Roundtable

Japanese Supreme Court: An Introduction

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INTRODUCTION

The Japanese Supreme Court has generated a lot of scholarly discussion in recent years, particularly in relation to its constitutional deliberation. Although several South East Asian countries share similar legal heritage, there is a divergence in the constitutional practices of the individual countries. Professor Norikazu Kawagishi shared an in-depth analysis of the Japanese Supreme Court as a constitutional court and its constitutional interpretations since the promulgation of the peace constitution. The discussion illuminates the intricacies that underlie the function of the Supreme Court. Insightful questions were asked and theories proposed as comparisons were undertaken between the various jurisdictions. The discussants approached the topic from very different perspectives. An enlightening lecture unravels the culture inside the judicial benches and its impact on constitutional jurisprudence.

I. OPENING REMARKS

Let me briefly introduce the background of this lecture. A group of faculty members including professor Wen-Chen Chang, three other professors, and myself, have been devoted to the study of East Asian Courts. We examined the function, organization and social perception of courts in East Asia, primarily based on the experiences of Taiwan, Japan, Korea, China, Vietnam, Mongolia, Thailand and Indonesia. The jurisdictions vary but we attempt to understand how courts function as an institution in different societies by examining the respective context including in transitional societies or mature democracies, big countries like China, small city states like Singapore, and even jurisdiction under "one country two systems" such as Hong Kong.

Many Asian states are very vibrant economically, politically, and socially, and we will attempt to explore this further. We are having an International conference tomorrow with delegates, professors, from various jurisdictions in East Asia discussing about courts in China, Hong Kong, Japan, and Mongolia. We would also like to inform our panelists and participants that we also offer a course called the East Asian Court Seminar in this law school, and some of the participants are here today as part of their class assignment.

With that I would like to introduce Professor Norikazu Kawagishi who will be presenting the institution and function of Japanese Supreme Court. We sure will benefit a lot from his presentation. His presentation will be followed by reflections from four discussants and then we are going to open up the floor for general discussion. Professor Kawaghisi, please!

II. SPEECH

JAPANESE SUPREME COURT: AN INTRODUCTION

PROFESSOR NORIKAZU KAWAGISHI

1. *Introduction*

Thank you very much Professor Yeh and the four discussants. It is a great honor and privilege for me to speak today to distinguished professors and students about the Japanese Supreme Court.

The Supreme Court of Japan is often described as inactive and conservative.[1] The Constitution of Japan, which was promulgated on November 3, 1946, and became effective six months later, vests the judiciary with the power of judicial review.[2] The idea of constitutional rights beyond mere legality was foreign to many Japanese citizens and even constitutional scholars because under the postwar constitution's predecessor, the Constitution of the Empire of Japan, constitutional life did not embrace judicial review. Liberal scholars in the old regime argued for parliamentarism and thus judicial review was regarded as an obstacle for a Cabinet system based upon a majority in the Imperial Diet. Thus, the new Constitution introduced Japanese people to a new stage of liberal democracy. The transformation of politics from a vertical hierarchy to a horizontal relationship among equals through mutual persuasion led judicial review to be very promising, fuelled by the principles behind natural law.

The Supreme Court has invalidated an unconstitutional statute only eight times during the course of some sixty years. In comparison with the German Federal Constitutional Court, its inactivity is most remarkable. Recently, however, the Supreme Court of Japan has somewhat changed its attitude toward affirmative constitutional interpretation.

In this lecture, I will examine recent developments of judicial review in Japan and the reasons behind them. First, the organization and powers of the Supreme Court of Japan will be briefly considered. Then, I will discuss the main points that arise.

2. *The Organization and Powers of the Supreme Court of Japan*

According to the constitutional principle, "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by

1. *See*, *e.g.*, David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEXAS L. REV. 1545 (2009).

2. NIHONKOKUKENPŌ [KENPŌ][Constitution], art. 81(Japan) [hereinafter Constitution].

law".[3] The current Japanese judicial system consists of one Supreme Court and the following 4 levels of inferior courts established by the Court Act: high courts, district courts, family courts, and summary courts. A three-tier court system has been introduced with the District Court and Family Court as the courts of first instance, the High Court as the intermediate court, and the Supreme Court at the top. As the court of first instance, summary courts treat relatively minor cases.[4]

The Supreme Court is the highest court in Japan. It comprises of one Chief Justice and fourteen Associate Justices. While the Chief Justice is first designated by the Cabinet and appointed by the *tenno* or Emperor,[5] Associate Justices are appointed by the Cabinet.[6] The appointments of the Chief and Associate Justices are popularly reviewed at the first general election of members of the House of Representatives following their appointment. They are by popularly review "again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter".[7] Justices of the Supreme Court are appointed from "learned persons with extensive knowledge of law, who are not less than forty years old".[8] (Court Act, Article 41 par. 1) Although the Act allows justices to be appointed at the age of 40, no justice has yet been appointed in their forties. Justices generally tend to be appointed in their sixties. Because the mandatory retirement age for Justices is 70,[9] they generally serve less than ten years in the Supreme Court. Thus, justices usually have a popular review of their appointment only once. This relatively short tenure of justices brings strong leadership to the Chief Justice.

As a matter of practice, a system using a lenient quota of recruiting sources has been adopted. The current composition of Supreme Court Justices is 6 career judges, 4 lawyers, 2 prosecutors, 1 government official, 1 diplomat, and 1 scholar (an ex-judge). The Chief Justice has for many years come from the ranks of career judge.[10]

The Supreme Court has two basic functions. While on the one hand it works as the court of errors, the Supreme Court with its power of judicial review acts also, on the other hand, as a constitutional court. We will look

3. Constitution, art. 76, para. 1.

4. Saibanshohō [Court Act] Act No. 59 of April 16, 1947 (amended 2006), art. 33 par. 1. [hereinafter Court Act]

5. Constitution, art. 6, para. 2.

6. Constitution, art. 79, para. 1.

7. Constitution, art. 98, para. 2.

8. Court Act, art. 41.

9. Court Act, art. 50.

10. Up to now there have been 17 Chief Justices, 12 of whom have been career judges. The exceptions are the following: the first, Chief Justice Mibuchi Tadao, a lawyer; the second, Tanaka Kotaro, a university professor; the third, Yokota Kisaburo, a university professor; the seventh, Fujibayashi Ekizo, a lawyer; and the eighth, Okahara Masao, a prosecutor.

briefly at the first function and then discuss in some depth the second aspect.

The proceedings in the Supreme Court begin with the filing of a petition of final appeal on the part of a person involved who is dissatisfied with the judgment of a lower court, generally a high court. Because it mainly determines questions of law, the Supreme Court renders judicial decisions, as a rule, based upon an examination of documents alone (final appeal briefs and the records of the lower courts). If a final appeal is groundless, the Supreme Court may dismiss the final appeal with prejudice on the merits by a judgment, without oral argument. If, however, the Supreme Court finds a final appeal well grounded, a judgment is passed after it hears oral arguments.

Each year the Supreme Court accepts about 5,000 civil and administrative cases and 4,000 criminal cases.[11] The judicial docket of the Supreme Court is always overflowing with cases. The justices are so busily occupied with final appeal cases that it is difficult for them to wrestle with time-consuming and complicated constitutional issues. This is surely one of the causes for there being an inactive Japanese Supreme Court in constitutional litigations.

Because the Supreme Court Justices are extremely busy in their regular work and some of them are unfamiliar with judicial work itself, judicial research officials are available to assist the judicial work of the Supreme Court Justices. These officials are ordinarily appointed by the Supreme Court from exceptional career judges with 15 years of experience on average. Currently there is one chief, three senior (one for each civil, administrative, and criminal department), and 30 judicial research officials. The position of chief judicial research official is usually a main career path to a Supreme Court Justiceship. In fact, seven recent chief officials were actually appointed as the justices. It is said that judicial officials are deeply engaged in preparing judgments of cases. This may also be a reason for having a conservative Supreme Court in constitutional litigations.

The Supreme Court enjoys autonomy in its organization. The Constitution vests the Supreme Court with rule-making power over "the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs."[12] Judicial administration affairs are carried out through the deliberations of the Judicial Assembly and under the general supervision of the Chief Justice of the Supreme Court.[13] All justices participate in the Judicial Assembly, over

11. While in 2010, as for civil and administrative cases, the Supreme Court accepted 5,321 new cases and finished 4,989 cases. As for criminal cases, it accepted 4,024 new cases and finished 3,987 cases. *See generally* SHIHŌTŌKEINENPŌ [ANNUAL REPORT OF JUDICIAL STATISTICS] (2010).

12. Constitution, art. 77, para. 1

13. Court Act, art. 12, para. 1.

which the Chief Justice presides.[14] Because the Supreme Court Justices usually struggle against an extremely heavy workload, however, the Chief Justice and the General Secretariat play a pivotal role in judicial administrative affairs. In fact, the Secretary General, who heads the General Secretariat, is also influential in judicial administration in general and judicial personnel in particular. Furthermore, this position is also an important recurring source of Supreme Court Justiceship. Indeed, six of seventeen Chief Justices occupied this position before their appointment. It is often pointed out that owing to the General Secretariat's enormous influence over judicial personnel matters, the inner independence of the judiciary has long been in serious question. This control over judicial personnel by the General Secretariat may harbor a different reason for inactive judicial review.[15]

Before going too far, we must first return to the basic structure of another function of the Japanese Supreme Court judicial review.

The power of judicial review has existed since being introduced by the Constitution of Japan as established in 1946. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.[16] How has this constitutional review power been conceived? Does the Constitution allow an abstract review of law by providing for the article? If constitutional interpretation as part of legal interpretation is a natural function of the judiciary, as Chief Justice John Marshall of the United States Supreme Court emphasized in Marbury v. Madison,[17] then a constitutional provision on the constitutional review of law might be regarded as redundant and something positive. Such provision might be the foundation for a constitutional court or abstract review of law. Some constitutional scholars eagerly argued for a constitutional court immediately after the establishment of the postwar Constitution. It was on this argument that a case concerning the National Police Reserve was brought directly to the Supreme Court of Japan in 1952.[18] However, the Supreme Court unanimously denied such an argument. "[U]nder our present system," the Supreme Court reasoned, "the decision of a court may be sought only when there exists a concrete legal dispute between specific parties." The Court added "There is no basis whatsoever in the Constitution, laws, or statutes to support the view that the courts have authority to

14. Court Act, art. 12, para. 2.

15. *See, e.g.*, J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: POLITICAL ECONOMY OF JUDGING IN JAPAN (2003).

16. Constitution, art. 81.

17. 5 U.S. (1 Cranch) 137 (1803).

18. SAIKŌSAIBANSHO [Sup.Ct.] Oct. 08, 1952, 6 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 783. *See also*, SAIKŌSAIBANSHO [Sup.Ct.] Jul. 08, 1948, 7832 SAIBANSHO MINJIHANREISWHŪ [KENSHŪ] 801.

determine the constitutionality of laws, orders, and the like in the abstract and in the absence of a concrete case." As a corollary, lower courts may exercise this judicial review as a part of judicial power.

In Japan, therefore, control of the constitutionality of law by the court means constitutional review attendant with a case, that is, judicial review. There is no constitutional suit per se in Japan. After civil, administrative, or criminal litigation is properly filed, a court may exercise the power of judicial review. Even if a constitutional issue is appropriately and convincingly presented in litigation, the court does not necessarily answer the constitutional question. The court is required to show constitutional judgment only when it is necessary to solve a case. This is a rule of avoidance for constitutional judgments.[19]

Most Japanese constitutional scholars have denounced the Supreme Court as inactive and conservative. In constitutional litigation, for example, the Japanese Supreme Court has set a high threshold. It has adopted an extremely narrow understanding of standing. One scholar criticizes this narrow approach as reservation of procedural law.[20] The Japanese Supreme Court has also been hesitant substantially. It has almost always showed deference to judgments by the legislative and administrative branches. In fact, the Supreme Court has declared a statute unconstitutional only eight times in the past 66 years. They are the Patricide case,[21] the Pharmacy Location case,[22] the two malapportionment cases,[23] the Forest Division Limitation case,[24] the Post Office Limited Liability case,[25] the Overseas Voting Rights case,[26] and the Nationality Law case.[27] The Supreme Court has also judged disposition unconstitutional in a few cases.[28] Apart from

19. Ashwander v. TVA, 297 U.S. 288 (1936) (Brandies, J., Concurring).

20. The scholar is Munesue Toshiyuki.

21. SAIKŌSAIBANSHO [Sup.Ct.] Apr. 04, 1973, 27 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 265.

22. SAIKŌSAIBANSHO [Sup.Ct.] Apr. 30, 1975, 29 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 572.

23. SAIKŌSAIBANSHO [Sup.Ct.] Apr. 14, 1976, 30 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 223; SAIKŌSAIBANSHO [Sup.Ct.] Jul. 17, 1985, 39 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1100.

24. SAIKŌSAIBANSHO [Sup.Ct.] Apr. 22, 1987, 41 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 408.

25. SAIKŌSAIBANSHO [Sup.Ct.] Sept. 11, 2002, 56 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1439.

26. SAIKŌSAIBANSHO [Sup.Ct.] Sept. 14, 2005, 59 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 2087.

27. SAIKŌSAIBANSHO [Sup.Ct.] Jun. 4, 2008, 62 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1367.

28. I mention some of the cases here. The Supreme Court held that the forfeiture of a third party' property without providing him/her with notice and the opportunity to excuse or defend was against the Articles 29 & 31 of the Constitution and declare it was unconstitutional as applied. SAIKŌSAIBANSHO [Sup.Ct.] Nov. 28, 1962, 16 SAIBANSHO MINJIHANREISWHŪ [KENSHŪ] 1593. The Supreme Court declare that the prefecture's expenditures from public funds to Yasukuni Shrine & YehimeGokoku Shrine (religious corporations) which held ritual ceremonies were against Article 20

equality and voting rights, the Supreme Court seems to be a guardian of economic freedom and property rights. On the other hand, freedom of expression, which is regarded as one of the most fundamental rights in a liberal democracy and thus is widely believed to warrant careful protection, has never been sufficiently appreciated; indeed there are many dubious laws and practices restricting free expression. It is a common understanding in the Japanese constitutional academic circles that the government may regulate economic freedom more extensively than freedom of expression. According to constitutional scholarship, thus, the Supreme Court through the power of judicial review should examine regulations on free expression more rigorously than those of economic freedom. Here constitutional theory and constitutional practice see their greatest separation. It is no exaggeration to say that Japanese Supreme Court has played only a minimal role in the liberal democratic process.

3. *Recent Developments*

Although the general description of judicial review in Japan as inactive is right, we can discern a new trend when we look carefully at recent developments in constitutional adjudication. In the first eleven years of the twenty-first century, the Japanese Supreme Court struck down a law three times, while it declared a law unconstitutional only five times in the entire period from 1947 to 2000 (53 years). It is important to pay attention not only to the quantity but also to the quality of decisions on the unconstitutionality of a law.

On September 11, 2002, the Supreme Court invalidated the Law on Postal Service.[29] It was held that some parts of Articles 68 and 73 of the Law on Postal Services which exempted or limited the liability of the state based on the Law on Government Liability for special delivery mail in cases where the loss had occurred as a result of the intention or negligence of the postal worker contravened Article 17 of the Constitution.[30] In this respect, the Law on Postal Service was a specific law of the State Redress Law. The latter was enacted in order to materialize the right to make a claim provided

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paragraph 3 and Article 89. SAIKŌSAIBANSHO [Sup.Ct.] Apr. 2, 1997, 51 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1673. The Supreme Court held that the act of Sunagawa City in Hokkaido to offer the city-owned lands to a joint neighborhood association for the use as the site of a Shinto shrine facility without compensation was in violation of Article 89 and the second sentence of Article 20, paragraph (1) of the Constitution. SAIKŌSAIBANSHO [Sup.Ct.] Jan. 20, 2010, 64 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1.

29. SAIKŌSAIBANSHO [Sup.Ct.] Sept. 11, 2002, 56 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1439.

30. Article 17 of the Constitution of Japan reads "Any person may sue for redress against a State or public entity as provided by law, in cases where he has suffered damage as the result of an illegal act of a public official."

for by Article 17 of the Constitution. This constitutional right is not a negative right such as a constitution traditionally cherishes but a positive right through which people may seek redress for damage inflicted by a government official. Thus, if the Supreme Court had invalidated the whole provision of the said articles, the plaintiff would not have been awarded compensation for the damage because there would have been no legal foundation whatsoever for a positive right. The Supreme Court wisely adopted a method of partial invalidation of law for the first time. Although only parts of the articles of the Law on Postal Service that conflicted with Article 17 of the Constitution were struck down, the residuum of the articles remained valid.

On September 14, 2005, furthermore, the Supreme Court showed an affirmative attitude to a remedy for constitutional rights.[31] The most important issue in this case was the unconstitutionality of depriving Japanese citizens residing abroad of the right to vote. There was no overseas voting system in Japan until 1998 in the Public Offices Election Law. Since then there had been an overseas voting system only for proportional representation elections in both Houses. Thus, Japanese citizens who lived abroad were denied the right to vote in national elections until 1998 and have since been unable to vote in elections of the House of Representatives members under the single-seat constituency system and in elections of the House of Councillors members under the constituency system. Japanese citizens who live in Japan are entitled to two votes in both elections of the Houses of Representatives and of Councillors. Therefore Japanese citizens residing abroad were denied the invaluable opportunity to vote in national elections anyway. The Supreme Court emphasized the importance of the right of people to vote and its exercise in a democracy.

> [I]t is unallowable in principle to restrict the people's right to vote or their exercise of the right to vote, aside from imposing certain restrictions on the right to vote of those who have acted against fair elections, and it should be considered that in order to restrict the people's right to vote or their exercise of the right to vote, there must be grounds that make such restriction unavoidable. Such unavoidable grounds cannot be found unless it is deemed to be practically impossible or extremely difficult to allow the exercise of the right to vote while maintaining fairness in elections without such restrictions.

31. SAIKŌSAIBANSHO [Sup.Ct.] Sept. 14, 2005, 59 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 2087.

In this case, the Supreme Court found no unavoidable grounds for restricting the right of Japanese citizens residing abroad to vote both before 1998 and since then. Thus the Court held that the lack of any overseas voting system until 1998 and of an overseas voting system for the single-member constituency election for members of the House of Representatives and constituency election for members of the House of Councillors since then were inconsistent with Article 15 paragraphs 1 and 3, Article 43 paragraph 1, and the proviso of Article 44 of the Constitution.[32]

What is noteworthy in this decision is that the Supreme Court first discussed the "[c]onstitutionality of the restriction of the exercise of the right to vote of Japanese citizens residing abroad" and then "[s]uits to seek declarations" and "[c]laim for state compensation". Here the Supreme Court directly examined whether a constitutional right is invalidly restricted or not before it considered proper forms of litigation. The Supreme Court placed the substantial examination of constitutionality over procedural technicalities. Reservation of procedural law was denounced in this case. Furthermore, the Supreme Court accepted as legitimate a legal suit for obtaining a declaration that plaintiffs who would continue to reside abroad should be eligible to vote in an election of members under the single-seat constituency system in the next general election of House of Representatives members and in an election of members under the constituency system in the next regular election of House of Councillors members on the grounds that they are listed on the overseas electoral register. In addition, the Supreme Court admitted that this was regarded as an exceptional case "where it is obvious that the contents of legislation or legislative omission illegally violate citizens' constitutional rights or where it is absolutely necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious but the Diet has failed to take such measures for a long time without justifiable reasons". Thus, the Supreme Court declared that the legislative omission by the Diet should be deemed illegal under Article 1 paragraph 1 of the State Redress Law.

On June 4 2008, the Supreme Court again enthusiastically exercised the power of judicial review.[33] The Japanese Nationality Act adopts the principle of granting nationality to a child based on the child's blood

32. Article 15(1) and (3) of the Constitution of Japan reads "1. The people have the inalienable right to choose their public officials and to dismiss them. 3. Universal adult suffrage is guaranteed with regard to the election of public officials." Article 43(1) of the Constitution reads "Both Houses shall consist of elected members, representatives of all the people." Article 44 of the Constitution reads "The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income."

33. SAIKŌSAIBANSHO [Sup.Ct.] Jun. 4, 2008, 62 SAIBANSHO MINJIHANREISWHŪ [MINSHŪ] 1367.

relationship with the father or mother.[34] As a supplemental rule, the Act provided that "A child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgment by either parent and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death."[35] The Supreme Court understood that this provision caused "a distinction between a child who satisfies this requirement and a child born out of wedlock who is also acknowledged by a Japanese father but whose parents have no legal marital relationship, in that the latter child may not acquire Japanese nationality even where he/she has satisfied other requirements prescribed in said paragraph". In conclusion, the Court invalidated this distinction as inconsistent with the constitutional protection of equality.[36] In its reasoning, the Supreme Court presented a view that "it is necessary to deliberately consider whether or not there are any reasonable grounds for causing a distinction in terms of the requirements for acquisition of Japanese nationality" because of the significance of nationality in people's political and social life. The Court admitted that the legislative purpose itself from which this distinction is derived had a reasonable basis but concluded that reasonable relevance between this distinction and the legislative purpose no longer existed because of the changes in social and other circumstances at home and abroad. Thus, the Court declared that "today, the provision of Article 3, paragraph 1 of the Nationality Act imposes an unreasonable and excessive requirement for acquiring Japanese nationality." Moreover, the Court granted the plaintiffs Japanese nationality by adopting the method of partial unconstitutionality. The Supreme Court considered the legitimation requirement alone unconstitutional and struck it down. Thus it may use the remaining part of the Article of the Nationality Act to invest the plaintiffs with Japanese nationality. This judgment of the Supreme Court might have brought out a serious backlash from conservatives who allege that Japanese nationality should be limited to "the authentic Japanese". In the process of amending the Nationality Act, such voices were so powerful that both Houses had to pass supplementary resolutions for preventing the fraudulent obtainment of nationality based upon camouflaged acknowledgments. This

34. Article 2 item 1 of the Nationality Act reads "A child shall be a Japanese citizen in the following cases: (i) Where the father or mother is a Japanese citizen at the time of birth."

35. Kokusekihō [The Nationality Act] Act No. 147 of May 4, 1950, art. 3, para. 1.

36. Article 14 paragraph 1 of the Constitution of Japan reads "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."

episode well demonstrates how judicial review and democratic will may collide with each other.

As we observed, the Supreme Court of Japan has slightly changed its attitude toward constitutional litigation. The almost inactive era seems to have come to an end. However, we cannot regard the Supreme Court as activist because the Court has never protected freedom of expression, one of the most important constitutional rights in a liberal democracy. The Supreme Court may now, however, be en route to transforming itself. The question thus arises of why the Supreme Court has become slightly more active than before.

One possible explanation is a proposal to establish a constitutional court to deprive the Supreme Court of the power of constitutional interpretation. Since the end of the Cold War, some have strongly argued for constitutional amendment in which the introduction of a constitutional court is one important item.[37] Once a constitutional court is established, the Supreme Court will no longer be the highest court in Japan. To avoid such a situation, the Court might have come to think that it must show its presence though declaring certain laws unconstitutional. Another reason may also relate to the end of the Cold War. The Supreme Court Justices no longer have to worry about a regime choice.[38] The Soviet Union is history. They may recognize that they themselves have wider leeway in protecting fundamental human rights. The Supreme Court, for the first time in its existence, is situated in circumstances where it is ideologically less cumbersome for the justices to exercise the power of judicial review. Thirdly, we may point out the change in power from the Liberal Democratic Party to the Democratic Party of Japan that took place in 2009. Because the LDP had virtually monopolized government for over fifty years, the Supreme Court Justices may have always felt conscious of its influence. The change in power may have led them to realize that other options were available. At any rate, it is too early to draw any decisive conclusion, as we do not yet know the whole scheme of the new Supreme Court.

4. *Conclusion*

So far, Japanese constitutional scholars have discussed what Japanese judicial review should be by making reference to the theories and practices of American and German constitutional review. In a sense, that is scholarship for scholarship's sake. It is because there have been overwhelmingly few declarations of unconstitutionality and academic circles are decisively

37. For example, the Yomiuri Shimbun presented a constitutional revision plan in 1994.
38. Fukuda Hiroshi, a former Supreme Court Justice, expresses such a view.

deficient in common experiences of significant constitutional litigations to share with each other. As we saw briefly, however, the Supreme Court has shown a slightly more active attitude to constitutional interpretation in this century. The will and effort on the part of the Supreme Court to clarify the meaning of the Constitution may cause repulsion in political departments. Particularly in the political situation of populism, the Supreme Court may be severely censured when it blocks the actions of a political department through its interpretation of the Constitution.

At long last, the Supreme Court of Japan has just begun to occupy some solid space in the liberal democratic process. In the parliamentary government system the Constitution adopts, the political resistance of a majority may be more intense than that in presidentialism. Political departments may not easily accept decisions on unconstitutionality by the Supreme Court. An institution of judicial review presupposes a plurality of constitutional interpretation. The Supreme Court may express a constitutional interpretation different from that of a political department, which is basically majoritarian. Because the protection of constitutional rights is generally based upon a minority view, collisions between the Supreme Court and political departments are fully to be expected under the institution of judicial review. Success in judicial review in a liberal democracy will depend upon how extensively common citizens are able to accept a complicated picture of democracy with judicial review. Recently it has become meaningful for the first time to discuss a Japanese approach to judicial review. The discussion has only just begun.

Thank you very much.

PROFESSOR JIUNN-RONG YEH

Thank you, Professor Kawagishi, for the informative and insight presentation. While he began with the general view that most people think the Japanese Supreme Court is conservative, he also introduced some of the possible institutional and historical reasons behind this. He also highlighted that there has been some recent changes and provided some possible reasons for the change. The future of the Japanese Supreme Court in the next decade is quite fluid. This is the general overview of the presentation. We are very lucky to have some discussants including Professor Batbold Amarsanaa who is from Mongolia and has been in many foreign jurisdictions including Japan, Germany, and the United States. He is very experienced in commercial law and arbitration. We are glad to have him as our discussant. We will begin with him, followed by our other three discussants.

III. COMMENTARY

PROFESSOR BATBOLD AMARSANAA

Thank you Professor Yeh for your wonderful words, I would like to note that I am very glad to come to NTU. I was at the College of Law seven or eight years ago, perhaps at the old campus. In the Mongolian judicial system, we have a separate Supreme Court and Constitutional Court. This structure is based on the 1992 Constitution and this is the first time Mongolia established a constitutional court in its history although we adopted our first constitution in 1924. During the drafting process, we found documents indicating that the people who drafted the constitution, had perused the English, Korean, and Japanese constitutions.

When the 1992 Constitution was drafted, the Mongolian drafters were considering whether to adopt the French style Council or the US style Supreme Court constitutional review. However in the end, Mongolia chose neither systems. One of the important jurisdiction of the Constitutional Court in Mongolia is to review the constitutionality of statutes adopted by parliament.

The Constitutional Court of Mongolia has been very active although it has only twenty years of history. Currently, the Constitutional Court judges are appointed by parliament for six years. We have nine Constitutional Court members and three of them are suggested by the president, three by parliament and the remaining three are by the Supreme Court.[39] As I have said it is quite political so it depends on the parliament as well.

Let me also touch the composition of the Constitutional Court in Mongolia. The members of the current Constitutional Court are a former President of Mongolia, several bureaucrats, two female members, and a few politicians. Because the Constitutional Court's jurisdiction is very much connected to politics, the members should be very capable and able resistant to political decisions that are not in the interest of the country. As far as I can see, it is still at the stage of hastening process in politics.

In order to familiarize the court and its functions, let me tell you two cases relevant to judicial review. In 1999, an amendment to the Constitution was adopted by parliament at the election year. This amendment has been called by some scholars such as Prof. B. Chimid, so-called the father of the Constitution, the worst amendment since the constitutional hand over. He said that it undermined the fundamental concept of constitutional power. These amendments were deliberated by the Constitutional Court, and it invalidated the amendment based on the fact that not following procedural

39. The Constitution of Mongolia, art. 65, para. 2.

rule. The amendment was made into law in three weeks and it was very politically motivated amendment. Later, the new parliament readopted the exact same text of the amendment which is a valid part of the Constitution today. This is one of the few hotly debated cases among politicians and constitutional law scholars.

The second case is an ongoing one. Mongolia has adopted new election law in late December and this year is an election year. This new election law has adopted proportional along with the majority system of election. The problem with this new, dual system of election is one person can be both proportionally listed as well as run for election in the district. For instance s/he loses in the district with more than twenty percent of the vote of the constituency, s/he can still be elected to the parliament from the proportional list. This point which enables one candidate to transfer within majority and proportional system has received criticism from many scholars. This case will be deliberated on the 25th of March this year based on the petition submitted byone of my colleagues at the law school. This is the second case.

The Constitutional Court in Mongolia is still put under tests by political institutions, and we have to see what will happen in the future. You cannot say today that the Constitutional Court is well positioned, and it is not yet strong enough to resist political decisions that are problematic.

PROFESSOR JIUNN-RONG YEH

Thank you very much, we know that the Constitutional Court in Mongolia has been well received in many ways but we will be able to listen to the whole story tomorrow. Today we have at least been able to get a brief idea of the court. Shall we turn the discussion to Professor Lin Chao Chun, followed by Huang Sieh Chuen and Professor Chang Wen Chen? Professor Lin Chao Chun is a Professor in Taipei University; he has been with us on many occasions so he is quite a familiar face.

PROFESSOR CHAO-CHUN LIN

Thank you very much for Professor Yeh's invitation and for Professor Kawagishi's very enlightening lecture. I have a few questions about your paper. My first question is as follows: as you just mentioned, many Japanese scholars would like to create a constitutional court that is higher than the Supreme Court. However, I am wondering whether you might have any specific plan to implement this idea. Could you give us any specific example? Further, I am curious about that since more than half of the Japanese Supreme Court justice are from non-career judges, why is this Supreme Court seemingly so conservative? This is in contrast to the

Taiwanese experience. In Taiwan, non-career judges have always occupied more than half of the seats in our Constitutional Court, and they have performed very well, facilitating hugely the protection of human rights in Taiwan and helping to tackle with various tough issues of separation of powers. Based on Taiwan's experience, to design a new constitutional court, perhaps it would be better to take it seriously to consider a new way of appointing justices of the new court.

My second question is related to the first one. I would like to focus on the role of the Chief Justice of Japanese Supreme Court. It seems to me that the Chief Justice of Japanese Supreme Court is always a career justice. As you just also mentioned, career judges always play an important role within Supreme Court. For example, the Secretary General and Chief Legal Research Officers are always recruited from career-judges and in latter day, they have a great possibility to become a Justice of the Supreme Court. Based on this situation, is it then fair to say that the judicial bureaucracy, non-career judges, actually controls the Supreme Court? Thus, although more than half of the nine justices are non-career judges, they cannot exert significant influence on the Court. This is simply the existence of the huge judicial bureaucracy within the court.

The third one is about administrative litigation. In your paper you mentioned that one of the significant changes after the Second World War is that Japan abolished the old administrative court. But as I know the number of the administrative law cases is not quite a lot. For example, in Taiwan, we have roughly one hundred thousand cases per year, but in Japan, it seems you have only fifty thousand cases per year. In terms of the population differences between the two countries, the quantity of administrative law cases in Japan is relatively low. Thus, I am wondering what are the factors that make people not to use the administrative procedure to protect their rights and interests in Japan?

PROFESSOR JIUNN-RONG YEH

Thank you very much. I think we will have a follow up discussion after the four discussants speak, let us now invite Professor Huang Sieh Chuen to give her comments.

PROFESSOR SIEH-CHUEN HUANG

First of all I would like to thank Professor Kawagishi for his insightful lecture today in his introduction to the organization of the Japanese Supreme Court and the analysis of judicial review.

Although I have studied and worked in Japan for seven years, I have to

confess that I seldom pay attention to the role of the Supreme Court of Japan as a constitutional court. This is because the articles of the civil code involving family and inheritance, which is my research interest, have never been declared as violating the constitution even though there have been deliberations as to the constitutionality of such articles. Therefore to comment on the whole judicial review system either in Japan or in Taiwan is far beyond my ability. Today, the other three discussants Professor Amarsanaa, Professor Lin and Professor Chen are much more specialized than me in dealing with constitutional problems. So instead of touching the large issues today, I will examine the problems from a micro perspective, which is to compare judicial review concerning family law and inheritance law in Japan with that in Taiwan.

Firstly, in Japan, from Professor Kawagishi's presentation we already know that no articles in Japan's civil code involving family or inheritance have ever been declared unconstitutional. Nevertheless it does not mean that there is no constitutional litigations on family or inheritance law. Actually, we have seen at least two cases which have been brought to the grand bench of the Supreme Court. The first case involves Article 787 of the Civil Code. This article allows an illegitimate child to bring an action for validation or acknowledgement on the provision that the suit shall be brought into the court within three years since the death of the parent. So in this case, the plaintiff argued that the provision was a violation of Articles13 and 14 of the Japanese Constitution. As we understand, Article 13 offers protection of the right to life, right to liberty, right to pursuit of happiness. Article 14 paragraph 1 provides for equal treatment under the law. However in 1955, the Supreme Court of Japan did not declare Article 787 unconstitutional because the provision protects the stability of parent-child relationship and treats every illegitimate child equally.

But the second constitutional case brought to the grand bench, which was a far more important case, occurred only recently in 1995. The debate was that the provision in Article 900 of the Civil Code, which determines the share of inheritance of an illegitimate child to be half that of the legitimate child, is against Article 14 of the Constitution. The court contended that the aim of the law is to respect the legitimate child who was formed between spouses married by law while at the same time paying due attention to the child who is illegitimate. So Article 900 breaks a statutory share of one half of the legitimate child's share in order to protect the illegitimate child, and simultaneously balances and respects the legal marriage and protection of the illegitimate child. In other words the Supreme Court said the law cannot be regarded as unconstitutional and an unreasonable discrimination. However we may notice that there were five justices showing dissenting opinions that support the unconstitutional argument at that time. So it is a

very controversial but important case which was cited repeatedly afterwards in similar cases that arose in 2000, 2003 and 2009 in the petit bench.

Contrary to the past attitude of Japan's Supreme Court, the Constitutional Court of Taiwan has done a more prominent job in family law. For instance, in 1994, Interpretation 365 decided that Article 1089 of the Civil Code of Taiwan, which provides that if there is inconsistency between the parents while exercising the right regarding their minor child the father can make a final decision prior to mother, violated Article 7 of the Constitution, that is the protection of equality. This consequently led to the amendment of the Civil Code two years later.

In addition to sexual equality our Constitutional Court emphasizes very much the protection of human rights of children as stated in Article 22 of the Constitution. For instance, Article 1063 of the Civil Code entitled husband and wife to the right to disavow or rebut the assumption of legitimacy of their child, while the child was not allowed to bring an action for it. In Interpretation 587 in 2004, our court held that the law to establish paternity is intended to balance the maintenance of stable status and protection of a child's interest. However the court contended that the provision inappropriately restricted the right of the child and was insufficient in protecting the right to personality. As a result the law was said to be inconsistent with the constitutional provision of protecting right to personality and the right to litigation.

Generally speaking, the Constitutional Court in Taiwan made at least six unconstitutional declarations toward articles relating to family law and indeed paved the way for the revision of the Civil Code. There is no doubt that our grand justice in Taiwan enthusiastically promotes constitutional values and creating the opportunity for reform and reformation of our family law.

In comparison the attitude of the Supreme Court of Japan toward judicial review is veritably modest and it really displays gracious respect and tolerance for legislature. Of course the differences derive from many reasons such as perhaps the quality of law–making, but it is unexamined and requires further study. I will leave it here, and I apologize once again for not being able to offer more orthodox constitutional topics but rather only limited family law stories. However I have been inspired a lot by Professor Kawagishi's report regarding the analysis of Japan's Supreme Court. I especially appreciate the moderator Professor Yeh for his kindness for inviting me to participate in this wonderful discussion and share my few opinions with you. Thank you very much.

PROFESSOR JIUNN-RONG YEH

Thank you very much. I think Professor Haung has made a very good case study and comparison. She chose family law and particularly gender issues and also inheritance in comparing Taiwan and Japan. I thought there were many similar things they would like to promote. We are very inspired by that. We now have another discussant, Professor Chang please.

PROFESSOR WEN-CHEN CHANG

Thank you, Professor Yeh. In the interest of time, I will be brief in my reflections on this wonderful paper on the Japanese Supreme Court. First, I would like to share with Professor Kawagishi that Professor Yeh and I recently co-authored an article entitled "The Emergence of East Asian Constitutionalism".[40] In that article we adopted a similar stance to what you presented today. While most scholars argue that the Japanese Supreme Court has been conservative, probably one of the most conservative in the world, we actually have some reservations with that position. We think that like Taiwan and South Korean constitutional courts, the Supreme Court of Japan has just been cautiously responding to socio-political demands as the Liberal Democratic Party had dominated the politics since World War II. It is difficult for any court to directly defy a popular political party, and there is no exception to the Supreme Court of Japan. Hence it is understandable that the Japanese Supreme Court has been conservative in ruling against statutes enacted by such a popular political party as the Liberal Democratic Party. In the article, Professor Yeh and I traced all eight decisions and examined how these decisions were responding to social and political demands for change. We find that when there was a possibility for political and social change, the Supreme Court would be more opened for reform, finding statutes unconstitutional and even invalidating them. This may help explain why the Supreme Court of Japan has become more liberal as there have been increasingly greater political and social openings in this recent decade.

My second point is on possible ways by which the Supreme Court of Japan may become more liberal. Like you, Professor Kawagishi, I am also an institutionalist and prefer to contemplate institutional possibilities which may facilitate the liberalization of the Japanese Supreme Court. I think in the paper you have already examined some institutional possibilities, but I would like to discuss further. You argue that being a court of error is one of the obstacles for the Japanese Supreme Court to become more active on

40. Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011).

constitutional issues. I am wondering if there are any institutional possibilities to reduce the workload of the Court being a court of error. I am sure that you as a Yale Law School graduate are familiar with the grand reform made by the Judiciary Act of 1925 in which the US Supreme Court provided with the discretionary power of "writ of certiorari" and was able to transform from a court of error into a constitutional court. I am wondering if any similar reform may be undertaken for Japan's Supreme Court, and if the Court may undertake any similar measure without the legislative reform? I at least find one possibility inspired by your article as you mentioned that in the Code of Civil Procedure one of the requirements for appealing to the Supreme Court is that the issue must be concerned with constitutionality or the significance of the laws or regulations. This seems to me that the Supreme Court may enjoy discretionary powers to review only the cases of constitutional importance and thus release itself from the heavy burden of being a court of error. I would like to solicit your view on this institutional possibility.

The other institutional possibility for the reform of the Japanese Supreme Court may lie with the composition of justices as well as that of their law clerks and research officers. We know that justices of the Supreme Court have been mainly appointed from professional judges. However, some justices are appointed from former ministers, attorneys-at-law or legal academics who may have cultivated more liberal views due to prior experiences. Therefore I would like to ask whether it would be a possibility in Japan to provide justices of the Supreme Court with more law clerks or research officers from diverse backgrounds, for example from scholarly circles. In South Korea, judicial research officers who provide assistance to the Constitutional Court or the Supreme Court may come from judges of lower courts or from constitutional law professors for a short period of time. I wonder whether this institutional design has ever been considered as a possibility and can it be done without any legislative reform.

The third institutional possibility for reform may be related to the issue concerning judicial administration. Before I address the issue, I would like to express my appreciation of your detailed discussion on institutional obstacles confronting the Japanese Supreme Court, which has not been often addressed in the works of Japanese constitutional scholars. We know the secret to the success of the US Supreme Court is due in large part to each and every capable Chief Justice. For example, Chief Justice Rehnquist was a powerful Chief Justice, who participated in and deliberated on all cases while maintaining strong in steering judicial administration. In Japan, is there any proposal for the reform of judicial administration to release the Supreme Court from heavy workloads for instance delegating judicial administration to lower courts? Would this be considered as a possible

reform or would it be seen as a threat to the institutional prestige of the Japanese Supreme Court? Is there any proposal in which the work load may be distributed to other associate justices or other administrative officers? Is there any proposal that may allow Chief Justice to concentrate more on the deliberation of cases? These are just three institutional possibilities that may not require legislative reform but may be implemented by the Supreme Court itself if wishing to become a more active court. I am soliciting your views to see whether these are feasible institutional possibilities.

Lastly I would like to recapitulate the role of the Japanese Supreme Court, which may already be very active. Let us compare the Japanese Supreme Court to the Mongolian Constitutional Court or the Taiwanese Constitutional Court. I think there are two kinds of court. One kind of court places stronger emphases on the rights of individuals while the other kind of court considers more of politics. Many constitutional courts are actually courts of politics. The French Constitutional Council, Constitutional Court of Mongolia or Grand Justices in Taiwan offers great example. Courts of politics are often occupied by controversial political issues rather than issues of individual rights. In contrast, courts of rights are just in the opposite. Your article has provided details on how the Japanese Supreme Court has been concentrating on rights of individuals concerning private spheres including family and how the Court has tried not to strike down legislation but still provide remedy to individuals without involving politics. Seen this way, I think, the Japanese Supreme Court can be recapitulated as an active court of rights. If this is correct, the next question is when the Court would become a court of politics as constitutional practices in the West have demonstrated that a court of rights would inevitably become a court of politics. A well-known example is, again, the US Supreme Court in a watershed case *Griswold v. Connecticut*,[41] in which the Court was a court of rights ensuring individuals the right of privacy to use contraceptives but inevitably faced with contentious politics. If the Japanese Supreme Court can be recapitulated as an active court of rights, the next question is why such a court of rights has saved itself from transforming into a court of politics? It seems that by focusing on private remedies of individuals instead of unconstitutional invalidations the Supreme Court of Japan may save itself from political confrontation. Perhaps it is a good alternative to a court of rights without risking being a court of politics. Thank you very much.

41. Griswold v. Connecticut, 381 U.S. 479 (1965).

IV. GENERAL DISCUSSIONS AND RESPONSE

PROFESSOR JIUNN-RONG YEH

Today we have a very good panel and they have addressed the issue from different angles comprising of stories surrounding the role of the Japanese Supreme Court which I think is very impressive. I was thrilled to listen to all the discussion, and I think the audience must have also greatly benefited from this session. We would also like to solicit some comments or quick questions from the audience who have already heard many of the questions and comments. Do any of you have anything in mind before we run out of time? You can speak in any language, we can convey to Professor Kawagishi anything that is said.

Question:

In regards to the background of the judges in the Japanese Supreme Court, it seems to me that a legal background is not required to become a constitutional judge. If that is the case, how does that impact on the judicial decisions that are handed down and does it have any influence on the conservativeness of the court itself? If the court has legal scholars, would that have any impact at all? Thank you.

Question:

I just have one quick question. In recent days I have read a lot of articles about democracy and political parties in Japan. So I know bureaucracy and political parties have huge power and influence in policy making, bill drafting and even in judicial appointment. My question is about legal independence. How can the judicial system or the Supreme Court keep its independence from politics, political parties or bureaucracy from an institutional perspective?

Question:

I would like to raise a question regarding the history of the Supreme Court in Japan. As we know, the current constitution in Japan was adopted in 1946, and there were two institutional choices, the constitutional model and the Supreme Court model. It was the Supreme Court model that was established in Japan. We would like to know why it was the Supreme Court model that was established in Japan? The simple answer to that is that the constitution was led by General MacArthur, so the Japanese learnt the US

Supreme Court model. But we have read from the literature that countries with parliamentary traditions such as US-Allied countries in Europe will usually choose the constitutional model because they think the traditional judiciary is not that trustworthy so they need an independent institution to be responsible for the constitutional review. Thus I would like to know if there are any similar experiences in Japan in relation to the background and history of the Supreme Court.

Question:

My question is similar. In Thailand we have a lot of political problems. When we have a problem relating to politics, there is shared power to deliberate on the issue in our Constitutional Court. So a lot of cases in the Constitutional Court are mainly about political issues, but the citizens of Thailand also have a lot of problems as well. As Professor Chang mentioned, it is a human rights problem, which I think also this is very important. So now in Thailand the problem is how to balance human rights and the political issues within the function of the constitutional court.

Professor Jiunn-Rong Yeh:

I also have one question, I sympathize with you for so many question to answer and you can exercise your discretion in selecting questions to answer. I think there are different schools of thoughts which we add into the theme of today. The theme of today is whether the Japanese Supreme Court is conservative or not. Well the first layer of our question will be, what do you mean by conservative? What do you mean by doing nothing? How are we going to determine that? Some people will argue, no I do not think that Japanese Supreme Court is conservative at all. This is the first layer of question. The second layer of question is, if for some reason we do believe the Japanese Supreme Court is conservative or inactive, then how are we going to analyze that? Is it a good or bad thing? What was the drive or underlying reason for that? This is the second layer of questions. The last one is, what is going to be changed through institutional choice? Are we going to change the role of the Secretary General? Are we going to change the bureaucracy or should we change the institution itself? No doubt there are lots of possibilities.

Let me just mention a concept from Professor Hasebe,[42] who argued that the Japanese Supreme Court is not that conservative, and inactive, in a way

42. *See generally* Yasuo Hasabe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5(2) INT'L J. CONST. L. 296 (2007).

that slightly differed from Professor Chang and my point of view. Our view is that it is not that conservative because the Japanese, Taiwanese and Korean courts always respond to social dynamics. As long as there is some consensus or development in the society, the Court will respond. We call this kind of responsiveness the social dialogue model and we see that the Japanese Supreme Court is not that conservative.

But Professor Hasebe emphasized a comparative institutional approach that asserts that the quality of the legislation is relatively good in Japan. You have the worst congress passing the worst legislation and you have the best constitutional court to kill this bastard, then of course you have an active constitutional court. We do not need many cases to declare legislation unconstitutional and as we see Professor Sieh Chuen just alluded to that when she looked into the gender and inheritance aspect and questioned the quality of the legislation and I think it is a legitimate concern. I also remember that Professor Hasebe argued that there are some special unions in Congress or in the Ministry of Justice, they are very capable of reviewing bills before they are promulgated. So try to imagine the capacity of our Congress, they pass laws without a very lengthy review process, so of course you have that kind of active constitutional court. Also, before you send that bill out of the Cabinet, the Ministry of Justice maybe able to review it, so either in the Ministry or in the Legislature you may have a very good legal team or legal unit to review that bill before it is actually passed. So I think this kind of institutional comparative view is also very important for this kind of comparison.

I have just suggested some possibilities for you to respond to and I think it is a wonderful discussion. I think if our panels stay in Yang Ming Shan together for two days we can come up with two or three very good articles. Now we need to let you respond to some of the comments.

Professor Kawagishi

Thank you very much for all the comments and questions. I am not sure that I can reply to all the questions, but I will do my best.

In Japan we have a dual candidacy system for the single member district constituencies and proportional representation elections in the House of Representatives. The Supreme Court acknowledges it as constitutional. The Diet is believed to have wide discretional power regarding the election system.

What you said hit the point. First of all, unlike Taiwan, non-career judges tend to be more active than career judges. In the current practices six Supreme Court justices have been career judges. Two justices are ex-prosecutors and two are ex-governmental officials Prosecutors are

conservatives, not in a political sense but in a legal one. They as professionals assume existing laws are constitutionally established. That is partly why the Japanese Supreme Court is conservative. Because the Cabinet selects justices, the selection is connected to the will of the majority party in power. However, this is a general description. The most important recent case is a 2004 case, the overseas voting case. An ex-diplomat justice strongly supported voting rights and showed active leadership in judicial opinion-making. It is said that he turned down a first scenario prepared by a judicial research official and led the Court to its epoch-making decision. Thus he serves as an example of active Supreme Court justiceship. There has been an argument that a constitutional court should replace the inactive Supreme Court. Conservatives strongly support a constitutional court because they have always tried to repudiate the peace constitution, which has been the most important controversy in the Japanese constitutional history. Most constitutional scholars, however, do not necessarily support the argument. The justice mentioned above is a counter-example to establishing a constitutional court.

When the Cabinet adopts a bill, the Cabinet Legislation Bureau will first give a view on whether the bill is constitutional or not. Of course, when we have a political question, deliberations on the constitutionality of governmental actions in the government bodies is not focused on legal aspects alone. According to the Cabinet Legislation Bureau's constitutional interpretation, the exercise of collective self-defense is unconstitutionally against Article 9. Conservative politicians have therefore tried to deprive the Cabinet Legislation Bureau of its constitutional interpretation power and instead create a constitutional court in the hope that it might decide that collective self-defense is constitutional. Many constitutional scholars, on the other hand, believe that it is unconstitutional. Article 9 is a real issue underlying the argument for a constitutional court system. The background of this argument is peculiar to the Japanese constitutional system, which is very different to that of the Taiwan Constitutional Court.

The judicial bureaucracy is very powerful in Japan. You raised the issue of the independence of the judiciary. There are many discussions on this question from different standpoints. So far, we have not seen any clear evidence that the party in power intervened in judicial administration including judicial personnel affairs. As I have said, under the Meiji Constitution, the judiciary had no autonomy: They were under the supervision of the Justice Department. Thus, independence is very precious to the Justices of the Supreme Court and the judiciary as a whole. Generally speaking, they have attempted to do their best to avoid governmental or political interventions. Under the monopoly of power exercised by the Liberal Democratic Party, the Supreme Court might voluntarily act in a way

that responded to the demands of the government or the LDP. This is not a denial of judicial independence per se. In Japan, people believe the judicial independence on the outside has been relatively well maintained but judicial independence on the inside has been dubious because of the strict control of judges by the General Secretariat of the Supreme Court. Judges are very hesitant to engage in civic affairs, not to mention political events. They do not go to popular bars but instead to small bars. This atmosphere might be regarded as somewhat related to the Supreme Court's conservativeness and inactiveness in constitutional adjudication. In contrast, however, the judiciary has played an important role in private law. For example, the Act on Equal Opportunity and Treatment between Men and Women in Employment can be regarded as an outcome of the accumulation of judicial precedents.

In Japan some private law professors argue that the autonomy of private law. In their argument, the constitution is marginalized and civil law and family law are prioritized. However, in Japanese family law there are several constitutionally dubious provisions, for example, provisions on marriageable age and period of prohibition of remarriage. While only a male who has attained 18 years of age may enter into marriage, a female of 16 years may do so. Once a married couple divorces, the ex-wife alone must wait for six months before remarrying. Furthermore, a married couple can only choose one family name, so ninety-eight percent of married couples in Japan use the name of the husband. In the view of many constitutional scholars, all these things are unconstitutional, but the Supreme Court has turned down all related claims. Issues of family law reform have lately attracted a great deal of attention in Japan.

Now I realize that I should learn more about the decisions in Taiwan. When I was a student, I could not imagine that mature East Asian people such as Taiwanese, Mongolian, Korean, and Japanese, could come together to talk about constitutional review. I felt quite guilty because Japan was in alliance with the United States and had more or less supported dictatorial regimes in Asian countries. However, it is an amazing fact that in many countries that have gone through liberal democratization we can now discuss and share constitutional experiences with one another. I wish to learn lessons from the practices of the Taiwan Constitutional Court, as well as from those of the Korean Constitutional Court. The Korean Constitutional Court tries to avoid the failures of the Japanese, but at least the Japanese experience has a meaning here.

On the other hand, the Japanese Supreme Court is active in view of the fact that they declared many political practices constitutional. For conservatives or supporters of the Liberal Democratic Party, the constitutional interpretations of the Supreme Court may be satisfactory. In

the historical situation of 1946 I do not think the Constitutional Court was a real choice because there were very few significant precedents available for the framers of the constitution. Among the articles I have written is one on the birth of judicial review in Japan. There I pointed out that there had been no affirmative action from the Japanese side. The Japanese Supreme Court derived from the initiative of Government Section, Supreme Commander for the Allied Powers. The Japanese people have struggled to materialize this foreign institution. The process of materialization is still ongoing.

In conclusion, let me apologize for not having responded to all of your questions. I do appreciate all the questions and comments—they have given me a valuable opportunity to rethink the Japanese constitutional experience. Thank you very much.

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日本最高法院運作初探

川 岸 令 和

摘 要

日本最高法院在近年來引起許多學術討論，特別是有關其憲法思維。雖然數個東南亞國家都分享相同的法律繼受遺產，但在個別國家的憲法實踐上卻出現分化的面貌。川岸令和教授分享了一個關於日本公布和平憲法後，最高法院作為憲法法院與其憲法解釋的深入分析。此一討論闡示了作為日本最高法院基礎的複雜因素，在討論中與談人詢問許多具有洞見的問題，並且提出理論以比較不同國家的法律制度。與談人從非常不同的角度切入此一議題，此一深具啓發性的講座揭示了司法體系內的文化與其對憲法法理的衝擊。

關鍵詞：日本最高法院、憲法解釋、司法制度、憲法政治