

more carefully. The textbook review case involves a wide range of constitutional issues such as educational freedom, the freedom of publishing textbooks, censorship, academic freedom, due process of law, and so on. This decision rejected all the plaintiff's claims. However, among other things, there is strong criticism of the ruling on the censorship issue. Because textbook writers want to publish their ideas and thoughts through textbooks, the textbook review system by itself should be said to constitute unconstitutional censorship as long as it may examine the substance of the ideas. In addition, once judged as disqualified, it is almost impossible to publish the disqualified textbook in the marketplace. In this sense the ruling should be considered to neglect the reality of the publishing market.

From the viewpoint of limiting discretionary power in textbook review, it is important to define the meaning of "the mistakes that are hard to overlook" standard. According to the Court, this standard judges whether the opinions of the approval officers are based on common opinions or established theories in the academic world and the descriptions of the manuscripts are to be evaluated as mistakes in the light of them. Although this ruling may operate to narrow the scope of the discretion, there can be a question whether it is within the role of the courts to recognize established theories in the academic world. Moreover, while this ruling is based on the assumption that textbook should be written with reference to established theories, there may exist different ideas of textbooks, which may invoke different sets of standards.

**Prof. KENJI URATA**  
**SATOSHI KOTAKE**

## **2. Law of Property and Obligations**

**A case concerning claims made by residents who suffered from environmental pollution caused by the use of the Atsugi Base.**  
Decision by the First Petty Bench of the Supreme Court on Febru-

ary 25, 1993. Case No. (o) 58 of 1987. 47 *Minshū* 643; 1456 *Hanrei Jihō* 32.

[Reference: Civil Code, Articles 198, 199, and 709; State Liability Act, Articles, 1(1) and 2(1).]

### **[Facts]**

At first, the background must be explained.

The Atsugi Base was originally a naval base of the US Navy. In 1971, an agreement was reached between the two governments, and the practical purpose of the Atsugi Base was changed. Since then, the Atsugi Base has been a joint base between the US Navy and the Japanese Marine Self-Defense Force. Many military planes have used the base, as have planes carried the aircraft carrier, the Midway since 1973.

In 1976, the plaintiffs, residents living in the neighborhood of the Atsugi Base, brought an action against the state (defendant) claiming (1) that landing and taking off US Navy planes at the Base should be suspended (injunction), (2) that use by Japanese Marine Self-Defense Force planes should be suspended (injunction), (3) that compensation for damages in the past should be made, and (4) that compensation for damages in the future should be made, on the ground that they have suffered physical and mental injury from noise, vibration and exhaust emitted by aircraft landing and taking off from the base.

The injunctions and the compensation for damages in the future were rejected in both the first and second instances. The compensation for damages in the past was allowed in the first instance, but in the second instance the decision was reversed. The plaintiffs appealed to the Supreme Court.

### **[Opinions of the Court]**

The claim for the injunction of the US Navy planes should be dismissed (1). The use of the Base of the US Navy planes is based on a treaty. There is no term in the treaty or other legislation prescribing the power of the Japanese government to regulate the use of the Base by the US Navy. Therefore, the claim made by the

plaintiffs is that the defendant should stop a third party's action which the defendant has no power to control.

The claim for the injunction to restrain the Japanese Marine Self-Defense Force from using the Base for their planes should be rejected (2). The Director General of the Defense Agency has the power to control the flight of Self-Defense Force planes and to regulate them for the purpose of safe flight. The execution of this power inevitably produces a duty to endure injuries. Thus, the current case should be brought in an administrative suit.

The decision by the court of second instance for compensation for damages in the past should be reversed and remanded (3). The question whether the injury is wrongful or not when the damage arising from using the Base occurs should be decided by balancing the seriousness of the damages with the public interests of using the Base. The court of second instance recognized only the public interests of using the Base and decided that the plaintiffs had to endure the injury. However, in the judgment the judges made an error in the application of the doctrine of wrongfulness. Traditionally it is thought that there are several considerations to decide the wrongfulness of the injury: (a) the condition of the injury and the degree of the damage; (b) the nature, contents and degree of the injured interests; (c) the contents and degree of public interests or needs which are involved in the injury, (d) whether or not the defendant takes any measures to prevent the damage, or their contents and effects, and so on. In considering these factors of this doctrine, the court of second instance should have examined whether or not the damages suffered by the plaintiffs, though indirect, were serious and heavy, whether or not there is a reciprocal relation between the interests which the plaintiffs got from the existence of this Base and the damage arising from this Base, and whether or not the anti-noise measures which the defendant had taken were effective.

With regard to the claim for compensation for damages in the future, the court of second instance held that even if the same kind of action (the landing and taking off of planes) was foreseen to continue in the future, it was impossible to assume the exact amount of compensation as well as the establishment of such a claim. This

decision should be supported and the claim should be dismissed (4).

*[Comment]*

Whether or not an injunction against the flight of planes is allowed is one of the major issues in lawsuits concerning environmental pollution caused by airplanes. This problem has two levels, the first is in procedural law and the second is in substantive law. The reason for justifying the injunction has been discussed in substantive law. Traditionally, an injunction has been justified when a claim is made for injuries to real rights. The person who has any real right, such as ownership, can make claim against injuries done to his property. The injunction can be granted by analogy with this claim. Recently, the opinion based on personal rights has prevailed. This view is that personal interests must be respected from the view of the dignity of human beings. Articles 13 and 25 of the Japanese Constitution and Article 710 of the Civil Code are provisions to the effect that personal interests should be preserved. There are other opinions which are based on the law of tort or environmental rights. In the current case, the Supreme Court did not grant an injunction for reasons at the procedural level. Therefore, the view of the Supreme Court concerning justifying such injunctions remains unclear.

Though the compensation for damages in the future has never been allowed, there have been many cases which allowed the compensation for damages in the past. In the current case, the second instance did not allow compensation, on the ground that the Atsugi Base was very important for defense purposes and involved a great public interest and that the residents living in the neighborhood of the Atsugi Base must endure the noise arising from the landing and taking off of planes. Here, the court of second instance held that the degree of enduring injuries would increase in proportion to the degree and extent of the public interest involved in the injuries. But the court of second instance may have gone too far in considering public interest. Public interest is very important, but on the other hand the damages have been inflicted by wrongful actions. Even if the actions are of great public interest, many injured persons exist and their damages cannot be sacrificed for the usefulness for the peo-

ple at large. Overwhelming importance should not be attached to public interests. Indeed, in many cases public interests were taken into consideration but overwhelming importance was not attached to them. The main elements which should be taken into consideration are the nature, degree and extent of the damages. In the current case, the Supreme Court followed the prevailing theory, especially the criteria showed in the Osaka International Airport Case (decision by the Grand Bench of the Supreme Court, on December 16, 1981. See 3 *Waseda Bulletin of Comparative Law* 149), and insisted that full consideration of the matter should be made. This statement itself has no problem, but the way of considering the matter is problematic. And whether or not the conclusion is reasonable is also problematic. The Supreme Court also held that there must exist a reciprocal relation between the interests of the existence of the Atsugi Base and the damages arising from the Base. It follows that a minority should not suffer any disadvantage in the name of public interests.

The Atsugi Base case (No. 2) was held in 1992 (decision by the Yokohama District Court, on December 21, 1992. 1448 *Hanrei Jihō* 42). On that occasion, a claim for an injunction against US Navy planes and compensation for damages in the future was dismissed, a claim for an injunction against Japanese Self-Defense Forces planes was also dismissed, and a claim for compensation for damages in the past was partly allowed.

**Prof. KATSUICHI UCHIDA**  
**YASUO OKADA**

### **3. Family Law**

**A case in which it was held that the Proviso of Article 900(iv) of the Civil Code providing that the share in the succession of an illegitimate child shall be half of that of a legitimate child is unconstitutional.**