COMMENT

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When the Supreme Court decision in the *Repeta* case[1] was handed down on March 8, 1989, I was in West Berlin. I came back to Tokyo on the final day of March. At the beginning of April, I was busy reading letters, newspapers, and other documents that had reached me during my absence. Among the pile of publications, I noticed a small newsletter, a monthly paper of the Japan Civil Liberties Union. The headline caught my eyes. It read something like this: "The Supreme Court liberalized taking notes in the courtroom." I was very surprised at first, but a few seconds later I began to think that this was a bad joke. I thought that this publication was a special April Fool's issue; however, we do not have the American custom of celebrating April Fool's Day. I certainly had not expected the Supreme Court to revise the decision of the lower court. I thought it would have been rather natural for the Court to rely on judges' discretionary disciplinary powers at the expense of the people's right to know. This was a rather shocking decision, which I did not expect from the otherwise restrained Supreme Court.

The Supreme Court held that, in spite of a judge's wide discretionary powers, the presiding judge is not allowed to prohibit those in attendance from taking notes, irrespective of the context or type of case. As I pointed out in my paper for this symposium,[2] the Supreme Court characteristically decided the case almost totally on the basis of the scope of the judge's discretionary powers. Although the Court spoke of the spirit of the constitutional guarantees of freedom of expression and of the right to gather information, the main emphasis of the decision was on the scope of the judge's discretionary powers. It seems to me, however, that the issue presented here was related to a citizen's right to attend, inspect, and record court proceedings. As such, it was very similar to the type of case that the United States Supreme Court confronted in the Richmond Newspapers case[3] in 1980.

In that case, the American Supreme Court dealt with the issue at the constitutional level without the slightest hesitation. The Court treated the issue as a problem concerning first amendment rights. There is a great contrast between the approaches of the two Supreme Courts. Evidently, the

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1. 43 Minshū 89 (Sup. Ct., G.B., Mar. 8, 1989) (reversing 1222 Hanrei Jihō 28 (Tokyo Dist. Ct., Feb. 12, 1987) and 1262 Hanrei Jihō 30 (Tokyo H. Ct., Dec. 25, 1987)).

2. Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American and European*, LAW AND CONTEMP. PROBS., Winter 1990, at 17.

3. Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555 (1980).

Japanese Supreme Court would not like to make any affirmative statements about the people's right to know because, I submit, once open to that direction, constitutional claims would extend from the right to take notes in the courtroom to the right of access to government records, and even to the right to inspect governmental institutions, such as prisons and military bases. For better or worse, the Japanese Court is more cautious in this respect than the American courts.

I would also like to discuss some problems surrounding penal institutions or detention settlements. In Japan there has been no serious discussion about what Americans call "prisoners' rights."[4] The Japanese seem to take it for granted that those who are responsible for the maintenance of an institution such as a prison have wide discretionary disciplinary powers; prisoners shall be subject to such powers almost absolutely. Thus, to the Japanese, speaking about the constitutional rights of prisoners is nonsensical.

The next case that I would like to touch on concerns both the rights of prisoners and the citizens' right to know. If one wants to visit detainees in the Tokyo detention center, one has to apply for permission to enter. On the application form, one must show the purpose of the visit, one's status, and one's connection with the detainee. If one is a relative or a friend, no serious problem will occur. However, if a journalist applies and the purpose of the visit is to interview a detainee, the journalist will encounter difficulty in seeing the detainee.

Recently, a few journalists and detainees sued the detention center over its refusal of access to the journalists. This lawsuit is now pending in the Tokyo District Court. Since the lawsuit, the rule has been relaxed, and some journalists are permitted entrance. This kind of discrimination against journalists would rarely occur in the United States, where journalists seem to be regarded as representatives of the community and have little difficulty in gaining access to such a governmental institution.

The American flag burning case, *Texas v. Johnson*,[5] also interests me very much. Although we do not have a flag desecration statute that protects the national flag of Japan, we do have one provision in our criminal code[6] similar to state and federal statutes on flag desecration in the United States. This criminal code provision declares that persons who desecrate national flags and symbols of foreign countries shall be prosecuted as criminals. One incident took place over the desecration of the Chinese flag, but it was purely political in nature. In recent years, there have been no cases.

However, one case is now pending in the Okinawa District Court which involves an activity similar to flag desecration. In October 1987, the annual National Athletic Meet was held in Okinawa. Yumitan Village was to be the site of the softball games. One of the most horrible battles had been fought in

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4. If my memory serves me correctly, there was a big controversy in the United States about this matter in the 1970s.

5. 109 S. Ct. 2533 (1989).

6. KEIHŌ (PENAL CODE) art. 92.

the village during the last stage of World War II, and many civilians had been killed there. The Hinomaru flag symbolized the residents' bad memory of the battle. Thus, it was very controversial whether the Hinomaru flag would be raised during the opening ceremony for the games. Despite the controversy and public protests against the plan of hanging the Hinomaru flag, it was hoisted at the central, highest pole on the morning of October 26, 1987, at the opening ceremony. A citizen of the village pulled down the flag and burned it. He was arrested, and after twenty-five days of police detention he was indicted for destroying another person's property[7] and for two other minor charges (invasion of another person's building[8] and obstruction of another person's business performance[9]). I do not know whether the defendant made a freedom of expression argument in his defense. Theoretically speaking, this case concerns destruction of property, not flag desecration. We do not have a law that designates the Hinomaru flag as a national flag. I wonder if in this case the constitutional arguments for freedom of expression could prevail.

I mentioned something about confrontational bills in my own paper for this symposium.[10] Legislation concerning national flags, national anthems, and other national symbols constitute, no doubt, confrontational bills. As such, it is very difficult to gain sufficient popular support for such legislation to be passed by the Diet. Thus, the Japanese Supreme Court is fortunate enough to remain free from the involvement of vexing constitutional issues arising from such controversial legislation as its American counterpart confronted in *Texas v. Johnson*.[11]

7. *Id.* art. 261.
8. *Id.* art. 130.
9. *Id.* art. 234.
10. *See* Okudaira, *supra* note 2.
11. 109 S. Ct. 2533.