

---

---

# MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2012

---

---

## 1. Constitutional Law

### **X v. Japan**

Supreme Court Grand Bench, October 17, 2012

Case No. (*Gyo-Tsu*) 51 of 2010

66(10) MINSHU 3357

#### **Summary:**

Under the provisions on the apportionment of seats for members of the House of Councillors stated in Article 14 and Appended Table III of the Public Offices Election Act (referred to as the “Apportionment of Seats”), at the time of the ordinary election of members of the [HC] held on July 11, 2010 (referred to as the “Election”), the disparity between constituencies in terms of the value of votes may be considered to be a state of extreme inequality to such an extent that it has raised the question of unconstitutionality (referred to as a “state of unconstitutionality”). However, since the failure to revise the said provision by the said election date may not be regarded as beyond the bounds of the Diet’s discretion, the said provision may not be considered to have violated Art.14(1), etc.,

of the Constitution.

**Reference:**

Constitution, Art.14(1), Art.15(1)and(3), Art.43(1), Art.44; Public Offices Election Act, Art.14 and Appended Table III

**Fact:**

This case is a suit to seek the invalidation of an election filed by the appellants who are voters in the Tokyo Constituency with regard to the Election, alleging that the provision on the Apportionment of Seats is in violation of Art.14(1), etc., of the Constitution and invalid, and therefore the election held in the said constituency as part of the Election pursuant to these provisions is also invalid.

Tokyo High Court judged that the maximum disparity in the Election between constituencies in terms of the number of voters per member was 1:500 and was not so unequal that a problem of unconstitutionality was raised, and rejected the claim of the appellants.

**Opinion:**

The final appeal is *dismissed*.

**Leading Cases about the Constitutionality of the Apportionment of Seats of HC:**

“At the time of the ordinary election of members of the[HC]held on July 2001 ... , the maximum disparity between constituencies in terms of the number of voters per member was 1:5.06.” “[J]udgment of the Grand Bench of the Supreme Court of January 14, 2004... , stated, in its conclusion, that said provisions on the apportionment of seats may not be regarded to have been unconstitutional at the time of said election.” “However, this judgment was accompanied by dissenting opinions by six Justices, as well as concurring opinions by four Justices pointing out that there would be room for acknowledging unconstitutionality if the same situation were left as it is without any action being taken to rectify it.” “Furthermore, at the time of the ordinary election of members of the[HC] held in July 2004 under the aforementioned provisions on the apportionment of seats, the maximum disparity between constituencies in

terms of the number of voters per member was 1:5.13.” “Also in ... judgment of the[GB] of the Supreme Court of October 4, 2006 ... , it is stated, in its conclusion, that, at the time of said election, said provisions on the apportionment of seats may not be considered to be unconstitutional.” “In said judgment, the court pointed out, in consideration of the importance of equality in the value of votes, the Diet should make constant efforts to correct the inequality in the value of votes.”

“Following the 2004[GB] Judgment, the meeting of the representatives of parliamentary factions, hosted by the President of the [HC] ... deliberated the target issue.” “However, since it was difficult to correct the disparity regarding the apportionment of seats before the ordinary election of members of the[HC] scheduled in July 2004, the committee reached an agreement on June 1, 2004, to suspend and resume the deliberation after said election.” “According to this agreement, on December 1, 2004, after said election was held, an expert committee in charge of the election system was established under the House of Councillors Reform Council, which was established as an advisory organ for the President of the[HC].” “The expert committee discussed various proposals for corrective measures.” “Among these proposals, the most dominant proposal was the one recommending the reapportionment of four seats with the aim of correcting the disparity with regard to the constituencies where the disparity currently exceeds 1:5 or is likely to exceed this level in the near future, and based on this proposal, the Act for Partial Revision of the[POE] Act ... was enacted on June 1, 2006.” “As a result of the revision by this Act ... , the maximum disparity between constituencies in terms of the population per member on the basis of the population counted by the population census conducted in October 2005 was reduced to 1:4.84.” “At the time of the ordinary election of members of the[HC] held in July 2007 ... under the provisions on the apportionment of seats for members of the[HC] after the 2006 Revision ... , the maximum disparity between constituencies in terms of the number of voters per member was 1:4.86.” “In ... the judgment of the[GB] of the Supreme Court of September 30, 2009 ... , it is stated, in its conclusion, that the Provisions on the Apportionment of Seats may not be considered to be unconstitutional at the time of said election.” “In said judgment, it is stated

that said disparity may be interpreted as a great inequality from the perspective of equality in the value of votes and that further efforts should be made in order to reduce the disparity between constituencies in terms of the value of votes, and therefore that the current election system should be reformed in order to significantly reduce the maximum disparity.”

“After the 2006 Revision, an expert committee was once again established under the [HCRC] in June 2008.” “The expert committee held six meetings during an 18-month period from December 2008 to May 2010.” “While finding that there was not enough time to correct the disparity for the coming ordinary election of members of the [HC] in July 2010 ... , the expert committee decided to review the election system for the ordinary election of members of the [HC] to be held in 2013 and pointed out that the [HCRC] should make a decision to immediately commence the review process after the Election.” “The expert committee also presented a time schedule, requesting the submission of a bill to revise the POE Act within 2011.”

“At the time of the Election held in July 2010 as the second ordinary election of members of the [HC] under the Provisions on the Apportionment of Seats, the maximum disparity between constituencies in terms of the number of voters per member reached 1:5.00.”

### **Equality in the Influence and the Value of Votes:**

“It can be construed that the Constitution requires equality in the substance of the right to vote, or in other words, equality in the influence of votes in electing Diet members or equality in the value of votes.” “However, the Constitution, at the same time, leaves it to the Diet’s discretion to decide what type of election system should be introduced to reflect the people’s interests and opinions fairly and effectively in the political process.” “In view of this, equality in the value of votes is not the sole and absolute criterion for deciding the mechanism of the election system, but it must be realized in harmony with other policy purposes and grounds that the Diet is authorized to consider.” “Consequently, as long as a specific decision made by the Diet can be found as a reasonable exercise of its discretion, such a decision cannot be judged to be unconstitutional even if the decision compromises equality in the value of votes to a certain extent.”

“It is interpreted that the Constitution adopts a bicameral system and differentiates the[HC] from the[HR] in terms of the scope of authority and the members’ term of office in order to have each House perform unique functions so that the Diet can represent the people in a fair and effective manner.” “From this perspective, the mechanism of the election system for members of the[HC] ... is designed to divide the members of the[HC] into two groups, namely, nationally-elected members and locally-elected members.” “The former members are elected by nation-wide constituency consisting of all prefectures, whereas the latter members are elected by prefecture-based constituency (this system remains basically the same under the post-1982 Revision election system, under which members of the[HC] are divided into two types of members, i.e., members to be elected by proportional representation and members to be elected by constituencies).” “At the time of the enactment of the House of Councillors Election Act in 1947 and the enactment of the[POE] Act in 1950, the establishment of such an election system may not be considered to have gone beyond reasonable exercise of the Diet’s discretion.” “However, in the case where extreme inequality in the value of votes has emerged as a result of constant population migration in this age of dramatic social and economic change, if no measures are taken to correct this inequality although such a state of inequality has continued for a considerable period of time, and such non-action may be considered to be beyond the bounds of the Diet’s discretion, it would be reasonable to interpret that said provisions on the apportionment of seats violates the Constitution.”

“This reasoning is in line with the series of[GB] judgments on elections of members of the[HC] (locally-elected members and members elected by constituency), which have been rendered since the 1983[GB] Judgment, and the necessity to modify this reasoning as a basic framework for determination cannot be found ... .” Although “[m]any[GB] judgments have been handed down regarding the issue of disparity, with the maximum disparity always staying around the level of 1:5” ... , “[t]hese [GB] judgments have basically maintained said framework for determination itself, but have adopted a stricter stance in substance.”

**Framework of Constitutionality Judgment:**

“The Constitution adopts a bicameral system and guarantees the superiority of the[HR] as far as certain subject matters are concerned... , while specifying the system for the[HC] by stating that the term of office of members of the[HC] shall be six years without the possibility of dissolution ... and that elections shall take place for half the members every three years ... .”

“The purpose of these provisions is to guarantee the superiority of the [HR] to a certain extent under the parliamentary cabinet system in order to ensure effective administration of national politics, and at the same time to give almost the same authority to the[HC] as that of the[HR] in dealing with various subject matters including legislative matters and set a longer term of office for the members of the[HC], thereby having the will of the people from diverse and long-term perspectives reflected in national politics and controlling and balancing the authority of both Houses, so as to ensure the stability and continuity of the administration of national politics.” “It is up to the Diet’s reasonable discretion to determine what kind of election system should be adopted in order to achieve said objectives of the Constitution and to maintain a balance with the need for equality in the value of votes including how to define the characteristics and functions of the[HC] and the differences from the[HR] under a bicameral system and how to reflect such definitions in the respective election systems.” “In order to examine the reasonableness of the exercise of discretion, it is necessary to take into account the changes in the system and society that have occurred over a period of 60 years or so since the establishment of the election system for the members of the[HC], or over a period of almost 30 years ever since the[GB] of this Court first presented the basic framework for determination as described in 3 above.”

In the case of the[HC], the population differences between prefectures have widened due to population migration over these years.” “Under the current election system, which is designed to set the number of seats for each prefecture-based constituency on the premise that an even number of seats must be apportioned to each constituency so that elections can be held for half the members in accordance with the Constitution, the maximum disparity of 1:2.62 at the time of the

establishment of the system in 1947 had grown to 1:5.26 at the time of the 1977 Election, for which the 1983[GB]Judgment was handed down.” “The disparity further expanded to 1:6.59 at the time of the 1992 Election, for which the Supreme Court handed down the 1996[GB]Judgment, pointing out that the disparity may be regarded to be an extreme inequality in the value of votes to such an extent that it could raise a question of unconstitutionality.” “Subsequently, the disparity was corrected to some extent through reapportionment.” “However, the fundamental mechanism of the election system has never been reformed, leaving the disparity of about 1:5 unaddressed.”

“[I]t is obvious that the[HC] as well as the[HR] have the obligation to properly reflect the people’s will in national politics as the highest organ of state power.” “The call for equality in the value of votes should not be taken any more lightly just because the election in question is for members of the[HC].”

“It is still reasonable to consider that a prefecture is a regional unit of administration, etc., and in this respect, the fact pointed out in said judgment might have been reasonable.” “However, the Constitution does not require the use of a prefecture as a unit of constituency for members of the[HC].” “On the contrary, it can be found that the inflexible use of a prefecture as a unit of constituency has caused the prolonged great inequality in the value of votes as a result of the ever-widening differences in prefectural population.”

“The current election system has adopted the mechanism that sets the number of seats for each prefectural-based constituency within the predetermined total number of seats on the premise that an even number of seats must be apportioned to each constituency so that elections can be held for half the members in accordance with the Constitution.” “Despite these calls for improvement, since the 2006 Revision, no legal revisions for improving the aforementioned situation have been made before the Election.” “Upon comprehensive consideration of these situations, even though it should be taken into consideration that the Election was the second ordinary election held after the reapportionment of four seats conducted as a result of the 2006 Revision, said disparity indicates that the level of inequality between constituencies in terms of the value of votes at the time of the Election was no longer negligible in light of the importance

of equality in the value of votes.”

### **Unconstitutionality of Provisions on the Apportionment of Seats:**

“While, in the 2009[GB]Judgment, this court pointed out the structural problem of the election system for members of the[Hc]and the need for a reform of the mechanism itself, it should be noted that it was only about nine months before the Election.” “As pointed out in said judgment, in consideration of such facts as that the reform of the mechanism of the election system itself would take a long time because such a reform would, by its nature, require a great deal of work, such as making highly political decisions in consideration of the desired form of the[HC], and that discussions have been underway with the aim of accomplishing system reform including the reform of the mechanism of the election system itself, such as the discussions in the expert committee established under the[HCRC]in response to said judgment(the bill to partially revise the[POE]Act ... , which was submitted to the Diet after the Election, only suggests, in its main text, the reapportionment of four seats in four constituencies, but contains a supplementary provision requiring further discussions for fundamental reform of the election system), the failure to revise the Provisions on the Apportionment of Seats before the Election may not be regarded to be beyond the Diet’s discretion.” “Therefore, the Provisions on the Apportionment of Seats may not be considered to be unconstitutional.”

### **Necessity for a Radical Reform of the Election System:**

“In the case of the election system for members of the[HC], on the premise that an even number of seats must be apportioned to each constituency within the predetermined total number of seats so that elections can be held for half the members in accordance with the Constitution, a great disparity in the value of votes has continued to exist for a long time.” “However, in light of the facts that an election system that can properly reflect the will of the people is the foundation of democracy, that it is necessary to meet the constitutional requirement of equality in the value of votes, and that the[HC]has distinctive roles in the administration of national politics as mentioned above, in order to reflect the will of the people in a more appropriate manner, it is necessary to do more than just

reapportioning certain seats among some constituencies.” “For example, reasonable reform should be made to the current system of setting the number of seats for each prefecture-based constituency.” “Such legislative measures designed to reform the mechanism of the current election system itself should be taken in order to correct said inequality as soon as possible because such a level of inequality raises the issue of constitutionality.”

### **Editorial Note:**

In Japan, there is a long history of this kind of lawsuit. Many constitutional judgments were issued in the 1990s. However, it was rare that a judgment of unconstitutionality was shown. As opposed to it, this case shows the judgment of a state of unconstitutionality also about the HC election following the HR election of the previous year. In this kind of lawsuit, it had been traditionally permitted that the disparity in a HC election should be larger compared with that of a HR election. It may be considered as constitutionality to the maximum disparity which is 1:6.00 in a HC election exceeding 1:5.00. However, the latest Court judgment is moving the specific gravity from the quantitative judgment of such a disparity to a qualitative judgment of the election system itself through carrying out the premise of the serious consideration of the equal value of voting rights. It can be said that the element of traditional constitutionality judgment itself is shifting.

The Court did not accept the disparity of 1:5.00 which Tokyo High Court had admitted. Especially, it is an important point that the Court said clearly that the call for equality in the value of votes should be same in a HR election as in a HC election. Under the existing system, which has combined the even constants originating in half re-election and the constituency of in each of all the prefectures unit, the problem of the disparity of a voter's value cannot be solved by means of fine tuning like a *4-Zou 4-Gen* (which means “the reapportionment of four seats in four constituencies”) because of the large population change between prefectures. This judgment is a very epoch-making and positive judgment in the point of the irrationality of the framework of the HC election which made each prefecture the fundamental unit.

Although this judgment was limited to a declaration of a state of

unconstitutionality, some lower courts invalidated the HR election in December, 2012, immediately after this judgment. If based on this Opinion, it is clear that the election system of the member of HC which holds a disparity with a higher unequal nature than that of HR is unmaintainable in the present state, since the equality of value of voting rights essentially is not distinguished. Now, the argument towards a constitutional amendment is increasing in Japan. In order to collateralize the legitimacy of the legislature with the authority of an initiative of a constitutional amendment, the political wing must carry out fundamental revision of their election system.

## **2. Law of Property and Obligations**

**X v. Y**

Supreme Court, March 16, 2012

Case No. (Ju)332 of 2010

66(5) MINSHU 2216; 1370 HANREI JIHO 135; 1370 HANREI TAIMUZU 115

### **Summary:**

A clause in the general conditions applicable to a life insurance contract, which provides that the contract shall lapse without demand of performance in the event of nonpayment of insurance premiums, is not regarded as a clause that “impairs the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of Article 1, paragraph (2) of the Civil Code,” as defined in Article 10 of the Consumer Contract Act.

### **Reference:**

Article 10 of the Consumer Contract Act; Articles 91 and 541 of the Civil Code.

### **Facts:**

X entered into a medical care insurance contract with the appellant on August 1, 2004, and also entered into a life insurance contract with the