

Judgments of the Supreme Court

Date of the Judgment 1993.1.20
Case Number 1991(Gyo-Tsu)No.111

Judgment upon case of constitutionality of the provisions of the Public Offices Election Law on Election Districts and the Apportionment of Seats

Kawahara *et al.* v. The Tokyo Prefecture Election Administration Commission (1993). The 1993 House of Representatives Malapportionment Case

Minshu 47-1 at p. 67 ; Supreme Court, Grand Bench, January 20, 1993 ; Tokyo High Court (First Instance) [apportionment of seats for the House of Representatives declared unconstitutional].

COMMENT

The following decisions indicate the Supreme Court's basic view about challenging the validity of elections on the basis of unconstitutionality of the House of Representatives' apportionment provisions: the April 14, 1976, Grand Bench judgment (Cf. "Judgment upon Case of Constitutionality of the Provisions of the Public Offices Election Law on Election Districts and the Apportionment of Seats" from "The Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality" ("The Series"), No. 17) , the November 7, 1983, Grand Bench judgment, and the July 17, 1985, Grand Bench judgment (Cf. The Series, No.21).

Article 14 (1) of the Constitution, which guarantees equality under the law, requires equality of vote value concerning the inherent right of the people to elect members of both the House of Representatives and the House of Councillors of the Diet. On the other hand, the Constitution in principle entrusts to the discretion of the Diet the concrete determination of the framework of the election system for the election of members of both Houses of the Diet. Therefore, in a case in which inequality of vote value exists under the concrete framework of the election system determined by the Diet, in order to determine whether such inequality violates the constitutional requirement for equality of vote value, a court must examine whether the inequality is within the limits of rationality of the Diet's exercise of its discretion. Thus, in a case in which apportionment provisions were constitutional when enacted or amended, but due to population shifts the disparity in the number of electors or population per Diet member elected under such provisions increases and has reached a point at which the disparity violates the constitutional requirement of electoral equality, the apportionment provisions in question should not immediately be held unconstitutional on that basis alone; rather, the above provisions should first be declared unconstitutional when the correction has not been carried out within a reasonable period of time as constitutionally required.

The Supreme Court in the present case, following the line of thinking set out in the above decisions, held that the disparity in the ratio between the number of electors and the representatives among electoral districts at the time of the election at issue had reached a level that violated the constitutional requirement of equality of voting rights. But the Court held that it was difficult to conclude that a correction had not been made within a reasonable period of time as constitutionally required from the fact that the provisions had not been amended to correct the disparity during the period from when the disparity in the ratio

between the number of electors and representatives among electoral districts had reached the point of violating the constitutional requirement of equality of voting rights until the election in question. Therefore, the Court held, it could not conclude that the Diet member apportionment provisions at issue on the date of the election had been unconstitutional.

OUTLINE OF THE CASE

On February 18, 1990, when the general election of the members of the House of Representatives was held, the ratio between the number of electors and representatives of the Kanagawa Prefecture Fourth District to that of the Miyazaki Prefecture Second District was 3.18 to 1. The plaintiffs, electors in the Tokyo Prefecture Fifth District, claimed that the apportionment provisions of the Public Office Election Law, which did not satisfy the constitutional requirement of equality of voting rights, were unconstitutional, and therefore the election was invalid.

The Tokyo District Court, the court of first instance, held that it could not conclude that the inequality of vote value indicated by the maximum disparity of 3.18 to 1 in the ratio between the number of electors and representatives among the electoral districts at issue on the date of the election at issue amounted to a state of remarkable inequality which cannot generally be thought to be reasonable as within the limits of the Diet's discretion and in consideration of the various factors which the Diet may normally consider, and dismissed the plaintiffs' claims.

¹ This Comment and Outline of the Case do not constitute any part of the Court's opinion.

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Case Number (*Gyo Tsu*) No. 111 of 1991

Judgment of the Supreme Court, Grand Bench, January 20, 1993

Appellants : Masakazu Kawahara

Satoshi Ueda

Hisashi Muto

Appellee : Tokyo Prefecture Election Administration
Commission

JUDGMENT

A *jokoku* appeal has been filed by the Appellants from the judgment that the Tokyo High Court handed down on February 8, 1991 in a case concerning a petition to have an election

invalidated (Tokyo High Court (*Gyo Ke*) Nos.28, 38 and 45). The appellants' petition requests reversal of the judgment below, and the appellee has requested a judgment dismissing the *jokoku* appeal. Accordingly, we render judgment as follows.

DECREE

The *jokoku* appeal is dismissed:

The appellants shall bear the costs of the *jokoku* appeal.

REASONS

Concerning the reasons for the *jokoku* appeal by the appellant Kawahara, Ueda, and Muto, and Yasushi Koshiyama, attorney for appellant Kawahara and appellant Ueda :

I. Lawsuits challenging the validity of elections by reason of the unconstitutionality of provisions for the apportionment of Diet seats

The basic view of this court concerning such lawsuits challenging the validity of elections was indicated in the Supreme Court Grand Bench judgments (*Gyo Tsu*) No. 75, 1974, decided on April 14, 1976 (30 *Minshu* 3 at p. 223 ; hereinafter, "The 1976 Grand Bench Judgment") ; (*Gyo Tsu*) No. 57, 1981, decided on November 7, 1983 (37 *Minshu* 9 at p. 1243 ; hereinafter, "The 1983 Grand Bench Judgment") ; and (*Gyo Tsu*) No. 339, 1984, decided on July 17 1985 (39 *Minshu* 5 at p.1100 ; hereinafter, "The 1985 Grand Bench Judgment"). There is no reason why we should modify these judgments. Their contents are as follows.

1. Article 14(1) of the Constitution which guarantees equality under the law should be interpreted in connection with the inherent right of the people to elect the members of both the House of Representatives and the House of Councillors of the Diet, as not only prohibiting discrimination in the qualifications of an electors (article 44, proviso), but also as requiring equality in the substance of voting rights, namely, equality in the influence of each elector's vote in the election of Diet members, in other words, requiring equality of vote value.
2. The Constitution, because it in principle entrusts to the Diet's discretion the concrete determination of the framework of the election system of the members of both Houses (articles 43 and 47), should be interpreted to mean that equality of vote value is not constitutionally deemed to be the sole and absolute criterion for determining the election system and that, in principle, equality of vote value should be realized in consonance with its relation to other policy objectives and reasons which the Diet may properly consider.

Therefore, in case in which inequality of vote value exists under the concrete framework of the election system determined by the Diet, in order to decide whether that violates the constitutional requirement of equality of vote value, we must examine whether the above inequality can be approved as coming within the limits of the Diet's rational exercise of its discretionary power when considered in light of the constitutional requirement for equality of vote value as well as the goal of the election system in having the interests and opinions of the people to be impartially and effectively reflected in government.

3. Under the so-called single-ballot, medium-sized constituency system, which was

adopted after the enactment of the Public Office Election Law, equality in the ratio between the number of electors and the apportioned seats is the most important and fundamental criterion to consider in the partitioning of electoral districts and apportionment of seats, but other matters which should be considered include not only the existence of various circumstances such as the administrative divisions of the prefectures [*To, Do, Fu, and Ken*], cities, towns, and villages, and geographical conditions, but also how the Diet reflects changes in social conditions such as the phenomenon of the concentration of the population in the cities in the partitioning of electoral districts and apportionment of seats. Thus, there are a variety of policy and technical factors that go into the concrete determination of the partitioning of electoral districts and apportionment of seats; but there are no objective standards concerning how to reflect these in the making of this concrete determination, and therefore the only way to finally decide the constitutionality of the apportionment provisions is by deciding whether the concrete determination made by the Diet can be approved as a rational exercise of its discretionary power.

After considering from the above viewpoint, however, if inequality exists in the value of electors' votes under the partitioning of electoral districts and apportionment of seats concretely determined by the Diet or such inequality occurs due to subsequent population shifts, and after taking into account the various factors that the Diet may ordinarily consider, upon reaching a level that cannot generally thought to be rational, such inequality will be presumed to exceed the rational limits of the Diet's discretion. And, unless special reasons justifying this inequality are indicated, we will be forced to hold that this is a constitutional violation.

If, however, there is disparity between the number of electors or population (both of which may be considered as generally proportional) and the number of Diet members allocated among electoral districts under apportionment provisions which were constitutional when enacted or amended, in the case that, due to population shifts, the disparity has increased to a point at which it violates the constitutional requirement of equality of voting rights, the apportionment provisions at issue should not immediately be held unconstitutional on that basis alone ; rather, the apportionment provisions should first be declared unconstitutional when the correction is not carried out within a reasonable period of time as constitutionally required.

4. Also, article 204 of the Public Office Election Law should be interpreted as allowing lawsuits challenging the validity of an election by reason of the unconstitutionality of apportionment provisions to be brought under its provisions.

II. The constitutionality of the apportionment provisions at issue

1. The February 18, 1990, general election for members of the House of Representatives (hereinafter, the "Election at Issue") was held on the basis of the apportionment provisions of article 13(1), Appendix No.1, and supplementary provisions 7 to 10 of the Public Office Election Law (hereinafter, the "Apportionment Provisions at Issue"), which provisions had been amended by the Law to Partially Amend the Public Office Election Law (Law No. 67 of 1986; hereinafter, the "1986 Amendment"), but the disparity in the ratio between the number of electors and representatives among electoral districts on the date of the general election for members of the House of Representatives held on December 18, 1983, which was the last election held on the basis of the apportionment provisions before the above amendment, was a maximum of 4.40 to 1 (hereinafter discrepancies are given as approximations). As a result of the above amendment, under the Apportionment Provisions at Issue, which were based on the national census conducted in October 1985, the disparity in the ratio between the

population and representatives among electoral districts, decreased to a maximum of 2.99 to 1 ; further, the disparity in the ratio between the number of electors and representatives among electoral districts on the date of the election for members of the House of Representatives held on July 6, 1986 (hereinafter, the "1986 Election"), decreased to a maximum of 2.92 to 1. After that, the disparity in the ratio between the number of electors and representatives among electoral districts on the date of the Election at Issue held on February 18, 1990, increased to 3.18 to 1. These facts were lawfully found by the court below.

The inequality of vote value among electoral districts, as indicated by the disparity on the date of the Election at Issue, even after taking into account various factors which the Diet may ordinarily consider, should be said to have reached a level that cannot generally thought to be rational under the election system for the members of the House of Representatives in which equality in the ratio between the number of electors or population and the apportionment of seats is the most important and fundamental criterion. We cannot find any change in the framework of the election system on which we should modify our evaluation regarding inequality of vote value, or any other special reasons justifying the above inequality of vote value. Accordingly, it should be said that the state of inequality of vote value that existed among the electoral districts on the date of the Election at Issue had reached level that violated the constitutional requirement of equality of voting rights.

2. As stated above, although as a result of the amendment by the 1986 Amendment the disparity in the ratio between the number of electors and representatives among electoral districts on the date of the 1986 Election had decreased to a maximum of 2.92 to 1, it increased to a maximum of 3.18 to 1 on the date of the Election at Issue. This can be presumed to have been a result of subsequent population shifts that gradually occurred.

The state of inequality of vote value under the apportionment provisions before the amendment by the 1986 Amendment, which provisions were held to be unconstitutional by the 1985 Grand Bench Judgment, can be said to have been dissolved once as a result of the above amendment. After that, however, it can be presumed that the state of inequality of vote value resulting from an increase in the above disparity, from looking at the disparity's extent and movement, had reached a point of violating the constitutional requirement of equal voting rights sometime after the 1986 Election but some time before the date of the Election at Issue.

It is impossible to clearly ascertain this point in time given its nature. Thus we are forced to say that it is not clear how much time had passed from when, due to the increasing disparity, the inequality of vote value had reached a point of violating the constitutional requirement of equal voting rights until the election at Issue was held. However, the Election at Issue was held about three years and seven months after the date of the 1986 Election (July 6, 1986), which was also the date of enforcing the Apportionment Provisions at Issue, and about three years and three months after the date of the official announcement of the final results of the 1985 national census (November 10, 1986).

In addition to the facts stated above, in terms of the fact of constantly occurring population shifts, the result of these population shifts is that the above disparity can both increase and decrease ; in contrast to this, considering the necessity for stability in politics, it is necessary to give consideration to the fact that it is both impractical and improper for the Diet to frequently amend the apportionment provisions. Furthermore, the maximum disparity in the ratio between the number of electors and representatives

among electoral districts on the date of the Election at Issue was not remarkably different from the maximum disparity on the date of the 1986 Election. After making an overall consideration of these facts, it is inevitable to say in this case that it is difficult to conclude that amendments for the purpose of correction were not passed within a reasonable period of time as constitutionally required from the fact that the correction was not made during the period from when the disparity in the ratio between the number of electors and representatives among electoral districts had reached a point of violating the constitutional requirement of equal voting rights until the Election at Issue.

Also, upon the approval of the bill for the 1986 Amendment at the plenary session of the House of Representatives, resolutions such as the following were passed : "This correction of the apportionment of seats for the House of Representatives at this time is a temporary measure to immediately amend the current provisions that were held unconstitutional. We will wait for the official announcement of the final results of the 1985 national census, and will then promptly conduct a review for a drastic amendment." However, this is an expression of determination by the House of Representatives, from its position as a legislative body, about the appropriate exercise of its legislative power ; the existence of this resolution is an issue which is on a different level from the legal determination as to whether, concerning the disparity in the ratio between the number of electors and representatives among electoral districts had reached a point of violating the constitutional requirement of equal voting rights, the correction was made within a reasonable period of time as constitutionally required.

3. Therefore, in this case, although the disparity in the ratio between the number of electors and representatives among electoral districts on the date of the Election at Issue had reached a point of violating the constitutional requirement of equal voting rights, we cannot conclude that the Apportionment Provisions at Issue on the date of the Election at Issue were unconstitutional.

III. Conclusion

Therefore, although the point in the judgment of the court below that the inequality of vote value, as indicated by the maximum disparity of 3.18 to 1 in the ratio between the number of electors and representatives among the electoral districts under the Apportionment Provisions at Issue on the date of the Election at Issue, cannot be said to have reached a state of remarkable inequality that cannot generally thought to be rational after taking into account the various factors that the Diet may ordinarily consider within the limits of its discretionary power, cannot be approved, the conclusion that the Apportionment Provisions at Issue on the date of the Election at Issue cannot be said to be unconstitutional can be approved.

The appeal, which discusses matters concerning illegality and unconstitutionality which do not affect the conclusion of the court below, or criticizes the judgment of the court below on the basis of its own interpretation, which differs from the above holdings, cannot be adopted as a whole.

Accordingly, this Court by unanimous opinion of the Justices of the Bench, except for the opinions of Justices Itsuo Sonobe and Osamu Mimura and dissenting opinions of Justices Shirohei Hashimoto, Toshijiro Nakajima, Shoichiro Sato, Ryohei Kizaki and Motoo Ono, renders judgment as set forth in the decree in accordance with article 7 of the Administrative Case Litigation Law, and articles 396, 384, 95, 89 and 93 of the Code of Civil Procedure.

The opinion of Justice Itsuo Sonobe is as follows :

I agree with the conclusion of the majority opinion that the appellants' appeal should be dismissed in this case. However, I have a different reason, stated below, from the majority opinion.

I think it proper that this Court should decide only the constitutionality of the whole of the apportionment provisions, but not invalidate the provisions even if they are held to be unconstitutional, in litigation concerning the validity of elections on the grounds of unconstitutionality of the apportionment provisions (hereinafter, "Apportionment Litigation"). The reasons are stated below.

The Diet itself is inherently responsible for guaranteeing that the people can exercise the right to elect members of the Diet freely and equally. Considering this responsibility in relation to the election of members of the House of Representatives at issue, the provisions which guarantee the exercise of the right to elect the members of the House of Representatives equally are the so-called apportionment provisions prescribed in this Appendix No.1 of the Public Office Election Law. It is provided that Appendix No.1 is to be corrected every five years from the date of the enactment of the law (the end of Appendix No.1) in accordance with the latest national census, and its purpose is to make clear that Diet is responsible for correcting the apportionment provisions to conform to shifts in population.

Next, looking at the relationship between the apportionment provisions and constitutional litigation, in principle our system of constitutional review does not permit the so-called abstract normative control, whereby the constitutionality of an act's provisions is judged in the abstract apart from actual cases, and it is the same with examination of the constitutionality of the apportionment provisions. The Supreme Court has consistently held that Apportionment Litigation can be conducted under the electoral litigation provisions of article 204 of the Public Office Election Law, by which the court has been able to decide the constitutionality of apportionment provisions and fulfill its judicial duty to guarantee equal voting rights to the people at the instance of individual cases of Apportionment Litigations within the limits possible under judicial procedures.

Also article 204 of the Public Office Election Law is inherently a provision concerning electoral litigation (public litigation), which is based on capacity that is not related to an individual's legal interest; it is not a provision which contemplates Apportionment Litigation, which aims to protect the private right of vote value of each individual elector. Moreover, in Apportionment Litigation, the present law does not provide for any far reaching effect in a case in which the court declares invalid the election at issue, nor does it provide for any concrete measures for the court and the authorities concerned to take about the apportionment provisions at issue in the particular case.

Under the present law, in the ordinary case seeking invalidation of an election, upon a judgment that the election at issue is held invalid, the Election Administration Commission must hold another election in accordance with the opinion expressed in the judgment and based on the provisions of the Public Office Election Law. But, in an Apportionment Litigation case the provision itself on which the Election Administration Commission depends is declared unconstitutional and invalid. Therefore, it is not enough to only decide that the election at issue is invalid. That is, I do not think it helpful for the redress of the right of the party who filed the Apportionment Litigation case at issue, unless the Court decides that the Diet is placed under a duty to amend the apportionment provisions without delay, or the Court

proposes necessary, concrete measures under which the Election Administration Commission must hold another election in accordance with the opinion expressed in the judgment, along with the ruling to declare the election invalid. It is the same with the so-called separation theory, which declares invalid an election for an electoral district with respect to which the Apportionment Litigation case has been filed by declaring part of the apportionment provisions to be invalid. Although I do not think it is contrary to the nature of the judicial function for a court to devise these measures, in consideration of the surrounding circumstances I cannot help but say that at this stage the time has not yet come for us to do so.

Considering the matters stated above, in the present Apportionment Litigation case I think that it is proper for the court to objectively decide only the constitutionality of the whole of the apportionment provisions, and not invalidate provisions even if they are held to be unconstitutional. Therefore, I understand that the main purpose of Apportionment Litigation is to issue, looking to the future, a warning decision about the unconstitutionality of the apportionment provisions. In a case in which a warning decision is given, there is no need to repeat that the Diet should deal with it rapidly and faithfully, and fulfill its constitutional responsibility, to properly maintain constitutional order.

Such an interpretation like this comes into question in relation to article 98(1) of the Constitution. I think that, at the present stage the method which makes the apportionment provisions unconstitutional but not invalid is more appropriate as a "reasonable" way of judicial decisions "from the general point of view" in Apportionment Litigation, as compared with the former method which, being set forth in precedents, judged the unconstitutionality and invalidity of apportionment provisions on the premise that it is possible not to declare an election invalid under the principle of so-called circumstantial judgment, even if the election were based on apportionment provisions which are declared unconstitutional and invalid. And I recognize that such an interpretation like this is contrary to the opinion in the precedent that stated "the people should be equipped with as many means of redress as possible against acts of government impairing fundamental human rights" (see the majority opinion in the 1976 Grand Bench Judgment), and recognized Apportionment Litigation, and the basic legal theory that the court should not take the case unless it is helpful for actual resolution of a conflict. But there has never been such a precedent in past Apportionment Litigation in which the election was declared invalid. And the reason why the court applied the basic legal principle implied in article 31 of the Administrative Case Litigation Law and decided not to invalidate the election in the case at issue since the 1976 Grand Bench Judgment is not always like the case at issue, and applies to Apportionment Litigation generally so long as the present system continues.

As a result of repeated application of the basic principle of law implied in the so-called circumstantial judgment in the following Apportionment Litigation, there is no denying that it has become widely recognized that claims requesting the invalidation of an election will not come to be granted even if the apportionment provisions are declared unconstitutional and invalid. Thinking in this manner it is not impossible for us to think that the present Apportionment Litigation happens to play a role in litigation seeking a declaration of unconstitutionality of the apportionment provisions.

Although a basic principle of law implied in the so-called circumstantial judgment allows that "there is a possibility that a conclusion of balancing goes into the opposite direction depending upon individual circumstances and the judgment invalidating the election is made" (see the dissenting opinion of Justice Jiro Nakamura in the 1983

Grand Bench Judgment), it is not enough to render a judgment invalidating an election in order to redress the right of the elector who brought Apportionment Litigation. It takes more time to devise necessary remedies using "some creative way of thinking" (see the dissenting opinion of Justice Seiichi Kishi in the 1976 Grand Bench Judgment) as stated above. Thinking in this manner, I cannot help but decide it appropriate that the present Apportionment Litigation is brought as litigation seeking a declaration of unconstitutionality of the apportionment provisions.

The criteria for this Court to decide the constitutionality of the apportionment provisions in Apportionment Litigation is, theoretically, whether equality in the value of each vote is guaranteed for each elector and, as a practical matter, whether the Diet always and positively makes an effort to equate the apportionment provisions with the theoretical criteria. Nevertheless, if the apportionment provisions give an elector in one electoral district a voting right with a value more than twice as great as that of an elector in another electoral district, we cannot help but understand that it consequently provides for a class election which recognizes the exercise of voting rights having a different value depending on the area ; and we must say that it leads to a problem of a violation of the principle of equality under the law provided for in article 14 of the Constitution. I think that the court should decide whether the apportionment provisions violate the Constitution in actual individual cases keeping the above in mind.

Accordingly, applying these considerations to this case, the disparity in the ratio between the number of electors and representatives among electoral districts was a maximum of 3.18 to 1 when the Election at Issue was held, so the Apportionment Provisions at Issue which brought about the inequality of vote value at that time were obviously in violation of article 14(1) of the Constitution, which guarantees equality under law. Therefore, I think that the court should hold the Apportionment Provisions at Issue unconstitutional, but for the reasons stated above, not invalid and should issue a judgment dismissing the demands of the appellants.

Consequently, I think the judgment of the court below cannot be approved on the basis that we cannot say that the Apportionment Provisions at Issue are not unconstitutional. But considering this from the viewpoint that those provisions are unconstitutional but should not be held invalid, that part of the judgment of the court below stating that the election cannot be invalidated and dismissing the demands of the appellants should be approved.

The opinion of Justice Osamu Mimura is as follows :

I have no objection to the conclusion of the majority opinion that the demands of the appellants should be dismissed, but my reasons, as stated below, are different.

- I. I believe that the apportionment provisions are separable, as Justice Okahara and five other Justices stated in the 1976 Grand Bench Judgment cited by the majority opinion. Although my reasons are almost the same as the dissenting opinion of Justice Okahara and four other Justices and the other dissenting opinion of Justice Kishi, I will state my basic view on litigation concerning the validity of elections on the grounds of unconstitutionality of apportionment provisions (hereinafter, "Litigation on the Unconstitutionality of Apportionment Provisions"), including some views different from their opinions and some points which I want to emphasize as the reasons why the apportionment provisions are separable.
1. The majority opinion in the 1976 Grand Bench Judgment stated that the apportionment provisions are inseparable because every part of the apportionment provisions are

related to every other part, and a change in one part of the provisions would influence the other parts. It is true that a change in one part of the provisions can influence the other parts. But there is reasonable latitude in the total number of representatives, considering that the number, not fixed in the Constitution, is 471 by the Provisions of the Public Office Election Law, and 512 for a while by the Supplementary Provisions. And it is clear, in view of the details of past amendment of the Law to correct the inequality of vote value, that an amendments of the numbers of seats in some electoral districts does not always influence those in other districts, and that even if it does, there is no influence on most other districts. Especially in the Apportionment Provisions at Issue, it is clear that a change in the numbers of seats in some electoral districts does not influence those in most other districts because the apportionment provisions, at the time of the 1986 Amendment, were constitutional without excessive inequality beyond the reasonable discretion of the Diet and there was no such inequality in the number of the seats in most electoral districts, even though there was inequality in a few districts caused by gradual shifts in population. Thus I cannot agree that the whole of the Apportionment Provisions at Issue violated the constitutional requirement of equality of voting rights from the viewpoint that the apportionment provisions are inseparable.

2. From the viewpoint that the apportionment provisions are separable, the question is whether the provisions on the number of seats in the electoral districts at issue, where litigation on unconstitutionality of the apportionment provisions has arisen, violate the constitutional requirement of equality of voting rights. One way, as the opinion of Justice Okahara and four other Justices in the 1976 Grand Bench Judgment stated on this matter, that the constitutionality should be judged by the deviation from the average number of electors per representative. I believe, however, that the question about equality is whether there is excessive inequality beyond the reasonable discretion of the Diet between the number of seats in the electoral districts at issue and those in other districts. Therefore, to resolve this question, we need to determine the difference between the number of electors per representative in the election districts at issue and the maximum or minimum number in all districts. If the inequality in the value of each vote is found to exceed the reasonable discretion of the Diet, the provisions on the number of seats in the election districts at issue do not satisfy the constitutional requirement of the equality of voting rights. In this connection, to make our decision about inequality, we can follow the majority opinion on the matter whether the inequality that appears in the biggest disparity between the number of electors and representatives among all electoral districts exceeds the reasonable discretion of the Diet.
3. As the majority opinion states, even if the provisions on the number of seats in the electoral districts at issue do not satisfy the constitutional requirement for equality of voting rights, the provisions should not be held unconstitutional immediately if the inequality is found to be caused by the gradual shifts in the population unless a revision is not made within a reasonable period of time.
4. If the provisions on the number of seats in the electoral districts at issue are unconstitutional, we must examine whether the provisions and the election conducted under the provisions should be declared invalid in connection with article 98(1) of the Constitution. The 1976 Grand Bench Judgment held that the election at issue in that case was valid under the basic principle of law implied in the system of so-called circumstantial judgment embodied in article 31(1) of the Administrative Case Litigation Law. I cannot agree with this opinion from the viewpoint that the apportionment provisions are separable. On this matter, what is important is the opinion of Justice Kishi in the 1976 Grand Bench Judgment that equality is a relative, not absolute, concept. In other words, a provision on the number of seats in an

electoral district does not satisfy the constitutional requirement for equality of voting rights, not by the content of the provision itself, but by comparison with a provision for another electoral district. Consequently, if it does not contribute to, but instead violate the constitutional requirement for equality of voting rights, that one provision is held to be invalid ; and if there is no such circumstance as stated above in the other provisions, it does not violate article 98(1) of the Constitution to hold the former provision valid and the latter invalid.

There are two cases in which the provisions on the number of seats in the electoral districts at issue were held to be unconstitutional. In one case, the number of electors per representative in the electoral districts at issue was far bigger than the smallest number of all the electoral districts and the disparity was excessive. In the other case, the number of electors per representative in the electoral district at issue was far smaller than the biggest number of all the electoral districts and the disparity was excessive. (It is also possible in this case to file a suit based on article 204 of the Public Office Election Law because it is a public litigation.) In the former case, the number of seats in the electoral district at issue were too few in comparison with the number of seats in the electoral district in which the number of electors per representative was the smallest of all the electoral districts. The number of seats in the electoral district at issue should have been increased under the principle of equality. If you hold the provision invalid on the number of seats in the electoral district at issue and the election conducted under the provision, it does not contribute to, but instead violates, the constitutional requirement for equality of voting rights, extending the present inequality. In the latter case, on the other hand, the number of seats in the electoral district at issue was excessive in comparison with the number of seats in the electoral district in which the number of electors per representative was the biggest of all the electoral districts. The number of seats in the electoral district at issue should have been decreased under the principle of equality. If you hold invalid the provision on the number of seats in the electoral district at issue and the election conducted under the provision, in the sense that the election is invalid for electing too many representatives, it does contribute to the constitutional requirement for equality of voting rights, by not extending the present inequality. Surely, that makes invalid the election of representatives whose number should be apportioned to the electoral district at issue under the principle of equality. But it is the Diet that has the power to make a decision, within its reasonable discretion, on the number of seats in the electoral district in which the provision on the number of seats is unconstitutional, and the Court is obliged to hold the election as a whole in the election district at issue to be invalid because the Court does not have the power to make a part of the provision valid. Thus, I believe that in the former case the provision of the number of seats in the electoral district at issue and the election conducted under the provision are valid, but that in the latter case the provision of the number of seats in the electoral district at issue and the election conducted under the provision are invalid.

- II. It is evident that, at the time of the Election at Issue, the number of electors per representative in the Tokyo Prefecture Fifth District was 2.13 times that of the minimum number of electors, which was the number in the Miyazaki Prefecture Second District, and 0.67 as much as the maximum number of electors which was the number in the Kanagawa Prefecture Fourth District.

The inequality which appears in the disparity as stated above is not beyond the reasonable discretion of the Diet. Therefore, I believe, the provisions of the number of seats in the electoral districts at issue were not contrary to the constitutional requirement of equality of voting rights at the time of the election.

Although the reasons in the judgment in the court below differ from the reasons in my opinion, I can agree with the conclusion that the election at issue was neither unconstitutional nor invalid.

The dissenting opinion of Justice Shirohei Hashimoto is as follows :

I agree with the majority opinion that the state of inequality in the value of each vote among the electoral districts was in an unconstitutional state at the time of the Election at Issue. However, I cannot agree with the conclusion of the majority opinion which states that the Apportionment Provisions at Issue cannot be held unconstitutional at the time of the Election at Issue since it is difficult to conclude that the unconstitutional state was not corrected within a reasonable period of time as constitutionally required. The reasons are stated below.

- I. In regard to whether the disparity between the number of electors and representatives among electoral districts can be held to have been in an unconstitutional state, the Supreme Court has taken an individual approach to review whether or not an unconstitutional state exists, and has not indicated that there is a certain numerical limitation on the maximum disparity which amounts to an unconstitutional state. Summing up the former Supreme Court decisions, however, we can estimate that a maximum disparity of 3 to 1 has been the numerical limitation.

In my view, I think it has few theoretical grounds, is difficult, and is not necessarily appropriate to show a specific figure as the standard limitation on unconstitutional state. But if I dare say, the apportionment should be established under the principle of being proportional to population and it may nevertheless be said that it is at least strongly presumed to be unconstitutional if the ratio exceeds 2 to 1 from the viewpoint of the principle of one man, one vote, and it is possible to say that the ratio of 2 to 1 is reasonable as an idea. It is assumed, however, that the Supreme Court decisions up to now have set the ratio of 3 to 1 as a numerical limitation on the maximum disparity amounting to an unconstitutional state, and this view seems to be almost fixed in practice. I want to understand that the figure of 3 to 1, though ideally 2 to 1 is appropriate, is harmoniously shown as a result of considering the existence of policy and technical factors and respecting the discretion of the Diet, as an alleviation or revision vis a vis accomplishing the principle of being proportional to population. Consequently, I am of the opinion that it is in an unconstitutional state at least in a case in which the maximum disparity is very close to 3 to 1.

Secondly, the reasonable period theory, which states it should be held unconstitutional only if the maximum disparity in an unconstitutional state is not corrected within a reasonable period of time as constitutionally required, functionally has the significance of avoiding the effect of immediately holding the ratio unconstitutional, while it is possible to say that it was nonetheless created in consideration of the existence of political factors and the discretion of the Diet.

Then, the reasonable period is not determined simply by automatically judging whether a certain amount of time has passed or not, but also maybe what should be judged from a so-called broad point of view through the entirety of a considerably long period. This was stated earlier in the dissenting opinion of Justice Shigemitsu Dando in the 1983 Grand Bench Judgment.

Examining the changes in the maximum disparity in the apportionment of the seats by the ratio of population or number of electors from this point of view, under the apportionment provision amended by the Law No.63 of 1975, the disparity was as

follows:

2.92 to 1 (ratio of population) at the time of the promulgation of the amending law in July 1975, on the basis of the population in the national census conducted in October 1970, but it increased continuously to 3.71 to 1 (ratio of population) based on the national census conducted in October 1975; 3.94 to 1 (ratio of the number of electors) at the time of the election in June 1980 ; 4.54 to 1 (ratio of population) based on the national census conducted in October 1980 ; 4.40 to 1 (ratio of the number of electors) at the time of the election in December 1983; 5.12 to 1 (ratio of population) based on the national census conducted in October 1985 ; and although under the apportionment provisions of the 1986 Amendment, it had decreased slightly for a time to 2.99 to 1 (ratio of population) at the time of the promulgation of the amending law in May 1986, on the basis of the population based on the national census conducted in October 1985, and to 2.92 to 1 (ratio of the number of electors) at the time of the election in July 1986, it increased again to 3.18 to 1 at the time of the election at issue in February 1990. In short, taking a broad, long-term view, it is possible to say that, with other than a few exceptions, the maximum disparity has always exceeded 3 to 1, and in view of the changes in population, it does not seem difficult to guess that this kind of trend will continue indefinitely. In fact, we can continuously see the trend of maximum disparity as 3.38 to 1 (ratio of population) based on the national census conducted in October 1990, after the election at issue, 3.34 to 1 (ratio of the number of electors) in September 1990, and 3.40 to 1 (ratio of population) in March 1992. Judging from the above circumstances, it may safely be said that the maximum disparity in the apportionment provisions has generally been in a state which should be called an unconstitutional state.

In this regard, the majority opinion states that the inequality of vote value under the apportionment provisions before the amendment by the 1986 Amendment (4.40 to 1), which was held unconstitutional by the 1986 Grand Bench Judgment, can be evaluated as having been solved as the result of the 1986 Amendment, but I cannot concur with this statement. That is, based upon the changes in circumstances such as :

(1) even from the viewpoint of the Supreme Court as stated above, the figure of 2.92 to 1 disparity is only one step before an unconstitutional state, and the figure of 2.99 to 1, the maximum disparity in the ratio of population in May 1986, just before the election, is almost in an unconstitutional state ;

(2) since it is obvious in light of the 1983 Grand Bench Judgment that the maximum disparity of 3.94 to 1 at the time of the election conducted in June 1980 was in an unconstitutional state, the result of the national census conducted in October 1980 showing that the maximum disparity had increased and had reached 4.54 to 1 was a matter of grave concern, and

(3) moreover, the result of the national census conducted in 1985 ended up with an extraordinary high ratio of 5.12 to 1 and the disparity increased further, it is considered that the fact that the maximum disparity remained at about 2.99 to 1 or 2.92 to 1, very close to 3 to 1, as a result of the amendment by the 1986 Amendment cannot be evaluated as a satisfactory correction. I cannot help but say that the evaluation that the unconstitutional state has been solved once by the above amendment is a view which only takes note of the situation at one point in time. It seems that the evaluation on this point was one of the reasons for the majority opinion to conclude that a reasonable period for correction had not passed in the case at issue, but if this is the case, I still regretfully cannot agree with it.

In regard to the above reasonable period, it should be considered that the Public Office Election Law provides at the end of Appendix No.1 for the Appendix to be regularly revised every five years after going into effect based on the results of the most recently conducted national census. However, considering the fact that the maximum disparity in the apportionment provisions has been generally in an unconstitutional state as stated above, I cannot help but think that it is a matter of course that the Diet should commence a fundamental correction in order to fulfill its responsibility to the people not to bring about an unconstitutional state in the apportionment provisions for a considerable period, without waiting every five years for the results of the most recently conducted national census.

Under the above circumstances, in consideration of the general tendency of the above long-term unconstitutional state and in view of the situation in which it is fully foreseeable to exceed 3 to 1 in the near future, I am forced to say that the legislature had the responsibility not to confine itself to taking temporary measures but to take fundamental measures to correct the fixed number of seats in the amendment by the 1986 Amendment.

In short, the maximum disparity of 3 to 1 tacitly interpreted as an unconstitutional state as shown by past Supreme Court decisions as stated above, is nothing but a harmonious figure resulting from adding nonpopulation factors to the idea of the equality of vote value and respecting the discretion of the Diet. Therefore, I think that we do not need to give so much consideration to the policy factors or the discretion of the Diet, and we should give much more weight to the idea of the equality of vote value, namely, the principle of being proportional to population, which is the most important and fundamental principle of the Constitution, when determining that the apportionment provisions are in an unconstitutional state on the basis of the above figures and judging whether or not a reasonable period for correction has passed. In the case at issue, both the maximum discrepancy in the population of 2.99 to 1 in May 1986, which is the result of the amendment by the 1986 Amendment, and the maximum disparity in the number of electors of 2.92 to 1 at the time of the general election held in July 1986, cannot help but be regarded as being in an unconstitutional state as stated above. And it is as the majority opinion states that the maximum disparity of 3.18 to 1 at the time of the Election at Issue held in February 1990 was in an unconstitutional state.

Moreover, as I stated above that such an unconstitutional state did not arise as of the time of the amendment by the 1986 Amendment but had constantly so existed before then. Therefore, the fact that the disparity in vote value has reached a level that violates the constitutional demand for equality in voting rights is caused by the fact that the long-term unconstitutional tendency has not been given much emphasis and has not been fundamentally and thoroughly examined. In short, I cannot but regard it as the result that a necessary correction was not legislated within a reasonable period, and thus it may safely be said that the apportionment provisions were already unconstitutional at the time of the Election at Issue.

- II. The majority opinion indicates the following circumstances as being the main grounds for concluding that a reasonable period of time had not passed, in addition to the evaluation that the unconstitutional state was dissolved as a result of the amendment by the 1986 Amendment as stated above:

- (1) the period until the date of the Election at Issue was held was about three years and seven months from the date that the 1986 Election was held, and the Apportionment Provisions at Issue were set forth (July 6, 1986), and was about three years and three

months from the date that the final figures of the 1985 census were officially announced on November 10, 1986;

(2) while population shifts occur continuously and as a result the disparity can either increase or decrease, it is neither practical nor appropriate for the Diet to frequently amend the apportionment provisions in light of the demand for stability in politics;

(3) the maximum figure for the disparity between the numbers of voters and representatives among all districts at the time of the Election at Issue (3.18 to 1) was not remarkably different from the maximum disparity at the time of the 1986 election (2.92 to 1). However, I cannot agree With any of the circumstances indicated as the main grounds in the majority opinion. That is, in regard to point (1), when considering a reasonable period, as stated above it is not appropriate to take note of only a certain period after the date that the 1986 Amendment went into effect. And it is also inappropriate to consider a reasonable period of time starting from the date of the official announcement of the final figures of the 1985 national census because it is recognizable without waiting for the official announcement of the results of the most recently conducted national census that generally the disparity has been constantly in an unconstitutional state.

In regard to point (2), as I stated above, the reduction of the disparity as a result of population shifts is merely a very temporary phenomenon, and the increase in the disparity is a general tendency when considered from a long-term perspective; and it is possible to adopt a view contrary to the majority opinion regarding the frequent amendment of the apportionment provisions and the demand for stability in politics. That is, when amending the apportionment provisions, I think that they should make fundamental corrections from a long-term perspective in order to not hold an election under the amendment law in an unconstitutional state for a long time, taking it into full consideration that it is difficult to constantly reconsider the amendment of a fixed number of seats, and they must maintain an amended fixed number of seats for a long time for the purpose of the demand for stability in politics as well, and it is not appropriate to frequently amend the apportionment provisions in accordance with population shifts.

As for point (3), as the majority opinion states, the maximum disparity of 3.18 to 1 at the time of the Election at Issue was in an unconstitutional state, which exceeds 3 to 1, the numerical limitation of the disparity tacitly indicated by past Supreme Court decisions, and 2.92 to 1 at the time of the 1986 Election is also a figure of disparity exceedingly close to this limitation.(In my opinion, as stated above, it should be regarded as having been in an unconstitutional state.) Therefore, it is nothing more than to miss the mark to simply compare a figure of disparity inherently presumed to be in an unconstitutional state and a figure of disparity exceeding close to an unconstitutional state, conclude that the former is not remarkably different from the latter, and then based on this assumption use the fact that a reasonable period for correction has not passed as one factor in one's conclusion.

- III. In the case at issue, it should be regarded as characteristic that, when the bill for the 1986 Amendment passed the plenary session of the House of Representatives, they passed a resolution that stated, "this correction of the apportionment of seats for the House of Representatives at this time is a temporary measure to immediately amend the current provisions that were held unconstitutional. We will wait for the official announcement of the final results of the 1985 national census and will then promptly conduct a review for a drastic amendment." This is an expression of determination by the House of Representatives from its position as a legislature body, about the

appropriate exercise of its legislative power, and the majority opinion also points to this. I suppose that it is possible to say that it is an exception for the House of Representatives to pass a resolution such as the above when passing a bill for correction of the fixed number of seats, and that this can be construed as the House of Representatives itself recognizing that the provisions for the fixed number of seats had been constantly in an unconstitutional state. And based on this premise, it is possible to understand this decision as being a statement by the House of Representatives itself stating that the correction of the fixed number of seats in 1986 was not enough to dissolve the unconstitutional state but merely a temporary measure, while announcing the resolution to begin a radical amendment immediately. In consideration of the fact that the reasonable-period theory involves more or less policy factors that take into consideration of the discretion of the Diet, as stated above, once the legislature itself made such a recognition and announced its resolution, it may well be said that it is a matter of course to consider this as an important factor when judging whether it was corrected within a reasonable period or not. Therefore, considering the existence of that resolution, I think that it is enough to reach the conclusion that a reasonable period for correction has Passed.

In this regard, I cannot agree with the majority opinion which, as stated above, although pointing out that it is a statement of resolution made by the House of Representatives from the viewpoint of the legislature about the appropriate exercise of its legislative power, does not consider the existence of the above decision since it is a matter different from a legal judgment about whether it was corrected within a reasonable period.

IV. As stated above, the apportionment provisions at issue were held unconstitutional as a whole at the time of the Election at Issue, but different considerations are needed for reviewing the validity of the election held pursuant to it. That is to say, in regard to the Election at Issue, when summing up and considering ;

(1) the detriment that the voting right, a fundamental right of electors, is restricted by the unconstitutional apportionment provisions, and other bad effects caused by not invalidating the validity of the Election at Issue,

(2) as a result of the judgment invalidating the Election at Issue, inconveniences which are even temporarily brought about by the occurrence of circumstances not foreseen by the Constitution, for instance, that the apportionment provisions must be amended under circumstances in which the representatives elected from the district at issue will not be present, and

(3) the degree of disparity between the number of electors and the representatives among all the election districts at the time of the Election at Issue, and other circumstances which appeared in the case at issue, it is possible to view this case as coming within a category in which it is appropriate to comply with the basic principle of law implied in the system of the so-called circumstantial judgment. Moreover, considering that the principal object of apportionment litigation like this is to seek a declaration holding the apportionment provisions unconstitutional and to demand a correction in the legislature, and that the effectiveness of the system of constitutional review should ultimately be guaranteed by respect for and compliance with a judicial review of the legislature and the executive, I conclude that it is appropriate only to go as far as to state that the Election at Issue is invalid in that it was held pursuant to the unconstitutional apportionment provisions and to declare the invalidity of the election in the decree, and not to invalidate the Election.

The dissenting opinion of Justice Toshijiro Nakajima is as follows :

I am not in accord with the majority opinion which concludes that the Apportionment Provisions at Issue are not unconstitutional. I explain my reasons for this below with explaining my view on each issue in the cases concerning the unconstitutionality of apportionment provisions.

- I. Standards of constitutional review concerning disparity in the numbers of electors or population per representative in elections for members of the House of Representatives

The majority opinion indicates that the state of inequality in vote value among electoral districts at the time of the Election at Issue, in which the maximum disparity was 3.18 to 1, became so great as to violate the constitutional requirement of equal voting rights. Although I agree with this conclusion, I have the following opinion regarding the proper standards of constitutional review concerning this disparity.

Until now, the Supreme Court has confined its judgments to deciding the constitutionality of the relevant disparity in each individual case, without setting any numerical level for the disparity which would be held unconstitutional. However, it is unlikely that there are no standards to judge this issue ;rather, the court must have had a certain numerical limit in mind. Taking such factors into consideration as the reasoning of the 1983 and 1985 Grand Bench Judgments, which concluded that the state of inequality of vote value had been dissolved once by the Amendment Law of 1975, which had reduced the disparity to 2.92 to 1, I cannot help but assume that the Court considered this numerical borderline should be generally accepted to be 3 to 1. Although, given its nature, it is impossible to explain the grounds for this 3-to-1 criterion in a theoretically perfect way, I think that those grounds can probably be explained in a reasonable way by allowing for the existence of policy factors which the Diet may take into account to moderate or modify exhaustive population-proportionate-doctrine slightly, as shown in Justice Nakamura's dissenting opinion in the 1983 Grand Bench Judgment. Moreover, we may consider this 3-to-1 criterion to have taken root through the accumulation of Grand Bench decisions, lower court judgments, and public understanding.

Thus, disposition which avoids clearly defining concrete standards in the name of individual judgment on the specific facts of each case will be open to criticism due to a lack of consistency, and should be tolerated. Furthermore, in order for the judiciary to encourage the Diet to correct unconstitutional disparity of its own accord, it is necessary to define concrete standards of correction in order to ensure legal stability.

In addition, although under the principle of population proportionalism it might have been theoretically possible in the past to imagine stricter standards than the above, I cannot help but regard such an attitude as unrealistic since it pursues ideals in vain, in the light of the situation where these standards have taken root through an accumulation of court decisions, judgments and public understanding as stated above.

Consequently, I am of the opinion that this case should be disposed of by indicating definitely that, in principle, the standard of judicial review on the constitutionality of disparity is 3 to 1 ; provided, however, that this criterion simply sets a limit on the degree of disparity and it would mean that an apportionment provision would be presumed to exceed the reasonable discretion of the Diet if the relevant disparity had exceeded that limit. It is a matter of course that this criterion does no more than set a limit for the Diet to exercise its discretion, so it will be natural that the Diet should not content itself with tentative amendment of the apportionment provisions close to this

limit but squarely face the task of passing a radical amendment.

II. Whether the disparity was corrected within a reasonable period of time or not

I should say that, given its nature, it is impossible to determine the point in time when the disparity under the Apportionment Provision at Issue clearly reached an unconstitutional level, although we can presume, judging from the degree and shift of the disparity; that this point in time was after the 1986 Election but some time before Election at Issue, as stated in the majority opinion. Indeed, since the period between the point in time when the disparity reached an unconstitutional level and the Election at Issue was shorter than the period between the enforcement date of the 1986 Election and that of the Election at Issue, which is about three years and seven months, it is clear that the period in this case is relatively short if compared to those in such cases as the 1976 and 1985 Grand Bench Judgments, which declared that the correction disparity had not been made within a reasonable period of time as constitutionally required.

However, whether or not disparity is corrected within a reasonable period of time as constitutionally required should not be determined uniformly based on the length of time which has elapsed. Rather, when we make decisions on this issue, on the premise that the Diet may exercise its reasonable discretion, we have to take into account whether we can find that the Diet made serious efforts to correct the disparity under the concrete circumstances of the relevant period. Although it is certain that the judiciary cannot, or should not, consider the specific political situation or circumstances in the Diet under which the legislature is to correct the state of inequality, we should at least take into account as one of important factors how the legislature itself comprehended and evaluated the contents of the amendment of the relevant apportionment provisions and what intention it demonstrated that it possessed regarding a future plan of disposition.

Incidentally, it is possible to regard the provision at the end of Appendix 1 of the Public Office Election Law to the effect that the apportionment provisions shall be reviewed every fifth year in accordance with the most recent national census as the Diet's own comprehension and demonstration that the Diet had to take into account in advance subsequent population shifts that were foreseeable and to make corrections so as not to cause a situation in which a remarkable state of inequality would occur in the following five years. Moreover, particularly in this case, by way of adopting a special accessory resolution at the time of approval of the 1986 amendment bill, the House of Representatives expressed its comprehension that the relevant correction of apportionment was merely a "temporary measure to immediately amend the current provisions that were held unconstitutional," and also expressed its intention "[after] the final results of the 1985 national census, [to] promptly conduct a review for a drastic amendment." Nevertheless, years and months have passed without any amendment, not to mention as "immediate and drastic" amendment. This fact should be regarded as an important factor for the judiciary in determining whether or not the correction within a reasonable period of time was made. The majority opinion considers the existence of the resolution above to be an issue of a different dimension from a legal judgment on whether or not correction within a reasonable period of time was made. But I am of the opinion that the expression of understanding and intention by the legislature itself, as stated above, should be grounds for this legal judgment because it is premised on a policy factor of the scope of the reasonable discretion of the Diet.

Accordingly, in this case, since the legislature had not amended the apportionment provision at all between the point in time when the disparity reached an

unconstitutional level after the 1986 amendment but before the Election at Issue, it is difficult to find that the Diet made serious efforts towards correction, even when allowing room for the Diet's reasonable discretion. Therefore, I cannot help but judge that there was no correction within a reasonable period of time as constitutionally required.

For reasons already stated, the Apportionment Provisions at Issue should be held unconstitutional, and consequently the Election at Issue was conducted under unconstitutional and invalid apportionment provisions.

III. Validity of the Election at Issue

In this case, as stated above, the period between the point in time when the disparity reached an unconstitutional level and the Election at Issue was not relatively long, and also considering the various circumstances concerned in this case such as the degree of the disparity; thus, in accordance with the general principle of law which is implied in the basis of the system of the so-called circumstantial judgment as discussed in the 1976 and 1985 Grand Bench Judgments, it is proper to declare the Election at Issue was illegal because it was held under unconstitutional apportionment provisions, and to pronounce in the decree that the election is illegal, and not to nullify the validity of the election itself.

However, if a general election were to be conducted in the future after the lapse of a reasonable period of time without any correction of a maximum disparity over 3 to 1, and if a lawsuit claiming unconstitutionality of apportionment provisions were filed, the judiciary would not be allowed to again repeat the same disposition stated in this case, but would have to adopt more effective measures.

That is, in accordance with the supplementary opinion of Justice Terada and three other Justices and the supplementary opinion of Justice Kidoguchi in the 1985 Grand Bench Judgment, I am of the opinion that this Court should render a judgment to the effect that the election is declared invalid, but that the Court's declaration of the invalidity of the election would go into effect only if the apportionment provisions were not corrected within a certain period of time after the judgment. (Short term as an additional grace period for amending the law might be enough because a reasonable period of time for correction would have already passed.)

The dissenting opinion of Justice Shoichiro Sato is as follows :

I. Concerning the disparity in the value of each vote

As the 1976 Grand Bench Judgment indicated, equality under the law (article 14(1) of the Constitution) aims, in relation to voting rights, at a thorough equalization of the political value of each citizen. Equality of the value of each vote is required under article 14(1), which, it should be said, will not tolerate the existence of disparity in the value of each vote.

Thus, upon determining the election system, the Diet should attach the greatest importance to equality of vote value and be under a constitutional obligation to make efforts to correct the disparity in the value of each vote as thoroughly as possible in concrete decisions about the apportionment of seats, electoral districts, etc. Even so, however, the requirement of mathematical precision of equality might result in imposing an impossibility. As its existing election system, Japan adopts the medium-sized constituency system based on the administrative divisions such as the

prefectures, (To, Do, Fu and Ken). So long as this system is assumed, it is inevitable that the disparity in the value of each vote will occur to some extent. But there seems to be no objection to the opinion that, when determining the apportionment of seats, equality of the value of each vote is the most significant factor to be considered. The Public Office Election Law enacted in 1950 also takes this factor into consideration, because the Appendix No.1 of the Law, at the beginning, succeeds in its entirety to the Appendix to the Members of the House of Representatives Election Law following the amendment by Law No.43 of 1947, which apportions a certain number of members of the House of Representatives among each of the prefectures (To, Do, Fu and Ken) in proportion to the population.

Concerning the disparity in the value of each vote, the majority opinion holds on the one hand that the disparity of 3.18 to 1 in the number of voters per representative among electoral districts on the date of the Election at Issue is considered to have been in an unconstitutional state, and on the other hand disparity of 2.92 to 1 reduced by the 1986 Amendment is considered to have been constitutional, that is, inequality in the value of each vote had been solved at the time of the amendment. Although this opinion does not indicate a limit on the degree of disparity permitted, the limit may generally be presumed to be approximately 3 to 1 from the succession of precedents of this Court, and I assume that the majority opinion accepts this presumption. As the majority opinion indicates, however, even though the criterion for judging constitutionality is whether the disparity in the value of each vote reaches an extreme inequality which might be regarded as generally unreasonable, even after taking into account various factors that the Diet may ordinarily consider, the limit on the degree of disparity permitted cannot be held to be at the level of 3 to 1.

Since it should be construed as clearly unequal in common sense that one has one vote while another has two votes, it should be said that extreme inequality as might be regarded as generally unreasonable should mean the disparity exceeding the level of 2 to 1; therefore, such disparity is not permissible under the Constitution except in special cases such as an electoral district that makes up a district area which forms an independent living zone (a solitary island or a remote area). (However, even disparity not exceeding the level of 2 to 1 is not always permissible. In the case in which the existence of the so-called reverse phenomena reaches a considerable number in relation to the apportionment of seats among electoral districts, even a disparity not exceeding the level of 2 to 1 should be considered to be an unconstitutional state.)

II. Concerning a reasonable period of time during which to correct the disparity

Since the Diet should accept the responsibility of paying attention to the equality of the value of each vote at all times and preventing the occurrence of an unconstitutional state, I cannot help but have some doubts about establishing the point whether or not any correction of the disparity had been made within a reasonable period of time as constitutionally required as a factor in the judgment of constitutionality. Moreover, even if this factor can be admitted, one could say that, since a reasonable period of time is one during which the Diet needs to enact legislation to remedy the unconstitutional state, it is desirable that the period should be as short as possible.

And in order to judge whether the disparity had been corrected within a reasonable period of time, we must determine the initial point at which the unconstitutional state arose. But partly because the majority opinion does not indicate clearly the criteria for judging the constitutionality of disparity, there is no other way than to suppose the initial stage. Consequently, it is difficult to judge this point.

The majority opinion presumes that the disparity at issue created an unconstitutional state some time before the date of the Election at Issue and states that we cannot help but say it is difficult to conclude that the correction had not been made within a reasonable period of time as constitutionally required, because the Election at Issue was conducted almost three years and seven months after the date that the 1986 Election was conducted and the 1986 Amendment took effect (July 6, 1986), and almost three years and three months after the date that the final results of the national census conducted in 1985 were announced (November 10, 1986). The majority opinion decides that a reasonable period of time is more than three years and seven months as well as three years and three months.

However, since a reasonable period of time as described above is, as stated above, one during which the Diet needs to enact legislation to remedy the unconstitutional state, this period should be the minimum period necessary for the remedy, for which two Diet sessions are enough, and it should be held that this period had already elapsed in the instant case.

It is no exaggeration to say that, if we adopt a lenient view about disparity and consider such a long period of time as the majority opinion indicates to be a reasonable period of time, we will lose most of the spirit of the precedents in which the Supreme Court has been overcoming objections and taking the position that litigation demanding the invalidation of elections on the grounds of unconstitutionality of the apportionment provisions (apportionment litigation) is to be permitted by virtue of article 204 of the Public Office Election Law.

Furthermore, I agree with the opinion of Justice Hashimoto and Justice Nakajima regarding the construction of the supplementary resolution concerning the "drastic amendment" that was adopted when the 1986 Amendment was passed.

III. Conclusion

In accordance with the analysis stated above, I think that in this case the Court should state that the Election at Issue is illegal on the ground that it was conducted under unconstitutional apportionment provisions, and declare in the decree the illegality of the Election at Issue.

Further, because apportionment litigation should not be confined to litigation for declaration of unconstitutionality, if a situation like that found in this case is repeated in the future, the Court will be forced to hand down a judgment invalidating the election concerned. As a concrete measure regarding this point, we should follow the conception indicated in the supplementary opinion by Justices Terada, Kinoshita, Ito and Yaguchi in the 1985 Grand Bench Judgment.

The dissenting opinion of Justice Ryohei Kizaki is as follows :

I cannot completely agree with the view of the majority opinion, following the Grand Bench decisions in the cases of constitutionality of the apportionment provisions for the seats of members of the House of Representatives, as to the issues of :

1. the assessment of the disparity in the number of electors or population per representative in the election of the members of the House of Representatives (hereinafter, "disparity");
2. the reasonable period of time necessary for the Diet to correct an unconstitutional

disparity;

3. in the case in which the disparity in some electoral districts has become unconstitutional, whether the apportionment provisions in the Public Office Election Law have become unconstitutional and invalid as a whole or the apportionment provisions in particular districts have become unconstitutional and invalid, and whether it is sufficient to render judgment invalidating the election in the districts.

Therefore I reach a different conclusion from the majority opinion. The reasons are as follows:

I. The assessment of the disparity

1. The majority opinion, following the three Grand Bench decisions in 1976, 1983 and 1985 on the cases of constitutionality of apportionment provisions for seats of members of the House of Representatives (hereinafter, "The Three Grand Bench Judgments"), states in the first place that the Constitution guarantees the equality of the value of each vote in the election of Diet members, indicates a view that equality of the value of each vote is not constitutionally deemed to be the sole and absolute criterion for determining the election system, and that, in principle, it should be interpreted to require that equality of vote value should be realized in consonance with its relation to other policy objectives and reasons which the Diet may properly consider; and states that although the most important and fundamental criterion to be considered in partitioning of electoral districts and apportionment of seats is the equality of the ratio between the number of electors and the apportionment of seats in each district, other factors which should be taken into account include not only the administrative divisions of the prefectures [To, Do, Fu and Ken], cities, towns and villages and geographical circumstances but also how the Diet reflects changes in social conditions such as phenomenon of the concentration of population in the cities in the partitioning of electoral districts and apportionment of seats.
2. However, what I particularly want to emphasize in the majority's opinion is that although the majority opinion indicates the principle of the equality of ratio of voters to the number of seats of representatives in each district (hereinafter, "Equality of Vote Value") and other factors which should be taken into account as being within the discretion of the Diet, as criteria for partitioning the electoral districts and the apportionment of seats, it is not clear in what proportion the two criteria should be taken into account.

"Equality of Vote Value" is the fundamental right of the people guaranteed by the Constitution, whereas "other factors which should be taken into account" should be considered merely for deciding the concrete framework of the electoral system by the Diet as the legislative organ. Thus the two criteria are different in their relative importance, and legislation determining the framework of the election system should not undermine the constitutional requirement of Equality of Vote Value.

3. Also, Equality of Vote Value means 1 to 1 in numbers as a matter of course, but in reality it is impossible to have no disparity, because the Public Office Election Law first decides the total number of the seats and then distributes them among the electoral districts. But if the disparity has become 2 or more to 1, it means that one elector has one vote in some districts while another elector has two or more votes in other districts, which is obviously contrary to the principle of equality. Therefore, in order to maintain the principle of equality, the apportionment provisions should be determined so that the ratio of disparity is less than 2 to 1. Although there is a discrepancy in the

ratio of less than 2 to 1 but more than 1 to 1, it will not undermine the constitutional principle of equality because one elector will have fewer than two votes.

Furthermore, although the people are sovereign in the Constitution, considering the fact that the most important opportunity in which they can actually participate in national politics is voting in the election for members of the Diet, realization of the equal value of each vote has great significance for the people not only as a formality but also in substance. As the 1976 Grand Bench Judgment states, "equality under the law provided in article 14 (1) of the Constitution should aim, in relation to the right to vote, at a thorough equalization of the political value of each citizen," and this equal right of the people should not be argued at the same level as the discretion of the Diet.

Therefore the Diet, in determining the apportionment provisions, should exercise its discretion within a limit which will not undermine the Equality of Vote Value and make the utmost effort to keep the maximum value of each vote at less than twice that of the minimum one. And the Diet has to accept the judicial assessment that the apportionment provisions are unconstitutional when the disparity exceeds the above-mentioned limit.

4. Also, that majority opinion does not clarify the criterion for the concrete figure as to disparity nor the limit of the discretion of the Diet. Therefore the judgment whether or not the Diet has exceeded the limit of its reasonable discretion should be made separately in each case. As a result, the criterion for judgment is not clear, so I cannot help but be worried that the criterion has become very vague, given that outsiders have no choice for understanding but must depend on guessing, and understanding may be different depending on each person. Therefore should the court not clarify the criterion ?

I think that the discretion of the Diet concerning Equality of Vote Value should be regarded as a small relaxing or modifying criterion against the thoroughgoing and rigid principle of population-proportionality that it can be exercised within so-called fine tuning, and that it should serve the realization of the principle of equality. Therefore the maximum disparity can be recognized within a ratio of less than 2 to 1, considering the disparity created by non-population factors.

5. Next, I would like to consider, looking back at the results of how the Diet has exercised its discretion, the partitioning of the electoral districts and apportionment of seats in the election of the members of the House of Representatives.

(i) First, Appendix No.1 of the Public Office Election Law enacted in 1950 took over the amended Appendix of the old House of Representatives Election Law as it was, but disparity in the ratio of the maximum population per representative to the minimum among electoral districts was 1.51 to 1 at that time.

(ii) The Public Office Election Law was amended in 1964 to correct the increase in the disparity resulting from shifts in population, which increased by 19 the number of the members in 12 electoral districts and divided the electoral districts with six seats each, with a total of 123 electoral districts and 486 seats. As a result, the disparity in the ratio of the maximum population per representative to the minimum among electoral districts was corrected by reducing from 3.21 to 1 to 2.19 to 1.

(iii) There was also an amendment in 1975, which increased by 20 the number of the members in 11 electoral districts and divided the electoral districts with six seats or more each, with a total of 130 electoral districts and 511 seats in total. As a result, the

disparity in the ratio of the maximum population per representative to the minimum among electoral districts was corrected by reducing from 4.83 to 1 to 2.92 to 1.

(iv) There was an amendment in 1986 to correct the disparity, which reduced by one the number in each of seven electoral districts, increased by one the number of the members in each of eight electoral districts, and dissolved three electoral districts with two seats caused by reduction of the members by means of changing borders with the neighboring districts, resulting in a total of 512 seats. As a result, the disparity in the ratio of the maximum population per delegate to the minimum among electoral districts was corrected by reducing from 5.12 to 1 to 2.99 to 1.

By this general survey, we can say that the Public Office Election Law was amended in every case mainly due to population shifts, and the disparity was corrected in every amendment. But as far as the results are concerned what the Diet seems to have considered as the exercise of its discretion in the correction was nothing but changing the electoral districts and increasing or decreasing the number of members, which is reform related only to the population factor, and I cannot find any materials to clarify what other factors were considered. Therefore it is not necessary to overemphasize the discretion of the Diet on non-population factors in the apportionment of seats.

Although I can recognize that the discrepancy was improved, the disparity ratio was 2 or more to 1 as the result of the reforms after 1964, and it is not clear why it was not improved enough to make the disparity less than 2 to 1.

6. As for a maximum disparity of less than 2 to 1, I am not of the opinion to not allow for an exception, of course. It is not that one cannot predict that the maximum disparity may become 2 or more to 1 despite the utmost efforts of the Diet, or that there may be special reasons that leads to such a result, but the Diet should show the special reasons to the people and should not hesitate to make the effort to be understood by the people. If the people can understand the special reasons, it will not be contrary to the principle of equality that the maximum disparity exceeds the limit of 2 to 1 by the exercise of the discretion of the Diet. But as far as the case at issue is concerned, I cannot find any materials indicating such special reasons.
 7. For the reasons stated above, I think it violates the Constitution that the Diet permitted the maximum disparity of 2 or more to 1 to remain without any special reasons. And as far as the case at issue is concerned, I must say that the maximum disparity of 3.18 to 1 in the Election at Issue violates the Equality of Vote Value required by the Constitution. Therefore, I am not in accord with the majority opinion as to the reasons for unconstitutionality, but I agree with the conclusion in the majority opinion that the maximum disparity at issue is unconstitutional.
- II. A reasonable period of time for correction of the disparity after reaching an unconstitutional level
1. As to this matter, the first question is whether the disparity should be found unconstitutional or not. In my view, a disparity in the ratio of the maximum number of voters per representative to the minimum which amounts to 2 to 1 is unconstitutional; it goes without saying that a reasonable period of time had already passed since the results of the national census conducted in 1960 shows that the disparity in the rate of the maximum voters to the minimum had reached as much as 3.21 to 1 and it still remained at 2.19 to 1 after the partial amendment of the Public Office Election Law of 1964. Therefore, the disparity at the time of the election at issue was of course unconstitutional.

2. Because more than ten years have already passed since the 1976 Grand Bench Judgment and the social conditions have radically changed, I would like to state my view as to the question of "a reasonable period of time at issue," with a mind to the changes in the social conditions.

It is to be desired that correction of the disparity within a reasonable period of time should be made as promptly as possible since the unconstitutional state of affairs will last as long as the correction is being carried out. After all, a reasonable period of time should be construed as the shortest period of time necessary for the correction of the unconstitutional state of affairs. Thus, the Diet must keep a constant watch over the disparity and correct it soon after it realizes that the disparity has reached an unconstitutional level. The Diet must not neglect to correct the disparity simply because the Diet has discretion. From the viewpoint that the people hold sovereignty, it should be said that a reasonable period of time should be as short as possible. On the other hand, in order to guarantee the people's important rights of equality, as provided for in the Constitution, and to stabilize the basis for the representation of the Diet members themselves, the Diet give priority to this matter over others.

Nevertheless, it may be fairly said that, as a matter of fact, the correction of the disparity has not been made for a long time as indicated in the Three Grand Bench Judgments. As for the 1983 Grand Bench Judgment, which decided that the apportionment provision was constitutional for the reason that the reasonable period of time had not passed yet, it seems slightly too generous, although this matter is related to the evaluation of a disparity that amounted to 2.92 to 1.

3. Looking back upon the past, nearly half a century has passed since the enactment of the Public Office Election Law, the state of affairs has greatly changed. That is to say, the situation of population shifts, which has a bearing on the case at issue, has changed much and, in regard to grasping that situation, along with the technical developments significant progress has also been made in research capabilities, which are incomparably superior to what they were in the past. To ascertain the number of the electors of each electoral district throughout the country, there is no need to wait for the results of the national census conducted every fifth year. The list of electors prepared every year on the basis of residency registration has become readily available to ascertain the number.

The Public Office Election Law provides in the end of Appendix No.1 that Appendix No.1 is to be corrected every fifth year in accordance with the most recent national census, and that provision seems to have been a kind of objective towards which efforts should have been made at the time of the enactment of the Public Office Election Law soon after the war, while in these days, I believe that it has already fulfilled its role. Therefore, it is not appropriate to estimate the reasonable period of time at five years.

I think that it was easy for the Diet to from a clear view of the situation of the disparity by means of the list of the electors and that, in the future, a reasonable period of time should begin when it is possible to recognize that the disparity in the number of electors per representative has exceeded the level of 2 to 1.

- III. When the disparity among some electoral districts has grown unconstitutional, should the apportionment provisions at issue in the Public Office Election Law be unconstitutional as a whole in respect to all election districts (the view that the provisions are indivisible)? Or should it be unconstitutional in so far as the part of the electoral districts with the defect of the concern about unconstitutionality (the view that

the provisions are divisible) and should the elections be invalidated only in those districts ?

1. With regard to this question, I agree with the gist of the view that the provisions are divisible, which is discussed in detail in the dissenting opinion by Justice Masao Okahara and other four justices in the 1976 Grand Bench Judgment. I believe that, when the disparity of some electoral districts with others has grown unconstitutional, the apportionment provisions should be unconstitutional in relation only to those districts with defects of unconstitutionality, and it is enough to decide that the election should be invalidated in those districts.
2. The view that the provisions are indivisible, which was adopted by the Three Grand Bench Judgments and the majority opinion in this case, is based on the idea that the electoral districts and the apportionment of seats are decided after considerations with relation to the whole number of the seats and the apportionment provision thus made is inseparable and a change in a part of the provision had influence on the other parts.

On the other hand, the view that the provisions are divisible has its basis in the following. The unconstitutionality of the provision in relation to one election district does not necessarily make the whole provision unconstitutional. And the Public Office Election Law was amended in 1964, 1975, and 1986 to correct the disparity in the value of votes, which had increased with the extraordinary shift of population to the big cities after the enactment of the Public Office Election Law. Yet the amendments only managed to adjust the number of representatives in certain specific groups of electoral districts where the population had increased or decreased rapidly, and there are no indications that the amendments took into account the relationship that is indicated by the view that the provisions are indivisible. Thus, the fact is that the apportionment provisions were amended in relation only to certain specific electoral districts without reapportioning all electoral districts.

3. Although there are grounds for both views, I believe that there is no need to regard the apportionment provisions as inseparable as a whole, and the view that the provisions are divisible is justifiable in accordance with actual conditions. Further, if the apportionment were found unconstitutional and invalid because the increase in the variance had reached a point of violating the constitutional requirement of equal voting rights, according to the view that the provisions are indivisible, the court could not help but adopt the so-called circumstantial judgment type disposition because the court has to anticipate the uncontrollable political situation which would result if the apportionment provisions as a whole were held unconstitutional. Thus, an effective judgment would seldom be expected as a practical disposition. If the Supreme Court, holding that the apportionment provisions are unconstitutional as a whole, keeps invoking the so-called circumstantial judgment type disposition in litigation based on the unconstitutionality of the apportionment provisions, I am afraid that the equal voting rights of the people, who hold the sovereign power, might be left impaired in the long run.
4. For the reasons stated above, I support the view that the provisions are divisible. Thus, among the elections in the districts at issue, the Court should dismiss the petition for invalidation of the election in those election districts where the disparity maximum is less than 2 to 1. As for the the election in those election districts where the disparity is not less than 2 to 1, the Court should declare the elections there invalid, and following the supplementary opinion by Justice Jiro Terada and three other justices in the 1985 Grand Bench Judgment, decree that the effect of a decision declaring the elections invalid will come about if the correction is not made within a reasonable period of time

(one year), as set by the Court.

The dissenting opinion of Justice Motoo Ono is as follows :

I am in accord with the majority opinion partially on its basic attitude towards litigation challenging the validity of elections on the grounds of unconstitutionality of apportionment provisions and on its decision that disparity in the value of votes between electoral districts as of the date of the Election at Issue was so excessive that it violated the constitutional requirement for equality of voting rights. But I cannot agree with its decision that it is impossible to declare unconstitutional the apportionment provisions in this case because it is difficult to say that the provisions were not corrected within a reasonable period of time as constitutionally required after the 1986 Amendment, which can be recognized as having dissolved the previous inequality of vote value.

The Election at Issue was based on the amended apportionment provisions of 1986, and this amendment was made after the 1983 and 1985 Grand Bench Judgments concerning the general elections of the members of the House of Representatives held in 1980 and 1983 respectively ; these judgments stated that the ratio of the number of electors per representative among electoral districts of 3.94 to 1 and that of 4.40 to 1 respectively were so excessive that they violated the constitutional requirement for equality of voting rights; and as a result of the amendment the ratio of the maximum number of electors per representative to the minimum among election districts became 2.99 to 1 according to population based on the national census taken in October 1985.

About the question of whether the inequality of vote value among electoral districts violates the constitutional requirement for equality of voting rights, the Court previously has decided the issue of disparity on a case-by-case basis and has not set a standard with clear figures, which draws a line between constitutionality and unconstitutionality, but it seems to be generally understood that the maximum disparity of 3 to 1 is it, and I think that this understanding is reasonable from the standpoint of the accumulated judgments of the Court. Also, since it is theoretically difficult, given its nature, to show this kind of standard with fixed figures and the 3-to-1 standard is just a measure for a court to decide that the disparity is unconstitutional, I must say that the standard has leeway to some extent such as approximately 3-to-1 or about 3-to-1, and it does not stand to reason to say that it is unconstitutional if the disparity is more than the number "3" and is always constitutional if it is less than the number "3." If this is true, I think that the disparity of 2.99 to 1 naturally should be included in that of approximately 3 to 1. In addition, this standard is the very limit for the judiciary, beyond which exercise of the discretionary power about apportionment of seats entrusted to the Diet is no longer acknowledged as constitutional; And it should be recognized as the outer limit, as it were, which has been modestly set giving respect to the power of the Diet. Therefore the Diet should avoid approaching this limit, and the amendment which has just reduced the disparity down to 2.99 to 1 should be said to be really insufficient for corrective measures to dissolve the unconstitutional state of affairs. Certainly the issue here is the disparity as of the election, so if there were a tendency for the disparity to decrease judging from a predictable future population shift and it could be predicted that the disparity would not reach 3 to 1 or so, I could make a different estimate.

But I am sorry to say that, at the time of the amendment, there were no such circumstances from which I can recognize that the increasing disparity had stopped and was beginning to decrease; rather, the situation was such that it was sufficiently foreseeable that it would exceed 3 to 1 in the near future. The 1985 Grand Bench

Judgment also stated, "It was well predictable from previous population shifts etc. that the disparity in the number of the electors or population per representative had been on the increase, and we cannot deny that it was never due to anything but unpredictable peculiar circumstances." Fortunately, concerning the general election of the members of the House of the Representatives in 1986, which was held about one month after the amendment, the judgment of the Second Petty Bench in Case Number (Gyo Tsu) No.24 of 1988, decided on October 21, 1988 (42 Minshu 8 at p.644), held it constitutional because the disparity in the number of the electors was 2.92 to 1. But from this, I cannot admit directly that the amendment has dissolved the unconstitutional situation. The inequality of vote value did not simply happen. Rather, the Court, concerning the 1972 general election for members of the House of Representatives, to start with, and the elections held in 1980 and 1983, decided that these electors were held under unconstitutional circumstances; and concerning the general elections held in 1972 and 1983, declared these elections invalid because a reasonable period of time for amendment had already expired. This comes from the fact that amendments of apportionment provisions have been either neglected or insufficient, and I cannot ignore this course of events when I evaluate the said amendment.

And as for the number of seats of the representatives, it is difficult to review it for virtually every election and is not desirable for political stability. In addition, since there is an uncertain factor in that one cannot predict when a general election for members of the House of Representatives will be held, for a certain period of time the election must be based on the amendment. Thus, I think that it is a matter of course that the Diet should be careful enough at least not to invite such a situation as to hold an election in an unconstitutional state of affairs when they make an amendment. Even though a disparity of less than 3 to 1 may be interpreted as constitutional, at the time of the amendment it could have easily been predicted that sooner or later it would lead to a situation in which it had exceeded 3 to 1. And if such an amendment is interpreted as adequate, such abnormal events may possibly be repeated in the future so that most general elections of the members of the House of Representatives will be held under unconstitutional circumstances. And as was expected, the disparity exceeded 3 to 1 in this election. The House of Representatives in the plenary session resolved, "This correction of the apportionment of seats for the House of Representatives at this time is a temporary measure to immediately amend the current provisions that were held unconstitutional. We will wait for the official announcement of the final results of the 1985 national census, and will then promptly conduct a review for a drastic amendment."

This facts means, I think, that when the bill of the amendment passed, the Diet itself fully understood the circumstances at that time. I have to say that the amendment was nothing but a temporary or makeshift measure which was only for the purpose of the immediate general election of the members of the House of Representatives at that time and which postponed proper correction as I can guess from the said resolution; and that the Diet was still responsible to tackle the amendment continually, and evade such an abnormal event as to hold an election under unconstitutional circumstances.

Although the majority opinion also states that the previous unconstitutional situations were dissolved as a result of the amendment and that a reasonable period of time for amendment should be calculated anew from when it becomes an unconstitutional situation, I do not think, at least in this case, that a reasonable period of time for amendment should be calculated anew from when it becomes an unconstitutional situation even if I could acknowledge that the amendment had dissolved the previous unconstitutional situations. In the first place, I understand the thought of a reasonable

period of time for amendment to be an idea that in case an event happens which requires the revision of a law, it is severe to criticize the Diet for not revising the law or to call them to account, and that we should forgive them during a reasonable period of time, which is interpreted as being a certain period of time necessary to arrange for the revision. But I do not think this also holds good for a case in which the necessity for the amendment is fully recognized, and the Diet has sufficient time to revise the law if it wishes. In this case, as I said before, the Diet postponed proper correction, though they fully recognized the necessity for the amendment, and I must say that they had sufficient time to revise the law.

Given that I think this way, I must say that the 1986 Amendment was just a temporary or makeshift measure for the purpose of the immediate general election of the members of the House of Representatives, and should be recognized as a temporary measure in the process of a proper amendment, and that a reasonable period of time for amendment, which the 1985 Grand Bench Judgment held had already elapsed, has passed by. Therefore the apportionment provisions amended by the law of 1986 were at the time of the election in violation of article 14(1) of the Constitution and were invalid.

This is why I think that in this case we should declare in the decree that the election in the electoral districts at issue was illegal according to the so-called circumstantial judgment approach shown in the 1976 and 1985 Grand Bench Judgments.

The Grand Bench, Supreme Court.

Presiding Judge, Justice Ryohachi Kusaba

Justice Akira Fujishima

Justice Toshio Sakaue

Justice Katsumi Teika

Justice Seiichi Ohori

Justice Itsuo Sonobe

Justice Shirohei Hashimoto

Justice Toshijiro Nakajima

Justice Shoichiro Sato

Justice Tsuneo Kabe

Justice Ryohei Kizaki

Justice Osamu Mimura

Justice Katsuya Onishi

Justice Motoo Ono

Justice Toru Miyoshi

* Appendix omitted in the English translation.



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