Judgments of the Supreme Court

Search Results

2017 (Gyo-Tsu) 47

Back

Date of the judgment (decision)	2017.09.27
Case Number	2017 (Gyo-Tsu) 47
Reporter	Minshu Vol. 71, No. 7
Title	Judgment concerning the constitutionality of the provisions on the apportionment of seats for members (to be elected by constituency) of the House of Councillors stipulated in Article 14 and Appended Table 3 of the Public Offices Election Act
Case name	Case to seek invalidation of election
Result	Judgment of the Grand Bench, dismissed
Court of the Prior Instance	Tokyo High Court, Judgment of November 2, 2016
Summary of the judgment (decision)	At the time of the ordinary election of members of the House of Councillors held on July 10, 2016, under the provisions on the apportionment of seats for members of the House of Councillors to be elected by the constituency stipulated in Article 14 and Appended Table 3 of the Public Offices Election Act, which had been revised by Act No. 60 of 2015, the disparity between constituencies in terms of the value of votes did not indicate the existence of extreme inequality to such an extent that it would raise a question of unconstitutionality, and therefore, said provisions cannot be held to have been in violation of Article 14, paragraph (1), etc., of the Constitution. (There are opinions and dissenting opinions.)
References	Article 14, paragraph (1), Article 15, paragraphs (1) and (3), Article 43, paragraph (1), and Article 44 of the Constitution, Article 14 and Appended Table 3 of the Public Offices Election Act

	The Constitution of Japan Article 14 (1)All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Article 15 (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)Both Houses shall consist of elected members, representative of all the people. Article 44 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. Public Offices Election Act Article 14 (1) Constituencies for members of the House of Councillors to be elected by constituency and the number of members of the House of Councillors to be elected in each constituency are specified in Appended Table 3. (2) Even in the event of the abolition, creation, division or amalgamation of a prefecture or prefectures effected pursuant to the provisions of Article 6-2, paragraph (1) of the Local Autonomy Act, the constituencies for elections of members of the House of Councillors to be elected by constituency and the number of members of the House of Councillors to be elected in each constituency remain as they were before such event.
Main text of the judgment (decision)	The final appeal is dismissed. The appellants of the final appeal shall bear the cost of the final appeal.
Reasons	Concerning the reasons for the final appeal, argued by the appellants who also stand as appeal counsel, YAMAGUCHI Kuniaki, KUNIBE Toru and MISAO Michihiko, and the appellant, MORI Toru 1. This case is a suit seeking invalidation of an election filed by the appellants who are voters in the Tokyo Constituency and the Kanagawa Constituency with regard to the ordinary election of members of the House of Councillors held on July 10, 2016 (hereinafter referred to as the "Election"), alleging that the provisions on the apportionment of seats for members of the House of Councillors to be elected by constituency stipulated in Article 14 and Appended Table 3 of the Public Offices Election Act (hereinafter these provisions, including those in Appended Table 2 prior to the revision by Act No. 2 of 1994, are referred to as the "provisions on the apportionment of seats" over a period before and after multiple revisions) are unconstitutional and invalid, and therefore the elections

held in said constituencies as part of the Election pursuant to these provisions are also invalid.

2. The outline of the facts legally determined by the court of prior instance is as follows.

(1) The House of Councillors Election Act (Act No. 11 of 1947) divided a total of 250 members of the House of Councillors into 100 nationally-elected members and 150 locally-elected members, and under said Act, nationally-elected members would be elected by nation-wide constituency consisting of all prefectures, whereas locally-elected members would be elected by prefecture-based constituency, according to the demarcation of constituencies and the number of members to be elected in each constituency as specified in the appended table of said Act. Corresponding to the fact that the Constitution stipulates that an election for half the members of the House of Councillors shall take place every three years, said Act adopted the policy of apportioning an even number of seats (amounting to not less than two) to each constituency, in consideration of holding elections for half the elected members of each constituency, and in fact apportioned an even number of seats (from two to eight) to each constituency in proportion to the population of the respective constituencies. The provisions on the apportionment of seats under the Public Offices Election Act enacted in 1950 followed the abovementioned provisions on the apportionment of seats for members under the House of Councillors Election Act, without any changes. Thereafter, except for two seats additionally apportioned to the Okinawa Constituency, no changes had been made to said provisions on the apportionment of seats until the revision to the Public Offices Election Act by Act No. 47 of 1994 (hereinafter referred to as the "1994 Revision"). By way of the revision to the Public Offices Election Act by Act No. 81 of 1982 (hereinafter referred to as the "1982 Revision"), the 252 members of the House of Councillors were divided into 100 members to be elected by proportional representation, i.e. elected in proportion to the number of votes won by each political party or group under the proportional representation system, and 152 members to be elected by constituency, i.e. elected from prefecture-based constituencies under the constituency system. Members to be elected by constituency are identical to former locally-elected members, with a change of name only. Subsequently, through the revision to the Public Offices Election Act by Act No. 118 of 2000 (hereinafter referred to as the "2000 Revision"), the total number of seats in the House of Councillors was reduced to 242, consisting of 96 members to be elected by proportional representation and 146 members to be elected by constituency.

(2) At the time of the enactment of the House of Councillors Election Act, the maximum disparity between constituencies in terms of the population per member (hereinafter, when the "maximum disparity between constituencies" at the time of each legal revision is discussed, it refers to the maximum disparity in terms of the population as defined here) was 1:2.62 (hereinafter all values indicating disparities are approximate figures). Said disparity continued to gradually expand due to population migration, and at the time of the ordinary election of members of the House of Councillors (such election is hereinafter simply referred to as an "ordinary election") held in 1992 (this election is hereinafter referred to as the "1992 Election"), the maximum disparity between constituencies in terms of the number of voters per member (hereinafter, when the "maximum disparity between constituencies" at the time of each election is discussed, it refers to the maximum disparity in terms of the number of voters) reached 1:6.59. Subsequently, as a result of the reapportionment of eight seats among seven constituencies through the 1994 Revision, the maximum disparity between constituencies on the basis of the population counted by the population census conducted in October 1990 was reduced to 1:4.81. During the period before and after the reduction of six seats in total in three constituencies under the 2000 Revision as well as the

reapportionment of four seats among four constituencies conducted under the revision to the Public Offices Election Act by Act No. 52 of 2006 (hereinafter referred to as the "2006 Revision"), the maximum disparity between constituencies at the time of each ordinary election held between 1995 and 2007 stayed around the level of 1:5.

Meanwhile, in 1979 (Gyo-Tsu) No. 65, judgment of the Grand Bench of the Supreme Court of April 27, 1983, Minshu Vol. 37, No. 3, at 345 (hereinafter referred to as the "1983 Grand Bench Judgment"), the Grand Bench of this court presented a basic framework for determining the constitutionality of the provisions on the apportionment of seats, which will be discussed later in Section 3(1) below, and thereafter, with regard to the 1992 Election, the Grand Bench of this court held that extreme inequality had existed in the value of votes to such an extent a question of unconstitutionality could be raised (1994 (Gyo-Tsu) No. 59, judgment of the Grand Bench of the Supreme Court of September 11, 1996, Minshu Vol. 50, No. 8, at 2283). However, with regard to the two ordinary elections held under the provisions of the apportionment of seats after the 1994 Revision, the Grand Bench of this court held that the maximum disparity between constituencies could not be held to have reached such a level of inequality (1997 (Gyo-Tsu) No. 104, judgment of the Grand Bench of the Supreme Court of September 2, 1998, Minshu Vol.

52, No. 6, at 1373, 1999 (Gyo-Tsu) No. 241, judgment of the Grand Bench of the Supreme Court of September 6, 2000, Minshu Vol. 54, No. 7, at 1997). Subsequently, with regard to the two ordinary elections held under the provisions of the apportionment of seats after the 2000 Revision as well as the ordinary election held in 2007 under the provisions on the apportionment of seats after the 2006 Revision, the Grand Bench of this court made a determination in its conclusion, that the respective provisions on the apportionment of seats could not be held to have been unconstitutional, without making a clear holding as to whether or not the disparity had reached the abovementioned level of inequality (2003 (Gyo-Tsu) No. 24, judgment of the Grand Bench of the Supreme Court of January 14, 2004, Minshu Vol. 58, No. 1, at 56, 2005 (Gyo-Tsu) No. 247, judgment of the Grand Bench of the Supreme Court of October 4, 2006, Minshu Vol. 60, No. 8, at 2696, 2008 (Gyo-Tsu) No. 209, judgment of the Grand Bench of the Supreme Court of September 30, 2009, Minshu Vol. 63, No. 7, at 1520). However, in the above-cited judgment of October 4, 2006, the Grand Bench of this court pointed out that, taking into consideration the importance of equality in the value of votes, the Diet should make a constant effort to correct the inequality in the value of votes, and in the above-cited judgment of September 30, 2009, it also pointed out that, as the disparity at that time indicated that great inequality in the value of votes still existed, efforts should be made to reduce the disparity in the value of votes between constituencies, and in order to do so, it is necessary to reform the current mechanism of the election system itself. As seen from the above, with the maximum disparity between constituencies always remaining around 1:5, the Grand Bench of this court has started to take a stricter stance in substance toward disparity situations in terms of the value of votes.

(3) In regard to the ordinary election held on July 11, 2010, with the maximum disparity between constituencies having reached a level of 1:5.00 (this election is hereinafter referred to as the "2010 Election"), in 2011 (Gyo-Tsu) No. 51, judgment of the Grand Bench of the Supreme Court of October 17, 2012, Minshu Vol. 66, No. 10, at 3357 (hereinafter referred to as the "2012 Grand Bench Judgment"), the Grand Bench of this court concluded that the provisions on the apportionment of seats could not be held to have been unconstitutional at the time of the 2010 Election. However, in view of the changes in the circumstances surrounding the system and society over a long period of time, the Grand Bench of this court pointed out that the requirement of equality in the value of votes should not be taken any more lightly simply because the election in question is for members of the House of Councillors, and that the fact that each prefecture can be defined as a political unit and other facts that are

characteristics of the House of Councillors could no longer be regarded as legitimate reasons for leaving great disparity in the value of votes unaddressed for dozens of years. The Grand Bench of this court further pointed out that, with an increase in the difference in population between prefectures, given limitations to the possibility of choosing the option of increasing the total number of seats, it has become extremely difficult to answer the requirement of greater equality in the value of votes, while maintaining the current mechanism designed to use a prefecture as a unit of constituency, and that despite these calls for improvement, since the 2006 Revision, no legal revisions for correcting the great inequality in the value of votes had been made before the 2010 Election. Upon comprehensive consideration of these situations, the Grand Bench of this court held that the disparity between constituencies in terms of the value of votes shown by the maximum disparity at the time of the 2010 Election had indicated the existence of extreme inequality to such an extent that it could raise a question of unconstitutionality, and also pointed out that legislative measures to reform the current mechanism of the election system itself should be taken in order to correct said inequality, such as making a reasonable change to the current system of setting the number of seats for each prefecture-based constituency, and by doing so, such extreme level of inequality that could raise questions of unconstitutionality should be eliminated as soon as possible.

(4) After the 2012 Grand Bench Judgment was rendered, the bill to partially revise the Public Offices Election Act was enacted on November 16, 2012 (Act No. 94 of 2012; hereinafter referred to as the "2012 Revision Act"), and then put into effect on November 26, 2012 (hereinafter the provisions on the apportionment of seats after the revision by the 2012 Revision Act and before the revision by Act No. 60 of 2015 are referred to as the "Former Provisions on Apportionment of Seats"). Said bill was designed to reform the election system in preparation for an ordinary election scheduled in July 2013 by reapportioning four seats among four constituencies with regard to members to be elected by constituency. The bill contained a supplementary provision stating that review will be made continuously, working toward a conclusion regarding fundamental reform of the election system in preparation for an ordinary election scheduled in 2016.

On July 21, 2013, the first ordinary election under the Former Provisions on the Apportionment of Seats was held (this election is hereinafter referred to as the "2013 Election"). At the time of the 2013 Election, the maximum disparity between constituencies was 1:4.77.

(5) In September 2013, to discuss the reform of the election system of the House of Councillors in preparation for an ordinary election scheduled in 2016, the House of Councillors established the Election System Consultation Meeting under the Study Committee on the Election System Reform. In April 2014, the chairperson of the consultation meeting presented a specific proposal for reform that consisted of reform of the mechanism of the election system, and a revised version of this proposal was later presented as well. These proposals basically aimed to merge some constituencies with a small population per member with their neighboring constituencies and reduce their seats, while adding seats to some heavily-populated constituencies, with a view to significantly reduce the maximum disparity between constituencies. After May 2014, the consultation meeting engaged in study and discussions on, among other matters, the abovementioned proposals as well as the proposals submitted by the parliamentary factions in the House of Councillors (these proposals submitted by the parliamentary factions included a proposal for making some changes to the areas of the merged constituencies based on the abovementioned proposals, and a proposal for creating new units of constituencies that are larger than prefectures). After November 2014, the consultation meeting continued discussions to build a consensus, but failed because

opinions remained varied among the parliamentary factions. Consequently, a report including proposals from the parliamentary factions was submitted to the President of the House of Councillors on December 26, 2014.

(6) While these discussions continued, with regard to the 2013 Election, in 2014 (Gyo-Tsu) No. 155, No. 156 judgment of the Grand Bench of the Supreme Court of November 26, 2014, Minshu Vol. 68, No. 9, at 1363 (hereinafter referred to as the "2014 Grand Bench Judgment"), it was held, in line with the 2012 Grand Bench Judgment, that the abovementioned reapportionment of four seats under the 2012 Revision Act had only resulted in reapportioning seats among some constituencies while maintaining the mechanism of the election system designed to use a prefecture as a unit of constituency, and because, in fact, the maximum disparity between constituencies had stayed at around 1:5 throughout the period before and after said revision, said reapportionment of seats should inevitably be held to be insufficient to correct the extreme inequality that existed in the value of votes to such an extent that it could raise a question of unconstitutionality, and therefore it should be concluded that even after the abovementioned reapportionment of seats had been conducted under the 2012 Revision Act, the disparity between constituencies in terms of the value of votes had indicated the existence of extreme inequality to such an extent that it could raise a question of unconstitutionality. It was also pointed out that it is necessary for the Diet to take constant steps to discuss and build a consensus for a specific proposal for reform, such as making a reasonable change to the current system of setting the number of seats for each prefecture-based constituency, and further take legislative measures to reform the current mechanism of the election system itself as soon as possible, so that the abovementioned level of inequality will be corrected.

(7) Upon receiving the report in (5) above, the Study Committee on the Election System Reform discussed the proposals but could not reach a common conclusion among the parliamentary factions. Therefore, on May 29, 2015, it was decided that each parliamentary faction was to draft a bill. After discussions at each parliamentary faction, the revision proposals of the parliamentary factions were largely consolidated into two proposals: Proposal [i] for the reapportionment of ten seats including merger of four prefectures into two constituencies, which would introduce mergers of less-populated constituencies; and Proposal [ii] for the reapportionment of twelve seats by merging twenty prefectures into ten constituencies. On July 23, 2015, two bills to partially revise the Public Offices Election Act that contained the abovementioned proposals, respectively, were submitted to the Diet. With regard to the demarcation of constituencies and the number of members to be elected in each constituency, the bill pertaining to Proposal [i] above proposed to merge Tottori Prefecture and Shimane Prefecture into one constituency with two seats, and merge Tokushima Prefecture and Kochi Prefecture into one constituency with two seats, while reducing two seats each from three constituencies and adding two seats each to five constituencies. The provision of Article 7 of the supplementary provisions of the bill stated that, in light of the House of Councillors' way of being and taking into consideration correction of the disparity between constituencies in terms of the population per member, etc., review will be made continuously, definitely working toward a conclusion on the fundamental reform of the election system in preparation for an ordinary election scheduled in 2019.

The bill pertaining to the Proposal [i] above to partially revise the Public Offices Election Act was enacted on July 28, 2015 (Act No. 60 of 2015; hereinafter referred to as the "2015 Revision Act"), and then put into effect on November 5, 2015 (hereinafter the provisions on the apportionment of seats after the revision by the 2015 Revision Act are referred to as the "Provisions on Apportionment of Seats"). As a result of the revision to the Public Offices Election Act by the 2015 Revision Act (hereinafter referred to as the "2015 Revision"), the

maximum disparity between constituencies on the basis of the population counted by the population census conducted in October 2010 became 1:2.97.

(8) On July 10, 2016, the Election was held as the first ordinary election under the Provisions on the Apportionment of Seats. At the time of the Election, the maximum disparity between constituencies was 1:3.08.

3. (1) It is understood 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 to be a reasonable exercise of its discretion, such a decision cannot be held to be unconstitutional even if the decision compromises equality in the value of votes to a certain extent.

It is understood that the Constitution adopts a bicameral system and differentiates the House of Councillors from the House of Representatives 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 House of Councillors described in Section 2(1) above is designed to divide the members of the House of Councillors into two groups, namely, nationally-elected members (or members to be elected by proportional representation since the 1982 Revision) and locally-elected members (or members to be elected by constituency since the same revision). The former members are elected by nation-wide constituency consisting of all prefectures, whereas the latter members are elected by prefecture-based constituency. At the time of the enactment of the House of Councillors Election Act in 1947 and the enactment of the Public Offices Election Act in 1950, the establishment of such an election system may not be considered to have gone beyond the bounds of reasonable exercise of the Diet's discretion. However, where extreme inequality in the value of votes has emerged under the abovementioned mechanism as a result of constant population migration in this age of dramatic social and economic change, and if the Diet has not taken any measures to correct such a level of inequality despite its existence over a considerable period of time and such failure to take corrective measures is regarded as going beyond the bounds of the Diet's discretion, it would be appropriate to construe that the relevant provisions on the apportionment of seats have become unconstitutional.

This reasoning is in line with the series of Grand Bench Judgments on elections of members of the House of Councillors (locally-elected members and members elected by constituency) that have been rendered since the 1983 Grand Bench Judgment, and the necessity to modify this reasoning as a basic framework for determination cannot be found.

(2) The Constitution adopts a bicameral system and guarantees the superiority of the House of Representatives as far as certain subject matters are concerned, while specifying the system for the House of Councillors by providing that the term of office of members of the House of Councillors shall be six years, that there shall be no dissolution, and that elections shall take place for half the members every three years (Article 46, etc.). The purpose of these provisions is to bestow almost the same authority to the House of Councillors as that of the House of Representatives in dealing with various subject

that of the House of Representatives in dealing with various subject matters including legislative matters and set a longer term of office for the members of the House of Councillors, 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 should be considered that it is left to the Diet's reasonable discretion to determine what kind of election system should be adopted in order to achieve said purpose of the Constitution and to maintain a balance with the requirement of equality in the value of votes, including how to define the characteristics and functions of the House of Councillors and the differences from the House of Representatives under a bicameral system and how to reflect such definitions in the respective election systems. Similar to (1) above, this reasoning is also in line with the basic stance taken by the series of Grand Bench Judgments.

(3) As stated in (1) above, 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, and, as stated in (2) above, there is a certain purpose for the Constitution adopting a bicameral system for the Diet composition and differentiating the House of Councillors from the House of Representatives in terms of the scope of authority and the members' term of office. In view of the above, it can be accepted as a reasonable exercise of the discretion vested in the Diet to, in light of the House of Councillors' way of being and roles under the bicameral system, adopt an election system for the House of Councillors that is different from that of the House of Representatives, thereby reflecting the diverse opinions of the people from all levels of civil society in election results and having the House of Councillors perform unique functions that are different from those of the House of Representatives. In deciding a specific mechanism of the election system, it is not construed that the idea itself of taking into account the significance and substance, etc. of each prefecture serving as a political unit as one factor in view of adding the purpose and function of collectively reflecting the will of the residents in certain regions in election results should be denied. As long as it is in harmony with the requirement of equality in the value of votes, establishment of an election system is not construed to have gone beyond the Diet's reasonable discretion just because it is based on such a factor.

In determining the reasonableness of the Diet's exercise of discretion regarding the establishment of the abovementioned election system, the 2012 Grand Bench Judgment and the 2014 Grand Bench Judgment pointed out that it is necessary to consider changes in the circumstances surrounding the system and society over a long period of time. As such changes, these judgments listed the fact that the House of Councillors and the House of Representatives have adopted a similar election system, the fact that the House of Councillors has been playing an increasingly important role in the administration of national politics, and the fact that a constituency standard for the House of Representatives has been established with the aim of keeping the disparity between constituencies in terms of population basically lower than 1:2 in order to meet the requirement of equality in the value of votes. It was pointed out that under these circumstances, factors listed by the 1983 Grand Bench Judgment as grounds for tolerating the prolonged existence of great disparity in the value of votes no longer provided a sufficient reason for the disparity, which was as great as about 1:5, to remain in existence over dozens of years. In addition, it was held that, under the situation that the Constitution does not require the use of a prefecture as a unit of constituency—on the contrary, the inflexible use of a prefecture as a unit of constituency had caused such prolonged existence of great disparity—the abovementioned significance and substance, etc. of a prefecture could no longer be held to be providing sufficient grounds for the reasonableness of the abovementioned mechanism of the election system. These judgments, however, just determined that the inflexible use of a prefecture as a unit of constituency was a cause for

the prolonged existence of great inequality in the value of votes, and

did not hold that the use of a prefecture to determine the demarcation of each constituency itself is not allowed, as it is unreasonable.

Basically, it is hard to find grounds to take the requirement of equality in the value of votes lightly simply because the election in question is for members of the House of Councillors, and therefore it is necessary to take the requirement of equality in the value of votes sufficiently into consideration so that the will of the people will be reflected more properly in the composition of the House of Councillors. However, in light of, among other matters, the purpose of the Constitution and the roles of the House of Councillors as mentioned above, equality in the value of votes in the election for members of the House of Councillors still should be realized in harmony with the abovementioned purpose of the Constitution pertaining to the bicameral system, taking into account the fact that the Constitution stipulates that an election for half the members of the House of Councillors shall take place every three years and other unique factors that are required to be considered in apportioning seats for Diet members.

(4) The Election was held under the Provisions on the Apportionment of Seats as revised by the 2015 Revision Act, which was enacted after the 2014 Grand Bench Judgment was rendered. Unlike previous revisions, the 2015 Revision Act not only reapportioned seats among some constituencies, but also reformed the mechanism of the election system designed to use a prefecture as a unit of constituency by merging less-populated constituencies, which was a measure taken for the first time since the establishment of the House of Councillors. By virtue of this revision, the maximum disparity between constituencies, which had remained around the level of 1:5 for dozens of years until at the time of the 2013 Election, was reduced to 1:2.97 (1:3.08 at the time of the Election).

This revision introduced an unprecedented method that merges some less-populated constituencies to reform the aforementioned mechanism, which was the cause for the prolonged existence of great disparity in the value of votes over a long period of time, and by virtue of this revision, the maximum disparity between constituencies was reduced to the abovementioned level. In view of this, it can be seen that, in light of the abovementioned characteristics of the election of members of the House of Councillors, this revision endeavored to correct the disparity in line with the 2012 Grand Bench Judgment and the 2014 Grand Bench Judgment. In addition, the 2015 Revision Act states in its supplementary provision that review will be made continuously, definitely working toward a conclusion on the

fundamental reform of the election system in preparation for the next ordinary election. We can conclude that the direction and the strong will of the legislative branch toward further correction of the disparity in the value of votes in the future are shown in this provision, and that the legislative branch is endeavoring not to create great disparity at the abovementioned level again.

Consequently, it can be determined that the 2015 Revision overcame the prolonged existence of great disparity between constituencies in terms of the value of votes over a long period of time by reforming the mechanism of the election system designed to use a prefecture as a unit of constituency, and is aiming to realize further correction of the disparity. The fact that only some constituencies were merged and that many constituencies still use a prefecture as a unit does not affect this determination.

(5) Upon comprehensive consideration of the above situations, at the time of the Election, the disparity between constituencies in terms of the value of votes under the Provisions on the Apportionment of Seats as revised by the 2015 Revision did not indicate the existence of extreme inequality to such an extent that it could raise a question of

unconstitutionality, and the Provisions on the Apportionment of Seats cannot be held to have been unconstitutional.

4. For the reasons stated above, we can affirm the determination of the court of prior instance stating in its conclusion that the Provisions on the Apportionment of Seats cannot be held to have been unconstitutional at the time of the Election. We cannot accept the arguments of the appellants and appeal counsel.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices, except that there are opinions by Justice KIUCHI Michiyoshi and Justice HAYASHI Keiichi, and dissenting opinions by Justice ONIMARU Kaoru and Justice YAMAMOTO Tsuneyuki.

The concurring opinion by Justice KIUCHI Michiyoshi is as follows.

I am in agreement with the majority opinion that the Provisions on the Apportionment of Seats cannot be held to have been unconstitutional at the time of the Election. However, with regard to whether or not the disparity in the value of votes indicated the existence of extreme inequality to such an extent that it could raise a question of unconstitutionality at the time of the Election, I dissent from the majority opinion.

The reasons for my opinion are as follows.

1. Equality in the value of votes and constitutional review

As the value of votes in the elections of Diet members is the substance of the right to vote held by the people under the Constitution, equality in the value of votes is required by the Constitution as a fundamental principle for the Diet to be composed by members representing all the people, and is the most important and fundamental criterion that should be considered in deciding an election system.

It is obvious that the Diet is in charge of establishing an election system by law under the Constitution, and the legislative process is left to the Diet's discretion. However, the grounds for seeking compromise on the part of equality in the value of votes, which is appreciated as a constitutional value, must be reasonable ones, such as those supported by other constitutional values or those due to unavoidable technical restrictions.

The explanation that equality in the value of votes is not the sole and absolute criterion for deciding the mechanism of an election system has been adhered to by judgments of the Grand Bench on elections of members of the House of Councillors that has been rendered since the 1983 Grand Bench Judgment. This explanation does not deny that equality in the value of votes is the most important and fundamental criterion. The former judgment of the Grand Bench (1963 (O) No. 422, judgment of the Grand Bench of the Supreme Court of February 5, 1964, Minshu Vol. 18, No. 2, at 270) held that,"from the constitutional principle of equality under the law, it is desirable to apportion seats for members to respective constituencies in proportion to the population of voters, …but in what proportion seats for members should be apportioned to respective constituencies is a matter of legislative policy subject to the authority of the Diet, which is the legislative body."In contrast to this judgment, the 1983 Grand Bench Judgment presented a principle that"the principle of equality of the right to vote stipulated in the Constitution also requires…equality of the substance of the right to vote, that is, equality of the weight of each vote."The explanation that equality in the value of votes is not the sole and absolute criterion was stated on the basis of this principle. Therefore, it is construed that the explanation remained only confirming the Diet's discretion in the context that the Diet is not

completely prohibited to take into consideration factors other than equality in the value of votes in its legislation process.

2. The relation between use of a prefecture as a unit of constituency and equality in the value of votes

Since the 1983 Grand Bench Judgment, each prefecture has been defined as “a political unit with its own historical, political, economic, and social significance and substance.” In Section 2(2) of my dissenting opinion attached to the 2014 Grand Bench Judgment, I have already stated an overview of what has been stated in the judgments of the Grand Bench on elections of members of the House of Councillors since the 1983 Grand Bench Judgment regarding the use of a prefecture as a unit of constituency, and so I am not going to repeat it here. I want to note that, while the 1983 Grand Bench Judgment appreciated to a certain degree the characteristic of de facto prefectural representation as a factor for seeking compromise on the part of equality in the value of votes, the judgments of the Grand Bench after the 1983 Grand Bench Judgment started to point out that the cause for the disparity in the value of votes is the use of a prefecture as a unit of constituency. Upon the 2012 Grand Bench Judgment, the following was pointed out: 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 (note: the 1983 Grand Bench 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 House of Councillors. On the contrary, it can be found that the inflexible use of a prefecture as a unit of constituency has caused prolonged great inequality in the value of votes [⋯]. In this situation, said mechanism itself needs to be reformed.

As seen from the above, the judgments of the Grand Bench rendered so far have not taken for granted the use of a prefecture as a unit of constituency. A prefecture as a unit of constituency has been forced to step back to a certain degree from a value that can seek compromise on the part of the constitutional value of equality in the value of votes.

The majority opinion in this judgment continues to see each prefecture as a political unit, but the purpose of this stance is “adding the purpose and function of collectively reflecting the will of the residents in certain regions in election results.”

An election system using constituencies governs who will serve as a Diet member representing all the people by votes in each constituency. Each constituency should be a political unit sufficient to elect members because the election system using constituencies

requires so, but the unit should not necessarily be a prefecture.

The majority opinion states that the idea of taking into account the significance and substance, etc. of each prefecture as one factor is not denied. This opinion should mean that these points are taken into account as nothing more than one factor, and should not directly lead to the conclusion that the use of a prefecture as a unit in deciding the demarcation of each constituency is not unreasonable.

3. A two-step framework for determination of constitutionality and factors to be considered in it

The Grand Bench of this court has conducted a constitutional review regarding the provisions on the apportionment of seats for members of the House of Councillors within the framework of determination, which consists of the following two steps: [i] whether or not the disparity in the value of votes indicated the existence of extreme inequality to such an extent that it could raise a question of unconstitutionality (whether or not said disparity is in an unconstitutional state); and [ii] whether the Diet's failure to correct

such an unconstitutional state by the time of the election in dispute goes beyond the bounds of the Diet's discretion (or such failure is within the bounds of the Diet's discretion).

The 2012 Grand Bench Judgment stated that “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. Since there are no special grounds to justify this situation, it is inevitable to conclude that there existed extreme inequality to such an extent that it could raise a question of unconstitutionality.” As seen from this statement, the determination of [i], whether or not said disparity is in an unconstitutional state, is regarding the disparity in the value of votes shown by the disparity between constituencies at the time of an election.

At the time of the 2010 Election, discussions on the mechanism of the election system itself had been underway at the House of Councillors, and a supplementary provision of the bill for the 2012 Revision Act, which was submitted to the Diet after the 2010 Election, stated that review will be made continuously on the fundamental reform of the election system. The 2012 Grand Bench Judgment reviewed these facts as an issue of whether or not the Diet's failure to revise the provisions on the apportionment of seats by the time of the same election went beyond the bounds of the Diet's discretion, and held that it did not. In the period after the 2012 Grand Bench Judgment

and until the 2013 Election, the 2012 Revision Act including the abovementioned supplementary provision was enacted, and discussions on reform of the mechanism of the election system were continued pursuant to the supplementary provision even after the same election. The 2014 Grand Bench Judgment also reviewed these facts as an issue of whether the Diet's failure to revise the law according to the proposed reform by the time of the same election went beyond the bounds of the Diet's discretion, and held that it did not.

As seen from the above, not only the movement of the Diet up to an election, but also the movement of the Diet after the election are deemed to be factors to be considered since the determination of [ii], whether the failure is within the bounds of the Diet's discretion, is to be made regarding the direction of the movement of the Diet that it did not revise the law by the time of the election.

In other words, the determination of [i], whether or not the disparity is in an unconstitutional state, is regarding the disparity in the value of votes at the time of the election in dispute, and the determination of [ii], whether the failure is within the bounds of the Diet's discretion, takes into consideration factors including the movement of the Diet after the said election as a measure to review the direction of the Diet’s activities at the time of the election.

4. Whether or not the disparity is in an unconstitutional state

The Provisions on the Apportionment of Seats of the 2015 Revision Act, which was enacted after the previous election and under which the Election was held, stipulated reapportionment of ten seats among some constituencies, including a merger of four prefectures into two constituencies. As a result of this revision, the maximum disparity between constituencies at the time of the Election became 1:3.08, and the provision of Article 7 of the Supplementary Provisions of the act is presenting the Diet’s direction in the future by stating that, in light of the House of Councillors’ way of being and taking into consideration correction of the disparity between constituencies in terms of the population per member, etc., review will be made continuously, definitely working toward a conclusion on the fundamental reform of the election system in preparation for an ordinary election scheduled in 2019.

The 2012 Grand Bench Judgment pointed out that it has become

extremely difficult to answer the requirement of equality in the value of votes, while maintaining the mechanism designed to use a prefecture as a unit of constituency. The judgment then stated that

the disparity in the value of votes in the election held without changing the mechanism was in an unconstitutional state, and that legislative measures to reform the current system of setting the number of seats for each prefecture-based constituency should be taken.

The 2014 Grand Bench Judgment held that the provisions of the apportionment of seats by the 2012 Revision Act, which was enacted after the 2012 Grand Bench Judgment and under which the 2013 Election was held, maintained the mechanism of the system, and therefore was insufficient to correct the unconstitutional state.

In light of the above, in determining whether or not the disparity in the value of votes in the Election has been removed from its unconstitutional state by the Provisions of the Apportionment of Seats, it is important to consider whether or not the legislative measures to reform the current system were taken, as referred in the 2012 Grand Bench Judgment.

The Provisions of the Apportionment of Seats by the 2015 Revision Act reformed the previous system of using a prefecture as a unit for all constituencies, by merging constituencies. In substance, this reform only transformed four constituencies consisting of four prefectures into two constituencies consisting of four prefectures by conducting two mergers of constituencies, which combine two prefectures into one constituency, and maintains the system of using a prefecture as a unit of constituency. As it is shown by the facts that, based on the population counted by the population census conducted in 2010, which was referred to at the time of prescribing the Provisions of the Apportionment of Seats, the maximum disparity was 1:2.97, and became 1:3.08 at the time of the Election, it is hard to say that the Provisions of the Apportionment of Seats are “reasonable” legislative measures to deal with the disparity in the value of votes in response to population migration.

The disparity in the value of votes shown by the maximum disparity of 1:3.08 at the time of the Election has surely become lower compared to the maximum disparities at the time of previous elections. However, this result is derived from the provisions of the apportionment of seats that maintain the system of using a prefecture as a basic unit of constituency, and there is a fear that the disparity will expand further if no other measures are taken. The supplementary provision of the 2015 Revision Act states that, taking into consideration correction of the disparity, etc., review will be made continuously, definitely working toward a conclusion on the fundamental reform of the election system. This fact indicates that

the 2015 Revision Act itself needs further review and is insufficient to correct the unconstitutional state.

Therefore, it should be held that the disparity in the value of votes in the Election was not removed from its unconstitutional state even after the 2015 Revision.

5. Whether or not the failure is within the bounds of the Diet's discretion

Previous judgments of the Grand Bench pointed out that the provisions of the apportionment of seats before the 2015 Revision had used a prefecture as a unit for all of the constituencies and saw it as a problem that this point had not been corrected in any way through legal revisions even after this court pointed it out as the cause of the unconstitutional state. In connection with this, with regard to the criterion for determination of [ii], whether the failure is within the bounds of the Diet's discretion, as stated in Section 3 above, the judgments of the Grand Bench focused on whether or not the period after a judgment of this court is rendered and until an

the period after a judgment of this court is rendered and until an election is held (without a legal revision) is enough for legal revision. The present suit, however, offers different circumstances.

The provision of Article 7 of the Supplementary Provisions of the 2015 Revision Act states that taking into consideration correction of the disparity, etc., review will be made, definitely working toward a conclusion on the fundamental reform of the election system in preparation for an ordinary election scheduled in 2019. This means that the fundamental reform of the election system to correct the disparity will be conducted continuously after the revision this time and will be completed by the time of the ordinary election scheduled in 2019 (hereinafter referred to as the “2019 Election”).

The 2015 Revision reformed the previous election system of using a prefecture as a constituency, by conducting two mergers. Even though it conducted only two mergers, the revision represented the commencement of fundamental reform of the election system. To resolve the issue of fundamentally reforming the system of using a prefecture as a constituency in response to the requirement of equality in the value of votes, the Diet demonstrated its stance in the 2015 Revision indicating that it will conduct the fundamental reform in two steps—part of it at the time of the 2015 Revision, and completing it by a revision in preparation for the next election, namely, the 2019 Election. Given the difficulty of the issue of fundamental reform of the system, the Diet’s stance in conducting part of the revision by the time of the Election and definitely working toward a conclusion on the fundamental reform of the election system by the time of the next election, cannot be held to have gone beyond the bounds of the Diet's discretion.

Regarding the fundamental reform of the system in preparation for the 2019 Election, the 2015 Revision Act states in its supplementary provision, even though it is talking about the future, that the Diet will continue “definitely working toward a conclusion.” The supplementary provision of the 2012 Revision Act before the 2015 Revision Act also stated, although the word “definitely” was not used, that reviews will be conducted continuously, working toward a conclusion on the fundamental reform of the election system in preparation for the next ordinary election scheduled in 2016. In spite of this, fundamental reform was not conducted. In light of these facts, there may be an opinion that fundamental reform of the election system may not be conducted by the time of the 2019 Election. However, the judicial branch should not evaluate the Diet’s ability or will for specific legislation in the future, from outside of the Diet. As long as the supplementary provision of the 2015 Revision Act includes the phrase “definitely working towards a conclusion,” the Diet has in effect actually promised to conduct said fundamental reform.

The opinion by Justice HAYASHI Keiichi is as follows.

I am in agreement with the majority opinion concluding that the Provisions on the Apportionment of Seats are constitutional. However, I dissent from the majority opinion with regard to several basic points, so I would like to state my opinion simply as follows.

1. With regard to the Provisions on the Apportionment of Seats after the 2015 Revision, the majority opinion states that the unconstitutional state has been overcome because the maximum disparity between constituencies that used to be around 1:5 over a long period of time was reduced to around 1:3, and because of the provision on further fundamental reform in the Supplementary Provisions of the 2015 Revision Act. Given the "one person, one vote" principle and the principle of equality in the value of votes, however, I cannot fully concur with the majority opinion because I hesitate to make a definitive statement that the state of the value of votes casted by voters in one constituency which is about three times higher than another constituency is constitutional.

higher than another constituency is constitutional.

Still, as pointed out in the majority opinion, the 2015 Revision Act reduced the maximum disparity that was previously around 1:5 over a

long period of time to around 1:3 by introducing an unprecedented method that merges some constituencies, and the Diet's efforts that can be seen in the 2015 Revision Act, including the supplementary provision, should be highly appreciated. Under the basic framework for determination of the constitutionality of the provisions on the apportionment of seats presented by the 1983 Grand Bench Judgment, therefore, I determined, in light of the Diet's efforts mentioned above and the difficulties of building a consensus toward substantially reducing the disparity, that the failure of the Diet to correct the existence of extreme inequality to such an extent that it could raise questions of unconstitutionality during the period after the time of rendering the 2012 Grand Bench Judgment when the Diet became able to recognize the existence of extreme inequality and until the time of the Election, is within the bounds of the Diet's discretion. For this reason, I am in agreement with the majority opinion concluding that the Provisions on the Apportionment of Seats cannot be held to have been unconstitutional at the time of the Election.

2. As the basis for my opinion above, I would like to state my view on the principle of equality in the value of votes.

(1) The "one person, one vote" principle and the principle of equality in the value of votes in electing representatives for all the people are the foundation of the democratic system, in which citizens' decision-making is conducted through voting. Even though the phrase, "equality in the value of votes," is not clearly specified in the Constitution, equality in the value of votes is surely a principle directly derived from democracy and the principle of equality. With regard to an international view, "universal and equal suffrage" is stated as the right of every citizen in the International Covenant on Civil and Political Rights, (what is called the B Covenant) which was ratified by Japan in 1979 and is construed to have priority over domestic laws. We can see from this that the principle of equality is treated as an important principle paired with universal suffrage. In addition, for example, the United Kingdom, which has faced comparatively great maximum disparity between constituencies so far, stipulated in the Parliamentary Voting System and Constituencies Act 2011, even though the act has not been put into effect, that the electorate of almost all constituencies for elections for the House of Commons shall be no less than 95% and no more than 105% of the national average (i.e., only a maximum disparity of around 1:1.1 is allowed). As seen from the above, pursuit of equality in the value of votes is an international standard for democracy and can be treated as an international trend.

(2) Under the principle of equality, there is a question of to what extent should the disparity be corrected if the maximum disparity of around 1:3 cannot be held as constitutional. In principle, in light of the "one person, one vote" principle, the maximum disparity should be as close to around 1:1 as possible; however, this is just the ideal. As practical matters, if an election system using constituencies is chosen, it is difficult to realize the strict disparity of 1:1, and it is not appropriate to conduct excessively artificial demarcating in order to realize 1:1. In spite of this, however, the situation of "one person, two votes" cannot be allowed as a matter of principle in general.

3. The majority opinion points out again that, in view of having the House of Councillors perform unique functions, the prefecture-based election system for the House of Councillors itself is within the bounds of the Diet's reasonable discretion. The supplementary provision of the 2015 Revision Act states that a review of the election system will be made "in light of the House of Councillors' way of being." In connection with these facts, I would like to add the following remarks.

Certainly, the Constitution adopts a bicameral system, and therefore, in light of the purpose of the Constitution adopting the system and in view of having the House of Councillors perform unique functions, it is reasonable to a certain extent to use a prefecture as a unit of constituency. I do not dissent from the majority opinion that the continuous use of a prefecture as a unit itself is not unreasonable even though the 2012 Grand Bench Judgment and the 2014 Grand Bench Judgment held that the use of a prefecture as a unit of constituency for members of the House of Councillors is not required by the Constitution. However, since the use of such unit is not required by the Constitution, I construe that, given that the Constitution stipulates as a fundamental principle that members of the House of Councillors are elected as “representatives of all the people” as referred to in Article 43 of the Constitution as in the case with members of the House of Representatives, the use of a prefecture as a unit of constituency must be in harmony with the constitutional principle of equality in the value of votes among all the people, which means that the use must not significantly impair the principle (or if it is deemed as a process, the use must head toward further realization of equality in the value of votes).

4. While I am in agreement with the majority opinion in conclusion, I have slightly different views regarding a few points as seen from the above. At the same time, I expect the Diet to continue taking the principle of equality in the value of votes seriously and to continue recent efforts to reduce the disparity through conducting further

reviews of the fundamental reform promised through law in preparation for the ordinary election scheduled in 2019, not satisfying with the current situation. With regard to this point, I think I take the same view as the majority opinion.

The dissenting opinion by Justice ONIMARU Kaoru is as follows.

Dissenting from the majority opinion, I consider that the Provisions on the Apportionment of Seats are unconstitutional, and therefore the Election held under the provisions is also illegal.

1. For elections of members of the House of Councillors, as in the case of elections of members of the House of Representatives, I construe that the Constitution basically guarantees equality in the value of votes of the people at a ratio of as close to 1:1 as possible. I stated the grounds for the above construction in Sections 1 and 2 of my dissenting opinion attached to the 2014 Grand Bench Judgment, and so I will cite them. The House of Councillors, as well as the House of Representatives, is contemplated under the Constitution to be an organ that properly reflects the people's will in national politics as the highest organ of state power, and therefore, being an election for members of the House of Councillors to be elected by constituency cannot constitute a reason to draw apart from equality in the value of votes close to 1:1.

2. A bill to partially revise the Public Offices Election Act proposing reapportionment of ten seats among some constituencies, including the merger of four prefectures into two constituencies, was approved and enacted prior to the Election, and the Election was held under this revision act. As a result, the maximum disparity in the value of votes was reduced to 1:3.08 at the time of the Election. As it was the first time for constituencies to be partially merged for an election for members of the House of Councillors to be elected by constituency, and the maximum disparity in the value of votes was significantly reduced, we can appreciate the direction of the Diet’s efforts regarding the value of votes.

3. However, with regard to the maximum disparity in the value of votes at a ratio of 1:3.08 at the time of the Election, the figure itself is hard to be recognized as having realized equality in the value of votes.

Furthermore, upon comprehensive consideration of the following circumstances, I consider that the Provisions on the Apportionment of Seats indicate the existence of extreme inequality to such an extent

that it could raise a question of unconstitutionality.

(1) Certainly, each prefecture can be defined as a political unit, and the 2012 Grand Bench Judgment and the 2014 Grand Bench Judgment held that it should not be construed that the use of a prefecture as a unit of constituency is completely not allowed.

However, when the number of prefectures and the population in each prefecture are compared to the number of members to be elected in an election, it is obvious that it has become almost impossible to pursue equality in the value of votes at a ratio close to 1:1 while adopting the mechanism of apportioning an even number of seats to each constituency for election for members of the House of Councillors to be elected by constituency in accordance with the requirement of the Constitution to hold elections for half elected members of each constituency, and maintaining the system of continuously using a prefecture as a unit of constituency in general, as in the case of the Provisions on the Apportionment of Seats. It is construed that the Diet recognized these facts and therefore established the supplementary provision in the 2012 Revision Act, which stated that review will be made continuously, working toward a conclusion on the fundamental reform of the election system in preparation for an ordinary election scheduled in 2016.

(2) On the other hand, a series of Grand Bench Judgments have pointed out that equality in the value of votes should be realized in harmony with other policy purposes and grounds that the Diet is authorized to consider. Therefore, when the Diet cannot realize equality in the value of votes of voters, which is guaranteed under the Constitution, in revising an election system or the provisions on the apportionment of seats, policy purposes and grounds that lead to such a conclusion are required to be those that the Diet is authorized to consider and that are in harmony with the requirement of equality in the value of votes.

For these reasons, with regard to the fact that the Provisions on the Apportionment of Seats are creating disparity in the value of votes at around 1:3, I would like to examine what kind of policy purposes and grounds existed and whether equality in the value of votes is realized in harmony with other policy purposes and grounds that the Diet is authorized to consider.

(3) The Diet has not represented any policy purpose of or grounds for the maximum disparity in the value of votes being 1:3 in the Election held under the Provisions on the Apportionment of Seats. From the following facts, however, it can be seen that the policy purpose or the

grounds that the Diet had were to maintain prefecture-based constituencies and minimize impairment of this basis: the fact that a prefecture has been used as a unit of constituency throughout the period from when part of members of the House of Councillors were elected locally in the past to when part of members of the House of Councillors were elected by constituency in the previous election; the fact that the maximum disparity in the value of votes became around 1:3 because the merger in preparation for the Election was conducted only for four prefectures, each of which has a small population and was suitable for a merger with its adjacent prefecture also having a small population, and such merger could not be conducted for some prefectures, each of which has such small population per member as the four prefectures but has no less-populated adjacent prefecture that is suitable for a merger; and the fact that, even though several proposals were submitted to the Election System Consultation Meeting that did not stick to the use of a prefecture as a unit of constituency, making the maximum disparity in the value of votes into slightly more than 1:1 but not more than 1:2, the Diet had not adopted

these proposals until the time of the Election.

(4) On the other hand, this court has repeatedly requested the Diet to review the use of a prefecture as a unit of constituency in a reasonable way, as held in the 2012 Grand Bench Judgment and also in the 2014 Grand Bench Judgment that the current mechanism of the election system should be reformed, such as making a reasonable change to the current system of setting the number of seats for each prefecture-based constituency. Therefore, as discussed in (3) above, the Diet's decision to stick to the use of a prefecture as a unit of constituency as a policy purpose or grounds in developing the 2015 Revision Act and establishing the Provisions on the Apportionment of Seats does not conform to the judgment held by this court.

As seen from the above, in light of the relationship between the legislative power and the judicial power as contemplated under the constitutional order, the Diet should have reformed the election system for members of the House of Councillors, etc. for realization of equality in the value of votes, such as reviewing the mechanism of setting a prefecture as a unit of constituency, in accordance with the abovementioned judgment of this court. It can be seen, however, that the Diet did not correct the disparity in the value of votes with a policy purpose or on the grounds of using a prefecture as a unit of constituency, which should have been reviewed in a reasonable manner. Such policy purpose or grounds cannot be accepted as those that the Diet is authorized to consider and is not in harmony with the requirement of equality in the value of votes.

4. As the Diet was pointed out specifically as of October 17, 2012, when the 2012 Grand Bench Judgment was rendered, that legislative measures to correct the existence of inequality in the value of votes are required to be taken, the Diet recognized its obligation to revise the Public Offices Election Act and other provisions on the same day at the latest. Thereafter, about three years and nine months had elapsed until the Election was held. The Diet should have been able to complete the process and work for reviewing to reform the election system and revising the Act during the elapsed time. Therefore, the failure of the Diet to correct the unconstitutional state until the time of the Election is inevitably held to have gone beyond the bounds of exercise of the Diet's discretion, and the Provisions on the Apportionment of Seats were unconstitutional at the time of the Election.

5. As a conclusion for the foregoing, it may be possible to invalidate the Election. Given the past background that the fundamental reform of the election system was not realized even though a supplementary provision in the previous revision act to partially revise the Public Offices Election Act stated that review will be made continuously, working toward a conclusion on the fundamental reform of the election system in preparation for the next election, and the fact that, even if we conclude that the Election should be invalidated, public interest will not immediately be harmed significantly because the conclusion will simply lead to a loss of seats of members who were elected through the Election and will not lead to loss of the function of the House of Councillors, it is certainly able to conclude that the Election as a whole should be invalidated.

Article 7 of the Supplementary Provisions of the 2015 Revision Act, however, represents a great deal stronger will than those represented in the supplementary provisions of previous revision acts to partially revise the Public Offices Election Act, by stating that "in light of the House of Councillors' way of being and taking into consideration correction of the disparity between constituencies in terms of the population per member, etc., review will be made continuously, definitely working toward a conclusion on the fundamental reform of the election system in preparation for an ordinary election scheduled in 2019." As seen from this, it is highly expected that the Diet's efforts to correct the unconstitutional state will continue, and the fundamental reform will be definitely conducted based on the

principle of equality in the value of votes by the time of the ordinary election for members of the House of Councillors scheduled in 2019. This being true, the Election should be held unconstitutional, but it is appropriate for the judiciary, in light of the relationship between the legislative power and the judicial power as contemplated under the

Constitution, not to immediately conclude that the Election should be invalidated, but to examine first the results of the correction work with regard to which the Diet itself has promised to definitely work toward a conclusion by 2019.

For the reasons stated above, in my opinion, the Provisions on the Apportionment of Seats are unconstitutional, but this court should dismiss the claim made by the appellants under the doctrine of judgment in consideration of circumstances for the public interest, and declare that the Election is illegal.

The dissenting opinion by Justice YAMAMOTO Tsuneyuki is as follows.

1. Equality in the value of votes is the sole and absolute criterion

The Constitution of Japan, in its Preamble, provides that: "We, the Japanese people, acting through our duly elected representatives in the National Diet, [⋯], do proclaim that sovereign power resides with the people [⋯] 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." Thus, it declares the principle of sovereignty of the people under a representative democracy. Among the three organs vested with state power, it designates the Diet as the highest organ of state power and the sole law-making organ of the State (Article 41).

Therefore, members of the House of Representatives and the House of Councillors who constitute the Diet, the core of a democratic State, must be elected by a literally fair and impartial election. This logic is represented in Article 43, paragraph (1) of the Constitution, which provides, "Both Houses shall consist of elected members, representative of all the people." Of these elements, "fair election," which is in dispute in the present suit, is an essential constitutional requirement. This is because unless every one of the people can exercise their right to vote equally, the principle of sovereignty of the people underpinned by a representative democracy, which is advocated in the Preamble of the Constitution, would turn out to be pie in the sky. For example, in a national election, if the value of one vote in a particular area is a few times larger than the value of one vote in other areas, the people in the area with votes carrying a larger value would have greater political influence than those in areas with votes carrying a smaller value, based on such difference in value,

which is self-evident. Under such circumstances, despite the declaration that sovereignty resides with the people, government established in this manner can never be described as one "the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people."

In this sense, when assessing the provisions on the demarcation of constituencies and apportionment of seats for a national election, whether or not equality in the value of one vote based on the principle of equality under the law (Article 14) is pursued would be the sole and absolute criterion.

2. An election system causing a level of disparity larger than 20 percent is unconstitutional and void

The majority opinion states as follows: "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

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." It may be possible to adopt the view that the Diet is vested with broad discretion and permit the disparity in the value of one vote at a level of around 1:2 for elections of members of the House of Representatives. However, in light of the true nature of sovereignty of the people and representative democracy, I consider that equality in the value of one vote must be respected first and foremost in every national election as the sole and absolute criterion that takes precedence over everything. Only when this is accomplished can the representative democracy of Japan acquire legitimacy, being equally supported by all the people.

Another view is that in elections of members of the House of Representatives, the disparity in the value of one vote at a level of around 1:2 is permissible and if the disparity is kept at such level, equality under the law can be considered to be secured. I cannot agree with this view. When it comes to the case where the disparity in the value of one vote is 1:2, if such disparity can be generally observed as leveling off between areas or constituencies through several elections, e.g. the value of one vote in a particular area or constituency in an election is two times larger, but it becomes one half as large in the next election as compared to such value in other areas or constituencies, the situation could narrowly be described as being in conformity with the requirement of equality under the law. However, looking at the attempts made thus far in demarcating

constituencies, they have almost always failed to reduce the number of seats in time with regard to areas that experience population outflow, due to which people in these areas always have votes of greater value, while failing to increase the number of seats in time with regard to areas that experience population inflow, due to which people in these areas always have votes of lesser value. This means that people in the latter areas always have less chance to have their voices reflected in national politics, suggesting that a state that is not in conformity with the true nature of a representative democracy continues to exist.

Therefore, I consider that in order to accomplish equality under the law under the current election system for national elections, the principle must be that there will be no disparity in the value of one vote, that is, in comparison between all constituencies, the value of a vote will be always 1.0. I see no harm in regarding this principle as the sole and absolute criterion for national elections. I admit that it may be inevitable that the disparity in the value of votes at a level of around 10 to 20 percent emerges depending on the demarcation of constituencies due to rapid population migration or certain technical reasons. Yet, even in such cases, the permissible level of disparity should be about 20 percent at a maximum, and I consider that an election system that would cause a level of disparity larger than this in the value of one vote is in violation of the provisions of equality under the law and therefore unconstitutional and void.

3. An equal election system is also required for the House of Councillors

On the other hand, in light of the specific characteristics of the House of Councillors for which an election is scheduled every three years for half its members, as compared to the House of Representatives subject to dissolution by the constitutional authority of the Cabinet, it may not be completely impossible to tolerate a certain level of disparity in the value of one vote in elections of members of the House of Councillors as an inevitable consequence. However, political parties play an increasingly active role in the House of Councillors, as in the House of Representatives. Moreover, as is publicly known, the Diet was "twisted" for a while, that is, the majority parties in the House of Representatives did not hold a majority in the House of Councillors, and during the period when this phenomenon continued,

Councillors, and during the period when this phenomenon continued, despite the constitutionally guaranteed superiority for the House of Representatives over the House of Councillors, in reality, the House of Councillors virtually held the key in national politics. Through such experience, the significance of the House of Councillors in national politics has been recognized anew. This being true, as in the case of the House of Representatives, the election system that provides the basis for the House of Councillors should also be designed as one befitted to a representative democracy, causing no disparity in the value of one vote.

4. Transitional measures in the case when an election is invalidated

(1) The doctrine of judgment in consideration of circumstances for the public interest has no expressed legal grounds

As mentioned earlier, I consider that the value of one vote must be 1.0 in principle, and a disparity at a level of about 20 percent may be inevitable, but if any higher disparity emerges, the election should be invalidated. In that case, there are two major issues to reflect on: [i] the effect of any decision, etc. made by the House of Representatives or the House of Councillors whose members are elected in an election that is invalidated by a court judgment; and [ii] the status of Diet members elected in an election that is invalidated by a court judgment.

There is a theory for handling these issues in accordance with the doctrine of judgment in consideration of circumstances for the public interest: "even when an election is held to be illegal due to the fact that it was held under the unconstitutional provisions on the demarcation of constituencies and apportionment of seats under the Public Offices Election Act, if there are such circumstances indicated in the judgment due to which the unconstitutional state would not be immediately corrected by rendering a judgment to invalidate the election on the grounds of its illegality, but rather the invalidation of the election could lead to a consequence that is not necessarily in conformity to what is expected by the Constitution, the court should, in accordance with the general rule of law contained in the basis of Article 31, paragraph (1) of the Administrative Case Litigation Act, dismiss claims seeking a judgment to invalidate the election, and declare the illegality of the election in the main text of the judgment" (the summary of 1974 (Gyo-Tsu) No. 75, judgment of the Grand Bench of the Supreme Court of April 14, 1976, Minshu Vol. 30, No. 3, at 223). However, in a suit challenging the constitutionality of a national election, which is the most important system that supports representative democracy, I very much doubt if the court, while finding the election to be illegal, would be permitted to refrain from invalidating it and only declare its illegality, without any legal grounds to do so. In fact, looking back at the developments to date, even after the several legal revisions and discussions at the Diet concerning the demarcation of constituencies and apportionment of seats, equality in the value of one vote, which is the core principle of a representative democracy, has not been completely accomplished, and the process for improving such a situation has made little progress. In view of this, the court, as the organ with a mission to ensure the constitutionality of an election system, must invalidate an election if it clearly finds it to be unconstitutional, and I consider that the court, at the same time, has the authority to transitionally decide how to deal with issues that may arise from invalidating the election.

(2) The effect of any decisions, etc. that have already been made

For example, as for the first of the two issues mentioned above, i.e. the "effect of any decision, etc. made by the House of Representatives or the House of Councillors whose members are elected in an election that is invalidated by a court judgment," since a court judgment to invalidate an election only has a prospective effect and is not effective retrospectively, it goes without saying that there is no room for such judgment to have any influence on a decision, etc.

made by the Diet before the judgment is rendered, and such decision, as a matter of course, continues to be effective.

In addition, even after a court judgment to invalidate an election is rendered, including the period until a new election system designed to accomplish equality in the value of one vote is established in response to said judgment and the House of Councillors or the House of Representatives is formed with members elected in an election held under the new election system, each House composed of a certain number of members who continue to hold office will be able to make an effective decision, etc., as explained later. In this respect, there is no possibility of turmoil in national politics. Furthermore, even in such a case where, immediately after a judgment to invalidate an election is rendered, the House, composed of the same members as those who held office before said judgment, makes any decision, etc., such decision, etc. should be treated as effective in order to avoid turmoil in national politics.

(3) The status of Diet members elected in an election that is invalidated

As for the second of the two issues mentioned above, i.e. the "status of Diet members elected in an election that is invalidated by a court judgment," in the case of the House of Councillors, if the legality of the election is challenged in a suit with respect to all constituencies, as is the present suit, it should be construed that all of the members who were elected from the constituencies in which the election was invalidated due to the value of one vote (represented by the number calculated by dividing the number of eligible voters per member in each constituency by the national average of eligible voters obtained by dividing the total number of eligible voters in all constituencies by the total number of seats apportioned thereto; the same applies hereinafter) falling below 0.8 would lose their status as members of the House. This is because it may be impermissible in the first place to enable members elected from constituencies where the value of one vote is smaller than the permissible level of 0.8 to maintain their status and join business at the plenary sessions or committees of the Diet together with members elected from other constituencies. As for members elected from other constituencies, the invalidation of the election does not affect their status as members and they may continue to be members of the House of Councillors until the expiration of their term of office. Since an election takes place for half the members of the House of Councillors every three years (Article 46 of the Constitution), this approach will make it possible for the House of Councillors to continue its activities and also to hold an emergency session when necessary.

(Note 1) According to the estimate based on the electoral register (including overseas voters) as of September 2, 2016, among the 146 members of the House of Councillors to be elected by constituency, some 38 members would be elected from the constituencies where the value of one vote falls below 0.8 (if this discussion is limited to the estimate regarding the ordinary election held on July 10, 2016 for members of the House of Councillors to be elected by constituency, among the 73 members of the House of Councillors to be elected by constituency, some 19 members were elected from the constituencies where the value of one vote fell below 0.8), and even if these members lose their status and leave the House, it would have no particular influence on the composition of members of the House.

(Note 2) On the other hand, in the case of the House of Representatives, if the court renders a judgment to invalidate an election, among the members elected from the constituencies subject to the suit, all the members elected from the constituencies where the value of one vote falls below 0.8 would lose their status, whereas the members elected from other constituencies would maintain their status as members and may continue to be members of the House of Representatives until the expiration of their term of office or the dissolution of the House, despite the invalidation of the election.

	According to this approach, the House of Representatives would transitionally be composed of members elected from the constituencies where the value of one vote is 0.8 or larger, combined with members elected from the constituencies excluded from the scope of the suit if any constituencies are thus excluded. The House composed of these members would be required to make a law to specify a new method for the demarcation of constituencies and thereby accomplish equality in the value of one vote. If it is impossible for the House to be comprised of these members, an emergency session of the House of Councillors should be held at the request of the Cabinet, as in the case where the House of Representatives is dissolved (Article 54 of the Constitution), and at the emergency session, the House of Councillors should make a law to specify a new method for the demarcation of constituencies, under which the next election of members of the House of Representatives should be held. 5. An election system designed to accomplish equality in the value of one vote How to demarcate constituencies in order to accomplish equality in the value of one vote should of course be fully discussed at the Diet when making a law to specify a new method of demarcation of constituencies or apportionment of seats. There is concern that it would be extremely difficult or practically impossible to formulate a policy for demarcation as long as a prefecture or its subdivided area, i.e. a municipality or any other administrative district, is used as a basic unit of the constituency. The biggest obstacle is a prefecture, and its subdivided area, i.e. a municipality or any other administrative district, can also be a significant obstacle. Therefore, these types of jurisdiction or subdivision should no longer be used as a basic unit of constituency. Rather, constituencies should be demarcated by further dividing these subdivisions into, for example, areas set up for each polling station, or conversely, by treating the whole area of the country as a single constituency or dividing it into several large blocks and setting the number of seats to be apportioned. I consider that equality in the value of one vote can only be accomplished by adopting one of these two methods.
Presiding Judge	Justice TERADA Itsuro Justice OKABE Kiyoko Justice ONUKI Yoshinobu Justice ONIMARU Kaoru Justice KIUCHI Michiyoshi Justice YAMAMOTO Tsuneyuki Justice YAMASAKI Toshimitsu Justice IKEGAMI Masayuki Justice OTANI Naoto Justice KOIKE Hiroshi Justice KIZAWA Katsuyuki Justice KANNO Hiroyuki Justice YAMAGUCHI Atsushi Justice TOKURA Saburo

	Justice HAYASHI Keiichi

(This translation is provisional and subject to revision.)

About the Supreme Court
- Access to the Supreme Court
- Organization Chart of the Supreme Court
- Justices of the supreme court
- Topics

The Training and Research Institute for Court Officials

Judicial System in Japan

Judgments of the Supreme Court

Supreme Court Library

Publications
- Budgets

The Legal Training and Research Institute of Japan

Supreme Court of Japan
4-2 Hayabusa-cho, Chiyoda-ku, Tokyo 102-8651 JAPAN
Phone: (81)-(0)3-3264-8111