THE REAPPORTIONMENT CASES IN JAPAN: CONSTITUTIONAL LAW, POLITICS, AND THE JAPANESE SUPREME COURT*

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INTRODUCTION

Faced with a gross malapportionment and a failure of the legislature to make adequate reapportionment, the American courts decided to intervene. Insisting on the equality in worth or effectiveness of each vote, they began to require the now famous one-man-one-vote principle under the name of the Constitution. The Japanese courts, furnished with a power of judicial review similar to what is exercised by the American courts and confronted with the same problem, decided to follow this American track. Nevertheless, the Japanese courts have reached a conclusion quite different from the one the American counterparts have reached.

The purpose of this Article is to examine these reapportionment cases in Japan and to consider what have caused these differences. In Chapter I this Article will explain how the Japanese Constitution guarantees the right to vote and how that right is actually effectuated in the current election system. In Chapter II it will examine the reapportionment cases in Japan. And finally, in Chapter III, this Article will attempt to consider the differences between the Japanese and American reapportionment cases. Before turning to the examination of the Japanese reapportionment cases, a brief survey of the American reapportionment cases is offered in prelude.

PRELUDE — THE REAPPORTIONMENT CASES IN THE UNITED STATES

A. The Constitution, the Right to Vote, and the Election System

Even in the United States, the right to vote was not accorded a special judicial solicitude from the start. The original Constitution itself did not explicitly provide for the right to vote. It only stipulated that the House of Representatives "shall be composed of Members chosen every second Year by the People of the several States" (Article I, Section 2) and that "Representatives... shall be apportioned among the several States... according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons... three fifth of all other Persons." As to the Senate, initially two Senators were chosen by the legislature of each state (Article I, Section 3). And the Constitution relegated the election matters primarily to each state by stating that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof" (Article I, Section 4). With respect to state

legislators, the original Constitution nowhere required even the popular election, except in an ambiguous mandate that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government" (Article IV, Section 4).

It was only after the ratifications of the Civil War Amendments that the textual basis for a later development was firmly established. The Fourteenth Amendment prohibited the states from denying to any person the equal protection of the laws. It also changed apportionment methods by providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." The Fifteenth Amendment then declared that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Thereafter the Seventeenth Amendment altered the method for electing Senators by requiring the election by the people and finally the Nineteenth Amendment prohibited a denial or abridgment of the right to vote on account of sex.

It is hence abundantly clear that no discrimination based on above stated grounds is permitted regarding the right to vote. Yet the United States Constitution lacks any textual provision which guarantees the right to vote itself. As a result, the Supreme Court intimated that the Constitution did not confer upon anybody the right of suffrage.[1] In other words, the right to vote was not regarded as an individual constitutional right.[2] The history of the extension of the right to vote was hence accomplished by constitutional amendments and by congressional legislation such as the Voting Rights Act, and not by the courts. Moreover, its overriding concern focused on the extension of franchise, not on the equal worth or effectiveness of each vote.[3]

B. The Reapportionment Cases in the United States

At first, the United States Supreme Court was reluctant to intervene into malapportionment. In a highly divided and ambiguous decision in *Colegrove v. Green*,[4] it suggested that apportionment was relegated exclusively to the legislature. The Court thereafter consistently dismissed any challenges to malapportionment

1. *See, e.g.*, Minor v. Happersett, 21 Wall. 162, 22 L.E. 627 (1875).

2. *See* Kirby, Jr, *The Constitutional Right to Vote*, 45 N.Y.U.L. REV. 995, 996-1003 (1970); Padilla & Gross, *Judicial Power and Reapportionment*, 15 IDAHO L. REV. 263 (1979).

3. *See* Casper, *Apportionment and the Right to Vote: Standard of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 4-5.

4. 328 U.S. 549 (1946).

and affirmed lower court decisions which had rejected these claims, thus implying that apportionment was a non-justiciable "political question."[5] In 1962, however, the Supreme Court decided to set aside these jurisdictional barriers. In the landmark decision of *Baker v. Carr*,[6] the Court for the first time admitted that the federal courts had proper subject matter jurisdiction over a reapportionment suit and that plaintiffs challenging the constitutionality of malapportionment had standing. Moreover, it rejected the argument that apportionment was a non-justiciable "political question" and reversed in effect its earlier position.

Once the jurisdictional barriers had been set aside, it was not unpredictable that the Court began to redress existing gross inequality among the districts. Only one year later, the Court, in *Gray v. Sanders*,[7] struck down the county unit system in a primary election for state-wide offices as unconstitutional because it was a weighted voting system whereby rural votes were weighted heavier than urban votes. The Court stated the foundation of its decision and hence its later reapportionment decisions as follows:

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.[8]

In *Wesberry v. Sanders*,[9] the Court applied this same philosophy to congressional elections. The Court proclaimed that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws.... Other rights, even the most basic, are illusory if the right to vote is undermined."[10] "To say that a vote is worth more in one district than in another," the Court continued, referring to Article I, Section 2, "would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People'...."[11] Thus it concluded that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[12]

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5. *See, e.g.*, Cook v. Fortson, 329 U.S. 675 (1946). *See also* MacDougall v. Green, 335 U.S. 281 (1948). However, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court acknowledged justiciability of a challenge to racial gerrymandering, relying upon the Fifteenth Amendment.

6. 369 U.S. 186 (1962).

7. 372 U.S. 368 (1963).

8. *Id.* at 381.

9. 376 U.S. 1 (1964).

10. *Id.* at 17.

11. *Id.* at 8.

12. *Id.* at 7-8.

The Supreme Court reiterated the same one-man-one-vote principle in *Reynolds v. Sims*[13] for state legislative apportionment in the name of the Equal Protection Clause of the Fourteenth Amendment. There, the Court established that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[14] The Court proclaimed:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[15]

Insisting that "each citizen have an equally effective voice in the election of members of his state legislature,"[16] the Court held that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights."[17] The Court then turned to specific criteria to be employed. In *Reynolds*, the Court, while conceding that "[m]athematical exactness or precision is hardly a workable constitutional requirement," declared that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[18] But it indicated a willingness to tolerate more departures from the one-man-one-vote principle with respect to state legislative apportionment:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[19]

Thus, the Supreme Court made it clear that the court would employ two different criteria for congressional apportionment and state legislative apportionment.

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13. 377 U.S. 533 (1964).
14. *Id.* at 568.
15. *Id.* at 562.
16. *Id.* at 565.
17. *Id.* at 566.
18. *Id.* at 577.
19. *Id.* at 579.

The Court has continued to apply the rigid formula derived from Article I, Section 2, in congressional apportionment. In *Wesberry*, a maximum population variance of roughly 1-to-3 was held unconstitutional. In *Kirkpatrick v. Preisler*,[20] the Court rejected a state's argument that "there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard."[21] Insisting that this standard "requires that the State make a good-faith effort to achieve precise mathematical equality,"[22] it held a maximum population variance of 5.97%/ 1-to-1.06 (total percentage deviation/ maximum population-variance ratio) unconstitutional. The Court further invalidated maximum population variances of 13.1%/ 1-to-1.14[23] and 4.13%/ 1-to-1.04.[24] The Court demands "absolute equality."[25] In 1983, the Court in *Karcher v. Daggett*[26] upheld a district court decision which had found a maximum population variance of 0.6984%/ 1-to-1.007 not to be unavoidable despite a good-faith effort to achieve absolute equality.

Although the Court is not so demanding with respect to state legislative apportionment, it still requires relatively strict population equality under the Equal Protection Clause of the Fourteenth Amendment. In *Reynolds*, maximum population variances of 1-to-41 for the election of Senators and 1-to-16 for the election of Representatives were held to be unconstitutional. Yet the more important lesson of this decision was that the Court took quite a narrow view of permissible justifications for deviations and that it insisted on the population equality principle for both houses of a bicameral state legislature. On the same day, the Court also found several other state legislative malapportionments to be unconstitutional: maximum population variances of 1-to-2.4 for the election of Senators and 1-to-11.9 for the election of Assembly members,[27] maximum population variances of 1-to-32 for the election of Senators and 1-to-12 for the election of Delegates,[28] maximum population variances of 1-to-2.65 for the election of Senators and 1-to-4.36 for the election of Delegates,[29] maximum population variances of 1-to-15 for the election of Senators and 1-to-12 for the election of

20. 394 U.S. 526 (1969).
21. *Id.* at 530.
22. *Id.* at 530-31.
23. Wells v. Rockefeller, 394 U.S. 542 (1969).
24. White v. Weiser. 412 U.S. 783 (1973).
25. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).
26. 462 U.S. 725 (1983).
27. WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).
28. Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964).
29. Davis v. Mann, 377 U.S. 678 (1964).

Representatives,[30] and maximum population variances of 1-to-3.6 for the election of Senators and 1-to-1.7 for the election of Representatives.[31] However, the Court began to tolerate minor deviations in the 1970's. In *Abate v. Mundt*,[32] the Court upheld a maximum population variance of 11.9%/1-to-1.125 for the County Board of Supervisors election based on the town boundary, emphasizing the long history of connection between town and county in that particular county. Thereafter, the Court upheld a maximum population variance of 16.4%/1-to-1.18,[33] maximum population variances of 1.81%/1-to-1.018, and 7.83%/1-to-1.082,[34] and a maximum population variance of 9.9%/1-to-1.103.[35] These decisions insisted that a plaintiff show substantial deviations in order to make out a prima facie violation of the Equal Protection Clause. The Court held that only when a plaintiff succeeds in showing more than 10% deviations, must the state carry the burden of justifying deviations by legitimate state interests.[36]

C. Problems at Issue in the Reapportionment Cases

In order to intervene into the malapportionment problem, the United States Supreme Court had to set aside two chief jurisdictional barriers to reapportionment suits: the standing requirement and the "political question" doctrine.

In deriving the population equality principle, the Court did not hold that malapportionment is an infringement of the right to vote. Indeed the Court has not squarely held thus far that the right to vote is a constitutional right. The textual basis for the reapportionment cases are, therefore, Article I, Section 2, for congressional elections and the Equal Protection Clause for state elections. In other words, for congressional elections population equality is not a matter of constitutional right and for state legislative elections population equality is a matter of equal protection.

30. Roman v. Sincock, 377 U.S. 695 (1964).
31. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964).
32. 403 U.S. 182 (1971).
33. Mahan v. Howell, 410 U.S. 315 (1973).
34. Gaffney v. Cummings, 412 U.S. 735 (1973).
35. White v. Regester, 412 U.S. 755 (1973).
36. On the other hand, the Court has showed a somewhat different attitude toward a court-ordered reapportionment plan. Thus, when the constitutionality of court-devised plans were attacked, the Court struck down a maximum population variance of 20.14%/1-to-1.23 in Chapman v. Meier, 420 U.S. 1 (1975), and maximum population variances of 16.5%/1-to-1.18 for the election of Senators and 19.3%/1-to-1.21 for the election of House members in Connor v. Finch, 431 U.S. 407 (1977). The Court, in *Finch*, stating that these deviations "substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments," *id.* at 418, concluded that such "substantial deviations from population equality simply cannot be tolerated in a court-ordered plan, in the absence of some compelling justification." *id.* at 417.

The Court's reliance on two different textual sources has resulted in a bifurcated analysis of the malapportionment issues. Although the Court demands population equality and one-man-one-vote principle for both congressional and state legislative apportionments, it has adopted different standards in determining the constitutionality of malapportionment: an absolute equality standard derived from Article I, Section 2, for the congressional apportionment and a somewhat flexible substantial equality standard derived from the Equal Protection Clause for the state legislative apportionment.

Once the judicial standard for reapportionment is established, there has been no major trouble for the American courts in deciding reapportionment cases. Because almost all reapportionment suits are brought for declaratory judgment and an injunction, or both, it is natural for the courts to look to a maximum population variance and to judge its constitutionality.[37] In other words, the courts always look the entire apportionment scheme and decide whether it is constitutional. Despite some opposing views that judicial invalidation of the apportionment statute should be avoided since it makes the chosen legislature wholly illegitimate, it has been generally believed that such views are unfounded.[38] Accordingly, American courts usually declare the unconstitutionality of the apportionment statute and enjoin its enforcement in the next election. Because apportionment is a task to be assigned primarily to the legislature, courts are told to permit the legislature to devise and to submit a constitutional reapportionment plan.[39] In certain circumstances, however, courts may order an election by a court-designed reapportionment plan or an election at large.[40] Nonetheless, invalidation is far easier than devising a reapportionment plan which conforms to the constitutional standard. As long as the ultimate resolution depends on the legislature, any remedies have serious limits.[41]

37. In Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964), the Court stated:

> Regardless of possible concessions made by the parties and the scope of the consideration of the courts below, in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determing whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites.

Id. at 673. *See also* Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 735 n.27 (1964); Auerbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value*, 1964 SUP. CT. REV. 1, 10.

38. *See* Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAWYER 367, 388-89 (1963).

39. *See* Auerbach, *supra* note 37, at 18.

40. *See* Dixon, *supra* note 38, at 391-96; McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 700-05 (1963).

41. *See* Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUP. CT. REV. 252, 326-27. For the technical issues involved in the reapportionment cases, *see* Lucas, *Of Ducks and Drakes: Judicial Relief in Reapportionment Cases*, 38 NOTRE DAME LAWYER 401 (1963); Scanlan, *Problems of Pleading, Proof and Persuasion in a Reapportionment Case*, 38 NOTRE DAME LAWYER 415 (1963).

Sometimes the legislature cannot reach an agreement or the remedial stage takes more than 10 years and the legislature has to reapportion again in accordance with the result of a subsequent decennial census.[42]

It appears undeniable that owing to these reapportionment decisions the legislatures are forced to reapportion in accordance with the population shift.[43] However, these cases have not been necessarily approved by commentators. As one commentator put it, "[p]roverbially, hard cases make bad law. Some cases are so hard they may make no 'law' at all. Reapportionment may be an example."[44] Practically speaking, there are three issues involved in the American reapportionment cases: the appropriateness of judicial intervention, the legitimacy or textual basis for population equality in the right to vote, and the judicial standard.

The first issue is whether or not the judiciary is allowed to intervene into malapportionment issues in the first place. It is true that "the courts have been called upon to act as prime movers in effecting great reforms in areas where political and legislative processes have failed."[45] But it is also true that legislative inertia alone cannot justify judicial intervention.[46] Indeed a number of commentators opposed to judicial intervention on the ground that the courts should not enter into a "political thicket." The underlying notion is that districting and apportionment are legislative tasks with no judicially manageable standard.[47] One may further point out the existence of partisan political struggle beneath the surface of reapportionment suits.[48] Even if the judicial intervention is justified, it has been insisted that since "legislative reapportionment is primary a matter for legislative consideration and determination, judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."[49]

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42. Ely v. Klahr, 403 U.S. 108 (1971), illustrates the difficulty of granting remedies. In that case, the district court faced with a dilemma of conducting an election close at hand either by a court-ordered plan (which had become inadequate) or by a legislatively enacted plan (which was still inadequate). The court chose the lesser evil and ordered the election according to the unconstitutional reapportionment plan enacted by the legislature.

43. Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw. L. J. 607, 618 (1980). For a rather skeptical evaluation of the political effect of reapportionment cases, *see* Elliot, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI.L. REV. 474 (1970).

44. Dixon, *supra* note 38, at 397.

45. Neal, *supra* note 41, at 252.

46. *Id.* at 282-83.

47. *Id.* at 318. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J.).

48. *See* Lucas, *Legislative Apportionment and Representative Government: The Meaning of* Baker v. Carr, 61 MICH. L. REV. 711, 801 (1963).

49. Reynolds v. Sims, 377 U.S. 533, 586 (1964).

The second issue is closely intertwined with the first one. It is the issue of the legitimacy or textual basis for requiring equality in effectiveness or worth of each vote or, more specifically, population equality for the right to vote. The one-man-one-vote principle as formulated by the Court is criticized as lacking any textual basis or historical support.[50] It was said that "there is nothing in [Artice I, Section 2] that seems necessarily to refer to equality of districts."[51] Commentators are more critical of the Court's reliance on the Equal Protection Clause. They criticize the "fundamental rights" branch of strict scrutiny which was employed to demand population equality in the reapportionment cases. The "fundamental rights" methodology, they claim, finds no historical or textual justification in the Constitution. Apparently, the Court's message is that "the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters."[52] Perhaps the Court's reliance on the Equal Protection Clause may be a historical accident for all reapportionment questions could be framed in substantive due process terms as well.[53] The right to vote can be regarded as the liberty protected by the Due Process Clause of the Fourteenth Amendment and malapportionment may be seen as an invasion of that constitutional right, thus triggering strict scrutiny. However, in the early twentieth century the Supreme Court employed this substantive due process doctrine to protect liberty of contract, nowhere expressly provided for in the Constitution, and invalidated various kinds of social and economic legislation by employing strict scrutiny. Accordingly, the reapportionment cases raised the issue of whether the Due Process Clause or the Equal Protection Clause can be read as a textual source for an unenumerated constitutional right and whether the right to vote can be derived from the original intent as manifested by the constitutional text or by inference from the structure and relationship, two main conventional sources for constitutional interpretation.[54]

Even if the legitimacy of judicial imposition of population equality principle is

50. *See* McCloskey, *The Supreme Court, 1961 Term — Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962).

51. A. BICKEL, POLITICS AND THE WARREN COURT 193 (1965).

52. City of Mobile v. Bolden, 446 U.S. 55, 77 (1980) (plurality opinion).

53. *See* Dixon, *supra* note 38, at 385-86; Neal, *supra* note 41, at 285.

54. It is this "fundamental rights" approach that is the main focus of the current controversies over judicial review. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). *See generally* S. MATSUI, DEMOCRACY V. JUDICIAL REVIEW: AN INQUIRY INTO THE NATURE AND LIMITS OF CONSTITUTIONAL INTERPRETATION BY THE JUDICIARY (1986) (J.S.D. dissertation submitted to Stanford Law School). Although Dean Ely rejects noninterpretivism and the "fundamental rights" approach, he admits that the right to vote is constitutionally guaranteed since it is integral to representative democracy.

accepted, there still remains a problem of standards. As many concede and as the Court itself made clear, the Equal Protection Clause does not require proportional representation as an imperative of political organization.[55] Nevertheless, the Court has held that population equality is the most single important factor to be considered in reapportionment.[56] The late Professor Bickel criticized the Court:

> It is thus apparent that no one, no matter how strong his attachment to the notion of equal votes, regards equality of representation as the single overriding objective to be attained in the construction of representative institutions. On reflection, we all acknowledge other goals as well: stability, enhancement of the two-party system, representation of the loser as well as the winners, and representation also of the isolated and even alienated interests. That is why we now almost universally district, and that, sometimes, is why we district unevenly.[57]

For those who share this view, the "absolute equality" requirement for congressional apportionment and the substantial equality requirement for state legislative apportionment do not appear to leave enough room for reapportionment that takes non-population factors into consideration. Furthermore, excessive reliance on population equality may be criticized as causing fragmentation of traditional political boundaries and as leading to gerrymandering.[58]

In any event twenty years have passed since the Court began to intervene into malapportionment and these reapportionment cases seem to have gained an overall support for one reason or another.[59] Some commentators even criticize the Burger Court's exceedingly permissive attitude toward malapportionment in state legislative elections.[60] The focus of reapportionment in the United States has now shifted

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55. City of Mobile v. Bolden, 446 U.S. 55, 77-78 (1980) (plurality opinion). *But see* Note, *The Constitutional Imperatives of Proportional Representation*, 94 YALE L. J. 163 (1984).

56. According to Justice Harlan, the *Reynolds* Court precluded the following considerations as illegitimate: (1) history, (2) economic or other sorts of group interests, (3) area, (4) geographical considerations, (5) a desire to insure effective representation for sparsely settled areas, (6) availability of access of citizens to their representatives, (7) theories of bicameralism, (8) occupation, (9) an attempt to balance urban and rural power, and (10) the preference of a majority of voters in the state. Reynolds v. Sims, 377 U.S. 533, 622-23 (1964) (Harlan, J., dissenting). However, later Court decisions apparently modified this list.

57. A. BICKEL, *supra* note 51, at 194.

58. For additional literature on the reapportionment cases, *see, e.g.*, Dixon, *Legislative Apportionment and the Federal Constitution*, 27 L. & CONT. PROB. 329 (1962); Israel, *On Charting a Course through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 MICH. L. REV. 107 (1962); Note, Baker v. Carr *and Legislative Apportionment: A Problem of Standards*, 72 YALE L. REV. 968 (1963); Dixon, *The Warren Court Crusade for the Holy Grail of "One Man – One Vote"*, 1969 SUP. CT. REV. 219.

59. A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 117-19, 120 (1968). *But see* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

60. *See* Comment, *The Burger Court and Reapportionment: From One Person, One Vote to One Corporation, Many Votes*, 62 GEO. L. J. 1001, 1005-6 (1974); Walker, Jr., *One Man-One Vote: In Pursuit of an Elusive Ideal*, 3 HAST. CON. L. Q. 453, 473 (1976); Dovenbarger, *Democracy and Distemper: An Examination*

to issues of redistricting and dilution of the right to vote. Although the Court is still reluctant to prohibit gerrymandering and multi-member districting, they are sure to be regarded as the next agenda for the reapportionment suits.[61]

I. The Constitution, the Right to Vote, and the Election System in Japan

A. The Constitution and the Right to Vote

The Japanese Constitution of 1946 declares that the sovereign power resides with the people (Preamble & Article 1) and guarantees that "[t]he people have the inalienable right to choose their public officials and to dismiss them" (Article 15). There is, therefore, an explicit provision for the right to vote in Japan.

The Japanese Constitution has several provisions forbidding discrimination in elections. First is a provision which declares that "[u]niversal adult suffrage is guaranteed with regard to the election of public officials" (Article 15, Section III). Second is a general equal protection provision, which states that "[a]ll 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 14). Third is a special provision concerning elections which explicitly forbids discrimination because of "race, sex, social status, family origin, education, property or income" (Article 44). Nevertheless, there is no textual provision which mandates equal worth or effectiveness of each vote or apportionment based on population equality.

B. The Election System and the History of Malapportionment

The Diet, the Japanese legislative body, consists of the House of Representatives and the House of Councillors. Although members of both Houses must consist of "elected members" and are described as "representative of all the people" (Article 43), the adoption of bicameralism has been construed to allow some differences in character between two Houses. Thus, the term of office for the members of the House of Representatives is four years (Article 45), but because of

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of the Sources of Judicial Distress in State Legislative Apportionment Cases, 18 IND. L. J. 885 (1985). For a more detailed analysis of Burger Court's philosophy in the reapportionment cases, *see* Martin, *The Supreme Court and State Legislative Reapportionment: The Retreat from Absolutism*, 9 VALPARAISO U. L. REV. 31 (1974); Baker, *One Man, One Vote, and "Political Fairness"—Or, How the Burger Court Found Happiness by Rediscovering* Reynolds v. Sims, 23 EMORY L. J. 701 (1974).

61. *See infra* note 122.

not infrequent dissolution of the House by the Cabinet, the average term of each Representative is considerably shorter. In contrast, the term of office for the members of the House of Councillors is six years (Article 46) and there is no dissolution. Instead, the election for half the members takes place every three years. These differences lead to the perception that somehow the House of Representatives is a true representative body of the people. In contrast, the nature of the House of Councillors remains ambiguous.

Wide discretion to devise the election system is given to the Diet by the Constitution for it states that "[e]lectoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by laws" (Article 47). According to the Public Offices Election Law, the current statute regulating elections, the number of Representatives is 471 and Councillors is 252. But the 2d Addendum to that Law sets the number of Representatives at 511 "for the time being." Representatives are apportioned to 47 Prefectures, about 130 districts (Article 13 & Annexed Figure 1). The initial apportionment was made according to population and the statute presupposed reapportionment every five years in accordance with the result of most recent census (id). The Law adopts multi-member districts as a principle. Therefore, each voter casts just one vote (Article 36) and three to five Representatives are elected in each district except in Amami Island where only one Representative is chosen (the 9th Addendum).

Prior to the 1982 amendment, among 252 Councillors, 100 were elected at large and 152 were apportioned to the Prefectures. (The 1982 amendment altered elections at large to proportional representation. Thus, the current election system for Councillors is a combination of election in each Prefecture and proportional representation.) Because half the members of Councillors are elected every three years, the number of Councillors apportioned to each Prefecture must be even, currently, two to eight. This has caused larger deviations from population equality in the election for Councillors.

The initial apportionment was based on the 1946 census. It was just after the second World War and most of the people who left the city during the wartime for the sake of safety and food stayed in the rural areas. As in the United States, the subsequent growth of population and rapid urbanization made the initial apportionment scheme quite disproportionate to the actual demography. Despite the statutory provision which presupposed reapportionment every five years, the Diet rarely took action to remedy this inequality. Only once, in 1964, when

Okinawa was returned from the United States, it tried to reduce inequality roughly to 1-to-2 by adding to the number of Representatives.[62] There was no reapportionment for Councillors before the 1982 amendment. The failure of the Diet to reapportion was not surprising since the ruling conservative Liberal Democratic Party benefited from this very inequality and overrepresentation in rural districts.[63] There was hence no actual prospect of reapportionment by the legislature itself. It was natural that the intervention by the courts was expected as much as, or much more than, in the United States. Constitutional law scholars noticed the development of the reapportionment cases in the United States and began urging a similar development in Japan.

II. THE REAPPORTIONMENT CASES IN JAPAN

A. Decisional Law Prior to 1976

The Supreme Court, however, hesitated to intervene at first. When the constitutionality of malapportionment of the House of Councillors was challenged in 1964, the Court rejected the claim, stating that apportionment was relegated to the Diet and that the courts should not intervene except in the case of the most egregious inequality.[64] When one lower court held in 1973 that a maximum population variance of 1-to-5 was far beyond a permissibly reasonable level,[65] the Supreme Court again affirmed its earlier position and denied judicial intervention.[66]

B. The 1976 Supreme Court Decision

The Supreme Court finally changed its position in 1976. In this case, an eligible voter in a larger population district filed a suit challenging the validity of the

62. A maximum population variance was 1-to 1.51 in April, 1950 but it grew to 1-to-3.2 in 1960. Even though it was reduced to 1-to-2.19 in 1964 because of the amendment, it again grew to 1-to-3.22 in 1965, 1-to-4.83 in 1970, and 1-to-4.99 (eligible voters compared) in 1972. *See* Judgment of Nov. 7, 1983, Supreme Court, Grand Bench, MINSHUU vol.37, no.9, at 1243 (Dandou, J., dissenting).

63. For instance, one study shows that the Liberal Democratic Party could have 60.5% of the Councillors elected in each Prefecture while it could gain only 39.5% of the votes in 1977 and 63.2% of the Councillors but only 43.3 votes in 1980. Matsuzawa, *Sangiintihousenshutsugiin no Kokumindaihyousei to Teisuuhaibunkitei Goukenhanketsu*, JURIST, vol.794, at 19, 21 (1983).

64. Judgment of Feb. 5, 1964, Supreme Court, Grand Bench, MINSHUU vol.18 no.2, at 270.

65. Judgment of July 31, 1973, Tokyo High Court, HANREIJIHOU vol.709, at 3. The court, however, dismissed the suit, expecting corrective action by the Diet. *See* Tanaka, HANREI HYOURON vol.177, at 13 (1973). This decision was influenced by leading constitutional scholars who traced the reapportionment cases in the United States and advocated similar stricter judicial review in Japan. *See* N. ASHIBE, KENPOU SOSHOU NO RIRON 195 (1973).

66. Judgment of April 25, 1974, Supreme Court, First Petty Bench, HANREIJIHOU vol.737, at 3.

election, alleging the unconstitutionality of the apportionment statute. A lower court applied the traditional view and held a maximum population variance of 1-to-5 to be constitutional.[67] But this time the Supreme Court disagreed and held it to be unconstitutional.[68]

The first issue in this case was the legal basis of the suit. The plaintiff invoked Article 204 of the Public Offices Election Law stipulating that:

> Any elector or candidate for public office who has complaint as to the effect of election... may institute a suit at the High Court,... within thirty days of the date of the election concerned.

This provision was enacted for speedy resolution of controversies regarding the election and, for that purpose, it gives the elector or candidate special capacity to file a suit as an exception to the general standing requirement. The courts can invalidate the election only when there is "any act in contravention of statutory provisions" and where "there is likelihood of affecting the results of the election" (Article 205). In this sense, it is said to be a citizen's action, not actionable without a special legislative authorization. And for that matter, it was obvious that the Diet did not intend to include a reapportionment suit which attacks the constitutionality of the underlying apportionment statute itself. The Supreme Court, however, approved the legality of this action without hesitation. Because it was the only way for elector to challenge the validity of the election under the current statutory provisions and because "the way for correction and redress should be provided as possible against any governmental acts invading the fundamental rights of the people,"[69] the Court reasoned, the suit must be entertained.

The Supreme Court then turned to the merits. "The right to vote," said the Court, "constitutes an integral part of parliamentary democracy as a fundamental right guaranteeing the people the opportunity to participate in government."[70] Citing Preamble and Articles 1, 15, 43, and 44, and tracing the historical development of equality in the right to vote, the Court stated:

> [W]hat has been pursued consistently throughout this historical development is... an ideal that the people should be regarded as perfect equals as a principle concerning the voting in elections which constitute the most fundamental aspect of popular participation in government and that every difference in physical, personal,

67. Judgment of April 30, 1974, Tokyo High Court, GYOUSHUU vol.25 no.4, at 356.
68. Judgment of April 14, 1976, Supreme Court, Grand Bench, MINSHUU vol.30 no.3, at 223.
69. *Id.* at 251 (translation by author).
70. *Id.* at 242.

> or social conditions should be ignored. The equality in the right to vote, as a ultimate application of such an equality principle, requires not only the extension of franchise by abolishing restrictions placed on the eligibility of voters, but also, taking a step further, substantive equality in the right to vote, namely, the equal worth of each vote, that is, equal effectiveness of each vote to the election result.... As to the right to vote, the requirement of equality under the law, established by Article 14, Section I, of the Constitution, aspires to perfect equality in the sense that all the people should be equal in political worth and... the Constitution should be properly construed to require substantive equality in the right to vote, that is, the equal worth of each vote.[71]

"Yet," the Court added, " the requirement of equal worth of vote should not be conceived of as demanding absolute mathematical equality in effectiveness of each vote to the election result."[72] The Court, then, gave wide discretion to the Diet:

> The Constitution does not demand equality in the right to vote as a sole factor to be taken into consideration in the determination of election system by the Diet. The Diet can adopt the particular proper election system in order to accomplish fair and effective representation, taking into consideration other factors which it is allowed to consider as to the House of Representatives and the House of Councillors respectively.[73]

Thus, the Court formulated the following standard for deciding the constitutionality of malapportionment:

> [Districting and apportionment] involve quite various, complicated and delicate policy and technical factors. As to the extent to which each of these factors is to be considered and it is to be reflected in actual determination, there exists no objective precise standard. In the end, the question is whether the specific determination of the Diet can be sustained as a reasonable exercise of that discretion.... When [inequality in the right to vote] amounts to the level where, after taking into consideration various factors usually to be considered by the Diet, apportionment can be hardly conceived of as having reasonableness in general, it should be presumed to be exceeding the limits on reasonable discretion of the Diet and, absent a showing of special reasons to justify this degree of inequality, it has to be held to be unconstitutional.[74]

In the case before the Court, a maximum population variance was 210%/1-to-5 at the time of the 1972 election. The Court thought that this could no longer be sustained as reasonable. Even if the deviation "amounts to a degree to which it

71. *Id.* at 242-43.
72. *Id.* at 243.
73. *Id.* at 244.
74. *Id.* at 247.

contravenes the requirement of equality in the right to vote," the Court was still reluctant to declare it unconstitutional too hastily, since "apportionment provision involved should not be declared unconstitutional merely because of this fact alone. Only when the corrective action required by the Constitution considering the population shift is not undertaken during the reasonable period, malapportionment should be condemned to be unconstitutional."[75] In this case, the Diet failed to reapportion despite gross inequality beyond the reasonable level for over eight years without any special justifications. Accordingly, the Court concluded that the apportionment provision involved was unconstitutional at the time of the election.

The Court then faced difficult choices. First, it had to determine whether apportionment as a whole or apportionment in a particular district should be held unconstitutional. Since the suit is filed attacking the validity of the election in a particular district, it may be more natural for the Court to decide upon the constitutionality of malapportionment in that particular district. The Court thought, however, that apportionment constituted an interrelated integral unity and was unseverable. It thus held the whole apportionment to be unconstitutional. The Court then had to decide whether or not the election should be invalidated. The invalidation of the election, the Court reasoned, would disqualify not only Representatives chosen in malapportioned districts but also all elected Representatives. It deprives the underrepresented districts of Representatives in the Diet, casts serious doubt about the activities taken by the Diet thus far and makes it impossible to reapportion. The Court, in declining such a course, stated:

> As a principle, a statute repugnant to the Constitution is invalid *ab initio* and the effect of the action based on it should also be denied. However, it is so only because such a construction is ordinarily the best way to prevent or to remedy unconstitutional consequences. When such a construction does not necessarily contribute to the prevention or correction of unconstitutional consequences and produces highly inadequate consequences in relation to the Constitution,... naturally, a different, reasonable construction based on a universal perspective must be adopted.[76]

The Court invoked Article 31, Section 1, of the Administrative Cases Litigation Act which allows the judiciary to uphold the illegal administrative action when its invalidation would cause serious threat to public welfare. Although this provision was supposed to apply to a revocation action which seeks the judicial revocation of

75. *Id.* at 248-49.
76. *Id.* at 250.

administrative actions under the Administrative Cases Litigation Act and was not applicable to an Article 204 action under the Public Office Election Law, the Court reasoned that Article 31 rested upon a general principle of law not confined to revocation of administrative action. The Court, therefore, refrained from invalidating the election and held that it was valid despite the unconstitutionality of the apportionment provision. The suit was hence dismissed.

C. Aftermath of the 1976 Decision: Elections of Representatives

The Diet has refused to take any action, insisting that unconstitutional inequality condemned by the Supreme Court was remedied by the 1975 amendment. This reapportionment amendment was enacted before the Court decision and, by adding 20 Representatives, it managed to reduce a maximum population variance roughly to 1-to-2.92.[77] Population variance has become even larger, however, due to the subsequent growth and shift of population. And lower courts had to struggle with the vague standard left by the Supreme Court. Thus, while one court upheld the deviation of 1-to-1.3 from the average population in a particular district, stating that the court could only judge the constitutionality of the apportionment in that district,[78] only two days later, a different panel of the same court held a maximum population variance of 1-to-3.5 to be unconstitutional.[79] This incident showed the ambiguous nature of reasonableness standard adopted by the Supreme Court.[80] Later this same lower court went on to proclaim the demand of formalistic equality in the right to vote and declared any deviations over a maximum population variance of 1-to-2 to be unconstitutional.[81] Other courts have since held maximum population variances of 1-to-3.16[82] and 1-to-3.95[83] both to be unconstitutional.

On November 1983, the Court handed down another decision involving the

77. *See* Nonaka, *Giinteisuusaiban no Saikin no Doukou*, JURIST vol.680, at 78, 78-79 (1978).

78. Judgment of Sept. 11, 1980, Tokyo High Court, HANREIJIHOU vol.902, at 24.

79. Judgment of Sept. 13, 1980, Tokyo High Court, HANREIJIHOU vol.902, at 34.

80. *See* Nonaka, *supra* note 77, at 78; I. Satou, *Giinteisuuhukinkou ni kansuru Hutatsu no Hanketsu*, HOUGAKU SEMINAR vol.1979 No.5, at 20; Kubota, HANREI HYOURON vol.240, at 6 (1979); Shimizu, SHOUWA 53 NENDO ZYUUYOUHANREI KAISETSU 12; Ohmiya, 2 KENPOUHANREI HYAKUSEN 262 (1980).

81. Judgment of Dec. 23, 1980, Tokyo High Court, HANREIJIHOU vol. 984, at 26. *See* T.Abe, *Tokyo Kousai "Giinteisuuhaibunhiritsu Ichi tai Ni Ikenhanketsu" no Igi to Mondaiten*, JURIST vol.735, at 85 (1981); Yamamoto, *Teisuuzeseisaiban*, HOUGAKU KYOUSHITSU vol.6, at 55 (1981); Mukai, *Giinteisuuzeseisaiban*, TEIKYO HOUGAKU vol.13 no.1, at 197 (1982); Ashibe, SHOUWA 55 NENDO ZYUUYOUHANREI KAISETSU 9; Nagao, HANREI HYOURON vol.269, at 11 (1981).

82. Judgment of Oct. 22, 1981, Sapporo District Court, HANREIJIHOU vol.1021, at 25.

83. Judgment of Feb. 17, 1982, Osaka High Court, HANREIJIHOU vol.1032, at 19.

election of Representatives.[84] In appeals from two lower court decisions which had held the apportionment statute as applied to the 1980 election unconstitutional, the Court affirmed the constitutional requirement of population equality in the right to vote and held a maximum population variance of 1-to-3.94 to be far beyond the reasonable level. Nonetheless, the eight member majority did not condemn it as unconstitutional. For the majority, unconstitutional inequality condemned by its earlier decision was corrected by the 1975 amendment and it was hard to tell when the apportionment became unreasonable. Moreover, the majority thought it improper to reapportion too frequently because it would impair the stability of politics. Thus, the Court concluded that less than 4 years was still too early to condemn the unreasonable apportionment as unconstitutional.

The majority of the Court warned the Diet that "it is highly desirable to amend as soon as possible."[85] Yet the Court's warning could not make the Diet enact a reapportionment amendment. The general election was held in 1983 in accordance with the apportionment provision which was held by the Supreme Court to be far beyond reasonable limits imposed by the Constitution. A maximum population variance grew to 1-to-4.40 from 1-to-3.94. Eligible voters in underrepresented districts immediately filed suits attacking the constitutionality of the election. In all of the High Court decisions handed down regarding this election, the apportionment provision was held to be unconstitutional.[86] Finally, on July 17, 1985, the Supreme Court, in perhaps the most significant decision since its 1976 decision, upheld two of these High Court decisions.[87] The Court first reaffirmed Article 14's mandate for equal worth or effectiveness of each vote. The Court then decided that a maximum population variance of 1-to-4.40 was beyond what is generally believed to be reasonable by taking all factors into consideration and that the Diet failed to remedy this gross inequality during the reasonable period. It thus held the *current*

84. Judgment of Nov. 7, 1983, Supreme Court, Grand Bench, MINSHUU vol.37, no.9, at 1243.

85. The seven Judges dissented. Judge Fuzisaki denied the legality of the lawsuit and refused to demand the population equality principle. Six others thought that a maximum population variance of 1-to-3.94 was unconstitutional at the time of the election.

86. Judgment of Sept. 28, 1984, Hiroshima High Court, HANREI TIMES vol.537, at 92; Judgment of Oct. 19, 1984, Tokyo High Court, HANREI TIMES vol.537, at 92; Judgment of Nov. 27, 1984, Osaka High Court, HANREI TIMES 541, at 99; Judgment of Nov. 29, 1984, Osaka High Court, HANREI TIMES vol.541, at 99; Judgment of Nov. 30, 1984, Osaka High Court, HANREI TIMES vol.541, at 99; Judgment of Nov. 30, 1984, Osaka High Court, HANREI TIMES vol.541, at 99 (a companion case); Judgment of Dec. 7, 1984, Osaka High Court, HANREI TIMES vol.541, at 99; Judgment of Dec. 25, 1984, Sapporo High Court, HANREI TIMES vol.544, at 77.

87. The Judgment of July 17, 1985, Supreme Court, Grand Bench, HANREIJIHOU vol.1163, at 3.

apportionment statute which was employed in the 1983 election to be unconstitutional. Although the Court followed its previous position not to invalidate the actual election conducted under the unconstitutional apportionment statute, this was the first time in the history of the reapportionment cases that the Court held the existing apportionment scheme to be unconstitutional.[88]

D. Aftermath of the 1976 Decision: Elections of Councillors

With respect to the election of Councillors, the courts are more reluctant to require population equality. The courts tend to grant more discretion to the Diet in devising a representation basis different from population equality and, therefore, to tolerate more deviations than in the election of Representatives. Even after the 1976 decision, one lower court held a maximum population variance of 1-to-5.26 constitutional[89] and another court also upheld this same variance because it was too early to condemn the malapportionment as unconstitutional.[90] One court admitted that a "reverse apportionment phenomenon," where a less populous district had more Councillors than a more populous district, was hardly sustainable but decided to allow more time to the Diet.[91]

The Supreme Court approved this permissive attitude on April, 1983.[92] The Court admitted the necessity of equality in the right to vote and the population equality requirement even in apportionment of Councillors. Nevertheless, it concluded that a maximum population variance of 1-to-5.26 did not reach to the egregious level of raising the question of unconstitutionality.[93]

III. A Comment on the Reapportionment Cases in Japan

Ten years have passed since the Japanese Court first intervened into malapportionment issues. The judicial doctrines in the reapportionment cases

88. Five Judges, in two separate concurring opinions, implied the possibility that the Court would hold the election invalid if the Diet would employ the current unconstitutional apportionment provision without corrective action. Judge Taniguchi dissented and proposed to invalidate the elections in only grossly underrepresented and overrepresented districts.

89. Judgment of Feb. 28, 1979, Osaka High Court, Hanreijihou vol.923, at 30.

90. Judgment of June 13, 1979, Tokyo High Court, Hanreijihou vol.933, at 16.

91. Judgment of Sept. 28, 1982, Osaka High Court, Hanreijihou vol.1070, at 19.

92. Judgment of April 27, 1983, Supreme Court, Grand Bench, Minshuu vol.37, no.3, at 345.

93. Judge Taniguchi thought a maximum population variance of 1-to-5.26 beyond permissible limits even though the population equality requirement must be attenuated with respect to elections of Councillors. Nevertheless, he concluded that it was too early for the Court to condemn it as unconstitutional. Judge Dandou reached the same conclusion the Court had reached in its 1976 decision concerning the elections of Representatives.

appear to be fairly well settled.[94] Since the reapportionment cases are the only decisions of the Japanese Court which have held the Acts of the Diet unconstitutional in areas closely connected with politics, they deserve close scrutiny. In this Chapter, I will examine the Japanese Court's view on each issue involved in the reapportionment cases in light of the commentators' arguments and explore the implications of these decisions in Japanese constitutional law.

A. Justiciability

As to the admissibility of reapportionment suits, some dissenting voices notwithstanding,[95] the 1976 Supreme Court decision's view has been followed by later decisions and lower courts as well. It seems to have a majority support also from commentators.[96] It is remarkable that the Court was willing to grant redress by employing an "equitable" construction of a statute. Since the Japanese courts are extremely reluctant to intervene without express statutory authorization, it was natural for the plaintiffs to invoke some statutory basis for their claims, even if it is a far-fetched one. Moreover, the invocation of Article 204 produced some strategic benefits for the plaintiffs. First, since the action attacking the validity of the election based on Article 204 of the Public Offices Election Law was authorized by the Diet, the Court did not have to worry seriously about the separation of powers argument or the political question doctrine against justiciability. And second, since it was regarded as a citizen's action which can be filed without satisfying the ordinary

94. The Tokyo High Court applied the population equality principle to municipal legislative apportionment of members of the Tokyo Metropolitan Congress and held that a maximum population variance of 1-to-7.45 violated Article 15, Section 7 of the Public Offices Election Law which required the population equality principle. Judgment of July, 25, 1983, Tokyo High Court, HANREI TIMES vol.500, at 97. *See also* Judgment of Aug. 7, 1983, Tokyo High Court, HANREI TIMES vol. 531, at 80. The Supreme Court upheld the Tokyo High Court decision. Judgment of May 17, 1984, Supreme Court, First Petty Bench, MINSHUU vol. 38 No.7, at 721. The Tokyo Metropolitan Congress amended the apportionment ordinance but the Tokyo High Court held a maximum population variance of 1-to-3.4 still illegal. Judgment of Feb. 26, 1986, Tokyo High Court, ASAHI SHINBUN Feb. 27, 1986.

95. Only one Judge, Judge Amano, disagreed with the majority on this justiciability issue in the 1976 decision. In two cases handed down in 1983, Judge Fuzisaki denied justiciability. *See also* Taguchi, *Giinteisuu no Hukinkouzesei to Senkyososhou*, KEIOU DAIGAKU HOUGAKU KENKYUU vol.50 no.1, at 77 (1977); Hayashi, *Kokkaigiin no Senkyokubetsuteisuu no Hukinkoumondai ni taisuru kangaekata*, HOURITSU NO HIROBA vol.34 no.5, at 4 (1981); Ono, *Giinteisuuhaibunsoshou wo meguru Hanrei no Doukou to Mondaiten*, HOURITSU NO HIROBA vol.34 no.5, at 11, 15 (1981); Hiraga, *Hitori Ippyou: Ippyou Douchi (1)-(5)*, HANREIJIHOU vol.1024, at 3, vol.1026, at 3, vol.1028, at 3, vol.1929, at 3, vol.1031, at 3 (1983). Judge Kishi suggested a revocation suit against administrative action as an alternative. *See* Hamada, HOUGAKU KYOUKAI ZASSHI vol.95 no.1, at 219, 225-26 (1978).

96. *See* Ashibe, *Giinteisuuhaibunkiteiikenhanketsu no Igi to Mondaiten*, JURIST vol.617, at 36, 37-38 (1976); Wada, *Shuugiingiinteisuu Ikenhanketsu to sono Mondaiten*, HANREIJIHOU vol.811, at 3, 6 (1976), See also Y.HIGUCHI, SIHOU NO SEKKYOKUSEI TO SHOUKYOKUSEI 100-01 (1978); Y. Abe, *Giinteisuuhaibunkitei Ikenhanketsu ni okeru Soshouhouzyou no Ronten*, JURIST vol.617, 55, 58 (1976).

standing requirement, it was natural that the Court did not inquire into the standing issue. In short, the Japanese Court did not have to decide *Baker v. Carr.*

Nonetheless, it must be admitted that the invocation of Article 204 left the status of the right to vote unclear. For this statutory cause of action is generally regarded as a citizen's action, not as an action for the vindication of an individual right. Obviouly the prevailing view is premised on the belief that the right to vote is not an individual constitutional right or that malapportionment is not an invasion of the right to vote. The right to vote has been regarded as rather an obligation of the people or at most as an official function of the people as a whole. Even though leading commentators came to regard the right to vote as an individual constitutional right, they have not regarded it as a basis for claiming the population equality principle.[97] As stated below, the view that the reapportionment suits are not actions for the vindication of individual rights prompted lower courts to dismiss reapportionment suits seeking injunction and declaratory remedies as not justiciable, because they are not suits for the vindication of individual right and because no statutory authorization for such suits can be found.[98] Upon reflection, it was perhaps unfortunate that the Japanese Court and commentators did not notice the significance of the fact that the Japanese Constitution, unlike the United States Constitution, has an explicit textual provision for the right to vote.[99]

B. The Constitution, the Right to Vote, and Equal Protection

It is also noteworthy that the Japanese Supreme Court has regarded the right to vote as a fundamental right and required equal worth or effectiveness of one's vote by invoking the general equal protection provision. This view has been reaffirmed ever since its 1976 decision.[100] Reliance on the equal protection concept is a result

97. *See generally*, K.HASHIMOTO, NIHONKOKUKENPOU 413 (1980); K.SATOU, KENPOU 434 (1981).

98. *See infra* notes 116-17.

99. The characterization of the reapportionment suits as citizen's suits is inconsistent with the Court's holding that malapportionment violates the equal protection provision. If malapportionment is a denial of the right to equal protection, then the reapportionment suits must be seen as suits for the vindication of one's constitutional right. Tanaka, *Teisuuhaibunhubyoudou ni taisuru Shihoutekikyuusai*, JURIST vol.830, at 41, 42 (1985).

100. Judgment of April 27, 1983, Supreme Court, Grand Bench, MINSHUU vol. 37, no.3, at 345; Judgment of Nov. 7, 1983, Supreme Court, Grand Bench, MINSHUU vol.37, no.9, at 1243. In Judgment of July 17, 1985, the Court stated that "Article 14, Section I, of the Constitution demands not only prohibition of discrimination in voter eligibility concerning the inalienable right of the people to choose members of both House of Representatives and House of Councillors (Article 44), but also substantive equality in the right to vote, namely, equal effectiveness of each vote cast for choosing the legislators, that is, equal worth of each vote." Judgment of July, 17, 1985, Supreme Court, Grand Bench, HANREIJIHOU vol.1163, at 3. Judge Fuzisaki still disagrees this population equality requirement. Judgment of Nov. 7, 1983, Supreme Court, Grand Bench, *supra* (Fuzisaki, J., dissenting); Judgment of April 27, 1983, Supreme Court, Grand Bench, *supra* (Fuzisaki, J., dissenting). *See also* Hiraga (3), *supra* note 95, at 6.

of Japanese scholars' attempts during the 1970's to import the equal protection doctrine concerning the reapportionment cases in the United States to Japan. Under the conventional view of the Court the ordinary equal protection standard is one of reasonableness, similar to rationality review under the Equal Protection Clause in the United States. Under that standard, the demand for population equality in the right to vote would be transformed into a problem of mere reasonableness. Judge Itoh made that clear in his concurring opinion in the 1983 Court decision involving the House of Councillors. Under the general equal protection analysis, he reasoned, a statute should be presumed to be constitutional, unless it was explicitly forbidden by Articles 14 or 44. Because malapportionment was a discrimination by the place of residence, he then thought, the problem was whether or not it was reasonable. Because this reasonableness review should be very deferential,[101] the population equality requirement would be greatly undermined by deference to the Diet. Scholars have insisted, therefore, that the judiciary engage in more vigorous review because the right to vote is a fundamental right.[102] Although this interpretation raises serious methodological question, just similar to the problem which the "fundamental right" approach has posed in the United States, Japanese constitutional law scholars appear to have not taken the issue seriously. Since the Japanese Constitution explicitly provides for the right to vote it may be better for the Court to derive the necessity of equal effectiveness of each vote and the necessity of vigorous review from this provision, or maybe from its special characteristics in the whole structure of the Constitution, and not from the general equal protection provision.[103]

As to the judicial standard, although the Japanese Supreme Court is likely to hold a maximum population variance over 1-to-3 unconstitutional, it has never made clear the precise limits of malapportionment for the election of Representatives. Some Judges have expressed views that a maximum population variance over

101. Judgment of April, 27, 1983, Supreme Court, Grand Bench, MINSHUU vol.37, no.3, at 345, 358-61 (Itoh, J., concurring). He thus declined to subscribe to the prevailing view that the right to vote should be regarded as a fundamental right always demanding strict scrutiny.

102. *See* Nakamura, *Giinteisuu no Hukinkou to Senkyoken no Byoudou*, LAW SCHOOL vol.52, 72, 74 (1983).

103. *See* Takahashi, *Teisuuhukinkouikenhanketsu ni kansuru Zyakkan no Kousatsu*, HOUGAKUSHIRIN vol.74 no.4, at 79, 83-84 (1977). *See also* Tsujimura, *Senkyoken no Honshitsu to Senkyogensoku*, HITOTSUBASHI RONSHUU vol.86 no.2, at 210, 226 (1981); Y.HIGUCHI, *supra* note 96, at 121-22; Nagao, *Senkyo ni kansuru Kenpouzyou no Gensoku* (3), LAW SCHOOL vol.14, at 95 (1977); Nagao, *supra* note 81, at 14.

1-to-2 or 1-to-3 is unconstitutional.[104] The majority of scholars are highly critical of the excessively flexible and permissive standard adopted by the Supreme Court. Yet quite a few conclude that any deviation from population equality is unconstitutional.[105] Leading scholars would rather put the burden of justifying deviations on the government and reject any deviations over a maximum population variance of 1-to-2.[106] While the Diet should be allowed to consider non-population factors, the Court's willingness to tolerate almost everything as justifications for deviations from population equality is hardly acceptable.[107] Nevertheless, the reason why a maximum population deviance over 1-to-2 is to be held unconstitutional is not self-evident.[108] Whereas many intuitively believe that if one man's vote has the worth of two votes then malapportionment exceeds the constitutional limits, there are some commentators who suggest the German approach which would require reapportionment if one district has 33.3% more or less population than the average.[109]

The same critique is levied at the Court's approval of greater deviations with respect to elections of Councillors. While the Constitution adopts bicameralism and therefore some kinds of difference should be allowed for elections of Councillors, many commentators claim that Councillors are still representative of all the people and the Constitution guarantees the right to vote. Accordingly, they insist, deviations from population equality are no less questionable as they are with respect to elections of Representatives.[110]

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104. In Judgment of Nov. 7, 1983, Judge Nakamura stated that a maximum population variance over 1-to-3 is unconstitutional, Judge Dandou took the view that a maximum population variance over 1-to-2 is presumptively suspicious, and Judge Yokoi held a maximum population variance over 1-to-2 unconstitutional. *See also* Judgment of Dec. 23, 1980, Tokyo High Court, HANREIJIHOU vol.984, at 26 (a maximum population variance over 1-to-2 unconstitutional); Judgment of Nov. 27, 1984, Osaka High Court, HANREI TIMES vol.541, at 99 (a maximum population variance over 1-to-3 unconstitutional).

105. Tsujimura, *Senkyoken*, in KENPOUHANREI NO KENKYUU 159, 178-79 (A.Ohsuka. et. al. ed. 1982) (absolute equality).

106. *See* Ashibe, *supra* note 96, at 43; Nonaka, *supra* note 77, at 84-85 (1978); Hamada, *supra* note 95, at 229; Yoshida, *Giinteisuu no Hukinkou to Hou no Moto no Byoudou*, in KENPOU NO HANREI 22 (3d ed. 1977); Chiba, MINSHOU HOU ZASSHI vol.76 no.1, at 97, 105 (1977); Nonaka, *Senkyo ni kansuru Kenpouzyo no Gensoku*, KOUHOUKENKYUU vol.42, at 56, 77 (1980); K.SATOU *supra* note 97, at 87. *See also* Takahashi, *Giinteisuuhaibun no Hubyoudou*, in 4 KENPOUGAKU 98, 115 (Y.Okudaira ed. 1976) (presumption of unconstitutionality for deviation over 1-to-2).

107. Negishi, *Giinteisuuhaibun to Minshushugi*, HANREI TIMES vol.561, at 13, 17 (1985).

108. *Id.* at 20.

109. T.Abe, *Giinteisuuhaibun to Senkyo no Byoudou*, in GENDAI GIKAISEIJI 126 (1977) (judge should examine deviations from the average districts); Abe, *Ippyou no Kakusa to Hou no motono Byoudou*, JURIST vol.830, at 49, 53 (1985).

110. For comment, *see* Nonaka, *Saninteisuuhukinkou Goukenhanketsu no Kentou*, HOUGAKU SEMINAR vol.1983 no.7, at 16; Takano, *Sangiingiinteisuu Saikousaihanketsu ni tsuite*, JURIST vol.794, at 13 (1983); Matsuzawa, *supra* note 63; Ashibe, *Sangiinteisuusoshou to Rippouhu no Sairyou*, HOUGAKU KYOUSHITSU

C. *Problems of Remedy*

Severability and the treatment of the unconstitutional election were difficult problems for the Court. In its 1976 decision, the majority opinion thought the apportionment unseverable and hence held the whole apportionment to be unconstitutional. But his holding led the majority to refrain from invalidating the election. The minority opinion asserted that the Court should judge the constitutionality of apportionment in the particular district involved.[111] Then, it would not be so difficult for the Court to invalidate the election in that district. But this solution would produce some improper consequences pointed out by the majority. Taking the middle position, Judge Kishi offered an acrobatic solution. He would hold deviations in a particular district unconstitutional and would invalidate the election in that district. Nonetheless, he would allow the elected members to continue their activities because the unconstitutional defect could be cured by providing additional members to the underrepresented districts.[112]

Judge Kishi's approach may help the Court to avoid the curious holding that the election was valid despite the unconstitutionality of underlying apportionment provision. Indeed, this holding is hard to swallow from the standpoint of the rule of law.[113] The Court's position left the unconstitutional statute forever intact and gave no room for judicial relief. But it gained support from many scholars. They attempt to understand it as a kind of warning decision or a prospective ruling.[114] Apparently, however, many Judges and commentators feel deep frustration at the continued failure of the Diet to correct the unconstitutional apportionment statute. In the 1985 Supreme Court decision, several Judges expressed some concern that the majority's view would leave the unconstitutional statute intact. The ideal of rule of law, they claimed, would require invalidation this time.[115]

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vol.34, at 6 (1983); Kubota, *Sangiinchihoukusenshutsugiinteisuusoshou ni taisuru Daini no Saikousai Daihoutei Hanketsu ni tsuite*, HANREIJIHOU vol.1077, at 3 (1983); Nonaka, *Saninteisuuhukinkou Goukenhanketsu ni tsuite no Zyakkan no Kousatsu*, HANREIJIHOU vol.1077, at 7 (1983); Tsukiji, *Sangiinteisuusoshou Saikousaihanketsu — Sono Keika to Gaiyou*, HOURITSU NO HIROBA vol.36 no.7, at 4 (1983); Ueno, *Saikousai Hanketsu no Igi to Mondaiten*, HOURITSU NO HIROBA vol.36 no.7, at 16 (1983); Shimizu, *Sangiinteisuusoshou Zyoukokushinhanketsu Hihyou*, HOURITSU NO HIROBA vol.36 no.7, at 25 (1983); Yoshida, *Sangiinteisuusoshou Saikousaihanketsu wo yonde*, HOURITSU NO HIROBA vol.36 no.7, at 31 (1983); Yamamoto, HANREI HYOURON vol.300, at 23 (1983).

111. This is also a minority view among commentators. *See supra* note 87; T.Abe, *Giinteisuu Ikenhanketsu to Senkyo no Kouryoku*, HOURITSUJIHOU vol.57, no.11, at 51 (1985).

112. *See* Y.Abe, *supra* note 96, at 60; Kubota, *supra* note 80, at 9.

113. *See* Wada, *supra* note 96, at 7; Nonaka, *Kenpousoshou ni okeru "Zizyou Hanketsu" no Houri*, KANAZAWA DAIGAKU HOUBUNGAKUBU RONSHUU vol.25, at 1 (1977); Nonaka, SHOUWA 51 NENDO ZYUUYOU HANREI KAISETSU 12; Nonaka, 2 GYOUSEIHOU HANREI HYAKUSEN 418 (1979).

114. *See* Ashibe, *supra* note 96, at 46-48, 50-51; Wada, *supra* note 96, at 7.

115. *See supra* note 88.

Even if the majority's understanding is adequate, it is still imperative to seek alternative remedies. Arguably, injunction would be a more appropriate remedy. However, the courts are reluctant to accept this kind of action. For example, when a plaintiff sought a declaration of the Cabinet's obligation to submit a reapportionment bill to the Diet, one lower court dismissed the action, holding it not justiciable.[116] In an injunction suit, the lower court also dismissed it for the same reason.[117] The only remaining remedy is a damage action against the government. The plaintiffs' burden is not easy, however, since they must show not only the unconstitutionality of inaction or neglect of the Diet to reapportion but also fault on the part of the legislature. Lower courts tend to reject damage actions stating that no fault on the part of the legislature has yet been shown.[118]

The reluctance of the courts to admit injunction suits is predicated upon the conventional belief that the Japanese courts lack the "equitable" power exercised by the American courts. And this view was fortified by the separation of powers argument that injunction intrudes into the legislative and executive powers. Nevertheless, unsatisfied with the Court's willingness to leave the unconstitutional apportionment statute intact, a growing number of commentators came to argue that there is nothing in the Constitution to prevent the Japanese courts from granting injunctive relief.[119] Some commentators would even allow the judiciary to order an election based on a court-ordered reapportionment plan.[120] [121]

D. A Comment on the Role of the Judiciary in Japanese Society

When we compare the developments of the American and Japanese reappor-

116. Judgment of Nov. 16, 1976, Tokyo District Court, HAREIJIHOU vol.832, at 3.

117. Judgment of Nov. 19, 1976, Tokyo District Court, GYOUSHUU vol.27 no.11-12, at 1772, *aff'd*, Judgment of April 25, 1977, Tokyo High Court, GYOUSHUU vol.28 no.4, at 337. These cases are noted in Tomatsu, *Giinteisuu Hukinkousoshou Hanketsu no Kentou*, HOURITSU JIHOU vol.52 no.6, at 20 (1980).

118. Judgment of August 8, 1977, Tokyo District Court, HANREIJIHOU vol.859, at 3. *See also* Judgment of Oct. 19, 1978, Tokyo District Court, HANREIJIHOU vol.914, at 29; Judgment of Nov. 30, 1981, Tokyo District Court, HANREIJIHOU vol.1024, at 32; Judgment of Oct. 22, 1981, Sapporo District Court, HANREIJIHOU vol. 1021, at 25, These cases are noted in Yamamoto, HANREI HYOURON vol.225, at 15 (1977); Nonaka, SHOUWA 53 NENDO ZYUUYOU HANREI KAISETSU 22.

119. K.Satou, *Kihontekijinken no Hoshou to Kyuusai (1) (2)*, HOUGAKU KYOUSHITSU vol.55, at 65, vol.56, at 59 (1985); Tanaka, *supra* note 99, at 46.

120. Takahashi, *Teisuuhukinkou Ikenhanketsu no Mondaiten to Kongo no Kadai*, JURIST vol.844, at 21, 29 (1985). Nevertheless, many still believe that such an action is beyond the judicial power. Judgment of Nov. 7, 1983, Supreme Court, Grand Bench (Yokoi, J. dissenting); Abe, *supra* note 111, at 55.

121. For additional literatures, *see* I.Satou, *Giinteisuu Hukinkou Ikenhanketsu no Mondaiten*, HOUGAKU SEMINAR vol.1976 no.6, at 8; Ban, *Giinteisuuhaibunkitei Ikenhanketsu ni tsuite*, HOURITSU NO HIROBA vol.29 no.9, at 43 (1976); Koshiyama, *Shuugiinteisuuhaibunkitei Ikensoshou ni kansuru Saikousai Daihoutei Hanketsu*, JURIST vol.617, at 62 (1976); Yamamoto, 2 KENPOU HANREI HYAKUSEN 260 (1980).

tionment cases, we can find some similarities and some critical differences. Since the Japanese reapportionment cases have developed under the strong influence of American counterparts, it is interesting to note these differences. The first difference concerns the forms of action. The reapportionment cases in the United States are almost all suits for declaratory judgment and injunction, while in Japan they are usually suits seeking the invalidation of election already conducted. Japanese courts are indeed reluctant to grant injunctions or other remedies. This difference in the forms of action led the courts adopt different remedies. Whereas the American courts can declare the unconstitutionality of the apportionment statute and enjoin the election or they can order an election at large or an election based on a court-ordered reapportionment plan, the Japanese courts had to declare the unconstitutionality of the apportionment statute and dismiss the suits, leaving the election intact. The second difference concerns the constitutional limits placed on malapportionment. Both American and Japanese courts hold that the principle of equal protection demands the population equality principle. Nonetheless, while American courts require absolute equality in congressional apportionment and substantial equality in state legislative apportionment, Japanese courts are more tolerant of larger deviations from population equality.

It is arguable whether the rigid standard adopted by American courts is indeed a necessary ingredient of a democratic society or is desirable from the standpoint of actual management. Especially if we consider the fact that reapportionment has remained a politically agonizing issue in many states and the fact that attempts to preserve party dominance over an opponent party has resulted in subtle gerrymandering, there may be a limit to judicial power. But if we consider the critical significance of the right to vote in free democratic government, it is at least essential that the courts review the malapportionment with some vigorousness. Therefore, it may be tempting to suggest some factors which may have contributed to the differences of Japanese reapportionment cases from the American counterparts.

One factor is a unique system of election districts in Japan. As previously noted, the Japanese election system for the House of Representatives consists almost exclusively of multi-member districts. In the United States, multi-member district has been criticized by many commentators because it dilutes the power of votes for minority groups. Even though the United States Supreme Court is unwilling to hold that multi-member districts are unconstitutional *per se*, it has intimated that multi-member districts are unconstitutional if they are conceived or

operated as purposive devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.[122] Yet the United States Supreme Court has never held that diluting the voting strength of partisan minority is unconstitutional although it has occasionally suggested the possibility.[123] In Japan, the issue of malapportionment is entirely partisan. Moreover, where the voter casts only one vote and several Representatives are elected in one district, under the current political demography of political parties, minority groups have a considerable chance to sent their representatives into the Diet. If all districts were single-member districts, the ruling Liberal Democratic Party has a fair chance that it can hold overdominating majority in the Diet. In this unique political election system and under the current political culture in Japan, the issue of reapportionment does not arise as a single most crucial element.

The second factor is a close connection between the representative and the people represented. In Japan, the election districts are marked by a municipality's boundary line because of the belief that the connection between the representative and those represented should be maintained. The necessity of districting based on the traditional municipal boundaries is generally supported by the courts and commentators as well. There has been, therefore, no serious attempt to redraw the district lines or to challenge the districting practice in the court. Although the courts and commentators disagree about the degree to which it justifies deviations from population equality, the connection appears to be important for preventing partisan gerrymandering.[124]

The third factor is the attitude of Japanese courts, especially the Supreme Court. Under the current judicial formula of the equal protection, all problems of

122. *See* Fortson v. Dorsey, 379 U.S. 433 (1965); Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973); Wise v. Lipscomb, 437 U.S. 535 (1978); City of Mobile v. Bolden, 446 U.S. 55 (1980) (at large election); Rogers v.Lodge, 458 U.S. 613 (1982). Difficulty of challenging the dilution of voting strength is well illustrated in Brown v. Thomson, 462 U.S. 835 (1983). In this case, the Supreme Court upheld a maximum population variance of 89%, 1-to-3.2, because a plaintiff chose to challenge dilution of his voting strength, and not inequality in the right to vote itself. *See* Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HAST. L. J. 1 (1982); Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851 (1982); Butler, *Reapportionment, the Court, and the Voting Rights Act: A Resegretation of the Political Process?*, 56 U. COLO. L. REV. 1 (1984); Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985).

123. *See* Bickerstaff, *supra* note 44, at 607.

124. The United States courts and commentators have not solved the issue of racial as well as partisan gerrymandering. *See* Backstrom, Robins, & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121 (1978); Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE. L.J. 189 (1984).

discrimination are relegated to the problem of reasonableness review. But this may be said about all other areas of constitutional rights. The Supreme Court has not recognized the preferred position of political or personal rights.[125] In this climate of strong judicial restraint philosophy, it is almost impossible to expect the Court to review malapportionment with some rigor.

Finally, malapportionment is only one phase of all the issues involving the election system in Japan. There is some "fixing," especially in the rural districts, and, even in urban districts, many private companies force their employees to cast their own and their family members' votes for a particular candidate which the companies support. The public may not be necessarily taking the right to vote seriously. Moreover, various restrictions have been placed on election campaigns, including a limitation of the campaign period and a prohibition of any campaigning prior to this period, a prohibition of door-to-door canvassing, restrictions on the pamphleting, posting of posters, holding of rallies, or using of sound-trucks and so forth. And apparently, the Japanese Supreme Court has consistently upheld these far-reaching restrictions on the constitutional right of political expression and election campaigning. This insensitivity of the Diet, courts, and the general public toward political freedom may suggest that ordinary citizens regard the election as a formalistic ceremony.

CONCLUSION

The Court has now made clear that the current apportionment statute is unconstitutional. Although the Liberal Democratic Party proposed a so-called six-plus-six-minus plan which would move six representatives from overrepresented districts to underrepresented districts, opposition errupted and the Diet could not reach an agreement in its 1985 regular session. Meanwhile, the 1985 census has turned out a striking result that a maximum population variance is now 1-to-5.12 for the House of Representatives.[126] In order to reduce maximum poulation variance to the below 1-to-3 level, which has been assumed by the Court to be the constitutional limits, the Diet has to revise the statute quite drastically.[127]

125. *See generally* L.BEER, FREEDOM OF EEXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY (1984); Boltz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HAST. INT'L & COMP. L. REV. 87 (1980).

126. ASAHI SHINBUN, Dec. 27, 1985, at 2.

127. The Liberal Democratic Part is now thinking of the ten-plus-ten-minus plan, a plan which adjusts the number of apportioned Representatives. However, there is some disagreement even within the party and it is not clear whether the Diet will come up with a compromise during this year's regular session.

In any event, the reapportionment cases are, to this date, the only holdings handed down by the Japanese Supreme Court which declared the Act of the Diet unconstitutional in the context involving political rights. Although the issue is more subtle in Japan than in the United States, the legislative insensitivity toward political rights appears to necessitate more active judicial role. It is hoped that the reapportionment cases will contribute to the development of a theory of judicial review in Japan.