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.

By Prof. HIDETAKE SATO
MASAFUMI FUNAKI

b. Administrative Law

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

special attention. Two of the most important ones are introduced here in detail, and some others briefly.

1. **A change in the policy of inviting enterprises and compensation for damage.**

Decision by the Third Petty Bench of the Supreme Court, on Jan. 27, 1981. Case No. (*o*) 1338 of 1976. A case demanding compensation for damage. 35 *Minshū* 35. 994 *Hanrei Jihō* 26. 435 *Hanrei Taimuzu* 75.

[Issues]

Local autonomous bodies have been endeavoring to invite enterprises to their localities in an attempt to promote local industrial development, ensure tax earnings and secure employment for local residents, and they usually provide such enterprises with various conveniences and advantages.

If an autonomous body should cancel its policy halfway through for some reason, the enterprise making preparations to advance into the locality would suffer great losses such as abandonment of business, etc. In such a case, the question arises as to the responsibility of the local autonomous bodies for loss.

In the current case, the change in policy occurred when a town mayor, known for his opposition to the inducement of enterprises, was returned in an election. The decisions in the first and second instances both dismissed the claim of the enterprise for compensation from the autonomous body on the ground that the observance of the will of the residents is a prerequisite to the cooperation of the autonomous body with such enterprises.

[Opinions of the Court]

The case was reversed and remanded.

The Supreme Court held that 1) in the decision-making process of an autonomous body, the will of the residents must be respected to the maximum possible extent, that 2) an autonomous body is not bound, as a matter of principle, by its decision that stretches into the future because it is deemed necessary to

cope with social changes, and that 3) if the decision in question is accompanied by a recommendation directed toward a specific person separately and concretely urging the latter to engage in a specific activity, and if such a recommendation is continuitive, and if such a person engages in an activity in compliance with such recommendation, the person in question should be protected in the light of the principle of estoppel.

Thereupon, the Supreme Court allowed the claim of the enterprise on the following three points: (1) the enterprise suffered a great loss due to the uncooperative manner of the autonomous body, (2) there were no objective circumstances that necessitated the refusal of cooperation on the part of the autonomous body, and (3) no alternative steps were taken to avoid causing any loss.

[Comment]

This country has no compensation provisions regarding such specific loss. So, judicial precedents and academic theories, quoting the West German guarantee concerning such projects (Plangewährleistungsanspruch), have been trying to recognize compensation claims for such loss on the basis of the principle of estoppel. (Reference: Decision by the Tamana branch of the Kumamoto District Court, on Apr. 30, 1969. 574 *Hanrei Jihō* 60).

It must be said that the current decision followed existing views as such. But, opinions are varied in judicial precedents and academic theories as to cases where the principle of estoppel should be employed. For instance, in a similar case of this kind in which the project inducement ordinance of Kushiro City was at issue, the courts in the first and second instances turned down the claim of the enterprise for compensation on the ground that there had been no close cooperative relations between the autonomous body and the enterprise that had advanced into the area. (19 *Gyō shū* 408. 516 *Hanrei Jihō* 11.) The standard shown in the current decision is, therefore, very helpful.

[Reference: Civil Code § 709; State Liability Act § 1 (1)]

2. **The Osaka International Airport Case.**

Decision by the Grand Bench of the Supreme Court, on Dec. 16, 1981. 35 *Minshū* 1369. 1025 *Hanrei Jihō* 39. 761 *Jurisuto* 152.

[Issues]

A total of 302 residents living in the neighborhood of Osaka International Airport, contending that their rights to privacy and rights to the environment had been intruded by the noise, etc. of aircraft, demanded that 1) the landing and taking off of planes between 9 p.m. and 7 a.m. be suspended (injunction), that 2) compensation be paid for past damage caused by airplane noise, etc. and that 3) compensation be paid for future damage.

The case attracted wide attention involving public opinion and academic circles since such problems as aircraft noise, environmental rights and injunctions that the use of certain establishments be suspended have become, for the first time, the subject of litigation in the Supreme Court, and the alleged suspension was centered on certain flights to and from a big airport like Osaka International Airport.

Since injunction was central to the various demands, attention will be focussed on this issue. The plaintiff's injunction was allowed in both the first and second instances.

[Opinion of the Court]

The decision of the lower court was reversed and the suit was dismissed.

1) Majority Opinion:

With regard to the state-run airport the Minister of Transport has two separate responsibilities, one concerning the management of the establishments or facilities and the other on aviation administration. The former is subject to private law regulations while the latter contains the exercise of public authority as the authority related to aviation matters.

Since the landing and taking-off are regulated by the two authorities above, which are exercised together, the demand for injunction invariably becomes demand for cancellation of the exercise of the governmental power on aviation. Therefore, *Jokoku* appel-

lee et al. cannot demand injunction in terms of civil matters aside from the question of "whether or not they can file some kind of suit by means of an administrative suit."

2) Supplementary Opinion (one justice):

The action calling for the suspension of the use of the state-run airport must be filed not as a civil suit but as an administrative suit.

3) Minority Opinion (four justices):

a) In the domain such as dealing with pollution problems in which legislative steps have been delayed, the court should make positive efforts to formulate judicial precedents.

Since the *Jokoku* appellee opted for a civil suit, there ought to be a decision as to the principal matter by paying respect to their action. This point is of particular importance in the light that the majority opinion failed to conclude that there existed scope for an administrative suit concerning the current case (one justice).

b) In the light of related laws and actual practice in the use of the airport, the responsibility of the airport cannot be interpreted an entailing the exercise of public authority. Even if the suit for suspension were allowed, it would not be binding upon the governmental power of primary judgment (three justices).

c) The relationship between the Minister of Transportation holding the power to manage the airport and the aviation transport enterprises is in the public relationship containing the exercise of public authority, but the relations between the above two and the people in general (residents) have no such relationship (one justice).

[Comment]

Anti-pollution suits used to be deployed centering on claims for damages around 1965, but the weight has shifted today to suits for removing the cause of public hazards (injunction).

In this regard, expectations were placed on the Supreme Court as to what decision it would hand down in relation to the adjustment of the public nature of an enterprise and the need of injunction. The current Supreme Court ruling (dismissal), therefore, has been unpopular in academic circles.

Although criticism against the current decision can be summed up in the minority opinion, the following two points called for specific attention.

To begin with, the Supreme Court dismissed the suit on the premise that the exercise of the governmental power should be handled in an administrative suit and that other acts should be handled in civil suits, but the majority opinion did not specify that the current case should be handled as an administrative suit. (On this score, the majority opinion is understood to be different from the supplementary opinion.) This can be interpreted as a denial of the right of access to the courts (Constitution § 32).

Secondly, the decision ruled that the power of regulation concerning the landing and departure of aircraft is authoritative or governmental.

But this view is considered wrong in point of evaluation of the legal relations where the power of regulation shall be exercised. For instance, the decision by the Tokyo High Court on Dec. 21, 1981 (1030 *Hanrei Jihō* 26) interpreted the exercise of aviation regulation power in connection with the relationship between the administrator regulating the establishments or facilities and the entrepreneurs of aviation transport making direct use of such establishments.

Therefore, an evaluation different from the current decision must be made on the exercise of the power to regulate in dealing with the relations between the administrator regulating the establishments and the people at large (residents).

3. **Another cases.**

The first petty bench of the Supreme Court in a decision made on July 16, 1981, handed down judgment on the "administrative guidance" relating to architectural regulation. (35 *Minshū* 930. 1014 *Hanrei Jihō* 59.)

In an attempt to execute a sanction provision in the municipal regulations that the supply of water shall not be extended to illegal structures, the staff of the municipal water works bureau refused to accept an application for water supply to an illegal structure and

returned the application back to the applicant. Contending that such an act was illegal, the builder filed a claim for state liability.

The Supreme Court ruled that the bureau employees did not refuse to supply water as a final decision and that as such an act should be recognized as guidance to the illegal builder to the effect that his application would be accepted following a change of the illegal status of the structure in question, such guidance is not illegal. It is worthy of note in that the Supreme Court set a standard expressly concerning the refusal of water supply as a means to eliminate illegal structures.

A case in which the Supreme Court ruled for the first time that there is scope for a claim for state liability against an unlawful governmental "refusal" action to citizen's application.

Decision by the First Petty Bench of the Supreme Court, on Feb. 26, 1981. 35 *Minshū* 117. 996 *Hanrei Jihō* 42.

With regard to the "refusal" action, even if it is cancelled because of its being unlawful, a desired action would not necessarily be put into practice. As a result, there have been both negative and affirmative views as to whether such an unlawful action of refusal can logically have an adverse impact on the interest of the party who filed the application, on the premise that such an action would be taken.

The court decision has put an end to this problem by taking an affirmative stand.

A case concerning the change of reasons for rectifying a tax return in blue on business.

Decision by the Third Petty Bench of the Supreme Court, on July 14, 1981. 35 *Minshū* 901. 452 *Hanrei Taimuzu* 86.

That the acquisition price of a piece of real estate was too expensive was listed by administrative authorities as reason for rectification of a blue tax return. But, later, in the course of the cancellation suit, it was contended by administrative authority, by changing the reason for the rectification, that the sales price was more expensive.

The court ruled that it is permissible to maintain the lawfulness of the step taken. Academic circles, commenting on the decision, held that the replacement of the reason for such rectification should be based on the interest of the taxpayers.

By Prof. HIDETAKE SATO
HIROSHI KOBAYASHI

2. Law of Property and Obligations

1. Requirement of an exclusively-owned portion in the Act for Comparted-Ownership, etc. of Building.

Decision by the First Petty Bench, the Supreme Court, on June 18, 1981. Case No. (*o*) 1373 of 1978. A claim requesting the cancellation of the registration of building ownership. *Jokoku* appeal dismissed. 35 *Minshū* 798. 1009 *Hanrei Jihō* 58.

[Facts]

X et al. who bought the flats of a subdivision condominium, called *Manshon* in Japanese, called on Y who effected the registration of his comparted-ownership of a garage and a storehouse located within the said condominium to cancel the above registration on the ground that the garage and the storehouse in question did not meet the requirements of an exclusively-owned portion as prescribed in Article 1 of the Act for Comparted-Ownership, etc. of Building (Ch. 69 of 1962) and therefore they could not be objects of comparted-ownership.

[Opinions of the Court]

***Jokoku* appeal dismissed. (Claim dismissed)**

1. To be an exclusively-owned portion as prescribed in Articles 1 and 2 of the Act for Comparted-Ownership, etc. of Building, it is sufficient if the portion is separated from other parts to an extent