

## Judgments of the Supreme Court

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Date of the judgment (decision)	2005.09.14
Case Number	2001 (Gyo-Tsu) 82
Reporter	Minshu Vol. 59, No. 7
Title	Judgment concerning whether or not the Public Offices Election Law (before 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 at the time of the general election of members of the House of Representatives held on October 20, 1996
Case name	Case to seek declaration of illegality of deprivation of the right to vote of Japanese citizens residing abroad
Result	Judgment of the Grand Bench, partially dismissed on the merits, partially quashed and decided by the Supreme Court
Court of the Prior Instance	Tokyo High Court, Judgment of November 8, 2000
Summary of the judgment (decision)	<p>1. The Public Offices Election Law (before 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 who were residing abroad and had no address in any area of a municipality in Japan from voting in national elections at the time of the general election of members of the House of Representatives held on October 20, 1996.</p> <p>2. 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 who were residing abroad and had no address in any area of a municipality in Japan to vote in national elections of Diet members under the proportional representation system will, at least at the time of the first general election of members of the House of</p>

Representatives or regular election of members of the House of Councillors to be held after this judgment is handed down, be in violation of Article 15(1) and (3), Article 43(1), and the proviso of Article 44 of the Constitution.

3. A suit to seek declaration that Japanese citizens who are residing abroad and have no address in any area of a municipality in Japan are eligible to vote in an election of members under the single-seat constituency system in the next general election of members of the House of Representatives and in an election of members under the constituency system in the next regular election of members of the House of Councillors on the grounds that they are listed on the overseas electoral register, is a legal suit to seek declaration on legal relations under public law.

4. Japanese citizens who are residing abroad and have no address in any area of a municipality in Japan are eligible to vote in an election of members under the single-seat constituency system in the next general election of members of the House of Representatives and in an election of members under the constituency system in the next regular election of members of the House of Councillors on the grounds that they are listed on the overseas electoral register.

5. In 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 exceptionally be deemed to be illegal for the purpose of Article 1(1) of the Law Concerning State Liability for Compensation.

6. Given the facts that despite the absolute necessity to take legislative measures to establish a system for allowing Japanese citizens who were residing abroad and had no address in any area of a municipality in Japan to exercise the right to vote in national elections in order to assure the opportunity for such Japanese citizens to exercise the right to vote, for more than ten years from when the bill to enable such Japanese citizens to vote in national elections was abandoned until the general election for members of the House of Representatives was held on October 20, 1996, and no legislative measures were taken to enable such voting, such legislative omission should be deemed to be illegal for the purpose of Article 1(1) of the Law Concerning State Liability for Compensation, and the State shall pay such Japanese citizens 5,000 yen as compensation for non-pecuniary damage in order to compensate mental distress suffered by them from being unable to exercise the right to vote in the election. (There are dissenting opinions and a concurring opinion concerning 1, 2 and 4 to 6.)

#### References

(Concerning 1, 2 and 4) Article 15(1) and (3), Article 43(1), and Article 44 of the Constitution

(Concerning 1 and 6) Article 21(1) of the Public Offices Election Law (before amendment by Law No. 62 of 2000), Article 42 of the Public Offices Election Law (before amendment by Law No. 47 of 1998), and Article 15(1) of the Basic Resident Register Law

(Concerning 2 to 4) Article 42, Chapter 4-2 (Overseas Electoral Register), and Article 49-2 of the Public Offices Election Law, and Article 8 of the Supplementary Provisions for the Public Offices Election Law

(Concerning 3) Article 4 of the Administrative Case Litigation Law

(Concerning 5 and 6) Article 1(1) of the Law Concerning State Liability for Compensation, and Article 41 of the Constitution

Article 15(1) and (3) of the Constitution

1. The people have the inalienable right to choose their public officials and to dismiss them.

3. Universal adult suffrage is guaranteed with regard to the election of public officials.

## Article 43(1) of the Constitution

Both Houses shall consist of elected members, representatives of all the people.

## Article 44 of the Constitution

The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

## Article 21(1) of the Public Offices Election Law (before amendment by Law No. 62 of 2000)

Persons eligible to be listed on the electoral register shall be Japanese citizens aged 20 years or over having an address in an area of a given municipality in Japan (excluding those who do not have the right to vote pursuant to the provisions of Article 11(1) [Persons without the right to vote or run for office] or Article 252 [Suspension of the right to vote or run for office of those convicted of election crime] of this Law or Article 28 of the Political Funds Control Law (Law No. 194 of 1948) [Suspension of the right to vote or run for office of those convicted of violation of the Political Funds Control Law]) who continue to be listed on the basic resident register of the municipality for three consecutive months or more since the day on which their resident cards for the municipality were prepared (or the day on which a move-in notification was filed by those who changed their address to the municipality from another municipality in accordance with Article 22 [Move-in notification] of the Basic Resident Register Law (Law No. 81 of 1967)).

## Article 42 of the Public Offices Election Law (before amendment by Law No. 47 of 1998)

(Listing on the electoral register and voting)

1. Persons not listed on the electoral register shall not have the right to vote. However, the superintendent of the poll shall allow such persons to vote if they come to the voting place on the date of election with a written decision or final and conclusive judgment stating that they should be listed on the electoral register.
2. Persons listed on the electoral register shall not have the right to vote if they are not eligible to be listed on the electoral register.

## Article 15(1) of the Basic Resident Register Law

(Relationship between the basic resident register and the electoral register)

Persons eligible to be listed on the electoral register shall be such persons who are listed on the basic resident register and have the right to vote.

## Article 42 of the Public Offices Election Law

(Listing on the electoral register or overseas electoral register and voting)

1. Persons not listed on the electoral register or overseas electoral register shall not have the right to vote. However, the superintendent of the poll shall allow such persons to vote if they come to the voting place on the date of election with a written decision or final and conclusive judgment stating that they should be listed on the electoral register or overseas electoral register.
2. Persons listed on the electoral register or overseas electoral register shall not have the right to vote if they are not eligible to be listed on the electoral register or overseas electoral register.

## Chapter 4-2 (Overseas Electoral Register) of the Public Offices Election Law

## Article 30-2

(Overseas electoral register)

1. The municipal election management commission shall compile and keep an overseas electoral register in addition to an electoral register.
2. The overseas electoral register shall be retained permanently, and only one overseas electoral register shall be used for both elections of

members of the House of Representatives and members of the House of Councillors.

3. The municipal election management commission shall, upon application under Article 30-5(1), make listing on an overseas electoral register.
4. The overseas electoral register may, as provided by Cabinet Order, be compiled using magnetic disc.
5. If necessary for holding an election, an abstract copy of the overseas electoral register (a document containing part or all the information recorded in the overseas electoral register or containing only necessary information in the case where the municipal election management commission compiles the overseas electoral register using magnetic disc in accordance with the preceding paragraph) may be used.
6. Article 6 of the Law Concerning the Use of Information and Communication Technology for Administrative Procedures shall not apply to compilation of the overseas electoral register.

#### Article 30-3

(Information to be entered in overseas electoral register)

1. In the overseas electoral register, the voter's name, last address (the address recorded on the voter's resident card immediately before he or she has changed his or her address overseas; hereinafter the same) or registered domicile at the time of application (at the time the voter submitted an application form under Article 30-5(1) to the consular as provided in Paragraph 2 of the said article or the person designated by Ministry of Internal Affairs and Communications Order or Ministry of Foreign Affairs Order as provided in the said paragraph; hereinafter the same in Paragraphs 1 and 3 of the said article), sex, and date of birth shall be entered (or recorded in the case where the overseas electoral register is compiled using magnetic disc in accordance with Paragraph 4 of the preceding article).
2. The municipal election management commission shall, when it has divided the municipal area into two or more voting districts, designate, as provided by Cabinet Order, one or more voting districts for which an overseas electoral register is to be organized (hereinafter referred to as "voting districts designated for overseas voters").
3. Except for the matters provided in the preceding two paragraphs, the format of the overseas electoral register and other necessary matters shall be provided by Cabinet Order.

#### Article 30-4

(Eligibility to be listed on overseas electoral register)

Persons eligible to be listed on the overseas electoral register shall be Japanese citizens aged 20 years or over (excluding those who do not have the right to vote pursuant to the provisions of Article 11(1) or Article 252 of this Law or Article 28 of the Political Funds Control Law) and not yet listed on any overseas electoral register, who have an address, for three consecutive months or more, in an area governed by the consular (including the head of the embassy or legation acting as consular or a person acting for the head; hereinafter the same) who has jurisdiction over the citizens' address in regard to application for listing on the overseas electoral register (the area refers to an area designated by Ministry of Internal Affairs and Communications Order or Ministry of Foreign Affairs Order as an area to be governed by the consular in regard to application for listing on the overseas electoral register).

#### Article 30-5

(Application for listing on overseas electoral register)

1. Persons eligible to be listed on the overseas electoral register under the preceding article may, as provided by Cabinet Order, apply in writing for listing on the overseas electoral register to the municipal election management commission governing the area where they have the last address (the municipal election management commission governing the area where they had the registered domicile at the time of application if they have never been listed on any municipality's basic resident register).

2. Application under the preceding paragraph shall be filed, as provided by Cabinet Order, through the consular who has jurisdiction over the applicant's address in regard to application for listing on the overseas electoral register (or the person designated by Ministry of Internal Affairs and Communications Order or Ministry of Foreign Affairs Order in areas designated by Ministry of Internal Affairs and Communications Order or Ministry of Foreign Affairs Order as areas where it is extremely difficult to file an application through the consular; hereinafter the same in this chapter).
3. When an application is filed under the preceding paragraph, the consular shall, as provided by Cabinet Order, immediately send the application form under Paragraph 1 with his or her comments on the eligibility of the applicant to the municipal election management commission governing the area where the applicant has the last address (or the municipal election management commission governing the area where the applicant had the registered domicile at the time of application if he or she has never been listed on any municipality's basic resident register).

#### Article 30-6

(Listing on overseas electoral register)

1. The municipal election management commission shall, without delay, list the person who has filed an application under Paragraph 1 of the preceding article on the overseas electoral register if the person who has filed the application is eligible to be listed on the municipality's overseas electoral register.
2. Notwithstanding the provision of the preceding paragraph, the municipal election management commission shall not list any person during the period from the date of official announcement of the date of an election of members of the House of Representatives or members of the House of Councillors until the date of the election.
3. Having made listing under Paragraph 1, the municipal election management commission shall provide the person who has filed an application under Paragraph 1 of the preceding article with a certificate that the person is listed on the overseas electoral register (hereinafter referred to as "overseas voter certificate") through the counsel who has sent the application form under the said paragraph in accordance with Paragraph 3 of the said article.

#### Article 30-7

(Public inspection of overseas electoral register)

1. The municipal election management commission shall, quarterly and every time an election of members of House of Representatives or members of the House of Councillors is held, make available for public inspection, for a period designated by Cabinet Order and at the municipal office or other place designated by the municipal election management commission, the documents containing the name of the person listed on the overseas electoral register in accordance with Paragraph 1 of the preceding article, the title of the consular concerned (the consular who has sent the application form under Article 30-5(1) concerning the person listed on the overseas electoral register in accordance with Paragraph 3 of the said article; hereinafter the same in this paragraph), and the person's last address and date of birth (the name and date of birth of the person listed on the overseas electoral register and the title of the consular concerned in the case where the person has never been listed on any municipality's basic resident register).
2. The municipal election management commission shall announce the place of public inspection at least three days prior to the date of commencement of public inspection.

#### Article 30-8

(Filing of objection to listing on overseas electoral register)

1. The provisions of Article 24(1) and (2) shall apply mutatis mutandis to the filing of objection to listing on the overseas electoral register.
2. The provisions of Article 15(1)(i) to (iv) and (vi), Article 15(4), Article 21, Article 25, Article 26, Article 31, Article 36, Article 39, and Article 44 of the Administrative Appeal Law shall apply mutatis mutandis to the filing of objection under Article 24(1) that is

applicable mutatis mutandis under the preceding paragraph.

3. The provisions of Article 214 shall apply mutatis mutandis to the filing of objection under Article 24(1) that is applicable mutatis mutandis under Paragraph 1.

#### Article 30-9

(Litigation on listing on overseas electoral register)

1. The provisions of Article 25(1) to (3) shall apply mutatis mutandis to litigation on listing on the overseas electoral register. In this case, in Paragraph 1 of the said article, "Paragraph 2 of the preceding article" shall read "Paragraph 2 of the preceding article that is applicable mutatis mutandis under Article 30-8(1)," and "seven days" shall read "seven days (excluding, if provided by Cabinet Order to do so, the number of days required for delivery by postal mail or delivery by non-postal mail under Article 2(2) of the Law Concerning Correspondence Delivery by Private-Sector Operators (Law No. 99 of 2002) conducted by general correspondence delivery businesses provided in Article 2(6) of the said law, special correspondence delivery businesses provided in Paragraph 9 of the said article or foreign correspondence delivery businesses provided in Subparagraph 4 of Article 3 of the said law)."

2. The provisions of Articles 213, 214, and 219(1) shall apply mutatis mutandis to litigation under Article 25(1) and (3) that is applicable mutatis mutandis under the preceding paragraph. In this case, in Article 219(1), "two or more claims against the validity of an election, two or more claims against the validity of seats won by successful candidates in an election under Article 217 or 218, two or more claims against the validity of seats won by successful candidates who ran for public office under Article 210(2), two or more claims against the validity of seats won by successful candidates who ran for public office, etc., under Article 211 or against their eligibility as candidate, or a claim against the validity of an election and a claim against the validity of seats won by successful candidates in the election under Article 217 or 218" shall read "two or more claims against listing on or deletion from an overseas electoral register made available for public inspection."

#### Article 30-10

(Indication and amendment of overseas electoral register, etc.)

1. Where the municipal election management commission has come to know the fact that a person listed on the overseas electoral register has lost the right to vote under Article 11(1) or 252 of this Law or Article 28 of the Political Funds Control Law or a new resident card has been prepared for a person listed on the overseas electoral register in a particular municipality in Japan, the commission shall immediately indicate the fact on the overseas electoral register.

2. Where the municipal election management commission has come to know any changes or errors in the information entered in the overseas electoral register in respect of a person listed on the overseas electoral register (or the information recorded in the overseas electoral register in respect of a person listed on the overseas electoral register in the case where the overseas electoral register is compiled using magnetic disc in accordance with Article 30-2(4); hereinafter the same in Article 30-13), the commission shall immediately amend or correct the information entered in the overseas electoral register (or recorded in the overseas electoral register in the case where the overseas electoral register is compiled using magnetic disc in accordance with the said paragraph).

#### Article 30-11

(Deletion from overseas electoral register)

The municipal election management commission shall immediately delete, from the overseas electoral register, any person listed on the overseas electoral register who falls under any of the following cases. In this case, if the person falls under Subparagraph 2 or 3, the commission shall announce the fact.

(1) The commission has come to know that the person has died or lost Japanese nationality.

(2) Four months has elapsed since a new resident card was prepared

in a particular municipality for the person subject to the indication under Paragraph 1 of the preceding article.

(3) The commission has come to know that the person should have not been listed at the time of listing.

#### Article 30-12

(Notification on amendment of overseas electoral register, etc.)

1. Where the municipal mayor has received a notification, application or any other document related to the family register from a person who has registered domicile in the area of the municipality and is listed on another municipality's overseas electoral register (hereinafter referred to as "person listed on other municipality's overseas electoral register ") or made any entries in the family register at his or her discretion or has made entries, deletion or correction of entries in schedules attached to the family register, and has come to know that the municipal election management commission of the other municipality should amend or correct the overseas electoral register, the person listed on other municipality's overseas electoral register should be deleted from the overseas electoral register or a new resident card for the person listed on other municipality's overseas electoral register has been prepared in a particular municipality in Japan, the municipal mayor shall, without delay, notify the municipal election management commission of the other municipality to that effect.

2. The provisions of Article 29 shall apply mutatis mutandis to notification concerning confirmation of the eligibility to be listed on the overseas electoral register, provision of public inspection of an abstract copy of the overseas electoral register and other facilities, and request for investigation on amendment of the overseas electoral register.

#### Article 30-13

(Public inspection of documents relating to overseas electoral register, etc.)

The consular shall make available for public inspection the documents, as provided by Cabinet Order, which contain the name of the municipality where a person who has been given an overseas voter certificate through the consular is listed on the overseas electoral register, the name of the person listed, and other matters concerning the information entered in the overseas electoral register, and provide other facilities as appropriate.

#### Article 30-14

(Recompilation of overseas electoral register)

The provisions of Article 30 shall apply mutatis mutandis to recompilation of the overseas electoral register.

#### Article 30-15

(Delegation to Cabinet Order for listing on overseas electoral register)

Except for the matters provided in Articles 30-4 to 30-14, other necessary matters concerning the listing on the overseas electoral register shall be provided by Cabinet Order.

#### Article 49-2 of the Public Offices Election Law

(Overseas voting)

1. Notwithstanding the provisions of Article 44, Article 45(1), Article 46(1) to (3), Article 48, and the next article, voters listed on the overseas electoral register (excluding those listed on the electoral register and designated by Cabinet Order; hereinafter the same in this article) who intend to vote in an election of members of the House of Representatives or members of the House of Councillors shall, in accordance with Article 48-2(1) and Paragraph 1 of the preceding article and as provided by Cabinet Order, be allowed to vote by any of the following methods.

(1) During the period from the date of official announcement of an election of members of the House of Representatives or members of the House of Councillors until at least five days prior to the date of election (or the date designated in advance by the Minister of Internal Affairs and Communications in consultation with the Minister of

Foreign Affairs in cases where votes are to be accepted at Japanese diplomatic establishments abroad from which it takes days to send the votes to Japan or there are other special circumstances; the date thus designated shall be excluded from the period), visit in person the voting place under the control of the head of the Japanese diplomatic establishments abroad (excluding the heads of Japanese diplomatic establishments abroad designated by the Minister of Internal Affairs and Communications in consultation with the Minister of Foreign Affairs; hereinafter the same in this subparagraph), present their overseas voter certificate or passport or other documents as provided by Cabinet Order, fill in a voting slip, and submit it in an envelop to the head of the establishments.

(2) Fill in a voting slip at any place where voters are currently present, and send it by postal mail or other means.

2. For the purpose of applying the provisions mentioned herein to persons listed on the overseas electoral register who intend to vote in Japan in an election of members of the House of Representatives or members of the House of Councillors, "electoral register" shall read "overseas electoral register," and "voting place" shall read "voting place in the voting district designated for overseas voters" in the proviso of Article 42(1); "voting place" shall read "voting place in the voting district designated for overseas voters" in Article 44(1); "electoral register" shall read "overseas electoral register,...presenting their overseas voter certificate," "the electoral register" shall read "the overseas electoral register," and "Article 19(3)" shall read "Article 30-2(4)," and "documents; hereinafter the same in the next paragraph, and Article 55 and Article 56" shall read "documents" in Article 44(2); "voting place for early voting" shall read "voting place for early voting designated by the municipal election management commission," and "voting district" shall read "voting district designated for overseas voters" in Article 48-2(1); "Article 42(1)" shall read "Article 42(1) that applies constructively under Article 49-2(2)," "voting place on the date of election" shall read "voting place in the voting district designated for overseas voters on the date of election," and "voting place for early voting" shall read "voting place for early voting designated by the municipal election management commission" in the column for Article 42(1) in the table in Article 48(2).

3. The provisions of Paragraphs 2 and 3 of the preceding article shall not apply to votes cast by voters on the overseas electoral register who intend to vote in an election of members of the House of Representatives or members of the House of Councillors.

#### Article 8 of the Supplementary Provisions for the Public Offices Election Law

For the purpose of applying the provisions mentioned herein, for the time being, "one or more voting districts" shall read "voting district" in Article 30-3(2); "election of members of the House of Representatives or members of the House of Councillors" shall read "election of members of the House of Representatives under the proportional representation system or members of the House of Councillors under the proportional representation system" in Article 30-6(2), Article 30-7(1), Article 49-2, and Article 30-7(1) that applies constructively under Article 6 of the Supplementary Provisions; "persons not listed" shall read "persons not listed (persons not listed on the electoral register for elections other than an election of members of the House of Representatives under the proportional representation system or members of the House of Councillors under the proportional representation system)" in Article 42(1); "overseas electoral register" shall read "'overseas electoral register for an election of members of the House of Representatives under the proportional representation system or members of the House of Councillors under the proportional representation system" in Article 49-2(2); "an election campaign targeting votes to be cast by voters listed only on the overseas electoral register (excluding those as provided by Cabinet Order under Article 49-2(1)) who intend to vote in an election of members of the House of Representatives or members of the House of Councillors" shall read "with respect to an election of members of the House of Councillors under the proportional representation

	<p>system, an election campaign targeting votes to be cast by voters listed only on the overseas electoral register (excluding those as provided by Cabinet Order under Article 49-2(1))" in Article 194(1), Article 195, and Article 247.</p> <p>Article 4 of the Administrative Case Litigation Law (Party suit) In this law, a "party suit" shall refer to a suit concerning a disposition or decision to declare or create legal relations between the parties, which is brought against either party, a suit to seek declaration on legal relations under public law, or other suits concerning legal relations under public law.</p> <p>Article 1(1) of the Law Concerning State Liability for Compensation When a governmental official who is in a position to exercise the public authority of the State or of a public body has, in the course of performing his duties, illegally caused damage to another person either intentionally or negligently, the State or the public body concerned shall be liable to compensate such damage.</p> <p>Article 41 of the Constitution The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.</p>
<p><b>Main text of the judgment (decision)</b></p>	<p>1. The judgment of the second instance shall be changed as follows. The judgment of the first instance shall be changed as follows. (1) Among the suits to seek declarations, suits to seek declaration of illegality of the Public Offices Election Law shall be dismissed on the ground of a deficiency of procedural requisites. (2) It is declared that the jokoku appellants indicated in the attached List of Parties 1 are eligible to vote in an election of members under the single-seat constituency system in the next general election of members of the House of Representatives and in an election of members under the constituency system in the next regular election of members of the House of Councillors on the grounds that they are listed on the overseas electoral register. (3) The jokoku appellee shall pay each jokoku appellant 5,000 yen and interest thereon at 5% per annum for the period from October 21, 1996, until the completion of payment. (4) The other claims made by the jokoku appellants shall be dismissed on the merits.</p> <p>2. The whole costs of the lawsuit shall be divided into five parts, one part of which shall be borne by the jokoku appellants and the rest by the jokoku appellee.</p>
<p><b>Reasons</b></p>	<p>Concerning the grounds for jokoku appeal and grounds for the petition for accepting the jokoku appeal argued by the attorneys for jokoku appeal KITAMURA Youichi, et al.</p> <p>I. Outline of the case</p> <p>1. This is a case in which the parties dispute whether or not it is appropriate to preclude Japanese citizens who reside abroad and have no address in any area of a municipality in Japan (hereinafter referred to as "Japanese citizens residing abroad") from exercising the whole or part of the right to vote in national elections (hereinafter, the system for allowing Japanese citizens residing abroad to exercise the right to vote in national elections shall be referred to as the "overseas voting system").</p> <p>2. Outline of the systems regarding the exercise of the right to vote of Japanese citizens residing abroad</p> <p>(1) For the purpose of allowing Japanese citizens residing abroad to exercise the right to vote, the overseas voting system was established by the partial amendment of the Public Offices Election Law by Law No. 47 of 1998 (hereinafter referred to as the "Amendment"). However, it was provided that, for the time being, the new system should be applicable only to elections of House of Representatives (HR) members under the proportional representation system and elections of House of Councillors (HC) members under the proportional representation system (Article 8 of the Supplementary</p>

Provisions of the Public Offices Election Law after the Amendment). The outlines of the systems regarding the exercise of the right to vote of Japanese citizens residing abroad before and after the Amendment are as follows.

(2) Outline of the system before the Amendment

Article 42(1) and (2) of the Public Offices Election Law before the Amendment provided that persons not listed on the electoral register and those not eligible to be listed on the electoral register should not have the right to vote. It was further 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 since the day on which their resident cards for the municipality had been prepared (Article 21(1) of the said law, Article 15(1) of the Basic Resident Register Law). Japanese citizens residing abroad were excluded from the electoral register because they were not listed on the basic resident register of any municipality in Japan. For this reason, Japanese citizens residing abroad were unable to vote in any elections of HR members or elections of HC members.

(3) Outline of the system after the Amendment

By the Amendment, an overseas electoral register was newly established (see Chapter 4-2 of the Public Offices Election Law), and the principal sentence of Article 42(1) of the Public Offices Election Law before the Amendment was revised from "Persons not listed on the electoral register shall not have the right to vote" to "Persons not listed on the electoral register or overseas electoral register shall not have the right to vote." 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 (Article 8 of the Supplementary Provisions of the Public Offices Election Law after the Amendment).

3. In this case, the jokoku appellants indicated in the attached List of Parties 1, who are Japanese citizens residing abroad, alleging that depriving them of the opportunity to exercise the right to vote on the grounds that they reside abroad is in violation of Articles 14(1), 15(1) and (3), 43, and 44 of the Constitution and Article 25 of the International Covenant on Civil and Political Rights (Treaty No. 7 of 1979), seek against the jokoku appellee (i) declaration that the Public Offices Election Law before the Amendment is illegal (in violation of the articles of the Constitution and the Covenant mentioned above) for having precluded the jokoku appellants from exercising the right to vote in elections of HR members and elections of HC members, and (ii) declaration that the Public Offices Election Law after the Amendment is illegal (in violation of the articles of the Constitution and the Covenant mentioned above) for precluding the jokoku 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 (as principal claims), as well as (iii) declaration that the jokoku appellants 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 (as an alternative claim).

In addition to the above, the jokoku appellants indicated in the attached List of Parties 1 and the jokoku appellants indicated in the attached List of Parties 2 who were residing abroad as of October 20, 1996, and then returned to Japan seek damages of 50,000 yen per person and delay damages thereon from the jokoku appellee, alleging that they suffered from being unable to vote in the general election of members of the House of Representatives held on that day (hereinafter referred to as 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.

4. The court of the second instance 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 jokoku appellants argue that the provision of the Public Offices Election Law that restricts Japanese citizens residing abroad from exercising the right to vote in national elections is in violation of, among others, Articles 14, 15(1) and (3), 22(2), 43, and 44 of the Constitution, and also argue the illegality of the judgment of the second instance that regarded the suits for declaration as being not allowed and dismissed the claim for state compensation.

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

1. 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, in its preamble and Article 1, proclaims that sovereign power resides with the people, and 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. Therefore, it must be said that it is in violation of Article 15(1) and (3), Article 43(1), and the proviso of Article 44 to restrict the people from exercising the right to vote without such unavoidable grounds. This also applies where the people are unable to exercise the right to vote due to the State's failure to take necessary measures to enable them to exercise the right to vote.

Japanese citizens residing abroad, unlike those residing in Japan, are generally unable to exercise the right to vote due to lack of eligibility to be listed on the electoral register. However, they still have the constitutional right to vote, and the State is responsible for taking necessary measures to practically enable them to exercise the right to vote while giving consideration to maintenance of fairness in elections. The State may argue unavoidable grounds to take no such measures only when it is deemed to be practically impossible or extremely difficult to take such measures while maintaining fairness in elections.

2. Constitutionality of the Public Offices Election Law before the Amendment

As mentioned in I. 2(2) above, under the Public Offices Election Law

before the Amendment, Japanese citizens residing abroad were not listed on the electoral register and therefore they were precluded from voting. This may be because in order to enable Japanese citizens residing abroad to vote, necessary measures should have been taken for example, providing Japanese diplomatic establishments abroad with necessary human and material resources, which would have required efforts to overcome many obstacles.

According to the records, the following facts are evident: on April 27, 1984, the Cabinet submitted to the 101st session of the Diet a "Bill for Partial Amendment of the Public Offices Election Law" which was aimed to establish an overseas voting system applicable to all elections of HR members and HC members, on the grounds that "under the circumstances where an increasing number of Japanese citizens reside abroad along with the development of close relationships between Japan and other countries, it is necessary to guarantee such Japanese citizens the opportunity to exercise the right to vote." The bill was continuously carried over until the 105th session without substantive deliberation, and finally quashed upon the dissolution of the House of Representatives on June 2, 1986 and from that day until the Election was held on October 20, 1996, no amendment of law was made to enable Japanese citizens residing abroad to exercise the right to vote. 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 unavoidable 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 jokoku appellants who were Japanese citizens residing abroad from voting at the time of the Election.

### 3. Constitutionality of the Public Offices Election Law after the Amendment

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. At that time, there was an opinion that, under the circumstances where it was practically difficult to provide Japanese citizens residing abroad with election bulletins before the voting day and therefore it was difficult to provide them with correct information on individual candidates, there were problems that still needed consideration regarding the measure to allow Japanese citizens residing abroad to vote in elections of HR members under the single-seat constituency system and elections of HC members under the constituency system, in which voters must write the names of candidates with their own hands. In light of this, it is inappropriate to go so far as to say that it was groundless to allow Japanese citizens residing abroad to vote only in elections under the proportional representation system, which might cause fewer problems, as the first step to establishing an overseas voting 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. Furthermore, the Law for Partial Amendment of the Public Offices Election Law (Law No. 118 of 2000) was promulgated on November 1 and put into force on November 21, 2000, with the aim of adopting an open list for elections of HC

members under the proportional representation system. After this amendment, voters are, in principle, required to write the names of persons on the HC Candidates List as prescribed in Article 86-3(1) of the Public Offices Election Law when voting in elections of HC members under the proportional representation system. Furthermore, Japanese citizens residing abroad exercised the right to vote under this system in elections held in 2001 and 2004. Taking these facts into account, 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.

### III. Suits to seek declarations

1. Among the suits to seek declaration as the principal claims, the suit to seek declaration that the Public Offices Election Law before the Amendment is illegal for having precluded the jokoku appellants indicated in the attached List of Parties 1 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, because 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.

2. Among the suits to seek declaration as the principal claims, the suit to seek declaration that the Public Offices Election Law after the Amendment is illegal for precluding the jokoku appellants indicated in the attached List of Parties 1 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 illegal, because a suit is deemed to be illegal due to lack of benefit of declaration where it is possible to achieve the purpose of the suit by filing a more appropriate suit, and in this case, as mentioned in 3 below, a suit to seek declaration as the alternative claim for declaration is more appropriate.

3. The suit for the alternative 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 were not amended as required, the jokoku appellants indicated in the attached List of Parties 1 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. Therefore, the suit for the alternative claim for declaration can be deemed to be intended to obtain, in advance, declaration that the jokoku 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, if a person files a suit to seek declaration that the person shall be eligible to exercise the right to vote in a specific election when there is a controversy over such eligibility, benefit of declaration can be found if such suit can be regarded as an effective and appropriate means. Therefore, the suit for the alternative claim in this case can be regarded as a suit to seek declaration on legal relations under public law and benefit of declaration can be found as mentioned above. In addition, needless to

say, the suit for the alternative claim is a legal controversy. Consequently, the suit for the alternative claim in this case can be regarded as a legal suit that is intended to obtain declaration that the jokoku appellants who will continue to reside abroad shall be 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.

4. Next, we examine acceptability of the alternative claim. As mentioned above, 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 and therefore invalid. Thus, the jokoku appellants indicated in the attached List of Parties 1 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. Consequently, the alternative claim for declaration is well-grounded and it should be upheld without the need for further argument.

#### IV. Claim for state compensation

Article 1(1) of the Law Concerning State Liability for Compensation provides that when a governmental official who is in a position to exercise the public authority of the State or of a public body has caused damage to an individual citizen in violation of his legal duties toward that citizen, the State or the public body concerned shall be liable to compensate such damage. Therefore, the issue of whether or not the legislative act or legislative omission by Diet members can be regarded as being illegal for the purpose of the said provision should be determined depending on whether or not Diet members have acted in violation of their legal duties toward an individual citizen in the legislative process. This issue should be distinguished from the issue of unconstitutionality of the contents of legislation or legislative omission, and even if the contents of legislation or legislative omission were against the Constitution, the legislative act or legislative omission by Diet members would not be immediately deemed to be illegal due to such unconstitutionality. However, 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. The purport of 1978 (O) No. 1240, judgment of the First Petty Bench of the Supreme Court of November 21, 1985, Minshu Vol. 39, No. 7, at 1512, is not contrary to this reasoning. The jokoku appellants who were residing abroad were also guaranteed by the Constitution the opportunity to vote in national elections, and in order to assure such opportunity to exercise the right to vote, it was absolutely necessary to take legislative measures to establish an overseas voting system. However, according to the facts mentioned above, 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 jokoku 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.

Next, we examine the degree of mental distress suffered by the jokoku appellants. Comprehensively considering that, if restricting Japanese citizens residing abroad from exercising the right to vote is judged to be illegal in this case, it would considerably relieve the mental distress suffered by the jokoku appellants from being unable to vote in the Election, it may be appropriate to order the State to pay each jokoku appellant 5,000 yen as compensation for non-pecuniary damage. Therefore, there is no need to remand this case to the court of the second instance for reexamination as to the amount of loss suffered by each jokoku appellant, and it is reasonable for the Supreme Court to order payment of compensation mentioned above. Consequently, the claim made by the jokoku appellants for state compensation shall be upheld to the extent to seek payment of 5,000 yen per person and delay damages thereon at 5% per annum as provided by the Civil Code for the period from October 21, 1996, until the completion of payment, and other claims shall be dismissed on the merits.

#### V. Conclusion

For the reasons stated above, the judgment of the second instance can be accepted as justifiable for having dismissed the principal claims for declaration on the ground of a deficiency of procedural requisites, but it contains an apparent violation of laws that has affected the judgment for having dismissed the alternative claim for declaration on the ground of a deficiency of procedural requisites and also dismissed the claim for state compensation on the merits. According to the reasoning mentioned above, without needing to hear further arguments, the jokoku appellants' alternative claim for declaration is well-grounded and therefore should be upheld, their claim for state compensation is well-grounded and therefore should be upheld to the extent to seek payment of 5,000 yen per person and delay damages thereon, and other claims should be dismissed on the merit. The jokoku appellants' argument is well-grounded to the extent mentioned above, and without needing to examine their argument alleging violation of the treaty, the judgment of the second instance should be changed as mentioned in Paragraph 1 of the main text. Therefore, the judgment was rendered in the form of the main text by the unanimous consent of the Justices, except that there is a dissenting opinion by Justice YOKOO Kazuko and Justice UEDA Toyozo, and there is also a dissenting opinion by Justice IZUMI Tokuji regarding IV of the majority opinion shown above. In addition, there is also a concurring opinion by Justice FUKUDA Hiroshi.

The following is the concurring opinion of Justice FUKUDA Hiroshi. I am in agreement with the majority opinion, but considering that there is a dissenting opinion that is negative about state compensation for deprivation or restriction of the right to vote of Japanese citizens residing abroad (opinion by Justice Izumi) and there is also a dissenting opinion arguing that deprivation or restriction of the right to vote of Japanese citizens residing abroad basically depends on the Diet's discretion and the existing overseas voting system has yet to raise an issue of unconstitutionality (Justice Yokoo and Justice Ueda), I would like to give my opinion as a concurring opinion.

#### 1. Deprivation or restriction of the right to vote and state compensation

The opinion presented by Justice Izumi that in the case of deprivation or restriction of the right to vote of Japanese citizens residing abroad, it is inappropriate to grant state compensation even if such deprivation or restriction is obviously unconstitutional, is understandable in a way and it largely arouses my sympathy. In particular, based on my personal view that, in a democratic nation under the representative democratic system, citizens' right to vote is the core of popular sovereignty and therefore we must avoid such a situation that would bring about a false recognition that the Diet or Diet members would be allowed to deprive citizens of the right to vote or continuously restrict them from exercising it if the State paid some compensation for such deprivation or restriction, I agree with the opinion that monetary compensation is basically not suitable for

deprivation or restriction of the right to vote .

Nevertheless, I still agree with the court opinion with respect to the following two points.

The first point is that, if a judgment is rendered to determine unconstitutionality of deprivation or restriction of the right to vote of Japanese citizens residing abroad, it would bring benefits only to those who currently reside or stay abroad. For those who have returned to Japan after elections, apart from mental satisfaction with the outcome of the judgment, there is no way of relief but monetary compensation. For the benefit of some jokoku appellants who have already returned to Japan, monetary compensation is inevitably needed.

The second point, which is as important as or more important than the first point, is that compensation for having prevented citizens from exercising the right to vote due to the Diet or Diet members' act or omission, is to be paid from taxes collected from citizens. In my opinion, payment of state compensation may play a significant role, irrespective of its amount, in that it can make the general public aware of the fact that taxes collected from them will be used to pay compensation for having prevented them from exercising the right to vote, the core of representative democracy, due to the Diet or Diet members' act.

2. I completely disagree with the opinion that deprivation or restriction of the right to vote of Japanese citizens residing abroad is not unconstitutional and it is within the bounds of the Diet's discretion.

Most democratic nations today adopt representative democracy as the basis for their state governing systems. Under the representative democratic system, citizens who have reached a certain age are eligible to exercise the right to vote in elections on an equal footing, without restrictions, and at regular intervals (including elections to be held due to the dissolution of the House of Representatives; hereinafter the same), and the Diet consisting of members who are chosen in such elections functions as the highest organ of state power and forms a state governing system together with administration and judicature under the principle of separation of power. According to the provisions of the Constitution, Japan is one of such nations that adopts a representative democratic system, and its legislative body, which is the core of representative democracy, cannot be legitimated unless it has gone through an equal, free, and regular election. In achieving the goal of democratic nations, i.e. respect for fundamental human rights, the Diet must play an important role as the highest organ of state power under the principle of separation of power.

The Diet hardly has the discretion to deprive citizens of the right to vote or restrict them from exercising it in any aspects of equality, freedom, and regularity. 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. It must not be forgotten that popular sovereignty is the basic philosophy of the Constitution of Japan and Japan is a nation that adopts the representative democratic system.

In many cases, it has been proven from experience that the well-being of citizens residing abroad is significantly affected by the political or other situation of their mother country.

I personally think that we should get away from the old idea that Japan, in spite of its political regime as a nation that adopts the representative democratic system, is allowed to generally restrict its citizens from exercising the right to vote simply because they reside abroad.

The following is the dissenting opinion by Justice YOKOO Kazuko and Justice UEDA Toyozo.

In our opinion, the whole of the jokoku appeal should be dismissed for the following grounds.

1. The Constitution of Japan proclaims the principle of popular sovereignty in its preamble as follows: "We, the Japanese people, acting through our duly elected representatives in the National

Diet...do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people."

Following this, the Constitution clearly states that the right to choose public officials is an inalienable right of the people, by providing that "The people have the inalienable right to choose their public officials and to dismiss them" (Article 15(1)) and "Universal adult suffrage is guaranteed with regard to the election of public officials" (Article 15(3)).

The Constitution further provides that the Diet shall consist of the House of Representatives and the House of Councillors (Article 42), both Houses shall consist of elected members, representative of all the people (Article 43(1)), and the number of the members of each House, the qualifications of members of both Houses and their electors, electoral districts, and method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law (Articles 43(2), 44, and 47). Thus, the Constitution basically leaves it to the Diet's discretion to decide the specific mechanism of the election system applicable to members of each House. In fixing the qualifications of Diet members and electors, however, the Constitution clearly prohibits discrimination because of race, creed, sex, social status, family origin, education, property or income (proviso of Article 44).

When the Diet decides the specific mechanism of the election system applicable to members of each House, it must ensure such elections are held in an open, fair and appropriate manner that reflects the free will of every Japanese citizen and without any confusion, by giving due consideration to matters necessary to implement fair and, equitable elections and avoid any disruption. Although it is needless to say that Japanese citizens who reside in countries or regions where Japan cannot exercise its sovereignty (each of such countries and regions has a different situation) and who have no address in any area of a municipality in Japan (i.e., Japanese citizens residing abroad; there are also various types of Japanese citizens residing abroad, including those who have dual nationality and those who have the status of permanent resident abroad) have the right to vote as long as they have Japanese nationality, when allowing Japanese citizens residing abroad to exercise the right to vote in an election held in Japan, more social and technical difficulties may occur than in the case of Japanese citizens residing in Japan. Therefore, what kind of voting system is suitable for such Japanese citizens residing abroad to ensure fair, equal, and peaceful elections is also an issue that the Diet should duly consider and it is also left to the Diet's discretion.

In other words, it is the Diet's duty to make choices and decisions on various matters relating to the mechanism of the election system to implement fair, equal, and peaceful elections in which voters' free will can be reflected in a fair and appropriate manner. Such matters relate to how to design the mechanism of the election system applicable to members of each House, and include: what election system should be adopted from the nationwide constituency, multiple-seat constituency, single-seat constituency, or proportional representation, or combination thereof; how to form such combination; electoral zoning; the total number of seats of each House and the apportionment of seats to electoral districts; the mechanism of the electoral register system; voting methods; how to carry out electoral campaigns (how to publicize political views of individual candidates among voters). Furthermore, what kind of voting system is suitable, in connection with the mechanism of the election system adopted by the Diet and amid various social and technical difficulties, for Japanese citizens residing in countries or regions where Japan cannot exercise its sovereignty to ensure fair, equal, and peaceful elections is an issue on which the Diet should make determination, choice, and decision, and it is also left to the Diet's discretion (this does not apply to the case where the Diet restricts citizens residing in Japan under the sovereignty of Japan from exercising the right to vote. We are in agreement with the following majority opinion: it is unallowable in

principle to restrict the right to vote of citizens residing in Japan 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; in order to restrict any citizens' right to vote or their exercise of the right to vote, there must be grounds to regard such restrictions as 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; and, it is in violation of the Constitution to restrict citizens from exercising the right to vote without such unavoidable grounds).

2. The mechanism of the election system applicable to members of each House is fixed by the Public Offices Election Law. In the past, persons not listed on the electoral register and those not eligible to be listed on the electoral register were precluded from exercising the right to vote. Persons eligible to be listed on the electoral register were Japanese citizens aged 20 years or over having address in areas of a municipality in Japan who continued to be listed on the basic resident register of the municipality for three consecutive months or more since the day on which their resident cards in the municipality had been prepared. Japanese citizens residing abroad were excluded from the electoral register because they were not listed on the basic resident register of any municipalities in Japan. For this reason, Japanese citizens residing abroad were unable to exercise the right to vote in any elections of members of Houses of the Diet.

By the partial amendment of the Public Offices Election Law in 1994, the combination of the single-seat constituency system and the proportional representation system was adopted for elections of HR members which had been held under the multiple-seat constituency system for years. By the partial amendment of the Public Offices Election Law by Law No. 47 of 1998, the overseas electoral register system was introduced, which opened a path for Japanese citizens residing abroad to be listed on the overseas electoral register and enabled them to vote in elections of members of the Houses of the Diet. However, Article 8 of the Supplementary Provisions of the amended Public Offices Election Law provides 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, and 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. It is explained that the reason why this provision gives Japanese citizens residing abroad the opportunity to vote only in elections of members of the House of the Diet under the proportional representation system is that it is extremely difficult to provide Japanese citizens residing abroad with correct information on individual candidates during a limited period of electoral campaign, 12 to 17 days.

3. As mentioned above, in the past, Japanese citizens residing abroad had not been given the opportunity to vote in elections of members of the Houses of the Diet. By the legal amendment in 1998, the Diet gave them the opportunity to vote in elections of members of the Houses of the Diet under the proportional representation system while denying their opportunity, for the time being, to vote in elections of HR members under the single-seat constituency system and elections of HC members under the constituency system in light of the significant difficulty in providing those residing abroad with information on individual candidates.

These choices made by the Diet can be evaluated as having resulted from its due consideration regarding what kind of voting system is suitable, in connection with the current mechanism of the election system, for Japanese citizens residing abroad to ensure fair, equal, and peaceful elections. It is appropriate to construe that these choices are reasonable to a certain extent amid various social and technical difficulties in providing correct information on candidates, securing an environment where citizens can vote of their own free will, and preventing election fraud, that they do not constitute an abuse of the discretion allowed to the Diet or go beyond the bounds of such discretion, and that even if consideration is also given to the

fact that the Diet did not establish an overseas electoral register system until 1998, the choices that has been made by the Diet are not in violation of the provisions of the Constitution or the treaty as alleged by the jokoku appellants, and therefore they are not unconstitutional.

4. Although we are in agreement with the majority opinion that the suits to seek declaration of illegality of the Public Offices Election Law before and after the Amendment as the principal claims are illegal due to a deficiency in procedural requisites and the suit for the alternative claim is a legal, because we deny the unconstitutionality of 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, we consider that the alternative claim for declaration is groundless and therefore should be dismissed on the merits. Consequently, the judgment of the second instance that dismissed the alternative claim for declaration on the grounds of a deficiency of procedural requisites contains an apparent violation of laws that has affected the judgment. In this case in which the jokoku appellants make the alternative claim for declaration, the jokoku appeal should be dismissed on the merit with respect to the part concerning the alternative claim for declaration in accordance with the principle of prohibition of changes against appellants.

The claim for state compensation for unconstitutional legislative omission or failure to establish an overseas voting system, in our opinion, is groundless and therefore should be dismissed on the merits because such omission is not in violation of the Constitution. The judgment of the second instance drew the same conclusion, so the jokoku appeal should be dismissed on the merits with respect to the part concerning the claim for state compensation.

The following is the concurring opinion of Justice IZUMI Tokuji regarding the majority opinion mentioned in VI above.

I disagree with the majority opinion with respect to the part that upholds the claim for state compensation, and agree with it with respect to the other parts.

The majority opinion says that in order to compensate mental distress suffered by the jokoku appellants from being unable to exercise the right to vote in the Election because of the Public Offices Election Law that precluded Japanese citizens residing abroad from voting at the time of the Election, the State shall pay each jokoku appellant 5,000 yen as compensation for non-pecuniary damage under the Law Concerning State Liability for Compensation. However, in my opinion, monetary compensation is not suitable for such mental distress suffered by the jokoku appellant, so without needing to examine unconstitutionality of the Public Offices Election Law at the time of the Election, the jokoku appellants' claim for state compensation should be dismissed on the merits.

When citizens suffer discriminatory treatment without justifiable reason in terms of the exercise of the right to vote, which is a fundamental right guaranteed by the Constitution, the courts must strive to find a way to eliminate such discrimination and restore their right and to give appropriate remedies, while performing the duty to play an active role in maintaining the normal operation of democratic political procedures.

The claim for state compensation in this case is not principally intended to obtain monetary compensation but intended to obtain a virtual declaration, in the reasons for judgment, of the unconstitutionality of the Public Offices Election Law for precluding Japanese citizens residing abroad from exercising the right to vote, thereby indirectly encouraging the Diet to take legislative measures to restore the right to vote. It would appear that the jokoku appellants dared to add the claim for state compensation, which may be a circuitous way to restore the right to vote, considering that suits other than a suit to seek state compensation might be denied legality. In general, where legislation prevents the exercise of a fundamental right under the Constitution, it is better to allow a claim for state compensation as the last resort when there is no other appropriate

way to restore the right than to file a suit to make such claim with the aim of indirectly correcting unconstitutional legislation. Also, where legislation causes specific losses to a certain range of citizens due to the nature of the right and the type of violation of the right, a suit to seek state compensation may be more appropriate as a way to restore the right.

However, it is indisputable that the right to vote is a personal right that is necessary to exercise the right to take part in national administration as a fundamental human right, but it is different from a purely personal right because it can also be regarded as an official duty to collectively take part in the official process of choosing Diet members or State organs. Furthermore, the mental distress that the jokoku appellants allege to have suffered from being unable to vote in the Election due to legislative defects seems to be shared among hundreds of thousands of Japanese citizens residing abroad and therefore it is not so personal. For this reason, it must be said that the jokoku appellants' mental distress is difficult to evaluate in monetary terms and monetary compensation is not suitable for it. The United Kingdom and the United States have a system whereby nominal damages may be afforded even when no actual loss occurred due to violation of a constitutional right. However, the Law Concerning State Liability for Compensation of Japan does not adopt such a system of nominal damages, so it is necessary to determine the amount of actual loss suffered by the jokoku appellants, which is a difficult task. If monetary compensation should be paid to relieve the jokoku appellants' mental distress, it would follow that pecuniary compensation should also be paid to voters who suffer discriminatory treatment, in electoral districts where underrepresentation occurs in terms of the value of each voter's vote due to imbalance in apportionment of seats. However, in light of the facts that it is difficult to evaluate their mental distress in monetary terms and there are a number of voters entitled to receive compensation, most of whom pay taxes, the source of the compensation, it must be said that monetary compensation is, by its nature, not suitable for such mental distress and it is not contemplated by the Law Concerning State Liability for Compensation as an object to be compensated. Relief by monetary compensation will not be accepted or supported by all Japanese citizens.

With respect to the issue of inequality in the value of each voter's vote, the Supreme Court has conventionally accepted, as a way of relief, suits disputing the validity of elections in accordance with Article 204 of the Public Offices Election Law, and in this jokoku appeal, the court also addresses, as the alternative claim for declaration, the jokoku appellants' claim for guarantee of the exercise of the right to vote of Japanese citizens residing abroad. With such a way of judicial relief available, there is no need to further afford monetary compensation.

As mentioned above, courts should actively work toward correcting discriminatory treatment in terms of the exercise of the right to vote due to legislative defects, but if they use monetary compensation as a means of correction, it would impose excessive burden on taxpayers because of too wide a range of persons being entitled to compensation, which might affect freedom in court judgment. I recommend that courts should work unflinchingly toward correcting inequalities in the exercise of the right to vote without such financial concerns.

**Presiding Judge**

Justice MACHIDA Akira  
 Justice FUKUDA Hiroshi  
 Justice HAMADA Kunio  
 Justice YOKOO Kazuko  
 Justice UEDA Toyozo  
 Justice TAKII Shigeo  
 Justice FUJITA Tokiyasu  
 Justice KAINAKA Tatsuo  
 Justice IZUMI Tokuji  
 Justice SHIMADA Niro  
 Justice SAIGUCHI Chiharu

Justice IMAI Isao Justice NAKAGAWA Ryoji Justice HORIGOME Yukio
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