

must be charged with liability for the damages, it would be out of date.

This decision is the sixth Supreme Court's judgement to hold legislation unconstitutional on its face after an interval of fifteen years. While more than 50 years have passed since the enactment of the Constitution of Japan, the number of the Supreme Court's judgements of unconstitutionality were only about ten, even adding judgements of unconstitutionality other than judgements to hold legislation unconstitutional on its face. In other words, in the operation of the judicial review for more than 50 years, the overwhelmingly majority of decisions by the Supreme Court were judgements of constitutionality. It is not appropriate to call this Supreme Court's attitude "judicial passivism," because the judgement of constitutionality by the Supreme Court has the function of legitimating the legislation suspected of unconstitutionality and the effect of vitalizing the implementation of the Constitution by the majority of the legislature and administration. In this sense, the attitudes of Supreme Court for more than 50 postwar years should be called the "judgement of constitutionality activism." We cannot help doubting whether the Supreme Court has properly exercised its judicial review power.

2. Administrative Law

Osaka High Court, December 5, 2002

Case No. (gyo-ko) 58 of 2001

The Intermediate Appeal Case for Confirmation of the Status
of Atomic-Bomb-Victims under the Act on Backing

Atomic-Bomb-Victims

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Reference:

The Act on Backing Atomic-Bomb-Victims, Arts. 1, 2, & 27.

Facts:

This litigation is one of the litigations generally called the “Atomic-Bomb Victims Abroad Litigations”. The appellee (the plaintiff) was born in Korea under “the Absorption of Korea into Japan”, and enlisted in the Japanese army based on a call-up paper which was issued under the Ordinance on the Military Draft of Koreans enforced in 1944. In 1945, he was bombed by an atomic bomb which was dropped by the American Air Force. In 1998 he came to Japan in order to have medical treatment for the aftereffects of being bombed. Under the Act on Backing Atomic-Bomb-Victims, he received a passbook, received treatment in hospital, acquired the title of receiving the health care allowance, and received a decision that he would receive an allowance of 34,130 yen per year. Although under this decision, he received two month’s allowances, subsequent allowances were halted because of his departure from Japan. The Act on Backing A-bomb-Victims has no provision that the qualification for receiving allowances is limited to residents in Japan. But, in the legal practice, under a circular notice issued by the chief of the public health department, this Act had not been applied to “A-bomb victims who have moved their place of residence out of the territory of Japan” and they lost their rights. Against this cutting off of his allowance based on the disposal of losing his right, the plaintiff brought a lawsuit to the Osaka District Court for (A) cancellation of the disposal to lose his status as an “A-bomb victim” under art. 1 of this law and the receivers of health care allowance (to the Osaka prefectural governor); (B) confirmation that he has the status of “A-bomb victim” (in Japan) and payment of health care allowance which otherwise would have been paid up to 2003 (to the Osaka prefectural governor); (C) jointly and severally payment of 2,000,000 yen as damages under sec. 1 of art. 1 of the State Tort Liability Act (to Japan and the Osaka prefectural governor).

The trial court decided that claims A and C were dismissed. But claim B was affirmed, thus the plaintiff won. Against this decision, Japan and the Osaka prefectural governor brought an intermediate appeal.

Opinion:

Dismissal of the intermediate appeal.

This decision consists of three parts and a concluding part.

In the first part as to the issue of whether “A-bomb victims” necessarily lose their status because they come not to be resident and present in Japan, the Osaka High Court answered No.: “We cannot affirm the interpretation as a reasonable one that, in spite of no express provisions to the effect in the legal nature, legislative intent, or legal structure of this law, those who once acquired the status of ‘A-bomb victims’ legally and validly became excluded from the objects of the application of this Act because they came not to be resident and present in Japan, thus necessarily losing their status of ‘A-bomb victims’”; “because this Act has no nationality clause, it is normally expected that foreigners which may be objects of this Act may be not resided or present in Japan. Thus, in reasonably interpreting its provisions, we must squarely face the fact that ‘victims of A-bomb are victims regardless of where they live.’”

In the second part (concerning claims A and B), the Court holds that the appellee’s status of “A-bomb victim” is confirmed, and that the appellee has a right to receive health care allowances: “It is sure that there is no provision of a concrete way of allowing those who are not resident and not present in our lands, but also there is no provision expressly excluding it. In the Act on Backing the Survivors of the War and Others, another piece of compensative legislation, money practically has been sent. In the light of this fact, ... health care allowances also should be provided to ‘A-bomb victims’ who are not resident or present in our lands”; “There is no legal ground that the appellant, the Osaka prefectural governor, has treated the appellee of the status of ‘A-bomb victim’ as losing this status, and stopped the provision of health care allowance since August [1998]. Therefore the appellee has a right to receive the health care allowance from August 1998”.

The third part (concerning claim C) holds that there is no state tort liability on which the appellee claimed damage: “Even if circular notices are illegal, it does not directly follow that the agency behaved with intention or through carelessness. Evaluating this act as an illegal act through intention or carelessness requires the special conditions that the circular notice clearly violates upper norms, and that in the administrative work different treatments had been general...”; “Intention or carelessness under art. 1 of the State Tort Liability Act cannot be found.”

Editorial Note:

This decision is welcome to us. For as to stopping the provision of the health care allowance because of leaving Japan, this decision holds that this disposal of stopping the provision was illegal, and orders the local government to pay an amount of money which otherwise would have been paid. On the other hand, however, it is also unsatisfactory. For, as for state tort liability, this decision holds that because this disposal of stopping the provision is the consequence of following a circular notice and the officer's intention or carelessness were not found, that is, there is no liability, the claim of damage is rejected — although this judgment is only following the existing doctrines of the State Tort Liability Act.

The illegality judgment of the disposal in this case is mainly derived from three factors. The first factor is that there is no textual ground for limiting the provision of health care allowance to “A-bomb victims” resident or present within our domains. The appellants insisted that this Act was not applied to A-bomb victims abroad because there is no way to provide the allowance to them. But, this decision rejected this insistence and holds that, even if there is no procedural provision, sending money is possible.

The second factor is the nature and human purpose of the Act on Backing A-bomb Victims. The decision, putting emphasis on this factor, rejects the insistence that the administrative law has the principle of territorial privilege for jurisdiction, or that, because this Act is a piece of social security legislation without contributions, it does not apply to residents abroad who are not members of Japanese society. The third factor is that in deciding this case the court had the perception that “victims of the A-bomb are victims regardless of where they live.”

Now, this decision was fixed because Japan and the Osaka prefectural governor did not appeal. As one of the Atomic-Bomb Victims Abroad Litigations it is significant in fixing on illegality decision. But in the light of subsequent developments, the national government does not have the attitude to take this decision seriously and to promote backing A-bomb victims abroad: (1) Although the national government revised the Cabinet ordinance in order to provide allowances for A-bomb victims abroad which had been found to have this status, because of prescription,

the national government rejected beyond payments beyond the last 5 years; (2) The national government insisted to other courts that courts should reject claims of plaintiffs because to pay unpaid amount will make them lose their standing; (3) Although the national government has accepted payment of an unpaid amounts, it continues to deny national tort liability; (4) While in 2003, plaintiffs, A-bomb victims, won in the other three litigations of A-bomb victims abroad, if courts hold that the payer is the national government (there is insistence that because there is no express way of giving provision to A-bomb victims abroad, the payer is not the local government but the national government) the national government appealed to a higher court, although if the court holds that the payer is not the national government but the local government, it does not appeal; (5) While A-bomb victims ask for procedures to apply for the status of "A-bomb victims" without going to Japan, the national government remains unwilling to listen to such voices (among about 5,000 A-bomb victims abroad, only 2,200 have received the pass books for A-bomb victims).

Japan is the only State which can urge anti-war, anti-nuclear, and peace sentiments as an A-bombed State to the world. But it is not persuasive that the State, while having a negative attitude to post-war compensation and having a positive attitude to dispatching the Self-Defense Forces abroad and emergency legislation, expresses for anti-war and anti-nuclear views. The first task of Japan, in order to contribute to international peace, is to face the post-war compensation problems seriously, not preparing emergency legislation or revealing its presence in battle fields.

3. Law of Property and Obligations

Supreme Court 3rd P.B., January 29, 2002

56 (1) MINSHU 185, 1778 HANREI JIHO 28, 1086 HANREI TAIMUZU 96

Whether there is considerable reason for newspapers, who accepted