

b. Administrative Law

A case in which the constitutionality and legality of the textbook review system was upheld.

Decision by the Third Petty Bench of the Supreme Court on March 16, 1993. Case No. (o) 1428 of 1986. A case claiming damages. 47 *Minshū* 5-3483; 1456 *Hanrei Jihō* 62; 816 *Hanrei Taimuzu* 97.

[Reference: Constitution of Japan, Articles 21, 23, 26; Fundamental Law of Education, Article 10.]

[Facts]

After World War II, the existing system of government-compiled textbooks was abolished and replaced by a textbook review system in which all textbooks at elementary, junior high, and high school levels are produced privately and then subjected to approval by the Ministry of Education. When Saburo Ienaga, who since 1952 had published through a textbook company a high school history textbook, *Shin Nihonshi* (New History of Japan), applied in 1963 for governmental approval of his revised version of the book, his book was rejected by the Ministry of Education. Ienaga applied again the following year, after rewriting some portions of the book, but it was only conditionally approved. Therefore, Ienaga, then a professor at the Tokyo University of Education, filed a lawsuit in 1965 demanding damages.

In 1974 the Tokyo District Court rejected Ienaga's claim that the textbook review system itself was unconstitutional, but awarded Ienaga partial damages on the grounds that there was an excessive exercise of discretionary authority by the Minister of Education. But in 1986 the Tokyo High Court dismissed all Ienaga's claims. Ienaga then appealed to the Supreme Court.

[Opinions of the Court]

Article 26 of the Constitution does not prescribe directly who should decide the contents of education for children and how such decisions should be made. The state has the power to direct the contents of education for children within the boundaries regarded as

necessary and proper so that it can protect children's interests or meet public interests in and concerns for the growth of children.

Textbook review can cover not only formal review of errors in writing or misprints, but also review of the substantive contents of description, that is, the contents of education. Since in general education pupils and students are not equipped to criticise the contents of classes, and there is scant room for them to choose schools or teachers so that it is necessary to ensure the equality of educational opportunity, it is required that the contents of education should be neutral and fair as well as precise, and that they should be maintained at a given level nationally regardless of region or school. Textbook review is undertaken to realize the demands mentioned above, and the criteria for the review are not thought to exceed the necessary and reasonable boundaries for the above mentioned purposes and do not include elements which prevent children from growing as free and independent persons.

Textbook review does not constitute censorship in violation of Article 21 (2) of the Constitution because it does not prevent the publishing of disqualified textbooks as general books and does not have the characteristic either of the purpose of prohibiting publication or of reviewing the contents before publication.

It is necessary to prohibit publishing and using disqualified books as textbooks in the light of the demands of fair and neutral education and for the purpose of ensuring a consistent level of education in general education. Moreover, the restriction is only to prohibit publishing in the special form of textbooks those books which include portions recognized as disqualified from the above mentioned viewpoint. Therefore, the restriction of the freedom of speech in the textbook review system is to be within reasonable and necessary boundaries not in violation of Article 21 (1) of the Constitution.

Textbooks are books used for pupils and students in general education as the main teaching materials for school subjects which are arranged according to the organization of a course of study, and do not have the purpose of expressing the results of academic studies. The textbook review system is not in violation of Article 23 of the Constitution which guarantees academic freedom, because it restricts

the expression of the results of studies only in the form of textbooks.

The review and judgment in the textbook review system is a special technical judgment which is academic and educational, and is to be left to the reasonable discretion of the Minister of Education. The judgment becomes illegal according to national compensation law as exceeding the boundaries of discretionary power of the Minister only when the judgment by the Minister is found to depend upon mistakes that are hard to overlook; that is, mistakes in understanding either the substance of descriptions in the manuscript or the state of relevant theories and educational conditions at the time of the review, or mistakes in evaluating the violation of the criteria of the review, and so on. In this case there were no such mistakes that were hard to overlook.

[Comment]

There are three different kinds of lawsuits in which Ienaga challenged the constitutionality and legality of the system of governmental approval of textbooks. In addition to this 1965 damages-claiming case, in 1967 Ienaga also filed a suit seeking to reverse the 1966 disapproval of his revised version of the book and in 1984 filed a suit seeking damages for the 1980 and 1983 conditional approvals of his textbook. Among the series of lawsuits initiated by Ienaga, then, this is the first Supreme Court decision which ruled on the merits of the case. As to the second suit, after the Supreme Court overturned the decisions of the lower courts technically and remanded the case for further review in 1982, the Tokyo High Court, relying on the technical ground of mootness, finally settled the suit in 1989 without reaching a decision on the merits. As to the third suit, after the Tokyo District Court and the Tokyo High Court awarded Ienaga partial damages in 1989 and in 1993 respectively, the case was appealed to the Supreme Court and is still pending.

In this case the Court upheld the constitutionality and legality of the textbook review system for the first time. However, instead of deciding the case mainly by resorting to previous cases, the Third Petty Bench of the Court should have sent the case to the Grand Bench of the Court which might consider the constitutional issues

more carefully. The textbook review case involves a wide range of constitutional issues such as educational freedom, the freedom of publishing textbooks, censorship, academic freedom, due process of law, and so on. This decision rejected all the plaintiff's claims. However, among other things, there is strong criticism of the ruling on the censorship issue. Because textbook writers want to publish their ideas and thoughts through textbooks, the textbook review system by itself should be said to constitute unconstitutional censorship as long as it may examine the substance of the ideas. In addition, once judged as disqualified, it is almost impossible to publish the disqualified textbook in the marketplace. In this sense the ruling should be considered to neglect the reality of the publishing market.

From the viewpoint of limiting discretionary power in textbook review, it is important to define the meaning of "the mistakes that are hard to overlook" standard. According to the Court, this standard judges whether the opinions of the approval officers are based on common opinions or established theories in the academic world and the descriptions of the manuscripts are to be evaluated as mistakes in the light of them. Although this ruling may operate to narrow the scope of the discretion, there can be a question whether it is within the role of the courts to recognize established theories in the academic world. Moreover, while this ruling is based on the assumption that textbook should be written with reference to established theories, there may exist different ideas of textbooks, which may invoke different sets of standards.

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2. Law of Property and Obligations

A case concerning claims made by residents who suffered from environmental pollution caused by the use of the Atsugi Base.
Decision by the First Petty Bench of the Supreme Court on Febru-