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Global Perspectives on Freedom of Association: Freedom of Association in Japan

Junta Okada

Societās Exploring the Value of Freedom of Association

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Freedom of Association in Japan

Junta Okada

I. Introduction

Research on freedom of association in Japan[1] is scant. While it discusses freedom of expression in approximately forty pages, the most famous textbook on the Constitutional Law in Japan, written by Nobuyoshi Ashibe,[2] tackles freedom of association in only one and a half pages. There is no title "freedom of association" in the major brief casebook of the Constitutional Law.[3]

However, there are many cases and controversies involved with associations or groups. These are analysed in another constitutional contexts; therefore issues regarding freedom of association remain hidden.

This article attempts to ascertain and examine the "hidden issues". After introducing the related provisions and the history of freedom of association in the Constitutional Law of Japan (Part I & II), the various laws and the contemporary cases considered to limit associations will be the subject for discussion (Part III). Lastly, this article shows the potential of academic theory on freedom of association with reference to the establishment process of the Constitution (Part IV) and the conclusion.

II. Overview: Related Provisions to Freedom of Association

The current Japanese Constitution has a provision for freedom of association, Article 21, which reads, 'Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.' It also contains a provision for trade unions to associate, Article 28,

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[1] Recent distinctive studies on freedom of association in Japan might include Takeshi Inoue, *Kessha no Jiyu no Houri* [Legal Theories on Freedom of Association] (Tokyo: Shinzansya, 2014) and Junta Okada, *Kankeisei no Kenpo Riron* [Constitutional Theory of Human Relationship] (Tokyo: Maruzen Planet, 2015).

[2] Nobuyoshi Ashibe, *Kenpo* [Constitutional Law] (8th Ed,Tokyo: Iwanami, 2023). It is said that 'Association' in the Constitution means 'to join together continuously by many people for a particular purpose, like political, economic, religious, artistic, academic and so on.' ibid. at 240.

[3] Yasuo Hasebe and others (eds), *Kenpo Hanrei Hyakusen* [The Best Hundred Cases Series: Constitutional Law] (7th ed, Tokyo: Yuhikaku, 2018).

which reads, ‘The right of workers to organise and to bargain and act collectively is guaranteed.’

The right to establish religious associations is included in the freedom of religion provision under Section 1 of Article 20; ‘Freedom of religion is guaranteed to all.’ Associations for academic purposes including universities and their activities are secured by the Academic freedom in Article 23; ‘Academic freedom is guaranteed.’ Before and during World War II (WWII), the Japanese Government had severely oppressed religious groups and academics. Therefore, those two provisions were included in the Constitution.[4]

Furthermore, the Japanese Constitution also has a provision regarding family under Section 2 of Article 24, which reads. ‘[w]ith regard to choice of spouse and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.’ However, there is a conflict regarding whether the concept of “Association” includes families (most of the Japanese law scholars deny).

In summary, Article 21 generally secures the freedom of association while some other provisions secure th freedom of specific groups.

III. History

The former constitution of Japan, the Constitution of the Empire Japan of 1889 (“*Meiji Kenpo*”), also provided for freedom of association, which read, ‘Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations’ (Article 29). The *Meiji Kenpo* was established so that it indirectly, thorough the Prussian Constitution of 1871, referred to the then Belgian Constitution of 1831, which had the oldest provision of freedom of association. The then Belgian Constitution was a liberal product of the nineteenth century.

However, because the Meiji Kenpo had the basic principle of ‘reservation of rights by parliamentary laws’, which allowed the parliament to limit human rights by statute, the security

[4] Shigenori Matsui, *The Constitution of Japan* (Oxford: Hart, 2011) 191, 211-212.

of freedom of association was very fragile under the Constitution. The rights under the *Meiji* Constitution were protected only within the confines of statutes.[5] It was not a liberal product.

Under the Constitution, a notorious law, the Peace Preservation Law ("*Chian-iji-hou*"), which was the milestone to the repressive regime, was enacted in 1925. It was directed against those who established organisations with the object of changing the Japanese system of government or of negating the system of private property. Under this law the following were listed as crimes: the joining of such organisations; attempted establishment of such organisations; discussion of matters connected with changes in the form of government or elimination of system of private property; rioting and terrorism connected with those aims; and offering and accepting contributions to such organisations.[6]

In the original law, the Act enforced 10 years imprisonment as a maximum penalty. Although the terms "Japanese system of government" in the Act were very ambiguous, the amendment Act of 1928 imposed the death penalty for establishing organisations aimed at "changing the Japanese system of government". The essence of this "Japanese system of government" was Imperialism or the Emperor's sovereignty and it also called "*Kokutai*" which was a politically loaded word in Japanese. This Act was repealed in 1945.

The current Constitution has abolished this principle and adopted proportionality, equality and other principles for protecting the Human Rights of the Constitution, including freedom of association.

IV. Laws Limiting Associations

Some kind of associations have caused the government anxiety. The Japanese government has tried to limit associational freedom in various situations. The targeted associations and the method of limitation have been changed according to circumstances. In contrast, there are legal conflicts inside associations (including companies, trade unions and religious corporations) and much case law related to those conflicts.

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[5] ibid at 155.
[6] John M Maki, 'Japan's Subversive Activities Prevention Law' (1953) 6(3) The Western Political Quarterly 504.

It is not usual to introduce some of those issues in the context of freedom of association in Japan. However, from my personal point of view, it is useful to draw the outline of freedom of association and its limits in Japan.

(i) Restrictions on Associations: "Habou-hou"

Under the *Meiji Kenpo*, limitation of associations had occurred frequently and severely, especially during WWII. In contrast, after WWII, the Japanese Government did not regulate associations very positively because of this history and the constitutional protection for associations.

For instance, the Subversive Activities Prevention Act ("*Habou-hou*") of 1952 (Act No 240 of 1952), which enables the Government to dissolve and illegalise an association, and prohibit the members to associate again, has not been applied in any associations to date.

This Act is aimed at authorising necessary control measures on an organisation that has performed a terroristic subversive activity as an organisational activity and supplementing penalties for terroristic subversive activities, thereby contributing to ensuring public security (Article 1). Article 4 of the Act defines a 'terroristic subversive activity' as conducting acts such as insurrection, disturbance or homicide, with the aim of creating civil commotion or achieving political purposes, where such activities pose a serious threat to the peaceful lives of citizens.[7] The Act states that, if an organisation that has committed violent subversive activities is alleged to pose a threat and if apparent risk for conducting further activities is noted, the organisation shall be disbanded (Article 7) or have its activities restricted (Article 5). These implementing procedures for controlling subversive organisations begin with the request from the Director-General of the Public Security Intelligence Agency (PSIA) in the Ministry of Justice (Article 11). The PISA is not a police unit, but rather an investigative agency for suspected organisations. The Public Security Examination Commission (PSEC), which is an independent and extra-ministerial organ of the Ministry, examines the application from an objective and neutral viewpoint and determines whether there is need for any control measure or what control measure should be taken (Article 22).

[7] Ministry of Justice, *Major External Organs of the Ministry* <https://www.moj.go.jp/ENGLISH/MEOM/meom-01.html> accessed 2 August 2024.

The initial target of the Act was the Japanese Communist Party (JCP), as seen in the Peace Preservation Law of 1925. After WWII, the Allied Powers, which governed the occupied areas of Japan, legalised the JCP. However, after the party's success in the 1949 general election during the cold war, the Allied Powers changed their policy into the "Red Purge". This policy change drove the JCP into violence. They adopted the “1951 Platform” which endorsed subversive activities, and led to guerrilla warfare by the labouring class with the aim of overturning the US-led capitalism and monopoly economy. Consequently, the JCP lost the popular support and all of its seats in the House of Representatives in the general election of 1951. Therefore, in 1956, they adopted the resolution, which denied the “1951 Platform”, saying that the Document was inapplicable to the current situation in Japan. Having established the “1961 Program”, the JCP examined the issue comprehensively and, in conclusion, categorically rejected the armed struggle policy;[8] it had become difficult to apply the Act to the political moderate JCP.

This Act is too powerful to use under the current Constitution, even for dangerous cults such as the *AUM Shinrikyo* that caused many terror incidents in 1990s.[9] Upon receiving a request from the Director-General of the PSIA for the dissolution of *Aum Shinrikyo* under Article 7 of the Act, the PSEC decided to reject the disposition request on 31 January, 1997.[10]

(ii) Associations under Surveillance

Therefore, the recent legal regulations regarding suspicious associations tend to observe closely the suspected associations and limit some actions between concerned people (e.g. *Yakuza*, the suspected terrorist group, among others). For instance, the ex-*AUM* groups[11] are under surveillance by the PSIA in accordance with the Act on the Control of Organisations Which Have Committed Acts of Indiscriminate Mass Murder (Act No 147 of 1999). This Act is aimed at prescribing necessary control measures on an organisation whose members have committed an act of indiscriminate mass murder as an organisational activity to reveal the status of the organisation's activities and prevent the recurrence of the act, thereby contributing to ensuring

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[8] Shii Kazuo, ‘Speech: Talking About the 100-Year History and Program of the Japanese Communist Party’ (2022) https://www.jcp.or.jp/english/jcpcc/blog/2022/09/jcp100-year.html accessed 2 August 2024.

[9] PSIA, *25 Years After the Tokyo Subway Sarin Gas Attacks* <https://www.moj.go.jp/psia/25years_after_the_tokyo_subway_sarin_gas_attacks> accessed 2 August 2024.

[10] Ministry of Justice, *What is the Public Security Examination Commission?* <https://www.moj.go.jp/EN/kouanshin/kouanshinsa_index.html> accessed 2 August 2024.

[11] PSIA, *Report: Review and Prospects of Internal and External Situations* (2023) 61-66 <https://www.moj.go.jp/content/001393313.pdf> accessed 2 August 2024.

public security including the peaceful existence of the citizens (Article 1). The PSEC may implement a disposition to place the organisation under the surveillance of the Director-General of the PSIA by setting a period of time not exceeding three years (Article 5(1)). On 6 January, 2021, the PSEC decided to continue the surveillance on the ex-AUM cult groups for three years; this marked the seventh such continuation since the first decision was issued. This Act is referred to as the "new legislation for the AUM" and has been applied only for those cult groups.

Although one of the cult groups filed a suit alleging unconstitutionality of the Act several times, courts did not approve their claim. A district court denied their claim of violation of freedom of association, reasoning as follows:

> 'The surveillance disposition provided by the Act is subject to an organisation whose officers or personnel have committed an act of indiscriminate mass murder as an organisational activity and whose activity falls under any of the matters set forth in the items inArticle 5(1). Therefore, that is limited to distinguished case and it would be highly necessary to implement a disposition to place the organisation under surveillance to ensure public security. However, the restrictions of the organisation and its members occurred by the disposition and are not related to the essential part of their activities. Moreover, although the organisation is religious, their religious activities would not be prohibited and there would be no interference with the spiritual or religious affairs of their members. Additionally, there is a due process for them.
>
> Consequently, the restrictions as noted above inevitably affect the organisation and its members, including the members who have never committed an act of indiscriminate mass murder. The restrictions are necessary and reasonable based on the public welfare for realising the purpose of this Act'.[12]

[12] Tokyo District Court, 29 October, 2004, *Shomugeppou* 51(11) p 2921.

Similarly, the Supreme Court of Japan rejected an appeal from the High Court, which held that the Act and the application of the Act to the ex-AUM groups are constitutional.[13]

(iii) Starving Strategy for Yakuza

The Act on the Prevention of Unjust Acts by Organised Crime Group Members (Act No 77 of 1991), or the "*Anti-Boryokudan* Act", was established to control the Japanese Mafia (the "*Boryokudan*" or "*Yakuza*"). The feelings towards the *Yakuza* are ambivalent in Japan. Some of their activities consist of illegal business or are violent nature. However, they are treated as a "necessary evil" as their existence has maintained public order in underground and indecent societies. Some politicians, public officials, businesspersons and celebrities entered into relationships of codependency with the *Yakuza*. However, in the 90s, the conflict that surrounded Yakuza tensions intensified and many ordinary people were involved in the battles. The National Police Agency further changed the policy and declared the eradication of the *Yakuza*. Establishing the Act was conducted as part of that movement. The Agency states:

> 'Membership including associate members of the *Boryokudan* peaked in 1963, at approximately 184,100 persons. Since then, it was on a steady decline until 1987 when it once again started showing signs of growth. With the implementation of the Anti-*Boryokudan* Act in 1992, this growth trend halted and the number of *Boryokudan* members began to decline again. As of the end of 2020, Boryokudan membership stands at approximately 25,900'.[14]

The Act was challenged as unconstitutional several times in the courts. A high court ruled that the provision of the Act, which prohibits the activities of members of the most dangerous designated *Yakuza* group, did not violate the freedom of association. The court stated:

> 'Article 46(iii) of the Act does not prohibit establishing *Yakuza* groups or joining them voluntarily (controls not to organise) but punishes some unjust or unlawful activities conducted by the members of the designated *Yakuza* groups (controls of their activities).

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[13] Supreme Court, 1st petty bench, 21 November, 2013, *unreported*. See also Tokyo High Court, 16 January 2013, *Shomugeppou* 59(8) p 2195.

[14] The *Boryokudan* is commonly referred to as the "*Yakuza*" and is defined by the Anti-Boryokudan Act as 'any organisation likely to facilitate its members to collectively or habitually commit illegal acts of violence'. National Police Agency, *Police of Japan* (2021) 28. <https://www.npa.go.jp/english/Police_of_Japan/police-of-japan2021/001/001.pdf> August 2 2024.

> These controls upon activities are necessary and reasonable as a means of realising the fair purpose of the Act, which ensures safety and peace in civic life and secures liberties and rights'.[15]

In another case, the Supreme Court stated that the Act was constitutional because it did not restrict the freedom of association itself.[16]

Recently, to restrict the activities of Yakuza, all prefectural governments in Japan have made the laws, alleged "*Bouhai-jourei*" (Ordinance on Elimination of Organized Crime Groups).[17] One of their targets is the relationship between the citizens and *Yakuza*. For instance, the Tokyo Metropolitan Government Ordinance on Elimination of Organised Crime Groups (Ordinance No 54 of 2011) states its basic principles as the citizens 'are not to associate with organised crime groups, are not to fear them, are not to fund them and not to use services from them' (Article 3). 'A business operator must not offer a payoff, in connection with its business' to *Yakuza* in return for an act by *Yakuza*, which consists of any violent and unlawful act (Article 24(1)), and 'the Public Safety Commission may order the person who committed the act to take necessary actions to prevent the violation of the provision 'within a fixed period not exceeding one year' (Article 30).

Through the elimination of these movements,[18] most Japanese came to regard the *Yakuza* as anti-social groups ("*Hansya*"). Connecting with the *Yakuza* can cause a chilling effect. Most Japanese major companies declare to rupture connections with the *Yakuza*. Today, the members of *Yakuza* groups can neither open their personal bank accounts in accordance with the policy of banks in Japan nor much of the other social services provided by private sectors.

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[15] Fukuoka High Court, 18 June 2014, *Koutousaibansyo-saibansokuhousyu* H26 p 157.

[16] Supreme Court, 1st petty bench, January 23, 2023, *unrecorded* <https://www.courts.go.jp/app/hanrei_jp/detail2?id=91702> accessed 2 August 2024.

[17] National Police Agency, '*White Paper on Police*' (2012) 46 <https://www.npa.go.jp/hakusyo/h24/english/Contents_WHITE_PAPER_on_POLICE2012.htm> accessed 2 August 2024.

[18] In the *Nishinomiya City Managed House Ordinance Case in 2013*, the Supreme Court recognised the constitutionality of the Ordinance which provided that the mayor might demand the surrender of a city-managed housing unit if the resident thereof proves to be a Yakuza group member. Supreme Court, 2nd petty bench, 27 March 2015, *Minshu* 69(2) p 419 <https://www.courts.go.jp/app/hanrei_en/detail?id=1350> accessed 2 August 2024.

Therefore, this pressure ruins *Yakuza* groups gradually. However, another problem has arisen. Because any person for whom 5 years have not yet passed since leaving a *Yakuza* group is practically treated as a member of the *Yakuza*,[19] problems regarding the violation of human rights by ex-members of the *Yakuza* are pointed out. The National Police Agency and local police are trying to help former members of the *Yakuza* to open new bank accounts so that they may assimilate into society.[20]

(iv) Act for Organised Crimes

Recently, organised crimes, including the *Yakuza*, cults and terrorist groups, have been considered significantly harmful to a peaceful and sound social life in Japan. The proceeds of crime facilitate organised crimes, and interference with business activities through the use of such proceeds can significantly impact sound economic activities.

Therefore, the Act on Punishment of Organised Crimes and Control of the Proceeds of Crime (Act No 136 of 1999) was established. This act defines an "association" as a continually unified body of multiple people with a common purpose, for which acts that fulfill such purposes or intents are repeatedly engaged in, in whole or in part, by an organisation, and an "organisation" as an integration of people who, as its members, act as one body according to their predetermined and allocated duties based on directions and orders (Article 2(1)).

The Supreme Court ruled that an investment company, which was in virtual bankruptcy, but continued persuading customers to invest, could be an "association" for fraud under the Act, despite the company not being originally established for the purpose of those crimes or the fact that some salespeople had no knowledge of the bankruptcy and criminal activities.[21]

As the horror of terrorism spread worldwide, the Japanese Government repeatedly attempted to amend the Act to implement the United Nations Convention against Transnational Organised Crime, which was adopted by the UN General Assembly on the 15th of November, 2000 and

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[19] Today, there are 50 laws which have provisions of the '5 years in terms of ex-Yakuza members' rule, including the Financial Instruments and Exchange Act, the Construction Business Act, the Medical Care Act, the Social Welfare Act and so on (as of 18 March 2024). Following the guideline of the Ministry of Justice or the Police Departments, many private companies tend to contain similar provisions in contracts in order to isolate the Yakuza.
[20] Kosuke Tauchi and Hayato Kaji, 'Police offer to help former yakuza set up bank accounts' *The Asahi Shimbun*, 17 April 2022
<https://www.asahi.com/ajw/articles/14580003> accessed 2 August 2024.
[21] Supreme Court, 3rd petty bench, 15 September, 2015, *Keishu* 69(6) p 721
<https://www.courts.go.jp/app/hanrei_en/detail?id=1409> accessed 2 August 2024.

became implemented on the 29th of September 2003. Article 5 of the Convention asks the States to criminalise participation in an organised criminal group, as follows:

> '1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
> (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
> a. Criminal activities of the organized criminal group;
> b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above described criminal aim;
> (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group'.

There were not any laws concerning "conspiracy" or "guilt by association" in Japan at the time. Many Japanese criminal theorists believe that preventive measures to punish an action before commencement of the act of committing crime might lead to the violation of human rights, and that "conspiracy" laws must be unconstitutional.[22] However, after the terror incidents, especially the Tokyo subway sarin attack by the *Aum* and 9/11, the Japanese came to reassess and demand the establishment of preventive measures for terrorism.

As Japan prepared for the Tokyo Olympic and Paralympic Games in 2020, the reinforcement of counterterrorism measures could not be postponed. To thwart terrorism before it occurs, the Japanese government recognised the need to implement the Convention. They decided to

[22] About 160 criminal scholars announced the statement against the "Anti-Conspiracy Bill" on February of 2017: <http://www.kt.rim.or.jp/~k-taka/kyobozai.html> accessed 2 August 2024.

amend the Act to establish provisions that criminalise a conspiracy to perform some harmful or illegal acts.

However, there remains tenacious oppositions to that kind of legislation. Critics say that the law is too broadly worded and gives the authorities sweeping powers. They have also questioned the inclusion of certain acts and asked how they could be linked to terrorism and organised crime.[23] The *Nichi-Ben-Ren* (Japan Federations of Bar Associations) said the Act 'holds a great significance in the sense that it changes the system and fundamental principle of the Japanese criminal code.'[24] They seem to overlap the law with the Peace Preservation Law of 1925, which had created a "surveillance society".

At the press conference after passing the amendment act through both Houses of the National Diet, Prime Minister Shinzo Abe stated, 'I would like to state clearly to the Japanese people once more that members of the general public will not be the subject of investigations as suspects'.[25] Despite Prime Minister Abe's assurance that the law will not be used unfairly, the critics are still unconvinced. One of the critics said:

> 'Lawmakers opposing the anti-conspiracy bill believed that Abe used global counterterrorism efforts as a façade to rush the anti-conspiracy bill's passage to create a loophole for Japanese law enforcement to suppress activities and labour unions under the guise of monitoring suspected terrorists. Critics feared the law enacted through the Abe administration's political manoeuvering could infringe upon citizens' constitutionally protected freedom of speech and peaceful assembly rights'.[26]

Unfortunately, Mr. Shinzo Abe, who was the longest serving Japanese prime minister in history, suffered from various scandals.[27] The opposition parties and their sympathisers tried to attack

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[23] Anonymous, "Japan passes controversial anti-terror conspiracy law", *BBC*, 15 June 2017 <https://www.bbc.com/news/world-asia-40283730> accessed 2 August 2024.
[24] Nichi-Ben-Ren, "*Statement on the Enactment of the Bill to Revise the Act on Punishment of Organised Crimes and Control of Crime Proceeds, including the Criminalization of Conspiracy*" (15 June, 2017) <https://www.nichibenren.or.jp/en/document/statements/170615.html> accessed 2 August 2024.
[25] Press Conference by Prime Minister Shinzo Abe (June 19, 2017) <https://japan.kantei.go.jp/97_abe/statement/201706/1223084_11579.html> accessed 2 August 2024.
[26] Brandon Marc Higa, 'Japan's Anti-Conspiracy Law: Relinquishing Japan's Civil Liberties in the Name of Global Counterterrorism Efforts' (2018) 19(1) Asian-Pacific Law and Policy Journal 218.
[27] Reuters Staff, 'Japan PM Abe's rating falls in media poll amid scandal woes' *Reuters*, April 15 2018

the bills, which the Abe Administration submitted to the Diet, with severe criticisms that were a far cry from those words of constructive discussions. The bill of the amendment of the Act was also labeled as an unconstitutional law. However, according to the text of the provision added to the Act,[28] the bill has narrowly tailored the application range, as follows:

> 'Article 6-2 Two or more persons who plan, as part of the activities of terrorist groups or other organised criminal groups, the commission of criminal acts listed in the following sections, are subject to the punishment prescribed in each of those sections, if any of them have arranged funds or goods or carried out preliminary inspections of relevant locations pursuant to the plan or other preparatory acts for the purpose of committing the planned criminal acts. An organised criminal group means a group of persons whose common purpose as the basis of organising the group is to carry out the crimes enumerated in the Appendix. However, those who surrender prior to executing the crime will have a reduced or exemption from that sentence.
>
> 1） Crimes listed in Appendix 4, which are punishable by the death penalty, indefinite imprisonment, or imprisonment with or without labour for more than 10 years - Imprisonment with or without labor for 5 years or less.
>
> 2） Crimes listed in Appendix 4, which are punishable by either imprisonment with or without labor for more than 4 years but less than 10 years - Imprisonment with or without labor for 2 years or less'.
>
> [Appendix 4 is omitted].

This provision provides the "Crime of Preparation of Acts of Terrorism and Other Organised Crimes", which is substituted for the conspiracy. A case falls under the Crime when it meets the following elements: (1) participation of "organised criminal groups" (2)"Planning" by two or more people to execute a crime and (3) conducting "acts to prepare for implementation" based on plans.[29] As of 30 July 2021, the number of persons received by public prosecutors[30] concerning the Crime remains zero.[31]

<https://www.reuters.com/article/us-japan-politics-idUSKBN1HM0D8> accessed 2 August 2024.

[28] The bill became the Act No 67 of 2017.

[29] Ministry of Justice, *Understanding the Crime of Preparation of Acts of Terrorism and Other Organized Crimes* <https://www.moj.go.jp/EN/keiji1/keiji12_00144.html> accessed 2 August 2024.

[30] It refers to the number of suspects in cases directly detected or received by public prosecutors or referred from judicial police officers (including special judicial police officers of investigative agencies and internal inspectors of the National Tax Agency).

[31] Research and Training Institute of the Ministry of Justice, *White Paper on Crime (Japanese Version)* (2022)

(v) Legal Entity and Freedom of Association

Today, in Japan, it is easier for associations to acquire a legal entity than before the legal reform of 2008, which was a major reform of the legal framework of Public Interest Corporations for the first time in 110 years.[32] However, some kinds of legal entity, like religious, educational, medical, or social welfare corporations must be established under stringent governmental regulations.

The National Federation of Bar Associations and regional bar associations are mandatorily established by the Attorneys Act (Act No 205 of 1949) and anyone who wants to partake in lawyers' business must be registered under any bar associations. Nevertheless, the autonomy of each bar association is highly guaranteed.[33]

Religious organisations obtain juridical status through certification by the authorities in accordance with the Religious Corporations Act (Act No 126 of 1951). 'A religious organisation may be incorporated under this Act' (Article 4(1)) and 'persons intending to form a religious corporation must prepare articles of incorporation containing the following matters, and receive certification of the articles of incorporation from the competent authority…'(Article 12). This procedure for incorporation is relatively easy, for strict scrutiny by the Authority would seem to result in restrictions of religious rights. However,, the procedure for dissolution is difficult, as shown below:

> 'Article 81 (1) When the court finds that a cause which falls under any of the following items exists with regard to a religious corporation, it may order the dissolution of the religious corporation at the request of the competent authority, an interested person, or a public prosecutor, and by its own authority:
>
> (i) in violation of laws and regulations, the religious corporation commits an act which is clearly found to harm public welfare substantially…'

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<https://www.moj.go.jp/housouken/housouken03_00118.html> accessed 2 August 2024.

[32] Public Interest Commission, *Promoting Public Interest Activities by the Private Sector* (2014) <https://www.koeki-info.go.jp/pdf/english.PDF> accessed 2 August 2024.

[33] Especially, the disciplinary actions are taken by the bar association of which the attorney holds a membership (Article 56).

Historically there are only two cases of dissolution due to the violation of laws.[34] The first was the dissolution of the *AUM Shinrikyo*. In the *AUM Shinrikyo Case of 1996*, the Supreme Court ruled:

> 'Therefore, even if a religious organisation is dissolved as a result of a dissolution order, believers are not prevented from continuing a religious organisation without juridical personality or from creating such an organisation anew, nor are they prevented from conducting religious acts or from procuring new installations or equipment for the exercise of such acts. The Dissolution Order does not accompany any legal effect which prohibits or limits religious acts by the believers. Admittedly, when a dissolution order takes effect, a liquidation procedure follows (Article 49, para 2, Article 51 of the Law), and as a result, the assets of the religious organisation such as the installation for rituals and other assets used for religious acts will be disposed of (Article 50 of the Law), and there is a possibility of some disruption to the continuation of religious acts which the believers had been conducting by using these assets. Although legal regulations on religious organisations do not accompany the effect of legally restricting the religious acts of the believers, if there is a possibility of some disruption to them, in light of the significance of religious freedom which is one of the spiritual freedoms guaranteed by the Constitution, whether the Constitution allows such restrictions should be examined carefully'.[35]

The Court stated that the Order of Dissolution might limit religious activities indirectly. However, it was constitutional as applied to the *AUM*, the Court decided.

(vi) Group versus Personal Interests

Today, most controversial cases concerning freedom of association are raised between private people (e.g. company v employee, executive board v shareholders and trade union v its member) rather than government v citizens of Japan.

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[34] Today, the process of dissolution order to the Unification Church attracts the attention of Japanese. Anonymous, 'State eyes court order to dissolve the Unification Church', *The Asahi Shimbun*, 3 September 2023 <https://www.asahi.com/ajw/articles/14996483> accessed 2 August 2024.

[35] Supreme Court, 1st petty bench, 30 January 1996, *Minshu* 50(1) p 199 <https://www.courts.go.jp/app/hanrei_en/detail?id=252> accessed 2 August 2024.

In these situations, the eligibility and limitation of the legal entity are questioned. It is an issue of "*ultra vires*".[36] When an association wants to donate money to political parties, can it order its members to pay for that? How about donation to the charity?

In the *Yahata Steel Corporation Case of 1970*[37], the Supreme Court stated that the constitutional rights should also apply to domestic legal persons to the extent that the nature of such rights permits. Therefore, the Court decided the for-profit company might have right to donate to political parties.

However, in the *Minami Kyushu Tax Accountants Association Case of 1996*, the Court ruled that the legally established association with compulsory participation might have no entitlement to make a donation of money to a political organisation defined under the Political Fund Control Law such as political party, even if it was aimed at lobbying amendment of the Law concerning the Association. It is an act beyond the scope of the purpose of a licensed tax accountants' association: 'the resolution passed at a general assembly of an association of licensed tax accountants to the effect that special dues be collected as donations to a political organisation is invalid'.[38]

In contrast, in the *Gunma Judicial Scriveners Association Case of 2002*, the Court ruled that a similar association can make a charitable contribution for supporting another judicial scriveners association's victims of the disaster within its scope.[39]

The Japanese Civil Code rules, '[a] juridical person shall have rights and assume duties to the extent of the purpose provided in the applicable articles of incorporation or act of endowment subject to the applicable provisions of the laws and regulations' (Article 33).[40] Although a donation to a political party is not "the purpose" of Yahata Steel originally, the Court stated that it 'is an act that falls within the scope of the company's capacity to hold rights as long as it is found to have been made to fulfill the company's social role as a result of objective and abstract observation.' The Court recognises that the companies' freedom of donation to political parties

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[36] E Merrick Dodd Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145.
[37] Supreme Court, Grand Bench, 24 June 1970, *Minshu* 24(6) p 625 <https://www.courts.go.jp/app/hanrei_en/detail?id=1912> accessed 2 August 2024.
[38] Supreme Court, 3rd Petty Bench, 19 March 1996, *Minshu* 50(3) p 615 <https://www.courts.go.jp/app/hanrei_en/detail?id=288> accessed 2 August 2024.
[39] Supreme Court, 1st Petty Bench, 25 April 2002, *Shumin* 206 p 233.
[40] It was the Article 43 at the time the *Yahata Steel* Case was decided.

as part of the freedom of expression is guaranteed by the Constitution 'as long as the donation does not go against public welfare.'

To make decisions in these cases, the Supreme Court would use a sliding scale while evaluating various factors, for example the purpose and character of the association, the value of its concerned constitutional rights and the importance and extent of the limited rights of the associational members.

The *Kokuro Hiroshima Chihon (Hiroshima Branch of the National Railways Union) Case in 1975*[41] is a similar case. The Court stated that 'under today's social conditions, joining a labour union is an important benefit for workers and the freedom of withdrawal therefrom is practically significantly constrained'.

Therefore, even if no special legislative regulation is imposed in this regard, it is necessary to add reasonable limitations to the controlling force of a labour union and the scope of union members' obligation to cooperate as the other party thereof from the perspective of harmony between the effectiveness of union activities based on majority rule and the basic interests of individual union members by weighing the content and nature of a specific disputed union activity and the content, degree, form, etc. of cooperation that union members are required to provide in relation to the activity.

In this case, the labour union ordered its members to pay special union dues as (1) funds for supporting another labour union's struggle, (2) expenses for giving relief to its members who were subjected to a civil or criminal adverse disposition owing to a struggle against the Japan-US Security Treaty and (3) funds for donation to a political party. The Court approved the obligations of the members to pay special union dues with regard to (1) and (2), but denied the obligation of (3). Decision (1) is relatively similar to the *Gunma Judicial Scrivener Association Case* while decision (3) is relatively similar to the *Minami Kyushu Tax Accountants Association Case*.

[41] Supreme Court, 3rd Petty Bench, 28 November, 1975, *Minshu* 29(10) p 1698 <https://www.courts.go.jp/app/hanrei_en/detail?id=1900> accessed 2 August 2024.

Regarding these cases, the Court has attempted to develop the theories with close reasoning. Therefore, it seems typical that 'numerous provisions of the Japanese Constitution contain public welfare exceptions to rights granted to individuals in the Constitution … the fact remains that group identity is a vital part of Japanese life, and hence, the Japanese law'. [42]

IV. Potential of Freedom of Association

In the Japanese academic theory, the human rights in the Constitution are mostly classified into three categories, Freedoms, Claim Rights and Political Rights.[43] Freedoms are called 'passive rights', because it is possible to put Freedoms into practice without government interference. By contrast, Claim Rights, which include Social Rights, need some interference or actions by the government.

In general, freedom of association is classified amongst Freedoms. However, we can find another face of freedom of association by reviewing the process of establishing the Constitution of Japan.

After WWII, in October 1945, the Japanese government began a study to review the *Meiji* Constitution for the liberalisation of the Constitution. On the 8th of February, 1946, the Gist of the Revision of the Constitution was submitted to the GHQ/SCAP (General Headquarters, Supreme Commander for the Allied Powers).[44]

However, the reform proposal by the Japanese Government, which was a minor change of the *Meiji* Constitution, did not satisfy the GHQ.[45] General MacArthur of the SCAP ordered the staff of the Government Division of GHQ to draft the new Constitution of Japan; GHQ further handed the Japanese Government its own draft (the "MacArthur's Draft"[46]) as a model.

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[42] Carl F Goodman, *The Rule of Law in Japan: Comparative Analysis* (3rd revised ed, Alphen Aan Den Rijn: Wolters Kluwer, 2012) 567.
[43] Luis Pedriza, *Lectures on Japanese Law: From a Comparative Perspective* (Osaka: Osaka University Press, 2017) 147.
[44] National Diet Library, *Matsumoto Draft Submitted to GHQ* (Digital Exhibitions) <https://www.ndl.go.jp/constitution/e/shiryo/03/074shoshi.html> accessed 2 August 2024.
[45] Charles L Kades, 'The American Role in Revising Japan's Imperial Constitution' (1989) 104(2) Political Science Quarterly 215-247.
[46] National Diet Library, *GHQ Original Draft* (Digital Exhibitions) <https://www.ndl.go.jp/constitution/e/shiryo/03/147shoshi.html> accessed 2 August 2024.

According to the Memorandum for the Chief of the Government Section made by the committee on Civil Rights (the Third Draft of the Chapter on Civil Rights before the "MacArthur's Draft"[47]), freedom of association was authorised as follows:

> 'Article __ Japanese citizens have the rights to organize freely in societies, unions or associations for any peaceful purposes; but secret political, militaristic or ultra-nationalistic organizations are prohibited, as shall be all organizations cultivating civil, international or interracial antagonism and strife'.[48]

It seems important that the article on freedom of association was located in the chapter 3 of "Social and Economic Rights" rather than in chapter 2 of "Freedoms" like freedoms of speech, religion, and thought among others. What does this mean? Because the Government Section of the GHQ had leftist tendency, their staffers might have treated freedom of association as a right of "corporatism" like the thought of Robert Owen, who was a founder of the co-operative movement, and tried to develop co-operatives and the trade union movement for the working class.[49] Before the new constitution was established, the GHQ had ordered the Japanese government to establish the Labor Union Act of 1945. In the early stage of occupation, promoting trade union movement for workers was a top priority.[50]

However, the distinction between "Freedoms" and "Social and Economic Rights" disappeared in the MacArthur's Draft. Lastly, freedom of association has been noted in the same article of the freedom of expression and assembly (Art.21) on the Japanese Constitution Today. At a glance, it is very similar to the Article 29 of *Meiji* Constitution. However, its meaning might be different from the old provision and be interpreted from other perspectives.

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[47] MacArthur's Draft was a prototype of the Constitution of Japan. Then, the Japanese government made the proposal for revision of the *Meiji* Constitution based on the Draft under the influence and supervision of the Occupied Army. See generally, Michael Schaller, *The American Occupation of Japan: The Origins of the Cold War in Asia* (Oxford: Oxford University Press, 1987), Kazuo Kawai, *Japan's American Interlude* (Chicago: University of Chicago Press, 1960) and Howard B Schonberger, *Aftermath of War: Americans and the Remaking of Japan, 1945-1952* (Kent: Kent State University Press, 1989).

[48] Kenzo Takayanagi and others (eds), *The Making of the Constitution of Japan I* (Tokyo: Yuhikaku, 1972) 224.

[49] Robert Owen, *A New View of Society or Essays on the Principle of the Formation of the Human Character and the Application of the Principle to Practice* (Whitefish: Kessinger Pub, 2010), originally published in 1813.

[50] However, the occupation policy shifted to restrain the labor movement under the Cold War: <https://www.ndl.go.jp/modern/e/cha5/description11.html> accessed 2 August 2024.

Today, the economic disparity becomes much greater and alternatives to a capitalist economy are desired. Corporatism may be one choice, and then there is need to reconsider freedom of association not only as freedom but also as a ‘Social and Economic Right’. It might become the way to find out the potential of freedom of association.