Jurisprudence of Justice Katsuya Uga of the Supreme Court of Japan

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As a Justice of the Supreme Court of Japan,[1] Justice Katsuya Uga's motto is to face each matter with sincerity from a fair and neutral standpoint to draw reasonable conclusions by closely reading the materials, organizing thoughts, and attentively listening to the views of other justices. Further, he has quoted the words of Princess Ayako, the third daughter of the late Prince Takamado, as an impressive phrase of wisdom: "What we have today will not necessarily be there tomorrow." With these words in mind, he strives to do everything he can daily without putting things off until the next, spending every day free of regret.[2]

Ideologically, Justice Uga's jurisprudence tends to fall neutral to liberal, especially in comparison to other fellow justices, and he is not reluctant about expressing his views in dissenting opinions. For example, he wrote a dissenting opinion in the 2019 House of Councilors Election vote disparity case[3] expressing deep concerns and suggesting possible remedies to mitigate vote weight disparity. In another case in 2021, *fūfu-bessei* (constitutionality of requiring married couples to share the same surnames),[4] Justice Uga wrote a dissent finding unconstitutionality in forcing married couples to share the same legal surname since that prevents equal and free decision-making for both spouses and recognizing the disparate impact of Japan's law on women. Justice Uga has also supported more conservative decisions, as seen in an important capital punishment case[5] handed down on September 8, 2020, joining the majority opinion finding that capital punishment does not violate the Constitution's Article 13's right to liberty or Article 36's ban against torture or cruel punishment, and thereby upholding the nation's death penalty system.

Prior to being appointed as a Justice of the Supreme Court of Japan on March 20, 2019, Justice Uga was a well-respected professor and researcher in administrative law at Tokyo University with over 40 years of experience.[6] He began his career as a researcher upon graduating from Tokyo University with a degree in law in 1978 and has visited the United States on several occasions as visiting researcher and professor for leading educational institutions including

[1] The Supreme Court of Japan consists of a Chief Justice and fourteen Associate Justices [Justices of the Supreme Court (May 1, 2022, 8:00 AM), https://www.courts.go.jp/english/about/justice/index.html.]. Together they decide cases as a Grand Bench ("*dai-hotei*") for appeals involving the constitutionality of a law, regulation, and/or order by a lower court. [Organization Chart of the Supreme Court (May 1, 2022, 8:01 AM), https://www.courts.go.jp/english/about/organization/index.html.]. However, most cases are heard by one of three Petty Benches ("*sho-hotei*") comprised of five justices each. Justice Uga serves on the 3rd Petty Bench. [Id.]

[2] Katusya Uga, *Justices of the Supreme Court: Katusya Uga*, COURTS IN JAPAN, https://www.courts.go.jp/english/about/justice/Uga/index.html (last visited Feb. 28, 2022).

[3] Saikō Saibansho[Sup. Ct.] Nov. 18, 2020, 2020 (Gyo-Tsu) 78, 74 [Minshū].

[4] Saikō Saibansho[Sup. Ct.] Jun. 23, 2021, 2020 (Ku) 102.

[5] Saikō Saibansho[Sup. Ct.] Sep. 8, 2020, 2018 (A) 318.

[6] Uga, *supra* note 2.

Harvard Law School, University of California, Berkeley, and Georgetown University Law Center.[7] He has published extensively mainly in the fields of administrative law, freedom of information law, administrative procedure law, environmental law and comparative work on American law. Throughout his career, he has also served on numerous committees and held leadership positions with municipal, government, and academic organizations.

Justice Uga is one of the most influential legal scholars in modern Japan who held conversations with legal scholars, practitoners, and students virtually at the University of Hawai‘i at Mānoa William S. Richardson School of Law on May 2 and the Supreme Court of Hawai‘i on May 3. Below are summary translations of major cases he has written opinions for, which will hopefully highlight achievements for our readers in Hawai‘i as well as in other places in the Asia and Pacific region.

[7] *Id.*

Key Decisions

1. Constitutionality of Hate Speech Restriction Ordinances (5-0, Uga, J. in unanimity with 3rd Petty Bench)[8]

Feb. 15, 2022

（ヘイトスピーチ規制法）

Citizens of Osaka City challenged the constitutionality of Japan's first hate speech restriction ordinance enacted by Osaka City[9] claiming that it infringed on the constitutional guarantee of freedom of speech, prescribed in Article 21, section 1 of the Constitution.[10]

The 3rd Petty Bench unanimously upheld the ordinance as constitutional. While the justices acknowledged the importance of freedom of speech as one of the most fundamental rights in a democratic society, they determined that it can be reasonably limited in order to accomplish an inescapable public welfare rationale.

The Court reasoned that there is a substantial need to restrict hate speech because hate speech provokes discrimination, hatred, and even incites criminal conduct against those targeted. Moreover, the Court mentioned that excessive and malicious demonstrations involving discriminatory conducts occurred frequently in Osaka City, and held that the ordinance which only restricts extreme and highly malicious demonstrations is constitutional.

2. Constitutionality of Legal Gender Change Recognition Requirements for Transgender People [11] (4-1, Uga, J. dissenting against 3rd Petty Bench majority opinion)

Nov. 30, 2021

（性別の取り扱いの変更申し立て）

A transgender person challenged a court's decision to deny their legal gender recognition after a gender sterilization surgery. *The Supreme Court 3rd Petty Bench ruled that requiring a transgender person to be childless in order to be allowed to pursue gender changes does not violate Articles 13 and 14 of the Constitution*.[12]

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[8] Saikō Saibansho [Sup. Ct.] Feb. 15, 2022, 2021 (Gyo tsu) 54.

[9] The hate speech ordinance in question addresses race-based expressions targeting Japan's permanently resident population of ethnic Koreans. [Saikō Saibansho[Sup. Ct.] Feb. 15, 2022, 2021 (Gyo tsu) 54.] See generally Koji Higashikawa, *Japan's Hate Speech Laws: Translations of the Osaka City Ordinance and the National Act to Curb Hate Speech in Japan*, 19 ASIAN-PAC. L. & POL'Y J. 1 (2017), for an English translation of the Osaka City Ordinance. *See also* Craig Martin, *Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada*, 45 HASTINGS CONST. L. Q. 455 (2018).

[10] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated. *Id.*

[11] Saikō Saibansho [Sup. Ct.] Nov. 30, 2021, 2020 (Ku) 638.

[12] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with

Justice Uga dissented and emphasized that the requirement violated Article 13 of the Constitution. He commented that changes of the gender in the family registry (*koseki*) do not cause confusion of the child's mentality or family relationship because it is just an attempt to match the transgender person's factual existence in their daily living circumstances with the gender indicated in the family registry documentation.

3. Constitutionality of Forcing Married Couples to Share Last Names (11-4, Uga. J. dissenting against Supreme Court Grand Bench)

Jul. 23, 2021[13]

（夫婦別姓訴訟）

Three couples in common-law marriages requested to legally marry while maintaining separate surnames. *The Supreme Court Grand Bench affirmed the lower court decision, which dismissed the plaintiffs' appeals by the vote of 11 to 4.* The majority opinion held that the top court has "found no points that should be changed from the decision in 2015, even as it takes into account the changes in the society and awareness among people," such as the increase in working women and more people in favor of allowing different surnames, and decided that the surname issue is a matter that should be discussed in parliament rather than seeking a judicial settlement.[14] The majority opinion reasoned that allowing different surnames in one family reduces "family ties" and produces the risk of discrimination against children who have different surnames from one of the parents.

Justice Uga dissented. He shared a dissenting opinion that it is an unjust "intervention by the state not to allow legal marriages unless couples accept the same surname, even if they do not wish to."[15] When two people get married, husband and wife must receive equal rights. A surname, together with a first name, is the symbol of a person's identity and closely tied with social evaluation of the person. If the married person is forced to change his/her surnames, the social evaluation of the person tied to the name as well as his/her identity may perish. Under the majority rule, one person must accept the infringement of personal right to get married.

Therefore, requiring couples to share the same last names violates Article 24 of the Constitution by preventing equal and free decision-making when couples get married.[16]

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the public welfare, be the supreme consideration in legislation and in other governmental affairs. *Id.* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. *Id.*

[13] Saikō Saibansho [Sup. Ct.] July 23, 2021, 2020 (Ku) 102.

[14] Saikō Saibansho [Sup. Ct.] Nov. 30, 2021, 2020 (Ku) 638.

[15] Saikō Saibansho [Sup. Ct.] Nov. 30, 2021, 2020 (Ku) 638.

[16] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce 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. *Id.*

Moreover, Justice Uga disagreed with the majority opinion which reasoned that allowing different surnames would reduce "family ties". He mentioned that there is no evidence that family ties became weaker in other countries that allow couples to have different surnames.

4. Henoko Coral Reef Lawsuit[17]
(3-2, Uga, J. one of two dissenters on 3rd Petty Bench)

Jun. 6, 2021
（辺野古サンゴ訴訟）

The governor of Okinawa claimed that the central government's order asking the governor to authorize the transplantation of coral reefs to construct the U.S. military base in Henoko was unlawful.

The 3rd Petty Bench's majority opinion held that the governor abused his discretionary power by failing to authorize the transplantation. The court reasoned that transplantation of coral reefs was necessary because landfill constriction may cause the extinction of the coral reefs.

Two justices dissented including Justice Uga. Justice Uga pointed out the existence of soft sea floors found in the proposed construction area and noted that whether it is even physically possible to conduct the proposed landfill operations is still unknown. Accordingly, he concluded that the governor did not abuse his discretionary power because transplantation would be meaningless if the overall construction program intended by the U.S. military cannot be conducted.

5. Request to Annul Election Result Due to Vote Weight Disparity [18]
(12-3, Uga. J. dissenting against Supreme Court Grand Bench)

Nov. 18, 2020
（選挙無効請求事件）

In the 2019 Election for House of Councilors, the weight disparity of a single vote was as high as 3.00, depending on the population of its constituency. Voters from forty constituencies requested to annul election results, claiming that vote weight disparity violated the Constitution's requirement for fair elections in terms of seats being proportional to the number of voters. The Supreme Court Grand Bench rejected the plaintiffs' demand to annul the 2019 Election for House of Councilors by the vote of 12 to 3, with 2 justices separately concurring and 3 dissents. *The majority opinion held that the value of each vote was not in "a state of extreme inequality arising to the level of an issue of constitutionality".*

Justice Uga dissented, saying that vote weight disparity should be considered as the violation of Article 14, Section 1 and Article 15, Section 1 of the Constitution if there is no

[17] Saikō Saibansho [Sup. Ct.] Jul. 6, 2021, 2021 (Gyo hi) 76.

[18] Saikō Saibansho [Sup. Ct.] Nov. 18, 2020, 2020 (Gyo tsu) 28.

reasonable explanation for the disparity.[19] According to his opinion, the issue of vote weight disparity must be subjected to strict judicial review, because electoral equality is fundamental for the sovereignty of the people and democracy, which are key concepts of the Constitution. Therefore, the National Assembly must make an utmost effort to equalize the weight of each vote, and if there are unavoidable reasons for the disparity, it must provide its reasons and fulfill its accountability to mitigate the disparity.

6. Hakamada Incident Retrial Order Appeal [20]
(3-2, Uga, J. dissenting against the 3rd Petty Bench for procedural matters)

Dec. 22, 2020

（再審開始決定に対する即時抗告の決定に対する特別抗告事件）

This case is one of the most famous criminal justice cases in Japan. Iwao Hakamada, originally sentenced to death while maintaining innocence concerning a murder, requested for a retrial based on new evidence. In the retrial proceedings, the lower court ordered a retrial, but this ruling was subsequently reversed by the Tokyo High Court ruling that the new evidence was not compelling enough to exonerate Hakamada.

The Supreme Court 3rd Petty Bench, relying on expert knowledge surrounding change of color in bloodstains, etc., overturned the Tokyo High Court's decision and *remanded the case back to the High Court*.

Two justices, including Justice Uga dissented. While concurring with the substantive decision to overturn the High Court decision, Justice Uga would have had the matter immediately returned to the original court for retrial proceedings without further delay.

7. Labor Dispute: Differences in Retirement Allowance for Contract Workers[21]
(4-1, Uga. J. dissenting against the 3rd Petty Bench)

Oct. 13, 2020

（損害賠償請求事件）

Contract workers sued Tokyo Metro for disparities in retirement allowances received between them and regular employees. *The Supreme Court 3rd Petty Bench, reversed the High Court's decision*, which found the disparity in retirement allowance illegal. The 3rd Petty Bench concluded it is not unreasonable for the company not to pay retirement allowances for contract workers since there were differences in the content of work between regular and contract workers.

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[19] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. *Id.* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 15. The people have the inalienable right to choose their public officials and to dismiss them. *Id.*

[20] Saikō Saibansho [Sup. Ct.] Dec. 22, 2020, 2018 (Shi) 332.

[21] Saikō Saibansho [Sup. Ct.] Oct. 13, 2020, 2019 (Zyu) 1190.

Justice Uga dissented. He agreed that the court may take into consideration the difference in the content of work, but retirement allowances also have a nature of a reward for many years of service. A contract worker in this case had worked for the company for about 18 years, which is longer than some regular employees, therefore, the company should pay retirement allowances to this worker.

8. Labor Dispute: Differences in Bonus Payment for Contract Workers[22] (5-0, Uga. J. in unanimity with 3rd Petty Bench)

Oct. 13, 2020

（地位確認等請求事件）

A former full-time contract worker claiming that differences in bonus pay between contract workers and permanent workers is unreasonable. *The Supreme Court 3rd Petty Bench unanimously held* that it is not unreasonable to pay bonuses to contract workers, because the purpose of the bonuses was to secure and retain regular workers, who could face transfers and were assigned responsibilities that did not apply to irregular workers.

9. Constitutionality of Death Penalty[23] (5-0, Uga. J. in unanimity with 3rd Petty Bench)

Sep. 8, 2020

（住居侵入、強盗殺人未遂、強盗殺人、窃盗被告事件）

The defendant sentenced to death in the lower courts appealed to the Supreme Court, arguing that death penalty violates article 13 and 36 of the Constitution.[24] *The Supreme Court 3ed Petty Bench unanimously dismissed his appeal*, concluding that death penalty does not violate the Constitution.

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[22] Saikō Saibansho [Sup. Ct.] Oct. 13, 2020, 2019 (Zyu) 1055.

[23] Saikō Saibansho [Sup. Ct.] Sep. 8, 2020, 2018 (A) 318.

[24] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. *Id.* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden. *Id.*

Appendix

Justice Uga's Professional Career[25]:

- Research Associate, University of Tokyo, Faculty of Law (1978).
- Associate Professor, University of Tokyo, Faculty of Law (1981).
- Visiting Researcher, Harvard Law School (1983).
- Visiting Researcher, University of California, Berkeley (1984).
- Visiting Professor, Harvard Law School (1990).
- Professor, University of Tokyo, Graduate Schools for Law and Politics (1994)
- Visiting Researcher, Georgetown Law School (1998).
- Professor, University of Tokyo, Graduate School of Public Policy (2004).
- Justice of the Supreme Court (2019).

Recent Notable Publications

- Uga Katsuya, Administrative Law Text, Vol. 2 Administrative Remedy Law, (Yuhikaku Publication, 7th ed. 2021). (http://www.yuhikaku.co.jp/books/detail/9784641228030)

- Katsuya Uga, Information Disclosure, Open Data and Management of Public Documents, (Yuhikaku Publication, 2019). http://www.yuhikaku.co.jp/books/detail/9784641227798

- Katsuya Uga, Protection and Utilization of Personal Information, (Yuhikaku Publication, 2019). http://www.yuhikaku.co.jp/books/detail/978464122778

- Survey in Municipal Law (9th ed., March 2021) (地方自治法概説第 9 版)

- Information Disclosure, Open Data and Management of Public Documents (Yuhikaku, 2019) (情報公開・オープンデータ・公文書管理)

- Protection and Utilization of Personal Information (Yuhikaku, 2019) (個人情報の保護と利用)

[25] Uga, *supra* note 2.