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# JAPANESE SUPREME COURT<sup>1</sup>—ITS INSTITUTION AND BACKGROUND

*Hideo Chikusa\**

## Preface

**A**S quite aptly spoken by Dean Attanasio, despite the ever close relationship between the United States and Japan, the information available about Japan inside the United States is extremely limited.

Since Dean Attanasio requested that I present a lecture regarding the Japanese Supreme Court, I would like to describe its institutions where I am a member. In doing so, I would also like to cover some background information including an overview of the Japanese judicial system as a whole and its social and historical surroundings.

## I. SIMILARITIES AND DIFFERENCES BETWEEN U.S. AND JAPANESE SYSTEMS

### A. SIMILARITIES—PROCESS OF ESTABLISHMENT

The present Japanese courts were established under the new constitution promulgated in 1946, that is, immediately after the Second World War. The basic fabric of this constitution is based upon the U.S. Constitution. As far as the judicial system is concerned, the current constitution has the following differences from the previous one.

Japan established its first constitution in 1889, which year is called the 22nd Year of Meiji, after the reigning Emperor's name. This so-called "Meiji Constitution" laid the foundation for Japan joining the modern states.

This constitution was patterned after the Continental Law, particularly the German constitutional system. The *Daishin'in*, or the Major Court of Review, established under this old Constitution, fulfilled the function as the court of final review for both civil and criminal cases.

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1. This article is the result of some relatively minor revisions I made to the original draft article of the same title on the basis of which I made a lecture on February 19, 1999, at SMU Law School. In translating the original draft of the article, I owe my gratitude to Mr. Haruhiro Nakatsu, attorney-at-law, who is the graduate of Academy of Anglo-American Law, 1960-1961, my immediate predecessor. Mr. Nakatsu is active in the international practice as a partner in the International Division of Asuka-Kyowa Law Firm in Tokyo. My sincere thanks are addressed to him.

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For administrative cases, there was a separate court called the Administrative Court. Although it is called a "court," it was in fact a part of the administrative system. It functioned to correct erroneous administrative decisions and actions, but the conditions for allowing a citizen to file any lawsuit of this type were restricted, and it did not function as the system to protect citizens' rights against administrative abuses.

Under the new Constitution, this shortcoming was overcome by unifying the entire system and by abolishing any special type of court. By subjecting all sorts of cases, including the administrative cases, to the ordinary court jurisdictions, our judicial system became like the judicial system of the United States. At the same time, the courts were given the power to review the constitutionality of all laws, ordinances, rulings, and administrative acts. The so-called "supremacy of judicial power" was thus established.

## B. DIFFERENCES BETWEEN THE TWO SUPREME COURTS

Because differences exist between the United States and Japan in their foundations and their respective histories, those differences could be easy to misunderstand. Thus, when we discuss the differences in their judicial systems, we should take into consideration their respective sociological backgrounds, which I will do later. But, let me start by pointing out the differences in their outward appearances.

### 1. *Structures of the Courts*

The Japanese Supreme Court has fifteen justices, not nine like the United States. The justices' career backgrounds are respectively, six career judges (consisting of four who majored in civil cases and two who majored in criminal cases), two who have been prosecutors, four who have been practitioners, one diplomat, one professor from the law department of a university, and one administrative official (often the former head of Legislation Bureau of the Cabinet).

The break-down just mentioned has undergone some changes in the past, but by and large the similar structure has been maintained since the inception of the Court. When one justice retires, the new candidate is nominated from the same group or profession as that from which the retiree was chosen from. And in the overwhelming number of cases, the candidate was appointed as the successor. This is due to the policy pronounced when the Court was established that, in order to substantiate the mission assigned to the new Court, not only the legal professions but other professions should be included to incorporate their wisdom.

### 2. *Grand Bench and Petit Benches*

Discussion and adjudication of cases by fifteen justices are, however, not always easy, and at the inception of the Court's history, the reforma-

tion proposals were considered many times.<sup>2</sup> The established structure is that three Petit Benches with five justices each are installed, and each one decides the ordinary cases assigned to it. The Grand Bench deals only with cases (i) involving constitutional issues, (ii) bearing socially important issues, (iii) requiring the unified views of the Court where opinions of two or more Petit Benches differ from each other, or (iv) requiring the alteration of the holdings of the Court's own precedents. If the cases are counted by reference to the issues involved, as opposed to the inceptional era, the trend is that the number of cases handled by the Grand Bench is just one or two, or at the largest, just several per year. This is due to the fact that a case containing the same issue was probably already adjudicated earlier by the Grand Bench, and it may be adjudicated later by the Petit Bench citing the preceding judgment entered by the Grand Bench.

### 3. *Appointment and Guarantee of Tenure*

I do not think that there is any substantial difference between the United States and Japan in the professional independence and the guarantee of tenure of the justices. In the case of the justices of the Japanese Supreme Court, however, the retirement age is fixed at seventy (in the case of judges in general, sixty-five, and in the case of the judges in the summary court, seventy). Since the justices are appointed at the age of more than sixty, the tenure is almost always less than ten years, and frequently less than five years. Apart from the merit that it refreshes the Court, one can not deny the clerical tiresomeness of always having to handle the retirement of someone among as many as fifteen.

The Cabinet appoints justices (with the exception of the appointment of the Chief Justice whose appointment is made by the Emperor upon the designation made by the Cabinet<sup>3</sup>) and the Emperor acknowledges the appointment.<sup>4</sup> The judges may not be dismissed except through the judgment of impeachment, unless he or she is ruled as incapable of fulfilling his or her mission due to physical or mental health defects. The judges may be subject to disciplinary actions by the court on the basis of the Law of Professional Careers of Judges.<sup>5</sup>

Additionally, the appointment of justices must be submitted to a national vote at the time of the election of the members of the House of Representatives to be conducted for the first time of the appointment of a justice and subsequently at 10-year intervals. If a majority of votes is for the dismissal of a particular justice, the justice in question is dismissed.<sup>6</sup> This has, however, never happened.

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2. Saiko-saibansyo Kikokaikaku Mondai Kankei Shiryo (Materials Concerning the Problems on Reorganization of the Supreme Court) published by Secritaria-general of the Supreme Court in 1957, 58 Vols. 1-6.

3. See KENPO art. 6 and Article 39 of the Law of Court.

4. See Article 39, Paragraph 3 of the Law of Court

5. See KENPO, art. 78.

6. See KENPO, art. 79.

#### 4. *System of Judicial Research Officials*

In the United States, each justice employs law clerks to assist the justice's pursuit of his or her professional duties. A similar institution in Japan is the system of judicial research officials. This is a collection of young career judges. There are about twice as many judicial research officials as the number of justices, and they do not report exclusively to a particular justice.

As with the justices, the pending cases are distributed to the judicial research officials in the order of receipt in the docket, and the one to whom a case is distributed assists the justice to whom the identical case happens to be assigned by researching as directed by that justice. The judicial research officials are generally judges who have sat on the bench for ten and twenty years, and at present, there are sixteen members in charge of civil cases, five in charge of administrative cases, nine in charge of criminal cases, and a few (now three) assistant judges.

#### 5. *Judicial Administration—Administration Bureau*

All of the judicial power belongs to the Supreme Court, and the lower courts have been established in accordance with the relevant provisions of the law.<sup>7</sup> As a result, the system, operation, budget, and personnel management of the courts, including the lower courts, are governed by the Supreme Court. Thus, management of this administrative system bears a considerable importance. The major decisions are determined by the Conference of the Justices inside the Supreme Court who convene every Wednesday. To efficiently handle the practical aspects, the Administration Bureau of the Supreme Court, a special body to which the task is assigned, must be well organized and functional. In this bureau, a considerable number of the people who have the designation of judge are assigned to support the management of the entire judicial system. This system and its operation are related to the traditional Japanese system, and is said to be unique among all the countries.

#### 6. *Non-Existence of the Federal System*

Since the United States is the united federation of the states, and its Federal Supreme Court sits on the apex of the entire judicial system, the Court adjudicates the constitutional legitimacy of interpretation and application of federal law. As opposed to this, Japan is not a federation of states, and its judicial system is an unitary one throughout the country. We do not have problems which arise from being a federal state. It could therefore be said that the Japanese Supreme Court is similar to any U.S. state supreme court, including the function of constitutionality review of the lower laws and ordinances.

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7. See KENPO, art. 76.

## II. GEOGRAPHICAL CHARACTERISTICS AND CULTURE OF JAPAN

### A. GEOGRAPHICAL CONDITIONS

#### 1. *Overcrowded Archipelago Extending in North-South Direction*

The Japanese territory is an archipelago (chain of islands) on the north-eastern coastline of the Asian continent and, although its north-south extension matches that of the United States, the whole of its space is slightly less than 370,000 sq km, and is still less than the space of California, which is 410,000 sq km. Furthermore, more than 70% of Japan is covered by the mountains and forests. Historically, Japan is a country of agriculture, but due to the scarcity of flat lands, it presently does not have the ability to supply enough food to its own nationals. The total population is now approximately 120,000,000 which equals about half of the population of the United States. Thus, if you try to imagine what Japan is like today, you could imagine states such as Washington, Oregon and California alongside the Western coast of the United States separated from the continent, sunk underneath the Pacific, and only leaving half of their territory as an island. And there, a population of about half of the United States immigrated and lived.

#### 2. *Restriction in Livable Space and Over-Congested Society*

What happens when so many people live in such a limited space? We could well say that it is one of the most grand experiments in a history of mankind.

If you fly at night along the length of the Japanese archipelago, you will find an incessant, continuing line of the artificial lights and residential houses along the coastline and the main highways from the southern Kyushu to Tokyo. These areas are administratively divided into many prefectures, cities, towns and villages, but are physically unified without any conspicuous borders. To use a metaphor, the country called Japan is an integrated circuit chip, small but highly and tightly organized.

### B. CHARACTERISTICS OF JAPANESE SOCIETY: CLOSED AND STABLE; UNIFIED AND HOMOGENEOUS (300 YEARS OF HISTORY TRACED BACK TO THE TOKUGAWA ERA)

In ancient times, the population was much less than today's population, but the fact remains that many people lived in a limited territory. Since Japan is an island country and it is physically segregated, few foreigners came there, and few Japanese left its boundary.

The time period for 300 years from the 17th Century to the 19th Century, before Japan became a modern country, is locally known as the "Tokugawa Era." During this era, Japan was governed by *Samurais* who maintained the generally warless country, and within this feudalistic peace the Japanese culture was fermented.

Japan was certainly a closed society from the outside, but inside, the society had enough information exchanged to be unified, hierarchical, and well governed. A natural development to Japan becoming a modern state at the outset of this century was the introduction of the European political system. Japan soon started to be one of the powers in the global context under the leadership of its government as a unified nation. Since Japan is a bureaucrat-governed state, that is unified, homogeneous, and closed, which had developed during the past 300 years, change would be difficult despite the increasing trend of its society and economy toward internationalization.

### III. CHARACTERISTICS OF JUDICIAL SYSTEM

#### A. RECONCILIATORY SPIRIT PRONE TO BE AGAINST DISPUTES

Dispute in a real society sometimes persists, and dies hard. In our country where people must live in a limited territory in a closed society, mutual concessions are required for mutual survival. This reconciliatory spirit is partially explained by the influence of traditional Confucianism, but the main reason is the desire to reside in a preparedness to find peace and harmony. This explains why what is called the "conciliation procedure" tends to be used more frequently than formal litigation requiring a black-and-white determination, and why many cases are settled out of court.

#### B. POPULATION OF LAWYERS

While there are about 900,000 American lawyers, there are less than 17,000 Japanese lawyers nationwide. There are fewer than 3,000 Japanese judges, including the judges at the summary courts, and there are even fewer prosecutors. This comparison should not, however, be exaggerated. We would also have to take into account the fact that the graduates from the law departments of universities in Japan are slightly more than law school graduates in the United States, and those graduates are absorbed into the administration and the industry as the staff of their legal departments. And, in addition to the lawyers admitted to the bar in Japan, there are many other legal professions, such as tax counsels, public accountants, civil scriveners, administrative scriveners, and industrial property counsels, all nationally licensed. With these perspectives, the whole society in legal context of Japan is not substantially different from that of the United States, but it remains true that in Japan, there are fewer trials and, accordingly, far fewer people who are directly engaged in handling litigation.

#### C. CAREER SYSTEM OF JUDGES

Japanese judges are appointed immediately after they finish their legal training, and they remain judges until retirement age. This principle still survives. Of course, there are some exceptions. First of all, as previously

mentioned, the selection of the justices in the Supreme Court is not made on the basis of this principle. Since the judges, prosecutors and lawyers have the same qualifications, their exchanges are possible, so that presently there are more than several practicing lawyers per year who are appointed as judges, and there are many judges who are transferred to the Ministry of Justice and the other ministries to take jobs in the national legislative bodies. Nevertheless, an overwhelming number of judges continue to work as judges from the time of appointment until their retirement. Against this trend, criticisms are sometimes raised from lawyers at the bar who say that the career judges do not have experience of the real world, or are much too bureaucratic in handling their jobs, and the whole system must be revolutionalized in the Anglo-American fashion so that all legal professionals are raised from the identical cradle of the "bar."

#### D. INSTITUTION FOR EDUCATION OF LEGAL PRACTICES

There is an educational institution attached to the Supreme Court called "Shiho Kenshu Sho" (Judicial Research and Training Institute). Those who pass the National Law Examination can enter it. The trainees educated there, after undergoing a two-year traineeship and passing the so-called "second examination," obtain the basic qualifications to become either judges, prosecutors, or lawyers. This institution may be called a sort of national law school. It was established as early as the new judicial system started under the new Constitution and is still there. This is certainly an excellent system for training the legal professionals to have equal and common qualities and abilities. It, however, has a shortcoming in that, because all costs and expenses for maintaining and running the institution are borne by the national government, budgetary restrictions prevent the abrupt increase in the number of trainees. Also, one could not deny that criticism exists against training practitioners at the national expense.

#### E. THE CABINET LEGISLATION BUREAU

There is a problem as to at which point on the constitutionality development of a governmental action should be examined. For example, when the government decides to dispatch its self-defense force abroad, at what stage and by whom is it permissible to review the constitutionality of the decision of the government? Article 9 of the Constitution declares the total abolition of war as the means to solve international problems.

I understand that under the German system, this type of problem may be examined and determined by the Constitutional Court in advance of its implementation. The Supreme Court of Japan, however, renders its judgment on the constitutionality only through concrete cases of dispute, and therefore it does not give any such judgment until the issue comes before it, after going through the lower courts' review.

In order to study any kind of legal problems inside the government, involving such a constitutional issue, there is an body called "Hosei Ky-



oku," or the Legislation Bureau, inside the Cabinet. The views of the Government itself are determined based upon its opinion. The head of this bureau is a member of the Cabinet and is often appointed from judges and prosecutors. And, as I mentioned earlier, he or she is often later appointed as a justice of the Supreme Court.

Also, the other departments of the Legislation Bureau review the drafts of law, cabinet ordinances, and the ministerial ordinances to prevent any draft bearing a constitutional problem or being inconsistent with the legal system as a whole from being produced to the Diet. This function is close to that of the French *Conseil D'Etat*, and by virtue of this preliminary review, there is very little chance that any new legislation contravening the Constitution or the established legislative frameworks would see the light of day. Because of the leadership played by the Government in general, so far, the Government has prepared almost all of the drafts of the law produced to and passed by the Diet.<sup>8</sup>

#### IV. DISPOSITION OF CASES BY SUPREME COURT AND ITS CONSTITUTIONALITY REVIEW

##### A. INCREASE IN CASES AND DISPOSITIONS BY COURT

The increase in the number of cases, particularly civil cases, is a common phenomenon all over the world, and Japan is no exception to that trend.<sup>9</sup> It is perhaps rightly pointed out that in peacetime, the standard of living increases, and the number of criminal cases decreases. Conversely, the economic activity of the citizens is stimulated, and the consciousness of rights is intensified and the number of civil cases increases. This observation is squarely applicable to Japan's recent situation. The number of criminal cases decreased to one-third, while the number of civil cases increased three times during the 50 years after the War.

##### B. DISPOSITION OF CASES

With respect to the Supreme Court, the annual number of pending civil cases have been consistently over 1,000 cases, and sometimes they exceed 2,000 cases. At the same time, criminal cases have decreased from 500 to 1,000 cases. In overwhelming events, a case is disposed of within six months.<sup>10</sup>

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8. Any draft of law prepared by the Members of the Diet is also examined beforehand by the other Legislative Bureau installed inside the Diet.

9. Looking only at civil cases, the number of the new cases the Supreme Court received in its docket in 1955 was about 1,000. This number doubled by 1984, and tripled by 1992. Conversely, the number of criminal cases was about 5,500 in 1955, 4,000 in 1960, 3,000 in 1970, and 2,000 in 1984. Recently, it has been between 1,300 and 1,400, showing a visibly downward trend.

10. By the statistical data for 1997, one-third of the pending cases continues to be in the docket beyond one year. Ten percent of the cases took one to two years for disposition, 8.6% of the cases took more than two years to three years, and 5.7% took more than three years. To summarize, cases which require deliberation take more than one year for a judgment. Fifteen percent of those take more than two years.

### C. REVISION OF CIVIL PROCEDURE LAW AND ADOPTION OF "CERTIORARI"

Revision of the civil procedure system is now a world-wide trend. During the past five years in Japan, the Civil Procedure Law has undergone a substantial remodeling.<sup>11</sup>

Discretionary certiorari jurisdiction is new to the Court. This system was implemented as early as 1891 in the United States, and the present system is based on revisions introduced in 1925. In the United States, the cases of mandatory appeal have increased and measures against it are in debate. This system has been introduced in Japan, and it would be premature to predict how this system would effectively work without seeing the future results.<sup>12</sup>

### D. CONSTITUTIONALITY REVIEW AND HISTORY OF DENIAL OF CONSTITUTIONALITY<sup>13</sup>

The Supreme Court of Japan has, for the past fifty years, given many judgments on the cases involving constitutionality issues, along with its history of adjudicating ordinary cases as the court of final appeal. Until the end of 1998, about seven hundred criminal cases and 170 civil (including administrative) cases were reviewed by the Supreme Court.<sup>14</sup>

Nevertheless, in only two criminal and four civil cases did the Supreme

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Among these judgments, about 2.5% of the judgments reverse the lower court judgments, and half of them were remanded to the lower courts for further adjudications. The other half were adjudicated by the Supreme Court itself. The reversal and remand judgment is made in the event that in the Supreme Court's judgment, the lower court made mistakes in interpreting the relevant laws and regulations. Hence, further fact-finding efforts are required in light of the correct interpretation of the laws and regulations, and this accounts for about 1.2% of the total cases.

11. The main purpose for the revision has been to introduce more economical and efficient methods for handling the cases to cope with the drastic increase in the number of cases for trial. In particular, at the level of the fact-finding procedure, the efforts were concentrated to establishing ways for accelerating the process of sorting out trial materials, resolving issues at dispute, and discovering the method of disposition (including the disposition by settlement). For that purpose, the combination between the trial presentation and the informal search for the settlement opportunity which had been practiced in the courtroom was vindicated by the revised law, and a method for more concentration of examination of witnesses was implemented to eliminate delay in the examination process.

12. This reformation is made applicable to the cases whose hearings were closed on or after January 1, 1998, and, therefore, it is not applicable to all cases in the Court's docket. Nevertheless, the number of pending cases decreased drastically. It is unlikely that the number of those cases involving complicated and difficult issues having taken more than two years for deliberation would decrease drastically with this reformation. The crucial point to consider is how the total energy used for disposition of the final appeal cases could possibly be mobilized to the difficult cases. It is unlikely that any abrupt improvement could really be expected.

13. See Justice Itsuo Sonobe, *Iken-shinsa no Hohri-Nippon no Keiken* (Theories on Constitutionality Review-experience of Japanese Court) *Hoso-iho* attdst Times 47-11-1.

14. The Supreme Court compiled especially the cases involving constitutional issues that were reviewed by the Supreme Court from 1947 to 1989 and published them in 1989 as "Saikosaibansho Kempo Hanreisyu (Report of Cases involving Constitutional Issues of the Supreme Court), 5 vols. with index." This Report contains 690 criminal cases and 146 civil cases. From 1990 to 1998, more than 17 criminal cases and 20 civil cases were reviewed by the Supreme Court.

Court find unconstitutionality.<sup>15</sup> Very few cases have met the declaration of unconstitutionality and that has been criticized by outsiders, in particular, legal scholars, as indicative of an ultra-conservatism or an excessive concessiveness. However, this criticism is not warranted. As Justice Sonobe points out,<sup>16</sup> in general, the Japanese courts adopt a very careful, cautious approach in reviewing the constitutionality of any act of the State. The Supreme Court of Japan maintains this approach to the constitutional issues with due deference to (a) the political judgment, or the so-called Act of State, exercised by the Diet and the Cabinet, and (b) the legislative discretion used by the Diet as the supreme legislative body. This attitude comes from the separation of powers between the legislative, executive and judicial branches. Judges who are not elected by the national election process are not in a position to take responsibility directly *vis-a-vis* the national constituents with respect to highly political decisions.

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15. (1) Parricide.

The old criminal code, which penalized parricide more severely than other homicides, was declared as "an obviously unreasonable discriminatory treatment" and hence unconstitutional. Parricide Case, 27 Criminal Cases Report 3, 265 (Sup. Ct., April 4, 1973).

(2) Confiscation of third party's property.

Confiscation of a vessel used for criminal offense, belonging to a third party without involving the owner third party to the procedure was declared unconstitutional Third Party Confiscation Case, 16 Criminal Cases Report 11, 1593 (Sup. Ct., Nov. 28, 1962).

(3) Proximity control of pharmaceutical retailers.

A rule for controlling distances among the pharmaceutical retailers was declared as contravening the guarantee of the freedom of professions on the grounds that "it exceeded the reasonable administrative discretion." Sumiyashi, Inc. v. Governor of Hiroshima Prefecture, 29 Civil Cases Report 4, 572 (Sup. Ct., April 30, 1975).

(4) Forest Law case.

While the purpose of the law stated as "by means of preventing the forest land from being unduly fragmented, attempt to stabilize the management of the forests, and in consequence thereof, protect and cherish the forests and strengthen the productive power of the forests, and thus contribute to the development of the national economy" meets the public welfare, but the provisions of the law where a co-owner of the forest land having a share of no more than one half is forbidden from requesting the other co-owners to partition his share was declared unconstitutional by being unreasonable and unnecessary restriction and violative of Article 29 of the Constitution which protects the property right. Hiraguchi v. Hiraguchi, 41 Civil Cases Report 3, 408 (Sup. Ct., April 22, 1987).

(5) Suit seeking judgment of unconstitutionality of rules for allocation of Diet seats among districts. The allocation of Diet seats among districts which was once reasonable has become inequitable in light of population shifts was declared as exceeding the permissible scope of the Dietary discretion and hence unconstitutional. Kanao et al. v. Hiroshima Prefecture Election Commission, 39 Civil Cases Report 5, 1100 (Sup. Ct., July 17, 1985). But, it refrained from declaring nullity of the election *per se*. This type of judgment which is called the "judgment of the situations," may be regarded as a judge-made law having established a sort of system of the declaratory judgment. Kurokawa v. Chiba Prefecture Election Commission, 30 Civil Cases Report 3, 223 (Sup. Ct., April 14, 1976).

(6) Suit seeking judgment of unconstitutionality of public donation to *Shinto* shrine.

Governor of Ehime Prefecture donated from the public fund to celebrate the festival of *Yasukuni* Shrine, a religious organization enshrining spirits of the war victims in *Shinto* manners. It was held that the donation contravened the provisions of the Constitution declaring the selection of the state, first from the religious, namely Article 20, Paragraph 3 and Article 89 of the Constitution. Anzai, et al. v. Governor of Ehime Prefecture, 51 Civil Cases Report 4, 1673 (Sup. Ct., April 2, 1997).

16. See Justice Itsuo Sonobe; *op. cit.*, 28.

E. MATTERS TO WHICH POWER TO REVIEW CONSTITUTIONALITY  
CAN NOT REACH

1. *Abstract Checking of Legislative Actions*

Article 81 of the Japanese Constitution is the explicit declaration of the ability of the courts to review the constitutionality of legislation, based on the judicial traditions such as *Marbury v. Madison* (1803) in the United States. In its monumental judgment rendered on July 7, 1948, the Supreme Court of Japan declared that "it has no power to determine the constitutionality of the law and ordinances in abstract terms with no reference to the concrete and actual cases involving the issue."<sup>17</sup> Soon afterward, it further declared that it was not the so-called Constitution Court empowered to exercise the abstract checking of legislative actions.<sup>18</sup>

The German Constitution Court is empowered to review the constitutionality of any particular law, without reference to any particular case. In Japan, however, the prevailing interpretation is as mentioned before, with due deference to the legislative power of the Diet, and the same principle prevails in the United States as well.

2. *Act of State and Matters Belonging to Private Determinations*

Traditionally, any highly political act of the state is outside of judicial review, and this tradition persists in the United Kingdom, as the so-called "act of state" doctrine. The equivalent notion is also supported in France as the "acte de gouvernement" and in Germany as the "Regierungsakt." The same tradition prevails in Japan, and the Supreme Court declared a similar doctrine with respect to the constitutionality of the U.S./Japan Security Treaty and the Law of Special Measures regarding Land for U.S. Military Force in Okinawa ("Sunakawa Case" in 1959<sup>19</sup> and the suit for executive order permitting in-lieu execution of signature and other actions of Prefectural Governor of Okinawa in 1997 ).<sup>20</sup>

The other area where the Court refrained from exercising its power to review constitutionality involved the relationship between the State or any other public bodies and the private individuals, if it remains to be a problem inside a society or organization standing on the autonomous

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17. See 2 Criminal Cases Report 8, 801 (Sup. Ct., July 7, 1948).

18. See Matters of Reserved Army of Police, 6 Civil Cases Report 9, 782 (Sup. Ct., Oct. 8, 1952).

19. Sunakawa Case, 13 Criminal Cases Report 13, 3225 (Sup. Ct., Dec. 16, 1959). It is sometimes pointed out that, although these judgments refer to the "highly political nature" of the subject matters, it reserves a qualifying statement that "as long as [ the subject matter] is not obviously and apparently unconstitutional and invalid," and that this shows the fact that the Court does not solely rely on the "act of state" doctrine.

20. Okinawa case, 50 Civil Cases Report 7, 1952 (Sup. Ct., Aug. 29, 1997). Likewise, the Supreme Court has placed outside of its judicial review such problems as constitutionality of the act of the Cabinet to dissolve the House of Representative (Tomabechi Case in 1960, 14 Civil Cases Report 7, 1206 (Sup. Ct., June 8, 1960); and the issue of adequacy of the procedures adopted for enactment of the law in the two Houses of the Diet (Case of Invalidity of Revision of Law of Police Professions in 1962, 16 Civil Cases Report 3, 445 (Sup. Ct., March 7, 1962).

principle.<sup>21</sup>

### 3. *Dispute Inside a Private Organization or Between Private Individuals*

Should a court give any judgment of constitutionality in a case where a fundamental human right constitutionally guaranteed is allegedly impaired within the relationship between individuals? In one case, it was alleged that a corporation discriminated against job applicants by considering their thoughts and beliefs. The Supreme Court denied the direct application of the constitutional provisions on the grounds that (i) the relevant provisions of the Constitution, or Articles 14 and 19, are not designed directly to regulate the rights and obligations between the individuals; (ii) the legislative measures are always available for protection of the rights of freedom and equality of individuals within a privately controlled relationship; and (iii) that the rescue from the infringement of those rights may be accomplished by application of such provisions of the Civil Code as Article 1 which prohibits the abusive exercise of civil rights, Article 90 which nullifies private acts contravening the public morals, and Article 709, which declares the basic principle of tort liabilities.

## V. CURRENT PROBLEM FOR JUDICIARY

The burden of the judiciary has increased remarkably upon the collapse of what is now dubbed the "bubble economy," meaning the economy based on the extraordinary boost of money flow and the unusual rise of the prices of land and securities. This burden is raised not only for coping with the increasing cases, but for meeting the national demand and expectation for more effective judicial functions, and meeting the outcry for the improvement of the entire judicial system including the increase in the number of legal professionals engaged in the litigation. The Government has recently established the "Judicial Reform Counsel," with the aim of completing the study of the pending problems within the next two years. The Civil Procedure Law has been revised, and several special measures to improve the civil execution procedures have been implemented, but the efforts for solving the whole pile of the problems have just begun.

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21. See *Yamakitamura Case*, 14 Civil Cases Report 12, 2633 (Sup. Ct., Oct. 19, 1960) involving the position of a local Diet member in 1960, *Toyama University Case*, 31 Civil Cases Report 2, 234 (Sup. Ct., March 15, 1977) involving the endowment of scholarly degree in a national university and *Shutokuji*, 34 Civil Cases Report 11, 1 (Sup. Ct., Jan. 11, 1980) involving an inside dispute in a religious organization in 1980.