

*Reviewing the vote-value disparity in electoral legislation in Japan*

*By MASUNAGA, Hidetoshi*

*(Translated by SATOH, Koh)*

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**Chapter I Japan is not a democratic nation**

Japan is not a democratic nation. This is simply because legislative actions are taken and the head of the national executive power is elected by the minority of the nation in the number of voters. Consideration on this significant issue is my topic of today.

(1) In the case of the Lower House election regulated by Public Offices Election Act of Japan, voters in certain electoral zones are granted 1.0, or fully valued voting rights, while voters in other zones are given only, say, 0.5, or half valued voting rights. For the Upper House election, voters in unfairly treated zones are given 0.3.

(2) I have thought as follows: [All men and women must have been equally born. Then, every one of them must be granted 1.0

voting right, no matter where he or she might live. The fact in Japan, however, is that some of them living in certain areas are granted fully valued voting rights, while others living in other areas are given less valued rights. Our national electoral legislation violates the equality of the people before the law that is provided in Article 14 of Constitution of Japan, for the reason that voting rights are given to people in a sort of discriminatory way, depending on where they live.] I was thinking of the issue of unequal voting rights within the framework of Article 14 of our constitution.

On the other hand, until 7 years ago I had no hesitation in believing that Japan was a democratic nation. In this country, elections have been almost fairly administered, freedom of the media has been reasonably secured, and people have been exercising their voting rights, reflecting the seemingly true information released from the press. In other words, I used to think of the issue of unequal voting rights quite independently from the matter of democracy until 7 years ago.

One day 7 years ago, however, I was suddenly reminded of a classroom at my elementary school where I was taught that democracy meant making final decisions on disputes by students' majority opinions after having finished exhaustive discussions. I also recalled another classroom where all of my 50 second-grader classmates participated in election of the class head according to the rule of majority, and I was convinced of what the democracy taught by the teacher exactly was. And these memories made me realize that Japan, with no provision of "one-person one-vote" electoral system can not be called a democratic nation. The impact I felt at that moment still remains lodged in my brain. That is the moment that the issue of unequal voting rights and the matter of democracy got linked together in my thought for the first time.

(3) This discussion can be simplified to comprehend how the problem of unequal voting rights will deteriorate the rule of majority. Suppose that voters living in a highly-populated area are given 0.8 voting rights, while 1.0 voting rights are granted those living in a thinly-populated area. Then, imagine that the total population of a nation was 100, which would consist of 54 residents (54%) in the highly-populated area and 46 residents (46%) in the thinly-populated area. This imbalance would practically result in counting 43 and 46 fully valued votes respectively.

Should each fully valued vote elect one Diet member, the number of resulting

elected lawmakers would be 43 for the highly-populated area and 46 for the thinly-populated area, out of 89, the total number of elected Diet members. 43 lawmakers means the minority of the parliament, while 46 dose its majority. And this imbalance would unfairly result that national legislative actions and appointment of the head of administrative body (or the prime minister in Japan) being decided by voters living in the thinly-populated area which is a minority of the population.

(4) The principle of democracy is a concept that legislative actions and appointment of the head of the executive power must be made by the majority in the number of voters, not in the number of lawmakers. Our current electoral legislation accepting the vote-value disparity allows the minority in the number of voters to make laws, or decide national budgets or appoint the prime minister. This way, how can Japan be called a democratic nation?

(5) We learn from the history that politically critical decisions have been often made by an extremely narrow margined majority of voters. A good example is the latest U.S. Presidential election of November, 2008. The epoch-making result of this election was reported as if Mr.Obama's victory were a landslide. But never was it. His winning was a result of 53% nationwide voters' support. Republican candidate McCain acquired as many as 46% votes despite of an impression of his crushing defeat. The remaining 1% flowed Ralph Nader and others. Just imagine for the sake of discussion; Democratic Candidate Obama could have never become the resident of the White House, if his supporters might incidentally have been given mere 0.1 less valued voting rights. Even such a small inequality could mean a lot as a potential hazard to the security of the democracy.

(6) Abraham Lincoln is famous with his words " Government of the people, by the people, for the people" in his address in Gettysburg, the bloodiest battlefield during the Civil War. He began this address with another widely known phrase "All men are created equal". As everyone agrees, the pillar of men's equality is obviously nothing but an equal enfranchisement to all citizens.

## **Chapter II Parties concerned with a conflict can never be qualified "the judges for solution of the conflict"**

(1) The summary of the major opinion expressed by Supreme Court of Japan was that

the Public Offices Election Act of Japan is considered constitutional if the vote-value disparity defined in the act is judged acceptable as a reasonable method to execute the discretionary powers authorized to the parliament. This opinion expressed by the majority judges does never seem convincing to me. Think of the fact that our parliament consists of lawmakers who are the parties directly concerned with the subject of the vote-value disparity as their own problem, or who at least are the stakeholders having some interest, if not much, in the subject. How can the parliament itself be qualified the party authorized to execute its own discretionary powers, even if the method of execution is conditioned to be "reasonable".

- (2) The law defines the maximum vote-value disparity of more than two to one for the Lower House election and more than four to one for the Upper House election. One of the court disputes was whether candidates who had won an election under such a vote-value disparity could be legally qualified as a member of the parliament. A candidate who won an election under such a rule must be considered none but an actual player in the game, since he would have to retire from the ground if Supreme Court had made a decision to judge the law unconstitutional and invalid. Or, he must be considered at least a party directly and specifically interested in the subject of dispute.

Besides discussing the legal qualification of Diet members who won an election under such a vote-value disparity, it must be strictly monitored that the constitutionality of the law shall be fairly judged in the light of the equality of the people before the law as provided in Article 14 of our constitution. The party directly concerned with or at least interested in this issue can not be qualified the judge of the dispute? I discuss this in (3) and (4) below.

- (3) First, let me introduce the doctrines of [Exclusion] and [Refusal] defined in Code of Civil Procedure of Japan. A judge who is a party directly concerned with the indicted case shall be excluded from execution of his duties (C.C.P. Article 23 Section 1 Item 1). It is because his fair execution of duties will not be anticipated. A judge who is a party interested in any litigant object shall be refused from execution of his duties (C.C.P. Article 24 Section 1). It is because there will be an objective situation where fairness of his judgment will be distrusted. It is obvious that the major opinion expressed by Supreme Court of Japan in the latest court decision of 2007 conflicts with these doctrines of [Exclusion] and [Refusal].

(4) In addition to the above provisions in the code of civil procedure, the Companies Act of Japan and other laws generally covering activities of incorporated bodies and juridical foundations restrict the members participating in resolutions of board meetings of joint-stock corporations, other incorporated bodies and juridical foundations under the similar doctrine. The restriction is that, at the meeting where voting rights for any resolution must be executed irrelevantly from voters' own interests, any party who might have a specific interest in the result of resolution shall be excluded from voting. This is because his fair execution of voting right being apart from his own interest would not be anticipated.

### **Chapter III A limit against “one-person one-vote right”**

In the light of the equality before the law as provided in Article 14 of Constitution of Japan, the maximum vote-value disparity must be decided by the restrictive terms that are considered practically and technically feasible with reasonable cost efficiency.

In 1983, at an action disputing legitimacy of U.S. Lower House Election, the electoral law of the State of New Jersey that permitted 0.7% vote-value disparity was judged unconstitutional and invalid, by Federal Supreme Court (*Karcher v. Daggett*, 462, U.S.725, 1983). The claimed discrimination was the difference between 527,472 voters in Congressional District No.4, the largest voting population in New Jersey and 523,798 voters in District No.6, the smallest. The difference of 3,674 voters stands for approximately 0.00697 against the population of District No.4, the highest populated electoral zone. U.S. Supreme Court, the regulator of interpretation of U.S. laws (which are known to have been a contributor to formulation of Constitution of Japan established right after the World War II ) executed the power to determine the unconstitutionality of a state electoral legislation to realize the rule of law that “one-person one-vote right” should be protected to ensure the equality of the people before the law.

### **Chapter IV “One-person one-vote right” must be also granted for the Upper House Election in Japan**

(1) Japan is a single nation, while the United States of America is a federal nation that consists of 50 states. As a result, the Upper House of Japan is entirely different from its U.S. counterpart. Imagine that someone might develop an argument that Japan's

vote-value disparity for the Upper House election, which maximum is five to one, could be allowable because U.S. Senate election permits even a higher vote-value disparity. But, this argument is never convincing. I discuss the reason as follow.

Every state of the United States of America exists as a state (nation). It has its own legislature, its own constitution and other laws, such as the state civil law, state corporate law, state copyright law, state criminal law, its own supreme, high and district courts, its own government offices, its own military forces, and its own taxation rights as a kind of an independent nation. To the contrary, local public authorities or prefectural governments including (Tokyo Metropolitan government) in Japan have none of constitutions, laws, supreme, high or district courts, or military forces of their own. Also they are not granted even taxation rights practically. Our prefectural governments function as mere local administrative districts, and can never satisfy the necessary requirement of a state (nation).

U.S. Federal Constitution clearly stipulates that every state can equally elect U.S. Senators. The United States of America was founded by 13 states, and then joined by 37 other states one after another. One of the conditions for the membership of the United States was a commitment in full compliance with Federal Constitution that stipulates every state's right to equally elect Senate members, which results in voting rights discriminated by the states for the Upper House elections. The argument that Japan's vote-value disparity for the Upper House election can be justified on the analogy of the disparity in the Upper House in the U.S., if you look at the institutional difference between our local public authorities and the states of the United States of America.

(2) Article 43 of our constitution stipulates that both members of the Upper House and the Lower House represent all the people in the whole nation. However, the Upper House lawmakers are not constitutionally expected to represent the interest of local electoral zones where they are to be elected. An argument to insist on this particularity of the function of the Upper House members and deny "one-person one-vote right" protected by Article 14 can never be acceptable, because there is no constitutionally written provision to support such a contradiction of the equality in voting right. "One-person one-vote right" must be granted to the people, by all means, according to Article 14. Or, suppose someone argues on the Lower House election that vote-value disparity must be accepted for the sake of protection of depopulated

regions. There is no justification found for this argument in any part of our constitution. This must be placed out of scope of any legal discussion.

## **Chapter V Decision of U.S. Federal Supreme Court: Reynolds v. Sims 377 U.S. 533, 84 S.Ct. (1964)**

Decision of U.S. Federal Supreme Court in 1964 (Reynolds v. Sims 377 U.S. 533, 84 S.Ct.1964) nullified an electoral law of the State of Alabama for the reason of the unconstitutional disparity comparably observed in the weight of one vote for zones with a larger number of black residents and for zones where white people were many. Voters living in zones with a large population of black people had had to accept much less valued voting rights. Since then, every one of U.S. citizens has been granted a fully valued voting right with no color discrimination, no matter where he or she might live.

The United States of America was founded as the first democratic nation in the human history after the Revolutionary War in 1776. Even in such a nation, the problem of the vote-value disparity could not be solved by means of the electoral system, a typical political structure of the democracy. It was resolved by a judicial process carried out in 1964. Only the judiciary can realize the rule of law named "one-person one-vote right". This historical fact speaks loud about what mission must be fulfilled by the judiciary for the nation. None of judicial missions can be performed by legislative and administrative authorities of the nation.

Looking back of the human history again, the democracy was founded, one, by revolutions such as American Revolutionary War and, two, by decisions of U.S. Federal Supreme Court. As obviously observed in the case of electoral law of the State of Alabama, mere repetition of elections could never solve the problem of the vote-value disparity decided by where voters lived. The court decision in 1964 includes the text "People, not land or trees or pastures, vote". I was impressed with this phrase. It can never be disputed that the people were not the land, not the trees, and not the pastures. By the same token, it can also never be disputed that every man and woman should have been granted a full voting right.

In present-day Japan, the majority of voters are undoubtedly not granted "one-person one-vote right". The black people prejudicially treated for election before 1964 were the minority counting only 11% of the total population of America. Eliminating the vote-value

disparity in today's Japan must be a much easier task than it was 45 years ago in America, simply because the unfairly treated voters are the majority of our population. Should Public Offices Election Act of Japan be revised to grant "one-person one-vote right" to every voter, no matter where he or she might live, new political parties might be launched to represent the interests of now fairly treated citizens, sharing values of politics with majority of voters for tackling review of national budgets, taxation purposes, pension payment as well as the problem of easy birth of the second-generation lawmakers.

## **Chapter VI A simple method to change Japan to a really democratic nation**

- (1) The Supreme Court has the power to determine the constitutionality of laws under the provision of Article 81 of our constitution. Supreme Court judges can hold the electoral legislation unconstitutional and nullify such law on the ground of the vote-value disparity. The Supreme Court has the power to make the law securing "one- person, one-vote" rule. Such a court decision will be magic key to force our lawmakers to revise the electoral law for securing "one-person one-vote right" to rule the law, so that all legislative actions shall be taken by the majority in the number of voters, not in the number of lawmakers themselves.
- (2) For the purpose of changing Japan, where all legislation and appointment of the head of the national executive power are currently done by the minority in the number of voters, to a democratic nation, where these actions are done by the majority in the number of voters, the key is exercise of voters' right to nationally review our Supreme Court judges in accordance with the informed consent. A patient's agreement with a specific medical practice must be expressed as an informed consent in advance. Unfortunately, however, our system for national referendum on Supreme Court judges includes none of steps that may be described as an informed consent.
- (3) The national referendum in 2005 resulted in as small as 8% as the highest percentage of non-confidence votes recorded on one of reviewed judges. As repeated in this article, the majority voters in Japan are given less valued voting rights. And yet, most voters did not cast negative votes against the judges who deliver a decision of the constitutionality for our Public Offices Election Act permitting the vote-value disparity. Their voting attitudes appear negating a proposition that those who can reasonably assess things could never assess things against their own



interests.

This rather mysterious fact was resulted that the voters exercise their voting rights of national referendum without having been informed whether judges to be reviewed had been supporting or disapproving the vote-value disparity permitted in our electoral legislation from the viewpoint of its constitutionality.

The other day I had an occasion to ask questions to 25 women. "Suppose that our law for election of parliament members grants men and women the voting rights valued 1.0 and 0.9 respectively. Also suppose, before your voting for national referendum on Supreme Court judges, you have known that the law has been considered constitutional and valid by some of judges being reviewed, and unconstitutional and invalid by others. Now, do you cast a confidence vote or a non-confidence vote for those who have judged the law constitutional and valid?" All of these women answered they would cast non-confidence votes.

Then, I repeated the same question to 19 men. They all answered, similarly to the women, they would cast non-confidence votes. Why did both men and women respond to my question in the same way? Because they know that sexual discrimination of voting rights is nothing but injustice.

There is a law which provides that residents in certain regions are granted the fully valued voting rights, while those in other regions are given the less valued. Should voters in such prejudicially treated regions have known, before going to their voting stations, who opines that the law which provides vote-value disparity is constitutional, the majority of them would cast non-confident votes for those judges. Exactly by the same attitude of the women who expressed their anger against sexually discriminated voting rights, voters in such prejudicially treated regions must not accept this sort of unfairness in the law, which does not handle him or her as a full-fledged political entity.

Now, imagine that an individual vote value of ten million valid voters were virtually 0.6. Every voter, however, puts his vote into a ballot box with no doubt that his ballot is worthy of a full-fledged value. With all of their votes counted, we have to find that ten million voting papers are now valued only at six million. In a metaphorical sense, this story sounds something like four million ballots have been pulled from ballot boxes by

invisible persons without voters' consents. Otherwise, nothing could add up to justify final calculation of the number of valid votes.

It has been reported that a number of members of international monitoring or watchdog committees were paying visits to several developing countries from abroad for protection of illegally smuggling out or destroying ballot boxes in their national elections. Such sorts of action must smash and ruin the foundation of the democracy. "Are there such countries in the today's world that can never satisfactorily control national elections by their own people? Disappearance of votes from ballot boxes means denial of election as a political system. It's too far distant from our common sense, isn't it?" Honestly I felt so. However, it is virtually nothing different from a denial of "one-person one-vote right" caused by the vote-value disparity, the most typical injustice in today's world.

(4) If national referendum on Supreme Court judges can be done based on the ground of the informed consent, it may be quite probable to have judges' majority opinions supporting the vote-value disparity changed to the opposite direction, as a result of the evaluation of voters' opinions. The Supreme Court of Japan consists of 15 supreme court judges. Should 8 judges, the majority, hold Public Offices Election Act allowing the vote-value disparity unconstitutional and invalid, Japan will be able to change to a really democratic nation where legislative actions and appointment of the head of the national executive power are made by the majority in the number of voters.

A judge who accepts such a value-vote disparity, might behave humbly with a sort of self-restraint, saying: "We, the supreme court judges, have not undergone a baptism by the electorate in the nation. So, Supreme Court judges must refrain from nullifying our Public Offices Election Act, unless the extent of the vote-value disparity is considered unreasonable. The lawmakers, who have been directly elected by the electorate, must be primarily responsible to find solutions within the Diet." Results of the national referendum on these judges done on the ground of the informed consent would let them become aware what the practically thought opinions of voters exceeding sixty millions are, and then they would not need to behave with modesty and self-restraint any more.

(5) Let's study the problem for our concrete solution. First of all, an attorney who desires

to be recommended by his bar association as a candidate of Supreme Court justice must file his candidacy, specifically defining his thought about significant legal issues including the problem of the vote-value disparity. Secondly, before voting for national referendum on qualification, Supreme Court judges must clarify their stances on the constitutionality of Public Offices Election Act in their answers to possible public questions, in the exactly same way as candidates bidding for the Diet membership publicize their manifests for potential voters' disputes prior to the election.

Supreme Court judges to be reviewed might include those who are in charge of a pending constitutional case regarding "one-person one-vote right". His desirable response to any question made on the constitutionality of our electoral law is to definitely express his personal opinion as a jurist, yet with a reservation that it might not be identical with his opinion to be announced on a subsequent court decision that shall be grounded on the results of hearing the arguments by the plaintiff and the defendant on actual conditions, and on the result of discovery as well. The object of the question raised in the court session for disclosure of his personal opinion will be limited, most probably, to the issue of "one-person one-vote right".

The benefits of the people of Japan may be subjected to the following comparable assessments. One is the case of a constitutional court decision made by the judges who had disclosed personal opinions as jurists on the issue of "one-person one-vote right" to potential voters beforehand, and successfully qualified later by confidence votes in majority. Another is where a constitutional court decision was made by the judges who had disclosed none of their personal opinion as jurists on this issue beforehand with no advanced opportunity of voters' actual referendum to qualify or disqualify them. The people of Japan would benefit much more from the former court decision than the latter without the slightest doubt.

## **Chapter VII The right of national referendum on Supreme Court judges is a franchise to voters**

As defined in Article 79 Section 2 and 3 of Constitution of Japan, the people of Japan are granted the right to remove Supreme Court judges from their offices by means of non-confidence votes in the majority of the nation. And this right is given to every voter in the full value, no matter where he or she might live. If the majority of potential voters with less valued voting rights get together and exercise their fully valued rights of

national referendum to disqualify the judges who support the constitutionality of the electoral legislation, the majority in 15 judges might judge the law invalid and unconstitutional. People's voluntary exercise of their enfranchised rights would enable to change present-day Japan to a really democratic nation where legislative actions and appointment of the prime minister could be done by the majority in the number of voters, not, in any sense, by the majority in the number of lawmakers. The right of national referendum on Supreme Court judges is an essential franchise, as significant as, or even greater than the voting rights for the Diet members. It is because the unequal electoral voting rights could be equalized by exercise of this franchise by the majority voters.

### **Chapters VIII Summing up**

- (1) The right of national referendum on Supreme Court judges defined in Article 79 of Constitution of Japan is a sole method to make a "one-person one-vote right" democracy happen in present-day Japan.
- (2) The judiciary is responsible to change Japan to a true democratic nation grounded on a "one-person one-vote right" by execution of the power to determine the constitutionality of any legislation authorized for achievement of [the rule of law].
- (3) Many voters have not been aware that putting x-marks in ballot papers for national referendum on Supreme Court judges is nothing but an execution of their franchises. They should know their filling in ballot papers prepared for the national referendum is the execution of their enfranchised power.
- (4) There should be no full-fledged voters, or less-fledged voters at the same time in Japan. We are all full-fledged Japanese entitled one-person one-vote rights. No second-class citizens given only less valued voting rights should be found in this nation
- (5) We, Japanese, can now be ready to execute our powers, subjectively for the first time, to nationally review Supreme Court Judges of Japan, ultimately opening the first page of the history of Democratic Japan. This is for both present-day Japan and Japan in the future.