
MAJOR JUDICIAL DECISIONS

Jan. — Dec., 1993

1. Constitutional and Administrative Law

a. Constitutional Law

A case in which punishment of an accused who had burned a *Hinomaru* (Rising Sun) flag during the opening ceremonies of a softball tournament at the National Athletic Meet in Okinawa Prefecture was upheld.

Decision by the Second Criminal Division of the Naha District Court on March, 23, 1993. Case No. (*wa*) 346 of 1987. A case of trespass, vandalism, and interference of due performance of business by force. 1459 *Hanrei Jihō* 157; 815 *Hanrei Taimuzu* 114.

[Reference: Constitution of Japan, Articles 21, 19; Criminal Code, Article 261.]

[Facts]

When the 42nd National Athletic Meet was held in Okinawa Prefecture in October 1987, Yomitan village became the site of a boys' softball tournament. During the opening ceremonies of the tournament, a *Hinomaru*, or Rising Sun Flag, was raised on the main pole

of the village's ball park as if it were the national flag. The accused, a resident of the village who was opposed to hoisting a *Hinomaru* flag because of his own belief, climbed to the top of the scoreboard, pulled down the flag, set fire to it with a lighter, and threw it away after showing it to the audience. The accused was prosecuted for trespass, vandalism, and interference of due performance of business by force.

During the trial the accused argued, among other things, that the charge of vandalism against him was not specified because the object of vandalism was described in the bill of indictment as the national flag instead of a *Hinomaru* flag. Yet there is no law in this country prescribing the existence of a national flag nor codifying which flag is the national flag.

The Naha District Court dismissed all the accused's claims and sentenced him to one year's imprisonment with suspension of sentence for three years. Since the accused appealed to the appellate court, the case is now being disputed in the Fukuoka High Court.

[Opinions of the Court]

The words "national flag" refer not only to the flag prescribed by law and the like that shall be used to symbolize the nation, but also to one that is virtually recognized and used by a large number of citizens as being symbolic of their nation. However, in the present national laws, there is no general rule specifying the *Hinomaru* flag as the national flag of Japan.

In international relations, a *Hinomaru* flag was once officially designated during the Meiji era as the flag to be used as the national shipping flag in order to differentiate Japanese vessels from those of other countries. But in domestic relations, there are no laws prescribing the national flag as symbolizing the unity of the people. Therefore, no action can be forced upon the people at large with regard to the *Hinomaru* flag. However, at present, no flag other than the *Hinomaru* flag is being treated by the Japanese people as the national flag and a large number of citizens have been recognizing and using the *Hinomaru* flag as the national flag. Therefore, it is easily understandable that the national flag described by the prosecutor

referred to the *Hinomaru* flag and thus there is no lack in specification of the charge of vandalism.

It is admitted that the accused committed the offenses in question by virtue of his deep belief that the *Hinomaru* flag is not in the least worthy of being the national flag, and that not a few in the village also shared his belief. In a democratic society, however, one's own claims should be realized through peaceful means such as discussion or persuasion by speech. The use of violence by the accused is hardly said to be an appropriate means of expressing his belief and is therefore lacking a justifiable reason.

[Comment]

This is the first case in which the legal basis of the *Hinomaru* flag was judicially discussed. Although the Japanese press and mass media widely reported immediately after this decision that the *Hinomaru* flag was acknowledged as the national flag by the judiciary for the first time, that headline was totally misleading. The court only noted that the national flag mentioned in the bill of indictment by the prosecutor was easily understood as referring to a *Hinomaru* flag in light of its virtual recognition as such by a large number of citizens. Therefore, quite contrary to reports by the press, the court never held that the *Hinomaru* flag was recognized as the national flag given legal meaning and effect by statutes or customary laws. Moreover, it is noteworthy that the court observed that the people at large do not have any obligation with regard to the *Hinomaru* flag as long as there are no current laws prescribing the existence of the national flag. This ruling may have implications for the current conflict concerning a duty of raising a *Hinomaru* flag at entrance and graduation ceremonies in schools, which has arisen since the Ministry of Education revised the course of study in 1989.

From the viewpoint of constitutional law, then, the heart of the issue in this case concerns whether burning a *Hinomaru* flag may constitute constitutionally protected speech as an attempt to convey a message by a nonverbal action, and thus it should be entitled to at least some freedom of expression protection. While the United States Supreme Court has long recognized that at least some forms

of conduct merit First Amendment protection under the so-called symbolic expression analysis, the legal argument has some room to be developed in this country. In this case the court had no regard for the speech aspect of the conduct in question and treated the accused's conduct only as an act of vandalism.

According to the symbolic expression analysis developed in the United States, however, once an intent to convey a particular message is present, and in a context where the likelihood is great that the message will be understood by those who view it, then the conduct is entitled to a form of protected expression, which is followed by the two-track method of justification analysis: if the interest advanced by the state is directly related to expression in the context of activity, the state's asserted interest must be subjected to the most exacting scrutiny (track one), while if the governmental interest is unrelated to the suppression of free expression, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations of First Amendment freedoms (track two). Here the accused's action clearly seems to satisfy the symbolic expression requirements because (1) he had a strong intent to protest against raising a *Hinomaru* flag which, he asserted, had been used for mobilizing ordinary people during World War II and was particularly linked together with the memory of the cruel battles in Okinawa island, and (2) the people in Yomitan village, where there had been a mass suicide near the end of the war, surely must have understood the accused's message when they viewed his action in the ball park. Therefore, there may be no room for doubt that this was a case of prosecution for the expression of an idea through activity. If so, since there is no dispute that the interest promoted by vandalism is unrelated to the suppression of free expression per se for it is the protection of others' property, the court should have engaged in the said track two analysis, that is, serious balancing of the competing interests. In other words, the court here at least should have inquired into whether the incidental restriction on alleged freedoms was no greater than was essential to the furtherance of the asserted important or substantial governmental interest. In any case, taking this opportunity, further discussion is being demanded.