MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2004

1. Constitutional Law

Koshiyama Yasushi et al. v. Tokyo Election Administration Commission

Supreme Court G. B., January 14, 2004

Case No. (*gyo-tsu*) 24 of 2003

58 (1) MINSHU 56; 1144 HANREI JIHO 3; 1849 HANREI TAIMUZU 105

Summary:

A case in which the Supreme Court ruled that Article 14 and Appendix Table 3 of the Public Offices Election Law, which stipulates the apportionment of seats for the House of Councillors (HC) members to be elected under the constituency system, has not been in violation of Article 14 (1) of the Constitution at the time of the House of Councillors election held on July 29, 2001.

Reference:

Constitution, Article 14 (1); Public Offices Election Law, Article 14 and Appendix Table 3.

Facts:

Article 14 and Appendix Table 3 of the Public Offices Election Law as amended by Law for Partial Amendment of the Public Offices Election Law (Law No.118 of 2000) (hereinafter referred to as the "disputed Amendment") reduced the total number of seats in the HC by ten. The number of seats for members to be elected under the constituency system was reduced by six, whereas the number of seats for members to be elected under the proportional representational system was reduced by four. Furthermore, in order to eliminate the "reverse phenomenon" that occurred after the 1994 Amendment and prevent the expansion of the disparity between constituencies in terms of the number of voters or population size per member, based on the latest population census (conducted in October 1995), two seats were taken from each of the three constituencies to which four seats had been apportioned that had the smallest populations. As a result of the disputed Amendment, the "reverse phenomenon" was eliminated but the maximum disparity between constituencies in terms of the population size per member based on the population census mentioned above remained at 1:4.79, which was substantially the same as the disparity before the amendment. The maximum disparity between constituencies in terms of the number of voters per member at the time of the HC election held on July 29, 2001 (hereinafter referred to as the "disputed Election") was 1:5.06.

The plaintiffs, who were voters of the Tokyo Constituency in the disputed Election, brought a case before Tokyo High Court, to seek for nullification of the election on the ground that the disputed Amendment which stipulates the apportionment of seats for HC members to be elected under the constituency system (hereinafter referred to as the "disputed Provision on the Apportionment of Seats"), is in violation of Article 14 of the Constitution and therefore null and void, and that the election in the Tokyo Constituency as part of the disputed Election held in accordance with this provision is also null and void. Tokyo High Court dismissed the case (October 30, 2002), and the plaintiffs appealed.

Opinion:

The appeal shall be dismissed.

Majority Opinion (Justice MACHIDA Akira, Justice KANATANI Toshihiro, Justice KITAGAWA Hiroharu, Justice KAMEYAMA Tsugio, Justice YOKOO Kazuko, Justice UEDA Toyozo, Justice FUJITA Tokiyasu, Justice KAINAKA Tatsuo, and Justice SHIMADA Niro):

The disputed Amendment is not beyond the bounds of the Diet's legislative discretion under the Constitution to decide the details of the mechanism of an election system, and therefore the disputed Provision on the Apportionment of Seats cannot be found to have been in violation of the Constitution at the time of the disputed Election.

Concurring Opinion 1 (Justice MACHIDA Akira, Justice KANATANI Toshihiro, Justice KITAGAWA Hiroharu, Justice UEDA Toyozo, and Justice SHIMADA Niro):

In light of the facts determined by the first instance court, if seats were reapportioned, without following the policy of apportioning an even number of seats, based on the population census mentioned above and in proportion to the population size in each constituency as defined at the time of the disputed Amendment, only one seat would be apportioned to 15 out of the 47 constituencies respectively and therefore HC elections under such a constituency system would be held only once every six years in these 15 constituencies. Thus, if such a provision on the apportionment of seats were adopted, significant inequality would occur in terms of the opportunity to vote between constituencies with two or more seats and constituencies with only one seat, and it would raise a concern of unconstitutionality.

Furthermore, if new constituencies are established by combining or dividing conventional prefecture-based constituencies to ensure that the number of voters per member will be substantially the same among constituencies, such zoning would diverge from the historical origin or political/economic/social unity of local communities or the sentiments of their residents, and could not perform the significance or function that traditional prefecture-based constituencies has fulfilled, i.e. satisfaction of the very purpose of local autonomy by collectively reflecting the intentions of residents who share a kind of political identity. Also, in order to apportion an even number of seats to each constituency to satisfy the constitutional requirement of holding an election for half of the HC members

every three years, it would be necessary to combine or divide constituencies repeatedly along with population changes and it would be difficult to realize the effectiveness of the bicameral system by vesting the HC with the function of reflecting the people's interest and opinions stably in the Diet as before.

Considering that the disputed Amendment actually eliminated the "reverse phenomenon," the disputed Amendment cannot be found to be beyond the bounds of the Diet's legislative discretion, and therefore it cannot be concluded that the disputed Provision on the Apportionment of Seats was in violation of the Constitution at the time of the disputed Election.

Justice SHIMADA Niro delivered an Additional Concurring Opinion for Concurring Opinion 1.

Concurring Opinion 2 (Justice KAMEYAMA Tsugio, Justice YOKOO Kazuko, Justice FUJITA Tokiyasu, Justice KAINAKA Tatsuo):

When exercising its discretion, the legislative body is not only subject to a negative restriction not to exercise its discretion against the purport of the Constitution but is also obliged to exercise its discretion positively and appropriately in line with the purport for which it is given discretion by the Constitution.

The legislative body is entrusted with the task of making complicated and sophisticated policy considerations and determinations. The issue of whether the legislative body has made a policy determination by giving due consideration to the difference in the level of importance among various matters to be considered, and in particular, the difference in their position under the Constitution, can also be subject to the examination on constitutionality. With respect to the issue of whether the matters that may be taken into consideration in terms of legislative policy but cannot be deemed to be guaranteed directly under the Constitution, such as regional representation and electoral zoning by prefecture, can be regarded to be equally important as matters that are recognized to be guaranteed directly under the Constitution, such as equality in the value of each voter's vote, we consider that it is not a matter of legislative policy but a matter of law, and it can be, and should be, judged by the judicial power. When judging this issue, we should naturally place importance on

the matters guaranteed directly under the Constitution, and in particular, equality in the value of each voter's vote, which is one of the people's fundamental human rights.

From the viewpoints mentioned above, the legislative body of Japan has made only minor corrections merely to satisfy immediate needs and cannot be evaluated as having exercised its discretionary power mandated by the Constitution fully and appropriately in line with the purport of law. Therefore the current apportionment of seats is strongly suspected to be unconstitutional.

However, as it is clearly revealed that one of the objectives (matters to be considered) for the disputed Amendment was to "eliminate the reverse phenomenon and prevent the expansion of the disparity in the apportionment of seats," the means taken by the legislative body were undoubtedly a step toward correcting inequality. Accordingly it cannot be denied that this amendment is reasonable to some degree, and in this respect, we cannot help hesitating to judge the result of this amendment to be unconstitutional.

Caveat: if the legislative body leaves the current situation without taking any action to correct it until the next election, there would be sufficient room for acknowledging unconstitutionality on the ground that the legislative body failed to exercise its discretion to fulfill its obligation.

Justice KAMEYAMA Tsugio and Justice YOKOO Kazuko also delivered an Additional Concurring Opinion for Concurring Opinion 2 respectively.

Dissenting Opinion (Justice FUKUDA Hiroshi, Justice KAJITANI Gen, Justice FUKAZAWA Takehisa, Justice HAMADA Kunio, Justice TAKII Shigeo, Justice IZUMI Tokuji):

It is obvious that the disputed Provision on the Apportionment of Seats goes against the principle of equality of right to vote under the Constitution and is therefore in violation of the Constitution.

Additional Dissenting Opinion 1 (Justice FUKUDA Hiroshi):

The electoral equality includes equality in the value of each voter's vote, and so efforts are required to ensure that the disparity in the value of each voter's vote is reduced to as close to zero as possible when deciding the electoral zoning, the number of seats to be apportioned, and other

matters pertaining to the election systems, except for a disparity that has inevitably arisen from purely technical uncontrollable factors.

Additional Dissenting Opinion 2 (Justice FUKAZAWA Takehisa):

When it comes to HC elections, even if the upper house election is nullified, the nullification only applies to the members involved in the given election and it does not have any bearing on the other half of the members or members elected under the proportional representation system. The disputed Provision on the Apportionment of Seats at the time of the disputed Election is in violation of the Constitution and invalid under Article 98 (1) of the Constitution and therefore the disputed Election held in accordance with the disputed Provision is null and void.

Additional Dissenting Opinion 3 (Justice HAMADA Kunio):

The Supreme Court should require the legislative body to correct the unconstitutional provision on the apportionment of seats for compliance with the Constitution within a certain period of time, and should consider rendering a declaratory judgment with the condition that future elections under the uncorrected provision on the apportionment would be nullified.

Justice KAJITANI Gen, Justice TAKII Shigeo and Justice IZUMI Tokuji also delivered an Additional Dissenting Opinion respectively.

Editorial Note:

It is appropriate to construe that, with respect to the inalienable right of the people to elect members of both houses, the Constitution does not only prohibit voters from being discriminated against because of race, creed, sex, social status, family origin, education, property or income, but also requires equality in the substance of the right to vote, in other words, equality in the influence of each voter's vote in electing Diet members or equality in value of each voter's vote (Arts. 15 [1] & 14 of the Constitution).

On the other hand, with respect to elections of members of both houses, the Constitution provides that, under the restriction that Diet members shall be representative of all the people, the number of members of each house, electoral districts, method of voting, and other matters pertaining to the method of election of members of both houses shall be determined by law (Arts. 43 & 47 of the Constitution), leaving it to the

Diet's broad discretion to decide what type of election system should be introduced to reflect the people's interest and opinions fairly and effectively in the administration of the Nation.

Therefore, it should be construed that the Constitution does not regard equality in the value of each voter's vote as the sole and absolute criterion for deciding the mechanism of an election system but rather contemplates it, in principle, as a matter that should be realized in harmony with other policy purposes and grounds that the Diet is authorized to consider. For this reason, as long as specific decisions made by the Diet can be reasonably approved as ones within the scope of exercise of its discretion, they will be viewed as permissible choices even when they might undermine equality in the value of each voter's vote.

The purport of the Constitution to adopt a bicameral system vests specific elements to the HC in substance and function by differentiating between the election method applicable to HC members and that applicable to House of Representative (HR) members. Accordingly the mechanism of the HC election system described was designed to divide HC members into nationally-elected members or members elected under the proportional representation system and locally-elected members or members elected under the constituency system, and to provide the latter members with the significance or function of collectively reflecting the intentions of the residents of each prefecture, in light of the fact that a prefecture can be defined as a unit with historical, political, economic, and social significance and substance as well as being a political entity.

With respect to the provision on the apportionment of seats in the HC, the Supreme Court so far has ruled the maximum disparity at 1:6.59 unconstitutional (Supreme Court G. B., September 11, 1996), and those at 1:5.26 (Supreme Court G. B., April 27, 1983) and at 1:4.81 (Supreme Court G. B., September 2, 1998) constitutional. The 1983 Grand Bench Judgment articulated two threshold constitutionality requirements of a provision on the apportionment of seats; a provision should be deemed to be in violation of the Constitution only in the case where the Diet, through the establishment or amendment of the provision on the apportionment of seats, has caused significant inequality in value of each voter's vote to an extent that can not be overlooked in light of the importance of equality in the value of each voter's vote, or the

Diet has taken no corrective measures even when such inequality has occurred due to subsequent population variation and remained for a considerable period of time. As long as the precedent was controlling, the constitutionality of the disputed Amendment would have been well expected.

It is worth noting, however, that the concurring opinion 2 introduces a new theory on how the discretion of the legislative body should be restricted. According to the new theory, whether the legislative body has automatically followed conventional patterns of determinations without careful thought instead of making appropriate and timely judgment by taking various factors into consideration, whether the legislative body has not considered the matters that should have been considered or has considered matters that should not have been considered, or whether the legislative body has placed too much importance on matters that should not have been emphasized, is a question of whether the legislative body has appropriately fulfilled the duty of exercising the discretionary power that the body has been entrusted under the Constitution and therefore a question of law that is subject to judicial review. Thus, the issue can, and should, be subject to the examination on unconstitutionality.

In addition, if we take the reasoning of the concurring opinion 2 supported by four Justices seriously, which will surely doubt the constitutionality of future elections under the uncorrected provision on the apportionment, it will be more than likely that the same kind of elections here will be void because ten Supreme Court Justices together will strike them down. One dissenting opinion criticizes the majority opinion, arguing that, viewing the present situation, it is clear that the Supreme Court has failed to fulfill its responsibility of appropriately exercising the authority to determine constitutionality with respect to election systems or to play its predetermined role in maintaining the democratic regime under the Constitution (Justice FUKUDA). Another dissenting one speculates if the Supreme Court tolerates such inequality, which shakes the foundations of representative democracy, as being constitutional, the judicature should be regarded as failing to appropriately exercise its power and authority to conduct constitutional review under the guise of prudence in exercising judicial power (Justice KAJITANI). And the other dissenting one insists that if the Supreme Court, which is authorized

under the Constitution to conduct the constitutional review, acts in an overly prudent manner in exercising its authority properly, it would be against the expectations and do damage the trust of the people in the judicature, which is in charge of protecting the democratic society and the Constitution (Justice HAMADA).

The principle of the reapportionment should be "One Person, One Vote" (see Reynolds v. Sims, 337 U.S. 533 [1964]). It is true there exist minor difficulties such as gerrymandering, especially racial gerrymandering (see e.g., Shaw v. Reno, 509 U.S. 630 [1993]) in Japan, but the malapportionment problem surely remains persistently. Because it must directly concern members of the Diet both in their status and interests, they are certainly reluctant to take drastic measures for correcting the suspect provision on the apportionment. Indeed, in spite of this case, the HC election was held on July 11, 2004 without any corrections of the maximum disparity at 1:5.16 between constituencies then. If we cannot expect the Diet's competence of self-correction and cannot rely on the Judiciary for the effective correction, it's high time we should create the independent, disinterested and powerful third institution resolving this conundrum.

2. Administrative Law

Xs v. Japan and Kumamoto Prefecture
Supreme Court 2nd P.B., October 15, 2004
Case Nos. (*o*) 1194 and 1196 of 2001
58 (7) MINSHU 1802; 1373 SAIBANSHO JIHO 4; 1876 HANREI JIHO 3;
1167 HANREI TAIMUZU 89; 259 HANREI CHIHOJICHI 48

Summary:

It is illegal that the State and Kumamoto Prefecture did not exercise their regulatory authority on the wastewater discharged from Chisso's Minamata Factory after January in 1940. Therefore, according to Article 1 of the National Redress Law, the State and the Prefecture