MAJOR JUDICIAL DECISIONS

Jan. 1985 – Dec. 1986

1. Constitutional and Administrative Law

a. Constitutional Law

The constitutionality of a preliminary injunction against the publication of libelous expressions.

Decision by the Grand Bench of the Supreme Court on June 11, 1986. Case No. (*o*) 609 of 1981. A case of claim for damages. 40 *Minshū* 872.

[Reference: Constitution of Japan, §21; Code of Civil Procedure, §§760 and 757 (2)]

[Facts]

Defendant Y, who intended to run for the Governorship of Hokkaido in the election of April 1976, noticed that the monthly "*Hoppo* (North) Journal" was planning to carry a defamatory article about him in its April issue. Y, judging that the article fell under the category of libel, applied to the Sapporo Distirct Court for a preliminary injunction against the publication, sale etc. of the magazine. The Court issued the preliminary injunction without oral pleadings or a hearing . Plaintiff X, the publisher

of the monthly, filed a claim for damages against Y and the State of Japan, asserting that the injunction was unconstitutional and unlawful. The court of first instance, the Sapporo District Court, and the court of second instance, the Sapporo High Court, dismissed X's claim. Then, X submitted a *jokoku* appeal.

[Opinions of the Court]

Jokoku appeal dismissed.

(1) A preliminary injunction against the expression before publication corresponds not to the "censorship" (Constitution of Japan, §21 (2)), since it will be issued by the court through examination on the application of the party, but to "prior restraint on expression", which can be permitted only under severe and clear conditions.

(2) When the expression concerns public affairs, the injunction must not, in principle, be issued against its publication. But the injunction may exceptionally be issued (i) if it is clear that the expression is untrue or its purpose is not mainly to promote the public interest and in addition (ii) if it is feared that the party in question may suffer serious and irreparable damage.

(3) On the occasion of issuing a preliminary injunction against expression which concerns the public interest, the courts must have oral pleadings or a hearing of the assailant as a rule. But if the court, through examination of the materials submitted by the applicant, is satisfied that the content of the expression is clearly untrue or the purpose of the expression is clearly not mainly to promote the public interest, and that, in addition, there is a fear of serious and irreparable damage to the applicant, the court may issue a preliminary injunction without oral pleadings or a hearing of the assailant.

[Comment]

In our country, opinions of lawyers differ as to whether a permanent or preliminary injunction may be issued against libelous expression before its publication. Even if such an injunction should be permitted, there is a controversy as to whether or not the injunction conflicts with Article 21 of the Constitution, that is, freedom of expression and prohibition of censorship (See, Constitution of Japan, §21). The injunction against publication

of the expression is dangerous for freedom of expression in our country, all the more because the preliminary injunction — the ordinary style of the injunction — may be issued through a simplified procedure and sometimes secretly in our legal system (See, Code of Civil Procedure, §757 (2), which nearly corresponds to "temporary restraining order"). Judges have even dealt with some cases where censorship or prior restraint on expression by administrative offices was the main issue. This is the first decision by the Supreme Court that showed in detail its opinion about the constitutionality of judicial prior restraint on libelous expression.

In this decision, the Supreme Court, following its 1984 decision on the customs inspection (38 *Minshū* 1308), confined the executive power of the censorship to administrative offices only and held consequently that injunctions by judges did not fall under censorship. So far, most constitutional lawyers had considered censorship to be a synonym for prior restraint. But recently, opinions which seek to distinguish censorship from prior restraint by kinds of censors or their methods have become influential. The opinion (1) of the Court noted above seems to be based on the whole on this newly circulated opinion.

What is most remarkable about this decision is that it permitted an injunction against publication of the expression which contained matters of public concern. So far, the opinions had been powerful among constitutional lawyers that an injunction might not be issued when the expression in question contained matters of public concern. On the other hand, several courts had issued an injunction even in such cases, though their opinions had varied as to the requirements for grant of an injunction. According to this decision of the Supreme Court, those requirements of the injunction are, in short, (i) a high degree of illegality of the expression in question and (ii) the existence of the possibilities for the party in question of suffering serious and irreparable damage (the above-noted opinion (2)). As to the requirement (i), some commentators say that the Court should have attached greater importance to the existence of intent or actual malice on

the part of the assailant rather than to the untruthfulness of the content of the expression. And, as to the requirement (ii), it is desirable that more detailed criteria should be established focusing on the possibility of self-relief through "more speech".

This decision says that oral pleadings or a hearing of the assailant should precede the issue of the preliminary injunction against publication of the expression as a rule, but at the same time it also says that oral pleadings or a hearing of the assailant is unnecessary when the judge is satisfied that the requirements (i) and (ii) mentioned above are fulfilled in light of the materials submitted by the applicant. This statement seems to be based on the false idea that if the conclusion is already apparent, then procedures are trivial matters.

By Prof. HIDETAKE SATO
KIYONOBU MIYAI

b. Administrative Law

1. A case in which the application by Kyoto MK Taxicab Company for the reduction of the taxi fare was disputed.

Decision by the Second Civil Division of the Osaka District Court on January 31, 1985. Case No. (*gyo u*) 49 of 1983. A case seeking to avoid the rejection of an application for taxi fare reduction. 36 *Gyōshū* 74 ; 1143 *Hanrei Jihō* 46.

[Reference: Road Transportation Act, Art. 8.]

[Facts]

The fixed rate and revision of the taxi fare needs the sanction of the Transport Minister in accordance with the provision of Article 8(1) of the Road Transportation Act, and Article 8(2)(i) to (v) provide the sanction standard. The Ministry of Transport established the principle of "the same fare in the same area" (a