MAJOR JUDICIAL DECISIONS

Jan. - Dec., 1980

1. Constitutional and Administrative Law

a. Constitutional Law

During the year under review (1980), there was only one decision by the Grand Bench of the Supreme Court, holding that the Restriction of Shipowner Responsibility Act was constitutional (Decision on Nov. 5, 1980, 986 *Hanrei Jihō* 105). The decision had no significance except that the Supreme Court was asked for the first time to make a decision on the constitutionality of the Act above. Moreover, there has been no fresh development on the constitutional theory.

One of the characteristics featuring the Supreme Court decisions in the year under review was that the Petty Bench followed past precedents as in the past. It must be noted, however, that there are a number of important constitutional cases still pending in the Supreme Court, such as the "Naganuma Nike Case" involving the dispute over the constitutionality of the Defense Forces, the "Ienaga Textbook Case" concerning the constitutionality of the textbook authorization system, and the "Osaka Airport Pollution Case" dealing with environmental rights. The Supreme Court will be compelled in one way or another to make a deci-

sion on constitutional disputes in the course of handling those cases.

A number of cases including the decisions made at the courts below are introduced here.

In connection with the right of equality, the Tsu District Court in a decision on Feb. 21, 1980 (961 *Hanrei Jihō* 41) ordered that unreasonable discrimination against a female employee be corrected.

The issue was whether or not the failure of a local public body to promote one of its female employees violated Article 13 of the Local Officials Act and Article 4 of the Labor Standards Act. The court upon probing into related facts in detail held that it was disadvantageous treatment based on sex to deny the female plaintiff promotion.

Also in connection with the right of equality the decision of the Tokyo High Court on Dec. 23, 1980 (984 *Hanrei Jihō* 26) concerning the unequal representation in certain constituencies was worthy of notice.

It was contested in the case whether or not the House of Representatives election held on June 22, 1980 was null and void. The plaintiff asserted that the election violated the right of equality (Constitution § 14) as the gap between the most over-populated constituency and the most sparsely populated constituency in respect of the population per representative was 3.94 to 1. The court in its decision held that "it is unconstitutional when the ratio of the population gap goes over 2 to 1," and at the same time strongly pointed out the negligence on the part of the National Diet to correct the election constituencies.

The current decision was significant in two points compared with the epochal decision of 1976 made by the Grand Bench of the Supreme Court (30 *Minshū* 223) which, dealing with the inequality of about 5 to 1 in relative value of the votes cast in the House of Representatives election held in 1972, found the election unconstitutional on the ground that the constitution seeks equality in the value of the ballot cast by each voter" and that "inequality in this regard can hardly, in general, be consid-

ered rational."

In the first place, the decision of the high court, based on the concept that equality in the value of a vote should be based on the "principle of formalistic equality," took the stand that the maximum possible respect should be paid to the "principle of proportionality on population." The 1976 Supreme Court decision, while stating that "proportion by population is a most important basic standard," exhibited a logic that takes into account the element of policy consideration by the Diet, that is, a non-population element, when dividing into constituencies. On the other hand, the current high court decision explicitly demonstrates the thorough principle of a proportionate population.

Secondly, the high court decision adhering to the basic stand above clearly states that provisions running counter to the principle of equality are unconstitutional as a whole where the value of a vote between the most populated district and the most sparsely populated district "exceeds a ratio of roughly two to one." This decision should be considered highly significant in that it clearly points out for the first time the 2 to 1 standard in the decision on unconstitutionality embodying the principle of a proportional population.

Of interest in another case concerning the election and the issue of freedom of expression was the decision made by the Matsue Chapter of the Hiroshima High Court on Apr. 28, 1980 (964 *Hanrei Jihō* 134). The Matsue Chapter held that the provision prohibiting door-to-door calls (the Public Officers Election Act § 138 (1)) was unconstitutional. As we introduced in the last number of this Bulletin, there have been many similar decisions made at the local district court level. However, the current decision is noteworthy in that it was the first decision on unconstitutionality ever made by the high court.

The decision reasoned that the unconstitutional nature of the provision prohibiting door-to-door calls was as follows:

Taking up the contention that door-to-door calls were likely to contribute to malpractice and that such visits might disrupt

the *otherwise* private life of the person visited, it questioned whether there exists any reasonable relation between the prevention of such disruptions and the prohibition of door-to-door calls. After probing into individual cases, the court came to the following conclusion: it cannot be said that when there is no provision prohibiting door-to-door calls there exists a high probability of causing annoyances, that is, such visits may become the soil in which malpractice tends to thrive or increase. The possibility of given rise to such disruptions is an extremely abstract one, and although the relation between the prevention of such annoyances and the prohibition of door-to-door calls cannot be totally denied, it cannot be said there exists a rational relation between them. In this regard, the court said that "the prohibition of door-to-door calls cannot be considered the most reasonable and absolutely necessary provision permissible *within the bounds of* the Constitution."

On the other hand, it must be noted that the Supreme Court has consistently upheld that the provision prohibiting door-to-door calls is constitutional. (Decision by the Second Petty Bench, the Supreme Court, on June 6, 1980. 964 *Hanrei Jihō* 129.)

With regard to the issue concerning freedom of expression, a decision by the Second Petty Bench of the Supreme Court, on Nov. 28, 1980 (982 *Hanrei Jihō* 64), dealt with the case dubbed "The Lining Paper of a Fusuma Sliding Door of a Four-and-a-Half-Mat Room."

The case concerned the issue of obscenity. Although efforts have been made by lower courts to clarify the standard of reaching decisions on obscenity, the Supreme Court decision described the framework of the decision on obscenity as follows:

"It is necessary to study various problems such as the intensity and style of the lewd, detailed portrayal and description of sex in the literature in question, the weight of the said portrayal and description in the whole context of the literature, the relation between the portrayal and description and the ideology expressed in the literature, the structure and development of the story, the degree of easing sexual excitement by its artistic

and ideological nature, and whether or not it can be considered as mainly appealing to the sexual interest of the readers when the literature is viewed as a whole including the points mentioned above."

Such was the tentative conclusion reached by the Supreme Court. Although the framework of the decision was thus presented, it will give rise to many arguments in the future whether or not it is legally valuable as a standard of decision on obscenity.

In connection with obscenity control, the Sapporo District Court handed down a decision on Mar. 25, 1980, dealing with customs censorship in the Customs Tariff Act (961 *Hanrei Jihō* 29).

The defendant in the case had ordered books and 8-mm movie films from foreign firms. The custom office informed him that the goods in question corresponded to "books and other materials prejudicial to good morals" as prescribed in Article 21 (1) (iii) of the Customs Tariff Act, and the defendant then filed a suit livery of the goods in question. The defendant then filed a suit with the court claiming that the handling of the matter by the office corresponded to the censorship prohibited by Article 21 (2) of the Constitution and was therefore unconstitutional.

The Sapporo District Court upon studying the relation between the said provision of the Customs Tariff Act and Article 21 (2) of the Constitution came to the following conclusion:

"To make a notice as prescribed in Article 21 (3) of the Customs Tariff Act and for the Customs director to make a decision according to Article 21 (5) of the said Act correspond to censorship. Moreover, it is difficult to say that such can be permitted as an exception. That such notice and decision were made in the handling of the said goods should be considered unlawful and unconstitutional in itself."

In a sense, the decision deployed the theory of "unconstitutionality in application" and has attracted attention, being the first of its kind to hold Customs censorship unconstitutional.

With regard to the right to live, the Osaka District Court dealt

with a case involving the question of equal rights in its decision on Oct. 29, 1980 (985 *Hanrei Jihō* 50). In that case, it was contested whether or not the requirement that one has to be Japanese national to receive payment of the Disabled Persons Welfare Pension runs counter to the equal rights provision of the Constitution.

The court, in its decision, held that to establish such a requirement is purely a matter of legislative policy. We cannot overlook the fact that behind the reasoning leading to the current decision exists confrontation over interpretation of Article 25 of the Constitution.

Article 25 (1) of the Constitution says that all people shall have the right to maintain the minimum standards of wholesome and cultured living, while Article 25 (2) says that in all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health. The conflicting interpretation results from whether Article 25 of the Constitution should be regarded as one and complete or whether Article 25 (1) and (2) should be interpreted independently of each other.

It appears that the court stands by the latter, contrary to the general trend in academic circles. In other words, a logic weakening the human rights consideration in the right to live has been introduced by expanding the scope of legislative measures concerning social welfare on the premise that the first part concerns poverty relief measures and the latter part measures to prevent poverty. It must be noted that academic circles are highly critical of such a dichotomous stand.

Lastly, there were a number of court decisions involving "environmental rights" as part of "new human rights." The problems of environmental pollution have become quite serious in developed nations in recent years. Against such a background, what is called environmental rights has come into the limelight.

The court has been generally passive in acknowledging such new rights of this kind. For instance, there was a decision handed down by the Nagoya District Court concerning noise made by Shinkansen bullet trains (Decision on Sept. 11, 1980; 976 *Hanrei*

Jihō 40). The court denied the concrete nature of the rights involved in "environmental rights" on the ground that the contents of environmental rights and the scope of the persons entitled are ambiguous, and that Articles 13 and 25 of the Constitution on which the claim was based are "program in nature."

In the Date Environmental Right Suit, the Sapporo District Court on Oct. 14, 1980, rejected by the same token the appeal of the plaintiffs, based on environmental rights, calling for a suspension of the construction and operation of a thermal electrical generation plant (988 *Hanrei Jihō* 37).

Such is the reality involving the judicial powers, but in the light of the reality in which environmental pollution now calls for special attention, the day will come in the not too distant future when even the judicial powers cannot remain indifferent to this reality.

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b. Administrative Law

There were many decisions handed down in the year under review concerning administrative law. Introduced here are four Supreme Court decisions that are likely to set precedents.

1. Case concerning the scope of damage on the local autonomy in a citizens' suit and the revival of a citizens' suit.

Decision by the Second Petty Bench, the Supreme Court, on Feb. 22, 1980. (Case No. [*gyo tsu*] 22 of 1976. The case of a claim for damages in a citizens' suit. 920 *Hanrei Jihō* 50.)

[Issues]

With regard to the borrowing of funds by local autonomies,