under the Constitution to conduct the constitutional review, acts in an overly prudent manner in exercising its authority properly, it would be against the expectations and do damage the trust of the people in the judicature, which is in charge of protecting the democratic society and the Constitution (Justice HAMADA).

The principle of the reapportionment should be "One Person, One Vote" (see Reynolds v. Sims, 337 U.S. 533 [1964]). It is true there exist minor difficulties such as gerrymandering, especially racial gerrymandering (see e.g., Shaw v. Reno, 509 U.S. 630 [1993]) in Japan, but the malapportionment problem surely remains persistently. Because it must directly concern members of the Diet both in their status and interests, they are certainly reluctant to take drastic measures for correcting the suspect provision on the apportionment. Indeed, in spite of this case, the HC election was held on July 11, 2004 without any corrections of the maximum disparity at 1:5.16 between constituencies then. If we cannot expect the Diet's competence of self-correction and cannot rely on the Judiciary for the effective correction, it's high time we should create the independent, disinterested and powerful third institution resolving this conundrum.

2. Administrative Law

Xs v. Japan and Kumamoto Prefecture
Supreme Court 2nd P.B., October 15, 2004
Case Nos. (*o*) 1194 and 1196 of 2001
58 (7) MINSHU 1802; 1373 SAIBANSHO JIHO 4; 1876 HANREI JIHO 3;
1167 HANREI TAIMUZU 89; 259 HANREI CHIHOJICHI 48

Summary:

It is illegal that the State and Kumamoto Prefecture did not exercise their regulatory authority on the wastewater discharged from Chisso's Minamata Factory after January in 1940. Therefore, according to Article 1 of the National Redress Law, the State and the Prefecture

accept liability for damages to the patients of Minamata disease (mercurial poisoning) and the sufferers of health hazard due to having consumed fish and shellfish from Minamata Bay and the surrounding area after that month.

Reference:

Factory Wastewater Regulation Act, Articles 1, 2, 7 and 12; Water Quality Control Act, Articles 1 and 5; National Redress Law, Article 1.

Facts:

This case is one that Xs (58 plaintiffs) set up themselves as sufferers from Minamata disease and sued the State and the Prefecture for redress according to Article 1 of National Redress Law, on the grounds of that the State and the Prefecture should have exercised their regulatory authority based on the Food Sanitation Law, the Factory Wastewater Regulation Act and the Water Quality Control Act (two water quality acts) for the prevention of the occurrence of Minamata disease and of its damage from spreading.

The Minamata disease is methyl mercury toxinosis caused by the ingestion of fish and shellfish polluted by methyl mercury discharged from Chisso's Minamata Factory. Xs were domiciled in the area around Minamata Bay some time ago, and consumed fish and shellfish from Minamata Bay and the surrounding areas. On May 1, 1956, a doctor at Chisso's Minamata Factory reported to the Minamata healthcare center the occurrence of patients having a brain disorder of unknown etiology. This is called "the official discovery of the Minamata Disease." To that end, the Minamata healthcare center investigated, and turned up that there had been patients with the same symptoms already in 1953 and that up to the point of January 1957, 54 patients had been medically identified as having a strange disease, of whom 17 had died. After the official discovery of the Minamata disease, the Minamata healthcare center, the lab in the faculty of medicine of Kumamoto University investigated the cause of this strange disease. In the result of that research, in January 1957, the State and the Prefecture arrived at a conclusion *prima facie* that the cause of the disease might be due to consumption of polluted fish and shellfish at the time. The Kumamoto prefecture called attention to the residents

in Minamata city not to eat fish and shellfish from Minamata Bay and to refrain voluntarily from fishing. In 1957, it became clear that Minamata disease was a kind of toxinosis, but the causative agent was unclear. In one workshop held in 1958, the Ministry of Health and Welfare (MHW) issued the statement that the causative agent was estimated to come from some factory in Minamata city, but the Ministry of International Trade and Industry (MITI) wanted the MHW to decline to give a decisive statement as long as the causative agent was not unspecified. At that time, in 1959, the victims of Minamata disease were 71 patients and 28 fatalities. Then, in consideration of the great deal of harm caused by the disease, MITI gave a spoken order to the Chisso's Minamata Factory to block a drainage path, to set up an effluent treatment facility as rapidly as possible, and to fall in with the investigation. Not otherwise MITI was asked by MHW to undertake appropriate measures against the wastewater from Chisso's foctory, and therefore couriered documents to call for locating an effluent treatment facility rapidly and completely.

In succeeding years, many actions for damages against the Chisso Corporation, the State and the Prefecture (Minamata Disease Lawsuits) were brought in many parts of the country. This case was one of those suits. Xs organized a society of "Kansai Victims of Minamata Disease," took actions to clarify the responsibility of the Chisso Corporation, the State and the Prefecture on October in 1982 (we do not think of the suit against the Chisso Corporation here). In the first trial of this suit given on July in 1994, Osaka District Court gave a decision to deny the responsibility of the State and the Prefecture. The Xs lodged an appeal against the decision. Contrary to this, Osaka High Court (appeal court) held that it was illegal that the State and the Prefecture did not exercise their regulatory authority fixed by the two water quality acts and the fisheries industry coordination regulation of the Kumamoto prefecture. Against this decision of the appeal court, the State and the Prefecture appealed to the Supreme Court. All other suits for government responsibility as to Minamata disease were turned down in accepting "a political solution," at the same time, this case has become the only suit which has carried "a judicial solution" through to the end.

Opinion:

Dismissal of final appeal.

If the state and the prefecture do not exercise their regulatory authority and that non-execution of their authority is considered as be seriously bankrupt of rationality beyond the limit of what is acceptable according to the intent and object of the statute and regulation which fix their regulatory authority, to the nature of that authority and to the concrete circumstances, they must assume responsibility for a person who suffers damage from their non-execution of authority in conformity to Article 1 (1) of the National Redress Law.

1. The responsibility of the state:

Two water quality acts provide that: on the premise that the competent authority takes the procedure fixed by those acts (the competent authority designates relevant body of water as a designated water body, lays down water quality criteria for this designed water body, designates the facility which discharges wastewater as a specific facility by government decree when a considerable injury to industry or a not-to-be-missed threat to public health arise or can arise), the competent minister exercises his regulatory authority to order measures required for the amelioration of industrial wastewater treatment and suspension of the use of this specific facility and so on in accordance with Articles 7 and 12 of the Factory Wastewater Regulation. This authority should be exercised on a timely basis and *ad rem* in order to protect the life and health of people around who are concerned in the aggravation of water quality in the designed water body as one of its main objectives.

According to the fact, the following situation is certifiable by the end of November in 1959.

(1) Three years had passed since the official discovery on May 1, 1956, during that period the situation had been continuing where serious damage was done to residents' life and health who consume fish and shellfish from Minamata Bay and the surrounding areas, and the State recognized that there were a number of patients and fatalities.

(2) The State could have recognized with high probability that the causative agent was a kind of organic mercury compound and was discharged from the facility of Chisso's Minamata factory.

(3) The State could have made a quantitative analysis of mercury in the wastewater from that facility.

In view of the foregoing circumstances, at least in November of 1959, the competent authority could have and should have designated Minamata Bay and the surrounding areas as a designated water body, fixed water quality criteria so that mercury and its compound must not be undetectable from the wastewater discharged to this designated water body and carried out the necessary procedure fixed by the two water quality acts to exercise the regulatory authority. And at least in December of the same year, the minister of MITI could have exercised that authority to order Chisso Corporation to ameliorate its wastewater treatment, to suspend using that facility or to take all other necessary measures. In addition, considering the seriousness of the health hazard caused by Minamata Disease, he should have exercised that authority as quickly as possible. It is clear that if he had have exercised his authority over the corporation, it would have been possible to prevent the damage from spreading, but indeed he did not do that, so the damage expanded as a result.

2. The responsibility of the Kumamoto Prefecture:

According to the facts above, the Governor of Kumamoto Prefecture had or could have arrived at a common perception of the circumstance above with the State. So the Governor should have exercised the regulatory authority based on the Fisheries Industry Coordination Regulation until the end of December in 1959. Thus, the decision of the appeal court that the Prefecture must respond in damage by virtue of the National Redress Law Article 1 (1) because it was notably devoid of rationality that he did not exercise his authority after January of 1960 is approvable, because it is possible that the regulation has health protection of person who consume aquatic products as its final aim regardless of its direct objective of breeding aquatic animals and plants.

Editorial Note:

The National Redress Law Article 1 (1) provides that the state and the local government must respond to damage which their servants gave inadvertently or intentionally to others in conducting their duties ("exercise of public authority"). It involves the case where the administration

illegally does not exercise its regulatory authority. Despite the fact that the legislation gave administrative authority to the regulatory authority to obviate a danger to public health and life, when it did not exercise its authority and in consequence gave damage to someone, the responsibility of the State and the government is brought into question. Then it is at issue whether it is illegal or not that the administrative authority did not exercise its power. In most cases it is unclear, because legislation generally gives it discretion to do or not to do so. So judges are faced with the problem of how and by which they figure out if the administrative authority had an obligation to exercise its power. In this regard, jurisprudence has built a framework for judgement; "obligation to do" theory and "reduction of administrative discretion to zero" theory. The former is that it imposes an obligation to do so on the administrative authority under the given conditions in view of the interest protected through the exercise of its power and the object of the legislation, the latter is that with respect to its discretion to do or not to do so as a general rule, but when the circumstances need not respect its discretion, its scope constracts so that it becomes illegal to do nothing. In each case it behooves that we define the conditions for the illegality of non-exercize of the regulatory authority.

3. Law of Property and Obligations

Xs v. Urban Renaissance Agency
Supreme Court 1st P.B., November 18, 2004
Case No. (*jyu*) 482 of 2004
58 (8) MINSHU 2225; 1883 HANREI-JIHO 62

Summary:

A case which affirms that a claim for *isharyo* where a transferor did not explain the fact that is important for the transferee of the transfer contract of the condominium to consider the propriety of the price in deciding whether or not to enter into the contract, deserves to be considered an illegal act.