be applied to the dissolution of a legal marriage by a death.

Furthermore, at present, there is also the view that, focusing on a variety of extra-marital relationships, a stable unmarried cohabitation as well as a *de facto* marriage, or quasi-marriage, should be allowed application of the Article, and parties who request protection under the general principal of property law should be respected in their choice.

In prior rulings of lower courts, many decisions have relied upon the general principles of property law and been hesitant to apply this provision. There have only been three decisions upheld that applied it.

This decision is the first such case in the Supreme Court and remarkable in the point that the Supreme Court denied the application of the provision and unified the decisions of the lower courts.

MASAYUKI TANAMURA
HIROSHI NARUSAWA

5. Criminal Law and Procedure

1. Supreme Court, 2nd P.B., March 27, 2000

Akiyoshi v. Japan

54 (3) KEISHŪ 839, 1715 HANREI JIHŌ 171, 1035 HANREI TAIMUZU 113

The defendant who filed a false application for postal life insurance, concealing the fact that applicants had been placed in hospital for treatment, and had already made contracts which reached the amount legally set as an upper limit, was guilty of fraud.

Reference:

Penal Code (*Keihō*) Art. 246, para. 1, The Law on Postal Life Insurance (*Kan'iseimeihokenhō*) Art. 1

Facts:

The defendant, Koji (Takaharu) Akiyoshi (hereinafter X), worked

in a post office, mainly dealing with matters concerning contracts for postal life insurance. X conspired with the insurance applicants A and others (hereinafter A&c.) and filed a false application, concealing the fact that A&c. had been receiving hospital treatment, and that A&c. had already made contracts that reached the amount legally set as an upper limit. X deceived the personnel of the post office, made them believe that the application was a proper one, caused the contract to be signed, and led the insurance policy to be delivered to A&c..

The Fukuoka District Court and the Fukuoka High Court convicted X on a charge of fraud (Art. 246, para. 1). The rationale of the conviction of the High Court was as follows: The postal life insurance is a program run by the State, the aim of which is to bring stability to the economic activities of citizens, and to promote welfare through the offering of easily received life insurance, that is supported by a solid management, and requires only a reasonable fee (Art. 1, The Law on Postal Life Insurance). X's act constitutes a violation of the public interest protected by the Law on Postal Life Insurance. Nevertheless, the act was a fraud, because the act of X, at the same time, violated the interest of property. The postal life insurance program was designed to protect a certain administrative interest. But the substance of the program was simply a type of economic activity essentially no different than that of the life insurance programs run by private enterprises. In addition, the insurance policy is subject to the right of property, and is in itself (economically) valuable.

After the conviction in the High Court, the defendant appealed to the Supreme Court.

Opinion:

Jōkoku appeal dismissed.

The defendant filed a false application for the postal life insurance, concealing the fact that A&c. had been placed in a hospital for treatment, and that A&c. had already made contracts which reached the amount legally set as an upper limit, thereby deceiving the personnel of the post office into believing that the application was an appropriate one, causing the contract to be signed, and the insurance policy to be delivered to A&c. The judgment of the Fukuoka High Court, provided

in Article 246, paragraph 1 of the Penal Code, is affirmed.

Editorial Note:

A fraud is a crime, which violates the personal interest of property. Does that mean, as some might say, that an act of deceiving an agency of the State and receiving property or a certain economic advantage is not punishable as a fraud, because the act violates only the public interest, and does not infringe any personal interest? The prevailing view among academics, as well as the opinions in judicial decisions, deem this kind of defraud punishable, whenever the act necessarily violates the "property" of the State.

As to the case at hand, it is true that the simple life insurance is a program operated by the State. The substance of the program, however, is no different than that of a life insurance program run by a private enterprise. The act of deceiving officials in the post office into delivering its property to the third party, as the act of X in this case, therefore, should be punished, respectively.

In the case at hand, the main issue concerned the economic value of the insurance policy, as an actual economic loss was required to constitute the crime of fraud. The question here was, would the passing of an insurance policy amount to an economic loss on the part of the State?

When a passport is fraudulently acquired, the court said that it constituted the crime of untrue entry provided in Article 157, paragraph 2 of the Penal Code, and not the crime of fraud. By delivering these licenses, the agency of the State only certifies a certain kind of qualification, and does not give the license any kind of economic value. Accordingly, the fraudulent acquisition of these licenses does not constitute the crime of fraud.

A postal life insurance policy, as in the case in question, on the other hand, should be treated differently. The presentation of the insurance policy is required to receive the insurance money, and the State is excused from its obligations when it completes the payment of the insurance money to the presenter (holder) of the policy. Consequently, such an insurance policy is not just a certificate of some qualification, but is something tightly connected to the exercise of a certain right or

the performance of some obligation stemming from the contract. This means that the insurance policy is, in itself, economically valuable. When this document is issued, the State is placed in actual danger of paying the insurance money in case an accident actually occurs, and that situation could be considered abstractly as an economic loss on the part of the State.

The decision of this kind had been anticipated since the Supreme Court had already decided that the fraudulent acquisition of a private life insurance policy constituted the crime of fraud. However, on the question of whether or not such an acquisition of a national health insurance policy constitutes a fraud, lower courts are divided.

2. Supreme Court 1st P.B., June 27, 2000.

Mainali v. Japan

54 (5) KEISHŪ 461, 1718 HANREI JIHŌ 19, 1040 HANREI TAIMUZU 108

The appellate court is allowed to order a re-detention of the defendant under certain conditions, even after an acquittal in the trial court, saying that it was not proved beyond a reasonable doubt that he had committed the crime charged.

References:

Code of Criminal Procedure (*Keisohō*) Art. 60, para. 1 & Art. 345

Facts:

The defendant, Govinda Prasad Mainali, an illegal immigrant from Nepal, was accused of robbing and murdering a female working for Tokyo Electric Power Co. After two and a half years of trial, the District Court of Tokyo acquitted X as there still remained a reasonable doubt as to the identity of the criminal and the defendant. The warrant of detention lost its effect with the announcement of the acquittal (*Keisohō*, art. 345), but X was soon detained in the Immigration Center of Tokyo on a written detention order, because he had been staying in Japan without authorization after the original admission had become void, and was expected to be deported on the written deportation order in the near future. The prosecutor, in addition to the lodging of a

Kosō appeal as to the facts of the case, etc. moved to urge the Tokyo District Court (and after the request was rejected by the District Court, to the Tokyo Court of Appeals) into issuing an ex officio detention order against X. The reason for this motion was that X was expected to be deported in the near future, making a speedy and a fair trial in the appellate court impossible, also interfering with the enforcement of punishment after the anticipated conviction by the Court of Appeals. The 4th Criminal Chamber of the Tokyo High Court issued a warrant of detention shortly after the arrival of the records of the prior trial in the court below, but before any factual inquiry has been made. The defendant specially sought relief from the Supreme Court, moving to set aside the detention order issued from the High Court.

Opinion:

Tokubetsu-Kōkoku appeal dismissed.

Even if the trial court had acquitted the defendant on the grounds that the case had not been proved beyond a reasonable doubt, the appellate court is allowed to order the re-detention of the defendant at any time; after examining the records, and after considering the reasoning of the court below in acquitting the defendant, the appellate court reaches a decision that ① there was a probable cause that the defendant committed the crime in question, ② one or more of the conditions provided in Article 60 of the *Keisohō* were fulfilled, and ③ there was a necessity for detention also for the appellate court to properly and promptly review the decision below (or to retry the defendant). Such a judgment of detention is not to be limited by the instance of the court, and it does not require further inquiry into the evidence (presented in the court below).

In examining the cause and the necessity for the detention, the court can take into consideration the fact that the procedure for the deportation of the defendant has been initiated.

(Endo and Fujii, JJ., dissented and filed separate opinions)

Editorial Note:

The issues argued were ① whether or not the appellate court could detain a defendant after he had been acquitted in the court be-

low, and if it could, ② whether any limits as to the time (or the instance) of ordering such a detention existed, and ③ what kind of standard for determining the cause and the necessity for such detention was to be applied, and ④ whether the fact of initiation of the procedure for deporting the defendant could be considered in the process of making such a determination.

In Japan(,according to the prevailing view), State appeals — even after an acquittal — are allowed by the Code of Criminal Procedure (Arts. 351, 372, 377–383). Accordingly, the acquitted defendant has a chance of receiving another trial (or a review of the judgment of acquittal) against his will.

Article 60, paragraph 1 of the *Keisohō* provides for the cause of detention, and it is construed further that there also has to be a probable cause for suspecting that the defendant committed the crime, and a necessity of detention for issuing the warrant of detention. There are no expressions therein limiting the issuing of the warrant of detention in respect of the stage of the procedure or the instance of the court.

Article 345 of the *Keisohō*, on the other hand, provides for the nullification of the warrant of detention after the declaration of the judgment of an acquittal, dismissal on the merits of the case, etc.

The issues ①, ② and ③ were concerned with the relationship of those provisions. Namely, whether Article 345 intended to limit, in some manner, the appellate courts in ordering the detention of the defendant already acquitted in the court below. The majority opinion could be read as denying any influence from Article 345 on Article 60, and refusing to recognize a notable limit in determining the cause or the necessity of detention after an acquittal. But the majority opinion could also be read as showing some respect for the acquittal in the lower court, if we focus on the expressions such as "and after considering the reasoning of the lower court in acquitting the defendant", or "there was a necessity for detention also for the appellate court to properly and promptly review the decision below (or to retry the defendant)".

Issue ④ was closely connected to the defects in the law concerning the interactivity between the *Keisohō* and the Immigration and Refugee Recognition Act (*Nyukanhō*). Since both statutes lacked pro-

vision for interactivity between a criminal trial and the procedure for deportation, the defendant could be deported, prior to (or, theoretically, even in the middle of) a trial. In light of this defect in the law, the prosecutor asked for the detention of the defendant in order to sustain the possibility of due and prompt procedure in the appellate court, and the execution of punishment after the anticipated conviction in the appellate court. The majority opinion, after rejecting the argument of equal protection under the law (Constitution, art. 14), decided that the court could take into consideration the fact that the procedure for the deportation of the defendant has begun.

The dissenting opinions, on the contrary, emphasized on the significance of Article 345, implying limits in ordering the detention in respect of the time or the instance, and/or demanding higher standards in determining the cause or the necessity for detention. They also stressed the injustice of placing the defendant in jeopardy of a second detention owing to defects in the law, for which he is not responsible.

Scholars are divided as to the propriety of this decision. Since these issues reflect views as to the principle of presumption of innocence or as to the distribution of power between the judicial branch and the administrative branch, they are very difficult to solve. It should be noted, in any event, that these issues also relate to problems concerning the admission of State appeals, touching the principle of double jeopardy embraced in Article 39 of the Constitution.

TAKEHIKO SONE
JUN KOJIMA

6. Commercial Law

Osaka District Court, September 20, 2000
Nishimura v. Yasui
1721 HANREI JIHŌ 3

When a bank corporation suffered damages resulting from fraudu-