

the premise that, to impose the death penalty, criminal responsibility of the defendant is beyond question. In judicial precedents in cases of homicide, however, even if defendants are determined to have psychopathic personalities, there have been decisions which impose the death penalty on defendants (see, for instance, the decision by the Kobe District Court Toyooka Branch, December 5, 1964. 6-11=12 *Kakeishu* 1345.). It might be said that this decision to impose the death penalty, although criticized, has supplanted former judicial precedents.

Prof. MINORU NOMURA
RYOKICHI ITO

6. Commercial Law

A case concerning validity of the issuance of new shares without notice of the matters concerning the issuance.

Decision by the Third Petty Bench of the Supreme Court on January 28, 1997. Case No, (o) 317 of 1993. 51 *Minshu* 71.

[Reference: Commercial Code, Article 280.3.2, 280. 15]

[Facts]

Corporation Y (defendant, appellee, final appellee) issued 2400 shares in 1988, and 900 of them was subscribed by A, a representative director of Corporation Y. As a result, the number of shares owned by A was increased to 1270, and, A become the largest shareholder of Corporation Y instead of X (Plaintiff, appellant, final appellant) who had 800 shares. X filed an action against Corporation Y, claiming the issuance was invalid. X asserted: (1) that corporation Y had issued the new shares without public notice and notice to each shareholders required by Article 280.3.2; and (2) that B, a director of Corporation Y, had not been received notice for the directors meeting to have approved the issuance; (3) that the purpose of the issuance had been to assure A the control of Corporation Y, (4) that because those who subscribed the new shares had not contribute really, the filling of capital

was substantially lacked.

The Court of first instance (Kanazawa District Court) upheld the claim on the ground of (3) and (4) in 1991, and the Court of second instance (Nagoya High Court) also upheld the claim for same reason in 1992. Y appealed.

[Opinion of the Court]

Appeal dismissed.

Any corporation was required to give the public notice or notice to each shareholder of the matters concerning the issuance of new shares (Article 280.3.2) to assure shareholders opportunity for exercising the right to claim injunction (Article 280.10) (See Decision by the First Petty Bench of the Supreme Court on December 16, 1994. Case No. (o) 666 of 1989. 47 *Minshu* 5423). Therefore, it is appropriate to construe that the lack of public notice or notice to each shareholders of the matters concerning the issuance of new shares should be the cause of nullity of the issuance, except when, if the injunction of the issuance was claimed, such injunction would not be admitted for the lack of the cause of injunction. Considering (3) and (4) of X claims, it is impossible to say that in this case there is no cause of injunction. So, the said issuance is invalid on the ground of (1).

[Comment]

Since our Commercial Code has no provision about the cause of nullity of the issuance of new shares, it should be settled through the interpretation of courts. With respect to this problem, the Supreme Court recently held valid the issuance of new shares in grossly unfair manner (Division of the Third Petty Bench of the Supreme Court on December 16, 1993. Case No. (o) 391 of 1990. 47 *Minshu* 10-5423). Since this court put a narrow interpretation on the cause of nullity of the issuance of new shares, in practice there is no other way but to give shareholders remedy by means of injunction of issuance of new shares provided in Article 280.10.

Article 280.3.2, requiring of any corporation to give public notice or notice to each shareholders of the matters concerning the issuance of new shares, was enacted in 1966 designed to assure shareholders

opportunity for exercising the right to claim injunction provided in Article 280.10. For the validity of the issuance without such notice, there is divergence of views among lower courts and scholars. This decision is the first one of Supreme Court to show the view for this problem.

There are three views about this problem. The first is that such issuance should be valid, because the security of transaction of shares is most important. According to this view, the issuance of new shares without notice provided in Article 280.3.2 will bring only the liability of directors to corporation. The second is that such issuance should be invalid in all cases, because the design of legislature to enact Article 280.3.2 is most important. The third is that such issuance should be invalid, except when the injunction of the issuance that a shareholder had claimed was not admitted, or when corporation can prove that such injunction would not be admitted. This judgement adopts the third view.

The many of lower courts had adopted the first view, but recently adopted the third view. Among scholars there are many proponents of the third view. The decision by the First Petty Bench of the Supreme Court on December 16, 1994, quoted in this decision, held such issuance invalid as one in violation of preliminary injunction order, stating "if the violation of preliminary injunction order has no effect on the validity of the issuance of new shares, it would be ruined that the legislature designed to specially give shareholders the right to claim injunction of issuance of new shares and to assure effectiveness of such right through providing shareholder with the opportunity for acquiring the preliminary injunction order". Supreme Court thus has attached weight to the design of legislative to enact Article 280.3.2, and so there is no room for adopting the first view. I suppose that this court adopts the third view, regarding the second view as going too far in effect that such view consecrates public notice or notice to each shareholder as mere means.

By the way, 1990 Reform Act gives pre-emptive right any shareholder of the corporation whose articles of incorporation contains the provision that the approval of the board of directors is required for the transfer of shares, and requires the resolution of general meeting to remove such pre-emptive right (Article 280.5.2(1)). The issuance of new

shares in violation of Article 280.5.2(1) is generally thought to be invalid. In the case of a corporation whose articles of incorporation contains the provision that the approval of the board of directors, the issuance of new shares without public notice or notice to each shareholder provided in 280.3.2 is in violation of Article 280.5.2(1) at the same time. So, such issuance would be invalid at all, whether the issuance of new shares in violation of Article 280.3.2 should be invalid or not.

Prof. YASUHIRO OSAKI
Assist. YASUHIKO KUBOTA

7. International Law

1. Illegality of the Expropriation of Ainu Land in View of Their Rights as An Indigenous People: The Nibutani Dam Case.

Decision by the Third Division of the Sapporo District Court on March 27, 1997. Case No. (*gyō-u*) 9 of 1993. A case demanding the cancellation of an administrative disposition. 1598 *Hanrei Jihō* 33; 938 *Hanrei Taimuzu* 75. 38 *International Legal Materials* 394.

[Reference: International Covenant on Civil and Political Rights, Article 27; Land Expropriation Act, Article 20; Administrative Litigation Act, Article 31]

[Facts]

The Ainu people, now estimated at 50,000 in Japan according to the Ainu Association of Hokkaido, are the original inhabitants of Hokkaido and its adjacent areas. Their life-style consists of hunting, fishing and gathering. Although the Ainu people are suffering from the Japanese government's "assimilation" policies – such as promoting a large number of people from the mainland to settle in the Ainu's place of residence and forcing the Ainu to use the Japanese language – since the end of the 19th century, they have managed to maintain their distinct culture and identity under such difficult conditions.