MAJOR JUDICIAL DECISIONS

Jan. - Dec., 1982

1. Constitutional and Administrative Law

a. Constitutional Law

1. **The conduct of the municipal office in permitting the use, renting and borrowing of city land for the *Chukon* Monument owned by the Association for Bereaved Families of the War Dead and defraying the expenses for moving the *Chukon* Monument was found to run counter to Articles 20 (3) and 89 of the Constitution.**

Decision by the Second Civil Division of the Osaka District Court on Mar. 24, 1982. Case No. (*gyo u*) 9 of 1976. A case claiming confirmation of invalidity of the decision to abolish part of the schoolyard. Partly dismissed and partly allowed. 1036 *Hanrei Jiho* 20.

[Facts]

Before the war a *Chukon* Monument (a monument dedicated to the war dead) was erected in the schoolyard of Minoo Elementary School and a memorial service for the war dead had been held

there every year. After the war, the *Chukon* Monument was reconstructed and memorial services were held under the auspices of the Association for the Bereaved Families of the War Dead every year; in a *Shinto* rite one year and a Buddhist rite the next.

In view of the expansion and reconstruction of the elementary school, it was decided to move the monument from the schoolyard. The Minoo Municipal Office moved the monument to the land acquired by purchase at the expense of the city, and it was decided to allow the land to be used by the Association free of charge. A company concerned which took charge of the movement conducted a religious service.

Residents, the plaintiffs in the current case, filed a citizens' suit contending that the *Chukon* Monument was not a mere monument but a religious facility, and that offering the Association of the Bereaved Families, which corresponds to a religious association or organization, to move the monument and use the land free of charge ran counter to Articles 20 (3) and 89 of the Constitution.

[Opinions of the Court]

The judgment of the court was manifold, but the passages concerning the Constitution are as follows:

In the first place, aside from the question of whether or not the *Chukon* Monument was related to the tenets of a specific religious sect, it is a religious facility for worshipping which is the expression of religious ideas. The move of the *Chukon* Monument in question was designed to maintain and use it for religious purposes, and it signifies that the conduct of Minoo City was in effect assisting and encouraging religious activities, thus violating Article 89 of the Constitution.

Secondly, with regard to the *Chukon* Monument and its removal, the Minoo Municipal Office showed an inordinate interest in the religious facility in the light of the large amount of expenses involved and possible continued relationship. It cannot escape comment that the moving of the Chukon Monument and its use, renting and borrowing of the land were religious in purpose, and it is evident that such conduct would, in effect, assist, advance and

promote religious activities, thus violating Article 20 (3) of the Constitution.

[Comment]

The basic bone of contention in the current case was, in short, whether or not the conduct of the Municipal Office to rent free of charge the city-owned land for the use of the *Chukon* Monument owned by the Association of the Bereaved Families of the War Dead was in contravention of Articles 20 (3) and 89 of the Constitution.

The current decision was clearcut in finding it unconstitutional. The court, in finding such a case as this unconstitutional, tended to interpret the term "religion" in Articles 20 (3) and 89 of the Constitution in a broad sense and strictly adhered to the principle of separation of politics from religion as provided for in Article 20 (3) of the Constitution. On this score, its attitude should be highly evaluated.

Secondly, however, its manner of uncritical dependence on the standard of "purpose and effect" adopted in the decision of the Supreme Court on the *Tsu* case on July 13, 1977 must be taken as highly problematical.

Primarily, the "purpose and effect" standard was a principle advocated in the United States for adjustment between a request for separation of politics and religion (i.e. church and state) and a request for state interference in religious activities. In other words, the "purpose and effect" standard was a theory advocated to adjust a situation in which the interests of citizens were likely to be gravely violated in terms of their welfare because of their belief in certain religions.

Accordingly, any easygoing employment of this standard in the current case, which does not require adjustment as above, should be considered deviating from the original purpose. On this point, the current decision will no doubt attract criticism from many quarters.

[Reference: the Constitution §§ 20 (3) and 89.]

2. A case in which the prohibition of the additional payment of the child sustenance allowance to the recipient of a welfare payment for the handicapped was adjudged not counter to Articles 24, 14, etc. of the Constitution.

Decision by the Grand Bench of the Supreme Court on July 7, 1982. Case No. (*gyo tsu*) 30 of 1976. A case demanding cancellation of the administrative decision. *Jokoku* appeal dismissed. 1051 *Hanrei Jihō* 29.

[Facts]

The *Jokoku* appellant (plaintiff and *Koso* respondent), a recipient of a welfare payment as a totally blind handicapped person under the National Pensions Act, had been bringing up her son singlehandedly after separating from her husband, and she requested the *Jokoku* appellee (the governor of Hyogo Prefecture, defendant, *Koso* appellant) that her qualification to receive the child sustenance allowance be acknowledged.

The *Jokoku* appellee, however, rejected her request on the ground that Article 4 (3) (iii) of the Child Sustenance Allowance Act prohibited the concurrent payment of a child sustenance allowance and other welfare payments. Thereupon, the *Jokoku* appellant filed a suit requesting that the rejection of her request be withdrawn.

In the first instance, the court revoked the decision on the ground that the article prohibiting the concurrent payment ran counter to Article 14 (1) of the Constitution. However, the court in the second instance ruled that the prohibition clause was constitutional, and dismissed her claim. Dissatisfied with the decision in the second instance, she filed a *Jokoku* appeal.

[Opinions of the Court]

In the first place, the question of how to realize the tenet of "the minimum standards of wholesome and cultured living" as provided for in Article 25 (1) of the Constitution is left up to the broad discretion of the legislative branch and is not appropriate for a court judgment.

Secondly, whether or not to make an adjustment between a welfare payment for the handicapped and a child sustenance allowance concerning concurrent payment belongs to the discretion of the legislative branch.

Thirdly, the concurrent payment prohibition clause in question cannot be considered unreasonable and unjust, viewed from the overall scope of the various measures adopted for physically handicapped persons, mothers and children, and the existing livelihood protection system.

[Comment]

The current decision was the first such decision by the Supreme Court concerning the right to live since the *Asahi* case of 1967. The following questions must be taken up in connection with the current decision:

To begin with, the current decision adopted the extremely broad theory of legislative discretion, but this means that the right to review unconstitutional legislation is to be waivered totally in the domain of social welfare suits.

Secondly, although it cannot be denied that legislative discretion is recognized in the domain of guaranteeing the right to live, it seems that a stricter standard ought to be employed in making a judgment in the case such as this one in which the principle of equality in welfare legislation is in dispute.

On this point, the current decision turned a deaf ear to the "strict rationality test" and "immediate standard of review" as advocated strongly by present-day academic theories.

[Reference: Constitution §§ 25 and 14; Child Sustenance Allowance Act §4 (3) (iii), prior to the revision by the Act, Ch. 93 of 1973.]

3. **A case in which the court ruled that the danger of flooding and water shortage accruing from the cancellation of the designation of a forest reserve for the purpose of establishing an Air Self-Defense Force Nike base was resolved with the completion of alternative facilities, including an anti-flood facility, and that**

the standing of the plaintiff-residents to sue (*Jokoku* appellant in the current case) demanding the revocation of the step cancelling such designation was no longer valid.

Decision by the First Petty Bench of the Supreme Court on Sept. 9, 1982. Case No. (*gyo tsu*) 56 of 1977. A case requesting the cancellation of a decision to withdraw the designation of a forest reserve. *Jokoku* appeal dismissed. 1054 *Hanrei Jiho* 16.

[Facts]

In accordance with the Third Defense Build Plan, it was decided to construct a ground-to-air missile base for the Air Self-Defense Force at Maoi, a state-owned forest reserve, at Naganuma Cho, Hokkaido. Later, the Minister of Agriculture and Forestry withdrew such designation on the ground that "there was public reason not to do so" as provided for by Article 26 (2) of the Forest Act.

The residents opposing the construction of a base, as *Jokoku* appellants, held that the decision to withdraw the designation of the forest reserve was unconstitutional, insisting that there was "no public reason" because the Self-Defense Forces themselves were unconstitutional.

In the first instance, the court taking up the issue of the Self-Defense Forces quite positively judged that the Self-Defense Forces were unconstitutional, thus recognizing the demand of the residents.

In the second instance, the court admitted that those residing in the Maoi Canal drainage area alone have the standing to sue in the current case. However, with regard to the withdrawal of the cancellation of designation of the forest reserve, the court ruled that the standing of the residents to sue was lost because substitute facilities, aimed at preventing flooding or shortage of water resulting from the cutting of the forest in question, had been completed. Thus, the case was dismissed in the second instance.

On the constitutionality of the Self-Defense Forces, the court in the second instance stated that the question dealing with the unconstitutionality of the Self-Defense Forces belonged to the domain of "administrative acts" and could not be the subject of judicial review.

The residents, dissatisfied with the ruling in the second instance, filed a *Jokoku* appeal, their contention being confined to the question of the standing to sue.

[Opinions of the Court]

The majority opinion of the court in the current decision was as follows:

In the first place, of the *Jokoku* appellants, those residing in the Maoi Canal drainage area have the standing to sue because they are qualified as "persons having direct interest" as provided for in Article 27 (1) of the Forest Act.

Secondly, it can be interpreted that the original court judged that with the establishment of substitute facilities, the danger of flooding disappeared, viewed from the standpoint of universally-accepted concepts, from the area in which the *Jokoku* appellants ruled as having the standing to sue were residing. In this regard, the standing of the *Jokoku* appellants to sue was lost.

Thirdly, the danger of infringement of interest due to the use of the vacated land following the felling of the forest after the decision to withdraw the designation did not constitute the legal interest on which the standing to sue was based.

Attached to the decision were the opinion of Justice Fujisaki and the dissenting opinion of Justice Dando. (Their opinions are omitted here due to lack of space.)

[Comment]

Legal disputes involved in the current case are manifold. Points at issue in the field of administrative law are taken up elsewhere in the Chapter of Administrative Law. So the problems are confined to the constitutional judgment here.

In the current case, the manner of approach toward the constitutional judgment was different in the first, second and third instances. In this decision, however, there was no constitutional judgment in the light of the consideration of the *Jokoku* appellants not to submit arguments dealing with the unconstitutionality of the Self-Defense Forces.

As was pointed out in the previous volume of Waseda Bulletin of Comparative Law (page 139), not a few scholars of the Constitution wonder if the manner of the court, i.e. avoiding a judgment on constitutionality, leads to a virtual additional confirmation of the unconstitutional fact.

On the other hand, there are some who maintain that it is better to avoid making a constitutional judgment for fear that the presence of the Self-Defense Forces may be judged constitutional as a result of conducting a positive constitutional judgment.

At any rate, it must be noted that more than 80 percent of the scholars of the Constitution believe the presence of the Self-Defense Forces is unconstitutional. The current case calls attention to the contention that the court ought to deal with the extremely powerful Self-Defense Forces and what the nation ought to do about this.

[Reference: Forest Act §27 (1); Administrative Suit Act §9.]

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b. Administrative Law

The Supreme Court handed down decisions on two controversial cases which have drawn special attention for many years, that is, the Naganuma Nike base suit and the second Ienaga textbook suit. The two decisions shall be taken up here from the standpoint of the "standing to sue" (Rechtsshutzinteresse), while other judicial precedents relating to state liability and citizens' suit will be introduced.

1. Two cases in which the Supreme Court refrained from making a substantive decision on the basis of passive understanding of the "standing to sue."