MAJOR JUDICIAL DECISIONS

Jan. – Dec., 2001

1. Constitutional Law

Kumamoto District Court, May 11, 2001
1478 HANREI JIHO 30, 1070 HANREI TAIMUZU 151

A case in which patients with Hansen's disease who have been taken into the national sanitarium under the Leprosy Prevention Law demand national compensation under the Law concerning State Liability for Compensation on the ground of the illegality of the quarantine policy and the legislative failure to abolish the law, and the liability for compensation of the state is recognized.

Reference:

Constitution of Japan, Articles 13 and 22; Law Concerning State Liability for Compensation, Article. 1.

Background:

Hansen's Disease is a bacterial infection disease caused by the Mycobacterium Leprae and an inflammatory disease which mainly damages the peripheral nerves and skin chronically. It is very rare for a

person to be infected with Hansen's disease and to present the symptoms of the disease, because the virulence of the Mycobacterium Leprae is originally very weak. And even if a person presents symptoms of the disease, he or she can recover completely without lesion through early detection and early treatment as an outpatient.

But in Japan, Hansen's disease had been called "leprosy" and had been the object of discrimination and persecution since the old days. Not a few patients with Hansen's disease had been ostracized from their hometowns and become wandering vagrants. Since the theory that Hansen's disease was an infectious disease was established in international conferences in 1897, concern for the prevention of Hansen's disease rose. In 1907, the "(first) Leprosy Prevention Law" (Law No. 11, 1907), which provided for the forced quarantine of "leprosy patients who can not receive treatment and have no one to care for them" in the sanitarium, was enacted. In 1919, part of this law was amended to provide power to the president of the sanitarium to punish the inmates. By this provision, the regulation authority of the president was strengthened drastically, and the character of the sanitarium as a concentration camp became clear. From those days, the practice of performing eugenics operations such as sterilization and abortion for the inmates spread.

In 1931, the "(old) Leprosy Prevention Law" (Law No. 58, 1931. hereinafter referred to as "old law") was enacted. This law expanded the object of the forced quarantine to "leprosy patients who are likely to spread the disease" and made even patients at home the object of the forced quarantine. In times of war, the forced quarantine of the patients was thoroughly enforced, and the human rights of the patients were severely infringed in the sanitariums by the abuse of the power to punish. Such thorough enforcement of the forced quarantine policy caused strong fears concerning Hansen's disease to take root in society such as that Hansen's disease was a terrifying infectious disease and that the patients were dangerous beings threatening the community.

But the virulence of Mycobacterium Leprae was originally very weak and international conferences had already repeated that forced quarantine should only be enforced in a limited way even in prewar days. In 1943, a very effective medicine was developed in the United

State and its effectiveness was confirmed at international conferences. Since 1947, that medicine has been adopted in Japan and tremendous progress has been seen in treatment for the disease. Furthermore, the patients' sense of human rights rose. In 1951, a nation-wide organization of the patients was organized and the movement seeking release from the forced quarantine policy became brisk.

Despite such circumstances, in 1953, the "(new) Leprosy Prevention Law" (Law No. 214, 1953. hereinafter referred to as "new law"), which took over the forced quarantine policy of the old law composed of a forced medical examination, forced quarantine at a national sanitarium, limitation of the right to leave, the prohibition of employment etc., was enacted. Thereafter, the treatment for the disease improved and international conferences have strongly advocated the abolition of forced quarantine since 1950. In Japan, the number of the patients drastically decreased because Japan escaped from the postwar state of confusion. And Since 1970, a mitigation of the limit on the right to leave was attempted. But the new law itself has not been abolished. Since 1991, a movement to abolish the new law became active. At last, in 1996, the "Law abolishing the Leprosy Prevention Law" (Law No. 28, 1996) was enacted and the new law was abolished.

But the patients with Hansen's disease and their families had suffered unreasonable discrimination and prejudice due to the long-enforced quarantine policy. The abolition of the new law can not remove their pain. The patients with Hansen's disease filed suits against the state demanding damages based on Article 1 of the "Law Concerning State Liability for Compensation" with district courts in Kumamoto, Okayama, and Tokyo. In 2001, the number of the patients named in courts was over 700. The Kumamoto District Court decision introduced here was the first decision in a series of suits filed by the patients with Hansen's disease.

Facts:

The 127 plaintiffs are former patients with Hansen's disease who had been taken into the national sanitarium under the new law. Based on the Law concerning State Liability for Compensation, plaintiffs filed suits against the state, demanding national compensation for harm

caused by the imprisonment in the sanitarium under the new law and the quarantine policy and for harm caused by being exposed to discrimination and prejudice caused and proposed by the existence of the new law and the enforcement of the quarantine policy, on the ground of the illegality of the quarantine policy which the Health and Welfare Ministry has implemented since 1947 when the Law concerning State Liability for Compensation had been effectuated and the illegality of the legislative acts to enact the new law and the failure to abolish the new law until 1996. The plaintiffs demanded 115 million yen each. The Kumamoto District Court recognized the liability for compensation of the state and ordered the state to pay a total 1.82 billion yen in compensation. The state abandoned the appeal, so the decision became final.

Opinion:

Claim partially affirmed, partially dismissed.

(1) The illegality and fault of the Health and Welfare Ministry in implementing the Hansen's disease policy

Because the quarantine of patients infringe continuously and very seriously their human rights, it should be implemented with maximum care under the Constitution, which guarantees all people the fundamental human rights as eternal and inviolate rights and requires that the rights shall, to the extent that it does not interfere with public welfare, be the supreme consideration in legislation and in other government affairs. The implementation of the quarantine should be allowed at least as far as it is required from the point of view of public health to prevent Hansen's disease. And the need that requires the quarantine should be decided with sufficient care, based on the latest prevailing medical knowledge, considering the prevailing circumstances of the spread of the disease, and respecting the seriousness of the infringement of the human rights caused by the quarantine.

Based on the above, even when the new law was enacted, the need that required quarantine for almost all of the patients, regardless of the strength of the virulence of each disease, could not be identified, given the changes in medical knowledge and the circumstances of the spread of the disease. And since 1960 at the latest, Hansen's disease was no

longer considered as a special disease that required the implementation of a quarantine policy, so the need that required the quarantine was lost for all the inmates and the patients.

Therefore, in 1960 at the latest, the Health and Welfare Minister should have drastically changed the quarantine policy, including following the necessary procedures for the abolition of the new law. The Health and Welfare Minister should at least have implemented appropriate measures making clear that all the inmates could freely leave the sanitarium. And the Health and Welfare Minister should have implemented the appropriate measures to remove the institutional defects because of which the patients who needed treatment in the hospital could not but enter a sanitarium. Furthermore, the discrimination and the prejudice against patients with Hansen's disease permeating society could not be solved as long as the government continued to hold the quarantine policy. Therefore, the Health and Welfare Minister should have implemented appropriate measures to remove the discrimination and the prejudice in the society.

The Health and Welfare Ministry should assume legal obligation for the act of the Health and Welfare Minister which desultorily neglected the circumstances of the inmates, continued the quarantine under the new law, and left in place the societal recognition that Hansen's disease was a terrifying infectious disease and the patients were dangerous beings to be quarantined, without implementing appropriate measures for drastic changes in the quarantine policy and other things. Therefore, it is appropriate to admit the illegality of the execution of the public powers of the Health and Welfare Ministry under the Law concerning State Liability for Compensation. And it is easy to admit the full fault of the Health and Welfare Ministry, because the Health and Welfare Ministry could easily obtain the medical knowledge and information necessary to decide about the need that required the quarantine and grasp the circumstances of the discrimination and the prejudice against patients with Hansen's disease and former patients in 1960.

(2) The illegality and fault of the legislative act of the Diet

The freedom to choose and change one's own residence guaranteed by Art. 22 para. 1 of the Constitution forms a part of economic

liberty and has an aspect of representing personal liberty in a wider sense than Article 18 of the Constitution which provides for the prohibition of involuntary servitude. Moreover, to contact with many parts of society and to communicate with many persons according to one's own choice has a decisive importance in one's life as a human being and freedom to choose and change one's own residence is indispensable for these actions. The quarantine provision of the new law comprehensively limited this freedom. But the infringements of human rights caused by the quarantine provisions cannot accurately be grasped only within the freedom to choose and change one's own residence. The quarantine of patients with Hansen's disease exerted a definitely significant influence on the life of the patients and seriously harmed all possibility to develop the life which the patients should naturally have as human beings. Therefore, the infringements of the human rights caused by the quarantine extended to the whole social life as a human being. Such infringements of the human rights should be treated widely as infringements of the personal rights based on Article 13.

These human rights are not unlimited and are subject to reasonable limits for the public welfare. But even when the new law was enacted, the quarantine provisions of the new law imposed excessive limits on the human rights exceeding the need to prevent Hansen's disease and transcending the reasonable limits for public welfare. And, in 1960 at the latest, it completely lacked any ground supporting its reasonableness, so its unconstitutionality became clear.

Even if a law is unconstitutional, the legislative act to enact the law or the failure to abolish the law by Diet members would not automatically become illegal under the Law concerning State Liability for Compensation. In a case concerning legislative failure to reinstate an at-home voting system, the Supreme Court (Supreme Court, 1st P.B., November 21, 1985) held: "With the exception of the unlikely event of enactment of laws clearly contravening the fundamentals of the Constitution, the legislative acts of Diet members are not subject to assessment of their legality for the purpose of applying the Law Concerning State Liability for Compensation, Article 1, Paragraph 1". But this decision concerned the voting methods of the Diet members which

was originally left to the discretion of the Diet and was entirely different from our case concerning the quarantine provisions of the new law which imposed very serious limits of freedom unparalleled in the other cases. This decision suggested the principles of parliamentary democracy and majority rule as the grounds for its arguments. But these grounds do not apply similarly to our case, because the quarantine provisions of the new law sought to protect the interests of the majority, the general public, at the sacrifice of the minority, patients with Hansen's disease, and the danger of threatening the guarantee of the human rights of the minority inheres in leaving a decision about its propriety to majority rule. Moreover, "the unlikely event of enactment of laws clearly contravening the fundamentals of the Constitution" should not be interpreted as an absolute condition for admitting the illegality of the legislative act under the Law concerning State Liability for Compensation.

Given the seriousness of the infringement of the human rights caused by the existence of the quarantine provisions of the new law and the needs of the judicial relief, it is appropriate to admit the illegality of the legislative failure to abolish the quarantine provisions of the new law by Diet members since 1965 at the latest as a very particular and exceptional case unimaginable otherwise. And it is easy to admit the full fault of the Diet members because they could easily grasp the fact which we find as the premise to decide the unconstitutionality of the quarantine provisions of the new law.

Editorial Note:

We can say that the decision handed down by the Kumamoto District Court was the very natural result given the long-standing inhumane treatment of patients with Hansen's disease. But the Kumamoto District Court had to break a high wall to hand down such a decision. It has been said that it is very difficult to demand national compensation on the grounds that human rights are infringed by the legislative act or failure by the Diet under the Law Concerning State Liability for Compensation, Article 1, Paragraph 1.

This is due to the leading case about this issue, the Supreme Court Decision in 1985 on a case concerning the legislature's failure to re-

instate an at-home voting system (Supreme Court 1st P.B., November 21, 1985). This was the case in which a bedridden old man who could not go to the polling station demanded national compensation on the ground that the legislative act of abolishing and subsequently failing to reinstate an at-home system deprived him of the opportunity to exercise the voting rights guaranteed by Article 15 of the Constitution. The Supreme Court dismissed his demand. According to the Supreme Court, the question of whether legislation was unconstitutional was to be distinguished from that of whether the legislative acts or failures by the Diet members in relation to the legislation were deemed illegal for the purpose of applying the Law Concerning State Liability for Compensation. Under the system of parliamentary democracy adopted under the Constitution, the conduct of Diet members in relation to the substance of legislative acts should be determined by the political judgment of each member and the fitness of his or her judgment should ultimately rest on political assessment by the people. Therefore, legislative acts, which were essentially political, of Diet members were, by their nature, not amenable to legal restraint. Based on these arguments, the Supreme Court limited the possibility for legislative acts of the Diet to be assessed illegal under the Law Concerning State Liability for Compensation to "the exception of the unlikely event of enactment of laws clearly contravening the fundamentals of the Constitution". And the Supreme Court held that the legislative acts of abolishing and failing to reinstate the at-home voting system could not be construed as "the exception", on the ground that the Constitution contains no explicit provision which positively directs the establishment of an at-home voting system and, on the contrary, Article 47 left the determination of voting methods and other concrete matters pertaining to elections to the discretion of the Diet.

Many scholars have criticized this 1985 decision for substantially shutting out the possibility of relief from legislative acts under the Law Concerning State Liability for Compensation. But later Supreme Court decisions have never admitted demands for national compensation against legislative acts or failures, citing the 1985 decision as a precedent. Since 1985, even in the lower courts, demands for national compensation against legislative acts or failures have rarely

been admitted. As an only exception, the Shimonoseki Branch of the Yamaguchi District Court admitted demands for national compensation against legislative failures in the case in which national compensation was demanded against the legislative failure to apologize and compensate for the damage suffered by military prostitutes attached to the army (Shimonoseki Branch of the Yamaguchi District Court, April 21, 1998). But, on appeal, the Hiroshima High Court reversed this decision, arguing that "the decision of the lower court ignoring the standard offered by the 1985 Supreme Court decision was a self-righteous decision which did not understand the relationship between the legislature and the judiciary rightly" (Hiroshima High Court, March 29, 2001).

The reason the Kumamoto District Court broke these circumstances and reached a decision to admit national compensation for legislative acts and failures was that the long-standing infringement of human rights of the patients with Hansen's disease was above all really serious and that the sincere appeals of the patients with Hansen's disease, who appeared in the court overcoming many difficulties, made the Kumamoto District Court recall the original constitutional obligation of a court vested with judicial power and the judicial review. First, the Kumamoto District Court limited the reach of the 1985 decision as a precedent by emphasizing "the difference of the cases" between this case and the series of Supreme Court decisions. Although an approach to emphasize "the difference of the cases" has been often used to limit the reach of precedents in many decisions, the Kumamoto District Court decision was outstanding in that it clearly indicated what the meaning of the judicial review provided by the Constitution was and what the constitutional obligation of a court vested with this power was. Next, the Kumamoto District Court relativized the language of "the exception of the unlikely event of enactment of laws clearly contravening the fundamentals of the Constitution" in the 1985 decision and expanded "the exception" in which the national compensation was admitted. This re-interpretation has a very big significance, given that many previous decisions have had a tendency to make this language the conclusive factor to deny the demand for national compensation. And the Kumamoto District Court constituted this case as "the excep-

tion" and admitted the illegality and fault of Diet for the legislative failure, based on detailed fact-finding concerning the medical knowledge and international movements. This approach to expand the possibility of relief under the Law Concerning State Liability for Compensation by limiting the range of the 1985 decision through distinguishing cases, not denying the 1985 decision openly, is in particular noteworthy, given that the so-called "postwar compensation" lawsuits have been highlighted as lawsuits testing the legal obligation of the Diet in relation to the legislative acts and failures under the Law Concerning State Liability for Compensation in recent years.

It is also noteworthy that the Kumamoto District Court recognized not only the liability of the Diet but also the liability of the Ministry, in particular its liability for the failure to follow the necessary procedure for the abolition of the new law. It has been usually thought that the Cabinet should not refuse to administer a law on account of constitutional doubts about the law, because Article 73 of the Constitution makes "administering the law faithfully" one of the functions the Cabinet shall perform and the Cabinet is not vested with the power of judicial review. And although the Cabinet is vested with the power to submit a bill by Article 5 of the Cabinet Law, it has been usually thought that it only has the power, but not the duty to submit. Based on these understandings, even if the Cabinet would administer an unconstitutional law or would not follow the necessary procedure for the abolition of an unconstitutional law, the Cabinet would not assume a legal obligation. In fact, the Cabinet argued so in this case. But the Kumamoto District Court held that under the circumstances of this case, in which the damage the patients suffered from the quarantine policy was very serious and its error became clear, a positive action toward the abolition of the new law by the Health and Welfare Ministry was required. Without taking such a positive action at all, the Kumamoto District Court said, the argument could not be accepted that the Cabinet would not assume legal obligation for administering an unconstitutional law. Although very difficult legal issues are involved in this problem, the significance that the Kumamoto District Court took not only the Diet but also the Cabinet to task and recognized the liability of the government as a whole was very big at any

rate.

This decision made an unusual political impact. On May 23, Prime Minister Koizumi announced the "abolition of the appeal". On June 15, the government enacted the "Law to provide Compensation for the Inmates of the Hansen's Disease Sanitarium" (Law No. 63, 2001), which provided an apology in the preamble and compensation of a total of 70 billion yen. If the Kumamoto District Court had not handed down such a clear decision, these political advances could not have been anticipated. In this sense, this decision made us re-recognize the importance of the original role of courts to relieve the human rights of citizens from their violation by the administration and legislation.

2. Administrative Law

Supreme Court 3rd P.B., March 27, 2001
55(2) MINSHU 530.

The Second Supreme Court Decision in the Action for the Nullification of Nondisclosure Decision about the Social Expenses of Osaka Prefectural Governor

Facts:

In 1985, the inhabitants of Osaka Prefecture who are the plaintiff of this suit requested the Osaka prefectural governor to disclose the official document about his social expenses that had been spent from January to March, according to the Ordinance on the Opening Official Documents and so on to the Public (that would be revised as a whole in 1999). The governor made the decision not to disclose most of the documents that had been requested, because they corresponded to the nondisclosure reasons prescribed by that Ordinance. The plaintiffs instituted a suit to ask for nullification of that decision.