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# MAJOR JUDICIAL DECISIONS

Jan. – Dec., 2000

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## 1. Constitutional Law

Two cases concerning mass media report of crime and right to privacy: minors sued publishers of magazines which exposed their name and portrait, however, the judgements of the two High Courts were divided.

### 1. Osaka High Court, February 29, 2000

Shincho-sha v. Doe

1710 HANREI JIHŌ 121

#### Reference:

Constitution of Japan, art. 13; art. 21, para. 1; Juvenile Law, art. 61; Civil Code, art. 709; art. 710

#### Facts:

On the early morning of January 8, 1998, on a street in Sakai City, Osaka Prefecture, X, who was a 19-year-old boy at that time, having inhaled thinner, stabbed and seriously injured a high school girl

on her way to school with a kitchen knife. After that, X attacked a 5-year-old girl and her mother who were waiting for the pick-up bus of a kindergarten. He stabbed to death the girl who was running about and stabbed and seriously injured her mother who tried to protect her daughter. X was prosecuted for murder and other offences in the Osaka District Court. A monthly magazine, Y, ran an article about this case and revealed X's real name and published a photograph of his face in this article. X sued the publisher of Y and the author of the article for a violation of his personal rights, such as the right to privacy, the right to his own name and portrait, the right to honor and the right not to have his real name appear in print, and demanded compensation for mental anguish and the publication of an apology. The Osaka District Court (June 9, 1999, 1679 HANREI JIHŌ 55) ordered Y to pay 2.5 million yen in damages, finding the publication of this article to constitute an unlawful act, but rejected X's demand for the publication of an apology. Y appealed to the Osaka High Court. The Osaka High Court reversed the judgement of the District Court and rejected the claim of X as stated below. X appealed to the Supreme Court, but withdrew his appeal on December 6, 2000. So the judgment became final.

### **Opinion:**

#### *Reversed.*

The right to privacy, the right to one's own portrait and the right to honor can each find its basis in Article 13 of the Constitution of Japan and should be respected to the full unless they offend public welfare. On the other hand, the freedom of expression guaranteed in Article 21 of the Constitution of Japan occupies a superior position in the system of fundamental human rights guaranteed in the Constitution of Japan because it is the basis of democracy. Therefore, when individual rights to privacy, one's own portrait and honor are violated by an act of expression, in order to balance freedom of expression and infringement of these rights, such an act lacks illegality and does not become an illegal violation of right to privacy, insofar as that act concerns a proper matter of social concern and the contents and method are not unjust. As for criminal suspects, their privacy can be a proper matter of social

concern in relation to the criminal act, depending on the content and nature of the crime.

If personal interests not to have one's name appear in print can be recognized as an interest worth legal protection apart from personal rights or the rights to privacy, it is limited to when there is a circumstance that the person who is the target of the report should receive special protection in social life. In this regard, Article 61 is a provision based on the public interest purpose, which is to achieve the purpose of the juvenile law, to advance the sound growth of juveniles, and the criminal policy concern, which is to enable the juvenile's return to society and to secure the actual effect of a special prevention. Therefore, Article 61 does not give juveniles the right not to have their names appear in print and should not necessarily preempt freedom of expression and reporting.

Therefore, in order to balance freedom of expression and the infringement of the right to privacy, respecting the existence of Article 61, that act lacks illegality and does not become an infringement of the rights to privacy if that act is a proper matter of social concern and the contents and method of the act are not unjust.

Based on this, because this case was a heinous and serious one, gave society in general much anxiety and shock, and can be thought to be of strong interest even to persons generally in society, this article is recognized as a proper matter of social concern.

Next we will consider whether the contents and the method of description used were inappropriate. As for the report of criminal cases, though anonymity is desirable, it is understood that specifying suspects etc. in a report are fundamental elements of criminal news and an important matter of concern together with the criminal facts. Therefore the reporting of an actual name might be permissible in light of the mode and degree of the criminal facts, the position of the suspect or defendant, the characteristics and feelings of the victim, etc. At least, when a suspect is arrested *flagrante delicto* in a heinous and serious event, reporting the actual name is permissible. Considering that this crime was a very heinous and serious one, that a suspect was arrested *flagrante delicto*, and the feeling of the victims, the publishing of the name of the juvenile in this case does not immediately constitute an

infringement of his rights.

2. **Nagoya High Court, June 29, 2000**

Bungei-shunjyu-sha v. Doe

1736 HANREI JIHŌ 35

**References:**

Constitution of Japan, art. 13; art. 21. para. 1; art. 26; Juvenile Law, art. 61; Civil Code, art. 709

**Facts:**

In 1994, in a total of three places, one in Osaka City, Osaka Prefecture, and two in Inazawa City, Aichi Prefecture, X, who was a 19-year-old boy at that time, together with other boys who were 19 years old, lynched several young men and killed or wounded them. X and the other boys were prosecuted for murder, assault, false imprisonment, and robbery, etc. for each case in the Nagoya District Court and the Osaka District Court. A weekly magazine, Y, ran articles about the series of crimes, including reports of the victims' parents' feelings and the hearing records of the court. Y reported the appearances of X and the other boys in the trial and the circumstances of the crimes with tentative names in the article. In addition, there were descriptions of the career of X, his associates and the crimes that he committed as a boy. X sued the publisher of Y for defamation and demanded damages. The Nagoya District Court (June 30, 1999, 1688 HANREI JIHŌ 151) ordered Y to pay 300 thousand yen in damages, finding the publication of this article to constitute an unlawful act. Y appealed to the Nagoya High Court. The Nagoya High Court affirmed the judgement of the District Court as stated below. Y appealed to the Supreme Court and the case is pending now.

**Opinion:**

*Appeal dismissed.*

Based on the rights to honor and privacy which are an embodiment of the personal value of the individual deriving from Article 13, the children's right to learn, which the Supreme Court recognized as the

basis of the right to receive an education guaranteed by Article 26 in so-called Asahikawa Proficiency Test Case (Supreme Court G.B., May 21, 1976), and Article 14 of the International Covenant on Civil and Political Rights and the provisions of the Convention on the Rights of the Child, the point and purpose of Article 61 of Juvenile Law should be understood as follows. Article 61 intends to protect the fundamental right to receive more careful treatment to grow soundly in the process of growth and development by regulating reports, as well as the juvenile's rights to honor and privacy.

The freedom of expression and press guaranteed in Article 21 of the Constitution of Japan is very important as supporting the base of democracy and serving the people's right to know. But the exercise of that freedom is never absolute and when it collides with the rights or interests of others, it cannot but be restricted to a certain extent in order to balance it with those rights or interests.

Article 61 of the Juvenile Law restricts the freedom of expression and the press. But considering that the interests opposed to the freedom of expression were important fundamental rights, such as the right to grow up soundly in the process of growth and development, based on Article 13 and 26 of the Constitution of Japan and the ideal of the International Covenant on Civil and Political Rights, the press can report juvenile crimes without publishing the names and photos of juvenile assailants, and that, as for reporting in every field, the media, such as newspapers and other information media, are expected to provide information while respecting human rights as members of society, Article 61 demands a restriction of freedom of expression in order to protect human rights or the rights of juvenile and does not violate Article 21 paragraph 1 of the Constitution of Japan.

Therefore, those who publish any information leading to the identification of a juvenile in violation of Article 61 are liable for an unlawful act based on Article 709 of the Civil Code as violating the human rights of that juvenile. In contrast to the reporting of criminal cases committed by adults, the publishing of any information leading to the identification of a juvenile in violation of Article 61 is illegal, even if the content of the report is true, relates to matters of public interest and is published mainly for the public interest. Such publishing

is legal and exempted from liability only when there are special circumstances where the need to defend social interests over the rights or legal interests of the juvenile to be protected must clearly be given priority. But, in this case, there is no proof sufficient to recognize such special circumstances as to give a strong priority to the defense of social interests over X's right or interest not to be identified with the offender through this article.

### **Editorial Note:**

Article 21 of the Constitution of Japan guarantees freedom of expression by providing as follows: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed." Freedom of expression is said to occupy a superior position among the fundamental human rights guaranteed in the Constitution of Japan because it is indispensable to the self-fulfillment of individuals and self-government under the Constitution that adopts respect for the dignity of individuals and democracy as fundamental principles. So, when the government restricts freedom of expression, whether this restriction is constitutional or not must be judged by a stricter standard in comparison with restrictions of other freedoms or rights. Under Article 21, freedom of expression is guaranteed to the media as well. Especially, freedom of reporting is guaranteed to the media because the important mission of the media is to report. This freedom of the media is thought to play a very important role in serving the "right to know" of the people.

When ordinary criminal cases occur, based on this freedom of reporting, the media can in principle freely publish materials they have gathered on their own terms and the facts they can learn at the trial. The publishing of the real name and the photo of the suspect and the defendant is permitted as well. However, as for juvenile crimes, the circumstances are different. Under the Juvenile Law (*Shonenhō*) whose purpose is "promoting the welfare and wholesomeness of the juvenile" (Art. 1), reporting on and free access to information concerning juvenile crimes are restricted severely. Article 22, clause 2, which closes juvenile trials to the public, and Article 61, which prohibits the publication of any information that may lead to the identification of a ju-

venile offender, constitute that core. As a result, when reporting juvenile crime, the media must withhold any information that may lead to the identification of the juvenile offender such as the real name or photographs of the face. So the media can only report information such as facts and the backgrounds of the case in an abstract way. Is this regulation of information and reporting permitted in light of the freedom of expression, the freedom of reporting and the right to know of the people guaranteed by Article 21 of the Constitution of Japan? The two decisions introduced here have openly contended with this problem concerning Article 61.

Article 61 of Juvenile Law (*Shonenhō*) provides as follows. “The name, age, occupation, address, physical features, and any other information that leads to the identification [of the juvenile] may not be published in the form of an article or a photograph in a newspaper or other publication, for any juvenile who goes through a Family Court proceeding.” The following have been generally pointed out as the main points of Article 61: the protection of the child’s privacy and the honor, the promotion of the child’s recovery and return to society, the protection of the child’s best interests, the prevention of a repetition of the crime, the prevention of imitated crimes, etc. However, there is no penalty for violating Article 61. There had been a similar provision in the prewar Juvenile Law as well, but then there had been a punishment for violating that provision. But, when in 1948 the present Juvenile Law was enacted in line with the Constitution of Japan established following the war, the punishment clause was deleted. It is said that this was because the punishment clause was seen as problematic in the light of Article 21 of the Constitution of Japan and it was decided to rely on self-regulation by the media. But, because of the absence of the punishment clause, Article 61 has not necessarily been observed up to now. For a while after the enactment of the present Juvenile Law, the media interpreted Article 61 flexibly and the publishing of the real names and photos of the faces of juveniles was not rare. In such circumstances, many newspapers published the real name of the suspect in a case where a high school girl was murdered by an 18-year-old boy which occurred in 1958 and the Ministry of Justice suggested the reenactment of the punishment clause. With this as a turning point, the me-

dia, the Supreme Court and the Ministry of Justice discussed the issue. As a result, in 1958, the Nihon Shinbun Kyokai (Japan Newspaper Association) announced "a policy concerning the treatment of Article 61 of the Juvenile Law," declaring that the media should not publish the real names or photographs of the faces of juveniles except for certain exceptions. After that, the publishing of real names by newspapers decreased gradually. No newspaper publishing companies or TV stations belonging to the Nihon Shinbun Kyokai has published the real names of juveniles since the 70's. However, publishers which do not belong to the Nihon Shinbun Kyokai have often ignored Article 61 and published the real names and photographs of the faces of juveniles after that as well. Every time such a violation has occurred, the method of juvenile crime reporting and the propriety of Article 61 have been discussed vigorously.

In 1997 the most passionate discussion in recent years of this problem was triggered by a particular case. That was a serial murder cases that occurred in Kobe. This was the case in which a 14-year-old boy killed a primary school boy of his acquaintance, cut off his head and left it in front of the school gate of his own junior high school. Moreover, it was proved that the serial murder cases which occurred in the same area about that time were his crimes as well. Regarding these cases, some media ran sensational reports in overt disregard of Article 61. A weekly magazine, *Friday*, ran an article about these cases and revealed the photograph of the face of the suspect boy. This photo was also appropriated in many home pages on the Internet. Additionally, cases in which the methods of media reporting were sharply discussed occurred in many ways over these cases. Against such overheated reports, criticism arose from various quarters, measures to stop sales of such media were taken on a large scale by convenience stores and bookstores, and not a few libraries limited viewing the reports. The Ministry of Justice offered the exceptional advice to the publisher to recall the magazine. Moreover, beginning with these cases, the sudden increase, increasing seriousness, and ever younger perpetrators of juvenile crimes have become seen as a serious social problem, and arguments for amending the Juvenile Law have pounced forth. The two cases introduced here occurred in the midst of these passionate discus-

sions. Both cases attracted a great deal of public attention especially as they brought this problem into the courtroom in earnest for the first time.

The two decisions gave strongly contrasting judgments. It was the interpretation of Article 61 that ultimately divided both judgments. The Osaka High Court clearly rejected the assertion that juveniles were given “the right not to have their names appear in print” by Article 61, and interpreted Article 61 chiefly as “a provision based on criminal policy interest”. On the other hand, the Nagoya High Court rejected the assertion on the part of the publisher that “Article 61 is a criminal policy provision, and the interests which are conferred on juveniles by Article 61 are only reflective,” and interpreted Article 61 as conferring upon juveniles fundamental rights such as the right to honor, the right to privacy and the so-called “right of growth and development” based on Articles 13 and 26 of the Constitution of Japan and the ideal of the International Human Rights Treaty. Among these rights, the right to growth and development suggested by the Nagoya High Court has been strongly proposed on the basis of the Convention on the Rights of the Child, etc. by academic authors in recent year, and the recognition of this right by the Nagoya High Court is worthy of attention. But against this right, a doubt has been thrown at the character of the right because of the lack of clarity as to its concrete contents.

The difference in the interpretation of Article 61 stated above influenced the attempts to balance freedom of expression and the rights to honor and privacy by both Courts. Based on the superior position occupied by freedom of expression, the Osaka High Court pushed to the fore the perspective of balancing freedom of expression with the rights to privacy, etc.. But the right to privacy balanced against freedom of expression was not that based on Article 61 treated as a criminal policy provision. Article 61 was only given a position of being “respected” in this adjustment. Therefore, the framework adopted by the Osaka High Court can be said to be basically the same as the framework used in a case of the infringement of the privacy of adults. Furthermore, the Osaka High Court said that Article 61 should not necessarily preempt the freedom of expression and reporting because there was no penalty for the violation of this provision, and interpreted Ar-

ticle 61 as leaving observance of this provision to the “self-control of society” as much as possible. Therefore, the Osaka High Court seems to have a doubt as to the character of Article 61 as a norm for a trial in the first place. The Nagoya High Court also recognized the importance of freedom of expression and the need to balance freedom of expression with the right to privacy. But we receive the impression that the Nagoya High Court treated the existence of Article 61 as an *a priori* because it treated Article 61 as providing rights, and thus automatically came down on the side of the right to privacy guaranteed by Article 61 as a result.

Moreover, there were big gaps between both decisions with respect to the ways of grasping matters such as the boy’s delinquency and a crime. For example, the Osaka High Court said that the privacy of criminal suspects could be a proper concern of society in the relation of criminal acts and that the identification of suspects was a fundamental element of criminal news and an important concern together with the criminal facts. Because the Osaka High Court treated Article 61 as only a criminal policy provision, such characteristics of privacy and reporting of the name can be thought not to change fundamentally in the case of juvenile cases as well. In other words, from the point of view of the position of the Osaka High Court, facts about criminal cases, such as the identification of suspects including in juvenile cases, are matters that should not be considered one-sidedly as simply a private problem of the object of the protection. Rather, these facts should be announced officially and introduced to the public as a proper matter of social concern. By contrast, from the point of view of the position of the Nagoya High Court, which treated Article 61 as a rights provision, at least for juvenile crimes, apart from adult crimes, privacy, photographs of faces and the real names of juveniles do not have a public character and should be protected thoroughly as private matters. The judgments of the high courts were split in two. This vividly shows the difficulty of this problem of juvenile crime reporting and freedom of expression. It awaits the judgment of the Supreme Court.

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