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# MAJOR LEGISLATION

Jan. — Dec., 1998–99

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## 1. Constitutional Law

### National Flag and Anthem Act

Law No. 127, August 13, 1999 (Effective on August 13, 1999)

#### Background:

In Japan, the National Flag and Anthem had not been statutorily decided. The “*Nisshou-ki*” is the flag that shows a red circle against a white background. It is also called the “*Hinomaru*”. The “*Nisshou-ki*” was first made an official flag by the *Tokugawa* shogunate government only to distinguish Japanese ships from foreign ones. In the following *Meiji* era, “*Hinomaru*” was determined as the “national flag” for the same purpose. See Order of the Great Council of State (*Dajōkan*), January 27, 1870.

As to “*Kimigayo*”, the *Meiji* government compelled pupils to sing “*Kimigayo*” in unison at some school ceremonies. However “*Kimigayo*” has not officially been determined as the national anthem. The words of “*Kimigayo*” are found in the old poetic anthology “*Kokin-Waka-shu*” edited in 905. In the *Meiji* era, some melodies were com-

posed for these words, and the present one was settled on. The meaning of the words can be interpreted differently but the official interpretation was that it prayed for the government of the Emperor to last forever.

The Constitution of the Great Japanese Empire was promulgated in the February of 1889. Under this, it was the Emperor that had sovereign power and he was regarded as sacred and inviolable. In 1890, "the Imperial Rescript on Education (*Kyōiku Chokugo*)" was issued. It represented the Emperor's personal opinions on the correct morals for Japanese subjects, and was legally unenforceable. However, in fact, it had more authority than the statutes, making it the ultimate value for the Japanese people to uphold the Emperor system. To construct a strong nation-state with a modern system, the *Meiji* government schemed to implant the ideology of the Emperor System in the people through school education.

The *Meiji* Government popularized "*Kimigayo*" and "*Hinomaru*" through public education. In 1891, the Ministry of Education ordered some songs, including "*Kimigayo*", to be sung on school ceremonies on the feast days (Rules on the Ceremony of the Feast Days). Those ceremonies were a good opportunity for the government to educate school children to have the loyalty and patriotic sentiments (*Chūkun-Aikoku*) that laid the foundation of the Japanese Emperor System. School children were taught to be good little members of the nation. He or she must strive for the attitude of *Chūkun-Aikoku*, being grateful to the Emperor.

Under this structure of the State, giving glory to the Emperor was identified with giving glory to the State, and both "*Kimigayo*" and the "*Hinomaru*" gradually acquired the position of national anthem and national flag. But the government could not enact the "*Hinomaru*" as the national flag in 1931.

From the 1930s to the end of World War II, the "*Hinomaru*" and "*Kimigayo*" were related to the brave and tender soldiers and it was utilized as effective gadgets to impress "the justness and holiness" of the war. Materials in textbooks glorified life in the colonies, death for the country or other sacrifices. Education demanded children to sacrifice their lives for the Emperor and for the country. Outside the school,

people waved the “*Hinomaru*” on the news of a victory of Japanese troops or even when they sent off their sons to the battlefields. On the other hand, outside Japan, people were killed brutally by Japanese troops under the “*Hinomaru*”. These memories still give great pain to people both inside and outside the country, and often make people reject the “*Hinomaru*”.

After World War II, the Emperor survived by the political consideration of Douglas MacArthur, Supreme Commander of the Allied Powers. But hoisting the “*Hinomaru*”, the symbol of the “State of the Emperor” and the “Militarism of Japan”, was prohibited except with the permission of GHQ (General Headquarters of the Supreme Commander for the Allied Powers). On May 3, 1947, the New Constitution, “Constitution of Japan” was put in operation. In the new Constitution, it is the people, not the Emperor, with which the sovereign power resides. The Emperor is only the symbol of the State and of the unity of the people and it is provided that this position of the Emperor is derived from the will of the people (Article 1). Now it is explained in elementary schools that the Constitution of Japan is based on three principles: popular sovereignty, guarantee of the fundamental human rights, and unarmed pacifism. It provides various freedoms and fundamental rights and the democratic government.

In spite of the constitutional change, the Japanese government intended to keep “*Kimigayo*” in the same situation as before the defeat in the war. But people seemed to search for a different way. Some newspaper companies collected new songs for the nation or anthems. In 1951, Japan Teachers Union also collected the new national anthem.

The Japanese Government tried again to spread the “*Hinomaru*” and “*Kimigayo*” through school education. This first happened in 1949. The Minister of Education, Teiyu Amano, ordered the Boards of Education and the Universities of the whole country that all the schools should hoist the “*Hinomaru*” and sing “*Kimigayo*” on national holidays and at events. After independence in 1952, Japan was leaning to the right. Together with this movement, in spite of the strong resistance of the Japan Teachers’ Union, the government in 1958 revised the government guidelines for teaching in elementary and junior high schools. The guidelines provided “when a school ceremony is held on

national holidays etc., it is advisable to make children understand the meaning of those holidays and to hoist the national flag and to make them sing “*Kimigayo*” in unison” (Government Guidelines for Teaching, ch. 3, sec. 3, no. 5). In addition, the Ministry of Education aimed to make it a legal obligation. The guidelines were held to be legally binding by the Supreme Court later in 1990. *See* Supreme Court, 3rd P.B., Jan. 18, 1990 [*Denshūkan* High School Case] 44 (1) MINSHŪ 1.

Through these movements, the conservatives were aiming at the revival of “the Imperial Rescript on Education” or “Doutoku (the moral education)” in order to interfere with the formation of individuals’ value systems, though the compelling of a particular value system was a violation of the freedom of thought and conscience guaranteed by the new Constitution. In 1966, the Central Council for Education, advisory organ of the Minister of Education, published a report in which “the image of the expected person” was described. To satisfy that requirement, one must be patriotic and respect the Emperor.

It was in its 4th revision in 1977 that the government guidelines for teaching treated the “*Hinomaru*” and “*Kimigayo*” as the national flag and anthem for the first time. It is said that it was done under pressure from the “Liberal Democratic” Party (*Jimin-tō*), that had criticized the former expression in the government guidelines for teaching. But legally the determination of the national flag and anthem is a matter that should be done at least by statute.

In 1985, the chief of the Bureau of Elementary and Secondary Education, the Ministry of Education, issued a notice that “all” the schools must treat the “*Hinomaru*” and “*Kimigayo*” in a “proper” way. Although the government guidelines for teaching in 1977 providing that such school ceremonies with the “*Hinomaru*” and “*Kimigayo*” was only “advisable”, this notice meant *de facto* compulsion of them.

This notice caused litigation. In spite of the opposition of teachers and parents or citizens in Kyoto, in 1986, the board of Education in Kyoto City distributed to every elementary and lower secondary school audio tapes that recorded the playing of “*Kimigayo*” on the piano. These were to be played at the ceremonies when teachers refused to play “*Kimigayo*” on the piano for accompaniment. In 1987, the citizens of Kyoto brought a citizen suit for damages and the recovery

of the audio tapes, for the reason that the Board expended the public money illegally by distributing the audio tapes. They asserted that compelling people to sing “*Kimigayo*” violates the principle of popular sovereignty, the freedom of thought and freedom of religion (Constitution, art. 19, art. 20, para. 1 and 2), and also the right to receive education (Constitution, art. 23 and art. 26, para. 1, and Fundamental Law of Education, art. 10, para. 1 and 2).

The Kyoto district court dismissed their claim in 1992. It held that as far as the words or melody do not apparently defame or destroy the Constitution, it is not fit for the judicial review, distinguishing this case from *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), where “compulsion” to salute the national flag or to sing the national anthem was in question. At the same time, the district court affirmed that it is left to the sensitivity and the conscience of the individuals to determine if the national anthem or similar songs are appropriate or not. See Kyoto District Court, Nov. 4, 1992, 1438 HANREI JIHŌ 37, 799 HANREI TAIMUZU 258. The Osaka High Court (Jan. 25, 1996, 909 HANREI TAIMUZU 124) and the Supreme Court (Jan. 29, 1999, unpublished) dismissed the appeal without answering the questions. This is the first leading case as to “*Kimigayo*”.

In 1986, a flag burning case also occurred in Yomitan Village, Okinawa, in which a man was accused of pulling down the “*Hinomaru*” and burning it at the ceremony of the National Athletic Meeting. See Naha District Court, March 23, 1993, 1459 HANREI JIHŌ 157, 815 HANREI TAIMUZU 114.

Soon after the Emperor’s death in 1989, the government guidelines for teaching were revised again. At last the conservatives successfully imposed on schools the duty to hoist and sing the “national flag” and “national anthem” as an obligation. The guidelines pointed out concretely the admission and graduation ceremonies as the opportunity for that, and the expression “advisable” was changed into “shall be taught”. Under the guidelines, the political pressure of coercion got stronger. In February 1999, the principal of Sera High School committed suicide in Hiroshima Prefecture, where people experienced the holocaust by the atomic bomb and education was liberally controlled. He was reported to have been torn between the order of the Board of

Education and the teachers that opposed to the “*Hinomaru*” and “*Kimigayo*”. It was not the first case that a principal killed himself concerning the “*Hinomaru-Kimigayo*” problem; however, it had a strong impact and as a result opened the way for legislation.

### Provisions:

- Article 1, para. 1 The national Flag shall be *Nisshou-ki*.
- para. 2 The form of the *Nisshou-ki* shall be as shown on schedule 1.
- Article 2, para. 1 The National Anthem shall be *Kimigayo*.
- para. 2 The words and the score of *Kimigayo* shall be as shown on schedule 2.

### Editorial Note:

The new opinion of the Communist party to suggest legislation on the National flag and Anthem triggered this legislation. The majority found a suitable pretext to persuade the people to accept this legislation in the suicide of the school principal. Getting the majority of the Diet including the reluctant *Komei* Party, the ruling Liberal Democratic Party and the Liberal Party, kept out of nation-wide discussions, and dashed off the legislation. Their political purpose was apparent as mentioned above. Chief Cabinet Secretary Nonaka committed himself beforehand to the principle that the legislation would not be accompanied with coercion. In fact, there are no obligatory articles on hoisting the “*Hinomaru*” and singing “*Kimigayo*” in the legislation itself. However, even without legislation, the government had forced schools to hoist and sing “*Hinomaru*” and “*Kimigayo*” based on the government guidelines for teaching. And it had kept watch on teachers with video cameras and subjected to disciplinary punishment the disobedient teachers. This interference in education by the administration should have been a violation of the Fundamental Law of Education. The guidelines could not be utilized to justify legally this interference.

As to the meaning of “*Kimigayo*”, the government sounds basically as if it is maintaining the same idea as in the *Meiji* era, though it conceded that the Emperor is the “symbol” of the state and unity of

the people, and that his position derives from the will of the people (Constitution, art. 1). It is very strange that the State operating in the new regime has the same “*Kimigayo*” as it had in the old regime. So comprehensible are the attitudes of the people who reject “*Kimigayo*”. The same with the “*Hinomaru*”.

As is clear in the *Barnette* case in the United States, no official can prescribe what shall be orthodox in politics, nationalism or other matters of opinion. Also no official can force citizens to confess their faith. The Government should not disturb citizens, even concerning the National Flag or Anthem, to have various opinions and conduct according to their own. This is what the Articles 19, 20 and 21 of the Constitution guarantee.

Therefore, the Government is banned from implanting into the people, especially school children, a specific value from only one side. Based on this idea, the Article 10 of the Fundamental Law of Education declares that the education should not be subject to undue control. When there are plural opinions in conflict, teachers should show pupils plural choices. About the National Flag and Anthem problem in Japan, teachers should explain various standpoints to pupils, and let them choose their own standpoint.

As mentioned above, the rule of law has been always ignored in Japan. This is the core of the Japanese National Flag and Anthem problem. Then, how can a statute solve the problem?

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## 2. Administrative Law

### **Laws related to the Reform of the Central Government**

Basic Law for the Reform of the Central Government, Law No. 103, June 12, 1998.

Amendments to the Cabinet Law, Law No. 88, July 16, 1999.