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# MAJOR JUDICIAL DECISIONS

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Jan.–Dec., 2009

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## 1. Constitutional Law

### **X v. Japan**

Supreme Court G. B., September 30, 2009

Case No. (*Gyo-Tsu*) 209 of 2008

63 MINSHU 1520; 2053 HANREI JIHO 18

#### **Summary:**

In this case, the Supreme Court affirmed the 2007 election of the House of Councilors to be constitutional. The plaintiffs filed a law suit with the purpose of contending on its legal validity. Their argument is that the Law on National Official Elections and the allocation of seats of members of the House of Councilors are unconstitutional, because the allocation is not proportional to the population and numbers of the electorate, so that the law violates the Equal Protection Clause of the Constitution. The conclusion was supported by 10 majority Justices. 5 Justices write dissenting opinions.

**Reference:**

Constitution, Article 14, 15; Law on National Official Elections, Article 14, Attached Table 3

**Facts:**

Attached Table 3 in the Law on National Official Elections provides for the allocation of a number of seats for members of the House of Councilors. The Constitution Article 47 provides that the method and procedure of voting in national elections should be decided by laws, so that the legislator should and could enact statutes for those. According to the constitutional order, the Diet allocates seats to each district as in the Attached Table 3. However, its allocation has been disproportionate to the population in each district. Therefore, the allocation is unequal in the value of one vote. The biggest difference is 1 to 4.86, which means that a voter in district A could only have one fourth of the vote in comparison to a voter who lives in district B. Such a situation has been left for a long time. The plaintiffs argue that the Law on National Official Elections and its allocation of seats for members of the House of Councilors are not proportionate with the population and numbers of the electorate, so that the law violates the Equal Protection Clause of the Constitution.

**Opinion:**

The appeal shall be dismissed.

Majority Opinion: (Chief Justice TAKESAKI Hironobuo, Justice HORIKAGO Yukio, Justice FURUTA Yuki, Justice SAKURAI Ryoko, Justice TAKEUCHI Yukio, Justice KANETSUKI Seishi, Justice FUJITA Tokiyasu, Justice IWAI Osamu, Justice KAINAKA Tatsuo, Justice WAKUI Norio)

The Constitution protects the franchise and equal rights principle. It means that the people could not be deprived of the franchise and its value should be the same among the electoral districts. On the other hand, it mandates the Diet to decide the method of voting, so that the legislator has discretion on what is the best electoral system. Therefore, the protection of equal value is not the only criterion which should be considered in deciding the system. The diet could and should consider various issues

and form the system which could fairly and effectively reflect the will of the people in the national politics.

In the light of those foundations, the Court's review should be limited to only whether the current electoral system is a reasonable exercise of legislative discretion or not. Here, we should focus on the fact that the difference among the districts has been decreased over the years. The diet has refined the law according to recent population changes. In addition, it established the reform conference in the House to continue discussion on the problem. It means that the House tries to reform the system to realize the Constitutional equal protection of the value of the franchise. This work may require a long time and continuous effort, so that it is unreasonable to decree the current law unconstitutional.

However, the difference obtaining is an extremely unequal situation, which should be redressed quickly.

#### **Concurring Opinion:**

Justice FUJITA Tokiyasu, Justice FURUTA Yuki, Justice TAKEUCHI Yukio, and Justice KANETSUKI Seishi delivered concurring opinions. Their opinion suggests that the majority opinion does not permit long-term neglect, but rather requires the Diet to explain why the difference could not be dissolved and what it is actually doing to redress the problem.

#### **Dissenting Opinion:**

Justice NAKAGAWA Ryoji, Justice NASU Kohei, Justice TAHARA Mutsuo, Justice KONDO Takaharu, and Justice MIYAKAWA Koji delivered dissenting opinions. Justice TAHARA claims that the law and the elections based on it are illegal. The majority suggests that the protection of the equal value of the franchise is not the only and absolute criterion which should be counted in deciding the electoral system. However, it is the most important factor which should direct the design of the system. Therefore, the Diet has a duty to revise the law when the system provided by the law extremely violates the equal protection of the franchise which the Constitution requires.

In this case, the difference among the districts is 1 to 4.86, which means that a person could have a vote with one fourth of the value in com-

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 1st 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”)