intrusiveness of the remedy resulting from the judgment of unconstitutionality. However, in this case, Justices should have made a point of the significance of substantive right. They actually mentioned the meaning of the right to vote in the parliamentary democracy. They could have manifested the incompatibility with the Constitution. They could have done this without intrusive remedy, as Justice IZUMI actually did in his concurring opinion.

In view of the importance of the right to vote in the democratic state, it is very important that one Justice suggests the incompatibility of the present law with the Constitution. Whether the remedy in this case is unacceptable or not, it is clearly necessary that the Court identify the present system as being in the unconstitutional situation at least. It is not difficult to declare the unconstitutionality in order to urge the Diet to adopt proper measures. In this case, it is said that the Court could not fulfill even a minimum function.

2. Administrative Law

Xs v. Takane Town
Supreme Court 2nd P.B.,July 14 2006
Case No. (gyou-tu) 35 (gyou-hi) 29 of 2003
60 (6) MINSHU2369; 1947 HANROEI JIHO45

Summary:

Dismissal of final appeal

The part of the municipal ordinance of Takane town, which changes a basic charge of a villa watering contracting party over this case, is invalid, because that part violates article 244 paragraph 3 of the Local Autonomy Law.

Appellees (Xs) do not carry need to pay a difference between the basic charge of this case attached list and the basic charge before a revision by this case of a change in the municipal ordinance concerning a villa watering contracting party.

Thus it is possible to approve the original judgment which approved of

appellees' claim to confirm a lack of debts concerning the unsettled waterworks charge about the said difference and to recover the unfair profit corresponding to the paid waterworks charge and so on in conclusion.

Reference:

Constitution article 14 paragraph 1; Act on Waterworks article 14 paragraph 4 item 1and item 4; Local Autonomy Law article 244 paragraph 3; Act on Local public enterprise article 21 paragraph 2 and so on

Facts:

Xs (they are not recorded in the basic resident register of Takane town) possessed a villa in the area of old Takane town and concluded a watering contract between the said town (present Hokuto city). Takane town set an administrative regulation of the effect which does not admit a stop of a watering of the waterworks as a villa and a town revised Takanecho simple water project watering ordinance (It is called "this case ordinance" in the following.), and the charge raised the price of the waterworks basic charge of the villa owner who is not registered in the basic resident register in 2002. As a result, the differential has formed during a basic charge of a villa owner and a watering contracting party besides that (to a resident of 1400 yen, a villa owner is 5000 yen).

Xs raised the suit asking for an invalid confirmation of this case ordinance and the regulation mainly by civil suit, preliminarily by administrative litigation, because the revised ordinance and the regulation violate article 14 paragraph 1of the constitution (the principle of equality under the law), article 14 paragraph 4 item 1and item 4 of the old act on waterworks, article 21 paragraph 2 of the act on local public enterprise law, which adopts a cost base and prescribes the prohibition of discriminatory handling. Xs also raised a civil suit requesting the confirmation that the debt does not exist and the return of the unjust enrichment subject to the invalidity of this case ordinance.

Kofu district court charged that when an ordinance possesses a character such as the provision of a contract, it's possible to ask for an invalid confirmation of an ordinance in a civil suit. However, Kofu district court rejected this appeal, because in this case the invalid confirmation of a regulation is immature as trouble, therefore the profit of the confirmation in a

civil suit (interest to confirm) is chipped.

Furthermore, Kofu district court decided that when the particularity of the simple water project and the particularity of the waterworks use in a villa are considered, a waterworks basic charge in a villa stops at something rational, and the charge is rejected.

Tokyo high court made out as follows, that is to say, when a delivery specification is set by the shape of the ordinance, individual administrative disposition is not be needed after that, and the contents of an ordinance will be the contents of the watering contract, and an obligation is imposed on the demanded person. Therefore an ordinance can make itself the subject of an action for proceedings to confirm lack of void of administrative dispositions as administrative litigation (article 3 paragraph 4 of the Administrative Litigation Act) as something with an administrative disposition (disposition "nature"). On the other hand, the invalid confirmation of the ordinance is immature as trouble, and the profit of the confirmation in a civil suit is chipped.

And it can not be said that a waterworks basic charge in a villa is in a rational area even if we refer to the particularity of the simple water project and the particularity of the waterworks use in a villa, and this case ordinance is crossed with unfair discrimination. So that it is confirmed that the part where a basic charge in a villa over this is set is invalid.

Takane town appealed to Supreme Court. Further, Xs newly insisted that even if the appeal in which we ask for invalid confirmation of this case ordinance is unsuitable as complaint actions, it is legitimate as a suit between the people concerned of article 4 of the Administrative Litigation Law.

Opinion:

An administrative disposition which is to be the object of complaint actions of article 3 of the Administrative Litigation Law means an action constituting exercise of police power. On the other hand, this case ordinance generally revises the waterworks charge for the simple water project old Takane town does. So an establishment act of this case ordinance can not be identified with the disposal a government agency does as an execution of law substantially. Therefore an establishment act of this case change ordinance does not cross with the target administrative disposition

of complaint actions.

An action for proceedings to confirm lack of void of administrative dispositions as complaint actions and suit between the person concerned of article 4 of the Administrative Litigation Law are a different appeal. Appellees (Xs) raised the appeal asking for invalid confirmation of this case ordinance as complaint action, not suit between the person concerned of 4 article of Administrative Litigation Law. So the insistence of Appellees chips its premise, and is improper.

It is not considerable to understand a rule of article 244 paragraph 3 of the Local Autonomy Law not to be applied to a use relation in official facilities by the person who has that in the status in accordance with the resident. So it should be called the one which violates the said article of the Local Autonomy Law to treat discriminatively to these persons without a rational reason.

Though the waterworks amount of consumption fluctuates by various factors, it is not necessary to reserve the water source and the facilities which can stand up to the biggest amount of consumption for a water project. So it itself permits establishing a basic charge of a villa watering contracting party more expensively than a basic charge of a watering contracting party besides the villa as the discretion of a water project person.

But the waterworks charge which is a consideration of waterworks use in the water project carried on as a public corporation should be established based on the individual production cost of the watering concerned as a principle.

The setting method of the waterworks charge in this case change ordinance does not possess the rationality which just sanctions the big differential of the basic charge between the villa watering contracting party and the watering contracting party besides the villa sufficiently. Thus, we have no choice but to say that the revision of a basic charge of a villa watering contracting party by this case change ordinance crosses with the unfair discriminatory handling forbidden by article 244 paragraph 3 of the Local Autonomy Law.

Therefore the part where a basic charge of a villa watering contracting party over this case change ordinance was revised is invalid as the one which violates article 244 paragraph 3of the Local Autonomy Law. This case ordinance which affects a villa watering contracting party does not

need to pay to Appellees about a difference between a fixed basic charge and a basic charge before a revision by this case change ordinance.

It is possible to approve of the judgment of the original trial which approved a charge for the Appellees who claimed the confirmation that a debt does not exist and the return of the unjust enrichment the paid waterworks charge corresponding amount and prohibition of a stop in the water supply of small water supply system to person with the unsettled waterworks charge among the Appellees in a conclusion, but it is not possible to adopt the gist of an argument.

Editorial Note:

The Act on Waterworks requests that the charge is proper, in the light of the proper production cost which can be put under the efficient management (article 14 paragraph 4 item 1), and prohibits unfair discriminatory handling to a specific person (article 14 paragraph 4 item 4). And article 244 paragraph 3 of the Local Autonomy Law is the regulation which made the natural reason which prohibits "unfair discriminatory handling" (Equal principle of Constitution article 14 paragraph 1) about use in official facilities by a "resident" clear. Thus this provision of the Local Autonomy Law is a general comprehensive checking regulation. And the use of tap water is relevant to use of "official facilities."

Even if one is not a person with living headquarters in the area of the local public entity, but the one is the person who possesses the base which is fixed lives there and schedules continual activity, like a villa owner, and because of it, he falls into the person who should bear the taxes in a local public entity concerned, such a person is included in the "resident" prescribed in article 244 paragraph 3 of the Local Autonomy Law.

In this case, the ordinance which constitutes the waterworks contract, and collects the excessive charge compared with a general resident besides that to the villa owner who comes under the "resident" of article 244 paragraph 3 of the Local Autonomy Law, was declared invalid, because the ordinance is relevant to the "unfair discriminatory handling" to a "resident" which article 244 paragraph 3 of the Local Autonomy Law prohibits.

But on the other hand, the Supreme Court took a suit type theory out,

and charged that an ordinance establishment act is only a general abstract act which makes a rule, and the addressee's specification is broken off in such act, so it is impossible to authorize the disposition "nature" which is the necessary requirements for complaint actions of article 3 of the Administrative Litigation Law.

In the conventional Supreme Court's judgment, it is admitted that there is a disposition "nature" in an administrative disposition of the administrative organs' action directly shaping citizens'rights and duties, or the fixing of such scope, which must be legally recognized, and does not request an addressee's specification.

On the one hand, this judgment requests an addressee's specification strictly.

On the other hand, in inferior courts, about the ordinance which has an influence on the concrete rights and obligations which are a specific individual even if it does not pass through disposal by an administrative subject, the disposition "nature" is admitted in an establishment act of the ordinance. That is, this case change ordinance releases the implementation of nurture in four nursery schools of this case, and we can think that a law places this with disadvantageous disposal to a person. From these things, it is suitable that establishment of this case change ordinance falls into the administrative dispositions prescribed in article 3 of the Administrative Litigation Law(Xs v. Yokohama city Yokohama district court May 22 2006).

In the Japanese Administrative Litigation Law, an administrative action which possesses disposition "nature" is an object for complaint actions article 3 of Administrative Litigation Law, and an administrative action which does not possess disposition "nature" is the object for a suit between the people concerned of article 4 of the Administrative Litigation Law. In other words, you can make a sharp distinction between article 3 and article 4 by the presence of disposition "nature".

"Appeal of confirmation" was, from the stand point that it is useful and important to utilize a declaratory judgment from the point of view which answers to complication and diversification of administrative activity and for the relief with the effective right and profit of the people, written clearly as one type of between the person concerned of article 4 of the Administrative Litigation Law. namely, in case that a judgment is divided

about the presence of disposition "nature" like this case, so the case concerned is not made the target of complaint actions article 3 of the Administrative Litigation Law, "Appeal of confirmation" as one type of suit of between the person concerned of article 4 of the Administrative Litigation Law will cover such case. Further, concerning the interest to confirm for an appeal of confirmation to be approved, it is understood like that in a civil suit, and there is no change in this point.

But in this case, because the Administrative Litigation Law was in a transition period of a change, along the tendency of the conventional trial by lower courts, a possibility that an action for proceedings to confirm lack of void of administrative dispositions as complaint actions is raised could not also be denied. In fact when the Appellees appealed to a high court, they did so.

However, the Supreme Court did not admit disposition "nature" in an establishment act of an ordinance and judged that complaint actions and suit between the persons concerned were a different appeal, and charged that an Appellees' claim that this case appeal is legitimate as a suit between the people concerned was improper.

Certainly, an administrative disposition is the act which forms a right and also imposes obligation by one-sided will of the administrative side, an administrative agency and a private citizen can not be said to have an equal relationship in this case. On the other hand, contract is formed by agreement of an expression of two wills, an application and consent to the application between the equal persons concerned. What becomes an issue in this case is not an administrative disposition, but an ordinance as a provision of waterworks supply contract. When it is not so, to confirm the invalidity of an ordinance as a provision of waterworks supply contract by suit between the persons concerned is regarded as the proper means in a revised Administrative Litigation Law.

So, when thinking about where the meaning of the fact that the Supreme Court judged that the complaint actions and suit between the persons concerned were a different appeal and differentiated both of them strictly is, that it is based on the gist of the change in the Administrative Litigation Law in 2004, the Supreme Court may be the one which wanted to specify a direction that complaint actions deal with a "disposition and determination", and a suit between the person concerned deals with an

administrative act stereotype besides that, because the Supreme Court made the judgment process to the conclusion of the original court a law violation, but maintained the judgment in the original court as a conclusion.

However, even though such as not touching a change in the Administrative Litigation Law in a charge, this judgment is a precedent by which an ambiguity is left in the contents.

3. Law of Property and Obligations

Xs v. Meiwa Estate Company Limited etc.
Supreme Court 1st P.B., March 30, 2006
Case No. (*jyu*) 364 of 2005
60 (3) MINSHU 948; 1931 HANREI-JIHO 3, 1209 HANREI-TAIMUZU 85

Judgment concerning whether or not the interest in enjoying the benefit of a good scenic view deserves legal protection

Reference:

Civil Code, Art. 709

Facts:

In the area surrounding the Daigaku-Dori Street in Kunitachi City in Tokyo, self-regulations in order to keep a good scenic view have been carried out by the endeavor of the residents since the prewar period. In the place on the Daigaku-Dori Street, including the estate that is at issue in this case, especially people are not allowed to construct a building higher than the ginkgoes in Daigaku-Dori Street (higher than 20 m). A land developer, Y planned to build a fourteen-storied condominium on the estate, and got a building permit. Up to starting the construction, Y was requested by the municipal authorities and the residents to alter the plan, but ignored these requests. And Y forced the construction. Kunitachi City had laid down a municipal bylaw in order to stop the construction, but a court decided that the bylaw did not apply to the construction. So the resi-