MAJOR JUDICIAL DECISIONS

Jan. - Dec., 1981

1. Constitutional and Administrative Law

a. Constitutional Law

The judicial precedents in 1981 relating to the Constitution were controversial in many respects. The decisions were in one way or another centered on unarmed pacifism, the guarantee of the people's right to live and the right to work, and equality under the law.

There were also cases in which it was disputed whether or not the people have the right to privacy and environmental rights, although these are not expressly stated in the Constitution.

Taken up in this article are the judicial precedents related to the principle of demilitarized pacifism, which is one of the outstanding features of the Constitution. The trials and judicial precedents in question were byproducts of a great gap between ideal and practice, in that the Self-Defense Forces are actually in existence possessing the world's eight strongest war potential for all the Constitutional declaration of the principle of demilitarized pacifism and that there are bases of the U.S. Forces in Japan.

1. A case in which a request for an injunction against the U.S. Yokota Air Base for causing a public hazard was turned down.

Case No. (*wa*) 405 of 1976 and (*wa*) 1346 of 1977. Decision by the Hachioji branch of the Tokyo District Court on July 12, 1981. 1008 *Hanrei Jihō*. 19.

[Facts]

First, the background of the current case must be explained. The Yokota base of the U.S. Air Force was occupied and requisitioned by the U.S. Forces in 1945 following Japan's defeat in World War II. Since then, the U.S. Forces have been using the base under Article 6 of the Japan-U.S. Security Treaty.

During the Korean War in the early 1950s, it became the base of operations for U.S. B-29 bombers. With the intensification of the Vietnam War after 1965, highly explosive battle planes of the U.S. Forces used the base for landing and taking off. From about 1971 it has played an important role as an intermediary base for U.S. military air transportation backup forces.

From about the mid-1970s, the functions of the base were greatly strengthened and it developed into an all-out military base housing communications facilities, maintenance shops, housing quarters and recreational facilities.

Against such a background, the residents living around the base filed a request for an injunction against the state (defendant) on the ground that their personal rights and environmental rights had been violated, as they had suffered various damages such as destruction of their living environment, disturbance of their daily life, and mental and physical damage due to exhaust gas, vibration and noise caused by U.S. airplanes at the base.

They claimed as follows:

(1) In order to guarantee the personal rights and environmental rights of the residents in the neighborhood of Yokota Air Base, the state should not allow the U.S. Forces to use the base between 9 p.m. and 7 a.m. for landing and take-off.

(2) On the basis of the Law for Special Measures concerning Civil Cases to Implement Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan & U.S.A., regarding Facilities and Areas and the Status of U.S. Forces or the State Redress Act, the state should pay ¥1 million to each person as compensation for past damages and ¥20,000 to each person every month until such time when night flights are suspended.

[Opinions of the Court]

The Hachioji branch of the Tokyo District Court stated that since the state does not reserve the right of management and administration of Yokota Air Base leaving it all in the hands of the U.S. Forces, the injunction sought should be regarded as Verpflichtungsklage (a kind of lawsuit) calling on the state to enter into negotiations on the issue before the Japan-U.S. Joint Committee or to negotiate with the U.S. government through diplomatic channels.

Hence, it said, whether or not the state should take action to call on the U.S. government to restrict the activities of the U.S. forces is a highly political question and not that of the court to make a legal judgment.

Thus, the court turned down the claim of the plaintiffs. With regard to the claim for compensation, however, it admitted indirectly such physical damage as hearing impairment and high blood pressure in addition to disturbing their livelihood by noise, and ordered the state to pay a solatium for the past suffering amounting to not less than ¥22 million.

[Comment]

As was described earlier, the current case is different from many other usual cases of this kind, in which the unconstitutional nature of U.S. bases in Japan and the Japan-U.S. Security Treaty were directly in dispute.

It is a base hazard lawsuit aimed at keeping the health and living environment of neighboring residents from being damaged by the

existence of the U.S. base. However, the court, employing the "political question" theory, turned down the request of the residents for an injunction. (The evaluation of the judgment in this case will be made in the comment of the next case.)

2. A case in which an appeal concerning Hyakuri Base was reversed.

Decision by the Tokyo High Court on July 7, 1981. Case No. (*ne*) 817 of 1977 and case No. (*ne*) 409 of 1979. 1004 *Hanrei Jihō* 3.

[Facts]

The appellee in this case (a plaintiff in the first instance) had owned land intended for use by Hyakuri Base of the Air Self-Defense Force in Ibaraki Prefecture. The appellee concluded a real estate contract concerning the land in question with an appellant resident (the defendant in the first instance), who belonged to an anti-base group.

However, the appellee then sold the land to the state (the Defense Agency), as the money for the real estate deal had not been paid to him by the fixed date.

In the trial, the appellee insisted upon cancellation of the real estate contract with the appellant while the state insisted upon confirmation of its ownership of the land.

On the other hand, the appellant claimed that the real estate contract concluded between the appellee and the state was null and void because the Self-Defense Forces are unconstitutional. The appellant then contended that Article 9 of the Constitution should be applied directly to legal relations between private individuals, such as cancellation of the contract and the act of land acquisition as above, or even if it were not directly applied such an act is null and void because it is an act which has for its objective such matters that are contrary to public policy or good morals as provided for in Civil Code Article 90.

The decision in the first instance held that as a matter of conclusion the Self-Defense Forces in those days (about 1958) could

not be definitely regarded unconstitutional, that is, the Self-Defense Forces cannot be termed as having an apparent war potential which is prohibited by the Constitution Article 9 para. 2, and that the contract in the current case cannot be regarded as null and void for violating Civil Code Article 90.

The decision in the first instance made a constitutional judgment on the Self-Defense Forces while, at the same time, showing an attitude of refraining from making a constitutional judgment by employing the so-called "political question" theory or un act de gouvernement on the constitutionality of the Self-Defense Forces.

[Opinion of the Court]

The court of appeal in its decision avoided making judgment on the interpretation of the Constitution Article 9 and the Self-Defense Forces in supporting the decision of the first instance, stating that it is possible to draw a conclusion on the current case without making judgment on the constitutional issue raised by the appellee *et al.*

[Comment]

Roughly speaking, there have been four types of judicial cases in which the existence of the Japan-U.S. Security Treaty and the Self-Defense Forces, believed to be contradictory to the principle of unarmed pacifism, was at issue.

The first type belongs to the decision in which the Security Treaty or the Self-Defense Forces were clearly judged as unconstitutional (decision in the first instance concerning the Sunagawa case and the decision in the first instance concerning the Naganuma case).

The second type is that notwithstanding the contention of one of the parties to the suit that the Security Treaty and the Defense Forces are unconstitutional, the court employing the "political question" theory shied away from making a decision in the light of the Constitution and, as a consequence, the ex-

istence of the treaty and the Defense Forces were passed over unmentioned in the decision. (Decision by the Supreme Court on the Sunagawa case and the decision by the Court of Appeal on the Naganuma case.)

In the third type, although one of the parties insisted upon the unconstitutionality of the Self-Defense Forces as in the case of the second type, the court dealt with the case purely on a legal basis without going further into the judgment of Article 9 of the Constitution.

In the last type, the parties to the suit did not argue about the unconstitutionality of the treaty as well as the Self-Defense Forces and the court, accordingly, handed down a decision regarding the case as a purely civil law matter.

It is thus evident that there is a tendency among the courts dealing with cases of these types to assume a negative and self-restrained approach and avoid making a constitutional decision. The two judicial precedents introduced herewith also followed this existing trend, although the first case mentioned here did not dispute the unconstitutionality of the U.S. base and the Security Treaty directly.

Against such a trend seen in the courts, some scholars of the constitution are critical of the lack of prudence in employing or establishing the "political question" theory or the rules designed to avoid making a constitutional judgment. Not a few remain apprehensive of the sound practical functions of the court to be played under the present-day political situation in Japan.

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b. Administrative Law

In the year under review there were many cases calling for our