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# MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2005

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## 1. Constitutional Law

### **Takase et al. v. Japan**

Supreme Court G. B., September 14, 2005

Case No. (*gyo-tsu*) 82 and 83 of 2001, (*gyo-hi*) 72 and 77 of 2001

59 (7) MINSHU 2087; 1908 HANREI JIHO 36;

1191 HANREI TAIMUZU 143

### **Summary:**

The Supreme Court ruled that the Public Offices Election Law (before the amendment by Law No. 47 of 1998) was in violation of Article 15(1) and (3), Article 43(1), and the proviso of Article 44 of the Constitution for the reason that it completely precluded Japanese citizens residing abroad from voting in national elections, and the part of the provision of Article 8 of the Supplementary Provisions of the Public Offices Election Law that limits, for the time being, the applicability of the system for allowing Japanese citizens residing abroad to vote in national elections of Diet members under the proportional representation system will be in violation of Article 15(1) and (3), Article 43(1), and

the proviso of Article 44 of the Constitution.

**Reference:**

Constitution, Article 15(1) and (3), Article 43(1) and Article 44; Public Offices Election Law (before amendment by Law No. 62 of 2000), Article 21(1); Public Offices Election Law, Article 8 of the Supplementary Provisions; Law Concerning State Liability for Compensation, Article 1(1).

**Facts:**

Article 21(1) of the Public offices Election Law before the amendment by Law No. 47 of 1998 (hereinafter referred to as the “Amendment”) provided that persons eligible to be listed on the electoral register should be Japanese citizens aged 20 years or over having an address in an area of a given municipality in Japan who continued to be listed on the basic resident register of the municipality for three consecutive months or more. For this reason, Japanese citizens residing abroad were unable to vote in any elections of House of Representatives (HR) members or elections of House of Councilors (HC) members. In 1984, the Cabinet submitted to the 101st session of the Diet a “Bill for Partial Amendment of the Public Offices Election Law” which aimed to establish an overseas voting system applicable to all elections of HR members and HC members so as to guarantee such Japanese citizens the opportunity to exercise the right to vote. The bill was continuously carried over until the 105th session but finally quashed.

By the 2005 Amendment, an overseas electoral register was newly established and the overseas voting system shall be applicable to elections of HR members and elections of HC members. However, it is provided that, for the time being, the new system shall be applicable only to elections of HR members under the proportional representation system and elections of HC members under the proportional representation system; therefore, for the time being, it shall not be applicable to elections of HR members under the single-seat constituency system and elections of HC members under the constituency system (Art. 8 of the Supplementary Provisions of the Public Offices Election Law after the Amendment).

The plaintiffs, who are Japanese citizens residing abroad, were not able to vote in the general election of members of the HR held on October 20, 1996 (hereinafter referred to as the “Election”) due to the Public offices Election Law before the amendment by Law No. 47 of 1998, and even after the Amendment they will be able to vote only in the elections of HR members under the proportional representation system and elections of HC members under the proportional representation system. Accordingly they challenged the Public Offices Election Law both before and after the Amendment, alleging that it deprives them of the opportunity to exercise the right to vote on the grounds that it is in violation of Articles 14(1), 15(1) and (3), 43, and 44 of the Constitution, and sought against Japan declaration that the Public Offices Election Law both before and after the Amendment is illegal as well as declaration that they are eligible to exercise the right to vote in elections of HR members under the single-seat constituency system and elections of HC members under the constituency system. In addition to the above, they sought damages thereon from the defendant Japan, alleging that they suffered from being unable to vote in the Election due to the failure of the Diet, the legislative branch of government, to amend the Public Offices Election Law to enable Japanese citizens residing abroad to exercise the right to vote in national elections.

Tokyo District Court on October 28, 1999 (1705 HANREI JIHO 50) and subsequently Tokyo High Court on November 8, 2000 (1088 HANREI TAIMUZU 133) dismissed all the suits to seek declarations on the grounds that none of them could be deemed to be a legal controversy and therefore they were illegal, and also dismissed the claim for state compensation on the merits. The plaintiffs appealed to the Supreme Court.

### **Opinion:**

Partially dismissed on the merits, partially quashed and decided by the Supreme Court.

1. Constitutionality of the restriction of the exercise of the right to vote of Japanese citizens residing abroad:

Citizens’ right to choose members of the National Diet as their representatives through elections, which is a fundamental right that guarantees citizens the opportunity to take part in national administration, serves as

the core of parliamentary democracy, and a democratic nation should give this right equally to all citizens who have reached a certain age. The Constitution of Japan provides that the people shall act through their duly elected representatives in the National Diet. Article 43(1) provides that both Houses of the Diet shall consist of elected members, representative of all the people. Article 15(1) further provides that the people have the inalienable right to choose their public officials and to dismiss them. Thus, the Constitution guarantees the people, as the sovereign, the right to take part in national administration by voting in elections of members of the Houses of the Diet. Article 15(3) of the Constitution also guarantees universal adult suffrage with regard to the election of public officials, and the proviso of Article 44 prohibits discrimination as to the qualification of electors of members of both Houses because of race, creed, sex, social status, family origin, education, property or income. In light of the provisions mentioned above, it is reasonable to construe that the Constitution, under the principle of popular sovereignty, guarantees the people the right to take part in national administration by voting in elections of members of the Houses of the Diet as their inalienable right, and in order to achieve this goal, guarantees the people equal opportunity to vote. In light of the purport of the Constitution mentioned above, it is unallowable in principle to restrict the people's right to vote or their exercise of the right to vote, aside from imposing certain restrictions on the right to vote of those who have acted against fair elections, and it should be considered that in order to restrict the people's right to vote or their exercise of the right to vote, there must be grounds that make such restriction unavoidable. Such unavoidable grounds cannot be found unless it is deemed to be practically impossible or extremely difficult to allow the exercise of the right to vote while maintaining fairness in elections without such restrictions.

Even if there had been any problems to solve with regard to the implementation of fair elections and provision of correct information on candidates to allow a number of Japanese citizens residing all across the world to exercise the right to vote, considering that the Cabinet, which is responsible for the implementation of elections, already submitted the amendment bill in 1984 on the assumption that it should be possible to solve such problems, it cannot be said that there were unavoid-

able grounds for the Diet to take no measures to establish an overseas voting system for more than ten years since the amendment bill was quashed, thereby precluding Japanese citizens residing abroad from voting in the Election. Consequently, the Public Offices Election Law before the Amendment was in violation of Article 15(1) and (3), Article 43(1), and the proviso of Article 44 of the Constitution for the reason that it completely precluded the appellants who were Japanese citizens residing abroad from voting at the time of the Election.

Although the Amendment established an overseas voting system for allowing Japanese citizens residing abroad to vote in national elections, it was also stipulated that, for the time being, Japanese citizens residing abroad were allowed to vote only in elections of HR members under the proportional representation system and elections of HC members under the proportional representation system, and they were not allowed to vote in elections of HR members under the single-seat constituency system and elections of HC members under the constituency system. However, considering the repeated use of the overseas voting system and remarkable progress in communication technology on a global scale since the Amendment, it is no longer extremely difficult to provide Japanese citizens residing abroad with correct information on individual candidates. Accordingly it cannot be said that there will be unavoidable grounds to preclude Japanese citizens residing abroad from voting in elections of HR members under the single-seat constituency system and elections of HC members under the constituency system, at least at the time of the first general election of HR members or regular election of HC members to be held after this judgment is handed down. Therefore, it must be said that the part of the provision of Article 8 of the Supplementary Provisions of the Public Offices Election Law that limits, for the time being, the applicability of the overseas voting system to elections of members of the Houses of the Diet under the proportional representation system is in violation of Article 15(1) and (3), Article 43(1), and the proviso of Article 44 of the Constitution.

## 2. Suits to seek declarations:

The suit to seek declaration that the Public Offices Election Law before the Amendment is illegal for having precluded the appellants from exercising the right to vote in elections of HR members and elections of

HC members, is illegal due to lack of benefit of declaration, in that this suit is intended to obtain declaration of legal relations in the past, and obtaining such declaration cannot be deemed to be an appropriate and necessary measure to directly and fundamentally solve an existing legal controversy.

The suit to seek declaration that the Public Offices Election Law after the Amendment is illegal for precluding the appellants from exercising the right to vote in elections of HR members under the single-seat constituency system and elections of HC members under the constituency system, should be deemed to be also illegal, due to lack of benefit of declaration since it is possible to achieve the purpose of the suit by filing a more appropriate suit. In this case, however, the suit for the claim for declaration can be understood as a suit brought under public law by a party to seek declaration on legal relations under public law. If Article 8 of the Supplementary Provisions of the Public Offices Election Law was not amended as required, the appellants who are Japanese citizens residing abroad would be precluded from voting in an election of members under the single-seat constituency system in the next general election of HR members and in an election of members under the constituency system in the next regular election of HC members, or in other words, their right to exercise the right to vote would be violated. Consequently, the suit for the claim for declaration can be deemed to be intended to obtain, in advance, declaration that the appellants will be eligible to exercise the right to vote in such elections on the grounds that Article 8 of the Supplementary Provisions of the Public Offices Election Law is unconstitutional and null, in order to prevent violation of the right to vote. The right to vote is meaningless if it cannot be exercised, and it is impossible to restore the substance of its exercise once it is violated. In light of the importance of the right to vote, benefit of declaration can be found if such suit can be regarded as an effective and appropriate means. Therefore, the suit for the claim in this case can be regarded as a legal suit. We hold today that the appellants are eligible to vote in an election of members under the single-seat constituency system in the next general election of HR members and in an election of members under the constituency system in the next regular election of HC members on the grounds that they are listed on the overseas electoral register.

### 3. Claim for state compensation:

In exceptional cases where it is obvious that the contents of legislation or legislative omission illegally violate citizens' constitutional rights or where it is absolutely necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious but the Diet has failed to take such measures for a long time without justifiable reasons, the legislative act or legislative omission by Diet members should be deemed to be illegal under Article 1(1) of the Law Concerning State Liability for Compensation. Although a bill to enable Japanese citizens residing abroad to vote in national elections was adopted by the Cabinet and submitted to the Diet in 1984, no legislative measures were taken for more than ten years from when the bill was quashed until the Election was held. Such a significant omission falls under exceptional cases mentioned above, and therefore it cannot be denied that there was legislative negligence. This legislative omission prevented the appellants from voting in the Election, thereby causing mental distress to them. For this reason, in this case, the claim for state compensation by reason of such illegal legislative omission should be upheld.

There is a dissenting opinion, and there is also a dissenting opinion regarding 3 of the majority opinions shown above. In addition, there is a concurring opinion.

### **Editorial Note:**

There are at least two things to be pointed out about this case. One is that it is the eighth case in the history of judicial review in Japan, where the Supreme Court declared the specific law unconstitutional. The other is that the Supreme Court approved for the first time state compensation for unconstitutional legislative omission.

Article 81 of the Constitution of Japan provides that "the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act," and thereby the Supreme Court of Japan is granted the power of judicial review explicitly by the Constitution. By contrast, judicial review in the United States has not been provided in the Constitution, which was established in the famous case, *Marbury v. Madison* (5 U.S. 103 [1803]). Japanese judicial review

system was, however, originally introduced after the Pacific War, having been modeled on that of the U.S. Under the system, the Supreme Court, which is not a constitutional court principally responsible for judging the constitutionality of a law during or after a legislative process, can pass judgment on constitutional validity only in the context of settling a concrete dispute brought before it according to legally prescribed procedures. Thus, on the one hand, in the scope of judicial review as well as procedure, the Japanese system is no different from that of the U.S.

On the other hand, however, there has been a strong contrast in the actual operation between the two systems. The U.S. Supreme Court, as is well-known over the world, has actively reviewed legislation, and declared it unconstitutional frequently. There are a lot of unconstitutionality decisions which have aroused fierce debate, splitting public opinion in the country (*e.g.* *Brown v. Board of Education of Topeka* 347 U.S. 483 [1954], *Roe v. Wade* 410 U.S. 113 [1973]). Consequently, the U.S. Supreme Court has exerted enormous influence not only on the political process but also on American society and culture, through carrying out two missions, exercising judicial review for correcting the distortion of politics and guarding the civil rights of minority people, and as a result, it has acquired a considerable reputation.

The Japanese Supreme Court, on the contrary, has been extremely reluctant to exercise judicial review, not to mention to declare legislation unconstitutional. Compared with U.S. judicial activism, one can say the Japanese one is judicial passivism. There had been only seven unconstitutional cases until this case was decided, which would imply that the Japanese Supreme Court tends to defer to political branches. Ironically, “passive virtue” coined by the notable constitutional scholar Alexander M. Bickel, which recommends judicial deference to the political branch because of lack of democratic pedigree of the judiciary, is in fact practiced by the Japanese Supreme Court rather than the U.S. Supreme Court. Furthermore it will be more ironical that the Japanese Supreme Court has never gained the same reputation as the U.S. Supreme Court. Therefore, this unconstitutionality case as such has a unique value in the history of judicial review in Japan.

Moreover, it is worth noting that the case dealt with the right to vote guaranteed by the Constitution. Two cases among unconstitutional deci-



sions in Japan concerned apportionment of seats for the HR members, *Kurokawa v. Chiba Prefecture Election Administration* (31[2] MINSHU 234 [1976]) and *Kanao et al. v. Hiroshima Election Administration* (39[5] MINSHU 1100 [1985]). *Koshiyama et al. v. Tokyo Election Administration* (58[1] MINSHU 56 [2004]) introduced in the last *Waseda Bulletin of Comparative Law Vol. 24* (pp. 68–76), which concerns the apportionment of seats for the HC members, could be read as declaring it substantively unconstitutional, though the Court did not so explicitly probably because of deference to the legislature. While those three cases were about malapportionment degrading equality in the value of voters' vote, the law reviewed in this case directly limited the right to vote, and thereby from the start would have been highly likely to be unconstitutional. As the Opinion of the Court explained, since "citizens' right to choose members of the National Diet as their representatives through elections" is "a fundamental right that guarantees citizens the opportunity to take part in national administration," "it is unallowable in principle to restrict the people's right to vote or their exercise of the right to vote, aside from imposing certain restrictions on the right to vote of those who have acted against fair elections, and it should be considered that in order to restrict the people's right to vote or their exercise of the right to vote, there must be grounds that make such restriction unavoidable." Accordingly certain measures limiting the right to vote should be subject to strict scrutiny, that is, considered presumptively unconstitutional. The Concurring Opinion by Justice Fukuda expresses the same concern, saying that in the nation that adopts a representative democratic system, "deprivation or restriction of citizens' right to vote undermines not only the authority of the Diet as the highest organ of state power but also the ground for legitimacy of the existence itself of the Diet or Diet members." Judicial deference should be appropriate when and only when not only the representatives can assert their legitimacy on the ground that they are duly elected by citizens, but also the political process itself works fairly well. Therefore, where the premises of deference are not fully satisfied, the Supreme Court should decisively exercise judicial review and never hesitate to deny the suspectful political measures, or to declare them "unconstitutional."

The other point of the case should be that this is the first case that

approved state compensation for unconstitutional legislative omission. Japanese case law on the state compensation for unconstitutional legislative action (or omission) is said to have established the extremely high hurdle to be cleared for compensation: one may be compensated for damages caused by the legislature in the exceptional case where legislature would act against unambiguous constitutional mandates, intentionally or negligently (*see* Sato v. Japan 35[7] MINSHU 1512 [1985]). Taking the general and abstract nature of constitutional wording into account, such a case must be impossible rather than exceptional. For that reason, almost all of the scholars of constitutional scholarship have criticized the doctrine. It is true that the Opinion of the Court took the trouble to note that their holding would not be contrary to the established doctrine of compensation, but on making a careful examination of their newly asserted requisites for compensation, that “where it is obvious that the contents of legislation or legislative omission illegally violate citizens’ constitutional rights or where it is absolutely necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious but the Diet has failed to take such measures for a long time without justifiable reasons,” it seems evident that the hurdle is lower than the conventional doctrine, and thus one might conclude that the Court has jettisoned the existing doctrine implicitly. Anyway, after this, citizens can expect a more flexible judicial remedy for legislative omission than ever.

## 2. Administrative Law

### **X v. Minister of Construction**

Supreme Court G.B., December 7, 2005

Case No. (*gyo-hi*) 114 of 2004

1886 HANREI JIHO 52

### **Summary:**

Concerning the Action to quash the approval disposition about the railroad continuative two-level crossover enterprise as a city planning