

論確認訴訟之備位功能： 行政訴訟法第六條第三項之意涵與本質*

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我國行政訴訟法第六條第一項涵蓋三種確認訴訟之類型：一、公法上法律關係之確認訴訟；二、行政處分無效之確認訴訟；三、行政處分違法之確認訴訟。此三種確認訴訟類型皆係師承於德國行政訴訟體制，而關於確認訴訟備位原則之問題，首開我國法條第三項亦如德國行政法院法第四十三條第二項，僅就法律關係確認訴訟規範其備位性。由是，吾人不免生疑，無效確認訴訟與違法確認訴訟未被同時納入備位條款之中，其理究竟何在。緣於此，本文以比較法之對照方式，先是追本溯源於前揭德國規定之立法背景以及相關學說與實務之運作，深入剖析原備位規定之意涵與本質，次再據此檢視我國行政訴訟法第六條第三項之條文內容，並提出其缺失之處與修法建議。在掌握備位條款之真諦後，本文繼而探究釐清無效確認訴訟、違法確認訴訟與備位原則之關係實況。總而言之，上列三種確認訴訟之救濟功能各異其趣，實無法併用同一之備位規定。

關鍵詞：確認訴訟、法律關係確認訴訟、無效確認訴訟、違法確認訴訟、續行確認訴訟、備位性、訴訟經濟、程序競合規定、可行性、一般權利保護必要、確認利益、預備之訴訟合併（預備合併）

On the Subsidiarity of the Action for a Declaratory Judgment: The Meaning and Substance of Section 6, Subsection 3 of the Administrative Litigation Act

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ABSTRACT

The action for a declaratory judgment (“Feststellungsklage”) is defined by three categories in the section 6, subsection 1 of our Taiwanese Administrative Litigation Act. They are: (1) action for a declaration that a legal relationship exists or doesn’t exist (“allgemeine Feststellungsklage”); (2) action for a declaration that an administrative act is void (“Nichtigkeitsfeststellungsklage”); and (3) action for a declaration that a “finished” (“erledigt”) administrative act was illegal (“Rechtswidrigkeitsfeststellungsklage”). Actually, these three categories were adopted from the German administrative litigation system, where we may find that the initially enacted subsection 3 of our law only marked out the limits of the subsidiarity (“Subsidiarität”) of the “allgemeine Feststellungsklage”, in reference to the section 43, subsection 2 of the German Administrative Court Act (“Verwaltungsgerichtsordnung”). Eventually the question arose as to why the “Nichtigkeitsfeststellungsklage” and “Rechtswidrigkeitsfeststellungsklage” were not included in the subsidiarity clause at the same time. This article tries to analyze the meaning and the substance of the original subsidiarity regulation by the methods of comparison and contrast. We review the legislative background, theories and practices based on the German regulation mentioned above. We point out the shortcomings of section 6, subsection 3 of our Administrative Litigation Act by examining its contents and

make proposals for revision. Efforts are made further in examining the actual connection among “Nichtigkeitsfeststellungsklage”, “Rechtswidrigkeitsfeststellungsklage” and the principle of subsidiarity after the true meaning of the subsidiarity clause is fully apprehended. It is concluded that the difference of their relief functions made it impossible to incorporate the three “Feststellungsklagen” into the same subsidiarity regulation.

Key Words: Feststellungsklage, allgemeine Feststellungsklage, Nichtigkeitsfeststellungsklage, Rechtswidrigkeitsfeststellungsklage, Fortsetzungsfeststellungsklage, Subsidiarität, Prozessökonomie, Verfahrenskonkurrenzregelung, Statthaftigkeit, allgemeines Rechtsschutzbedürfnis, Feststellungsinteresse, eventuelle Klagenhäufung