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.

By Prof. HIDETAKE SATO
SADAO MORONE

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,

the Local Autonomy Act allows temporary borrowing (§235–3) and local bond floatation (§230). The head of Kunitachi Town et al., the defendants (*Jokoku* appellants), borrowed funds from certain monetary institutions without resorting to the two procedures mentioned above.

Contending that the payment of interest for such illegal borrowing constitutes "damage" prescribed in the Local Autonomy Act (§ 242–2 para. 1 (4)), the citizens (plaintiffs and *Jokoku* appellees) field a citizens' suit on the basis of the said article demanding damages on behalf of the town. The claim of the plaintiffs was recognized in both the first and second instances.

There were two points at issue in the *Jokoku* appeal. (a) Can the payment of interest for illegal borrowing constitute "damage," simply because the method of borrowing was illegal? (b) How to handle the claim of one of the plaintiffs who died before the decision in the second instance was handed down.

[Opinions of the Court]

Regarding (a), the Supreme Court held that even if the funds were procured by floating local bonds, the cost involved such as interest must be borne. Hence, the interest for illegal borrowing cannot be considered the total "damage." The difference between the interest for the illegal borrowing and the estimated interest for the local bonds should be considered the "damage" in question.

With regard to (b), the Supreme Court held that in the citizens' suit prescribed in Article 242–2 of the Local Autonomy Act, there is no reason why the suit should be continued, because when a plaintiff dies his action terminates accordingly. Reversed and decided in part.

[Comment]

The current decision is significant in that the Supreme Court made a decision for the first time on the scope of "damage" and the revival of a citizens' suit.

However, the judgment that the interest on illegal borrowings cannot be considered "damage" can be interpreted as having

ignored the importance of the Local Autonomy Act which restricts the methods of borrowing funds. In this regard, decisions by lower courts on similar cases and the decision in the original instance held that the interest on funds borrowed by an illegal method all constituted "damage." On this score, the finality of the judgment remains to be seen.

With regard to the revival of a suit, the Supreme Court, dealing with an election suit based on the Public Election Act Article 203 which belongs to the people's action (Actio Popularis) like the citizen's suit, has so far held that such revival cannot be permitted. (Decision by the Second Petty Bench, the Supreme Court, on Mar. 15, 1963. 17 *Minshū* 376). In this sense, the current judgment concerning the revival of a suit can be said to have followed past decisions. Academic theories also support such a conclusion. However, it is highly problematical to push through such a conclusion when a case in which a single plaintiff is involved has so much to do with an important issue.

[Reference: Local Autonomy Act § § 242–2, 230, 235]

2. A case in which a tort claim against a local autonomy was affirmed on the ground that encouraging retirement was unlawful. Shimonoseki Commercial High School Case.

Decision by the First Petty Bench, the Supreme Court, on July 10, 1980. (Case No. [*o*] 405 of 1977. A case claiming damages. 345 *Rōhan* 20.)

[Issues]

At the time when the incident occurred, there were no provisions on the retirement age of public officials in regular government service. The administrative authorities, for reasons of streamlining the budget and the personnel, made it a rule to encourage public servants to retire when they reached the age of 60. The defendant (*Jokoku* appellant) in the current case had been practicing such a system and encouraged the teachers, the plaintiffs, (*Jokoku* appellees) to do likewise.

As the plaintiffs refused to retire, the defendant repeatedly

persuaded them more than a dozen times until the case was brought to court. The contents of the suit mainly concerned the fact that the defendant continued pressuring the plaintiffs to retire and that the defendant refused to accept the demand of the union to desist as long as the plaintiffs did not agree to retire.

Thereupon, the plaintiffs, contending that such pressure was illegal, brought a tort claim against the defendant to court (the State Liability Act § 1). The decisions in the first and second instances were in favor of the plaintiffs.

[Opinions of the Court]

The Supreme Court, acknowledging the contention of the plaintiffs, dismissed the *Jokoku* appeal on the following grounds:

Firstly, the encouragement to retire was an act of persuasion aimed at forming the will to retire voluntarily among the persons subject to retirement. Accordingly, they were not bound by such persuasion. Secondly, the pressure to retire in the current case had been "given too persistently, going beyond the permissible limit as such."

In making the current decision, however, two justices expressed dissenting opinions.

[Comment]

Administrative authorities often express the expectation that the parties concerned with administrative activities shall observe prescribed behavior, called administrative guidance.

In recent years, administrative authorities tend to make administrative guidance for diversified purposes as a means to realize the best possible management. Retirement encouragement is a form of administrative guidance. The current decision is significant in that the Supreme Court for the first time clarified the limit of such encouragement and that it helps us to understand the way of thinking of the Supreme Court about administrative guidance.

Problems surrounding administrative guidance have already been pointed out by writers. Since administrative guidance is a hope to be realized, it needs the consent and cooperation of the

other parties. But, since the administrative authorities which *make* administrative guidance are in a superior position, such guidance tends to be compulsory in reality. In this sense, certain academic theories distinguishing administrative guidance into two categories: one based on law and the other not based on law, and maintain that since there is a principle calling for administrative activities based on law, the latter should not be permitted.

Most theorists, however, recognize the rational and useful nature of administrative guidance for dealing flexibly toward administrative needs and to cope with deficiencies in law, but at the same time point out its limitations. According to the dominant opinion, the effectiveness and limit of such guidance should be judged in due consideration of the actuality of cases. In this connection, the current decision is worthy of notice.

The decision that encouraging retirement is unlawful is supported by majority in academic circles. The finality of the judgment is pertinent judging from the contents of the case in question and the amount of pressure applied. At the time when the case occurred, there was no regulation concerning the age limit for public officials in central and local government service, but a system to fix the age limit at 60 was introduced as a result of the revision of the law in 1981. So, such cases as the current one will not occur in the future.

3. A case in which the police car checks carried out for the purpose of preventing traffic violations and arresting violators were challenged.

Decision by the Third Petty Bench, the Supreme Court, on Sept. 22, 1980. (Case No. [*a*] 1717 of 1978. The case involving a defendant charged with violating the Road Act.)

[Issues]

The police authorities have been taking frequent car checkes to prevent traffic violations and arrest violators. In a comprehensive car check, the police halts all passing cars at a certain place and questions the drivers and others on certain items.

The defendant in the current case was questioned by the police in such a car check and punished with a fine on a charge of violating the Road Act as he was found to be "drunk while driving." (Road Act §§ 65–1 and 119–1–7). Dissatisfied with this, the defendant brought the action to court. He claimed that there is not a clearcut authentic regulation concerning comprehensive car checks to control and prevent traffic violations. In this regard, such a car check was illegal, he contended. His claim was dismissed in the first and second instances.

[Opinions of the Court]

The Supreme Court dismissed the appeal on the following ground:

According to Police Act Article 2 para. 1, "traffic control" is part of the duties of the police. Hence, the traffic control activities of the police are generally permitted as long as they are not conducted compulsorily.

However, judging from Article 1 and other articles in the Act concerning the Execution of Duties by Policemen, such activities should not be without limitations in case they infringe upon the freedom and rights of the people. The comprehensive car check conducted for the prevention and control of traffic violations is "lawful so long as such activities are conducted by seeking the voluntary cooperation of the people and in a manner not unduly restricting the freedom of the users of cars."

[Comment]

The decision is very important in that it was the first such judgment ever made by the Supreme Court on comprehensive car checks for the control and prevention of traffic violations.

The comprehensive car check conducted by the police is not founded on any written law. The police authorities have been conducting car checks for various reasons, such as traffic control, to prevent general crimes, in addition to urgently set up car checks to arrest criminals of specific crimes. Although the legality of such checks has been questioned in various quarters, there have been no clearcut answers in academic theories or in decisions. However,

the legality of the urgently established car check seems to be generally recognized. There is even a decision that endorses such a view. (Decision by the Osaka High Court on Sept. 6, 1963). The two other cases such as car checks for traffic control and those for preventing general crimes have not been questioned.

The Road Act recognizes car checks by the police with regard to the prevention of accidents involving vehicles, defective cars, unlicensed drivers and drunken driving only when the cars correspond to the categories above. (Road Act §§ 61, 63 and 67). In other words, the Road Act does not recognize all car checks.

The Supreme Court, on the basis of such general provision as Article 2 of the Police Act, made the current decision and recognized the legality of comprehensive car checks on condition that the checks shall be conducted with the cooperation of the people. The Supreme Court has already recognized the legality of checking personal belongings at the same time as the ex-officio questioning on condition that the people consents. (Decision by the Third Petty Bench, the Supreme Court, June 20, 1978. 32 *Keishū* 670). In this regard, the current decision should be considered as having followed such precedents. Academic theories are rather critical of the decision, however, because a police checkup is always in favor of the power of authority, and questioning is likely to become high-handed under the pretext of cooperation. The decision in the current case is questionable on this point.

[Reference: Police Act § 2, Act concerning the Execution of Duties by the Police § 1, Road Act §§ 61, 63 and 67]

4. A case concerning restrictions on the perusal by detainees while their trial is pending of circular notices, etc. involving the Prison Act.

Decision by the Second Bench, the Supreme Court, on Dec. 19, 1980. Reversed and remanded. (Not registered yet in the law reports).

[Issue]

The plaintiffs (*Jokoku* appellees), indicated on a charge of as-

sembling with dangerous weapons, had been placed in custody at a prison following indictment. While in custody, their friends sent in magazines, but the prison warden did not permit them to read the magazines. Thereupon, the plaintifts contending such an act to be illegal brought an action for damages on the basis of the State Liability Act.

Since the magazine in question carried an article concerning a directive on management of the Prison Act, the restriction of reading such directives has become the core of a major issue in the current case. Their claim was dismissed in the first instance but allowed in the second instance.

[Opinions of the Court]

On the following ground, the Supreme Court reversed and remanded the decision:

Directives concerning the Prison Act as instructions or guidance in the line of official duty are not necessarily made on the premise that they will be read by inmates. Therefore, even if the contents of the directives, etc. do not have to be kept secret, it cannot be denied that they may cause unnecessary misunderstanding, unrest and disturbance among the inmates depending upon the contents of the directives. In addition, the plaintiffs (*Jokoku* appellees) were extremely defiant toward the prison staff while in custody. So, it can well be anticipated that if such reading had been permitted they might have resorted to an act violating their discipline by distorting the contents of the directives in question.

[Comment]

The decision is significant in that the Supreme Court for the first time made a decision on prohibiting the perusal of documents, etc. by inmates. The current decision is made up of the part concerning the directives and that of the behavior of the plaintiffs.

Although the directive is an instruction or guidance in the line of official duty, its contents are concerned with the interpretation of laws and regulations and their enforcement. Hence, it is presupposed that the directive in the current case must have dealt, in

detail, with the status of prison inmates.

Viewed from this point, it is desirable for the inmates to learn of the contents, for it concurs with the spirit of "freedom of person" (Constitution §§ 33 and 34), that no person shall be arrested or detained except on a warrant issued by a competent judicial officer, and the right to know (Constitution § 21). We cannot conclude that the decision in the current case generally recognized the prohibition of reading directives, etc. by inmates in prison, because the part concerning the behavior of the inmates is believed to have caused the current decision.

On the other hand, the question arises that if the *Jokoku* appellees had been treated inequitably, it would have violated the principle of equality in the Constitution (§ 14). The existing Prison Act has no direct regulation on the reading of documents by inmates but leaves the matter to Cabinet Orders, etc. (Prison Act § 31). This way of leaving the matter to the orders by the administrative authorities has also become a disputed point in the current case. On this score, many writers are of the opinion that this conflicts with the principle of administration under law.

[Reference: Constitution §§ 21, 33 and 34, Prison Act § 31, Prison Act Enforcement Order § 86–1]

By Prof. HIDETAKE SATO
HIROSHI KOBAYASHI

2. Law of Property and Obligations

1. *Monchu* in Okinawa, a clan or a blood-related association, is tantamount to an unincorporated association.

Decision by the Second Petty Bench, the Supreme Court, on Feb. 8, 1980. (Case No. [*o*] 701 of 1975. Claim for confirmation of land ownership and resultant transfer registration. Dismissed.