MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2010

1. Constitutional Law

The City of Sunagawa v. X etc.
Supreme Court, January 20, 2010,
Case No. (Gyo-Tsu) 260 of 2007
64 (1) MINSHU 1

Summary:

The act of a City of Sunagawa [referred as "the City"] to offer the city-owned lands to a joint neighborhood association for use as the site of a Shinto shrine facility without compensation is in violation of Article 89 and the second sentence of Article 20, paragraph (1) of the Constitution.

Reference:

Constitution, Article 20 (1) and 89

Facts:

The City (defendant, appellant and petitioner) owns the land where the Shinto shrine has been built on the S-area. This shrine includes the

Torii, the *Jishingu*, and the *Hokora* (these are clearly symbols of a Shinto shrine). The City has allowed a joint neighborhood association organized by neighborhoods living in the S-area to use the land for the site of the shrine without compensation. The Mayor of Sunagawa has participated in religious events at the shrine.

The historical circumstances concerning the shrine are as follows. In 1892, the neighborhoods of the S-area created a *Hokora* for prayers for a rich harvest on another piece of land in the S-area and the Office of Hokkaido approved it as a shrine in 1897. After some decades, the shrine was moved to the land where the shrine is built now because of the re-construction of a public elementary school on the shrine at that time. Although the land was owned by a private individual at the time of moving, the owner applied for a contribution to the Town of Sunagawa (that became the City in 1958) for a reduction in Property Tax, and the Town got the land on the grounds of a decision by the Town Council and permited a neighborhood association to use the land for a Shinto shrine without compensation in 1948. In 1970, a neighborhood association got an allocation from the City to build a new public facility on the land. Along with the construction of the new public facility, the old facilities were demolished, except for the *Hokora* and *Jishingu*, and the *Torii* was constructed newly. A new public facility is used for not only some religious events which have been held by the *Ujiko* Group (it is a group for holding Shinto ceremonies), but also a meeting by the neighborhood or a *juku* for young students living in the S-area.

X (plaintiff, appellee and respondent) who lives in the City, alleges that it is in violation of the constitutional principle of the separation of state and religion for the City to offer the land for use as the site of a shrine, and that the failure of the City to cancel the contract of the loan for use of the site and request the removal of these facilities and vacation of the land constitutes an illegal omission of administration of property, and based on these allegations sought a declaration of the illegality of such an omission under Article 242-2 (1) (iii) of the Local Autonomy Act. The District Court of Sapporo and the High Court of Sapporo both admitted that the connection between the City and Shinto was in violation of the Constitution referring to a "purpose-effect test", and therefore the Act of Offering Lands for Use [referred as "the Act"] by the City was unconstitutional. Both courts

held that the City's failure to request the neighborhood association to remove shrine constituted an illegal omission of the administration of the land.

Opinion:

The Supreme Court quashed the judgment in the prior instance by the Court's own authority and *Remanded* the case to the High Court for further examination as to points including whether or not there existed alternative means to rectify the unconstitutionality of "the Act."

The Opinion of the Court

"[T]here is no choice but to regard the Shrine's Property ... as collectively constituting a facility of a Shinto shrine." "The Ujiko Group is a religious organization whose main purpose is to perform religious rites, etc., and it actually performs religious festivals of the Shrine while collecting contributions, and in this respect, it can be construed to fall within the category of "religious institution or association" as set forth in Article 89 of the Constitution." "[The Act], as its direct effect, makes it easy for the Ujiko Group to carry out religious activities using the Shrine."

"[W]e have no choice but to say that [the Act] is an act by which the City permits a religious facility to be installed on the Lands without receiving any consideration therefor and makes it easy for the Ujiko Group to carry out religious activities using such facility, and it is unavoidable that said act is evaluated from the public's point of view to show that the City offers a special benefit to a specific religion and assists it."

"Taking into consideration the factors described above and making judgment comprehensively in light of the socially accepted ideas, it is appropriate to construe that [the Act] shows that the connection between the City and the Shrine or Shintoism goes beyond the limit that is deemed to be reasonable, in light of the social and cultural conditions of our country, in relation to the fundamental purpose of the system of securing guarantee of freedom of religion, and it constitutes an act of appropriating public property for use prohibited under Article 89 of the Constitution, and consequently, said act also constitutes the vesting of privileges to any religious organization prohibited under the second sentence of Article 20, paragraph (1) of the Constitution."

"However, the reason why we find said act to be unconstitutional is that the City has been offering the lands to the Ujiko Group, which conducts certain events using the facility described as above, for a long period of time without compensation, and in order to rectify such unconstitutional condition, there may be an appropriate means other than to have the Shinto shrine facility removed and the lands vacated."

"[I]t is evident that if the appellant takes a direct means and has the Shrine's Property removed immediately, it would not only undermine the trust in the Neighborhood Association which leases the lands on condition of using them as the site of the Shinto shrine but also would make it extremely difficult to carry out the religious activities which have been protected and inherited by local inhabitants, thereby seriously injuring the freedom of religion of the members of the Ujiko Group."

"If, in light of these circumstances, there exists any rational and realistic alternative means that the appellant can choose, the appellant's failure to take a measure of requesting the removal of the Shrine's Property and vacation of the lands is not immediately judged to be illegal in the aspect of administration of property." "[T]he appellant's failure to request the removal of the property and vacation of the lands is judged to be illegal only in cases where such failure is judged to be beyond the bounds of the appellant's discretionary power in the administration of property or to constitute an abuse of such power even when it is taken into consideration that there exist such alternative means."

"[T]he existence of alternative means to rectify the unconstitutionality of[the Act]is clear, irrespective of whether or not the parties allege such alternatives." "[T]he court of prior instance was also trying another case of an inhabitants' suit involving another Shinto shrine ... located in the City, in which the parties are almost the same as this case." "In said other case, the point in dispute was the constitutionality of the measure taken by the City in order to rectify the condition where the Shinto shrine facility exists on the city-owned land, i.e. granting the city-owned land, which had been offered to the neighborhood association for the use as the site of the Shinto shrine without compensation." "Both the court of first instance and the court of second instance found said measure to be constitutional, and this court also finds it constitutional." "Through the trial of such other case, the court of prior instance had official knowledge of the

likelihood that there exist such alternative means in this case as well and that the appellant may take such means."

"[A]s far as the court of prior instance judged the appellant's omission to request the removal of the Shrine's Property and vacation of the lands to be illegal, the court of prior instance should have appropriately examined and judged whether or not there exists any rational and realistic alternative means to rectify the unconstitutionality of[the Act], or exercised its authority to ask for explanation from the parties."

"[A]lthough the determination of the court of prior instance finding [the Act]to be unconstitutional can be affirmed, its determination finding the appellant's omission to request the removal of the Shrine's Property to be illegal contains violation of laws and regulations that apparently affects the judgment."

"[W]e remand this case to the court of prior instance."

The Concurring by Justice FUJITA

"When judging whether or not an act(including an omission)conducted by the state or a public entity in relation to religion is in violation of the principle of separation of state and religion ... , this court, in its past judgments, adopted the criteria for judicial review generally called a purpose-effect test ... ."

"The target of constitutional challenge in this case is the fact that a local public entity simply offers public land for the use as the site of the facility which is ... purely intended for Shintoism and has no particular meaning other than religious meaning." "[T]he phase in which the purpose-effect test was made to function was when the court determined which should be given more importance between "religious nature" and "secular nature" in cases where both natures resided in the act, etc. in question and they were nearly indistinguishable in superiority." "They were not cases where an act that clearly had a religious nature alone was disputed and the purpose of such act was further questioned." "In this sense, the unconstitutionality in this case is already clear even without questioning the applicability of the purpose-effect test."

"It is true that, ..., the Shrine itself can be clearly considered to be a purely Shinto facility, but on the other hand, in view of the appearance of the facility, the manner in which daily religious activities are held there,

etc., said facility does not have so strong a presence as a religious facility ..., ." "It could also be presumed that among quite a few Shinto shrine facilities located on public land, which are thought to exist across the country, a considerable number are in an extremely similar situation to the Shrine." "[T]he question peculiar to this case is whether or not a local public entity's act of offering public land for use, addressed to a facility that is primarily intended for a specific religion(in other words, has no "secularity" to be taken into consideration), can necessarily be judged to be in violation of Article 89 of the Constitution even in cases where the presence of such facility in the community is not so strong(or rather weak)."

The Opinion by Justice KAINAKA, Justice NAKAGAWA, Justice FURUTA and Justice TAKEUCHI

"We consider that there is the need for further examination as to the factors required when judging the constitutionality of[the Act]."

"[W]hen making a specific judgment on whether or not[the Act]is in compliance with Article 89 of the Constitution, "judgment should be made comprehensively in light of the socially accepted ideas, while taking into consideration various factors". " "[W]hen it comes to a religious facility that has survived and has been inherited based on its close relationship with the local community since the Meiji era, as the one in dispute in this case, it is necessary to consider comprehensively, in a literal meaning, factors such as the past history and background, the nature of the religious facility, the specific manner of using the land in question, the nature of the entity that operates the facility, the local inhabitants' understanding and the public's evaluation, not only from its appearance but also focusing on its actual conditions." "In this respect, the judgment in prior instance made specific and detailed findings of fact in its part determining that the Shrine's Property and the events held at the shrine have a religious nature, whereas it only made partial or abstract findings of fact with regard to the past background, the specific manner of using the land in question, the nature of the entity that operates the facility, and the local inhabitants' understanding and the public's evaluation."

The Dissenting by Justice HORIGOME

"[The Act] is not in violation of the Constitution, and therefore I disagree with the majority opinion that found said act to be unconstitutional, and consider that the judgment in prior instance should be quashed, the judgment in first instance should be revoked, and the appellees' claim should be dismissed."

"[I]t is inappropriate just to treat the Shrine in the same way as one would treat the facility that represents an exclusive religion that has a founder as well as an established dogma or sacred writings." "What is more, the Shrine, which is managed and operated by the ujiko group as described above, was initially erected for securing the peace of mind of the pioneers who developed Hokkaido, which means that it is more customary or secular."

"[E]ven when the points indicated by the majority opinion are taken into consideration, the general public does not regard by any possibility Sunagawa City's act of offering the site of the facility of the Shrine without compensation as the act of assisting, facilitating or promoting the religion of the shrine, and consequently, [the Act] cannot by any possibility be considered to be beyond the limit that is deemed to be reasonable, in light of the social and cultural conditions of our country, in relation to the fundamental purpose of the system of securing guarantee of freedom of religion."

Editorial Note:

The main issue of this case is constitutionality of the handling of religious facilities set up on public owned land. The Court held that the connection between the City and religious facilities and group in this case was unconstitutional, but it was not necessary to remove these facilities immediately. It seems that the main point of this case is the following.

First, an important change in the attitude of the Court to the test for judicial review as to the principle of separation between state and religion can be indicated as having a meaning related to legal theory. In prior cases which became a problem as to the separation of state and religious matters, the Court (and many other lower courts) have adopted a so-called "purpose-effect test" to review the constitutionality of the connection between the state and religion. A "purpose-effect test" means that when

the state has a certain connection with religious group or event, the court should check the purpose and effect of the act that brings about the connection, and if the range of such a connection exceeds a certain appropriate line, it would be unconstitutional. However, in this case, the including concurring and dissenting opinions, the Court did not use a "purpose-effect test", although the appellee court did use it. Justice Fujita, in his concurring opinion, explained that the "purpose-effect test" had been effective only in cases related to state acts containing both a religious and secular nature, and recognized that the Act in this case obviously contained only a religious nature. The Court held that the Act was evaluated from the public's point of view to show that the City had offered a special benefit to a specific religion and assisted it, and therefore exceeded the limit admitted in the Constitution.

Second, a social policy meaning also accompanies this decision. Because of the popular connection between local society and Shinto shrines, and the protection of Shinto in the previous Constitution (The Constitution of the Empire of Japan), it is said that there are a lot of facilities similar to this case in Japan. It is likely to become an irrational decision only by declaring the unconstitutionality of the Act. On the same day as this case, the Court held that the granting of City-owned land to a neighborhood association in order to rectify the unconstitutionality derived from the shrine on that land was constitutional. After that decision, on December 6, 2010, the High Court of Sapporo, which was the court of the remanded, also held that the City's granting of the land with compensation to the neighborhood association for the alternative means to use the land for facilities was not unconstitutional.

As mentioned by the Court, the secular nature of facilities cannot dispel an obvious religious nature with a shrine as a Shinto monument. Furthermore, pushing the constitutionality of this shrine by saying that the City and the neighborhood of S-area have a special circumstance regarding the connection between the state and religion does not go with the main function of our Constitution which protects religious minorities from that majority. Nevertheless, in the actual circumstances of this case, the Court should concern itself with the freedom of religion and the tradition of local society. It might have to be said that the Court's judgment, which gave some range of means to rectify the unconstitutionality

although it recognized the unconstitutionality of the Act, was appropriate in terms of both theory and policy.

2. Law of Property and Obligations

X v. Y
Supreme Court 1st P.B., June 17, 2010
Case No. (ju) 1742 of 2009
64 (4) MINSHU 1197; 1510 SAIBANSYO JIHO 1;
2082 HANREI JIHO 55; 1326 HANREI TAIMUZU 111;
85 Shouhisha Hou News 263

Summary:

Where a new building, which is the subject of a sale, must be pulled down and rebuilt due to serious defects contained therein, if, according to the socially accepted standards, the building itself is judged to have no social or economic value on the grounds that, for example, there is the concrete danger of the collapse of the building because those defects would affect its safety in terms of structural strength, the benefit that the purchaser of the building has enjoyed from having lived in it should not be set off or similarly adjusted with the purchaser's losses and therefore should not be deducted from the amount of compensation for damage based on a tort as claimed by the purchaser against the constructor, etc., equivalent to the expenses to be required for rebuilding.
(There is a concurring opinion.)

Reference:

Article 709 of the Civil Code

Facts:

Appellant Y1 concluded a contract for work with Appellant Y2, for the purpose of building the building, which is a steel-framed and slate-roofed three-story residential building, indicated in 2 of the list of articles attached to the judgment in the first instance (hereinafter referred to as