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."

(a) Naganuma Nike base case.

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. 1054 Hanrei Jiho 16.

[Facts]

See Major Judicial Decisions on Constitutional Law.

[Opinions of the Court]

Jokoku appeal dimissed.

In the first place, the plantiffs standing to sue are "the residents inhabiting a specific area which would be directly affected, in terms of easing floods and preventing water shortages" by the felling of the forest reserve in question, and, therefore, other residents residing in the neighborhood are not qualified as plaintiffs. In other words, those who filed an action in the interest of their lives, health, property and the protection of their livelihood shall not be recognized as "plaintiffs standing to sue."

Secondly, the judgment of the lower court that the danger of floods and water shortages as mentioned above had been resolved with the establishment of substitute facilities was just, and it stands to reason to interpret that the "standing to sue" of the entire group of *Jokoku* appellants no longer existed.

An infringement on the interest arising from the use of the vacated site (as a missile base) following the felling of the forest reserve does not constitute a basis for the standing of the plaintiff to sue in the current action demanding cancellation.

[Comment]

The positive significance of the current decision in finding the plaintiffs' standing to sue, if any, lies in the assertion that even if it is "a factual interest," and if it is interpreted as the interest of specific individuals according to the interpretation of the spirit of various laws, such interest shall be included in "legal interests" (Administrative Litigation Act, Article 9).

The current decision also interprets that the existence of provisions concerning advance procedures and litigation procedures can be considered a basis for the standing of the plaintiff to sue.

On the other hand, the criticism against this decision is mainly leveled at the judgment that it highhandedly acknowledged there would be no flood as a result of the establishment of substitute facilities and that the "standing to sue" has, therefore, disappeared.

Worthy of note in this regard is the dissenting opinion of Justice Dando who insisted that the case be remanded to the original court. He stated that although the majority view interpreted that the original court judged the danger of floods had disappeared, it should be interpreted that the court "merely judged whether or not the irrigation functions of the said facilities are the same as those of the forest reserve prior to deforestation." In this sense, he added, "the right course to act is to let (the original court) deliberate anew thoroughly and under the right theoretical premise decide if the "standing to sue" has disappeared."

His argument is worth studying, together with his opinion at court in the Ienaga textbook suit to be described here later.

Lastly, mention must be made of the so-called "theory of division" concerning the utilization of the vacated land.

Since the time the vacated land, following the cancellation of its designation as a forest reserve, became a base, floods have occurred frequently, even after the plaintiffs filed an action. The Supreme Court excluded this fact from its judgment as did the original court, because "the advantage or disadvantage arising from the purpose of the cancellation is not to be considered the effect of the cancellation, that is, the felling of the forest reserve."

Since cancellation can only be made when there is a judgment on "public interests" concerning the use of the vacated land, the majority judgment concerning this passage must be interpreted as follows: They simply ratified the fact that the Minister of Agriculture, Forestry and Fisheries acknowledged that the public interest as provided for in the Forestry Act does not include the interest of the residents in the neighborhood to avert flood damage (meaning, public interest is tantamount to military interest).

This, however, can hardly be called a legal interpretation based on the present Constitution and will no doubt see keen criticism on this score. It is small wonder that there is criticism stating that the theory of "standing to sue" was introduced in an attempt to conceal an antinational substantive judgment.

(b) The Second Ienaga Textbook Case.

Decision by the First Petty Bench of the Supreme Court, on Apr. 8, 1982. Case No. (*gyo tsu*) 24 of 1976. A claim requesting the cancellation of a decision on authorization. 36 *Minshū* 594; 1040 *Hanrei Jihō* 3.

[Facts]

The *Jokoku* respondent (plaintiff, Prof. Saburo Ienaga) filed an application with the Education Ministry for authorization of his high school textbook "New History of Japan," Fifth Edition, in 1962. The *Jokoku* appellant (the Minister of Education) rejected the textbook after examining it on the basis of its textbook authorization standards and the course of study (both, Notification of the Education Ministry, but the substantial standard is of the latter).

Thereupon, the *Jokoku* respondent, upon revising his manuscripts, filed an application for a second time. Approval was then obtained conditionally with "A's" opinions in 73 places and "B's" opinions in 217 places. (If revisions are not made in accordance with "A's" opinions, the book is rejected. "B's" opinions merely state that revision is desirable.)

The *Jokoku* respondent revised the passages in question as advised, but he then filed an action demanding state compensation for mental stress and loss in royalties on the book, insisting that the authorization system and the decisions made above rejecting his application were unconstitutional and unlawful. (This has been the first textbook suit. As plaintiff in the first instance, he won the case partially. The case is sub judice at the Tokyo High Court.)

Later in 1966, the *Jokoku* respondent filed an application for authorization about the partial revision of his textbook in question. The Education Minister disapproved of the textbook, as Prof. Ienaga

restored the revised parts based on "B's" opinions to the original in six places. The *Jokoku* respondent then brought an action demanding cancellation of the decision. This is the current case.

In the first instance (decision by Judge Sugimoto, on July 17, 1970), the plaintiff won the case as the court found it unconstitutional and unlawful for the state to interfere with educational contents while holding the textbook authorization system itself constitutional.

In the second instance (decision by Judge Asegami, on Dec. 20, 1975), the court judged the decision as unlawful (while refraining from making a constitutional judgment) and dismissed the appeal.

Later, the Education Minister's side in its *Jokoku* appeal insisted that with the overall revision of the course of study in 1976, the "standing to sue" in the current case had disappeared.

[Opinions of the Court]

The decision of the lower court was dismissed and remanded.

When an overall revision of the authorization standards is made, textbooks must be authorized under the new standards. Accordingly, it is interpreted that the *Jokoku* respondent lost the "standing to sue" by the cancellation of the decision in the current case.

However, in the light that there may be cases where the revision mentioned above will not lead to substantial changes in the authorization standards, this court shall remand the case to the lower court for a thorough review.

[Comment]

The current case is a constitutional suit pioneering the development of the theory of "right to education" in Japan. In this regard, it is regrettable that the Supreme Court has taken a posture in its decision as if to "shut the door" on this issue.

Although the current case is now being deliberated again in the Tokyo High Court, the following points concerning the theory of the "standing to sue" must be taken into account.

(1) Whether or not the "standing to sue" should continue in

case the authorization system itself is thought to be unconstitutional.

(2) When the system is considered constitutional, what about the relationship between the continuation of the "standing to sue" and the fact that the legally binding power of the course of study remains at the level of the "broad policy standards" (as is shown by the official understanding of the Education Ministry in May, 1976)?

(3) How should the purport of the authorization system be interpreted and to what extent has the authorization standards been altered this time within such framework?

(4) How should the finding of the "legal interest," which is described later, be judged?

On the other hand, the Supreme Court with regard to the current case adopted the principle that if the standard of dealing with the matter is changed completely by the time the court decision is made, the claim calling for cancellation of the decision would lose its "legal interest." This is similar to what is called the mootness doctrine in American law, but there remain many problems requiring further study.

In the first place, there is the question of a continuation of damages for the parties concerned, that is, the continuation of the state in which the plaintiffs have been disadvantaged unilaterally by the action conducted later by the defendants.

Secondly, the secondary interest (the interest accruing from the use of the said textbook in school as "teaching material" other than the textbook, the personal interest of the author, etc.) remains impaired.

Thirdly, there is a possibility that the act considered to be unlawful will be repeated.

In short, expectations are placed on the future development of the theory concerning "legal interest."

2. A case in which state liability was allowed when the failure of a policeman to exercise the authority invested in him was judged unlawful.

Decision by the Second Petty Bench of the Supreme Court

on Mar. 12, 1982. Case No. (*o*) 69 of 1982. A case to recover damages. 36 *Minshū* 29; 1053 *Hanrei Jihō* 84.

[Facts]

The gist of the recognized facts is as follows:

A man A, who is not a party to this case, had been convicted of violence and causing bodily harm. On the day when the incident occurred, A was already quite drunk and threatening customers at a snack bar where plaintiff X served as a manager.

X et al., at their wit's end about what to do with him, took him to a nearby police station and handed him over to a policeman. At that time, X gave to this policeman a knife which he had taken away from A on the way to the police station. The policeman swallowed A's story that the knife was for peeling fruit and that he had simply left it on the counter, and he let A go home with the knife.

The policeman then concluded that A's behavior did not constitute a crime and therefore there was no need to take A into custody or confiscate the knife. (See the Firearms and Swords Control Act, Article 24–2 (2)). A came across X on his way home, and slashed the latter on the face and chest, inflicting severe injuries, and X eventually lost the sight of his left eye.

X filed an action for damages against the Osaka Prefectural Office under whose jurisdiction the police station in question was placed. The court in the first instance dismissed X's claim, refusing to recognize the causal connections between the omission on the part of the policeman and the injuries incurred upon the plaintiff while recognizing the unlawfulness of the omission by the policeman.

In the hearing of the intermediate appeal, recognition concerning the causation as mentioned above was overturned and X's claim was, to a certain extent, allowed. The Osaka Prefectural Office, dissatisfied with the decision, filed a *Jokoku* appeal on the ground that nothing unlawful had occurred since policemen are not charged with any duty of commission under the Firearms and Swords Control Act.

[Opinions of the Court]

Jokoku appeal dismissed.

The policeman ought to have listened also to X's account of the circumstances instead of merely swallowing the story told by A who was in a state of inebriation. If he had done so, he could have judged that it was dangerous to allow A to go home carrying a knife with him.

In this sense, the behavior of the policeman, failing to confiscate the knife, even if temporarily, constituted an infringement of professional duty and unlawfulness. The decision of the lower court concerning the causation is just.

[Comment]

In this case, the Supreme Court adopted the judgment that even if the exercise of authority by public servants is left to their discretion, there arises the positive obligation of commission if (a) there is a pressing danger and (b) the public servant is in a position to easily exercise authority to effectively prevent danger. (Accordingly, omission becomes unlawful in this instance.)

There is no objection in academic theories and judicial precedents that omission is included in the unlawful act prescribed in Article 1, Item 1, of the State Liability for Compensation Act, but it is significant that the Supreme Court exhibited its posture by recognizing positively state liability for compensation against omission of regulations and authority by the administrative offices concerned.

Noticeable among the decisions this year concerning state liability for compensation were a case in which a claim for compensation, because of the failure of government economic policies, was rejected (decision by the First Petty Bench of the Supreme Court, on July 15, 1982. 1053 *Hanrei Jihō* 93. See 1 Waseda Bulletin of Comparative Law 53) and another in which state liability for compensation concerning a defective trial was denied.

3. A case in which a residents' claim by subrogation based on the Local Government Act, Article 242–2, was denied.

Decision by the Third Petty Bench of the Supreme Court on July 13, 1982. Case No. (*gyo tsu*) 128 of 1982. A case of citizens' suit. 36 *Minshū* 970; 1054 *Hanrei Jihō* 52.

[Facts]

As sludge piled up in Tagonoura Port due to the discharge of waste water by four paper manufacturing companies, the Shizuoka Prefectural Office was obliged to carry out dredging operations.

The total dredging costs amounting to ¥120 million was borne by the prefecture. Hence, prefectural residents (the plaintiffs) lodged the citizens' suit on the basis of Article 242–2 of the Local Government Act, involving the following four points.

(1) Claim for confirmation of illegality that the governor did not suspend the flow of waste water into Tagonoura Port and the discharge of waste water by the paper mills.

(2) Claim for damages against the governor amounting to ¥10 million.

(3) Claim for damages against the four paper manufacturing companies amounting to ¥10 million.

(4) Seeking an injunction to restrain the waste water discharge by the four companies.

In the first instance, the claims of the residents were dismissed on the ground that the governor has not neglected his supervisory responsibility concerning items (1) and (2) and that, concerning (3) and (4) the governor has not been derelict in demanding damages.

In the second instance the court allowed the claim of the residents on (3) recognizing that the sludge dredging expenses were caused by the joint tort (nuisance) of the paper mills, but dismissed the claims of residents on (1), (2) and (4).

Dissatisfied with the decision concerning (3) the four paper manufacturing companies filed a *Jokoku* appeal.

[Opinions of the Court]

Jokoku appeal dismissed and remanded.

"The expenditure of expenses needed to remove pollution or accumulated sludge must be considered in three separate parts, that

is: (a) that the local public entity in the said area must duly pay as a matter of administration, (b) that special expenditures made out of administrative discretion on the part of the local public entity are considered reasonable, and (c) that the damages must be awarded to make up losses caused by the nuisances of the paper mills and it is reasonable for the companies in question to ultimately bear the costs.

"The exercise of the right of claim by the residents for damages against the paper mills, in subrogation of the local public entity in the said area, must be limited to the above (c)."

In this connection, the judgment for recognition of the existence of Part (c) and related costs involved cannot be made by a single reason that there was a nuisance committed by the companies responsible for the waste water discharge.

[Comment]

The Tagonoura sludge public nuisance case was one of the most symbolic cases involving environmental destruction in Japan.

The current case can be termed a public nuisance suit in the form of citizens' suit.

The citizens' suit, taking its example from taxpayers' suit in the United States, is a kind of popular suit acknowledged only when it is recognized by law. One of the purposes of this suit system is for the taxpayers themselves to ensure that the finances of autonomous bodies are healthy.

Therefore, there is a strong opinion that although the exercise of the claim for damages by the local autonomous entity is left up to the discretion of the head of the entity (governor), the claim of the residents by subrogation should be recognized in a forward-looking manner on the basis of the purposes of such suits.

The current decision has been criticized that "it has curried too much favor with the polluting enterprises."

[Reference: Local Government Act § 242–2 (1) (iv)]

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