
MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2007

1. Constitutional Law

X v. Japan

Supreme Court 3 rd P.B., September 18, 2007

Case No. (a) 1819 of 2005

61 (6) KEI SHU 601; 1444 SAIBANSHO JIHO 1; 1987 HANREI JIHO 150

Summary:

In this case, the Supreme Court of Japan upheld a city ordinance which broadly restricted the constitutional rights to free speech and assembly. Hiroshima City has been worried about gang group activities in the festival every year. The City needed the police force to expel or take action against them. The ordinance was enacted in 2002 in order to crack down on gang group activities. Because it has some vague provisions on the face, the constitutionality was disputed in this case.

Reference:

Constitution, Article 21 (1), 31; Hiroshima City Ordinance for Expulsion of Gang Group, Article 16, 17

Facts:

Hiroshima City enacted the ordinance to clamp down on gang group activities. Article 16 provides that no one shall assemble without permission from the administrative office, in such a way that the public are worried or scared thereof. Article 17 provides that the Mayor can order them to expel or stop certain activities in public spaces administered by the city. The defendant in this case assembled without permission from the administrative office, in a way that the public were worried or scared. About 40 members of a gang group participated in that assembly. The defendant was accused of the violation of the city ordinance. The District Court ruled against the defendant. He appealed to Hiroshima High Court, but he lost again. He appealed to the Supreme Court of Japan on the constitutional grounds that the ordinance was too unclear to be applied without violating the constitutional rights.

Opinion:

The appeal shall be dismissed.

Majority Opinion (Justice HORIKAGO Yukio, Justice NASU Kohei, Justice KONDO Takayasu):

To be sure, the provisions of the ordinance are not clear on their face. They might be inappropriate as a criminal law. However, the scope of articles 16 & 17 is limited to activities or assemblies which the Mayor orders to be stopped or expelled. The ordinance is easily thought to regulate gang group activities, not others. This interpretation, which we can reach in considering the meaning of the ordinance as a whole, escapes constitutional challenges. In short, under the limited interpretation, we can apply the ordinance to this case constitutionally, without any constitutional violation.

Concurring Opinion (Justice HORIKAGO Yukio):

I agree with the majority. In addition, dissenting opinions challenge the approach that the majority took to avoid the violations of the Constitution, limiting the scope of the ordinance to conduct which could be regulated constitutionally. But, under any interpretation of the ordinance, the defendant violates the law. We have to consider the constitutionality, not of every provision, but of the ordinance as a whole. It is rea-

sonable to interpret the ordinance in the way that the scope of application is limited to avoid unconstitutional application. I disagree with the dissenting opinions that call for invalidating of the ordinance on its surface analysis.

Concurring Opinion (Justice NASU Kohei):

I agree with the majority. But I would like to make sure when and how we can adopt the limited interpretation to avoid constitutional violation. According to our precedent, there are two requirements to adopt such an approach. Firstly, interpretation has to distinguish the regulated things from others clearly, and under such an interpretation, it is clear that officials regulate only things which could be constitutionally regulated. Secondly, in looking at the provision, we and the people can understand whether certain acts could be regulated in a particular case.

The second requirement matters here. Our precedent requires that any interpretation of law should be guided by the provision itself, so that any interpretation which can not be read in the provision is unreasonable. The ordinance in the question is easily interpreted to regulate only gang group activities from its structure and purpose. Therefore, I think it is appropriate to interpret the ordinance in the limited way to avoid the constitutional challenges.

Dissenting Opinion (Justice FUJITA Tokiyasu):

I do not agree with the majority approach, because it is inappropriate to adopt the interpretation limiting the scope to which the ordinance applies in order to avoid the constitutional challenges. I think that when the right to free speech is invoked, the court should not resolve the constitutional matter through the interpretation of the provisions. We have to void the ordinance on its face. The city could easily rewrite it in a way that not violate constitutional rights. Forcibly interpreting any provision of a law is inappropriate when the right to free speech is at stake.

Dissenting Opinion (Justice TAHARA Mutsuo):

I find some difficulties in the majority approach. It is extremely difficult for people to reach the interpretation suggested by the majority. I think that the majority approach could be allowed only when the chilling effect on free speech is not caused and it is possible for the general public to read the law in such a way.

The ordinance in question could not be read in the way that the

majority actually did. Therefore, I do not affirm the constitutionality of the ordinance. I think it is constitutional to regulate gang group activities in public spaces. However, we can not apply unconstitutional law to the defendant.

Editorial Note:

In this case, how to judge the constitutionality of law in the area of free speech was disputed between the majority and the minority. The majority took the very technical approach to decide that the ordinance was constitutional. Usually, courts which consist of unelected judges should defer to democratic institutions, especially the parliament, so that courts should avoid invalidating laws which are enacted by the democratic institution. On the other hand, the guarantee of the constitutional rights is the main task of the judiciary. Constitutional courts, especially the Supreme Court, should take the balance between the two concerns. As one possible method of constitutional judging, courts sometimes interpret laws to remove their unconstitutional applications. The majority in this case took this approach to avoid validating the ordinance itself which was enacted by a democratic institution.

However, the dominant constitutional theories on free speech require a different way to examine constitutionality. As the dissenting opinions alleged, the ordinance has a chilling effect on general public activities rather than gang groups. Vague provisions in the ordinance do not make the standards as law clear, so that we do not know what the ordinance exactly regulates and what activities actually are punishable. To remove this chilling effect, judges should void it on its face. Otherwise, the administrative officials could apply the ordinance arbitrarily. Free speech is an essential right in a democratic society. From a historical perspective, the first step toward tyranny is the invasion of free speech. So, many constitutional and political theorists urge that we should be eternally vigilant of any violation of the right to free speech. Exceptionally in the free speech area, courts should strictly examine the constitutionality of a regulating law, even if they are seen as undemocratic.

The dissenting opinion delivered by Justice Fujita persuades me to agree with the minority, simply because it is extremely difficult to interpret the ordinance without any constitutional violations. It is also unrea-

sonable to suppose that the people read the ordinance as a whole in such a way. I think it is appropriate and possible to regulate gang group assembly in the constitutional law, but at least, the ordinance should be rewritten to make clear the scope of the regulations.

2. Administrative Law

X v. Governor of Tokyo-to

Supreme Court 2nd P.B., October 19, 2007

Case No. (gyo-hi) 390 of 2007

1446 SAIBANSHO JIHO 4; 1259 HANREI TAIMUZU 197

Summary: Dismissal of final appeal concerning the governor's establishment permission of based on Article 7 of the Medical Treatment Act (before the change by law No. 84 in 2006) to A hospital, the medical association and the doctors which establish a medical facility around the A hospital and carried out medical practice do not possess the standing concerning the Action to quash the governor's permission disposal of the establishment of A hospital.

Reference: Medical Treatment Act Article 7, Article 30 no 3, Article 30 no 7

Administrative Litigation Act Article 9

Facts:

The Medical Treatment Act is, by prescribing the matters needed for the establishment and management of a hospital and the matters necessary to the purpose which promotes the maintenance of the hospital and so on, a law which plans for the security of the system to offer medical treatment and contributes to the maintenance of national health (Article 1).

After it conforms to this gist, the Medical Treatment Act Article 7 Paragraph 1 prescribes that when anyone is trying to establish a hospital the permission of the prefectural governor in the place of establishment is needed. And, according to Article 7 Paragraph 4, when there is an applica-