parison with other districts. It should be unconstitutional to leave such a huge difference without any reasonable grounds for ten years, during which the Diet could redress the unconstitutional situation.

Editorial Note:

The equal protection of the franchise is one of the problems in which the Court has been aggressively involved. It is the most important and fundamental constitutional protection. Most constitutional lawyers claim that its value should be as equal as possible and the Court's review on that matter should be strict. However, the Court has tolerated the legislative actions because of the discretionary power. Recent judgments which the Court delivered in the last five years took a slightly stronger attitude toward the Diet, which recommended an early solution revising the law to be in proportion to the number of the electorate or the population. In the light of the constitutional law, the foundation of democracy should not be destroyed by the legislator. The review of the electoral system should be done strictly and precisely. It must be the basic role of judicial review.

2. Administrative Law

Xs v. Yokohama City
Supreme Court 1nd P. B., November 26, 2009
Case No. (gyo-hi) 75 of 2009
2063 HANREI JIHO 3

Summary:

Dismissal of final appeal

The children cared for in a municipal nursery school and their parents have a legitimate expectation to receive nursery care until the registration period ends.

Given that the enactment of the ordinance concerned in this case has the direct effect of the abolition of municipal nursery schools and so of depriving the children and their guardians of their legal status, the enactment of this ordinance is a reviewable action ("administrative disposal")

which can be quashed by a court.

However, as the nurturing period for the plaintiffs has already ended, this lawsuit has been dismissed due to lack of standing.

Reference:

The Modified Ordinance of the Yokohama City Nursery School Ordinance (Yokohama City Ordinance No. 62 of 2003)

Child Welfare Law (Before Modified Law No. 85 of 2008) Article 24

Local Autonomy Law Article 244-2

Administrative Litigation Act Article 3

Facts:

As Yokohama City enacted the ordinance abolishing the municipal (public) nursery schools with a view to privatizing them, they had been abolished. At the same time, a private social welfare corporation took charge of operating these nursery schools. This case was a lawsuit in which the plaintiffs, the children who had been hospitalized in those nursery schools and their guardians, claimed that the enactment of the modified ordinance constituted an invasion of the legitimate expectation to receive a nurturing service from public nurturing schools. They insisted that the enacting action of the ordinance made up an administrative disposal applicable to a lawsuit in accordance with the Administrative Litigation Act §3 (2) and that according by this ordinance has to be quashed. Besides they claimed compensation of 20,000 Yen be paid for the mental and physical damages in accordance with the National Remedy Law §1 (1).

The District Court (Yokohama District Court, May 22 2006, Case No. (gyo-u) 4 of 2004, 284 Hanrei Chiho Jichi 42) ruled that the children and their guardians have the legal right to receive the nurturing in the mentioned nursery schools and therefore the enactment itself of the ordinance abolishing then definitely invaded the legal one before some concrete action being taken by a public agency. And the court said that in this case the enactment of this ordinance constituted "an administrative disposal" in the meaning of the Administrative Litigation Act Article §3 (2). But in the result, the court said that this enactment did not need to be quashed, although it was against the law banning the misuse and abuse of the dis-

cretion concerned, in accordance with the Administration Litigation Act § 31, because the abolition of the municipal nursery schools had already passed two years and the children, plaintiffs, had already finished at the nursery school. But the court ordered Yokohama City to compensate 10 million Yen for mental damages.

The Court of Appeal (Tokyo Appeal Court, January 29 2009, Case No. (gyo-ko) 169 of 2006, 3164 Hanrei Chiho Jichi 60) overruled the District Court's decision. The Court of Appeal said that the ordinance setting up and managing the public facilities, including nursery schools, neither shaped the rights and obligations of the individuals who utilized public facilities nor confined the range of them; it functioned merely as a general norm. Furthermore, there were no particular conditions in this case that the enactment and the disposal should be put in the same place. Therefore the act of instituting the ordinance was not definitely an administrative disposal reviewable in the Court of Appeal. In addition, the Court of Appeal dismissed the claim of the damages. The defendants brought a final appeal in the Supreme Court.

Opinion:

According to the Child Welfare Law, the right to receive nursery care at the specified nursery schools is given by means of the choice of children's guardians and they can expect that this service will continue until the termination of the service period. Thus the children and their guardians who receive the nurturing services at a particular school have a legitimate expectation of receiving care at the same particular nurturing school until the service period expires.

The enactment of an ordinance constitutes a legislative activity of the regional parliament, so it is needless to say that it hardly makes up an administrative disposal applicable to the lawsuit of appeals in general. As the modified ordinance in this case aimed only at abolishing the particular nursery schools concerned, it invoked obviously the effect of abolishing the schools without the following concrete disposal by administrative agencies, so that at the same time it caused a serious effect of invading the legitimate expectations of the children who were currently being taken care of and their guardians, which was that they could take nursery care at the same particular nurturing school until the service period expires. So

enacting the ordinance can be equated substantially with an administrative disposal.

In this case, if the plaintiffs win in a civil procedure challenged against a local government, this judicial decision comes into effect only among the children, their guardians and the local government. This limited effect of the decision must perplex the local government in the regard whether the local government should abolish the municipal nursery schools without regarding the interests or hopes of the children and their guardians who are not plaintiffs. However, when a court quashes an administrative disposal by means of the public quashing procedure (Administrative Litigation Act §3(1)), all people, agencies and government must also obey this court's decision (Administrative Litigation Act §32). In the result, it is justified that enacting the ordinance should be considered as an administrative disposal which could be quashed by the public quashing procedure.

However, in the result, the court said that this enactment did not need to be quashed, although it was against the law banning the misuse and abuse of the discretion concerned, in accordance with the Administration Litigation Act §3(1), because two years had already passed since the abolition of the municipal nursery school and the children, plaintiffs, had already finished at the nursery school (Administrative Litigation Act §32).

Editorial Note:

According to The Administrative Litigation Act §3(1), "administrative disposal", which is judiciable in public quashing procedures, is defined as an exercise of public power including the disposal by public agencies. However this definition of an administrative disposal is not so clear that there have been many fierce disputes over its interpretation over a period of many years.

The court usually has said that not all public agencies' actions, which have the legal basis, belong to the administrative disposal, but the specified public actions, which legally shape the rights and obligations of the individuals and confine the range of them, constitute the administrative disposal (see: Xs v. City, Supreme Court 1nd P. B., October 29, 1964, Case No. (oh) 296 of 1962, 18(8) Minshu 1809). The administrative disposal of

this definition has got two criteria: whether a public action is compulsory or not, and whether it is made up to people or to an administrative organ, and has sometimes been called "substantive administrative disposal".

According to the criteria above, the actions of enacting the ordinance, making a public plan, and giving Gyoseishido (public guidance) etc. are not a substantive administrative disposal. However recently decisions of the Supreme Court have appeared in which they recognized the actions mentioned above as administrative disposals. These new decisions show the criteria of administrative disposal have been changing. To recognize some agencies' actions as administrative disposals, we can say, it is not always necessary that they constitute a substantive administrative disposal.

There are two similar cases to the Yokohama City case mentioned above, which are the Chiyoda Ward case and the Takane Town case. In the Chiyoda Ward case and the Takane Town case, the Supreme Court ruled that the enactment of the ordinance did not constitute the administrative disposal.

In the Chiyoda Ward case, the Supreme Court said that the enactment of the ordinance abolishing and merging the public elementary schools established by Chiyoda Ward did not constitute an administrative disposal (Xs v. Chiyoda Ward, Supreme Court 1nd P. B., April 25, 20 court02, Case No. (gyo-tsu) 60 of 1997, 229 Hanrei Chiho Jichi 52). The Supreme Court supported the decision of the Appeal Court and stated that this ordinance was merely a general norm and although the plaintiffs (guardians of the children) had the general legal rights to have their children study at the elementary school established and located by Chiyoda Ward at a place to which the children could easily go from their home. However the Supreme Court said that the guardians had not got the legal rights or legal interest to have their children study at the particular elementary school and therefore enacting the ordinance abolishing and merging the public elementary schools established by Chiyoda Ward was not an administrative disposal which was judiciable.

In the Takane Town case, the residents of an area of holiday homes in Takane Town who have got a base of their lives in another town claimed against that the ordinance raising largely the public water price only within an area of holiday homes was illegal. In such a case the Supreme Court

said that this ordinance changed the water price not for the designated people, but in general, so that the enactment was not equated with the concrete execution of the ordinance and therefore in this case the enactment of the ordinance was not an administrative disposal (Xs v. Takane town, Supreme Court 2nd P. B., July 14 2006, Case No. (gyo-tu) 35 (gyo-hi) 29 of 2003, 60 (6) Minshu 2369; 1947 Hanrei Jiho 45).

The two Supreme Court decisions above were different from the decision in the Yokohama City case. Has this different result among these cases which were similar got a rational and consistent reason? This question is important for forecasting the range in which enacting the ordinance could be recognized as the administrative disposal in the future.

As mentioned above in the Chiyoda Ward case, the Supreme Court said that the plaintiffs had no legal rights or interests to be schooled at a particular public elementary school established by Chiyoda Ward. This part of the decision is definitely different from the one in the Yokohama City case. In the Yokohama City case, it is very important that The Child Welfare Law of 1997 allowed the guardians to choose a particular nursery school when they applied to receive nursery care for their children at a nursery school. Before being amended, The Child Welfare Law had provided that a local government unilaterally specified a nursery school at which the children received nursery care. The Supreme Court surely understood that in the nursery care the law allowed the guardians of children to choose an nursery school they wanted, but in the elementary education the law did not allow them to choose a elementary school. The difference of the decisions between the Yokohama City case and the Chiyoda Ward case must be caused by the difference in the legal right to choose a school.

There is an opinion that the inconsistent decisions of the Supreme Court between the Yokohama City case and the Takane Town case must result from whether the range of people suffering from the disadvantages by the ordinance is specified or not. This opinion said that, in the Takane Town case, the personal scope influenced by the ordinance, which raised the public water price, was an unspecified large number of people, though the area, where the water price was raised sharply, was limited to an area of holiday homes. On the contrary, it said that in the Yokohama City case, the range of people affected by the ordinance abolishing the particular

municipal nursery schools was specified. Namely this opinion said that the Supreme Court focused on the issue of whether the people suffering from the disadvantages by the ordinance are specified or not. However, this opinion is not enough to explain the reason for the Supreme Court's approach in the Takane Town case, because in the Takane Town case it is possible to say that people suffering from the disadvantages by the ordinance were ones who lived within the area of holiday homes and therefore the range of people affected by the ordinance was also specified.

The most important thing in the Takane Town case is that the town water is supplied in the form of a contract. Therefore the ordinance raising the water price was substantially a contract stipulation about the water supply. So the Supreme Court must think that it was not appropriate to use the public quashing procedure for reviewing the legality of this ordinance by means of recognizing the enactment of the ordinance as an administrative disposal.

The Supreme Court's decision in the Yokohama City case makes sure that the enactment of the ordinance is recognized as an administrative disposal which could be quashed by the public quashing procedure (the Administrative Litigation Act §3(1)), when this ordinance invades the right guaranteed by the law and definitely invades this one before some concrete action is taken by a public agency.

In 2004, the important reform was made in the Administrative Litigation Act, in consideration for extending the scope of administrative relief which was really restrictive. Particularly, there had been lots of strong criticism about the strictness of the criteria of administrative disposal and plaintiff eligibility. At that time the provision about the administrative disposal was not reformed, but the scope of public actions recognized as the administrative disposal has been spreading in the court since 2004. The Supreme Court's decision in the Yokohama City case is one of the judicial decisions which has promoted this movement spreading out.

The Supreme Court's decisions in the Advice of the Suspension case (X v. Governor, Supreme Court 2nd P. B., July 15 2005, Case No. (gyo-hi) 207 of 2002, 59(6) Minshu 1661) and the Land Readjustment case (Xs v. City, Supreme Court G. B., September 10 2008, Case No. (gyo-hi) 397 of 2005, 62(8) Minshu 2029) also belong to these movements.

In the Advice of the Suspension case the Supreme Court said that the advice suspending the start a medical practice should be recognized as an administrative disposal. And in the Land Readjustment case the Supreme Court amended the previous decision, which had said the rezoning plan of the land was merely a blueprint and therefore had not effect of invading the individuals' rights and interests, and then said the plan of the land readjustment constituted an administrative disposal.

3. Law of Property and Obligations

Sanwa Sogo-Kikaku Kabusikigaisya v. Cooperative of Obama Ekimae Department Store et al.

Supreme Court 2nd P. B., January 19, 2009
Case No. (ju) No. 102 of 2007
63 (1) Minshu 97; 230 Saikosaibansho Saibanshu Minji 57; 1475 Saibansho Jiho 5; 1862 Kinyu Homu Jijo 33; 1289 Hannrei Taimuzu 85; 2032 Hanrei Jiho 45; 1321 Kinyu Shoji Hanrei 58

Summary:

Where the lessee who had run a karaoke establishment at the space in the leased building was prevented from running the business at the establishment space due to the lessor's failure to perform the obligation to repair in connection with the flood that occurred at the establishment space, and suffered damage equivalent to business profits, under the factual circumstances shown in (1) to (3) below, it is unacceptable under the rule of reason, as of the time when this action was filed to seek compensation for damage from the lessor at the latest, that the lessee claims compensation from the lessor for the entire damage, without taking any measures to avoid or reduce the damage, such as reopening the karaoke establishment business at another place, and the damage suffered by the lessee after the time when the lessee is considered to have been able to take such measures cannot entirely be regarded as "damage which would ordinarily arise" set forth in Article 416, paragraph (1) of the Civil Code:
(1) even if the lessor performed the obligation to repair, it is difficult to