
MAJOR JUDICIAL DECISIONS

Jan. – Dec., 1983

1. Constitutional and Administrative Law

a. Constitutional Law

1. A case that challenged the constitutionality of public spending on religious services.

Decision by the Second Civil Division of the Osaka District Court on March 1, 1983. Case No. (gyo u)49-1 of 1977. Residents of Minowo City v. Minowo City. 34 *Gyōshū* 358. Reference: Articles 20 and 89 of the Constitution; Article 242-2 of the Local Government Act.

[Facts]

The Minowo Society of the Bereaved Families of War Dead had held a memorial service every year, the form of which had been either that of Shintoism or of Buddhism by turns. In 1976 and 1977, city officials prepared a memorial service using city facilities and properties. On the day of the service, the Mayor and the City Secretary of Education used cars driven by city officials.

Residents of Minowo City filed a residents' suit under the provision of Article 242-2 of the Local Government Act on the ground that the conduct of the City had violated Articles 20 and 89 of the Constitution, which prescribed separation of religion from government.

Claims of the suing residents were as follows: (1) damages in that the Mayor paid city officials and the city Secretary of Education for their participation in the memorial service, (2) damages in that the facilities and belongings of an elementary school were used, (3) unjust enrichment in that the city Secretary of Education received salary for attending the memorial service.

[Opinions of the Court]

The court rejected the claims of (1) and (2) on the grounds that defendants did not have rights of direct administration of the city's properties, and that preparation for the memorial service by city officials was to be considered an official duty. It upheld the claim of (3).

The memorial service in question is held a typically religious activity. It is not proper for national or local government to designate officials' participation in religious services as an official duty. If officials' participation in religious services is regarded as an official duty, they may be forced to participate in religious services by official directions. But this is prohibited by Article 20 (2) of the Constitution ("No person shall be compelled to take part in any religious act, celebration, rite or practice."). As a result, officials' participation in religious services is considered nothing but the act of private citizens based on a sound interpretation of Article 20 of the Constitution. At the same time, it is not necessary for the court to judge the legality and constitutionality of the act of attending from the viewpoint of the constitutional principle of separation of religion from government. However, the Secretary of Education's act of attending the service is regarded as a private action; his being paid thus constitutes unjust enrichment, and he is obliged to return any funds received for this activity to the city.

[Comment]

This is a case related to the Chukon Monument Case which was reviewed in the 1984 issue of this Bulletin. The unique feature of this case is that the court avoided any judgment regarding the constitutional principle of separation of religion from government. Instead, it regarded the problem of officials' attending the memorial service merely as a problem of the freedom of religion of the official in question. The court indirectly ruled the conduct of the city Secretary of Education unconstitutional by reasoning that attending religious services might legally be interpreted only as a private act. However, the constitutional issue in this case was not the infringement of the Education Secretary's freedom of religion by the Mayor's requirement of attendance, but rather the legality of the city's spending public money on the memorial service. Therefore, the court should have reviewed this case simply as a problem involving the constitutional principle of separation of religion from government. The reasoning of this decision — that attending religious services may legally be interpreted only as a private act — makes it difficult to challenge directly the constitutionality of officials' participation in religious activities. It is arguable that the same reasoning is also applicable to their participation other than under official direction. In addition, the distinction between the act of participation and the act of preparation will raise new questions. All in all, this case was regarded as an attempt to effect the prohibition of public officials' participation in religious services and could raise questions about the issue of the Prime Minister's official visits to the Yasukuni Shrine.

2. A case challenging the constitutionality of uneven representation.

Decision by the Grand Bench of the Supreme Court on Nov. 7, 1983. Case No. (gyo tsu) 57 of 1981. Voters of Koshiyama, et al v. Election Administration Committee. 37 *Minshū* 1243. Reference: Article 14 (1) of the Constitution; Articles 204 and

13 (1) of, Annexed Table No. 1 and Schedules 7 to 9 to the Public Offices Election Act.

[Facts]

The general election of June 22, 1980, was held under rules for apportioning voting districts contained in the Public Offices Election (Amendment) Act 1975. The rules of the 1975 Act permitted fundamental inequalities in the apportionment of voting districts, since at the time of the election one vote in the least populous electoral district had the same weight as 3.94 votes in the most populous district. Voters in a number of electoral districts brought suit against the Election Administration Committee on the basis of Article 204 of the Public Offices Election Act. The plaintiff voters argued that the apportionment provisions adopted by the 1975 Act denied "equality of voting rights" guaranteed by the Japanese Constitution.

[Opinions of the Court]

When the constitutionality of apportionment standards which create inequality between voting districts is concerned, several principles come into play. Two of these are the basic constitutional requirement of equality of votes and the requirement that decisions within legislative discretion should be rational. After all, the purpose of the electoral system is that the various interests and opinions of citizens should be fairly and effectively reflected in the national political process. The two principles just mentioned have been applied with some modification depending on circumstances, however. In particular:

(a) *Rationality of the existing inequality between the weight given to votes in different districts.* At the time of the election in question, the inequality between districts effected by prevailing apportionment standards may have reached an "irrational" level for the circumstances of that election. An "irrational" level is one that fails to meet the constitutional requirements for equality of voting rights for all citizens.

(b) *Revision in district apportionment must be conducted periodically, and the length of time in between such revisions must be a “reasonable length.”* Even if the level of inequality between the weight given to votes in different districts had reached unconstitutional *levels* by the time of the 1980 election, this does not necessarily mean that the apportionment system was itself unconstitutional. That would only be true if, in addition to unconstitutional levels of inequality, the current system was characterized by procedures for periodic revision which were not “reasonable” attempts to comply with population and residence changes between districts, in order to maintain a relative degree of equality in the weight given to votes. Three factors suggest that, here, the length of period between revisions was proper. First, the courts are only supposed to examine the *rationality* of legislative decision-making in setting particular apportionment standards, which means that any one court’s analysis cannot be too focused on the specific details of difference between voting districts. Second, the need for political stability in Japanese society makes it impractical and unreasonable to revise voting districts too frequently. Third, the level of inequality in this election was smaller than the level which had been declared unconstitutional on improper apportionment grounds by the Grand Bench of the Supreme Court in 1976.

Overall, then, it can not be concluded that the apportionment standards prevailing at the time of the 1980 election were unconstitutional.

[Comment]

This decision basically followed the framework for analysis developed in the 1976 ruling on apportionment in elections. Only two points need special emphasis here. First, in the 1976 ruling, the Supreme Court never established a clear-cut standard to determine the impermissible limits of inequality between voting districts. But the trial court in the current case adopted a rule that inequalities were permissible up to a “about two-for-one” limit, under which apportionment would pass constitutional

scrutiny unless a vote in any one district received overall weight more than twice that of a vote in any other district. This "two-for-one" standard was also the prevailing favorite of a majority of Japanese constitutional lawyers. On appeal, however, the Supreme Court passed up an opportunity to establish any such "bright line" rule. It only confirmed that the levels of inequality in the 1980 election were unconstitutional.

Second, in the present case on the 1980 election, the concept of "reasonable time period," within which no further revision is required in apportionment, played a key role. However, if the level of inequality between districts at the time of the last revision in 1975 was overly great, but that level was allowed to prevail by a failure of the Supreme Court to overturn it, then the "reasonable time period" becomes useless as a tool to protect voting rights. Obviously, the tests for measuring unconstitutional levels and the rules for deciding how long those levels may continue without revision are closely linked.

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b. Administrative Law

1. Removal of underground petroleum tanks as a result of the construction of an underground pedestrian crossing and the adequacy of compensation for the resulting loss.

Decision by the Second Petty Bench of the Supreme Court on February 18, 1983. Case No. (*gyo tsu*) 155 of 1983. A case demanding revocation of the decision awarding damages. 37 *Min-shū* 59.