
MAJOR JUDICIAL DECISIONS

Jan. — Dec., 1991

1. Constitutional and Administrative Law

a. Constitutional Law

A case in which punishment of students who refused to participate in the practice of *kendo* because of their religious beliefs was held constitutional.

Ruling by the Third Civil Division of the Osaka High Court on August 2, 1991. Case No. (*gyo-su*) 3 of 1991. A case of *sokuji kokoku* appeal by the plaintiffs from the ruling dismissing their claim of a stay of execution. 764 *Hanrei Taimuzu* 279.

[Reference: Constitution of Japan, Articles 14, 20, and 26; Fundamental Law of Education, Article 9.]

[Facts]

Five students (plaintiffs, *kokoku* appellants), first-year students of the Kobe Municipal Technical College, who are all Jehovah's Witnesses, refused to participate in the practice of *kendo* because of their religious beliefs. Physical education was one of the required subjects of the college, and some gymnastic exercises, including *kendo*, were

adopted as required classes in the first-year course. As a result, the students did not earn credits in physical education and had to stay another year in the same class. This disciplinary measure was authorized by the president of the college (defendant, *kokoku* respondent), who was responsible for the educational affairs in the college.

The plaintiffs insisted that this disciplinary measure was virtually equal to compelling them to take part in the practice of *kendo* in violation of their religious freedom and demanded its repeal. In addition, they asked the court to order a temporary injunction of the measure against the president of the college. These two suits were brought independently and the ruling discussed here involves the second one.

In May, 1991, the Kobe District Court ruled in favor of the president and dismissed the students' claim. The plaintiffs appealed to the Osaka High Court.

[Opinions of the Court]

Kokoku appeal dismissed.

Although the decision not to allow students to move up into an upper class only remains as an educational action inside the students-school relationship, this decision is considerably related to students' rights and therefore subject to judicial review because students suffer disadvantage from this decision. For example, the students cannot take next-year's classes nor regular examinations, and they must re-enroll in all the classes which they already finished in the previous school year.

Because the technical college is not a school of compulsory education, the decision to enter this school is made by the individual students. The plaintiffs must naturally obey the school rules if they wish to study and graduate from this school once they enter the school voluntarily. The plaintiffs should not be allowed to refuse to obey any of the school rules which they cannot abide by because of their religious beliefs.

The fact that the plaintiffs suffered disadvantage because they did not follow the school rules for religious reasons is not covered by the religious freedom guaranteed by Article 20 of the Constitu-

tion and has no relation to a right to education. Rather, it is contrary to the need for religious neutrality in public schools to demand from the school or the president not to treat religious minorities such as the plaintiffs disadvantageously by giving them special consideration, because it amounts to thrusting the students' religious beliefs on the school.

[Comment]

This case involves two legal issues, that is, the scope of the judicial review and the constitutionality of the disputed disciplinary measure. First, this ruling affirmed the justiciability of the measure made by the president of the college. According to the ruling, the students have a serious stake in this decision because they suffer considerable disadvantage from this decision, which is distinguished from other educational and professional discretionary matters such as propriety of grading of results or certification of credits. This holding follows a series of prior decisions by various courts, and is convincing as meeting common sense although some theoretical questions remain.

Second, it is extremely difficult to solve the conflict between religious and educational duties. It is indeed true that a technical college is not a compulsory school and applicants have freedom of choice to enter such a school, as the ruling held. However, it is highly disputed to draw a duty of attending a particular course in non-compulsory school from a voluntary agreement of entering it, because applicants have virtually few alternatives in choosing schools and there should be no connection between a voluntary choice of schools and a duty to attend a particular course at least unless such a course is substantially related to the basic nature of the school. In addition, the plaintiffs here refused only to participate in the practice of *kendo* and took part in other regular classes of gymnastic exercises. Moreover, they attended the *kendo* classes sitting upright quietly in a gymnasium, and submitted reports in place of practicing, which the teachers refused to accept. In short, the school held firmly to its rule.

Then, should the school have taken some efforts to lessen the burden on the plaintiffs' religious beliefs? Does it conflict with the

idea of religious neutrality of public schools? In this college, students who fail to move up into an upper class for two successive years are expelled under the college rules. If so, since the students would probably suffer serious disadvantage by carrying out their own religious beliefs, it seems that the school could have constitutionally accommodated such religious minorities as long as there is no strong necessity for the school to compel them to renounce their freedom of religious practice. The idea of religious neutrality should have more flexibility in this context. In any case, this ruling is not safe from criticism in that it made the problem too clear-cut.

Prof. KENJI URATA
SATOSHI KOTAKE

b. Administrative Law

A case in which the expulsion of a student from a private school for getting driver's license and riding a motorbike in violation of a school rule was held illegal as exceeding the discretionary latitude of the principal.

Decision by the Fourteenth Civil Division of the Tokyo District Court on May 27, 1991. Case No. (*wa*) 878 of 1989. A case claiming damages. 1387 *Hanrei Jihō* 25; 764 *Hanrei Taimuzu* 206.

[Reference: Constitution of Japan, Article 13; School Education Law, Article 11; School Education Law Enforcement Regulations, Article 13 III.]

[Facts]

While the plaintiff was a second-year student of the Shuutoku High School, a private school, he was expelled because he had violated the model student life code, which prohibits getting a driver's license and riding a motorbike without permission. Under the school rule, the violation of this prohibition was directly related to withdrawal from school. The plaintiff insisted that the code was unconstitutional because it infringed upon his right of autonomy guaranteed