MAJOR JUDICIAL DECISIONS

Jan. - Dec., 1979

1. Constitutional and Administrative Law

a. Constitutional Law

During the year under review no case required presentation before the Grand Bench of the Supreme Court, with regard to constitutionality. Introduced here from decisions made at lower courts are cases believed peculiar to Japan.

1. Judgment ruling that the provision prohibiting door-to-door visit during an election is unconstitutional (in connection with the freedom of expression)

(1) Judgment at the Izumo Chapter, Matsue District Court. (Case Nos. (*wa*) 42 and 43 of 1976. Judgment, January 24, 1979)

In this case, door-to-door visits aimed at obtaining a vote on the occasion of the election for the House of Representatives held in 1979 were deemed as contravening Article 138, Paragraph 1 of the Public Offices Election Act.

(2) Judgment at the Yanagawa Chapter, Fukuoka District Court. (Case No. (*wa*) 33 of 1974 Judgment, September 7, 1979.)

In this case, door-to-door visits aimed at soliciting the public's presence at a speech meeting on the occasion of the elections for

the House of Councillors held in 1974 were deemed as contravening Article 138, Paragraph 2 of the Public Offices Election Act.

In both cases, the defendants claimed that the provision of the Public Offices Election Act strictly prohibiting door-to-door visits runs counter to Article 21 of the Constitution which guarantees the freedom of speech and expression. The two district courts found the defendants not guilty on the following grounds:

In parliamentary democracy, an election is the basic means by which the people as sovereign individuals can take positive part in politics, and speech is the most important element of election campaigns. In this regard, freedom of speech (freedom of political speech) must be respected to the utmost as an element of election campaigns. Thus, the two courts ruled that the said provision in the Public Offices Election Act was unconstitutional.

Article 138 of the Public Offices Election Act pertaining to the strict prohibition of door-to-door visits during an election originates in the Universal Suffrage Act which went into effect in 1925 (Ch. 47, 1925). The Universal Suffrage Act severely restricted election campaigns including the complete prohibition of door-to-door visits while making "male subjects of Imperial Japan" aged 25 and above eligible for voting (Article 5 of the said Act).

Following the implementaion of the present Constituion after the end of World War II, which guarantees fundamental human rights and the principle that sovereignty rests with the people, these restrictions were partially abolished, but the prohibition of door-to-door visits has been in effect as it was before the war. Therefore, the propriety of the prohibition has often been discussed as a constitutional problem centering on Article 21 on the freedom of expression.

The Supreme Court has consistently maintained an attitude that such prohibition does not violate the freedom of expression on the vague ground that door-to-door visits are attended by various "evils." (Grand Bench judgment, September 27, 1950. 23 *Keishū* 235.) The judgment at a petty bench of the Supreme Court in the year under review also basically followed the above

stand (Judgment, July 5, 1979).

There have been cases, however, in which lower courts have found the provision in question unconstitutional. The two judgments during the year under review were clear cases in point. The judgments ruling it unconstitutional were characteristic in that they adopted the "principle of minimum necessity," so to speak, as the standards for unconstitutionality, and that the restrictions on the freedom of expression should be those of "inevitable necessity" and "minimum necessity."

No country among the Western democracies has prohibited door-to-door visits as part of an election campaign. In this sense, the stand taken in the ruling of the lower courts mentioned above should be taken as complying with the world trend.

2. Joint enshrining of an SDF serviceman who died in the performance of his duties was found unconstitutional (in violation of the freedom of religion).

Decision by the Yamaguchi District Court. (Case No. (*wa*) 8 of 1973. Judgment, March 22, 1979.)

The Yamaguchi Prefectural Self Defense Forces Friends Association (*Taiyu-kai*), an association affiliated with the Self Defense Forces (SDF), in concert with the Yamaguchi local liaison office of the SDF, filed an application for the joint enshrining of an SDF serviceman, who died in the performance of his duties, at the Gokoku Shrine, a shrine dedicated to those who died for the country. (In Shintoism, the joint enshrining or *Goshi* means the enshrining of more than one deity as one or to enshrine an additional deity at a shrine which has already one deity dedicated.)

Contested in the case was whether or not the action of filing an application as such violated the freedom of religion of the serviceman and his Christian wife (Constitution, Article 20, Paragraph 1), and whether or not it was in violation of the principle of separating religion from politics (Constitution, Article 20, Paragraph 3, stating that the State and its organs shall refrain from religious education or any other religious activity).

The Yamaguchi District Court ruled that the action of joint

enshrining had violated the freedom of religion of the plaintiff to cherish the memory of her deceased husband in accordance with her own religious belief, and that the concerted action of the SDF Yamaguchi liaison office and the *Taiyu-kai* association to apply for joint enshrining at the Gokoku Shrine was in contravention of the Constitution, Article 20, Paragraph 3 prohibiting the religious activity of a state organ.

The points discussed in the said judgment were legion. However, it was particularly noteworthy that the court, holding that freedom of religion (Constitution, Article 20, Paragraph 1) is contained in the people's right to life, liberty and the pursuit of happiness (Constitution, Article 13), ruled that "the legal interests to claim redress for violation (of the freedom of religion) are guaranteed, and that it belongs to what is called the right of personality in private law." It must be further noted that the court interpreted the principle of separation of political matters from religious matters quite strictly.

The current case originally dealt with a constitutional problem concerning the freedom of religion, but went in such a way as to touch the very fundamental of the Constitution involving pacifism (Consitution, Article 9) and the principle of sovereignty resting with the people. The act to jointly enshrine at the Gokoku Shrine means the enshrining of the spirits of the war dead as a deity, in other words, an act aimed at lifting the morale of the men. In the Meiji State in which the emperor was sovereign, such an act was considered ideological support for the army under the emperor system, which waged an aggressive war.

In this regard, it was questioned in the current case if the said action, inseparable from the emperor system's ideology, was consistent with the basic concept of the present Constitution concerning pacifism and the principle of sovereignty resting with the people. In Japan today, there is a move calling for state management of Yasukuni Shrine, often regarded as the representative of Gokoku Shrines across the nation. In this connection, the significance of the judgment by the Yamaguchi District Court cannot be considered separate from the controversy over the pro-

posed bill calling for state management of Yasukuni Shrine.

The current judgment, although concerned directly with the freedom of religion of an individual, contains constitutional problems peculiar to Japan reflecting its unique political, cultural and spiritual climate.

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b. Administrative Law

1. A series of judgments concerning SMON suits

—Judgment in the Hiroshima SMON suit (Hiroshima District Court, February 22, 1979. *Hanrei Jihō* No. 920); Sapporo judgment in the SMON suit (Sapporo District Court, May 10. *Hanrei Jihō* No. 950); Kyoto judgment in the SMON suit (Kyoto District Court, July 2. *Hanrei Jihō* No. 950); Shizuoka judgment in the SMON suit (Shizuoka District Court, July 19. *Hanrei Jihō* No. 950); Osaka judgment in the SMON suit (Osaka District Court, July 31. *Hanrei Jihō* No. 950); and judgment in the Gunma SMON suit (Maebashi District Court, August 21. *Hanrei Jihō* No. 950.)

(a) Introduction

These were follow-ups to the series of judgments in the previous year of 1978 including the judgment in the Hokuriku SMON suit (Kanazawa District Court, March 1. *Hanrei Jihō* No. 878), the judgment in the Tokyo SMON suit (Tokyo District Court, August 3. *Hanrei Jihō* No. 889), and the judgment in the Fukuoka SMON suit (Fukuoka District Court, November 14. *Hanrei Jihō* No. 910). In each case, the court ruled in favor of the victims who acted as plaintiffs.

Since the judgment in the Tokyo District Court, the virus theory contending that viruses are responsible for SMON has been completely denied. Moreover, since the judgment of the