tests must be strictly applied when freedom of expression is in issue, especially in the context of the exercise of democratic rights. Freedom of expression is one of the most important and most cherished rights in a democracy, ranking equally with democratic rights themselves. Freedom of expression and communication about public affairs and political matters are essential to the maintenance of a free and democratic society, and to ensuring free and fair elections. Freedom of expression enables candidates to disseminate their policies, it enables criticism and comment of policies to circulate, and it enables electors to make a free choice..

To argue that freedom of expression should be restricted in the name of protecting democratic rights and free elections is almost a contradiction in terms. Restriction of freedom of expression could in fact undermine rather than protect the democratic process. To be compatible with the Covenant, and the jurisprudence of the Human Rights Committee under article 19, there must be a compelling need for any such restrictions, and the restrictions must be limited in their application to acts which are clearly shown to threaten the free and fair conduct of elections. The least restrictive means possible should be adopted, to ensure that there is no distortion of the democratic process, or stifling of political discussion. In other words they must be proportionate to the risk of harm.

On this basis it is permissible to restrict freedom of expression to prohibit bribery, to prevent fraud, intimidation, corruption and misleading information or the making of false and defamatory statements about candidates. Freedom of expression does not protect these actions, which are in themselves harmful and likely to undermine the conduct of free and fair elections.

The restrictions must however be proportionate to their objectives. If the relevant laws are drawn too broadly, they may penalize not only harmful acts, which actually threaten public order, but also harmless, non-dangerous, acts. The application of laws restricting freedom of expression have been found by the Human Rights Committee to be incompatible with the Covenant because their scope is too broad – extending to acts

which in themselves are not harmful. [*Faurisson v France* 550/1993, views adopted 8 November 1996.]

In this case, the focus must be on the application of the election law to the actions of Mr Oishi, rather than on the range of other actions which may fall within the ambit of the law. For the purposes of article 19 (3), the question is whether in penalizing his actions, the law constituted a necessary restriction on freedom of expression, proportionate to the objective of ensuring free and fair elections, or whether the law is wider in scope than is necessary for that purpose.

Each aspect of the law is considered from the point of view of its actual and potential harm, and the necessity for restrictions.

### **door-to-door canvassing**

Article 138 (1) of the Public Offices Election Law provides that no person shall conduct door-to-door canvassing regarding an election with the aim of gaining or causing another to gain or lose votes. The court found that the Defendant visited the persons he canvassed with the purpose of obtaining votes, in violation of this law.

The court considered that the crime of door-to-door canvassing is “a so-called abstract dangerous crime”, and that the Defendant's conduct involved the risk of infringement of legally protected societal interests. The court’s view was that door-to-door canvassing creates an opportunity for bribery or vote buying, and thus exerts an improper influence on the free expression of the will of the electors. As it is a harm in itself, its prohibition is justified. The court stated that the law leaves other campaigning methods available, including individual speech meetings, speeches and street speeches. (See Public Offices Election Law, art. 161 through art. 166).

Contrary to what the court said, there are sound reasons for the view that door-to-door canvassing is not in itself harmful to the democratic process. It is commonly practiced in many democracies without being penalized. Because it is such a widespread practice, and because a total ban on door-to-door canvassing is a severe restriction of freedom of expression, that ban can only be justified by reasons showing that such an extreme restriction is necessary and that no alternative, less restrictive, measures are available to combat bribery or vote buying.

Clearly, bribery or vote buying, as described by the court, are harms which undermine the democratic process. They are classified as offences in most countries. Any candidate for election or other person who engaged in such activities, or who offered inducements or threats, should be subjected to punishment.

But it is not established by any evidence that door-to-door canvassing is associated with or that it necessarily leads to bribery or vote buying, or that it would increase the incidence of such activities. The connection between the two factors is not substantiated by any evidence on this point.

The court failed to deal with the question which arises in applying paragraph (3) of article 19, namely whether there are less restrictive means of achieving the goal of

combating bribery and preventing improper influence or other actions which undermine democracy without restricting freedom of expression by a total ban on door-to-door canvassing. For example, rigorous enforcement of anti-bribery laws is an option which does not require the total banning of an activity which is valid in itself. It is difficult to see a justification for prohibiting door-to-door canvassing rather than enforcing strictly laws against bribery.

On the question of proportionality, it was not suggested that Mr Oishi's actions involved any bribery or vote buying, or that he did anything other than ask for voter support. In fact, the Court noted that "the Defendant's conduct was different in its criminality from the pernicious electoral crimes of vote buying and the like, and compared to those crimes has a smaller impact on the freedom and fairness of elections." Yet his conduct has been penalised under regulations which are aimed at preventing the serious offences of bribery or vote buying.

The court also said that "prohibition of door-to-door canvassing would correct inequalities between persons with financial means and those without as well as between those who can field staff in the election and those who cannot and thus rendering election campaigns fair". The court appears to have taken the view that elections would be unfair if candidates were compelled to pay high expenses in order to compete for votes by door-to-door canvassing.

Inequality of resources between candidates could potentially affect permissible campaign activities, for example, telephone campaigning, visiting offices, personal interviews or the cost of party advertising in the media. Certain inequalities are inevitable in a democracy, but they do not necessarily require restrictions on freedom of expression. Restricting freedom of expression is an inappropriate and disproportionate response to the problem of unequal resources, if other lesser means are available.

Alternative responses could be to impose legal limits on election expenditure, which would give candidates freedom of choice as to their methods of campaigning. This is the approach adopted by some countries. Other countries provide public funds for election expenses.

In this case, the existence of any problem regarding inequality has not been substantiated by any material evidence. The court has failed to consider, as required by article 19, paragraph (3), whether other, less restrictive means could deal with any such problem. Because of the importance of freedom of expression in relation to political matters, a total ban on door-to-door canvassing cannot be shown as necessary to deal with unequal resources.

The court also mentioned that door-to-door canvassing causes interference with tranquility and privacy. This argument is insufficient to support a serious restriction on freedom of expression in matters of public affairs by banning canvassing. Alternative and lesser forms of restriction could address this issue, such as limiting the hours of day, or limiting the activity to candidates only. Measures of this kind could reduce the potential for interference, while allowing candidates to exercise their right to freedom of

expression in the important area of public affairs.

The necessity for a complete ban on door-to-door canvassing has not been established. The restriction on freedom of expression resulting from the total ban on canvassing is disproportionate to the objective of that law. The necessity for punishing Mr Oishi's actions under the law is not established.

### **the distribution of campaign documents not prescribed by law**

Articles 146 and 142 of the Public Offices Election Law prescribe that during the election period, no one may distribute or post documents or drawings that display the name, symbol or mark of a candidate for public office, the name of a political party or other political group, etc, unless the documents comply with specifications as to size and number. The statutory punishment for violation is up to two years imprisonment or a fine of 500,000 yen or less.

In this particular case, postcard size is prescribed. Before the beginning of the election period, Mr Oishi distributed 18 copies of a one-page document stating the following: "Please ask your family members, acquaintances and friends right away to vote for Oishi," "Please let me continue to serve," and "We are late in our efforts for this election. I ask for your support." This newsletter, described by the court as an election campaign document, did not comply with the prescribed size. He was convicted of violating articles 146 and 142.

For the restriction on size and number of documents to comply with paragraph (3) of article 19 of the Covenant, it must be established that it is necessary to protect public order; and that the application of the law is proportionate to the need, that is, it goes no further than is necessary to protect the public interest. Because of the importance of freedom of expression to the democratic process and to the conduct of free elections, there must be clear and compelling grounds to support the restrictions.

The court took the view that the regulation was necessary because the distribution of election campaign documents not prescribed by law exerts an improper influence on the free expression of the will of the electors. Improper influence might, of course, arise from the content of documents. However, there is no suggestion that either the size or the content of Mr Oishi's documents was likely to have an improper influence. It is difficult to sustain the argument that documents falling outside the prescribed regulations as to size, could be improper in themselves or have an improper influence such as to justify a complete ban with serious penalties.

Example: In a case decided by the Human Rights Committee, the author was fined for distributing leaflets which had not been registered and which did not carry index and registration numbers. The author was fined. The Human Rights Committee found that the restrictions requiring registration were not shown to be necessary for the protection of public order (*ordre public*) or for respect of the rights or reputations of others. A violation of article 19 (2) was found. [*Vladimir*

*Petrovich Laptsevich v. Belarus*, 780/1997, views of 20 March 2000, Report for 2000, vol II p 178]

The court observed that “allowing unrestricted distribution, etc. of literature with respect to public office elections may invite unfair competition in election campaigning, causing thereby, harm to the freedom and fairness of elections and difficulty in maintaining the propriety and impartiality thereof.” However, it would be difficult to establish unfair competition solely on the ground of size.

The court justified the restriction on the basis that unequal expenditure may make elections unfair. The implication is that a candidate might spend more money on printing a larger document, and in this way give a more extended explanation of his or her policies. However, it does not follow that printing documents other than the prescribed size would necessarily involve increased expenditure; that could depend on other factors, such as method of production, quality of material, number, etc.

Restricting the amount of information a candidate may give to electors is a serious limitation on the freedom of candidates to inform electors in the manner of their choosing about their policies and programs on matters of public interest. Such a restriction cannot be considered necessary on equity grounds. Preventing candidates from expressing their policies in the manner they consider most suitable can hardly be justified on the basis of achieving electoral freedom and fairness.

If there are problems about unequal expenditure by candidates, these could be addressed in other ways, which do not involve restrictions on freedom of expression. For example, reasonable restrictions on election expenditure by candidates or parties do not violate article 19 or 25, since they leave freedom of choice as to the form and content of election material. [HRC General Comment: Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party" (para. 19)."]

For example, the UK imposes limits on election expenditure; a candidate who exceeds this limit can be penalized. This type of limitation leaves candidates with freedom of choice as to how to conduct their campaign. If unequal expenditure is seen as a problem that should be dealt with directly by overall restrictions on expenditure rather than by restricting freedom of expression with excessive regulation of the size of documents. In the present case, the court also commented that the restriction was justifiable and reasonable as it only prohibits one means of expression of opinion. Candidates were free to issue 2,000 postcards, and “there is no restriction on the freedom of expression of opinion through literature generally.” This is a complete misunderstanding of article 19. Each restriction of freedom of expression must be justified in its own terms. Whether the purpose of the regulation is to avoid improper influence, or to ensure fairness, to meet the conditions of article 19 (3) it must be shown to be necessary for that purpose and to be the least restrictive means to achieve the purpose.

In this case, Mr Oishi's documents contained nothing which could have an improper influence on electors, and his actions appear to have represented no threat whatsoever to the fairness of the elections.

It has not been established that the restrictions on size of documents are necessary to avoid improper influence or to ensure fairness. On the question of equity, the court failed to consider alternative means to deal with disparity in resources, which would not restrict the freedom of expression of candidates. The restrictions have little bearing on and are quite disproportionate to the objectives defined by the court.

### **campaigning outside of the official campaign period**

Article 129 of the Public Offices Election Law prohibits the conduct of an election campaign except during the period from the day on which notice of candidacy is received under the provisions of Article 86. The penalty is up to a year of imprisonment or a fine of 300,000 yen or less.

Mr Oishi was found to have engaged in door-to-door canvassing and distribution of election campaign documents not prescribed by law before filing as a candidate. He was convicted of conducting campaigning outside of the official campaign period. The permitted campaign was seven days.

The court's view was that setting campaign periods was justified to correct inequalities between persons with financial means and those without as well as between those who can field staff in the election and those who cannot. The court emphasized that the regulation concerning the campaign period does not restrict freedom of expression in regard to public affairs at other times as long as that expression does not involve election campaigning. "For example, the expression of political opinions by a candidate or prospective candidate in newspapers, magazines, speech meetings and the like is free regardless of whether during or outside of the official campaign period." According to the court, candidates could use these methods to express their opinions and enable electors to make independent decisions as to the selection of suitable representatives. To meet the requirements of paragraph (3) of article 19, it must be shown that the restriction is necessary on public order grounds and that it is the least restrictive means to achieve that purpose. It appears that the law prohibits asking for voter support at an election except during the prescribed period, while permitting statements of political opinions and policies. Since political material may be freely circulated at any time setting out the merits of an individual and his views and policies, the simple addition of a request for voter support cannot have any real impact on the fairness or equality of a future election. Asking for voter support cannot in itself carry be regarded as corrupt or improper, merely because it occurs before the designated period.

It is often observed in democracies that the election period starts immediately after the preceding election. In other words, a great deal of political activity, policy speeches and publications are aimed at gaining or keeping the support of voters, whether or not a direct request for elector support is made. In this realistic view of political life, it makes



little sense to distinguish between one form of campaigning and another.

The restriction appears to have little if any impact on inequality in access to resources.

In any event, the court did not consider whether any less restrictive means were available to deal with that issue, such as mentioned earlier.

Furthermore, there is no suggestion that Mr Oishi acted corruptly, or exerted any improper influence on voters by asking for support. He was doing no more than exercising his freedom of expression to impart information about his policies and to ask for voter support. Any other candidate could, at the same time, have disseminated personal information or information about their policies. The suggestion that Mr Oishi's acts were unfair, simply because they added a request for voter support, carries little weight.

Limiting campaigning to the period specified has not been shown to be necessary to protect public order, and is not substantiated on the grounds put forward by the court. Its application to Mr Oishi in the circumstances was quite disproportionate to any possible threat to public order or to the fairness of the election.

### **Penalties**

The penalty imposed on Mr Oishi for the violations found against him were: a fine of 150,000 yen, or in the alternative detention for a period of days calculated at a rate of 5,000 yen per day. He was held liable for all litigation costs. His electoral rights were suspended for three years, under art. 252, para. 1 of the Public Offices Election Law. His election was set aside. (Article 251 of the Public Offices Election Law).

To satisfy the requirements of paragraph (3) of article 19, it must be established that the penalties imposed are necessary to protect public order and proportionate to their purpose. In this case, the penalties imposed appear to be out of proportion to any harm which may have arisen from Mr Oishi's actions. The court failed to consider the actual effect of those actions. It is difficult to see any threat to public order or to the conduct of free and fair elections which resulted from his actions. They did not contribute in any way to making the election unfair.

The court's justification for setting aside the election of Mr Oishi was that he had exerted an unjust influence on the free expression of the will of the electors through unfair election campaigning. In considering whether the deprivation of electoral rights was compatible with the Covenant, the court said that "it is proper to exclude such persons from participating in public elections for a certain period and thereby ensure the fairness of elections while encouraging such persons to reflect on their actions." The court noted that the court may decide to withhold application of the provision on suspension or shorten the period of suspension based on the circumstances of the crime or other circumstances (Public Offices Election Law, art. 252, para. 4).

The setting aside of Mr Oishi's election, and the suspension of his electoral rights requires specific justification. It not only restricts his freedom of expression but also deprives him of the right to vote and to stand for election, rights protected by article 25

of the Covenant. Consequently, it must conform not only with article 19 (3) but must also be found not to be an unreasonable restriction of the democratic rights protected by article 25. In the present case, it was not shown that Mr Oishi's actions were any more than formal violations of the law. There is no evidence of any undue influence on the electors or of any effect on the fairness or the outcome of the election. In the circumstances, the application of this penalty does not conform with either article 19 or article 25 of the Covenant.

**Elizabeth Evatt**

## Annex 11

Fukuoka High Court

Date of the judgment: 2007.09.27

Case number: 2006 (U) No. 116

Accused:

OISHI Tadaaki

Status: Bungotakada City Council Member

The accused appealed the judgment rendered by the Oita District Court on January 12, 2006, on the case to be brought for violation of the Public Offices Election Law, so we have examined this case in the presence of Prosecutor HATTA Kenichi and rule as follows.

Formal Judgment:

The original judgment shall be reversed.

The accused shall be fined 150,000 yen.

When the whole amount of the fine cannot be paid, the accused shall be detained at a work house for a day per 5,000 yen unpaid.

The accused shall bear the court expenses for the first and second instances.

Five years of suspension of the rights to vote and to be elected, prescribed by Article 252(1) of the Public Offices Election Law shall not apply to the accused.

Reasoning:

The grounds for the appeal are described in (a) the statement of reason for appeal prepared by Chief Defense Counsel KONO Zenichiro, the defense counsels OKAMURA Masaatsu, FURUTA Kunio, NAKAYAMA Tomoyasu, YOSHINO Takayuki, UECHI Kazuhisa, ABE Chiharu, INOSHITA Akira, HATTORI Yuuken, UGAJIN Sunao, and SATO Masamichi, some of whose wording was changed according to the document correcting the statement, (b) the supplementary document on appeal and the supplementary documents (2) and (4), prepared by the chief defense counsel, and (c) the statement of reason for appeal, prepared by the accused, and the response to these statements is described in the answer filed by Prosecutor KATO Akira. Therefore, these documents are referred to here.

According to the original judgment, this is a case concerning door-to-door canvassing, election campaign and document distribution not allowed by the law, and campaigning outside the official campaign period: The accused, who was determined to run for the Bungotakada city assembly election held in April 2003, allegedly visited and asked 18

voters to vote for him before filing his candidacy, as well as distributed a total of 18 pieces of the document intended to solicit votes for him. Though the grounds for the appeal are wide-ranging, their outline is as follows: (1) The original judgment includes errors in fact-finding concerning the illegality and validity of the investigation of this case, and the impartiality of the institution of prosecution, and accordingly includes errors in application of law concerning the abuse of the authority of prosecution; (2) Article 239(1)(iii) (Article 138(1)), Article 243(1)(iii) (Article 142(1)), and Article 239(1)(i) (Article 129) of the Public Offices Election Law are invalid because they are in violation of Article 21 of the Constitution, Article 19 and Article 25 of the International Covenant on Civil and Political Rights (hereinafter referred to as the “Covenant”), and furthermore Article 98(2), Article 39, and Article 31 of the Constitution, so the accused is not guilty. Therefore, the original judgment, which found the accused guilty under those articles of the Public Offices Election Law, includes errors in application of law; (3) The original judgment, which found listed facts without proof that the accused’s acts in this case constitute the violation of Article 138(1), Article 142(1) and Article 129 of the Public Offices Election Law, includes errors in fact-finding; and (4) Even if the relevant articles of the Public Offices Election Law are valid and the given facts are found, the sentencing is in violation of the Constitution or inappropriate on the ground that it suspended the accused’s rights to vote and to be elected.

Then, considering the argument by the defense, we herein study the records and examine this case, taking into account the result of the trial at this court as well.

I. Concerning the argument that the original judgment on the defense counsel’s claim that the institution of prosecution of this case constitutes the abuse of authority to indict has an error

[Details omitted]

II. Concerning the argument that the provisions of the Public Offices Election Law, which prohibit door-to-door canvassing, document distribution not stipulated in the law, and campaigning outside the official campaign period, are invalid because they are in violation of Article 19 and Article 25 of the Covenant, and furthermore Article 98(2), Article 39, Article 31 and Article 21 of the Constitution, so the accused is not guilty

1. According to the argument, Japan has ratified the Covenant with no reservations in 1979, whose provisions concretely stipulate the contents of and restrictions on human rights, so the Covenant has legal force as a national law, and has direct applicability and self-executing nature, which enable judicial judgment at national courts. In addition, though the States parties cannot justify their failure to implement the Covenant due to differences in their culture, customs and social progress, the Human Rights Committee construes that those provisions of the Public Offices Election Law that restrict freedom

of election campaign are compatible with the Covenant only when (a) there is harm or threat that requires restrictions, (b) restrictions are appropriate for attaining the purpose, and (c) the extent of harm or threat that requires restrictions is proportional to the means of restriction. According to this interpretation by the Committee, the accused's acts are lawful because they are protected and permitted under Article 19 and Article 25 of the Covenant, and human rights are more broadly guaranteed under the articles of the Covenant than under the Supreme Court's interpretation of accumulated judicial precedents concerning freedom of election campaign under Article 21 of the Constitution, so punishment and sanction by the State under the Public Offices Election Law are in violation of the Covenant, as well as Article 98(2), Article 39 and Article 31 of the Constitution.

Given the argument mentioned above, we consider as follows. The Covenant was ratified with the approval of the Diet in June 1979, was promulgated in August 4, 1979, and entered into force in September 21, 1979. The Constitution provides in Article 98(2) that the treaties concluded by Japan and established laws of nations shall be faithfully observed, and the Covenant as a treaty went through publication procedure, including the approval of the Diet. Therefore, it is construed that the Covenant naturally has legal force as a national law without specific legislative proceedings when it is promulgated, and that the treaty constitutionally has precedence over laws and its force transcends laws. Moreover, under Article 2 of the Covenant, each State Party undertakes to respect and to ensure the rights recognized in the Covenant, to take legislative or other measures necessary for giving effect to those rights, and to ensure that any person whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy. Then the purport of the provision is obviously expected to be applied in each State Party, and the Covenant specifically defines inherent rights and freedoms citizens may enjoy equally, and like the constitutional provisions for civil and political rights, the provisions of the Covenant are concrete enough to be applied as a national law and also judicially applicable. Given these, it is construed that each State Party has the obligation to immediately enforce the Covenant.

Therefore, it is construed that the Covenant is self-executing and can be interpreted and applied at a court (See Judgment of the First Petty Bench (Supreme Court), October 22, 1981, Keishu Vol.35, No.7, p.696). Although Article 25 of the Covenant defines the political rights of citizens, not the people, which are different from rights on civil liberties in the nature of the right, they are defined as the rights of individuals who demand participation in a political process according to the principle of popular sovereignty, so they may be construed as meaning the same as rights on civil liberties.

In our view, however, the interpretation of the Covenant should be based on the object of Article 31 (General rule of interpretation) of the Vienna Convention on the Law of

Treaties, respect the purport of Article 32 of the Convention, and also respect General Comments the Human Rights Committee established under Article 28 of the Covenant adopted in accordance with Article 40(4) of the Covenant, because they can be supplementary means for confirming the meaning given by the application of Article 31 of the Convention.

## 2. Concerning Article 25 of the Covenant and ensuring freedom of election campaigning

According to the argument, the right to election activity is also guaranteed under Article 25 of the Covenant: Given Article 31(1) of the Vienna Convention which provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” the term “in the light of its object and purpose” also means that a legal framework is given for interpreting a “free and genuine election” as effective in the light of the object and purpose of Article 25 of the Covenant, which guarantees such an election as citizens’ right, and therefore, if freedom of election activity is “closely associated” with the right to be elected based on the free expression of the will of the voters and “respected as one of essential conditions,” it should be construed that such activity is also guaranteed under Article 25 of the Covenant.

However, Article 25 of the Covenant stipulates citizens’ political rights. In other words, it guarantees that an individual person enjoys the rights which have the public nature. And it is natural to construe that Article 25(a) and (b) relevant to this case, in the context and ordinary meaning of the terms of the article, guarantee the rights to take part in the conduct of public affairs, to vote and to be elected, as political rights. According to the argument by the defense, the Human Rights Committee says in its General Comment No.25 that “freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected,” so Article 25 itself guarantees these freedoms as rights. However, as indicated by the term “essential conditions,” the Comment merely means that freedom of expression, assembly and association, which are ensured as rights on civil liberties, must be fully protected as a precondition for the effective exercise of the right to vote. It is difficult to say that the Comment means that Article 25 itself guarantees freedom of election campaign as a right.

As mentioned above, it is construed that if freedom of election campaign is exercised as the expression of political opinions, it is protected under Article 19, Article 21 and Article 22 of the Covenant, in light of its method and form, as the exercise of the right related to freedom of expression, assembly and association (See Judgment of Hiroshima High Court, April 28, 1999, Koken Sokuho 1999, p.136).

Even if Article 25 as well as Article 19 of the Covenant is construed as guaranteeing freedom of election campaign as a right too, it cannot be found that the term “without unreasonable restrictions” of Article 25 denies restrictions for reasonable reasons in accordance with balancing of interests as mentioned below, because General Comment No.25 says that “any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria,” “the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable,” and “the right to vote at elections may be subject only to reasonable restrictions.” Although the comment on freedom of election campaign, made by Elizabeth Evatt, a witness for the first court, and others, to the effect that restrictions on election campaign should be based on strict criteria is one of insights into how the electoral system should be, that cannot be identified with the Human Rights Committee’s official comment, and at least it should not be construed that the Committee’s General Comment calls on the States Parties for a particular electoral system (See Paragraph 21 of General Comment No.25).

### 3. Concerning grounds for restricting freedom of expression provided for in Article 19(3) of the Covenant, and restrictions and prohibition on election campaign under the Public Offices Election Law

(1) Then, whether the Law’s provisions that prohibit door-to-door canvassing, distribution of documents not stipulated in law, and campaigning outside the official campaign period meet the grounds for restrictions provided for in Article 19(3) of the Covenant is considered.

Article 19(1) guarantees the right to hold opinions without interference as the absolute right that cannot be restricted. Article 19(2) ensures freedom of expression, which is the right as a means for exercising the right to hold opinions set out in paragraph 1 and is different in that it involves a specific external act. Then Article 19(3) sets out grounds for restricting the rights provided for in paragraph 2.

However, it is important for democracy that people can freely hold and express political opinions. Suffrage, especially the right to vote and to be elected, is critical as the right of citizens to participate in the political process. The free and fair election can be said to be a basic element to be protected under democracy. Therefore, during an election campaign, voters must be able to freely and fairly form political opinions. To this end, accurate, neutral and responsible information must be fairly provided, and citizens must be able to freely choose it, and form and freely express their will. Ultimately voters’ opinions are exercised by voting for one of candidates for an election, so freedom of standing for election must be ensured for securing freedom of voting. Moreover, election campaigning is a means of free and genuine election. Though it is included in the category of freedom of expression, its essence or pillar does not lie in the value of

self-realization. It is not a mere political activity for promoting, supporting or opposing political ideology or measures, but an activity with specific interests for letting a specific candidate hold public office for a certain period.

Therefore, it is needed to take measures to ensure the fairness of election because various negative effects are easy to be brought during a campaign. Presumably, it is also necessary to consider election campaigning from a different viewpoint because it as a type of election activity is closely related to each State's electoral system. So the restrictions provided for in Article 19(3) of the Covenant should also be interpreted in light of these objects and purposes.

The Diet has the authority to decide the method of voting and other matters pertaining to election for public office (See Article 47 of the Constitution. Paragraph 21 of General Comment No.25 of the Human Rights Committee also says the Covenant does not impose any particular electoral system.), and the Public Offices Election Law stipulates many matters pertaining to election, as well as lays down restrictions on election campaigning for the purpose of ensuring the fairness of election. Some of the restrictions apply to acts that have no value respected as an election campaign and exclusively undermine the fairness of election, including vote-buying and interest inducement. That is, they are passive and police restrictions, which aim to eliminate direct negative effects on election. There are other active and deliberate restrictions, including ones on the period and method of the election campaign, which apply to acts that are expected to have negative effects on conducting a fair election, though having some respected value as a campaign. If to restrict such acts is found to be desirable for ensuring the fairness of election as a whole, it may be allowable to restrict them. For election is the very process of democratic politics, and once a major, unfair campaign, including vote-buying and interest inducement, causes a serious defect, it is extremely difficult to remedy it – there is virtually no other way to deal with those crimes than ex-post detection and punishment, but in view of the reality of election crimes in Japan, such an ex-post response does not seem effective for restoring the sound process of democratic politics. The latter type of restriction has the nature of election rules that equally apply to all candidates, and helps realize the interest of maintaining the fairness of election, which the States Parties' legislative body seeks to protect with its legitimate authority. Therefore, even if these restrictions result in losing to some extent the value included in restricted acts, it does not mean that they are in violation of Article 19 of the Covenant. If the lost value is so serious that the State Party's authority to restrict should be denied, in other words, if that value exceeds the interest to be maintained and realized by restriction, it is conceivable that the restriction is in violation of Article 19 of the Covenant.

Furthermore, it is conceivable that the provision of freedom of expression provided for



in Article 19(2) of the Covenant is much the same as that in Article 21 of the Constitution, though the wording is different between them. With regard to restrictions on freedom of expression, Article 19(3) of the Covenant says “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.” On the other hand, the latter part of Article 12 of the Constitution says “the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.” Given both of the provisions, it is not conceivable that restrictions on freedom are stricter in Paragraphs 2 and 3 of Article 19 of the Covenant than in the above constitutional provision, so it cannot be said that these paragraphs constitute the ground for requiring different interpretation from the Constitution – rather, it cannot be said that it is the right attitude for the Japanese court bound by the Japanese Constitution to interpret the provisions of the Covenant differently from the Constitution, without firm grounds for interpreting differently. Therefore, Paragraphs 2 and 3 of Article 19 of the Covenant should also be interpreted and applied consistently with Article 21 of the Constitution.

(2) According to the argument by the defense, restrictions on freedom of election campaigning, which are restrictions on freedom of expression, need to meet strict criteria, including the so-called LRS (less restrictive alternatives) criterion and the principle of proportionality: 1) Restrictions are provided by law; 2) Restrictions are imposed for either of Paragraph 3(a) or (b) of Article 19; and 3) Restrictions are justified as necessary for achieving their purposes. And Elizabeth Evatt, witness for the original instance, and Sylvia Brown, witness for this instance, also gave testimony to this effect.

Truly, in restricting human rights stipulated by the Covenant, especially in restricting freedom of expression and other rights given a preferred position, from the standpoint of coordination with other human rights or interests, the view that strict criteria are in principle appropriate for judging the legitimacy of the relevant restriction in light of its importance or effect is not incomprehensible.

However, what election campaign should be permitted to what extent under what conditions must be considered, taking into account many factors – though they are different according to each State’s conditions at the time, including how to build an electoral system, the nature of election (national or local), the size of constituencies, the number of voters, the period of election campaigning, the availability and effectiveness of other means of election activity, and interests obtained and lost when the electoral system is adopted, as well as from the broad perspective which ensures that the electoral

system as a whole is applied and operated smoothly and the fairness and neutrality of election as the basis of democratic politics is not damaged. And it is construed that it is the role the legislative body of the State Party to bring the entire electoral system in view and design, and that this task as part of legislative politics is left to each State's discretion unless the basic principles of modern electoral laws (universal, equal, free and secret election) are violated (See Article 25(b) of the Covenant) or unless the spirit of respect for human rights to back up the principle of proportionality is neglected.

Given this, the legitimacy and reasonableness of restrictions imposed from the positive and policy standpoint, such as restrictions on the period and method of election activity, which are desirable for ensuring the fairness of election, cannot be necessarily judged by the above strict criteria that are fundamental standards for judging the fairness of restricting human rights. On the assumption that legislative discretion mentioned above can be exercised in this case, it should be judged by considering all the following matters: whether there is a reasonable relationship between the means and purpose of restriction; the balancing of interests lost and obtained by restricting a certain election campaign; the availability of other effective means of restriction easily employed for achieving the purpose of restriction; and the availability of other means that can realize restricted interests, in other words, whether restrictions are indirect and ancillary ones accompanying the means of expressing opinions, or direct ones intended to restrict the expression of opinions. (For example, to "uniformly" decide at what age one is given the right to stand for election for public offices is a crucial question for citizens on the border line because whether they are given the right to be elected depends on that decision. According to the argument, the State is supposed to shoulder the burden of rigorous proof concerning the legitimacy of that age and the act of restricting citizens' specific rights, but such proof must be virtually impossible, and to demand such a requirement is obviously inappropriate.)

However, it is construed that the question of whether restrictions on election campaigning is reasonable and necessary requires careful judgment because an election campaign is, as mentioned above, closely associated with an area of the electoral system where legislative discretion can be exercised, while it is a type of representation of freedom of expression and political activity, and can play a role in materializing voting rights.

[Omitted]

V. Therefore, according to Article 397(1) and Article 381 of the Code of Criminal Procedures, the original judgment is reversed, and according to the proviso of Article 400 of the same Code, the judgment is further rendered as follows:  
This Court applies the same penalty article to the same facts as the original judgment,

including the method to deal with multiple charges and choice among possible manners of penalties. This Court fines the accused for 150,000 yen within the amount provided under the penalty. When the whole amount of the fine cannot be paid, the accused shall be detained at a work house for a day per ¥5,000 unpaid according to Article 18 of the Criminal Code. According to Article 181(1) of the Code of Criminal Procedures, the accused shall bear the court expenses for the first and second instances. In consideration of the circumstances, according to Article 252(4) of the Public Offices Election Law, Article 252(1) of the Law, which provides for the five years of suspension of the rights to vote and to be elected, shall not apply to the accused. Thus this Court renders as in the Formal Judgment.

September 27, 2007

Fukuoka High Court, the 1<sup>st</sup> Criminal Division

Presiding Judge: Justice TORAI Yasuo

Justice MATSUO Yoshimichi

Justice NAKAMUTA Hiroaki

## Annex 12

Second Petty Bench, Supreme Court

Date of the judgment: 2008.01.28

Case number: 2007 (A) No. 1889

Defendant:

OISHI Tadaaki

Vocation: Bungotakada City Council Member

This court judges as follows concerning the defendant's appeal against Fukuoka High Court's judgment delivered on September 7, 2007, on the case to be brought for violation of the Public Offices Election Law.

Formal Judgment:

The appeal is dismissed.

Reasoning:

Of the grounds for the jokoku appeal argued by the attorneys, KONO Zenichiro, OKAMURA Masaatsu and FURUTA Kunio, one alleging violation of Article 21 of the Constitution is groundless because it is evident in line with the purport of the Supreme Court's precedent (The Grand Bench's judgment on Case 1968 (A) No.2265, April 23, 1969, , *Supreme Court Reports on Criminal Cases* Vol.23, No.4, p.235) that the provisions in Article 129, Article 138(1), Article 239(1)(i), Article 239(1)(iii), and Article 243(1)(iii) of the Public Offices Election Law, and Article 142(1) of the Public Offices Election Law before amendment by Law No.3 of 2007 are not in violation of Article 21 of the Constitution (See the Second Petty Bench's judgment on Case 1980 (A) No.874, June 15, 1981, , *Supreme Court Reports on Criminal Cases* Vol.35, No.4, p.205).

Other grounds alleging violation of Article 31, Article 39 and Article 98(2) of the Constitution lacks a basis because it is construed that the above-mentioned provisions of the Public Offices Election Law are not in violation of Article 19 and Article 25 of the International Covenant on Civil and Political Rights, and the other ground alleging violation of judicial precedents does not indicate specific precedents, so neither of these claims can be regarded as a ground for appeal under Article 405 of the Code of Criminal Procedure.

Of the grounds for the appeal argued by the defendant, one alleging violation of Article 98(2) of the Constitution lacks a base as stated above, another ground alleging violation

of Article 14 of the Constitution is in effect a claim of mere violation of statutes and regulations, and the other grounds are claims of errors in fact-finding, so neither of these claims can be regarded as a ground for appeal under Article 405 of the Code of Criminal Procedure.

Therefore, according to Article 408 of the Code of Criminal Procedure, the judgment was rendered in the form of the main text by the unanimous consent of the Justices.

Presiding Judge Justice NAKAGAWA Ryoji

Justice TSUNO Osamu

Justice IMAI Isao