

Constitutional Law Court in Japan

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Preface

Japan does not have a court with exclusive jurisdiction over matters of constitutional law. Since World War II, the Supreme Court has only ruled around ten cases as unconstitutional on their faces, while twelve cases have been declared unconstitutional on application. The prominent professor and former Supreme Court Justice Masami Ito stated that Japan preferred faceless judges because they are likely to render uniform decisions with no unique arguments, and it is futile to ask career-oriented judges to exercise judicial review diligently.

Judicial review is a mechanism for the judiciary to interact with the people involved in the political process.

In the past, Japanese scholars have discussed the establishment of a constitutional law court. In Japanese law, “cases and controversies” are not documented as a part of constitutional law; rather, such documentation is a legislative requirement of the Court Act. With an amendment of the Court Act alone, a constitutional law bench exclusively focusing on constitutional law matters can be established. Any amendment to the Japanese

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Constitution is highly contentious in contemporary Japan and may cause controversies that are unnecessary for the establishment of a constitutional law court.

The Japanese Supreme Court has been more active recently than it was in the past, especially with regard to cases involving equality of voting, which has been dysfunctional in the current political process. Family law cases—which change legislative facts dramatically—are handled by the Supreme Court in 2015.

The unique characteristic of justice is gradually becoming apparent. The courts render broad decisions while writing separate concurring opinions.

Therefore, this paper examines the possibility of establishing a court with specific jurisdiction over constitutional law.

I. Danger in Political Process in 2015

1. National Defense and Security Bills in Summer, 2015

In 2015, eleven national defense and security bills were passed as one bill in the House of Representatives. The bill was then sent to be passed in the House of Councilors. The Japanese Diet consists of two Houses¹, and the majority of seats in the Houses of Representatives and Councilors are held by the Liberal Democratic Party (LDP) and the Komeito Party. Statutes become effective by the approval of the two Houses of the Diet.

Article 59 (2) of Japanese Constitution² provides that if a bill is defeated in the House of Councilors, it is possible for the House of Representatives to pass the bill a second time “by a majority of two-thirds or more of the members present.” The bill must be passed by the House of Councilors within sixty (60) days after the bill is sent from the House of Representatives, according to Article 59 (4).³ If the bill fails to pass the House of Councilors,

1 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.42. The Diet shall consist of two Houses, namely the House of Representatives and the House of Councilors.

2 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.59 (2). A bill which is passed by the House of Representatives, and upon which the House of Councilors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

3 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.59 (4). Failure by the House of Councilors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection of the said bill by the House of Councilors.

the bill is discarded and does not carry over to the next session of the Diet. There are 475 seats in the House of Representative, and the LDP and its coalition partner, the Komeito Party, have 325 seats.⁴ It was possible for coalition government to pass the bill again in the House of Representatives under Article 59 (2), but the coalition parties did not use it. The LDP announced that it would not use the sixty days of Article 59 (2) and the second voting by a two-thirds of majority of the House of Representatives. This particular approach to the second vote meant that the ruling parties avoided further deliberation and the dissenting opinion of the parties out of office.

Instead, the LDP rushed the bill through by using the special committee for security bills. The chair of the committee is selected from the party with the majority of seats in the Diet. Thus, Yoshitada Kounoike, a member of the LDP in the House of Councilors, was selected to be the chair. However, it seemed to him that the government's explanation was unsatisfactory and lacked consistency in its explanation of the bill. With the last days approaching, around September 16, 2015, with deliberations in chaos, a resolution was made. The bill was brought to the plenary session of the House of the Councilors immediately. The opposition party submitted a censure motion against Minister of Defense General Nakatani and Prime Minister Abe in the House of Councilors, as well as a resolution of no confidence in the House of Representatives on September 18 to 19, 2015. The latter resolution has the power to make the prime minister resign or to dissolve the Diet within ten (10) days.⁵ Both of them were defeated, however. A majority was secured by the ruling party and its allying party. The purpose of this motion was to ensure that the bill ran out of time.⁶

During these events, those who objected to the bill gathered at the Diet for a demonstration with many constitutional law scholars.

4 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.43 (2). The number of the members of each House shall be fixed by law.

KOSHOKU SENKYO HOU [JAPANESE PUBLIC OFFICER ELECTION ACT], Law No. 60 of 2015, art.4. (Japan).

5 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.69 (2). If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved within ten (10) days.

6 KOKKAI HOU [JAPANESE NATIONAL ASSEMBLY ACT], Law No.79 of 1947 (now No.86 of 2014), art.68. (Japan). (any matters left unresolved at the end of one Diet session are not to be carried over to the next session).

Professor Yasuo Hasebe, Professor emeritus Setsu Kobayashi, and Professor Eiji Sasada in particular expressed the opinion in committee that the defense and security bills were unconstitutional. It was a big surprise because the scholar who were chosen by the ruling party stated publicly that the bills were unconstitutional. The former president of the Japanese Supreme Court, Shigeru Yamaguchi, said that if the Abe administration changed the traditional interpretation of Article 9 as a cabinet decision in 2014, the government should have explained that the previous governmental opinion was a mistake because the budget and related bills were passed under the pre-2014 governmental opinion, which had accepted only individual self-defense, not collective self-defense.⁷

After the bill passed at the House of Councilors, Abe carried out a cabinet reshuffle to maintain his level of support in cabinet.⁸ Many constitutional law scholars and Japanese bar associations planned to initiated legal actions to court, alleging that these security defense laws were unconstitutional. These people expected the Supreme Court to provide a lead in the laws unconstitutional. Even though, after World War II, the Japanese Supreme Court adopted the U.S. court system⁹, the number of unconstitutional decisions has been very small compared to the number in the United States.

2. The Resolution to be Reviewed by the Court

In Japan, this resolution was presented in chaotic conditions by the LDP and Komeito Party; in the past, the Japanese Supreme Court had reviewed one resolution of the Diet passed under similar conditions. During Shigeru Yoshida's fifth cabinet¹⁰, the ruling Liberal Party (*Jiyu to*) and the party out of office clashed over an amendment to the National Police Act.¹¹ The session of the Diet was repeatedly extended. At that time, there was no limit to extending the session in National Assembly Act.¹² The ruling party decided in the fourth

7 Shudanteki Jieiken no Koushi ha Iken [Exercise of Collective Defense Power is Unconstitutional], *The Asahi Shimbun*, (September 3, 2015). Available at <<http://www.asahi.com/articles/ASH9255ZGH92UTIL02Q.html>> (last visited on 26 in December, 2015).

8 The third Abe cabinet has started on October 7, 2015.

9 The origin and history of Japanese Constitution. Birth of Constitution of Japan [English]. < <http://www.ndl.go.jp/constitution/e/index.html> >. (last visited on 26 in December, 2015).

10 The fifth Yoshida cabinet from May 21, 1953 to December 10, 1954.

11 KEISATSU HOU [JAPANESE NATIONAL POLICE ACT], Law No.162 of 1954 (now No.124 of 2014). (Japan).

12 KOKKAI HOU [JAPANESE NATIONAL ASSEMBLY ACT], Law No.79 of 1947 (now No.86 of

extension of the session that if the session ran out of time, the bill would expire. In the next year's plenary session, the Diet needed to deliberate again.

Members from the parties out of office prevented the chair from entering the floor and announcing the extension of the session. The chair could not enter, but at the entrance pointed two fingers and announced an extension of two days, screaming. Only around ten members of the ruling parties applauded.

The chair and ruling party attended the extended session to pass the amendment of the National Police Act. The members of the non- governmental parties did not show upon the floor.

The Osaka prefecture's parliament resolved in June in 1954 that the spending based on that resolution of the Diet was effective, and the National Police Act was amended. The inhabitants of Osaka prefecture brought a suit for illegal spending under the Local Government Act.¹³

Supplementary to this is the fact that after World War II, the police system followed the United States model, and each unit was based on municipalities, such as city, town, and village. The new bill's proposal was to rearrange this into a prefectural basis. Each prefecture had its own headquarters to control the municipalities in its region. The central National Policy Agency controlled and coordinated among prefectures. Democracy and the efficiency of the police, central governmental intervention and local government independence, clarification of security responsibility, and political neutrality were balanced in this bill. Before World War II, the police force had been used to suppress dissenting opinion.¹⁴ The opposite parties were afraid of a return to a military state.

Usually, a plaintiff needs to have standing to bring a suit, according to the Court Act.¹⁵ The Local Government Act is an exception, allowing citizens to bring suits as taxpayers to

2014), art.12. (Japan).

13 CHIHO JICHI HOU [JAPANESE LOCAL GOVERNMENT ACT], Law No. 67 of 1947 (now No.50 of 2015), art.242. (Japan).

14 CHIAN IJI HOU [JAPANESE PEACE PRESERVATION ACT], Law No. 54 of 1941 [abolished]. (Japan)

15 SAIBANSHO HOU [JAPANESE COURT ACT], Law No. 48 of 2013, art 3 (1). (Japan). Courts shall, except as specifically provided for in the Constitution of Japan, decide all legal disputes, and have such other powers as are specifically provided for by law.

recover illegal spending.¹⁶

The Supreme Court dismissed the case.¹⁷ The Supreme Court noted that this amendment was passed under proper procedure at the Diet and then promulgated. The court had to respect the autonomy of the Houses of the Diet and should not judge the appropriateness of the resolution. This bill abolished the municipality policy and established the new prefectural police system, which was not counter to Article 92, which stipulated the autonomy of the local government.

In Japan, each House of the Diet has autonomy in managing decision making and is beyond judicial review. Resolutions for punishment of members of the Diet are not reviewed. The National Assembly Act comprises statutes passed by the two Houses. Generally, the National Assembly Act is superior to the regulations of each House. According to Professor emeritus Koji Sato¹⁸, it is possible to interpret the exclusive matters of each House as superior to the National Assembly Act, or just a gentleman's agreement. There is a precedent case book for each House. Sato states that if the procedural violation of the House is so clear that the court may render it unconstitutional because the statute passed at the Diet relates to the fundamental rights protected by Japanese Constitution.¹⁹

Returning to the resolution of the Defense and Security bill, the bill was resolved through conflict and arguments between members. It is doubtful that the resolution was effective. If its committee's resolution fails, the statute will not be effective.

Makoto Ito and other attorneys have brought several suits to some district courts and requested that these defense and security laws be ruled unconstitutional.²⁰ The bar association at Saitama prefecture²¹ announced its support for Hasebe and Kobayashi, and

16 KOJI SATO, *KENPO* [Constitution] 585,587 (Seibundo 2011).

17 Saiko Saibansho [Sup.Ct]Mar. 7, 1962, Showa 31 (o) no.61, 16 (3) Saiko Saibansho Minji Hanreishu [Minshu]445.

18 KOJI SATO, *KENPO* [Constitution] 462 (Seibundo 2011).

19 *Id.* At 464. See also, TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI, KATSUTOSHI TAKAMI, *KENPOII* [Constitution II] 231 (Yuhikaku 2012).

20 Anpohou Iken Shudan Teiso he [Bringing Suits for Security and Defense Act to Court], *The Tokyo Shimbun*, (December 22, 2015). Available at <<http://www.tokyo-np.co.jp/article/national/list/201512/CK2015122202000126.html>>. (last visited on 26 in December, 2015).

21 Statement by President of Saitama Bar Association (March 24, 2015). Available at <<https://www.saiben.or.jp/proclamation/view/294>>. [Japanese], (last visited on 26 in December, 2015).

retired judges expressed serious concern about the statutes.²²

Having seen the National Police Act amendment case, rather than contest the actions, Kobayashi might be waiting to keep this hot atmosphere until the 2016 election of the House of the Councilors.²³

3. Unconstitutional Decision in Nagoya High Court Decision

The preamble of the Japanese Constitution contains the term “live in peace.”²⁴ Before Abe’s cabinet decision of 2014 that the government would newly approve collective defense power²⁵, the Japanese government sent the Self Defense Force (SDF) abroad under special measures laws²⁶ regarding Iraqi humanitarian and reconstruction assistance. In order for the Japanese government to send ground and maritime SDF to Iraq, the Diet enacted special measures statutes in 2003, which was an act valid for four years. The government extended once another two years to 2009.

The plaintiffs argued that this dispatch was unconstitutional and asked for compensation under the National Redress Act²⁷ for the infringement of the right to live in

22 Saibankan OB 75 nin ga Hantai Seimei [Statement of Opposition by 75 Retired judges], (September, 15, 2015), The Jiji.com. Available at < <http://www.jiji.com/jc/zc?k=201509/2015091500750>>. (last visited on 26 in December, 2015).

23 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.46. The term of office of members of the House of Councilors shall be six years, and election for half the members shall take place every three years.

24 NIHONKOKU KENPO [KENPO] [CONSTITUTION], preamble. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have *the right to live in the peace*, free from fear and want.

25 The Cabinet Legislation Bureau (CLB) and the Supreme Court are reviewed in Yuichiro Tsuji, *Constitutional Amendment*, 37 Nanzan Review of American Studies 51 (2015). Drafting statute process is recorded in examination records of the Diet.

According to Masahiro Sakata, Ex-director of CBL, stated that only one experience to change its official interpretation was Article 66 (2) of Japanese Constitution.

MASAHIRO SAKATA, *SEIHU NO KENPO KAISHAKU* [Constitutional Interpretation by Government] 162-4 (Yuhikaku 2013).

NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.66 (2). The Prime Minister and other Ministers of State must be civilians.

26 LAW CONCERNING THE SPECIAL MEASURES ON HUMANITARIAN AND RECONSTRUCTION ASSISTANCE IN IRAQ. Law No.137 of 2003. (Japan) [expired].

27 KOKKA BAISHO HOU [JAPANESE NATIONAL REDERESS ACT], Law No.125 of 1947, art.1. (Japan).

peace stipulated in the preamble of the Japanese Constitution. They also asked the court to announce its unconstitutionality and an injunction against dispatching the SDF.

In 2008, the Nagoya high court dismissed the case with a conspicuous note.²⁸ The Nagoya court noted that air transportation by the Air SDF was beyond the scope limited by Article 3 of the special measures laws regarding Iraqi humanitarian and reconstruction assistance and was an unconstitutional activity under Article 9 of the Japanese Constitution.

The court noted no infringement of the right to live in peace and thus dismissed the argument seeking the announcement and injunction. The original decision to dismiss the damage argument was maintained.

The Nagoya court classified Baghdad as a combat region to which it was prohibited to send the SDF under the special measures regarding Iraq. This statute distinguished a combat region from a non-combat region. The court supported the Cabinet Legislation Bureau's official announcement that the SDF was to comprise the minimum necessary ability and not be an army, as prohibited in Article 9 of the Japanese Constitution.²⁹

The government appears to have won this case, but the court recognized the existence of right to live in peace.³⁰

In the past, the right to live in peace was disputed on the grounds that the content of "living in peace" was too speculative and subjective to be recognized as a legally substantial right.³¹

The losing plaintiff did not appeal because the Nagoya court admitted that the dispatch was unconstitutional and illegal but dismissed the argument seeking an announcement and injunction. The government won the case but could not appeal.

28 Nagoya Koto Saibansho [Nagoya High Ct.], April 17, 2008. Heisei18 (ne)no.499.

29 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

30 *supra* note16.

31 Mito Chiho Saibansho [Mito Dist.Ct.] Feb.17,1977, Showa 33 (wa)no.136,43 (6) SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 506.

Tokyo Koto Saibansho [Tokyo High Ct.] July, 7, 1982, Showa 52 (ne)no. 817.

Sapporo Chiho Saibansho [Sapporo Dist.Ct.] Sep. 7, 1973, Showa 52 (gyo u) no.16, 23, 24. 712 HANREI JIHOU [HANJI] 24.

This Nagoya decision is one approach by those who think the 2015 defense and security law is unconstitutional. The next chapter reviews some decisions on unconstitutionality by the Japanese Supreme Court and reviews why the number of such decisions by Japanese court has been small.

II. Unconstitutional Decisions in Japan

The Japanese Supreme Court has rendered only around nine (9) cases unconstitutional since the Japanese Constitution was promulgated on May 3, 1947. In December, 2015, the Japanese Supreme Court rendered two decisions for family law. The Court upheld Article 750 of the Civil Code³² constitutional, which requires married couple to pick either the husband's or wife's family name. The Court emphasized Japanese tradition to use same family name in one couple. On the other hand, the Court struck down Article 733 of the Civil Code³³, which prohibited women from remarrying within six (6) months of a divorce. The Court stated that one hundred (100) days was reasonable.

1. After the Unconstitutional Decision

One of the most famous cases concerns parricide. In this case, a junior high school student was raped by her own father. Her mother left after learning her own daughter was pregnant by her husband. The daughter tried to run away from her cruel father, but in vain. She had five children; two of them were passed away. Another six (6) were aborted, and she underwent an operation to be sterilized. She found a good man in her workplace and was eager to get married with him when she was twenty-nine (29) years old. She did not run away because her sister might be put in danger. She told her father about her work colleague. He freaked out, put her in confinement, and raped her. She was so tired of the abuse that she strangled him. At that time, she was 29 years old, and his father was 53 years old.

She was prosecuted under Article 200 of the Criminal Code³⁴, which stipulates that a

32 MIN POU [JAPANESE CIVIL CODE], Law No. 94 of 2013, art. 750. (Japan).

33 MIN POU [JAPANESE CIVIL CODE], Law No. 94 of 2013, art. 733. (Japan).

34 KEI HOU [JAPANESE CRIMINAL CODE], Law No.86 of 2013, art. 200. (Japan).

person who kills their own parent or their spouse's parent shall be punished by death or imprisonment for life with hard labor. Article 199 of the Criminal Code³⁵ stated that a person who killed another person shall be punished by death or imprisonment with hard labor life or for not less than three (3) years. Some approaches were made to reduce her sentence. Article 39 (2)³⁶ states that an act of diminished capacity shall lead to a reduced punishment as necessary. Article 68 (2)³⁷ states that when imprisonment with or without work for life is to be reduced, it shall be reduced to imprisonment with or without work for a definite term of not less than 7 years. Article 66³⁸ allows for a reduction in punishment in light of extenuating circumstances. Her sentence would be three and half years with no stay of execution.

In 1973, a majority opinion of the Supreme Court³⁹ upheld Article 200 of the Criminal Code unconstitutional under Article 14⁴⁰ of the Japanese Constitution. The purpose of Article 200 was permissible but the punishment was impermissibly too heavy compared to regular murder Article 199.⁴¹

After this decision, in 1995, Article 200 was abolished by the Diet. From the Supreme Court decision until 1995, the prosecutor respected this decision and used Article 199 for cases where a son or daughter had killed his or her father or mother. Constitutional law scholars think that the legislature will soon amend or abolish the statute that was held unconstitutional and respect the decision of unconstitutionality, and the administrative branch will refrain from its application until the statute is amended or abolished.⁴²

35 KEI HOU [JAPANESE CRIMINAL CODE], Law No.86 of 2013, art. 199. (Japan).

36 KEI HOU [JAPANESE CRIMINAL CODE], Law No.86 of 2013, art. 39 (2). (Japan).

37 KEI HOU [JAPANESE CRIMINAL CODE], Law No.86 of 2013, art. 68 (2). (Japan).

38 KEI HOU [JAPANESE CRIMINAL CODE], Law No.86 of 2013, art. 66. (Japan).

39 Saiko Saibansho [Sup. Ct] April. 4, 1973, Showa 45 (a) no.1310, 27 (3) Saiko Saibansho Keiji Hanreishu [Keishu] 265. Article 200 of the Japanese Criminal Code contradicts Article 14 of the Japanese Constitution and was held to be unconstitutional. This case is called the Parricide case.

40 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

41 In this case, the defendant had no mental disorder, but the Supreme Court ruled her sentence as two and a half years and with stay of execution for three years by using Article 199.

42 TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI, KATSUTOSHI TAKAMI, *KENPOII* [Constitution II] 320-328 (Yuhikaku 2012).

It still took 22 years for the legislature to amend Article 200 of the Criminal Code, however. This shows that there are still conservative members in the Diet who resist amendments to the statutes.⁴³

Soon after unconstitutional decision of Article 733 of the Civil Code by the Japanese Supreme Court, the Ministry of Justice gave notices to agencies that it should accept the registration of remarriage from women one hundred (100) days passed after their divorces. The Civil Code is expected to be amended soon.

III. Japanese Judicial Review: Concrete or Abstract

1. Concrete Judicial Review

The Japanese judiciary reviews the constitutionality of public actions. Article 76⁴⁴ states that “the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.” Professor Nobuyoshi Ashibe wrote in his textbook⁴⁵ that the mission of judicial power is to interpret and apply the law and then solve concrete cases.

Introducing U.S. constitutional studies, Koji Sato⁴⁶ also says that the originally judiciary system only serves adversarial parties in cases and controversies. Parties in cases and controversies have a concrete personal stake in the outcome of the case. He characterized Japanese judicial review as a concrete judicial review or incidental judicial review. Constitutional problems arise as incidental issues in civil, criminal, or administrative litigation.⁴⁷

The judiciary adjudicates each case and controversy between adversarial presentations of competing arguments in definite, concrete disputes, to reach its final judgment.⁴⁸ The

43 Akira Momochi, *To protect family ties*, The Sankei News, (December 22, 2015). Available at <<http://www.sankei.com/column/news/151222/clm1512220001-n1.html>>. (last visited on 26 in December, 2015). He supported constitutional decision of Article 750.

44 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.76 (1). The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

45 NOBUYOSHI ASHIBE, *KENPO* [Constitution]326,329 (Iwanami Shoten 2011).This book is still being edited by Prof. Kazuyuki Takahashi after Prof. Ashibe passed away.

46 KOJI SATO, *KENPO* [Constitution] 15, 620- (Seibundo 2011).

47 TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI, KATSUTOSHI TAKAMI, *KENPOII* [Constitution II] 271- (Yuhikaku 2012).

48 It seems that Prof. Koji Sato regards *Muskrat v. United States*, 219 U.S. 346 (1911) as important

judiciary has a duty to find and pronounce the law as applied to particular facts of the case, after hearing the legal arguments of the adversarial parties.

Sato and Ashibe introduced the famous U.S. case of *Marbury v. Madison*,⁴⁹ a good example of judicial review, showing that advisory opinions are not the business of the judiciary. Hypothetical questions violate case and controversy, erode judicial power, and are not solved by the judiciary. Imaginary cases are prohibited as well.

In the United States, the term “case and controversy” is a constitutional requirement in Article III of the U.S. Constitution⁵⁰. In the United States, there is no constitutional court with exclusive jurisdiction over constitutional matters, independent of the Supreme Court. Another difference is that there is no provision in the U.S. Constitution for judicial review. U.S. judicial review was derived from case law in *Marbury v. Madison*.

2. Abstract Judicial Review

In Japan, German constitutional law studies have also advanced. The German type of judicial review is called “abstract review.” There is a federal constitutional court in German called the *Bundesverfassungsgericht*, which has exclusive jurisdiction given by the basic law of Germany, the *Grundgesetz*.⁵¹

In German judicial review, the minority of the parliament can bring constitutional litigation in the absence of case and controversy. One-third of the federal parliament (*Bundestag*) or member states (*Bundeslander*) are eligible to demand judicial review of statutes. This is called “proceedings on the constitutionality of statutes.”

In addition, a party claiming that his or her constitutional rights are infringed in civil, criminal, or administrative cases is eligible to bring a constitutional claim to the constitutional court, which has exclusive jurisdiction under federal German constitutional law. When this claim is referred to the constitutional court, the proceedings stop until the decision is given, in a proceeding called constitutional complaint (*Verfassungsbeschwerde*).⁵²

for Japanese judiciary.

49 *Marbury v. Madison*, 5 U.S. 137 (1803). In the latest edition, NOBUYOSHI ASHIBE, *KENPO* [Constitution] (Iwanami Shoten 2015), *Marbury v. Madison* was deleted.

50 Article 3 of the U.S. Constitution.

51 Article 93 of German Constitution.

52 Article 100 (1) of German Constitution.

In Germany, any political party that has the goal of infringing the free and democratic fundamental order (*Die freiheitliche demokratische Grundordnung*) or endangering the existence of Germany is presumed to be unconstitutional. The federal constitutional court reviews its constitutionality when the federal parliament or federal government brings a claim. This is called fortified democracy (*Streitbare Demokratie*).⁵³

In the Japanese Constitution, there is no special provision regarding political parties. Article 21 of the Japanese Constitution⁵⁴ guarantees freedom of assembly and association, and there are no statutes against Nazis. There are some statutes that control political parties, such as the Public Officer Election Act⁵⁵ and the Party Subsidies Law.⁵⁶ Thus, political parties that could not exist in Germany may be allowed to exist in Japan.

3. Text of Japanese Constitutional Law and Reform of the Judicial System

Under the Japanese Constitution, judicial review is provided in Article 81⁵⁷, which stipulates that, “the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.” Unlike the U.S. Constitution, the term “case and controversy” does not exist in the Japanese Constitution.

Paragraph 1 in Article 3 of the Japanese Court Act⁵⁸ provides that, “[c]ourts shall, except as specifically provided for in the Constitution of Japan, decide *all legal disputes*, and have such other powers as are specifically provided for by law.” If the term “dispute” in the Court Act is interpreted as a counterpart of case and controversies in the U.S. Constitution, Japanese judicial review would be a U.S. type of judicial review. Nonetheless, case and controversy *maybe or may not be* still a legislative—or constitutional—requirement in Japan.

In the case of the amendment to the National Police Act, the taxpayer was able to bring

53 Article 9 (2), 18, 21, 81 (4) of German Constitution.

54 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.21 (1). Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

55 KOSHOKU SENKYO HOU [JAPANESE PUBLIC OFFICER ELECTION ACT], Law No. 60 of 2015. (Japan).

56 SEITO JOSEI HOU [JAPANESE PARTY SUBSIDIES LAW], Law No.69 of 2014. (Japan).

57 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art.81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

58 SAIBANSHO HOU [JAPANESE COURT ACT], Law No. 48 of 2013, art 3 (1). (Japan).

a suit even though the taxpayer had no concrete and legal dispute in the case. This is called “objective litigation,” intended to make the government observe the law.

There are two types of objective litigation in Japan. One is people’s litigation, which itself provides two kinds of litigation under Article 5 of the Japanese Administrative Case Litigation Act (JACLA).⁵⁹

One of these is resident litigation, under which any inhabitant who is a voter or candidate for public office may bring a suit for damage for illegal spending of the government or a financial accounting action. Compared to the citizen suits in the United States, the suit is limited to illegal government spending or a financial accounting action.

In addition, the voter can bring a suit to contest the validity of the election, which is provided for in Articles 203, 204, 207, and 211 of the Public Officer Election Act.⁶⁰

Sato⁶¹ explains that as an organization of legal principle and order, the legislature may approve objective litigation as a legal policy as long as it maintains legal principle. The purpose is to keep the administrative power within the law and to correct illegal activity.

Besides people’s litigation, interagency litigation is included in objective litigation. Disputes between governmental agencies are not a concern of the judiciary. Article 6 of the JACLA and Articles 176 (6), 251-5, and 252 of the Local Government Act⁶² allow this litigation.

A. The Number of Constitutional Decisions in Japan

Japanese constitutional law studies have focused on one question relating to whether Japanese courts have worked well.⁶³

U.S. professor Alexander Bickel explained that the mission of the judiciary was to

59 GYOSEI JIKEN SOSHOU HOU [JAPANESE ADMINISTRATIVE CASE LITIGATION ACT], Law No.59 of 2015, art 5, 6. (Japan).

60 KOSHOKU SENKYO HOU [JAPANESE PUBLIC OFFICER ELECTION ACT], Law No. 60 of 2015, art.203, 204, 207 and 211. (Japan).

61 KOJI SATO, *KENPO* [Constitution]623- (Seibundo 2011).

TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI, KATSUTOSHI TAKAMI, *KENPOII* [Constitution II]296 (Yuhikaku 2012).

62 CHIHO JICHI HOU [JAPANESE LOCAL GOVERNMENT ACT], Law No. 67 of 1947 (now No.50 of 2015), art.176 (6), 251-1,252. (Japan).

63 SHOUJIRO SAKAGUCHI, *RIKKENSHUGI TO MINSHUSHUGI* [Constitutionalism and Democracy] (Nihon Hyoronsha 2001). Professor Sakaguchi focuses on legitimacy of judicial review.

develop dialogue between the government and the people.⁶⁴ The U.S. Supreme Court renders 70–90 decisions a year. Cases are selected through certiorari. In the case that a conflict arises among federal courts of appeals or between state courts in two states, or between a state's highest court and a federal court of appeals, the U.S. Supreme Court issues a writ of certiorari to order these lower courts to send such cases to it to review the decisions.⁶⁵

The writ of certiorari performs the function of selecting only important constitutional law issues. The basis of certiorari is called the “rule of four,” meaning that the U.S. Supreme Court accepts an appeal if four Justices approve hearing the case. It is said that the U.S. Supreme Court has played a role in sending a message every year with regard to controversial issues in American society through its judicial review. By contrast, the Japanese Supreme Court has made only around ten decisions of unconstitutionality since 1947.

There are other cases in which the Supreme Court has held statutes constitutional but their application to concrete cases unconstitutional. The small number of unconstitutional cases is explained by the fact that the Japanese Supreme Court adjudicates constitutional issues at the grand bench, composed of 15 Supreme Court Justices, divided into three petty benches. The grand bench calls for all its members to deal with constitutional problems or to change a decision made in the past. There has been criticism that the Japanese Supreme Court has not played a role in connecting the government and people through constitutional decisions, a role it ought to play, according to Professor Bickel's description.⁶⁶

B. National Police Reserve Case: The Possibility of a German Court in Japan

Some believe that the Japanese Supreme Court does not function as well as the U.S. Supreme Court does. The Japanese Supreme Court does not have the certiorari system which screens for unnecessary appeals, and it is said that the load of cases to be dealt with is too heavy.⁶⁷

64 ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale University Press, 1962).

65 Rule 14 of the U.S. Supreme Court.

66 HIDENORI TOMATSU, *KENPO* [CONSTITUTION] 465 (Kobundo 2015). Judiciary takes a role to earn the trust of Japanese people through its decision.

67 Morio Takeshita, *Saiko Saibansho ni taisuru Jouso Seigen* [Restriction of the Appeal to the Supreme Court], 575 NBL 39, 576 NBL 44 (2015).

The famous National Police Reserve case is key in determining whether the Japanese Supreme Court works as well as the German Federal Constitutional Court does.

In 1950, the Korean Peninsula/Korean War occurred between North Korea, supported by the Soviet Union, and South Korea, supported by the United States. The United States sent armed forces that were stationed in Japan to the Korean Peninsula, leaving Japan's defenses weak. The General Headquarters occupying Japan at the time ordered the Japanese government to establish the National Police Reserve. Arguing that the establishment of the National Police Reserve contradicted Article 9 of the Constitution of Japan, Mosaburo Suzuki, the head of the Japanese Socialist Party, brought an action directly to the Supreme Court. The action was dismissed by the Supreme Court on the grounds of absence of a concrete case.

The Supreme Court⁶⁸ said that it had no authority to determine the constitutionality of any law or the like in the abstract. The plaintiff argued that the Japanese Supreme Court had the additional character, like the German Federal Constitutional Court, of reviewing abstract issues without a concrete case. The Supreme Court admitted that some other countries vested the authority for abstract judicial review in special judicial courts. However, the authority that had been vested in Japan's courts under the system now "in force consists of the authority to exercise judicial power, and for judicial power to be invoked," a concrete legal dispute must be brought. The courts cannot exercise power "whereby, in the absence of such a concrete legal dispute, they render an abstract judgment anticipating the future and relating to a doubtful or controversial matter concerning the interpretation of the Constitution or other law, order, and the like. In actuality, the Supreme Court possesses the power to review the constitutionality of laws, orders, and the like, but that authority may be exercised only within the limits of judicial power; in this respect, the Supreme Court is no different from the lower courts.."

This explanation has led to much legal discussion among Japanese constitutional law professors. For example, according to Professor Hidenori Tomatsu, this debate was so old that amendment of Japanese Constitution is required for the Japanese Supreme Court to use

68 Saiko Saibansho [Sup.Ct] Oct.8, 1952, Showa 27 (ma) no.23, 6 (9) Saiko Saibansho Minji Hanreishu [Minshu]783.

abstract review today.⁶⁹ In Japan, case and controversy is a legislative provision of the Court Act, not stipulated in text of Japanese Constitution. Consequently, constitutional law scholars specializing in German law have argued for amending the Japanese Court Act and providing for special proceedings, like the *Verfassungsbeschwerde*.⁷⁰

C. Faceless Judges: Reform of the Judicial System

Some scholars of U.S. law would agree about the heavy load of the Japanese Supreme Court.⁷¹ Justice Masami Ito outlined the character of Japanese court justice. Ito was a Tokyo university professor of U.S. law and was later appointed as a Justice of the Supreme Court. Ito explained that an ideal judge in Japan was regarded as a faceless individual who rendered uniform, not unique, decisions in common with other judges.⁷² Judges in Japan must follow only their professional conscience and the Constitution, under Article 76. He characterized the Japanese courts as working like the European courts and felt it was pointless to ask judges to play the role of judicial activist, like the Warren Court in the United States, which rendered remarkable decisions on controversial issues in American society, such as *Brown v. Board of Education* cases.⁷³

One reform plan for the Court Act has been discussed (The Naka-Nikai an) to redefine the membership and mission of the grand bench and the petty bench. Under this proposal, the grand bench is to consist of nine Justices and petty bench of thirty judges. These benches are different organizations, with the Justices of the grand bench dealing exclusively with

69 Hidenori Tomatsu, *KENPO* [CONSTITUTION]463 (Kobundo 2015). Tomatsu believes that only early stage of Japanese Constitution, it was possible to think that Japanese judiciary had abstract review until National Police Reserve Case was rendered.

Masato Ichikawa, *KENPO* [CONSTITUTION]350 (Shinseisha 2014). Ichikawa and Tomatsu emphasize the National Police Reserve Case.

70 Tsuyoshi Hatajiri, *Shihousaibanshogata Ikensinsasei ni okeru Saiko Saibansho no Yakuwari* [The Role of the Supreme Court in Judicial Review], KOJI TONAMI, et.al, *KENPO NO KIHANRYOKU TO KENPO SAIBAN* 335 [PROJECT:DIE NORMATIVE RAFT DER VERFASSUNG] (Shinzansha 2013).

71 *supra* note 66.

72 MASAMI ITO, *SAIBANKAN TO GAKUSHA NO AIDA* [Between Justice and Scholar] 106-137 (Yuhikaku 1993).

See also, Comment by Koji Sato at the House of Councilors, 27 in Feb.in 2002. (Japanese). Available at < <http://kokkai.ndl.go.jp/SENTAKU/sangiin/154/0051/15402270051002a.html> >. (last visited on 26 in December, 2015).

73 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

constitutional issues.

The reason for this proposal is that in Japan the process of the petty court is routine, whereas the work of grand bench is thought of as for very special occasions.⁷⁴ Even though the grand bench is requested to adjudicate constitutionally important cases, the grand bench usually expands the scope of precedents with minor modifications. The three petty courts substantively adjudicate constitutional cases under the current system.

The written decision cites prior precedent as a ground of reasoning, but sometimes it is too abstract and requires even constitutional scholars to read between the lines of court opinion. The differences between the case at hand and the precedent are not clarified sufficiently.⁷⁵

Ex-Justice Tokiyasu Fujita stated that Justice of the Supreme Court might take negative attitude to reverse the prior decisions, and they tend to postpone the conclusion in a future. For Japanese judiciary there might be the third approach between the United States and German federal constitutional court.

IV. Justiciability

1. Requirement of judicial review

For the judiciary to begin a judicial review in Japan, there are several requirements: standing, mootness, ripeness, and political question.

A. Standing and the Naganuma Nike Case

Standing requires the plaintiff to prove the injury in fact, causation, and redressability. The injury in fact is direct damage that includes economic, aesthetic, and environmental interests. The plaintiff in this case suffered this kind of damage as a result of the defendant's conduct. There are several exceptions for standing: third party standing, taxpayer standing, and congressionally created standing as objective litigation.

In the Naganuma Nike case, in the middle of the Cold War, to create a defense system in Hokkaido against the Soviet Union, the government lifted a permit on the national

74 TOKUJI IZUMI, *WATASHI NO SAIKO SAIBANSHO RON* [My Supreme Court Theory] 176–180 (Nihon Hyoronsha 2013).

75 TOKIYASU FUJITA, *SAIKOUSAI KAISOU ROKU* [Reminiscences of the Supreme Court] 153–161 (Yuhikaku 2012).

windbreak forest to construct a missile base. This forest had been cultivated as a water resource. The inhabitants near this base brought action, arguing that its construction contravened Article 9. As the owner of this forest was the government, there was no injury in fact. The cause of action was the right to live in peace, as noted in the preamble of the Japanese Constitution. The plaintiff added the complaint that lifting permission would lead to flooding and other natural disasters.

The Supreme Court⁷⁶ alternative facility to reduce the dangers of flood and drought was constructed, and the interest in bringing litigation disappeared.

B. Mootness and Ripeness

To adjudicate in court, case and controversy issues may exist at all stages of review, not just when the complaint is filed. For example, if the plaintiff dies and cannot challenge statutes, the case is dismissed. There are several exceptions for mootness, however. First, there is an exception for cases capable of repetition yet evading review. Second, exceptions are made for cases in which the defendant voluntarily and temporarily changed his conduct. Third, an exception is made for cases in which major issues are resolved and collateral consequences to the party occur. In the United States, class actions are the fourth exception, but the Japanese court system does not have class actions with some exception of special statutes.⁷⁷

In 1953, the Supreme Court⁷⁸ dismissed a case, known as the May Day Parade case, by mootness. The organizer of a labor union filed a permit for assembly in the public square in front of the imperial palace on the first day of May (May Day). The welfare minister denied the permit. Labor unions in Japan usually asked workers to assemble to protest or march on this day, which has special meaning for labor unions; labor unions in Japan are not industrial unions but enterprise labor unions.⁷⁹

The Supreme Court dismissed the case on the grounds that the case was moot. Japanese

76 Saiko Saibansho [Sup.Ct]Sep.9, 1982, Showa 52 (gyo tsu) no.56, 36 (9) Saiko Saibansho Minji Hanreishu [Minshu]1679.

77 SHOUHISHA KEIYAKU HOU [THE CONSUMER CONTRACT ACT], Law No. 61 of 2000. (Japan), art.13.

78 Saiko Saibansho [Sup.Ct]Dec.23, 1953, Showa 27 (o) no.1150, 7 Saiko Saibansho Minji Hanreishu [Minshu]1561.

79 In Japan, labor union groups have been organized within an individual company. Therefore, it had special meaning for each labor union to get together in one place, and sent message of the solidarity.

constitutional law professors think that this case constitutes an exception of mootness: being capable of repetition, yet evading review, like *Roe v. Wade*⁸⁰ in the United States.

Another requirement is ripeness. The case and controversy standard requires that an actual immediate threat of harm exists for a court to provide resolution.

2. Political Question

The Sunagawa case⁸¹ addressed the security⁸² treaty concluded between Japan and the United States in September 1951. The Japanese Supreme Court avoided reviewing the constitutionality of the treaty by the political question doctrine, that is, “decisions concerning a fundamental governmental action with a highly political character should not be made by the judiciary. Instead, the political branches of government, which are accountable to the people directly, or finally the people themselves should make these decision,” even if the dispute has case and controversies.⁸³

In the Sunagawa case, the government began a survey of the property of Tachikawa airport in July 1957 for the purposes of constructing a U.S. armed forces base at that site. A critical public objected to the base construction and protested near the fence on the property of the airport. After a while, the protestors wrecked the fence and trespassed on the property within an area of several tens of meters. They were arrested and prosecuted under the Law for Special Measures Concerning Criminal Cases to Implement the Administrative Agreement under Article III of the security treaty.⁸⁴

The defendants claimed that the prosecution contravened Article 31⁸⁵ of the Japanese Constitution and that the U.S. army forces stationed in Japan were unconstitutional under

80 *Roe v. Wade*, 410 U.S. 113 (1973).

81 Saiko Saibansho [Sup. Ct] Dec. 16, 1959, Showa 34 (a) no.710, 13 Saiko Saibansho Keiji Hanreishu [Keishu] 3225.

82 Kyu Nihonkoku to Amerika Gasshukoku to no aidano anzen hoshou jouyaku [The old security treaty between Japan and the United States], Japan-U.S., 28 April 1952, Treaty No. 6, 1952.

83 Taisuke Kamata, *Adjudication and the Governing Process*, PERCY LUNEY, JR AND KAZUYUKI TAKAHASHI, *JAPANESE CONSTITUTIONAL LAW* 156-7 (University of Tokyo Press 1993).

84 This chapter is discussed in Yuichiro Tsuji, *Amendment of the Japanese Constitutional Law*, 37Nanzan Review of American Studies 51 (2015).

85 NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 31 (Japan). No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 9.

The Japanese Supreme Court held in 1959 that Article 9 renounces “the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance.” According to the Sunagawa decision, paragraph 2 of Article 9 did not “include foreign armed forces even if they are to be stationed in our country.”

The Japanese Supreme Court determined that the court could review the treaty between Japan and the other state but avoided determining the constitutionality of the treaty.

The Japanese Supreme Court said that in the formulation of the treaty, “the Cabinet of the Japanese Government then in power, negotiated with the United States on a number of occasions in accordance with the constitutional provisions, and finally concluded the same as one of the most important national policies. It is also a well-accepted public knowledge that ... the question of whether the treaty was in accord with the Constitution was carefully discussed by both Houses and finally ratified by the Diet as being a legal and proper treaty.”

Constitutional law scholars think that Sunagawa case used the Japanese “political question” with the discretion of the legislature.⁸⁶ The Supreme Court explained that the courts may review a case unless it is remarkably clearly unconstitutional for the court to review the case. The criteria of remarkably clear unconstitutionality are not clear. The political question approach would be justified on the ground that the inherent constraint of the judiciary requires it not to intervene too much and to leave it to the people’s decision, given the accountability of the other two branches of the government. Constitutional law scholars believe that the political question approach provides an excuse for the judiciary to avoid confronting parties who have standing. Thus, if there are other ways to avoid a decision than the political question, the court should use it, such as legislative discretion or the autonomy of other branches of the government. Koji Sato argues that the court should not abuse the political question in cases easily.⁸⁷

86 TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI, KATSUTOSHI TAKAMI, *KENPOII* [Constitution II] 283 (Yuhikaku 2012). Nonaka states that in Japan political question doctrine was used only for disputes regarding Self Defense Force. “Highly political” is too weak for courts to avoid review.

87 KOJI SATO, *KENPO* [Constitution]645 (Seibundo 2011).

Conclusion

In this paper, the possibility is discussed of a Japanese constitutional court that has exclusive jurisdiction to review constitutional law matters.

It is possible to establish a constitutional law court without amending the Japanese Constitution. By amending the term, “all legal disputes” stipulated in the Court Act and preparing special procedures and the reorganization of the constitutional bench’s hierarchy, at the top of which is the Supreme Court, it would be possible for a special bench of the Supreme Court to focus on constitutional law cases. It depends on the question what is core of judiciary in Japanese Constitution. By pressure from “we” the people, the Supreme Court may change its attitude. There might be the middle approach between the United States and Germany.

The number of unconstitutional law decisions has been too small in Japan. Unconstitutionality decisions require the legislative branch to amend or abolish a statute quickly, and the administrative branch to refrain from applying an unconstitutional statute. The Supreme Court has already sent messages to the people concerning how Article 200 of the Criminal Code should be.

Professor emeritus and ex-justice of the Supreme Court Masami Ito has argued that the Japanese courts have followed the career system of European countries, and that decisions that are tasteless and odorless might be preferred; he used the term “faceless judges.” This issue must be reviewed by the principle of judiciary independence at another opportunity, but when the political process between the people and legislature malfunctions, the role of the court is still expected.⁸⁸ The legal stability undermined by sudden changes in cabinet decisions might require the court to demand a fair explanation of the legislature.

In Japanese constitutional law, judicial review has been discussed in terms of the issue of the constitutionality of the SDF under Article 9 of the Japanese Constitution. The prospect for suits seeking to rule defense and peace laws unconstitutional is not promising. The autonomy of each House of the Diet undermines the possibility of judicial review. The

88 YOUICHI HIGUCHI, *NIHON KOKU KENPOU MATTOU NI GIRON SURUTAMENI* [Discussing Seriously about Japanese Constitution] 128–130 [Misuzu Shobou 2015].

political question doctrine admits standing but may dismiss a case on merit. Legislative discretion is also another factor.

The Nagoya high court decision rejected the remedy of seeking damages but announced in dicta that dispatching the SDF was unconstitutional and approved the right to live in peace. This decision required standing.

The mission of the constitutional law scholars is to bridge the gap between ordinary people and the Constitution, send their detailed internal analysis to other country's constitutional researchers. In 2015 the Japanese Constitution is a hotly debated topic among people, the mission and duty of the constitutional law scholar are important issues.

Japanese constitutional scholars strongly believe that one mission of the court is to determine what the law is and to send a message through its decisions on disputed issues to cultivate democracy.

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