transfer must be the price by which the employee-shareholders can earn capital gains, that is market value, in order for it to be reasonable and to secure the employee-shareholders' opportunities to collect invested capital. With regard to this issue, the agreement in the instant case, under which the price at the time of transfer is par value, should be void, for it does not set a reasonable price.

Prof. YASUHIRO OSAKI
Assist. YASUHIKO KUBOTA
LISA ONO

7. Labor Law

A case which held that a series of conduct such as close supervision of workers, isolating them and violating their privacy only because they are members of the Communist Party or party sympathizers constitutes tort — Case of Kansai-Denryoku

Decision by the Third Petty Bench of the Supreme Court on September 5, 1995. 680 *Rōhan* 28.

[Reference: Civil Code, Article 709.]

[Facts]

Y (defendant, *kōso* appellant, *jōkoku* appellant) is an electric company. X1-X4 (plaintiffs, *kōso* appellees, *jōkoku* appellees) are employees of Y. X1-X4 are members of or sympathizers with the Communist Party, and also they are the left-wing minority of the labor union whose members are the employees of Y.

In 1960, resisting the renewal of the Japan — US Security Treaty Agreement, the Japanese labor movement arose, which caused a lot of damage to the business activities of Japanese companies. Later, Y was afraid that the same situation which arose in 1960 would occur at the time of the next renewal of the Agreement in 1970. Y asked the union to cooperate in protecting the business acitivies of Y, and

also made a plan to closely supervise and aggressively isolate the left-wing employees' group (including X1-X4) in Y. The concrete acts which were taken with respect to X1-X4 are as follows:

In the case of X1, his boss and his supervisor moved his desk just in front of his supervisor's desk and supervised him closely all day long; investigated him in order to check where he went after work; arranged that any employees who travelled the same way as X1 to go home after work would not contact X1. As a result of these acts, even his colleagues in the same workplace came to say only a few words to him.

In the case of X2, in order to supervise him closely, his boss and supervisors put a shadow on him; visited his home in order to check on what he was doing when he was absent from work; peeped into his house, since the supervisor heard that X2 distributed Akahata (red flag) the newspaper of the Communist Party; collected information concerning him through police offices located in the area where he lived and in his workplace; criticized his political ideas in front of other employees, and then managed to isolate him.

In the case of X3, in order to supervise him closely, his boss and his supervisor eavesdropped on each telephone call made from outside to him; put a shadow on him and hid to observe him secretly in order to check where he went after work; secretly opened his individual locker, found his Communist sympathizer notebook (Minsei-Techo), and took some pictures of it; managed to dissolve the photography club in which he engaged as a leader.

In the case of X4, his boss and his supervisor explained to other employees that he had extremely left-wing political ideas, and instructed them not to contact him; gave notice of these facts to those who engaged in activities with X4. As the result of these acts, few employees associated him. Also, by showing a photograph of X4 to a police office located in the area in which X4 lived, his supervisor collected information about him from the police office.

Around 1971, X1-X4 learned the above information from the personnel office of Y, which told them the scheme of Y to supervise and to isolate them. Then, X1-X4 complained that the series of Y's acts constituted torts and filed suit against Y for both emotional

damages of ¥2 million and attorney fees of ¥871,000. The Kobe District Court decided in part in favor of X1-X4, and ordered Y to pay ¥800,000 in damages, and ¥100,000 in attorney fees (decision of May 18, 1984, 433 *Rōhan* 43). Y appealed, but the Osaka High Court dismissed Y's appeal (decision of September 24, 1991, 603 *Rōhan* 45). Y then appealed to the Supreme Court.

[Opinions of the Court]

Appeal dismissed.

According to the facts the original court found, we can say following: There was no actual danger that X1-X4 would destroy or confuse the orderly business of the enterprise. By using their supervisors, Y supervised X1-X4 continuously, required other employees not to contact nor associate with them and isolated them in many other ways. It was only because they were members of or sympathizers with the Communist Party. In particular, Y let their supervisors follow X2 and X3 after they finished work, and Y let them secretly open X3's individual locker and take some pictures of the Minsei-Techo. These acts constitute a violation of the freedom to engage in human relationships in the workplace which X1-X4 have, as well as conduct constituting defamation. Also, the acts against X2-X3 violated their privacy, and we may say the conduct violated their personal interest. Considering that Y engaged in this series of acts on the basis of the company's policy, we have to say that each of these acts constitutes a tort against X1-X4.

[Comment]

The members of the Communist Party and their sympathizers played an important role in the Japanese labor movement in the postwar days, but after the Korean War began in 1950 and during the Cold War period, they were attacked and treated unfairly in their workplaces, in order to exclude them and to avoid labor disputes. Such a tendency was particularly evident in public employment. The business of an electric company, such as this case, is one which has public employment characteristics by its very nature. Recently, we have found some decisions of lower courts which provided relief to

members of the Communist Party and its sympathizers for damages they received from electric companies in the past. (See the cases of Tokyo-Denryoku: decision by the Maebashi District Court of August 24, 1993, 635 *Rōhan* 22; decision by the Kofu District Court of December 22, 1993, 651 *Rōhan* 33; decision by the Nagano District Court of March 31, 1994, 660 *Rōhan* 73; decision by the Chiba District Court of May 23, 1994, 661 *Rōhan* 22; decision by the Yokohama District Court of November 15, 1994, 667 *Rōhan* 25.)

This case is one of such a nationwide attack on the members of the Communist Party and their sympathizers.

In Japan, Article 19 of the Constitution protects personal freedom of beliefs or creed, however, the Constitution only protects the individual rights from state action, not from private action. If an employer violates an employee's freedom of beliefs or creed, Constitutional law has no way to provide relief to the individual employee. With respect to recruitment, the Supreme Court has held that Article 19 of the Constitution is not applicable to the relationship between private persons, and because employers are free to decide which workers to hire for their own businesses, "It cannot be unlawful even when an employer refuses to hire someone because of that person's beliefs or creed." (Case of Mitsubishi-Jyushi, decision by the Grand Bench of the Supreme Court of December 12, 1973, 27 *Minshū* 1536.)

In order to provide relief to employees who are attacked because of their beliefs or creed by employers, Article 3 of the Labor Standards Law (LSL) provides that, "Employers are forbidden to engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker." Though we cannot remedy hiring discrimination because hiring is not counted as a "working condition", many victims of discrimination should be receive relief under this LSL provision. The cited decisions of cases involving Tokyo Electric Company used this provision, however, it is not easy to prove discrimination under this provision. In this case, it is difficult to say there was discriminatory treatment with respect to "wages", or "working hours", or "working conditions". It is also hard to find some other employees who are comparable with the victims to show

discrimination in such a case as this one.

There is another approach to providing a remedy to an employee for an attack against his freedom of beliefs and creed by his employer. Even though the Constitution does not apply to a private relationship like the employment relationship directly, if the protection of freedom of beliefs and creed of employees is to be respected as an important part of our public policy, the courts will apply Article 90 of the Civil Code, that is, the provision stating that a contract which violates public policy and good morals is invalid. For example, in a case where there was a personnel policy that required women to resign upon marriage, the Tokyo District Court upheld that protection of equal treatment and freedom to marry under Articles 14 and 24 of the Constitution, found that the personnel policy compromised public policy and good morals as stated in Article 90 of the Civil Code, and held that a system requiring resignation upon marriage was void as a violation of public policy. (The case of Sumitomo Cement, decision by the Tokyo District Court of December 20, 1969, 20 *Rōminshū* 1407). In 1985, the Law Respecting the Improvement of the Welfare of Women Workers, including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment (Equal Employment Opportunity Law) was enacted and now employers may not stipulate marriage, pregnancy or childbirth as a reason for forced resignation of female employees or dismiss a female employee for any of those reasons. Reference to the case law before 1985 is useful when we would like to refer to the fundamental rights the Constitution protects.

In this case, however, the Supreme Court did not use the anti-discrimination provision nor the public policy provision. Instead the Court established that each employee has the freedom to engage in human relationships in the workplace and to have personal privacy, and then the Court held that the series of acts of the employer violated these personal rights the employees have and that the employer's acts constituted not discrimination but tort under Article 709 of the Civil Code. This is the first time that the Supreme Court mentioned the freedom to engage in human relationships in workplace.

In Japan, most discrimination not only consists in unfair treat-

ment with respect to working conditions, but also through actual isolation or exclusion. Since employees get a lot of information, skill and know-how from relationships in the workplace, isolation or exclusion not only causes emotional damage but also serious unfair treatment in training and promotion. It is very hard to show that such isolation or exclusion constitutes discriminatory treatment compared with the treatment of other employees in the same workplace. This decision of the Supreme Court appropriately dealt with such a special problem, and we have to note how the doctrine of the freedom to engage in free relationships in workplace will apply to the type of discrimination in which the victim is isolated.

Prof. KAZUHISA NAKAYAMA
TOMOKO SASANUMA

8. International Law

1. A case in which it was held that a disposition not recognizing a person as a refugee was lawful because the application for recognition of refugee status was done beyond the due date stipulated in Article 61.2 (1) of the Immigration Control and Refugee Recognition Act (hereinafter cited as "the Act") and there is no basis for applying the proviso of this provision.

Decision by the Second Civil Division of the Tokyo District Court on February 28, 1995. Case No. (*u*) 126 of 1991. A case requesting the revocation of the disposition not recognizing the plaintiff as a refugee. 1533 *Hanrei Jihō* 43.

[Reference: Immigration Control and Refugee Recognition Act, Article 61.2 (1) and (2); Convention Relating to the Status of Refugees of July 28, 1951, Article 1.]

[Facts]

The plaintiff is a Chinese national and entered Japan in Septem-