

Date of the judgment (decision)	1997.08.29
Case Number	1994 (O) 1119
Reporter	Minshu Vol. 51, No. 7 at 2921
Title	Judgment concerning whether or not a Minister of Education's opinions for improvement given in the school textbook examination procedure , which is of the nature of mere advice or guidance of the minister, may be held as illegal under the Act on State Liability for Compensation
Case name	Case to seek damages
Result	Judgment of the Third Petty Bench, partially quashed and decided by the Supreme Court, partially dismissed
Court of the Second Instance	Tokyo High Court, Judgment of October 20, 1993
Summary of the judgment (decision)	<p>1. Where, in the examination of a school textbook, the Minister of Education gives the applicant an opinion for improvement to the effect that the draft book will become a better textbook by making a certain correction, deletion or addition thereto, such opinion is of the nature of mere advice or guidance of the minister because it does not request the applicant to follow it as a condition for approval, and giving such opinion, in principle, does not raise an issue of illegality, regardless of whether the opinion is appropriate or not, unless there are special circumstances where the author or publisher of the textbook is forced to accept the opinion against their will.</p> <p>2. Where, in the examination of a high school textbook on Japanese history for which an application was filed in 1983, the Minister of Education gave an opinion for amendment with regard to the description of Unit 731 to the effect that the said description should be deleted in whole because no reliable academic study, paper or book had been issued yet and therefore it was too early to address this matter in a textbook, and requested deletion as a condition for approval, given the factual circumstances where by the time of the examination, many reference works and materials on Unit 731 had been published, and at that time, there was no academic view that was negative about the existence of Unit 731 or at least such negative view was not generally known, the minister, in the process of making such a decision, made an</p>

error that cannot be overlooked in understanding the circumstances surrounding academic views at the time of the examination and judging the draft description to be in violation of the Old Examination Standards, and went beyond the bounds of his/her discretionary power illegally.

(There are a concurring opinion and dissenting opinions concerning 2.)

(Concerning 1 and 2) Article 21, para.1 and Article 51 of the School Education Act, Article 1, Article 2, Article 3, Article 4, and Article 9 of the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977), Article 1, para.1 of the Act on State Liability for Compensation

Article 21, para.1 of the School Education Act

Elementary schools shall use textbooks examined and approved by the Minister of Education or textbooks for which the Ministry of Education holds authorship.

Article 51 of the School Education Act

The provisions of Article 21, Article 28, para.3 to para.11, and Article 34 shall apply mutatis mutandis to high schools.

Article 1 of the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977)

Necessary matters concerning examination of textbooks prescribed in Article 21, para.1 of the School Education Act (Act No. 26 of 1947) (including the cases where it is applied mutatis mutandis pursuant to Article 40, Article 51, and Article 76 of the said Act) shall be specified by this Ordinance.

References

Article 2 of the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977)

The term "textbook" as used in this Ordinance means a book produced as a textbook to be used by pupils or students of elementary schools, junior high schools, high schools, and other schools equivalent thereto.

Article 3 of the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977)

The standards for examination of textbooks shall be as specified by the textbook examination standards separately publicized by the Minister of Education.

Article 4 of the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977)

(1) An examination of a textbook shall be an examination for new production or examination for revision.

(2) An examination for new production is an examination to be

conducted with respect to a textbook newly produced.

(3) An examination for revision is an examination to be conducted with respect to each revision made for the purpose of improving a textbook previously examined and approved.

Article 9 of the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977)

(1) The Minister of Education shall consult with the Textbook Council about whether or not a draft book submitted upon application (excluding one rejected under para.3 of the preceding Article) is qualified as a textbook, make a decision to approve or reject the draft book based on the Textbook Council's report, and notify the applicant of the decision.

(2) The Minister of Education may give his/her opinion for amendment as a condition for approving the draft book under the preceding paragraph.

Article 1, para.1 of the Act on State Liability for Compensation

(1) When a public officer who is in a position to exercise the public authority of the State or of a public entity has, in the course of performing his duties, illegally caused damage to another person either intentionally or negligently, the State or the public entity concerned shall be liable to compensate such damage.

I. The first paragraph of the main text of the judgment of prior instance is changed as follows:

The first and second paragraphs of the main text of the judgment of first instance are changed as follows:

1. The appellee of final appeal shall pay the appellant of final appeal 400,000 yen and money calculated thereon at the rate of 5% per annum for the period from February 11, 1984, until the completion of payment.
2. The remaining part of the claim made by the appellant of final appeal is dismissed.

II. The whole cost of the lawsuit shall be divided into four, three parts of which shall be borne by the appellant of final appeal and the rest by the appellee of final appeal.

I. In this case, the appellant of final appeal alleges unconstitutionality and illegality of the measures taken by the Minister of Education with regard to the high school textbook on Japanese history written by the appellant, entitled "New Japanese History" (hereinafter referred to as the "Textbook"), namely, (i) upon the examination for new production for which an application was filed in FY1980, the minister gave opinions for amendment and opinions for improvement with regard to some descriptions in the draft book of the Textbook (hereinafter referred to as "draft descriptions"); (ii) upon the examination for revision for which an application was filed in FY1983, the minister gave opinions for amendment with regard to the draft descriptions made to revise the Textbook; (iii) the minister refused to accept the application for

Main text of the judgment (decision)

Reasons

correction filed in 1982. Based on this allegation, the appellant seeks damages from the appellee of final appeal (the State) under Article 1, para.1 of the Act on State Liability for Compensation for his/her mental distress suffered from these measures taken by the Minister of Education.

II. Concerning Chapter 1, Section 3 of the Reasons for Final Appeal (Violation of Article 26 of the Constitution, etc.) argued by the appeal counsels, MORIKAWA Kinju, OYAMA Hiroshi, IMANAGA Hiroaki, SHII Naotake, ENOMOTO Nobuyuki, FUKUDA Hiraku, ARAI Seiichiro, KOBAYASHI Masahiko, OKAWA Takashi, OMORI Noriko, TAHARA Toshio, TAKANO Norishiro, KADOI Setsuo, EMORI Tamio, KANAI Seikichi, UENO Kentaro, ARAI Ryoichi, WATANABE Harumi, YOSHIDA Takeo, TATEISHI Norifumi, KATO Bunya, FUJITA Yasuyuki, SAITO Yutaka, SAKAEDA Akinori, MAEDA Ruri, YAMAZAKI Izumi, IZAWA Mitsuaki, MURAYAMA Yutaka, KASAI Kiyoshige, HIKOSAKA Toshihisa, ONO Yutaka, SUGANUMA Tomoko, MORIKAWA Fumito, KANAZUMI Michiko, NAITO Isao, MOTONAGA Hiroaki, NAGAYOSHI Seigen, KINJO Chikashi, ISHIMINE Zenzo, IKEMIYAGI Toshio, SHIMABUKURO Katsuya, TERUYA Kantoku, TAKAHASHI Seiichi, YOSHIKAWA Motomichi, MAEKAWA Yuji, TAKEUCHI Hiroshi, and TAKI Yasunobu

In summary, the appeal counsels argue that the examination of a high school textbook conducted under Article 21, para.1 and Article 51 of the School Education Act, the Old Ordinance for Textbook Examination (Ordinance of the Ministry of Education No. 32 of 1977; hereinafter referred to as the "Old Examination Ordinance") and the Old High School Textbook Examination Standards (Public Notice of the Ministry of Education No. 134 of 1979; hereinafter referred to as the "Old Examination Standards") (such examination shall hereinafter be referred to as the "Examination") infringes freedom of education and therefore it is in violation of Article 26 of the Constitution as well as Article 13 and Article 23 of the Constitution and Article 10 of the Education Basic Act. Article 21, para.1 of the School Education Act provides that elementary schools shall use textbooks examined and approved by the Minister of Education, and this provision is applied mutatis mutandis to junior high schools under Article 40 and to high schools under Article 51 of the said Act. Accordingly, the Old Examination Ordinance provides for the examination procedures for textbooks to be performed by the Minister of Education, and Article 3 of the said Ordinance stipulates that the standards for examination of textbooks shall be as specified by the Old Examination Standards established by the Minister of Education. According to the Old Examination Standards, the screening of high school textbooks on Japanese history shall be conducted by examining whether or not the textbook under screening satisfies the three "basic

requirements," namely, (1) the textbook conforms to the purpose and policy of education prescribed by the School Education Act as well as the purpose of high schools and objectives of high school education prescribed by the School Education Act, (2) the textbook shall conform to the objectives of the relevant subject specified by the Courses of Study, and (3) the textbook shall treat political and religious matters in a fair manner, and also by examining whether or not the textbook is appropriate in light of the eight "necessary requirements" (41 items), including (1) the scope of matters addressed in the textbook shall be in line with the objectives and content specified by the Courses of Study, (2) the level of the textbook shall be in accordance with the stage of physical and mental development of the students who are to use the textbook, (3) selection and treatment of the content of the textbook shall be appropriate for implementing educational guidance, (4) organization, arrangement and volume of the textbook shall be appropriately designed so as to implement educational guidance effectively, (5) the textbook shall be free from any errors or inaccuracies, (6) the textbook shall not present one-sided views alone without due consideration. It follows that the screening in the Examination not only focuses on formality issues, such as mere clerical or typographic errors, but also covers the substantial content of descriptions, or content of education.

In this context, we examine whether or not the Examination complies with the Constitution. Article 26 of the Constitution, which directly provides for education, clearly states that education of children should be implemented exclusively for the benefit of children by those who shall be obliged to provide education, but it does not directly specify who is to decide the content and method of education and how these issues should be decided.

Under the Constitution, parents are entitled to freedom of education over their children when educating them at home based on their natural relationships with their children, and teachers are, when implementing ordinary education at high schools and other schools for lower education, also entitled to freedom of teaching to a certain extent in that they are vested with some discretion to select specific content of classes and teaching methods. Freedom of education is also allowed for private schools to a limited extent. However, in other areas of education, the State, which is, in general, supposed to make and implement a decision concerning social and public issues systematically on behalf of all citizens, should be deemed to have the authority to decide the content of education to the extent considered necessary and appropriate with the aim of establishing and implementing a broad and adequate education policy which is included in the scope of state affairs or as the entity capable of establishing and implementing such policy, or for the purpose of protecting the interest of children or satisfying the interest and concern of the public regarding children's development. Since the decision-making process for state affairs is generally susceptible to

various political factors, there is the risk that such political factors might have a deep influence on education, which is a cultural activity for cultivating the value of the inner mind of human beings and therefore should not be controlled by political views or interest of particular political parties or factions. For this reason, such state intervention in deciding the content of education is required to be as restrained as possible. In particular, considering that the Constitution guarantees fundamental freedom for individuals and provides that the independence of their personalities should be respected in state affairs, state interventions that hinder children from developing their free and independent personalities, for instance, forcing education that might implant false knowledge or one-sided views in children, are impermissible under Article 26 and Article 13 of the Constitution. However, these ideas cannot be the reasons for denying the State's authority to make a reasonable decision on the content of education for children based on justifiable grounds. Article 10 of the Education Basic Act provides that any unjust and unnecessary intervention in education by the administrative authority should be excluded. We should construe this provision as not prohibiting the educational administration from setting regulations that are considered necessary and reasonable for a permissible purpose. This reasoning is in line with the judicial precedent of this court (See 1968 (A) No. 1614, judgment of the Grand Bench of the Supreme Court of May 21, 1976, Keishu Vol. 30, No. 5 at 615). In the process of implementing ordinary education, because pupils and students to be educated have not yet acquired a sufficient ability to criticize the content of classes, and they have only limited options when choosing schools or teachers and therefore equal opportunity of education should be sought, the content of education is required to be accurate, neutral, and fair, and to be maintained at a uniform level nationwide in all regions or schools. Basically, this requirement is, in varying degrees, applied to high schools as well as junior high schools and elementary schools. It is also obvious that the content of education to be provided for pupils and students should be in accordance with their stages of physical and mental development. The fact that the screening in the Examination conducted according to the Old Examination Standards is aimed at satisfying these requirements is obvious from the content of the screening. We also cannot find the said Standards to go beyond the extent that is necessary and reasonable for this aim, nor can we find any aspects in the said Standards that would hinder children from developing their free and independent personalities. Furthermore, teachers would not be deprived of their discretion for conducting classes even when they are requested to use the textbooks examined through this process.

The appeal counsels also claim the appellant's freedom of writing a textbook. As explained above, Article 26 of the Constitution is not intended to provide for such freedom. The relationship between freedom

of writing a textbook and Article 23 of the Constitution is explained in IV below.

Consequently, the Examination conducted under the aforementioned statutes is not in violation of Article 26 and Article 13 of the Constitution or Article 10 of the Education Basic Act. This reasoning is evident in light of the gist of the judgment of the Grand Bench of the Supreme Court mentioned above (See 1986 (O) No. 1428, judgment of the Third Petty Bench of the Supreme Court of March 16, 1993, Minshu Vol. 47, No. 5 at 3483).

III. Concerning Chapter 1, Section 4 of the Reasons for Final Appeal argued by the appeal counsels (Violation of Article 21 of the Constitution)

As pointed out above, elementary schools, junior high schools, and high schools are required to use textbooks examined and approved by the Minister of Education (Article 21, para.1, Article 40, and Article 51 of the School Education Act). This means that for textbooks that have not gone through an examination or have been rejected as a result of examination, the door to publication in the form of textbooks will be closed. However, this restriction is only applied to a special form of publication, i.e. school textbooks that are required to be used for ordinary education, and authors of textbooks rejected as a result of examination are not prohibited from publishing such textbooks as ordinary books and making them available to the public, including teachers, pupils, and students, or in other words, placing such textbooks in a free market of thought.

"Censorship" set forth in Article 21, para.2 of the Constitution should be construed to mean a system enforced by the administrative authority, targeting an article in which thought is expressed and aiming to prohibit the publication of such an article of expression in whole or part, wherein all-embracing and general review shall be made to the content of the targeted article of expression prior to publication, and the publication shall be prohibited if the article is judged to be unqualified (See 1982 (Gyo-Tsu) No. 156, judgment of the Grand Bench of the Supreme Court of December 12, 1984, Minshu Vol. 38, No. 12 at 1308). Since the Examination, as explained above, does not prohibit the publication of rejected textbooks as ordinary books or have such aspects of aiming to prohibit publication or checking the content prior to publication, it does not constitute censorship, and therefore it is not in violation of the first sentence of Article 21, para.2 of the Constitution. This reasoning is evident in light of the gist of the judgment of the Grand Bench of the Supreme Court mentioned above (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993). Furthermore, freedom of expression under Article 21, para.1 of the Constitution is not guaranteed without restriction but it may be restricted for the sake of public welfare to a reasonable and unavoidably necessary

extent. Whether or not a restriction on a particular type of freedom of expression is acceptable within such limit should be determined by taking into consideration various factors, such as the degree of necessity of restricting the freedom, the content and nature of the freedom to be restricted, and the manner and level of the specific restriction imposed on the freedom. In the process of implementing ordinary education where education is required to be neutral and fair and to be maintained at a uniform level, it is necessary to prohibit the publication and use, as textbooks, of books that are judged to be unqualified in terms of these factors. Such restriction on publication and use is only applied to books the content of which is judged to be unqualified in terms of the factors mentioned above, and only intended to prohibit the publication of such books in the special form of textbook. Considering these points, we should say that the restriction on freedom of expression by way of textbook examination is within a reasonable and unavoidably necessary extent. Consequently, the Examination is not in violation of Article 21, para.1 of the Constitution, and this reasoning is evident in light of the gist of the judicial precedents of this court (1969 (A) No. 1501, judgment of the Grand Bench of the Supreme Court of November 6, 1974, Keishu Vol. 28, No. 9 at 393; 1977 (O) No. 927, judgment of the Grand Bench of the Supreme Court of June 22, 1983, Minshu Vol. 37, No. 5 at 793; and 1986 (Gyo-Tsu) No. 11, judgment of the Grand Bench of the Supreme Court of July 1, 1992, Minshu Vol. 46, No. 5 at 437) (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993).

The appeal counsels also argue that the Examination is in violation of Article 21, para.1 of the Constitution because the screening criteria employed in the Examination are not clear. It is true that some provisions of the Old Examination Standards are all-embracing and therefore these provisions could not be deemed to definitely and clearly indicate whether or not they are applicable to a specific description. However, since the Old Examination Standards and the provisions of the Courses of Study for High Schools (Public Notice of the Ministry of Education No. 163 of 1978) concerning the objectives of each subject as well as the objectives and content of each class, which are incorporated in the said Standards, have been established systematically from academic and educational perspectives, the said Standards and provisions cannot be deemed to be so unclear that they cannot be applied to a specific description in a textbook, if the author of the textbook who has expert knowledge on the relevant subject or class construes them as a whole. The appeal counsels' argument of unconstitutionality lacks a premise and therefore is inappropriate (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993).

The determination of the court of prior instance that goes along with this reasoning is justifiable, and the judgment of prior instance does not

contain such illegality as argued by the appeal counsels.

IV. Concerning Chapter 1, Section 5 of the Reasons for Final Appeal argued by the appeal counsels (Violation of Article 23 of the Constitution)

Textbooks are books for pupils and students to be used in the process of implementing ordinary education, as major teaching materials on the relevant subject that are organized and arranged according to the composition of the curriculum, and they are not such books that are intended to present the findings of academic research. The Examination only restricts the presentation of research findings by way of textbooks in the case where the research findings described in a textbook submitted upon application for examination fail to conform to the requirements specified by the Old Examination Standards, e.g. where the research findings have not yet gained support in academic circles despite the author's confidence in the validity of the findings, or where the research findings cannot be deemed to be suitable for being taught in the relevant curriculum. The Examination that has such nature is not in violation of Article 23 of the Constitution, which guarantees academic freedom, and this reasoning is evident in light of the gist of the judicial precedents of this court (1956 (A) No. 2973, judgment of the Grand Bench of the Supreme Court of May 22, 1963, Keishu Vol. 17, No. 4, 370, 1964 (A) No. 305, judgment of the Grand Bench of the Supreme Court of October 15, 1969, Keishu Vol. 23, No. 10 at 1239) (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993). The determination of the court of second instance that goes along with this reasoning is justifiable, and the appeal counsels' argument cannot be accepted.

V. Concerning Chapter 1, Section 6-I of the Reasons for Final Appeal argued by the appeal counsels (Violation of Article 13, Article 41, and Article 73, item 6 of the Constitution)

Article 21, para.1 of the School Education Act that shall apply mutatis mutandis to high schools pursuant to Article 51 of the said Act provides that the Minister of Education has the authority to examine textbooks and that schools shall be required to use textbooks examined and approved by the minister. This clause, which specifies the entity authorized to conduct examination and the effect of examination, can be regarded as the basis for the Examination. The content of and criteria for the screening in the Examination as well as the examination procedure are specified by the Old Examination Ordinance (Ordinance of the Ministry of Education) and the Old Examination Standards (Public Notice of the Ministry of Education). As mentioned above, textbooks are books for pupils or students to be used in elementary schools, junior high schools, high schools, and other schools equivalent thereto, as major teaching materials on the relevant subject that are organized and

arranged according to the composition of the curriculum, and by referring to the relevant provisions of the Education Basic Act and the School Education Act, we can find it obvious that education in these schools must be accurate, neutral, and fair and be implemented in line with the purpose of the relevant school, its educational objectives, and the content of its curriculum determined depending on the stages of physical and mental development of children. From this viewpoint, it is self-evident that the content of textbooks must be neutral and fair and be in conformity with the purpose of the relevant school, its educational objectives, and the content of its curriculum, and the level of the content must be in accordance with the stage of physical and mental development of pupils or students and suitable for use by pupils or students. The Old Examination Ordinance and the Old Examination Standards only materialize the requirements for textbooks that are clearly indicated in the aforementioned legal provisions, in the form of the content of and criteria for the screening. We cannot go so far as to say that the Minister of Education lacked delegation by law when establishing the content of and criteria for the screening as well as the examination procedure which served as detailed regulation for the implementation of the examination, based on Article 88 of the School Education Act. Consequently, the appeal counsels' argument that the Examination is in violation of Article 13, Article 41, and Article 73, item 6 of the Constitution lacks a premise and therefore is inappropriate (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993).

VI. Concerning Chapter 1, Section 6-II of the Reasons for Final Appeal argued by the appeal counsels (Violation of Article 31 of the Constitution)

The appeal counsels, while pointing out that Article 31 of the Constitution also applies to administrative procedures, argues that the Examination is contrary to due process of law because: (i) the applicant for examination is not provided with the opportunity to receive a notice, stand at a hearing or give explanation at any stage or phase of the examination process; (ii) the reasons for the dispositions are not indicated clearly in writing; (iii) the appointment of the members of the Textbook Approval and Research Council (hereinafter referred to as the "Textbook Council") or Senior Specialists for Textbooks is not fair; (iv) the deliberation process for examination is not open to the public; (v) the screening criteria employed in the Examination are unclear. However, the appeal counsels' allegation of unfairness of the appointment of the members of the Textbook Council and Senior Specialists for Textbooks mentioned in (iii) above is based on the facts inconsistent with the facts found by the court of second instance. With regard to the appeal counsels' allegation mentioned in (v), as we explained above, the screening criteria cannot be deemed to be unclear

as alleged. Therefore, the appeal counsels' argument of unconstitutionality on the issues mentioned in (iii) and (v) lacks a premise.

In some cases, due process of law under Article 31 of the Constitution should be construed to be applicable to administrative dispositions. However, administrative procedures vary depending on administrative purposes, and therefore, whether or not to provide the party subject to an administrative disposition with the opportunity to receive an advance notice, give explanation or raise a defense, should be determined by taking into consideration all relevant factors, such as the content and nature of the right or interest to be restricted by the administrative disposition, the extent of the restriction, the content, extent, and urgency of the public interest to be attained by the administrative disposition. It is not always necessary to provide such opportunity. The restriction imposed by the Examination does not affect the entry to the free market of thought, an essential part of freedom of expression, but it is implemented for very important public purposes such as ensuring neutral and fair education and maintaining a uniform level of education. In addition, in order to ensure fairness of examination, the Textbook Council was established as a consultative body of the Minister of Education, the members of which are educational personnel and other persons with relevant knowledge and experience, who are experts in the educational and academic fields. The Minister of Education shall make a decision to approve or reject a textbook based on the Textbook Council's report (Article 9 of the Old Examination Ordinance). Where the Minister of Education has given his/her opinion for amendment as a condition for approval, an appeal may be filed against such opinion (Article 10 of the said Ordinance). When making a decision of rejection, the Minister of Education shall notify the applicant of the reasons for rejection in advance, and the applicant's counterargument shall be heard (Article 11 of the said Ordinance). A notice of the Minister of Education's opinion shall be given through the procedure wherein a Senior Specialist for Textbooks, the minister's auxiliary agency, shall orally point out to the applicant the specific defects in the draft submitted upon application while giving examples and supplementary explanation, and shall respond to the applicant's questions on the minister's opinion. In this procedure, court stenographers and recording devices, etc. are available. The applicant may, while taking into account the explanation and responses given thereto, file a second application for examination with regard to the rejected textbook within the fiscal year when the textbook has been rejected or the following fiscal year. Taking into consideration all these facts determined by the court of second instance, we cannot conclude that the Examination is contrary to the purport of Article 31 of the Constitution only because of the circumstances mentioned in (i), (ii), and (iv) above. This reasoning is evident in light of the gist of the judicial precedent of this court (1986

(Gyo-Tsu) No. 11, judgment of the Grand Bench of the Supreme Court of July 1, 1992, Minshu Vol. 46, No. 5 at 437) (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993).

Consequently, the determination of the court of second instance regarding the appeal counsels' argument is justifiable, and the appeal counsels' argument cannot be accepted.

VII. Concerning Chapter 1, Section 7 of the Reasons for Final Appeal argued by the appeal counsels (Violation of the International Covenant on Human Rights)

In short, the appeal counsels argue that the Examination is in violation of Article 19 of the "International Covenant on Civil and Political Rights" (Treaty No. 7 of 1979), which guarantees freedom of opinion and expression. However, Article 19, para.3 of the said Covenant clearly stipulates that the exercise of the right to freedom of expression may be subject to certain restrictions provided by law for respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals. As explained in III above, even freedom of expression guaranteed under Article 13 of the Constitution may be restricted for the sake of public welfare to a reasonable and unavoidably necessary extent, and it is also evident from the language of Article 19 of the Covenant that this Article, which guarantees freedom of expression, does not mean to preclude a restriction thereof for the sake of public welfare to a reasonable and unavoidably necessary extent. Since, as explained above, the Examination is not in violation of Article 21 of the Constitution that guarantees freedom of expression, the appeal counsels' argument that the Examination is in violation of Article 19 of the said Covenant cannot be accepted.

VIII. Concerning Chapter 2 of the Reasons for Final Appeal argued by the appeal counsels (Unconstitutionality of the Implementation of the Examination)

As we have already explained above, the Examination is not in violation of the relevant provisions of the Constitution, and as far as the Examination is conducted in line with the objective and purpose of the textbook examination system, even if such conducting of the Examination causes a restriction on the writing of a textbook, it does not constitute unconstitutional implementation. Should textbook examination be conducted with the intent to make unjust intervention in education and beyond the objective and purpose of the textbook examination system, unconstitutionality of implementation might be suspected. However, the court of second instance denied that the Examination was conducted in such a manner in the process of making the dispositions concerned. Consequently, the appeal counsels' argument

of unconstitutionality lacks a premise and therefore cannot be accepted. Needless to say, if the Minister of Education has violated the Act on State Liability for Compensation in the process of making any of the dispositions concerned through the Examination, we should conclude that the State is liable for compensation, without needing to discuss unconstitutionality of the disposition.

IX. Concerning Chapter 3 of the Reasons for Final Appeal argued by the appeal counsels (Errors in the Criteria for Judging an Abuse of the Discretionary Power)

Where the Minister of Education conducts screening and makes judgment based on the Textbook Council's report by determining whether to approve or reject a textbook as well as the necessity of attaching a condition for approval and the content of such condition, the minister inspects the textbook submitted upon application from various perspectives such as whether or not the content of the textbook is academically accurate, whether or not it is neutral, and fair, whether or not it is appropriate for achieving the objectives of the relevant subject, and whether or not it is in accordance with the stage of physical and mental development of pupils or students. Such a technical judgment on academic and educational matters should be, due to the nature of the matters, left to the reasonable discretion of the Minister of Education. However, where in the course of determining whether to approve or reject the textbook or whether and/or what condition should be imposed for granting approval, the Textbook Council has made an error that cannot be overlooked in understanding the content of the descriptions in the draft or the circumstances surrounding academic views or education at the time of examination based on which defects are pointed out, or in determining the textbook to be in violation of the Old Examination Standards, and the Minister of Education is deemed to have made judgment based on the Textbook Council's erroneous report, it is appropriate to construe that the minister's judgment is beyond the bounds of his/her discretionary power and therefore illegal under the Act on State Liability for Compensation. Since the minister's opinion indicates defects in each description in the draft with a specific reason corresponding to the respective necessary requirement specified by the Old Examination Standards, individual opinions are based on different circumstances surrounding academic views or education. For instance, the minister's opinion on accuracy questions whether or not the description in the textbook submitted upon application is accurate from an academic viewpoint and therefore should be based on the objective circumstances surrounding the relevant academic views at the time of examination. In such case, the minister's opinion may (i) judge the draft description to be erroneous and therefore request a different description according to another academic view, or (ii) judge the draft description to be one-sided or too assertive and therefore request a different

description according to another academic view to be included in combination with the original description. Whether or not there is any considerable error in the minister's opinion should be determined, in the case of (i), by considering whether or not the draft description can be judged to be erroneous on the grounds that the academic view recommended by the minister is widely accepted as a common or established view in academic circles, or in the case of (ii), by considering whether or not the draft description can be judged to be one-sided on the grounds that there is no established view in academic circles. On the other hand, the minister's opinion on the selection or level of the content of the textbook questions not the accuracy of the draft description from an academic viewpoint but its appropriateness from an educational viewpoint, and such opinion should be examined by considering whether or not the matter discussed in the draft description can be judged to be inappropriate in light of the objectives of the relevant subject specified by the Courses of Study or the stage of physical and mental development of pupils or students (See the aforementioned judgment of the Third Petty Bench of the Supreme Court of March 16, 1993).

According to the facts determined by the court of second instance, the Regulations for Textbook Examination and Screening (adopted by the Textbook Approval and Research Council on June 15, 1978) effective at the time of the Examination provided for the procedures to be performed where the Textbook Council has made determination to approve a draft book of a textbook: (i) if it is found that the draft book is unqualified as a textbook unless necessary correction, deletion or addition is made thereto, the Textbook Council or the Minister of Education shall state to that effect in an opinion for amendment and request such an amendment as a condition for approval; (ii) if it is found that the draft book will become a better textbook by making a certain correction, deletion or addition thereto, although it is not necessary to point it out in an opinion for amendment, the Textbook Council or the Minister of Education shall recommend such an amendment in an opinion for improvement. These procedures prescribed in the regulation were actually implemented at the time of the Examination. Giving an opinion for amendment is equal to attaching a condition for approval in that the textbook would be rejected unless the applicant makes correction, deletion or amendment as requested in the opinion, and whether or not such opinion for amendment is illegal under the Act on State Liability for Compensation should be determined according to the criteria explained above. On the other hand, since an opinion for improvement does not directly affect the decision to approve or reject the textbook but only serves as the Minister of Education's advice or guidance, unless there are special circumstances where the author or publisher of the textbook is forced to accept the opinion against their will, we should say that, in principle, an opinion for improvement does not raise an issue of illegality, regardless

of whether the opinion is appropriate or not.

The determination of the court of prior instance that goes along with this reasoning is justifiable, and the judgment of prior instance does not contain such illegality as argued by the appeal counsels.

X. Concerning Chapter 4, Section 1-I and II of the Reasons for Final Appeal argued by the appeal counsels (Minister's Opinions for Improvement Given upon Examination in FY1980)

The appeal counsels argue unconstitutionality and illegality of the measure taken by the Minister of Education upon the examination for new production of the Textbook conducted in FY1980, i.e. the minister gave opinions for improvement with regard to the draft descriptions concerning "Shinran" and "Japanese invasion." However, the fact-finding by the court of prior instance concerning the appeal counsels' argument are affirmable based on the evidence mentioned in the judgment of prior instance, and, given the facts found by the court of prior instance, in particular, the fact that because the appellant countered the opinions for improvement and did not follow them, the descriptions of the draft book were maintained as the final descriptions without change and the Textbook was approved, and the fact that, in this process, the entity in charge of examination did not take any measures to directly or indirectly force the opinions for improvement to the appellant, the determination of the court of prior instance that denied illegality in the act of the Minister of Education of giving the opinions for improvement can be affirmed as justifiable.

The appeal counsels' argument, including the part alleging violation of the Constitution, is nothing more than a criticism of the fact-finding, which comes under the exclusive jurisdiction of the court of prior instance, or an assertion of inappropriateness in sentencing based on the facts that are not found by the court of prior instance, or a claim against the judgment of prior instance criticizing the court's holdings that do not affect the conclusion of the judgment, and therefore cannot be accepted.

XI. Concerning Chapter 4, Section 1-III of the Reasons for Final Appeal argued by the appeal counsels (Minister's Opinion for Amendment Concerning "Nanjing Atrocity " Given upon Examination in FY1980)

1. The outline of the facts determined by the court of second instance is as follows.

(i) Upon receiving the application for examination for new production in FY1980, with regard to the description of the footnote regarding the draft descriptions in the section entitled "All-out War with China" in the Textbook, i.e. "Immediately after occupying Nanjing, Japanese troops killed a great number of Chinese soldiers and citizens. This incident is called the 'Nanjing Atrocity' ", the Minister of Education gave an opinion for amendment to the effect that because this description, without modification, might be construed to mean that Japanese troops

committed an atrocity systematically, it should be amended so as to avoid such construction.

(ii) When giving notice of the reason for the opinion for amendment, Senior Specialist for Textbooks A explained as follows: According to the current status of the study on the Nanjing Incident, the draft description in question cannot be accepted due to its assertive expressions with regard to the time of occurrence of the incident ("immediately after occupying Nanjing"), the manner of committing the killing ("Japanese troops committed the killing systematically by a military order"), and the number of victims ("a great number of"), and therefore the said description should be amended. In the process of giving the said notice of the reason, Senior Specialist for Textbooks A suggested that in order to avoid the description from being construed to mean "Japanese troops committed the killing systematically," it should be revised to "a great number of Chinese soldiers and citizens were involved in the turmoil and killed" or "a great number of Chinese soldiers and citizens are said to have been killed by Japanese troops when involved in the turmoil." Since the applicant did not follow this suggestion, Research Official A, in the coordination phase, requested the applicant to add the phrase "in the turmoil" to the original description.

(iii) Upon such request, the appellant followed the opinion for amendment and revised the description as follows: "Through fierce battles with Chinese troops, Japanese troops occupied Nanjing in a state of excitement, and killed a great number of Chinese soldiers and citizens. This incident is called the 'Nanjing Atrocity'".

2. The appeal counsels argue that the minister's opinion for amendment is illegal with regard to the time of occurrence of the incident ("immediately after occupying Nanjing"). Although Senior Specialist for Textbooks A explained the reason for the opinion for amendment by indicating the three points separately, it is obvious, from the final description and the process in which it was adopted, that the opinion for amendment was intended to express that an amendment should be made to avoid the description in question from being construed to mean that the killing of a great number of Chinese soldiers and citizens was committed systematically by a military order. The court of second instance found the opinion for amendment to be illegal in that it resulted in having the applicant add the phrase "in a state of excitement."

3. Consequently, even where Research Official A, when giving the notice of the reason, made a statement on the time of occurrence of the incident, we cannot say that a different opinion for amendment has been given in addition to the one judged to be illegal by the court of prior instance, only because of such statement of the official. The determination of the court of prior instance that denied illegality of the opinion for amendment with regard to the time of occurrence of the incident can be affirmed as conclusion. The appeal counsels' argument is

a claim against the judgment of prior instance criticizing the court's holdings that does not affect the conclusion of the judgment, and therefore cannot be accepted.

XII. Concerning Chapter 4, Section 2 of the Reasons for Final Appeal argued by the appeal counsels (Examination for Revision in FY1983)

1. Process of the examination for revision

The outline of the facts determined by the court of second instance is as follows. In September 1983, the appellant filed an application for examination for revision via Company B, the publisher, to the Minister of Education, so as to make revisions to the 84 descriptions in the Textbook that had been examined and approved in FY1980. In December 1983, the Minister of Education, based on the Textbook Council's report, approved the 60 descriptions without condition, and approved the 24 descriptions with condition while giving opinions on amendment (about 70 points were indicated in the minister's opinions, including opinions for improvement.) The opinions on amendment in question that addressed the descriptions on the four matters discussed in detail below, "anti-Japan movements by Korean people," "acts of cruelty by Japanese troops," "Unit 731," and "Battle of Okinawa," were conditions for approval, given by reason of "inappropriate in selection and treatment of the content" set forth in Chapter 3, Section 2, I-3(1) and (2) of the Old Examination Standards, or "overemphasizing a specific matter" set forth in I-3(4) of the said section.

2. Concerning the opinion for amendment with regard to the description of "anti-Japan movements by Korean people"

(i) The appeal counsels argue as follows. With respect to the description in the main text on page 230 of the Textbook, "In 1894, upon the occurrence of the Donghak Rebellion in Korea, both Japan and China dispatched troops. Their relations became worse over the control of Korea after the suppression of the rebellion, and in August 1894, the Sino-Japanese War broke out eventually. The Japanese Army continued to win battles through to the following year," the appellant filed an application for examination for revision so as to revise this description as follows: "In 1894, the Sino-Japanese War eventually broke out. The Japanese Army continued to win battles through to the following year, but in Korea, the battlefield, anti-Japan movements by Korean people often occurred." The Minister of Education gave an opinion for amendment to the effect that part of the revised draft description, from "but in Korea, the battlefield" through to the end, should be deleted because what kind of event was indicated by the term "anti-Japan movements" was unclear and matters that had been described in a special study but not yet been sufficiently known by the public by an educational book should not be addressed in a textbook. Such opinion for amendment given by the minister is unconstitutional and illegal.

(ii) The outline of the facts determined by the court of second instance is

as follows.

(1) When giving the notice of the reason for the opinion for amendment, Senior Specialist for Textbooks A explained as follows: If the term "anti-Japan movements" mentioned in the draft description does not refer to the second occurrence of the Donghak Rebellion, this description should inevitably be regarded as a view that has not yet been introduced to academic circles, even where it is based on the findings of advanced academic study, and therefore it would be difficult for high school teachers to understand it. If the said term refers to the second occurrence of the Donghak Rebellion, students would be confused to find only the description of the second occurrence of the rebellion without the description of the first occurrence. In conclusion, the description in question is inappropriate in selection and treatment of the content, and therefore should be amended.

(2) NAKATSUKA Akira, a professor of Nara Women's University, presented the following view in his book entitled "Nisshin Senso no Kenkyu (Study of the Sino-Japanese War)" (1968): Against the Japanese Army which advanced into Korea in order to fight with China (Qing Dynasty), Korean people took up arms and actively resisted, and in the fall of 1894, open armed struggles referred to as the Uprisings in the Fall of Jiawu Peasant War occurred in many places in Korea. Unlike the peasant uprisings that had previously occurred, the said uprisings were apparently caused by the leading motive of resisting against the military invasion by the Japanese Army. Professor NAKATSUKA's view was highly evaluated by more than one scholar, and his book was listed as one of the basic reference works on the Sino-Japanese War in "Literature Guide for World History," edited by NAKAMURA Michio (1982), et al. Other scholars also presented views that were similar to Professor NAKATSUKA's view, namely, FUJIMURA Michio, a professor of Sophia University, in "Nisshin Senso (Sino-Japanese War)" (1973), and Kang Jae-Eun, a professor of Hanazono University, in "Jiawu Peasant War" (included in Iwanami Koza "Sekai Rekishi 22 (Iwanami Lectures, World History 22); 1969). Furthermore, Park Jong-Guen, a lecturer of Tsuru University (currently professor of Kumamoto College of Commerce), in his book entitled "Nisshin Senso to Chosen (Sino-Japanese War and Korea)" (1982), revealed that in addition to the movements that had conventionally been referred to as the Uprisings in the Fall of the Jiawu Peasant War, various other anti-Japan movements by Korean People occurred, pointing out the necessity to review these anti-Japan movements.

On the other hand, at the time of 1983, the popular uprisings that occurred in Korea in the fall of 1894 were generally referred to as the second occurrence of the Donghak Rebellion that followed the first occurrence in the spring of the same year or as the Uprisings in Fall of Jiawu Peasant War. The aforementioned book written by Park Jong-Guen pointed out that the core of anti-Japan movements was the

Uprisings in the Fall of Jiawu Peasant War led by Jeon Bong-Jun, the leader of the Donghak Rebellion, and the study of other anti-Japan movements by Korean people was insufficient in academic circles at the time of 1982. Most history books for general readers described the Donghak Rebellion and the Jiawu Peasant War without clearly distinguishing them by indicating the former as the first occurrence and the latter as the second occurrence. There was no history book that described only the second occurrence. Among the 15 high school textbooks on Japanese history approved in FY1982 and FY1983, there was no textbook that described only the second occurrence without mentioning the first occurrence; except for one that described both the first occurrence and second occurrence, all other textbooks described only the first occurrence.

(iii) In light of the views presented by Professor NAKATSUKA and other scholars as well as Professor Park's view, it is not impossible to construe the aforementioned draft description in question, "in Korea, the battlefield, anti-Japan movements by Korean people often occurred," to refer to not only the Uprisings in the Fall of Jiawu Peasant War, including the second occurrence of the Donghak Rebellion, but also any other types of systematic or sporadic anti-Japan movements by Korean people that occurred before or after the said uprisings. Also, it is not impossible to find a reasonable ground in the appeal counsels' argument that by describing the anti-Japan movements by Korean people that occurred after the outbreak of the Sino-Japanese War without mentioning the first occurrence of the Donghak Rebellion, the appellant intended, while giving due consideration from an educational viewpoint, to have students avoid misconstruing these movements as a religious war or part of purely domestic affairs and enable them to comprehend the historical nature of the Sino-Japanese War correctly. However, according to the aforementioned facts found by the court of second instance, in 1983, history books for general readers did not clearly distinguish the Donghak Rebellion and the Jiawu Peasant War, but refer to the event that occurred in Korea in the fall of 1894 as the second occurrence of the Donghak Rebellion or the Uprisings in the Fall of Jiawu Peasant War. In academic circles at that time, the study of anti-Japanese movements other than those thus referred to was insufficient. All other high school history textbooks described the first occurrence of the Donghak Rebellion or the Jiawu Peasant War, and there was no textbook that described only the event that occurred in the fall of 1894. Supposing such circumstances in academic circles at that time, from the mere description "in Korea, anti-Japan movements by Korean people often occurred," what kind of event is said to have often occurred cannot be clearly identified, and it is difficult for teachers and students to understand this issue. We should also point out that the said description is likely to cause confusion with the recognition of the event that had generally been referred to as the Donghak Rebellion or the Jiawu

Peasant War in the past.

According to the facts mentioned above, we can construe that the Minister of Education's opinion for amendment expressed that the draft description in question was difficult for teachers and students to understand and was likely to hinder the implementation of educational guidance, and it was given in order to have the applicant clarify the content of the draft description from a technical viewpoint in the educational field, thereby enabling students to understand the historical event correctly. In this respect, the minister's opinion for amendment should be deemed to be within the bounds of his/her discretionary power, and we should conclude that the minister cannot be deemed to have gone beyond the bounds of his/her discretionary power illegally by giving the opinion for amendment.

The determination of the court of prior instance that goes along with this reasoning can be affirmed as justifiable. The appeal counsels' argument, including the part alleging violation of the Constitution, is nothing more than a criticism of the choice of evidence or fact-finding, which come under the exclusive jurisdiction of the court of prior instance, or criticism of the judgment of prior instance based on the facts that are not found by the court of prior instance, or a claim of illegality of the judgment of prior instance based on the appeal counsel's own dogmatic view, and therefore cannot be accepted.

3. Concerning the opinion for amendment with regard to the description of "acts of cruelty by Japanese troops"

(i) The appeal counsels argue as follows. With respect to the description in the footnote on page 277 of the Textbook, "In particular, the Eighth Route Army created a wide range of liberated districts mainly in North China, and with support from local inhabitants, made attacks repeatedly on Japanese troops whose control was maintained only at points or along lines, thereby annoying Japanese troops that had poor experience in guerrilla warfare," the appellant filed an application for examination for revision so as to add the following description after this description: "Because of this, Japanese troops killed local inhabitants, burnt away villages, and sexually assaulted women all over the place, causing immeasurable damage to the lives, chastity and property of Chinese people." The Minister of Education gave an opinion for amendment to the effect that because sexual assault by soldiers against women was a universal phenomenon and therefore the additional description targeting Japanese troops alone was inappropriate in selection and treatment of the content and amounted to an overemphasis on a specific matter, the phrases "sexually assaulted women" and "chastity," should be deleted from the said description. Such opinion for amendment given by the minister is unconstitutional and illegal.

(ii) The outline of the facts determined by the court of second instance is as follows.

(1) When giving the notice of the reason for the opinion for amendment,

Senior Specialist for Textbooks A explained as follows: With respect to the description of "(Japanese troops) sexually assaulted women," although it can be found that this actually happened, such an event had happened in many battlefields of many times in the history of human beings, and therefore targeting Japanese troops alone would be a problem in selection and treatment of the content.

(2) At the time of 1983, there was a view presented by FUJIWARA Akira, a professor of Hitotsubashi University, that the Japanese troops during the period of the Fifteen-Year War, or in particular, the period of the Japan-China War when the Nanjing Incident occurred, were notably distinctive for their habitual commission of rapes compared to the Japanese troops during the periods of the Sino-Japanese War and the Russo-Japanese War or the troops of other states of the same time. EGUCHI Keiichi, a professor of Aichi University, presented a similar view. On the other hand, there was also a view that was negative about definitely asserting that Japanese troops committed rapes particularly frequently. There was no material that specifically depicted Japanese troops' violation of chastity committed in the battlefields mainly in North China. Nor was there a dominant academic view arguing that Japanese troops' violation of chastity in the battlefields in North China was distinctively more frequent or cruel to the extent that it should be noted separately from similar violations that occurred in other battlefields.

(iii) In order to describe an historical matter in a textbook, which one to choose from among events that constitute the said matter and how to describe such chosen event should be determined by considering whether or not the relevant event is distinctive and whether or not it is useful and necessary for understanding the entire picture of the said matter correctly. Therefore, if troops' violation of chastity of women during a particular war can be deemed to have been distinctively more frequent or cruel than similar violations during other wars, we should say that describing such event in a textbook, putting aside the issue of whether or not such description is appropriate in light of the stage of physical and mental development of the pupils or students who are to use the textbook, cannot be judged to be inappropriate in selection and treatment of the content or overemphasizing a specific matter only because troops' violation of chastity of women during a war is an event common to all times and places.

However, considering that the draft description in question follows the description "In particular, the Eighth Route Army created a wide range of liberated districts mainly in North China, and with support from local inhabitants, made attacks repeatedly on Japanese troops whose control was maintained only at points or along lines, thereby annoying Japanese troops that had poor experience in guerrilla warfare," and begins with the phrase "because of this," the draft description in question should inevitably be construed to describe the Japanese troops' behavior in the

battlefields mainly in North China where the Eighth Route Army created liberated districts. According to the facts mentioned above, there was no academic view or material arguing that Japanese troops' violation of chastity committed in the battlefields mainly in North China was distinctively more frequent or cruel to the extent that it should be addressed separately. Consequently, we should find it inappropriate to address Japanese troops' violation of chastity in the description of the scene in the battlefields mainly in North China, and we should conclude that the Minister of Education cannot be deemed to have gone beyond the bounds of his/her discretionary power illegally by giving the opinion for amendment by reason that the said description is inappropriate in selection and treatment of the content and overemphasizing a specific matter.

The determination of the court of prior instance that goes along with this reasoning can be affirmed as justifiable, and the determination process does not contain such illegality as argued by the appeal counsels. The appeal counsels' argument, including the part alleging violation of the Constitution, is nothing more than a criticism of the choice of evidence or fact-finding, which come under the exclusive jurisdiction of the court of prior instance, or a claim of illegality of the judgment of prior instance based on the appeal counsels' own dogmatic view while taking into consideration the facts that are not found by the court of prior instance, and therefore cannot be accepted.

4. Concerning the opinion for amendment with regard to the description of "Unit 731"

(i) The outline of the facts determined by the court of second instance is as follows.

(1) The appellant filed an application for examination for revision so as to add the following description in the footnote on page 277 of the Textbook: "Furthermore, a germ-warfare unit called Unit 731 was established in the suburbs of Harbin, and this unit, for many years until the Soviet entry into the war, continued to commit cruel acts of capturing thousands of foreign people, mainly Chinese people, and using them for human experimentation and causing death." The Minister of Education gave an opinion for amendment to the effect that the said draft description should be deleted in whole because with regard to the issue of Unit 731, no reliable academic study, paper or book had been issued yet and therefore it was too early to address this matter in a textbook and the draft was inappropriate in selection and treatment of the content.

(2) In response to this opinion, the appellant deleted the said draft description in whole.

(3) By the time of the Examination, a total of 36 reference works and materials on Unit 731 had been published, including two reprinted editions of the previous publications and several revised editions, and these publications were frequently reported in newspapers and television

programs at that time. In particular, the book in three volumes released by the writer MORIMURA Seiichi during the period from 1981 to 1983, entitled "Akuma No Hoshoku (Devil's Gluttony)," depicted the actual state of Unit 731 in detail based on the following materials: [1] the statements of the former personnel of Unit 731, [2] the materials held by the US Army including examination reports on the former high-ranking officers of Unit 731, [3] the records of the Khabarovsk War Crime Trials, [4] the medical academic papers written by the former high-ranking officers of Unit 731, and [5] the information collected in China. This book created a sensation and attracted public attention. By the time of the Examination, other academic books discussing the existence of Unit 731 had also been published: "Taiheiyo Senso (Pacific War)" written by the appellant (1968); "Kieta Saikinsen Butai: Kantogun 731 Butai (Vanished Germ Warfare Unit: Kwantung Army Unit 731)" written by TSUNEISHI Keiichi, an assistant professor of Nagasaki University (1981); "Saikinsen Butai To Jiketsushita Futari No Igakusaha (Germ Warfare Unit and Two Medical Scientists Who Killed Themselves)" jointly written by TSUNEISHI Keiichi, and ASANO Tomizo, journalist (1982). This topic was also addressed in a foreign book, "A Hidden Chapter in History" written by John Powell.

(ii) According to the facts mentioned above, the court of second instance held as follows. At the time of the Examination, the study on Unit 731 was still in the stage where relevant materials were discovered and collected and facts were about to be unveiled little by little. It cannot be said that the facts disclosed by that time had sufficiently been verified, and therefore it should inevitably be said that reliable materials were insufficient to describe this matter in a textbook. In conclusion, no considerable error can be found in the process whereby the Minister of Education gave the opinion for amendment by reason that it was too early to address this matter in a textbook.

(iii) However, the determination of the court of second instance mentioned above cannot be affirmed, on the following grounds. According to the aforementioned facts found by the court of second instance, it is obvious that by the time of the Examination, many reference works and materials on Unit 731 had been published, including the appellant's book published in 1968, and not all of these previous reference works and materials were published immediately before the Examination. Considering that the court of second instance did not find that at the time of the Examination, there was a negative view about the existence of Unit 731, it seems that at the time of the Examination, there was no academic view that was negative about the existence of Unit 731, or at least such negative view was not generally known. Assuming so, although among the publications revealing the actual state of Unit 731 that were available at the time of the Examination, many were written by writers and journalists who were not specialized in historical study, and the entire picture of Unit 731 had

not yet become completely clear, we should say that the outline of the story, that the Kwantung Army had a unit aimed at engaging in germ warfare, called Unit 731, and this unit killed many Chinese people by using them for human experimentation, had been established by the time of the Examination to the extent that no scholar in academic circles denied it. Taking into consideration this fact as well as the fact that by the time of the Examination, 38 years had elapsed since the end of the war, we should conclude that in the process of giving the opinion for amendment to the effect that the draft description in question should be deleted in whole by reason that it was too early to address the matter in a textbook, the Minister of Education made a considerable error in understanding the circumstances surrounding academic views at the time of the Examination and judging the draft description to be in violation of the Old Examination Standards, and went beyond the bounds of his/her discretionary power illegally. The determination of the court of prior instance that contravenes this reasoning is illegal in that it has wrongly construed or applied the laws and regulations on textbook examination, and such illegality apparently affects the conclusion of the judgment of prior instance. The appeal counsels' argument is well-grounded in that it alleges such illegality.

5. Concerning the opinion for amendment with regard to the description of "Battle of Okinawa"

(i) The appeal counsels argue as follows. With respect to the description in the footnote on page 284 of the Textbook, "Okinawa became the field of a ground battle, and about as many as 160,000 Okinawan people, men and women of all ages, were forced to a violent death in the war," the appellant filed an application for examination for revision so as to revise this description as follows: "Okinawa became the field of a ground battle, and about as many as 160,000 Okinawan people, men and women of all ages, died a violent death in the war. These victims included many who were killed by the Japanese Army." The Minister of Education gave an opinion for amendment to the effect that because the scope of the Okinawan people who died in the war should include those who committed mass suicides, whose number was the largest of all categories of victims, a description stating this fact should be added. By doing so, the minister went beyond the bounds of his/her discretionary power illegally.

(ii) However, according to the facts found by the court of second instance, in academic circles at the time of the Examination, there was almost no objection to the view that although the Battle of Okinawa involved local inhabitants on a full scale and created a greater number of civil victims than the number of military victims, Okinawan people who died in this battle included many who were executed by the Japanese Army on suspicion of espionage, many who were expelled from the refugee shelters by the Japanese Army or Japanese soldiers and killed by bombing by the attacking force, and many who were ordered by the

Japanese Army or driven by the hopeless war situation to commit mass suicides. Although there were various views regarding the number of these civil victims and an established view could not be found, it was a generally accepted view that the Battle of Okinawa can be characterized by the fact that a great number of Okinawan people were involved in the battle to death, as well as the facts that many Okinawan people were forced to death by the Japanese Army that should have protected them and that many Okinawan people died in mass suicides. Various factors were pointed out as the causes of the mass suicides, such as mass hysteria, extreme civics education policy (to turn citizens into loyal subjects of the Emperor), the existence of the Japanese Army and its induction, the orders of the leaders of the guard units, fear of "brute America and Britain," the Army's counterespionage measures against local inhabitants, and the state of Okinawan communities, and therefore a general view was that it was wrong to glorify the mass suicides as having derived from Okinawan people's noble sacrificing spirit of eliminating troubles for combat personnel.

In light of the facts mentioned above, we can find that in academic circles at the time of the Examination, the generally accepted view was that in Okinawa, which was the field of a ground battle, local inhabitants were victimized in a different manner than that in other places of Japan in that in addition to direct victims involved in the battle, a great number of Okinawan people were forced to die by the Japanese Army or killed themselves by committing mass suicides, and these extraordinary events were significant characteristics of the Battle of Okinawa. As the court of second instance found, various factors were pointed out as the causes of the events generally referred to as mass suicides, and it was argued that it was inappropriate to represent or glorify all these events by the single term of mass suicide. However, in order to educate students about the realities of the tragic death of Okinawan people involved in the ground battle, including why such a great number of Okinawan people were forced to die in an extraordinary manner, committing mass suicides, it may be necessary to describe in a textbook the events generally referred to as mass suicides in addition to the killing of local inhabitants by the Japanese Army, and when describing the mass suicides, it may be possible to prevent students from falsely understanding that Okinawan people committed suicides voluntarily and independently from external factors, by describing the events in an appropriate expression that would not glorify them. In fact, the appellant made a revision to include in the Textbook the final description, "Okinawa became the field of a ground battle, and about as many as 160,000 Okinawan people, men and women of all ages, died a violent death, killed by bombing or driven to mass suicides. These victims included many who were killed by the Japanese Army," which was considered by the Minister of Education to satisfy the requirement for approval. Although the appeal counsels argue that the phrase in the draft description, "killed by the Japanese Army,"

implies including death in mass suicides, this description cannot be read as including all events generally referred to as mass suicides, and as explained above, it is obvious that the generally accepted view in academic circles at the time of the Examination regarded the killing by the Japanese Army and the mass suicides as different characteristic events.

(iii) In light of the circumstances in academic circles at the time of the Examination, we can find a sufficiently reasonable ground and necessity in the measure taken by the Minister of Education who considered that in order to enable students to understand the Battle of Okinawa, it was necessary for implementing educational guidance to include the fact of mass suicides in the draft description in addition to the draft description of the "people killed by the Japanese Army," and gave an opinion for amendment to request such addition of the description of mass suicides to the draft description. Therefore, we cannot find the minister to have gone beyond the bounds of his/her discretionary power illegally by giving an opinion for amendment to the effect that the draft description that only included the killing of local inhabitants by the Japanese Army and excluded the mass suicides was inappropriate in selection and treatment of the content and overemphasizing a specific matter. Nor can we find that the amendment required by the minister significantly distorted what the appellant intended to say in the draft description. The determination of the court of prior instance that goes along with this reasoning is justifiable. The judgment of prior instance does not contain such illegality as argued by the appeal counsels, and the appeal counsels' argument, including the part alleging violation of the Constitution, is nothing more than a criticism of the choice of evidence or fact-finding, which come under the exclusive jurisdiction of the court of prior instance, or a claim of illegality of the judgment of prior instance based on the appeal counsels' own dogmatic view, and therefore cannot be accepted.

XIII. Concerning Chapter 4, Section 3 of the Reasons for Final Appeal argued by the appeal counsels (Refusal to Accept the Application for Correction)

1. The outline of the facts legally determined by the court of second instance is as follows. On December 2, 1982, Company B, the publisher of the Textbook, intended to submit a written application for correction so as to obtain approval for revising the description in the footnote on page 276 of the Textbook examined and approved in FY1980, "Through fierce battles with Chinese troops, Japanese troops occupied Nanjing in a state of excitement, and killed a great number of Chinese soldiers and citizens. This incident is called the 'Nanjing Atrocity' ", to the following description: "Despite the fierce resistance of Chinese troops, Japanese troops finally occupied Nanjing and killed a great number of Chinese soldiers and citizens. This incident is called the 'Nanjing Atrocity' ". The

official in charge at the Ministry of Education, having inspected the written application, concluded that the purpose and content of the application did not satisfy the requirement for correction, and refused to accept it, by explaining to the employee of Company B who had brought the written application to that effect and urging reconsideration.

2. We make examination in this context. Article 16 of the Old Examination Ordinance provides that where the publisher of a textbook previously examined and approved by the Minister of Education shall, with approval of the minister, make necessary correction to the textbook when finding (i) any clerical or typographic error or omission or description of a false fact, (ii) any description of a fact that has become obviously false due to changes in the objective circumstances, (iii) the need to update statistical data, or (iv) any other description that is likely to hinder the implementation of educational guidance and therefore needs to be corrected immediately. According to the facts determined by the court of second instance, the correction procedure is, unlike the examination procedure, conducted without consulting the Textbook Council.

3. Considering these provisions and the practice, it is appropriate to construe that the procedure for applying for correction is provided in order to revise any obvious error in a description in a textbook which is similar to a clerical or typographical error. The aforementioned description for which Company B filed an application for correction relates to a controversial issue that could divide opinions as to whether it is true or not depending on the understanding of the relevant historical facts. This reasoning still applies after the Old Examination Standards were revised in 1982 as argued by the appeal counsels. Consequently, we should conclude that Company B's application for correction is incompatible with the purpose of the correction procedure, and the refusal to accept the application for correction by reason of its failure to satisfy the requirement for correction is not illegal. The determination of the court of prior instance that dismissed the appeal counsels' claim made by alleging illegality in such refusal can be affirmed as conclusion. The judgment of prior instance does not contain such illegality as argued by the appeal counsels. The appeal counsels' argument, including the part alleging violation of the Constitution, is nothing more than a claim of illegality of the judgment of prior instance based on the appeal counsels' own dogmatic view, or a claim against the judgment of prior instance criticizing the court's holdings that do not affect the conclusion of the judgment, and therefore cannot be accepted.

XIV. Concerning Chapter 5 of the Reasons for Final Appeal argued by the appeal counsels (Determination of the Amount of Damages)
The fact-finding and determination by the court of prior instance concerning the appeal counsels' argument can be affirmed as justifiable based on the evidence mentioned in the judgment of prior instance, and

the appeal counsels' argument cannot be accepted.

XV. Conclusion

1. For the reasons stated above, the appeal counsels' argument is well-grounded to the extent that it alleges illegality in the determination of the court of prior instance concerning the opinion for amendment given by the Minister of Education in the examination in FY1983 with regard to the draft descriptions on "Unit 731," and the judgment of prior instance should inevitably be quashed in this respect, whereas other assertions in the appeal counsels' argument cannot be accepted.

2. Since, as we found above, the Minister of Education made a considerable error in the process of giving the said opinion for amendment, we should conclude that the minister, in the course of performing his/her duties, illegally caused damage to the appellant intentionally or negligently. In this case, the appellant seeks two million yen in total as compensation for his/her mental distress suffered from the measures taken by the Minister of Education, namely, giving opinions on amendment with regard to two draft descriptions and opinions for improvement with regard to another two draft descriptions in the examination for new production conducted in FY1980, refusing to accept an application for correction in 1982, and giving opinions on amendment with regard to five draft descriptions in the examination for revision conducted in FY1983. The judgment of first instance found illegality in the minister's giving an opinion for amendment with regard to one of the draft descriptions in the examination for new production conducted in FY1980, and upheld the appellant's claim to the extent to seek 100,000 yen as compensation. The judgment of prior instance, in addition to affirming the part of the claim upheld by the judgment of first instance, also found illegality in the minister's giving an opinion for amendment with regard to another draft description in the examination for new production conducted in FY1980 as well as an opinion for amendment with regard to one of the draft descriptions in the examination for revision conducted in FY1983, and found it appropriate to uphold the appellant's claim to the extent to seek 300,000 yen in total including the amount upheld by the judgment of first instance (200,000 yen for the examination in FY1980 and 100,000 yen for the examination in FY1983). As we explained above, the amount of compensation determined by the court of prior instance should be affirmed as justifiable, and illegality can be found in the measure taken in the examination in FY1983 in that the minister gave an opinion for amendment with regard to the draft description of "Unit 731." In light of the factual circumstances and developments of this case determined by the court of prior instance, 200,000 yen is a reasonable amount of compensation for the mental distress suffered by the appellant from receiving the illegal opinions on amendment with regard to two draft descriptions in the examination in FY1983. Consequently, we should

find the appellant's claim to be well-grounded and therefore uphold it to the extent to seek payment of 400,000 yen in total as compensation for such damage suffered from the examinations in FY1980 and FY1983, with delay damages thereon at 5% per annum, a statutory rate under the Civil Code, for the period from February 11, 1984, after the damage occurred, until the completion of payment, while dismissing the remaining part of the claim as inappropriate.

3. Therefore, the judgment of prior instance has been changed as indicated in the first paragraph of the main text of this judgment, and according to Article 408, Article 396, Article 386, Article 384, Article 96, Article 89, and Article 92 of the Code of Civil Procedure, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices. There are a concurring opinion by Justice SONOBE Itsuo concerning the issues mentioned in XII-2 to 4 above, dissenting opinions by Justice ONO Masao and by Justice OZAKI Yukinobu concerning those in XII-2 and 3, and dissenting opinions by Justice CHIKUSA Hideo and Justice YAMAGUCHI Shigeru concerning those in XII-4.

The concurring opinion by Justice SONOBE Itsuo concerning the issues mentioned in XII-2 to 4 above is as follows.

Concerning the issues mentioned in XII-2 to 4 above, for which opinions are divided in this court regarding the reasons attached to the judgment, I am in agreement with the majority opinion. From the viewpoint of a person who took charge of handling the precedent case, 1986 (O) No. 1428, judgment of the Third Petty Bench of the Supreme Court of March 16, 1993, Minshu Vol. 47, No. 5 at 3483, however, I would like to give my opinion to supplement the majority opinion with regard to the ground for this petty bench to apply the criteria for judging an abuse of discretionary power adopted by the said judicial precedent, while taking into consideration the consistency between the reasons attached to the precedent and those attached to this judgment.

I. Concerning "anti-Japan movements by Korean people"

I do not think it inappropriate to describe in a textbook the fact that after the Sino-Japanese War broke out, Korean people took up arms and actively resisted against the Japanese Army that advanced into Korea. Rather, I agree with the dissenting opinion that such description is necessary in order to enable students to understand the nature of the Sino-Japanese War and the relationship between Japan and Korea at that time.

However, a problem arises from the fact that the armed uprisings that occurred in many places in Korea in the fall of 1894 were, at the time of the Examination conducted in 1983, generally referred to as the second occurrence of the Donghak Rebellion or the Uprisings in the Fall of the Jiawu Peasant War. It is well known that the first occurrence of the Donghak Rebellion led by Jeon Bong-Jun, the leader of the Donghak,

was the direct factor that triggered the Sino-Japanese War. The armed uprisings that occurred as anti-Japan movements after the outbreak of the Sino-Japanese War were also known as having been led by Jeon Bong-Jun, and therefore they were referred to as the second occurrence of the Donghak Rebellion. Since peasants were the major actors of these uprisings that occurred on two occasions, they were also collectively referred to as the Jiawu Peasant War, with the term representing the year of occurrence of the uprisings included in the name of the events. In this respect, the court of second instance found the following facts. While Professor NAKATSUKA presented the view that the events collectively referred to as the Jiawu Peasant War included uprisings other than those led by Jeon Bong-Jun, most history books for general readers available in 1983 did not clearly distinguish the Donghak Rebellion and the Jiawu Peasant War. Furthermore, the book written by Park Jong-Guen and published in December 1982, entitled "Sino-Japanese War and Korea," revealed a view suggesting the existence of anti-Japan movements that should be distinguished from the events referred to as the Jiawu Peasant War, but this book also pointed out that the core of anti-Japan movements was the uprisings led by Jeon Bong-Jun, and the study of other anti-Japan movements by Korean people was insufficient in academic circles in 1982. At the time of the Examination in FY1983, Professor Park's view was not generally accepted. On the premise of such circumstances surrounding academic views at that time, the minister's opinion for amendment can be deemed to be reasonable in that it was given by reason that it was difficult to enable ordinary high school teachers to understand, from the mere description "anti-Japan movements often occurred," what kind of event was indicated by this description and how it was related to the events generally referred to as the second occurrence of the Donghak Rebellion or the Uprisings in the Fall of the Jiawu Peasant War, and in order to describe, from this viewpoint, the uprisings led by Jeon Bong-Jun that were said to be the core of anti-Japan movements, the relationship between these uprisings and the first occurrence of the Donghak Rebellion that was also led by Jeon Bong-Jun. No considerable error can be found in the process whereby the minister gave this opinion.

The dissenting opinion criticizes the determination of the court of second instance that found the Minister of Education's opinion for amendment to be legal, focusing on the fact that the minister approved the final version that described the events in dispute in the following abstract expression according to the opinion for amendment, "the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies." In my opinion, this criticism misses the point. The question is not the propriety of the final description but the propriety of the minister's opinion for amendment with regard to the original draft description. Furthermore, it is obvious that the final description refers to an event other than "anti-Japanese

movements," or more specifically, the event where after the outbreak of the Sino-Japanese War, the Japanese government concluded the "Japan-Korea Pact" so as to enable the Japanese Army to confiscate persons and horses as well as food supplies in Korea, but Korean people violently resisted and often refused to cooperate. This event does not need to be described in terms of its relationships with other events such as the Donghak Rebellion.

II. Concerning "acts of cruelty by Japanese troops"

The dissenting opinion argues that the draft description in the footnote in question that begins with the phrase "because of this" is not related to the preceding description of the Eighth Route Army but should be read as being related to the whole description in the main text on the Japan-China War. Since the phrase "because of this" must indicate that there is a matter that can be a cause or basis, if this phrase is construed to directly follow the main text, the precedent should be the sentence at the end of the main text, "the Japanese Army was unable to subdue the persistent resistance of Chinese people." However, such a manner of connecting the footnote with the main text is unnatural. Rather, as the majority opinion suggests, it is natural to read the draft description in question as indicating the Japanese Army that was annoyed by the guerrilla attacks by the Eighth Route Army, and the phrases in the draft description, "killed local inhabitants" and "burnt away villages," should inevitably be construed to depict the Japanese Army's attacks against the liberated districts where the Eighth Route Army was based. The dissenting opinion argues that the Minister of Education did not construe the draft description to focus on North China. However, according to the records (Evidence Ko No. 20), the Minister of Education gave an opinion for improvement to the effect that the phrase "because of this, Japanese troops...all over the place" should be revised more clearly because "all over the place" could be construed to mean "all over the place in the liberated districts," but the appellant did not follow this opinion, arguing that the Japanese Army killed local inhabitants and burnt away villages not only in the liberated districts but also in the districts occupied by the Japanese Army and the districts between those under the Japanese Army's control and those under the Chinese Army's control and therefore the area should not be limited to the "liberated districts." This fact implies that the Minister of Education, at least assuming that the draft description mainly focused on North China where the liberated districts were located, presented a view that it was desirable to limit the area to the liberated districts.

The dissenting opinion also argues that it might be unallowable for the court to judge the propriety of the Minister of Education's opinion for amendment by distinguishing North China and Nanjing, which was not questioned by the minister, because it is as if the court judged the propriety of the minister's opinion for amendment for a different reason

from that found by the minister. However, a description of an event that constitutes a historical matter (in this case, Japanese troops' violation of chastity) may be useful and necessary in some cases for enabling the readers to understand the entire picture of the matter correctly, but in other cases, the same description may make it difficult to understand the entire picture of the matter and may be likely to give a distorted recognition to the readers. In short, the fact that a description of an event is proper in a particular context does not necessarily mean that the same description is also proper in another context. The majority opinion judges the propriety of a description of each event that constitutes a historical matter based on whether or not the relevant event is distinctive. This judgment criterion depends on how to construe the Old Examination Standards. Therefore, according to this reasoning, the court is allowed to find a fact and make a determination as to whether or not the relevant event is distinctive, and based on the result of such fact-finding and determination, judge whether the minister's opinion for amendment with regard to the relevant description is legal or illegal. Although the court of second instance distinguished Japanese troops' violation of chastity committed mainly in North China and the same event in Nanjing, the court cannot be deemed to, by doing so, have judged the propriety of the Minister of Education's opinion for amendment based on a different reason than that found by the minister. Such judgment process is not contrary to the adversary system.

III. Concerning "Unit 731"

There are a number of historical matters in the modern and present-day eras the entire picture of which has not been clearly revealed due to various reasons. In particular, with respect to a number of matters during the war period, the cause, process, accurate number of victims and other details cannot be clarified due to various reasons, e.g. the matter happened in turmoil, many persons concerned have died due to their involvement in the matter, or the relevant records have been lost for some reasons. For example, it cannot be denied that the truth of the Nanjing Incident and the realities of local victims in the Battle of Okinawa have not yet been completely revealed. However, this does not deny the occurrence of the Nanjing Incident or the existence of local victims in the Battle of Okinawa. These examples clearly suggest that we cannot say that an event should not be described in a textbook unless its entire picture is revealed accurately.

In particular, "Unit 731" is an extraordinary incident wherein the Japanese Army conducted human experimentation, and it is difficult to review this incident based on the official records because the related records were destroyed systematically by the military authorities near the end of the war for fear of international criticism, and it is said that there is no surviving victim. Nevertheless, the conduct committed by Unit 731 was gradually revealed soon after the end of the war through

investigations by historians, writers and journalists. Among the academic views in FY1983, some questioned the accuracy of the materials used for the investigations, but there was no view that denied the very existence of Unit 731 and its conduct. Although the draft description in question may be somewhat inappropriate in terms of the number of victims, it is not so inappropriate to the extent that it should be deleted in whole by reason that it is too early to describe the existence of Unit 731 and its conduct. For this reason, I find a considerable error in the process whereby the Minister of Education gave the opinion for amendment that requested the deletion of the draft description in whole.

The dissenting opinion by Justice ONO Masao concerning the issues mentioned in XII-2 and 3 above is as follows.

I am in disagreement with the determination by the majority opinion with regard to the matters "anti-Japan movements by Korean people" and "acts of cruelty by Japanese troops" mentioned in XII-2 and 3, respectively. In my opinion, the Minister of Education made a considerable error in the course of giving the opinions on amendment with regard to the draft descriptions addressing these matters, and such error should be deemed to be illegal under the Act on State Liability for Compensation, for the following reasons.

I. Firstly, I would like to express my understanding of the theory of finding a considerable error established in the judgment on the so-called first textbook suit, 1986 (O) No. 1428, judgment of the Third Petty Bench of the Supreme Court of March 16, 1993, Minshu Vol. 47, No. 5 at 3482 (hereinafter referred to as the "First Judgment").

1. The First Judgment used the term "considerable error" following the judicial precedent, 1985 (Gyo-Tsu) No. 133, judgment of the First Petty Bench of the Supreme Court of October 29, 1992, Minshu Vol. 46, No. 7 at 1174. This precedent indicated the criterion to be applied by the court, in a suit to seek rescission of the license for the establishment of a nuclear reactor, for judging illegality of the safety review of the nuclear reactor, on the premise that the safety review should require a comprehensive determination based on highly advanced scientific and technical knowledge. However, the said precedent did not allow a broad discretionary power to the administrative agency but rather broadened the scope of judicial review aimed at determining whether or not the accused administrative agency's judgment is reasonable based on considerable grounds and materials, compared to that aimed at determining illegality of an administrative disposition, which is more discretionary.

2. The First Judgment does not mean to consider the issue of textbook examination as a scientific and technical issue but regards it as an issue concerning the right of education and therefore clearly states that the judicial precedent addressing the right of education, 1968 (A) No. 1614,

judgment of the Grand Bench of the Supreme Court of May 21, 1976, Keishu Vol. 30, No. 5 at 615 (hereinafter referred to as the "Achievement Test Case Judgment") should be relied on, by citing it almost in its entirety.

The Achievement Test Case Judgment acknowledged the State's authority to decide the content of education, holding as follows: "The State, which is, in general, supposed to make a decision on behalf of all citizens concerning social and public issues and realize such decision systematically, should be deemed to have the authority, under the Constitution, to decide the content of education to the extent considered necessary and appropriate with the aim of establishing and implementing a broad and adequate education policy which is included in the scope of state affairs or as the entity capable of establishing and implementing such policy, or for the purpose of protecting the interest of children or satisfying the interest and concern of the public in children's development." With respect to how the State should exercise such authority, the said judgment stressed that education "is a cultural activity for cultivating the value of the inner mind of human beings and therefore should not be controlled by political views or interest of particular political parties or factions," pointing out as follows: "Such state intervention in deciding the content of education is required to be as restrained as possible. In particular, considering that the Constitution guarantees fundamental freedom for individuals and provides that the independence of their personalities should be respected in state affairs, state interventions that hinder children from developing their free and independent personalities, for instance, forcing education that might implant false knowledge or one-sided views in children, are impermissible under Article 26 and Article 13 of the Constitution." Thus, the said judgment expressed that state interventions in deciding the content of education were allowed to the extent considered necessary and reasonable but should be as restrained as possible.

3. The First Judgment also allowed the State's authority in textbook examination. However, it did not mean to affirm a broad discretionary power but defined the bounds of discretion allowed to the Minister of Education by specifying objective points to consider when applying the criterion of "considerable error" in textbook examination. To be more precise: (i) where the minister's opinion judges the draft description to be erroneous and therefore requests a different description according to another academic view, the point to consider is whether or not the draft description can be judged to be erroneous on the grounds that the academic view recommended by the minister is widely accepted as a common or established view in academic circles; (ii) where the minister's opinion judges the draft description to be one-sided or assertive and therefore requests a different description according to another academic view to be included in combination with the original description, the point to consider is whether or not the draft description

can be judged to be one-sided on the grounds that there is no established view in academic circles; (iii) where the minister's opinion relates to the selection or level of the content of the textbook which questions not the accuracy of the draft description from an academic viewpoint but its appropriateness from an educational viewpoint, the point to consider is whether or not the matters addressed in the textbook can be judged to be inappropriate in light of the objectives of the relevant subject specified by the Courses of Study or the stage of physical and mental development of pupils or students.

4. However, the First Judgment did not distinguish the opinion for amendment and the opinion for improvement but collectively referred to them as the minister's opinions and discussed them together. This tendency was found throughout the process of the first textbook suit, from the judgment of first instance through to the judgment of final appellate instance. The minister's opinion for amendment and opinion for improvement are different in legal nature and therefore they cannot be judged according to the same criterion. The Regulations for Textbook Examination and Screening established two types of minister's opinions, providing that if "the draft copy is unqualified as a textbook unless necessary correction, deletion or addition is made thereto," such an amendment may be required as a condition for approval, whereas if "the draft copy will become a better textbook by making a certain correction, deletion or addition thereto," although it is not necessary to point it out in an opinion for amendment, such an amendment may be recommended in an opinion for improvement. This provision is intended to clearly distinguish an opinion for amendment and an opinion for improvement. In other words, the minister's opinion for improvement, which is the Minister of Education's manifestation of his/her opinion, serves only as administrative advice or guidance that is not legally binding to the author or publisher of the textbook, and therefore the author or publisher shall not be subject to disadvantageous treatment even if they do not follow the opinion (in this case, although the appellant did not follow the minister's opinion for improvement, the Textbook was approved and published without any change to its draft descriptions). On the other hand, the minister's opinion for amendment serves as an administrative disposition that shall impose serious disadvantage on the author or publisher because the textbook would be rejected unless they make correction, deletion or addition to the textbook as required in the opinion. Consequently, when the minister makes such an administrative disposition, it should be construed that the content of the opinion for amendment must be reasonable, and furthermore, the defect found in the draft description must be serious to the extent that the textbook should inevitably be judged to be unqualified unless necessary correction, deletion or addition is made with regard to the defect.

5. The court opinion is appropriate in that it points out the difference in legal nature between the minister's opinion for amendment and opinion

for improvement in IX above. This seems to me to be not only relaxing the requirement for judging the minister's opinion for improvement to be illegal but also giving a reason for strictly examining whether the minister's opinion for amendment is reasonable and necessary. It can be said that the minister's opinion for amendment shall not be judged to be legal only because its content is appropriate, but rather, legality of the minister's opinion for amendment should be judged depending on whether on not the draft description is so inappropriate to the extent that it is unqualified as a description in a textbook unless it is amended as required in the opinion.

II. Concerning the description of "anti-Japan movements by Korean people"

1. The court of second instance determined the following facts.

(i) With respect to the description in the textbook, "In 1894, upon the occurrence of the Donghak Rebellion in Korea, both Japan and China dispatched troops. Their relations became worse over the control of Korea after the suppression of the rebellion, and in August 1894, the Sino-Japanese War broke out eventually. The Japanese Army continued to win battles through to the following year," the appellant filed an application for examination for revision so as to revise this description as follows: "In 1894, the Sino-Japanese War eventually broke out. The Japanese Army continued to win battles through to the following year, but in Korea, the battlefield, anti-Japan movements by Korean people often occurred."

(ii) The Minister of Education, while giving an opinion for amendment to the effect that part of the revised draft description, from "but in Korea, the battlefield" through to the end, should be deleted because what kind of event was indicated by the term "anti-Japan movements" was unclear (i.e. whether or not the term referred to the second occurrence of the Donghak Rebellion) and the draft description in question was difficult for teachers and students to understand and was likely to hinder the implementation of educational guidance. The minister approved the revised textbook on the condition of such amendment.

(iii) In response to this opinion for amendment, the appellant revised the draft description as follows: "In 1894, the Sino-Japanese War eventually broke out. The Japanese Army continued to win battles through to the following year, but in Korea, the battlefield, the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies." The Minister of Education found the condition to have been met by this revision, and approved the final version of the revised description.

2(i) In light of the process wherein the examination was conducted, it is obvious that the minister's opinion for amendment judged the draft description of "anti-"Japan movements by Korean people" to be unclear

in meaning and difficult for high school teachers and students to understand, based on the assumption that the said description was a view that had not yet been introduced to academic circles, even where it was based on the findings of advanced academic study.

(ii) However, the judgment of prior instance, on the other hand, found the fact that "Study of the Sino-Japanese War" written by NAKATSUKA Akira, a professor of Nara Women's University, and "Sino-Japanese War and Korea" written by Park Jong-Guen, a lecturer of Tsuru University (currently professor of Kumamoto College of Commerce), revealed the fact that when the Japanese Army advanced into Korea in order to fight with China (Qing Dynasty), Korean people not only attempted passive resistance by not cooperating with the Japanese Army but took up arms and actively resisted, and in the fall of 1894, open armed movements against Japan occurred in many places in Korea. The judgment of prior instance determined that based on the views presented by Professor Nakatsuka and Professor Park, it was possible to construe the draft description in question to refer to not only the Uprisings in the Fall of the Jiawu Peasant War, including the second occurrence of the Donghak Rebellion, but also any other types of systematic or sporadic anti-Japan movements by Korean people that occurred before or after the said uprisings.

(iii) Professor NAKATSUKA's book had already been published in 1968, and was highly evaluated by other scholars, IGUCHI Kazuki, an assistant at the Institute for Research in Humanities, Kyoto University, in his essay in *Nihonshi Kenkyu*, No. 99 (1968), and Kang Jae-Eun, a professor of Hanazono University, in his essay in *Shirin*, Vol. 51, No. 4 (1968). This book was also listed as one of the basic reference works on the Sino-Japanese War in "Shin Chosenshi Nyumon (New Introduction to Korean History)" edited by the Society for Korean History Study (1981), "Literature Guide for World History" edited by NAKAMURA Michio (1982), and "Geppo 26 (Monthly Report 26)," a supplement to "Nihon No Rekishi 26: Nisshin Nichiro (Japanese History 26: Japan-China and Japan-Russia)" (1976). Professor NAKATSUKA, in the sections under the theme of "Sino-Japanese War" and "Donghak Rebellion" in *Encyclopedia genre Japonica* published in 1974, also included the descriptions according to his view presented in the said book. All of these facts were found by the court of second instance. (According to the records, in "Literature Guide for World History," a book edited for high school teachers and students, Professor NAKATSUKA's book was introduced as a book "aimed to reveal the whole picture wherein the Sino-Japanese War occurred as Japan's first full-fledged war against a foreign state in its modern history.") The court of second instance did not find any academic view that denied the existence of active armed resistance by Korean people, which had been revealed by Professor NAKATSUKA, or questioned the historical nature of such resistance as anti-Japan movements.

(iv) The judgment of prior instance and the majority opinion of this court argue that at the time of the Examination, there was no textbook that described only the second occurrence of the Donghak Rebellion without mentioning the first occurrence, and for this reason, concluded that high school teachers and students would be confused to find only the description of the Uprisings in the Fall or the second occurrence of the Donghak Rebellion without the description of the first occurrence. However, the revised draft description covered not only the second occurrence of the Donghak Rebellion but also all of the other peasant uprisings that occurred before or after that, and refrained from mentioning the Donghak Rebellion so as to have students avoid misconstruing these uprisings as a religious war or purely domestic affairs.

(v) The revised draft description is thus based on the understanding that the active resistance by Korean people against the Japanese Army's armed advance into Korea upon the Sino-Japanese War differs in historical nature from the Donghak Rebellion, and in light of the circumstances surrounding academic views that were in favor of this view, the revised draft description cannot be judged to be erroneous. Furthermore, if the Minister of Education considered that while taking into consideration the conventional academic views, it would be better to describe the Donghak Rebellion as well for clearer understanding, it would be sufficient to give an opinion for improvement and request the appellant to add a description of the Donghak Rebellion; the need to go so far as to request deletion of the description of "anti-Japan movements by Korean people" cannot be found.

(vi) When the appellant, following the opinion for amendment, revised the description as "the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies," the Minister of Education found the condition to have been met by this revision, and approved the final version of the revised description. Comparing the revised draft description and the approved final description, it is apparent that neither of them mentioned the Donghak Rebellion, and the only difference was the change from "anti-Japan movements by Korean people often occurred" to "the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies." The fact that the Minister of Education found the condition for approval to have been met by this change should inevitably be construed to imply that the minister considered that when describing anti-Japan movements by Korean people separately from the Donghak Rebellion, a domestic warfare for religious reasons, these movements should be described only as passive resistance (non-cooperative attitude) and it would be inappropriate to describe them as active resistance in a textbook. However, despite the fact that some movements against the Japanese Army provoked by Korean people occurred as active resistance, with a great number of Korean people

taking up arms (according to the records, it is found that the aforementioned books written by Professor NAKATSUKA and Professor Park described the fact that in the fall of 1894, hundreds of, or sometimes tens of thousands of Korean people provoked armed uprisings against the Japanese Army), the opinion for amendment in question resulted in having the appellant make a revision to describe only passive resistance (non-cooperative attitude) of Korean people. This is unreasonable and inappropriate from the perspective of selecting a historical matter to be described in a textbook.

Although the judgment of prior instance argues that the opinion for amendment in question meant to have the applicant clarify the content of the draft description from a technical viewpoint in the field of education so as to enable students to understand the historical matter correctly, it is not clear at all what aspect of the historical matter could be understood correctly by teachers and students thanks to such change in the draft description.

(vii) When describing modern and current history, selection and evaluation of historical matters to be described should not be conducted only from the viewpoint of the development and interest of one's own country but should be conducted from a broader perspective. This is obvious from the fact that the revision to the Old Examination Standards in 1982 provided for a new requirement that "due consideration shall be given, from the perspective of international understanding and international cooperation, to the treatment of historical matters that occurred in the modern and present-day eras between Japan and Asian countries" (Chapter 3, Section 2 [Necessary Requirements for Social Studies] I-3(15)). The draft description of "anti-Japan movements by Korean people" discusses the Sino-Japanese War not only in the context of Japan's modernization but also from the aspect of the impact on Korean people of the Japanese Army's armed advance into Korea. No educational viewpoint can be found in the argument that the description based on such consideration should be deleted from a high school textbook on history. Rather, if an educational viewpoint is taken into consideration, attention should be paid to the following warning message: "Such a country that tells a lie in a textbook---in particular, describes events that occurred very recently by using a rhetoric device and disguising them---will soon collapse" (SHIBA Ryotaro, "Taidanshu: Higashi To Nishi (Dialogue: East and West)," page 243).

3. It should be deemed that in the process of giving the opinion for amendment to the effect that the draft description in question was difficult to understand and inappropriate in selection and treatment of the content, the Minister of Education made a considerable error not only in understanding the circumstances surrounding academic views but also in giving due consideration from an educational viewpoint, and went beyond the bounds of his/her discretionary power illegally.

III. Concerning the description of "acts of cruelty by Japanese troops"

1. The court of second instance determined the following facts.

(i) With respect to the description in the footnote of the original textbook, "In particular, the Eighth Route Army created a wide range of liberated districts mainly in North China, and with support from local inhabitants, made attacks repeatedly on Japanese troops whose control was maintained only at points or along lines thereby annoying Japanese troops that had poor experience in guerrilla warfare," the appellant filed an application for examination for revision so as to add the following description after this description: "Because of this, Japanese troops killed local inhabitants, burnt away villages, and sexually assaulted women all over the place, causing immeasurable damage to the lives, chastity and property of Chinese people."

(ii) In response to this application, the Minister of Education gave an opinion for amendment to the effect that because sexual assault by soldiers against women was a universal phenomenon that therefore the additional description targeting Japanese troops alone was inappropriate in selection and treatment of the content and overemphasizing a specific matter. The minister approved the revised textbook on the condition of such amendment.

(iii) The appellant, following this opinion for amendment, deleted the phrases "sexually assaulted women" and "chastity" from the additional description and revised it as follows: "Because of this, Japanese troops killed local inhabitants and burnt away villages all over the place, causing immeasurable damage to the lives, chastity and property of Chinese people." The Minister of Education judged the condition to have been met by this revision, and approved the final version of the revised description.

(iv) Reviewing the circumstances surrounding academic views at the time of the Examination, it can be found that a lot of historical materials as well as the university professors' views (FUJIWARA Akira, a professor of Hitotsubashi University, and EGUCHI Keiichi, a professor of Aichi University) argued that during the period of the Japan-China War, Japanese troops frequently committed violation of chastity, and pointed out an abnormally large number of acts of violation of chastity committed by Japanese troops in the battlefields throughout China. On the other hand, there was another view, such as the one presented by KOJIMA Noboru, which was cautious about asserting the Japanese troops' commission of rapes as a particularly distinctive phenomenon. Furthermore, there was no material that specifically depicted Japanese troops' violation of chastity in the battlefields mainly in North China. Nor was there a dominant academic view arguing that Japanese troops' violation of chastity in the battlefields in North China was distinctively more frequent or cruel to the extent that it should be addressed separately from similar violations that occurred in battlefields in other areas of China.

2. The judgment of prior instance determined that the draft description in question depicted Japanese troops' violation of chastity in North China, and since there was no academic view or material arguing that such violation of chastity was distinctively more frequent in North China, no considerable error can be found in the minister's opinion for amendment given by reason that the description was overemphasizing a specific matter. The majority opinion of this court affirms this determination.

3. However, I cannot agree with reading the revised draft description as focusing on North China.

(i) It is true that the draft description in question was to be added to the footnote in the textbook, "In particular, the Eighth Route Army created a wide range of liberated districts mainly in North China, and with support from local inhabitants, made attacks repeatedly on Japanese troops whose control was maintained only at points or along lines, thereby annoying Japanese troops that had poor experience in guerrilla warfare." The said footnote pertains to the relevant description in the main text as a whole. From the content of the said description in the main text, "while throwing an enormous amount of manpower and armament in a wide range of battle lines, the Japanese Army was unable to subdue the persistent resistance of Chinese people led by the Nationalist Party (Kuomintang) and the Communist Party until the Japanese surrender in August 1945," it is obvious that the said description pertains to the whole land of China. Furthermore, considering that the footnote used a phrase with a broad meaning, "mainly in North China," as well as other phrases that refer to the whole land of China, e.g. "all over the place" and "Chinese people," and that the revised draft description in the footnote is connected with the description of the human experimentations committed by Unit 731 in the suburbs of Harbin, China, it is not inevitably necessary to read the said part of the revised draft description as focusing on events that occurred only in North China but rather it is natural to read it as pertaining to the Japan-China War as a whole.

(ii) In fact, neither party to this suit alleged, in the first or second instance, that the description in question focused on North China; rather, both parties presented their allegations and proof based on the assumption that the said description pertained to the battlefields throughout China. Therefore, the judgment of prior instance, which concluded that there was no proof of the fact that Japanese troops frequently committed violation of chastity in China based on the assumption that the said description focused on North China, should be deemed to have affirmed the minister's opinion for amendment by making determination based on an interpretation of the description that neither party asserted, and in this respect, it should inevitably be regarded as extremely strange.

(iii) Furthermore, if the Minister of Education construed the revised

description to focus on North China, it would have been sufficient for the minister to give advice and guidance to delete or correct the conjunction "because of this" or make other literal amendments so as to avoid the relevant part of the additional description from being construed in such a manner, and no reason can be found for ordering deletion of the phrases "sexually assaulted women" and "chastity" from the said description.

(iv) In the first place, it is obvious that the reason why the minister gave the opinion for amendment to order deletion was not at all because there was no academic view or material arguing that Japanese troops' violation of chastity was particularly frequent in North China, but because sexual assault by soldiers against women during wartime was a universal phenomenon and therefore it was not necessary to target Japanese troops alone. The court is only required to judge whether or not it is illegal for the minister to give an opinion for amendment for such a reason; it cannot be deemed that the court should replace the reason given by the minister for the opinion for amendment with a different reason given by the court and then judge prosperity of the opinion based on the latter reason.

4. Next, based on the assumption that the draft description in question pertains to the battlefields throughout China, I hereby judge legality of the opinion for amendment given by reason that sexual assault by soldiers against women was a universal phenomenon and therefore the additional description targeting Japanese troops alone was inappropriate in selection and treatment of the content and overemphasizing a specific matter.

(i) With regard to Japanese troops' assaults against Chinese women, the judgment of prior instance found that reviewing the circumstances in academic circles at the time of the Examination, there was an argument that Japanese troops had committed violation of chastity against Chinese women in the battlefields throughout China, and the number of such acts of violation had been abnormally large. Consequently, if the Minister of Education requests deletion of the draft description based on the opposing academic view that alleges the difficulty in asserting that the number was particularly large, it would be equal to requesting deletion of a description that is based on a generally accepted academic view, and in this context, the minister should be deemed to make a considerable error in understanding the circumstances surrounding academic views.

(ii) Furthermore, where the minister gives an opinion for amendment to the effect that when describing the damage caused by Japanese troops throughout China, a description that targets Japanese troops alone for committing violation of chastity is inappropriate in selection and treatment of the content and therefore should be deleted by reason that sexual assault by soldiers against women is a universal phenomenon, this opinion is impermissible because it hides from eyes the serious

damage caused by Japanese troops to people in the neighboring countries during wartime. Although it is true that there are many examples in history wherein troops sexually assaulted women during wartime, when we think of how deep a wound Japanese troops caused to the people in China and other neighboring countries by committing a number of acts of violation of chastity against Chinese women during the period of the Fifteen-Year War in the 20th century and how serious the impact of such wound is, we should find that requesting deletion of the said description as a condition for approval is, rather, contrary to the provision of the Old Examination Standards, Chapter 3, Section 2, I-3(15), which requires due consideration from the perspective of international understanding and international cooperation between Japan and its neighboring countries. Describing in a textbook the damage caused by Japan to the people of the neighboring countries in the modern and present-day eras is not a special or one-sided option, nor does it humiliate our own history. I can find no reason for excluding, in the examination procedure for our high school textbooks on Japanese history, the view that "anyone who closes his eyes to the past is blind to the present. Whoever refuses to remember the inhumanity is prone to new risks of infection" (Speech by Richard von Weizsacker, President of the Federal Republic of Germany [Japanese translation edited by NAGAI Kiyohiko, 10]).

5. I should say that in the process of giving the opinion for amendment to the effect that the additional description was inappropriate in selection and treatment of the content and especially overemphasizing a specific matter, the Minister of Education made a considerable error not only in understanding the circumstances surrounding academic views or materials but also in giving due consideration from an educational viewpoint, and went beyond the bounds of his/her discretionary power illegally.

The dissenting opinion by Justice OZAKI Yukinobu concerning the issues mentioned in XII-2 and 3 above is as follows.

Contrary to the majority opinion, I find it illegal for the Minister of Education to have given the opinions on amendment with regard to the draft descriptions on "anti-Japan movements by Korean people" and "acts of cruelty by Japanese troops," for the following reasons.

I. Concerning the description of "anti-Japan movements by Korean people"

1. According to the facts determined by the court of second instance, when giving the notice of the reason for the opinion for amendment to request deletion with regard to the draft description of "anti-Japan movements by Korean people," Senior Specialist for Textbooks A explained that the draft description in question did not satisfy one of the necessary requirements under the Old Examination Standards, I. [Content of textbooks and treatment thereof], 3 (Selection and

treatment), (1) "the textbook shall not contain any inappropriate aspect in selection and treatment of main texts, questions, and materials, which is likely to hinder the implementation of educational guidance."

Therefore, in this case, we should consider whether or not the draft description of "anti-Japan movements by Korean people" is inappropriate to the extent that it is likely to hinder the implementation of educational guidance unless it is deleted.

2. "Study of the Sino-Japanese War," the book written by NAKATSUKA Akira, a professor of Nara Women's University, and published in 1968, made known in academic circles the fact that when the Japanese Army advanced into Korea in order to fight with China (Qing Dynasty), Korean people not only attempted passive resistance by not cooperating with the Japanese Army but took up arms and actively resisted, and in the fall of 1894, open armed struggles against Japan, generally referred to as the Uprisings in the Fall of the Jiawu Peasant War, occurred in many places in Korea. Professor NAKATSUKA, in the sections under the theme of "Sino-Japanese War" and "Donghak Rebellion" in Encyclopedia genre Japonica published by Company C in 1974, also included the descriptions according to his view presented in the said book. In these books, Professor NAKATSUKA distinguished the Donghak Rebellion and the Jiawu Peasant War and regarded the Uprisings in the Fall of the Jiawu Peasant War, in particular, as national liberation struggles by Korean people against the Japanese invasion. This view was highly evaluated by other scholars in Japanese history, and his book, "Study of the Sino-Japanese War," was listed as one of the basic reference works on the Sino-Japanese War in "Japanese History 26" published by Company C (1976), "New Introduction to Korean History" edited by the Society for Korean History Study (1981), and "Literature Guide for World History" edited by NAKAMURA Michio, et al. (1982). Furthermore, other books presented views that were similar to Professor NAKATSUKA's view on the nature of the Sino-Japanese War and that of the Jiawu Peasant War, including "Sino-Japanese War" written by FUJIMURA Michio, a professor of Sophia University (1973), "Jiawu Peasant War" written by Kang Jae-Eun, a professor of Hanazono University (included in Iwanami Koza, "World History 22"; 1969), and "Sino-Japanese War and Korea" written by Park Jeong-Gun, a lecturer of Tsuru University (currently professor of Kumamoto College of Commerce) (1982). These facts were determined by the court of second instance.

On the other hand, according to the records, we can also find that most conventional history books and history textbooks regarded the first occurrence of the Donghak Rebellion as the factor that triggered the Sino-Japanese War, and explained that when the Donghak rose to action against the regime of that time, the government requested help from China (Qing Dynasty) for putting down the uprising, and China dispatched troops as requested, and then Japan also dispatched troops

for fear that China might gain control over the Korean Peninsula, which finally resulted in the outbreak of a war between Japan and China. Before the revision in question was made, the Textbook presented the description, "China was displeased with Japan's advance into Korea, ...and incidents occurred on two occasions between Japan and China ...over the hegemony in Korea. Japan continued to fight with China which asserted Korea as its dependency, with the aim of establishing Japan's control over Korea." Following this, the Textbook explained that the relations between Japan and China became worse after the occurrence of the Donghak Rebellion, and then concluded the section by stating "in August 1894, the Sino-Japanese War broke out eventually." Thus, the Textbook also described the Donghak Rebellion as the direct factor that triggered the Sino-Japanese War.

3. As reviewed above, although conventional history books and history textbooks described the first occurrence of the Donghak Rebellion as the direct factor that triggered the Sino-Japanese War, the fact is that the Sino-Japanese War was triggered by the conflict between Japan and China over the hegemony in the Korean Peninsula. Since this fact is clearly stated in the Textbook, a description of the Donghak Rebellion cannot be deemed to be absolutely necessary, and even if a description of the Donghak Rebellion is omitted as in the draft description submitted upon the appellant's application for examination for revision, such omission will not hinder the process of enabling students to understand the Sino-Japanese War.

Furthermore, the draft description in question was also intended to describe the fact that Korean people resisted against the Japanese Army's advance into the Korean Peninsula. The Minister of Education's opinion for amendment with regard to this draft description did not request that the Donghak Rebellion should be described as the factor that triggered the Sino-Japanese War.

4. As explained in 2 above, the fact that anti-Japan movements by Korean people occurred during the period of the Sino-Japanese War was generally known since it was revealed by Professor NAKATSUKA in his book "Study of the Sino-Japanese War," and Professor NAKATSUKA and other scholars had a view that these anti-Japanese movements by Korean people had a different nature from that of the first occurrence of the Donghak Rebellion. Given such circumstances, a description of the first occurrence of the Donghak Rebellion cannot be deemed to be necessary for describing anti-Japan movements by Korean people, and it should be concluded that the lack of a description of the first occurrence of the Donghak Rebellion will not hinder the process of teaching students about the fact of anti-Japanese movements by Korean people. Conventional textbooks mentioned the Donghak Rebellion only as the factor that triggered the Sino-Japanese War. The court of second instance did not determine that there was a textbook that regarded the Donghak Rebellion as anti-Japan movements, and the existence of such

textbook was not found in the records. Consequently, the fact that other textbooks describe the first occurrence of the Donghak Rebellion cannot be a ground for requesting the same description to be included in the draft description which addresses anti-Japan movements.

In this respect, the court of second instance held as follows: "The popular uprisings that occurred in Korea in the fall of 1894 have conventionally been explained with the name of the second occurrence of the Donghak Rebellion or described with the name of Uprisings in the Fall of the Jiawu Peasant War. Therefore, if the said popular uprisings are, as in the draft description, simply described as 'anti-Japan movements by Korean people' without any explanation regarding the relevance with the events that have conventionally been referred to with these names, what historical event is indicated by this description and from what perspective it is described cannot be clearly identified, and furthermore, there is concern that the said description is likely to cause confusion with the recognition of the events that have generally been referred to as the Donghak Rebellion (including its second occurrence) or the Jiawu Peasant War."

However, by arguing such concern, the court of second instance ignored the circumstances surrounding academic views at the time of the Examination as found by the court, wherein Professor NAKATSUKA's study had been published in 1968 and supported by many scholars for more than ten years since then, and in light of such circumstances surrounding academic views at that time as well as the level of knowledge and capacity to understand expected for high school teachers in general, the existence of such concern should be denied.

Furthermore, since it has generally been known that events generally referred to as the second occurrence of the Donghak Rebellion or the Jiawu Peasant War occurred in 1894 and no other event has been known, it is obvious that if teachers read the draft description and look into a general history book, they will necessarily arrive at the said events. This means, even where the first occurrence of the Donghak Rebellion is not described in the textbook, high school teachers and students would not face difficulty in teaching or studying the relevant events.

5. In response to the minister's opinion for amendment, the appellant adopted the following description as the final version: "In 1894, the Sino-Japanese War eventually broke out. The Japanese Army continued to win battles through to the following year, but in Korea, the battlefield, the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies." The judgment of second instance held that there was no evidence showing the "process whereby the final description was adopted," nor was there any evidence showing that the content of the final description had been determined according to the instruction of the examination authorities. It is easy to presume that since the Minister of Education rejected the draft description, the

publisher and the author, who wished to publish the textbook as one examined and approved by the minister, had no option but to make a concession to the minister's opinion. Even apart from this situation, in light of the fact that the final description was approved, the Minister of Education can be deemed to have determined that the draft description, "in Korea, the battlefield, anti-Japan movements by Korean people often occurred," did not satisfy the Old Examination Standards, but the final description, "in Korea, the battlefield, the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies," satisfied the Old Examination Standards.

The draft description and the final description differ from each other only between the phrase "anti-Japan movements by Korean people often occurred" in the former and the phrase "the Japanese Army was often unable to obtain cooperation from local citizens in labor and material supplies" in the latter, and there is no significant difference in the context before and after these phrases. Both descriptions depicted Korean people's resistance or rebellion in abstract expressions, without specifying a particular incident. Nevertheless, the Minister of Education argued that, with respect to the former description, what kind of event was indicated by this description was unclear unless it was connected with the names such as the Donghak Rebellion or the peasant war and therefore it would hinder educational guidance, whereas with respect to the latter description, although it was identical to the former description in that both descriptions depicted the fact of resistance in abstract expressions, the minister argued that it would not hinder educational guidance without being connected with the names such as the Donghak Rebellion or the peasant war because, as pointed out by the court of second instance, "from what perspective such a historical matter is indicated by this description can be clearly identified."

As reviewed above, while determining that teachers would face difficulty in teaching "anti-Japan movements" unless this event is connected with the Donghak Rebellion, the Minister of Education seems as if arguing that such difficulty could be avoided by describing that event as "non-cooperative attitude" instead. However, if an abstract and general statement on the non-cooperative attitude, as the one in the final description, would cause no confusion or difficulty in the implementation of educational guidance, it should follow that another abstract and general statement on "anti-Japanese movements by Korean people," as the one in the original draft description, would also cause no confusion or difficulty. It is difficult to find a reason for requesting only the appellant's draft description to include a statement on the first occurrence of the Donghak Rebellion.

6. Consequently, the draft description of "anti-Japan movements by Korean people" cannot be deemed to be inappropriate to the extent that it is likely to hinder the implementation of educational guidance unless it is deleted, and illegality can be found in the Minister of Education's

opinion for amendment with regard to the said draft description.

II. Concerning the description of "acts of cruelty by Japanese troops"

1. The first reason that I disagree with the majority opinion relates to how to read the draft descriptions concerned.

(i) The main text on page 277 of the Textbook stated that in the Japan-China War, the Japanese Army faced resistance by the Nationalist Party (Kuomintang) Army and the Eighth Route Army in a wide range of battle lines, and that "the Japanese Army was unable to subdue the persistent resistance of Chinese people led by the Nationalist Party (Kuomintang) and the Communist Party until the Japanese surrender in August 1945." The draft description in question is intended to add two sentences following the sentence originally included in the footnote for the said description in the main text. The original sentence (first sentence) is as follows: "In particular, the Eighth Route Army...mainly in North China, ...thereby annoying Japanese troops that had poor experience in guerrilla warfare." The additional sentences are as follows: "Because of this, Japanese troops...causing immeasurable damage to the lives, chastity and property of Chinese people" (second sentence) and "Furthermore, ... Unit 731 was established in the suburbs of Harbin, and this unit, for many years...continued to commit cruel acts..." (third sentence). The three sentences in the footnote were placed in succession in a single paragraph.

Since it was publicly known that the Eighth Route Army conducted particularly outstanding activities mainly in North China, it is obvious that the first sentence in the said footnote was inserted as a supplementary description of the manner of the resistance by China, which was discussed in the main text. The second sentence also serves as a note for the description in the main text concerning the persistent resistance of Chinese people throughout a wide range of battle lines, by stating the fact that "because of this, Japanese troops" took actions to suppress such resistance "all over the place" and describing how they took such actions. The third sentence, which describes the human experimentation committed by Unit 731 "in the suburbs of Harbin," should also be read as showing Japan's quest for a method for coping with the resistance by Chinese people as discussed in the main text. It is obvious that the description in question that begins with the phrase "because of this," together with the first sentence, forms a footnote for the relevant description in the main text, because (i) it clearly states that Japanese troops committed the acts mentioned therein throughout a "wide range of battle lines" in China by inserting the particular phrase "all over the place," and (ii) the third sentence that begins with the "furthermore" does not have any particular connection with the guerrilla attacks in North China, and therefore Unit 731 is regarded as a counterattack against the resistance by Chinese people discussed in the main text. Taking these into consideration, the phrase "because of this"

should inevitably be construed as a conjunction which pertains to both the second and third sentences. If, as argued by the majority opinion, the second sentence is considered to be connected with the first sentence alone, the continuity between the phrase "because of this" and the third sentence would be broken and the relevance between the third sentence and the main text would be made unclear, in which case it would be impossible to clearly indicate that the third sentence forms part of the footnote for the main text.

(ii) In fact, the appellee continued to read the draft description in the manner mentioned in the preceding paragraph. More specifically, the Minister of Education, since the oral notice of the opinion for amendment in December 1983, continued to request deletion of the descriptions on Japanese troops' violation of chastity against Chinese women from two footnotes, i.e. the footnote on the Nanjing Incident and the second sentence of the footnote in question. The State, the appellee, never distinguished these footnotes throughout the nine years during which this suit was pending in the fact-finding proceedings. Since Senior Specialist for Textbooks A gave the notice of the reason, throughout the first and second instances, the Minister of Education asserted the propriety of the opinion for amendment that requested deletion of both the footnote on the Nanjing Incident and the footnote in question, stating as follows: With respect to the description "there were many who sexually assaulted women," "although it can be found that [this] actually happened", "such an event had happened in many battlefields of many times" and "targeting Japanese troops alone would be a problem in selection and treatment of the content." Thus, in the process of conducting the Examination and carrying out the suit, the appellee was never conscious of the distinction between the case in Nanjing and the case mainly in North China.

Furthermore, there is evidence showing that the Minister of Education also understood that the draft description in question meant to refer to "all over the place in China." When the Minister of Education gave the opinion for improvement to the effect that the phrase "all over the place" could be construed to mean "all over the place in the liberated districts" and correction should be made accordingly, the appellant presented a counterargument that this kind of misconduct was committed not only in the liberated districts but all over the place in China, by citing the reference work recording the realities that the unit commander stationed in Chaozhou (Guangdong Province, near Shantou) had admitted as well as another reference work recording the behavior of the commander of the unit stationed in the Hainan Island (Diaries of the graduates of Shizuoka High School who died in the war; Evidence Ko No. 20). Taking into consideration the facts that the Minister of Education showed this view not in an opinion for amendment but in an opinion for improvement, which is effective only as advice or guidance, and did not strongly object to using a broader expression, "all over the place," and

since then, the minister presented no allegation regarding the place where the misconduct occurred, it can be found that the minister, having received the appellant's explanation on the case in South China, understood that the draft description meant to refer to "all over the place in China."

Also according to these facts, it is obviously contrary to the Minister of Education's view as well as the appellant's view to read the footnote in question as describing Japanese troops' violation of chastity in North China.

(iii) Since the footnote in question should be construed to pertain to the battlefields throughout China, the Minister of Education should inevitably be deemed to lack a reasonable ground for having judged the said footnote to be overemphasizing a specific matter and therefore in violation of the Examination Standards by reason that the accused misconduct was an event common to all times and places, in line with the judgment of prior instance determining similar behavior of Japanese troops in the Nanjing Incident. The minister's opinion for amendment should be deemed to have wrongly construed or applied the Old Examination Standards.

2. The second reason that I disagree with the majority opinion is that where the court judges the Minister of Education's opinion for amendment to be legal based on a different reason than that found by the minister, such court judgment would infringe the appellant's legal interest guaranteed under the textbook examination system.

(i) The Minister of Education requested deletion of both the description of Japanese troops' violation of chastity upon the occupation of Nanjing which was included in the footnote on page 276 of the Textbook, and the description of similar violation of chastity which was included in the footnote on page 277 of the said textbook, without distinguishing these descriptions but giving a single reason applicable thereto. To be more precise, with regard to the descriptions "there were many who sexually assaulted Chinese women" and "(Japanese troops) sexually assaulted women," the minister stated that although it can be found that this actually happened, such an event had happened in many battlefields of many times in the history of human beings, and therefore targeting Japanese troops alone would be a problem in selection and treatment of the content. The Minister of Education maintained this view throughout the examination process, and during the proceedings in the first and second instance of this suit, the minister did not distinguish these descriptions when discussing the opinion for amendment.

However, the judgment of prior instance abruptly presented the conclusion that the minister's opinion for amendment targeting the description of Nanjing was illegal for having gone beyond the bounds of his/her discretionary power, whereas illegality was denied for the opinion for amendment targeting the description of North China because violation of chastity cannot be regarded as a distinctive event in North

China.

(ii) The aforementioned determination of the court of prior instance allows deletion of the draft description based on a different reason than that indicated by the Minister of Education in his/her opinion, which would lead to the same consequence as permitting textbook examination that is in violation of the examination procedure under the Old Examination Ordinance, and therefore should be judged to be illegal. The judicial precedent, 1986 (O) No. 1428, judgment of the Third Petty Bench of the Supreme Court of March 16, 1993, Minshu Vol. 47, No. 5 at 3483, held that textbook examination cannot be deemed to be contrary to the purport of Article 31 of the Constitution, which guarantees due process of law, by comprehensively taking into consideration the following facts: the Minister of Education shall make a decision to approve or reject a textbook pursuant to the provision of the Examination Ordinance based on the report of the Textbook Approval and Research Council, the minister's consultative body; the written notice of the reason for rejection shall specify the requirement under the Examination Standards that the textbook fails to satisfy; a Senior Specialist for Textbooks shall orally point out to the applicant the specific defects in the draft submitted while giving supplementary explanation, and shall respond to the applicant's questions on the minister's opinion, and in this procedure, shorthand clerks and recording devices are available; the applicant may, while taking into account the explanation and responses given thereto, file a second application for examination with regard to the initially rejected textbook. As the judicial precedent additionally mentioned, through the revision to the Textbook Examination Ordinance in 1977, guarantee of due process of law under the examination procedure was further strengthened by establishing a new system for giving advance notice of the reason for rejection and hearing the applicant's counterargument.

Furthermore, as the judicial precedent pointed out, it is because "the minister's opinion indicates defects in each description in the draft with a specific reason corresponding to the respective necessary requirement" specified by the Examination Standards, that the applicant is given the opportunity to present a counterargument and request the minister's reconsideration, and also because of such characteristics of the minister's opinion, the applicant is able to consider revision as suggested in the reason for rejection and file a second application while taking into account the reason for the final rejection of the initial application.

Therefore, rejecting a textbook for a reason other than that clearly specified in the notice of the reason for rejection should inevitably be deemed to be contrary to the core element of the procedures established under the examination system for guaranteeing the applicant's interest. In short, the aforementioned judgment of the Third Petty Bench concluded that the textbook examination procedure "should be implemented in line with the purport of the laws and regulations related

to textbook examination" and that the textbook examination procedure is not contrary to the purport of guarantee of due process of law under Article 31 of the Constitution as long as the series of procedures explained above were performed. Consequently, textbook examination conducted without compliance to the Old Examination Ordinance and other relevant provisions should inevitably be judged to be illegal.

(iii) In the process of conducting the examination in dispute in this case, upon the appellant's application, the procedures were performed by Senior Specialist for Textbooks A according to the Examination Ordinance, namely, giving the advance notice of the reason for conditional approval, orally providing supplementary explanation, responding to the appellant's questions, hearing the appellant's counterargument, and giving the notice of adoption or rejection of the counterargument with reason attached thereto.

Throughout the series of procedures outlined above, as the reason for the opinion for amendment, the Minister of Education consistently pointed out that Japanese troops' violation of chastity was the same kind of event that had happened in many battlefields of many times in the history of human beings, and therefore targeting Japanese troops alone would be problematic in terms of selection and treatment of the content. According to the facts found by the court of second instance, it is obvious that the Minister of Education did not mention, as the reason for the opinion for amendment, the difference in frequency and cruelty between the acts of violation of chastity committed in Nanjing and those committed in North China, and at the court of second instance, neither of the parties addressed such difference in their arguments or request for examination on evidence. In short, there is no evidence showing that the Minister of Education pointed out this difference as a reason for the opinion for amendment.

If we assume that the Minister of Education construed the draft description to focus on North China, this would mean that the minister gave the opinion for amendment only by reason that violation of chastity of women by soldiers was a universal phenomenon, while recognizing that "it can be found that this actually happened" in North China but giving no consideration to the places where such events occurred or the frequency and manner of such events. If so, the Minister of Education should be deemed to have failed to give a "specific reason" with regard to "each description" by focusing on North China, and therefore the minister is not allowed to make a decision to approve or reject the Textbook by reason that the description focused on North China, without completely carrying out the necessary procedures (should the minister be allowed to make a decision in such a manner, it would be equal to allowing the minister to make a decision of approval or rejection without going through the examination procedure). In fact, the appellee did not allege as such in the proceedings of this suit. Consequently, if the court, which is supposed to judge the propriety of

the Minister of Education's opinion for amendment, makes a judgment on this issue for a reason other than that expressed in the minister's notice, such court judgment would be contrary to the purpose of the textbook examination system explained in (ii) above and constitute complete denial of the appellant's legal interest guaranteed under the examination system and therefore it should not be permitted.

(iv) In short, the court is subject to the procedural restriction that it should review the propriety of the minister's opinion for amendment only within the scope of screening and determination under the examination procedure, and therefore the court shall not be permitted to judge the propriety of the minister's opinion for amendment by alleging a fact that has not been found as a reason for rejection under the examination procedure. Where a textbook contains a part that has not clearly been judged by the Minister of Education, after consulting with the Council, to be in violation of the examination standards, it follows that such part has been judged to be basically in conformity to the examination standards from a technical viewpoint. If the court should be permitted to judge such part to be in violation of the examination standards based on its own view, the applicant would be deprived of the whole interest that is guaranteed thereto through the complete performance of the necessary procedures for hearing the applicant's opinions under the examination system by providing the opportunities to receive the notice of the reason, receive supplementary explanation, make a counterargument, request reconsideration, draft a revision, and file a second application for examination with regard to the rejected textbook. Moreover, in such a case, the court would function as the second examination organ, dependent from the Minister of Education, which would basically go against the textbook examination system wherein, for the purpose of achieving very important public purposes such as ensuring neutral and fair education and maintaining a uniform level of education as well as ensuring fairness of examination, the authority to make an advanced technical judgment is vested entirely in a statutory organ. Consequently, the determination of the court of second instance, which judged the minister's opinion for amendment to be legal by reason of the factor that had not been mentioned by the minister (the distinction between Nanjing and North China), should inevitably be deemed to be illegal in that it has wrongly construed or applied the laws and regulations on textbook examination.

The dissenting opinion by Justice CHIKUSA Hideo concerning the issues mentioned in XII-4 above is as follows.

I cannot agree with the majority opinion in that it found illegality in the Minister of Education's opinion for amendment with regard to the draft description of "Unit 731" included in the appellant's application for examination for revision filed in September 1983, and quashed the judgment of prior instance in this respect. The reasons for my opinion

are as follows.

I. The majority opinion argues as follows: "Although among the publications revealing the actual state of Unit 731 that were available at the time of the Examination, many were written by writers and journalists who were not specialized in historical study, and the entire picture of Unit 731 had not yet become completely clear, we should say that the outline of the story that the Kwantung Army had a unit aimed at engaging in germ warfare, called Unit 731, and this unit killed many Chinese people by using them for human experimentation, had been established by the time of the Examination to the extent that no scholar in academic circles denied it. Taking into consideration this fact as well as the fact that by the time of the Examination, 38 years had elapsed since the end of the war, we should conclude that in the process of giving the opinion for amendment to the effect that the draft description in question should be deleted in whole by reason that it was too early to address the matter in a textbook, the Minister of Education made a considerable error in understanding the circumstances surrounding academic views at the time of the Examination and judging the draft description to be in violation of the Old Examination Standards, and went beyond the bounds of his/her discretionary power illegally."

II. However, although the fundamental fact that a military unit called "Unit 731" had existed and committed human experimentation was not denied at the time of the Examination, if the court, only because of this, determines that there is a considerable error in the Minister of Education's opinion for amendment and therefore the appellee, the State, is liable for damages under the Act on State Liability for Compensation, I couldn't help but find a kind of logical leap here.

In the examination of a draft description specified in an application for examination, it is important, first of all, to judge the existence or nonexistence of a fact as a prerequisite for making a decision to approve or reject the description, because the description specified in the application must be supported by a fact. However, the existence of a fact is not enough. Examining a textbook is not proving a crime or disputing in historical science. As this court explained in IX above, when making judgment under the examination procedure, the Minister of Examination "inspects the textbook submitted upon application from various perspectives such as whether or not the content of the textbook is academically accurate, whether or not it is neutral, and fair, whether or not it is appropriate for achieving the objectives of the relevant subject, and whether or not it is in accordance with the stage of physical and mental development of pupils or students. Such a technical judgment on academic and educational matters should be, due to the nature of the matters, left to the reasonable discretion of the Minister of Education." It follows that such determination made by the Minister of Education is judged to be beyond the bounds of his/her discretionary power and

illegal under the Act on State Liability for Compensation only in the case "where in the course of determining whether to approve or reject the textbook or the necessity of attaching a condition for approval and the content of such condition, the Textbook Council has made a considerable error in understanding the content of the descriptions in the draft or the circumstances surrounding academic views or education at the time of examination based on which defects are pointed out, or in determining the textbook to be in violation of the Old Examination Standards, and the Minister of Education is deemed to have made judgment based on the Textbook Council's erroneous report." Needless to say, the Minister of Education should make such a judgment not with regard to the existence or nonexistence of a certain fact, an abstract issue, but with regard to the specific description in the revised draft actually submitted upon application.

III. According to the records, the description in the revised draft in question was supposed to be added in the following context. In the Textbook submitted upon application for the examination for revision, Chapter 11 is entitled "Fifteen-Year War and Culture during the Wartime," and it contains a section entitled "1. Start of Japan's Armed Advance into China, and Trends in the Worlds of Thought and Culture," which is composed of subsections, each of which is less than one page, under the following subheadings: "Great Depression and Japan," "China's Awakening and Japan," "Occupation of Manchuria," "Participation in the Authoritarian Bloc," "All-out War with China," "Expansion of Munitions Industry," "Establishment of War Regime," and "Trends in the Worlds of Thought and Culture." Among these descriptions, the second part of the subsection entitled "All-out War with China" (pages 276 and 277) states that, triggered by the clash at the Lugou Bridge, Japan went into a state of all-out war with China and that the Japanese Army occupied Nanjing, China's capital, and other major cities and areas along with the main railroads, thereby extending battle lines throughout China, but the National Government led by Chiang Kai-shek continued to resist, and then ends with the following description: "while throwing an enormous amount of manpower and armament in a wide range of battle lines, the Japanese Army was unable to subdue the persistent resistance of Chinese people led by the Nationalist Party (Kuomintang) and the Communist Party until the Japanese surrender in August 1945." A number sign [1] is placed at the end of this description, and the section for explanatory notes at the bottom of the same page contains the following description: "[1] In particular, the Eighth Route Army created a wide range of liberated districts mainly in North China, and with support from local inhabitants, made attacks repeatedly on Japanese troops whose control was maintained only at points or along lines, thereby annoying Japanese troops that had poor experience in guerrilla warfare." The draft

description submitted upon application for the examination for revision did not make any modification to the main text or the note shown above, but only added the following description after the description in note [1], in the same paragraph: "Because of this, Japanese troops killed local inhabitants, burnt away villages, and sexually assaulted women all over the place, causing immeasurable damage to the lives, chastity and property of Chinese people. Furthermore, a germ-warfare unit called Unit 731 was established in the suburbs of Harbin, and this unit, for many years until the Soviet entry into the war, continued to commit cruel acts of capturing thousands of foreign people, mainly Chinese people, and using them for human experimentation and causing death." Reviewing the context mentioned above, what the appellant describes in the Textbook prior to revision can be summarized as stating that Japan went into an all-out war with China but failed to achieve success due to the persistent resistance by Chinese people, and the description in note [1] is intended exclusively to explain the specific circumstances concerning Japan's unsuccessful state in the war. However, the draft description submitted upon application for examination for revision is somewhat different from the original description, stating that Japanese troops caused immeasurable damage to Chinese people all over the place, and that a germ-warfare unit called Unit 731 was established and this unit continued to commit cruel acts of using Chinese people for human experimentation.

IV. Textbooks on Japanese history are compiled for the purpose of enabling young people who will lead the future of Japan to understand the real picture of Japan correctly, and in the global society where we currently exist, it is natural that in the process of compiling them, not only Japan's standpoint but also its relationships with foreign countries, in particular neighboring countries, should be taken into consideration. From this viewpoint, it is necessary to have young people correctly understand even the shameful conduct committed by Japan in the past, and by doing so, it will be possible to develop mutual understanding with people of the foreign countries concerned and contribute to establishing friendship and peace in the future. If so, all the more because of this, the fact to be described in a textbook must be not only accurate in itself but also able to be correctly understood in the context. However, the draft description for revision adds two events that are different in purpose from the original descriptions in the main text and the note, without distinguishing the events, and therefore at first reading, it is impossible to clearly identify the relevance between the additional description and the original descriptions in the main text and the note. In fact, with respect to the first sentence of the additional description, the majority opinion of this court (see XII-3) considered, as the court of second instance determined, that "considering that [the draft description in question]...begins with the phrase "because of this," the draft

description in question should inevitably be deemed to describe the Japanese troops' behavior in the battlefields mainly in North Korea where the Eighth Route Army created liberated districts." Based on this view, the majority opinion found that the Minister of Education did not go beyond the bounds of his/her discretionary power by giving the opinion for amendment to the effect that the part of the description concerning Japanese troops' violation of chastity was inappropriate (in this respect, I agree with the concurring opinion by Justice SONOBE Itsuo).

The next question is what is the meaning of the following part of the description concerning "Unit 731" in the context. Since this part follows the preceding part of the note in the same paragraph, it could be construed to be also connected with the phrase "because of this." However, reviewing the content, I can't think that such construction is not questionable at all.

V. I am in agreement with the majority opinion in that it points out that since the early times after the war until today, the existence of "Unit 731" and its conduct have been widely known and there has been no academic view that denies such fact. It is also true that 38 years had elapsed since the end of the war until the time of the Examination. However, as the court of second instance determined, it cannot be said definitely that accurate research and studies on the fact regarding Unit 731 were conducted during such a long period of time (for details, I would like to cite the dissenting opinion by Justice YAMAGUCHI, II and III, in order to avoid overlap). It is presumed that there were some reasons for the lack of accurate research and studies, but although no academic view was presented to deny the fact over a long period of time, this does not clarify the details or significance of the fact. Every one of us, Japanese people, should remember the acts of cruelty committed by the Japanese Army, "Unit 731," outside Japan, irrespective of whether or not they are described in textbooks, and if they are actually described in textbooks, they would have great significance. In light of such nature, when including this matter for the first time in a textbook compiled for young people who do not yet have sufficient knowledge of Japanese history, it is necessary to describe the matter correctly in terms of not only the existence of the fact but also its significance, and when describing the matter, the purpose and content of the description should be sufficiently inspected. Based on this presupposition, a good reason can be found where, given the circumstances surrounding academic views at the time of the Examination, the Minister of Education gave the opinion for amendment to request deletion of the draft description by reason that it was too early to address this matter in a textbook, and the minister cannot be deemed to have made a considerable error by giving such opinion. It is not that the minister gave an opinion to request deletion of a description that was

already adopted by other textbooks. If the Minister of Education should be deemed to have made a considerable error by making such a decision, it is as if denying the minister's authority to examine a textbook or construing the minister's discretionary power very narrowly, and I would not deny that it might contravene the judgment of the Third Petty Bench of the Supreme Court of March 16, 1993.

For the reasons stated above, I disagree with the majority opinion on "Unit 731," and I consider that the determination of the court of second instance on this issue should be affirmed as justifiable.

The dissenting opinion by Justice YAMAGUCHI Shigeru concerning the issues mentioned in XII-4 above is as follows.

Contrary to the majority opinion, I deny illegality in the Minister of Education's opinion for amendment with regard to the draft description of "Unit 731," and consider that the appellant's final appeal should be dismissed in this regard, for the following reasons.

I. Needless to say, when describing a historical matter, an empirical approach is required, which means that it is required to closely study historical materials and find supportive evidence without exception. Our forerunner said this in the following expressions: "You should never talk of anything that lacks evidence or ground to assert it" (ARAI Hakuseki, *Jinmeiko* (biographical study)); "In this book, I do not state my own view without evidence. Not a few descriptions are with no doubt and I mention them as being doubtful." (*Hankanfu* (collection of feudal lords' genealogies), explanatory note).

Although there is an enormous amount of materials on modern and current history of Japan, the activities for identifying such materials have not been carried out systematically or comprehensively. In addition, due to the discovery of new materials and the review of the conventional understanding and evaluation of historical facts, consensus on historical views has not yet been established in many areas.

Consequently, when teaching modern and current history, it is necessary to examine, from a broad perspective, not only the reliability of the materials to be used but also the appropriateness of the selection of the materials, while giving consideration to providing students access to other materials produced from different viewpoints or standpoints. This may be reflected in a requirement in the "treatment of the content" section of Japanese History in the Courses of Study for High Schools (Public Notice of the Ministry of Education No. 163 of 1978): "(2) when teaching modern and current history, it should be ensured that students will understand historical facts based on objective and fair materials." This is also necessarily required when describing matters in history textbooks.

From this perspective, evaluation may differ in terms of appropriateness of the selection of the content of a textbook and the level of the selected content. Where the Minister of Education has given an opinion with

regard to the selection of the content of a textbook submitted upon application for examination and the level of the selected content, whether or not there is any considerable error in the minister's opinion, which questions not the accuracy of the draft description from an academic viewpoint but its appropriateness from an educational viewpoint, should be examined by considering whether or not the matters addressed in the textbook can be judged to be inappropriate in light of the objectives of the relevant subject specified by the Courses of Study or the stage of physical and mental development of pupils or students. This is indicated in the court opinion.

II. The outline of the facts determined by the court of second instance is as follows.

By the time of the Examination, a total of 36 reference works and materials on Unit 731 had been published, including two reprinted editions of the previous publications and several revised editions, and these publications were frequently reported in newspapers and television programs at that time. In particular, the book in three volumes released by writer MORIMURA Seiichi during the period from 1981 to 1983, entitled "Akuma No Hoshoku (Devil's Gluttony)," depicted the actual state of Unit 731 in detail based on the following materials: [1] the statements of the former personnel of Unit 731, [2] the materials held by the US Army including examination reports on the former high-ranking officers of Unit 731, [3] the records of the Khabarovsk War Crime Trials, [4] the medical academic papers written by the former high-ranking officers of Unit 731, and [5] the information collected in China. This book created a sensation and attracted public attention. By the time of the Examination, other academic books discussing the existence of Unit 731 had also been published: "Taiheiyo Senso (Pacific War)" written by the appellant (1968); "Kieta Saikinsen Butai: Kantogun 731 Butai (Vanished Germ Warfare Unit: Kwantung Army Unit 731)" written by TSUNEISHI Keiichi, an assistant professor of Nagasaki University (1981); "Saikinsen To Jiketsushita Futari No Igakusaha (Germ Warfare and Two Medical Scientists Who Killed Themselves)" jointly written by TSUNEISHI Keiichi, and ASANO Tomizo, journalist (1982). This topic was also addressed in a foreign book, "A Hidden Chapter in History" written by John Powell. There is a view that highly evaluates "Devil's Gluttony" and "Vanished Germ Warfare Unit" and argues that in academic circles of modern and current history of Japan, by the time of the examination in 1983, the fact of Unit 731 had already been sufficiently confirmed to the extent that it is described in the draft of the Textbook. However, on the other hand, the basic material used for writing "Devil's Gluttony" and "Vanished Germ Warfare Unit" were criticized as follows. (1) Since the publication based on the records of the Khabarovsk War Crime Trials, which was used as the basic material for writing these books, lacks a colophon or preface that is usually

attached to this kind of publication, it is impossible to identify its history (e.g. translator, publisher in Japan, publication date). Furthermore, there are many questions about its reliability as historical material, e.g. why this publication, which had been printed in Moscow, was issued in Japan which was under US occupation. Therefore, careful examination is required when using this publication, of which the original copy is unavailable for inspection, for academic purposes (The author of "Devil's Gluttony" pointed out that the records of the Khabarovsk War Crime Trials were nothing more than a documentary work about the winner who judged the loser, and in combination with the mixed intentions and feelings of the former soldiers who made statements therein, the publication, though hinting at the reality of Unit 731, did not accurately describe the entire picture of the unit.) (2) The materials held by the US Army, which were also used as basic material for writing "Devil's Gluttony," may be valuable as materials, but considering that they were obtained as a result of the US Army's examination conducted in Japan under occupation, they are questionable in terms of voluntariness and credibility of the statements made by the examined people and the scope of matters stated (human experimentation and other important matters are excluded), and therefore it is necessary to treat them carefully. It was not until 1981 or 1982 that these materials became accessible to researchers in general in the United States. Before the examination in 1983, only a small portion of the materials was made public in Japan, and therefore they cannot be deemed to have been tried sufficiently as historical materials. (3) The statements of the former personnel of Unit 731, which were also used as materials for writing "Devil's Gluttony," are questionable in terms of reliability and it is risky to use them unconditionally, because: (i) although the statements were mainly related to medical issues, most statements were obtained from lower-rank personnel who were not qualified as doctors (most of them were anonymous) and no statement was obtained from higher-rank personnel, mostly qualified as doctors, and (ii) the statements in question lack documentary support. (4) Many other reference works and materials recording statements made by related persons were memoirs written by lower-rank personnel or collections of hearsay reports and rumors compiled by journalists, and they were not presented as academic study books after their reliability was sufficiently examined. There are other arguments regarding the basic materials of the books on Unit 731. The book entitled "Pacific War" was mainly based on the records of the Khabarovsk War Crime Trials, and apart from this, no other materials were used except for articles published in non-scientific magazines and therefore it is questionable in terms of reliability as historical materials. The book written by Assistant Professor TSUNEISHI contains a formality defect in that it lacks notes that are generally attached to academic study books, and it also has problems in that the descriptions therein cannot be presented in such a manner that a

third party can verify the reference works or materials that they are based on, and that some important descriptions are completely based on supposition. Another book, "Devil's Gluttony," does not clarify the materials that it is based on in the manner generally applied to academic books and therefore it is difficult for other researchers to verify credibility of its content. It is also argued that by the time of the Examination in FY1983, the study on Unit 731 had not yet been achieved sufficiently, nor had it yet reached the level of academic study where it could be described in high school textbooks.

III. Given the circumstances outlined above, at the time of the Examination in FY1983, there were a number of reference works and materials concerning Unit 731, but many of them were problematic from an academic viewpoint, including those that should be treated carefully because the original copy was unavailable for inspection, those that had not been disclosed for long and not yet been criticized among researchers as historical materials, and those that were not compiled in the form of academic books and therefore difficult for other researchers to verify in terms of credibility of the content thereof. Therefore, the argument that the study on Unit 731 was insufficient at the time of the Examination in FY1983 can be deemed to be reasonably-grounded to a considerable extent.

Under the aforementioned circumstances surrounding academic circles at that time, if an empirical approach is taken as required when describing matters in history textbooks, the determination of the court of second instance should be found to be affirmable in that it concluded as follows: At the time of the Examination, the study on Unit 731 was still in the stage where relevant materials were discovered and collected and facts were about to be unveiled little by little. It cannot be said that the facts disclosed by that time had sufficiently been verified, and therefore it should inevitably be said that reliable materials were insufficient to describe this matter in a textbook. In conclusion, no considerable error can be found in the process whereby the Minister of Education gave the opinion for amendment by reason that it was too early to address this matter in a textbook.

IV. On this point, the majority opinion held as follows: "It is obvious that by the time of the Examination, many reference works and materials on Unit 731 had been published, including the appellant's book published in 1968, and not all these previous reference works and materials were published immediately before the Examination. Considering that the court of second instance did not find that at the time of the Examination, there was a negative view about the existence of Unit 731, it seems that at the time of the Examination, there was no academic view that was negative about the existence of Unit 731, or at least such negative view was not generally known. Assuming so,

although among the publications revealing the actual state of Unit 731 that were available at the time of the Examination, many were written by writers and journalists who were not specialized in historical study, and the entire picture of Unit 731 had not yet become completely clear, we should say that the outline of the story that the Kwantung Army had a unit aimed at engaging in germ warfare, called Unit 731, and this unit killed many Chinese people by using them for human experimentation, had been established by the time of the Examination to the extent that no scholar in academic circles denied it. Taking into consideration this fact as well as the fact that by the time of the Examination, 38 years had elapsed since the end of the war, we should conclude that in the process of giving the opinion for amendment to the effect that the draft description in question should be deleted in whole by reason that it was too early to address the matter in a textbook, the Minister of Education made a considerable error in understanding the circumstances surrounding academic views at the time of the Examination and judging the draft description to be in violation of the Old Examination Standards, and went beyond the bounds of his/her discretionary power illegally.

However, the issue to be discussed in this case is not whether or not it is proper to describe the outline of the story on Unit 731 in a textbook, but whether or not it is proper to include, in the footnote on page 277 of the Textbook, a specific and assertive description as follows: "Furthermore, a germ-warfare unit called Unit 731 was established in the suburbs of Harbin, and this unit, for many years until the Soviet entry into the war, continued to commit cruel acts of capturing thousands of foreign people, mainly Chinese people, and using them for human experimentation and causing death." Given the circumstances surrounding academic circles at the time of the Examination, as found by the court of second instance, it is impossible to definitely conclude that by the time of the Examination, the content of the draft description in question had been established to the extent that no one denied it, and what is more, if an empirical approach is taken as required when describing matters in history textbooks, it should inevitably be concluded that by that time, a sufficient amount of reliable academic studies, papers or books had not been made available to the extent that the draft description of Unit 731 could be included in textbooks. Assuming so, it is appropriate for the Minister of Education to have given the opinion for amendment by reason that it was too early to address this matter in a textbook and that the draft description failed to satisfy one of the necessary requirements under the Examination Standards, I. [Content of textbooks and treatment thereof], 3 (Selection and treatment), "(2)the textbook shall contain illustrations, photographs, notes, maps, figures, and tables that are necessary for implementing educational guidance, and shall not contain any inappropriate ones." No considerable error can be found in the process where the Minister of Education made such judgment, and the

determination of the court of second instance that goes along with this reasoning must be deemed to be affirmable.

V. In conclusion, I find the appeal counsels' argument to be groundless, and consider that the final appeal should be dismissed.

**Presiding
Judge**

Justice ONO Masao

Justice SONOBE Itsuo

Justice CHIKUSA Hideo

Justice OZAKI Yukinobu

Justice YAMAGUCHI Shigeru

(This translation is provisional and subject to revision.)

(* Translated by Judicial Research Foundation)