# The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan

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## 1 Introduction

The current system of constitutional review or control of constitutionality by the judiciary is accepted as "an essential or desirable feature of a liberal democracy."[1] Generally, two models of constitutional review exist: First, the American model, wherein ordinary courts exercise judicial review in concrete cases, also referred to as decentralized review: and second, the European model, characterized by centralization of control of constitutionality by a specialized constitutional court.[2] These two models have evolved in a unique manner.

Originally, constitutional review was not necessarily designed to protect fundamental rights. It is noteworthy the constitutional court model was conceived to guarantee constitutional order. Hans Kelsen, founder of the European model, defined this function as an element of the system of technical measures whose objective is to ensure the regular exercise of State functions.[3] Currently, the protection of fundamental rights, a key element of constitutional order, constitutes the most highlighted aspect of this system.

In 1946, Japan introduced the system of judicial review under its constitution. Article 81 of the Constitution stipulates that "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." As this article is considered an adaptation of the American style of

[1]Chen and Maduro (2015, p. 101).
[2]Cappellettie (1971, pp. 46–51).
[3]Kelsen (1928, p. 198).

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judicial review, the Supreme Court is vested with the role of "the court of last resort" with respect to ruling in concrete cases, as well as constitutional review. Under this system, the power of constitutional review is exercised only in concrete cases involving individual rights: the function of the protection of individual rights is considered to be prominent.

However, the Supreme Court of Japan has taken a moderate view when exercising its power of judicial review, whereas the U.S. Supreme Court has exercised it liberally. Seemingly, it performed the role of being "the court of last resort," in the ruling of civil or criminal cases, rather than constitutional review. The approach of the Japanese Supreme Court is often viewed as "judicial passiveness." Instances of constitutional review often supports the democratic transition: however, postwar Japan makes "the most important exception."[4]

To be certain, a judicial branch without democratic legitimacy should moderately and sensibly exercise its power of constitutional review: however, the passiveness of the Japanese Supreme Court in the ruling of the unconstitutionality of law is remarkable. From 1947, the year in which the Japanese Constitution was enacted, to 2016, the Supreme Court found a law to be unconstitutional in only ten cases. In addition, in cases involving official acts, no more than ten cases found the action to be unconstitutional. Although the Japanese Constitution adopted the American model of judicial review, perhaps only the concept itself was rooted.

In 1976, the Court held that "the people should be equipped with as many means of remedy as possible against acts of government impairing fundamental human rights" considering the constitutional requirements.[5] However, it seems that the Court has not yet fully demonstrated its expected role and has maintained a reserved attitude toward the political branch. From the beginning of this century, the Japanese Supreme Court has begun to assume a more active role in discrimination and vote equality cases. Despite a few remarkable rulings, the scope of this change is still uncertain. It has been asserted that institutional reforms are indispensable for activating the system.

After reviewing the fundamental characteristics of judicial review under the Japanese Constitution, the background of the Supreme Court's judicial review will be analyzed in comparison to the European constitutional justice system. Further, recent developments in rulings by the Japanese Supreme Court will be examined and the appropriate role of the judicial branch in protecting fundamental rights and the conditions for its realization will be discussed.

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[4]Sweet (2012, p. 826).

[5]Supreme Court, grand bench, 14 April 1976, 30 *Minshu*, p. 223 (http://www.courts.go.jp/app/hanrei_en/detail?id=48. Accessed 2 June 2017). English translations of Judgments of the Supreme Court as well as that of the provisions of laws concerning them are available at the following website: http://www.courts.go.jp/english/judgments/index.html.

## 2 Japanese Judicial Review

### *2.1 Establishing Constitutional Review*

Japan's modern Constitution was promulgated in 1889 and enacted in 1890. It was entitled, "The Constitution of the Empire of Japan" or the "Meiji Constitution." Although this Constitution indicated elements of a modern constitution, such as the separation of powers and the guarantee of rights, its central authority was the Emperor. Therefore, this Constitution was characterized by constitutionalism but in a more formal sense. Although certain rights were guaranteed, they were not human rights: rather the rights of "subjects" were guaranteed within the limits of laws. Moreover, "suits which relate to rights alleged to have been infringed by the illegal measures of the administrative authorities" belonged to the competency of the Court of Administrative Litigation (Article 61), and it accepted only limited matters enumerated by law. The system of judicial remedy against illegality of the administration was fragile.

The Constitution lacked a provision regarding constitutional review. A possibility of constitutional review over the formality of laws or orders was admitted by constitutional doctrines. However, the possibility of substantial control of constitutionality was denied by influential doctrines although certain doctrines asserted its possibility.[6]

After Japan's defeat in the Second World War, the Constitution was enacted in May 1947. On August 14, 1945, the Japanese Government accepted the Potsdam Declaration and promised democratization. The Constitution of Japan was influenced by the United States and the General Head Quarters (GHQ), which occupied Japan. Formally, the final Constitution was a result of amending the former Constitution and radically changing fundamental principles.

Article 76 of the Constitution stipulates that "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law," and the duality of jurisdiction, namely, the judicial court and the court of administrative litigation, is denied. The concept of this "judicial power" vested in courts (Article 76) is interpreted as adopting the American concept, which presupposes cases and controversies. Although this established interpretation is favorable to the American method of judicial review, decentralized and exercised in concreto, opposing opinions asserted that the centralized judicial review or the control of constitutionality in abstracto was possible without amending Article 81. Throughout the discussion on the draft of the Constitution, the meaning of Article 81 briefly became a controversial issue.

[6]See, Shishido (2005, pp. 332–340) and Kawagishi (2007, pp. 314–315).

## 2.2 Choosing Between the American and the Constitutional Court Model

During discussions among the Imperial Diet regarding the draft of the new Constitution, different interpretations of the judicial review adopted by Article 81 were developed. For example, Soichi Sasaki, a constitutional scholar and member of the House of Peers, argued that the Supreme Court could exercise the "power to determine the constitutionality" of laws (Article 81) in abstracto.[7] Ultimately, this interpretation was rejected by the government.

With respect to interpreting the original draft of Article 81, Japanese governmental experts had examined the American model and Austrian Constitutional Court model and remarkably excluded the latter. However, whether lower courts could exercise the judicial review was not decided. During the discussion on the draft of the Tribunal Act, they discussed other systems of centralized constitutional review within the limit of cases and controversies: the centralized system in which lower courts transferred constitutional issues to the Supreme Court. Finally, GHQ strongly recommended the American system of decentralized judicial review within the limit of cases and controversies. This was also ultimately adopted.

In 1952, the Supreme Court confirmed this rejection in its holding by providing the following statement: "for judicial power to be invoked, a concrete legal dispute must be brought before the courts." Therefore, "the Supreme Court possesses the power to review the constitutionality of laws, orders, and the like, but that authority may be exercised only within the limits of judicial power: in this respect, the Supreme Court is no different from the lower courts."[8]

## 2.3 Basis of Japanese Model

The introduction of judicial review was viewed as a great change by Japanese constitutional scholars, who understood that Japan was previously under the influence of German public law doctrines.[9] Kenzo Takayanagi, an authority on Anglo-American law and who had authored an article about American judicial review in the prewar period, commented about the impact of judicial review in the following manner in 1948: "The inheritance of the judicial supremacy by our Constitution is not merely a genuine technical change such as an introduction of

[7]Select committee on the amendment of the Constitution of the Empire Commission, House of Peers, September 23, 1946.

[8]Supreme Court, Grand Bench, 8 October 1952, 6 *Minshu*, p. 783 (http://www.courts.go.jp/app/hanrei_en/detail?id=4. Accessed 2 June 2017).

[9]Tomatsu (2001, pp. 256–257).

judicial review of law. We must have branded on our mind its deep and great impact on our politics and judicial system."[10]

After ten years, Takayanagi presented a less optimistic view about the future of judicial review in Japan, comparing the Anglo-Saxon approach with that of continental countries.[11] He argued that throughout the European continent, the judicial courts adopted the character of "judicial bureaucracy" composed of legal technicians skilled in civil and criminal cases. The legal technicians could hardly assume the construction of the constitution, which is "a political law" as well as "a law enforced by justice."[12] Therefore, the court of administrative litigation and subsequently the constitutional court were distinguished from the ordinary judicial courts and introduced throughout Europe. In contrast, the Anglo–Saxon's long tradition of unifying the legal profession, wherein judges are recruited from distinguished lawyers, nourished the strong political ability of the protection of the rule of law. It is also where lawyers and judges could unify against the government. Consequently, the Court can assume the function of constitutional review in the United States. Each system has its own consistency. Takayanagi mentioned the risk to the bureaucratic Supreme Court, incapable of handling "the political law" in Japan without the unification of the legal profession. Takayanagi also underlines the importance of the rule of law, which should be widely accepted for judicial review to take root in Japan.[13]

The unity of the legal professions, although preferable for a reinforced judiciary, appears difficult to achieve in Japan because of the solid tradition of the career judges. But in some aspects, the justices of the Supreme Court seem to be equipped with certain resources to deal with "the political law." The justices of the Supreme Court are already equipped with a certain degree of political legitimacy, at least at the institutional level. The cabinet selects and appoints the justices of the Supreme Court.[14] They too are submitted for review by the people at the first general election following their appointment (Article 79 of the Constitution). A judge is ultimately dismissed if the majority of the voters favor dismissal, although in practice, the removal of a judge is unlikely.

Moreover, the justices of the Supreme Court can be recruited not only from career judges but also from legal professionals other than career judges or non-legal professionals as well. Article 41 of the Tribunal Act stipulates that the justice of the Supreme Court is appointed among those who are more than 40 years with great insight and good legal knowledge and at least ten of them must be legal professionals (e.g., not only career judges, but also prosecutors, attorneys, or law professors with more than ten years of experience). Non-legal professionals, who meet the above requirements, may also be justices of the Supreme Court. Recently, the

[10]Takayanagi (1948, pp. 2–3).

[11]Takayanagi (1958, pp. 2–3).

[12]*Id*., pp. 62–63.

[13]*Id*., pp. 6–9.

[14]On the appointment process of justices, see, Law (2009) and Matsui (2011b, pp. 1377–1378).

composition of the Court has essentially been constant, consisting of six former career judges, two former prosecutors, four former lawyers, two former bureaucrats (one of whom is former diplomat), and one former law professor.[15]

The commentary on the Tribunal Act published by the Supreme Court explains that this article expects the Court to hold sound political and social sense considering the character of the Supreme Court as an organ with power to rule finally the construction of the Constitution, the fundamental law of the nation.[16] Each justice can submit their individual opinion in the ruling, as do the nine Justices in the United States.

However, this institutional basis was insufficient for the justices to decide "the political law," as is indicated by the docket sheet for the last seventy years. There have only been ten rulings suggesting that a law was unconstitutional. It is pertinent to understand the aspects that brought about the differences between the American prototype and the system ultimately implemented in Japan. Three explanations will be discussed below.

## 3 Backgrounds of Passiveness

### *3.1 Overburden of the Court*[17]

First, the Supreme Court has been overburdened with cases assigned to it as the court of last resort. Final appeals to the Supreme Court consist of the following aspects: violations of the Constitution or misinterpretation of Constitutional provisions; grave procedural contraventions by the lower courts, and discretionary acceptance of cases it considers significant with regard to civil or administrative cases; and conflicts with precedence from prior decisions, with regard to criminal cases. The Supreme Court judges annually consider approximately 7000–8000 civil, administrative, and criminal cases of final appeal and an additional 2000 or 3000 special appeals from procedural rulings of the lower courts.[18] They are assigned to three Petty Benches, each composed of five justices.

In 1993, the former Justice of the Supreme Court, Masami Ito, remarked that under these conditions it is difficult for justices to be responsive to constitutional issues included in numerous ordinary cases, even if the function of constitutional justice is expected of them.[19] The Tribunal Act mandates that rulings of

[15]See, Law (2009, pp. 1568–1569). In March 2017, former law professor was appointed, succeeding former attorney.

[16]Bureau of the Supreme Court (1969, p. 55).

[17]See, Law (2009, pp. 1577–1579) and Matsui (2011b, pp. 1409–1411).

[18]See, http://www.courts.go.jp/english/vcms_lf/2017-STATISTICAL_TABLES.pdf. Accessed 2 June 2017.

[19]See, Itoh (1993, pp. 123–124).

unconstitutionality or new constitutional constructions must be decided by the Grand Bench composed of all fifteen justices, a mandate from which overloaded justices might abstain. The Supreme Court functions as a court of last resort in civil or criminal cases, rather than providing a pathway for constitutional review.

In the United States, the Federal Supreme Court selects the cases it will hear through a system of certiorari. Cappellettie remarked that the constitutions throughout the European continent generally adopted the constitutional court system of centralized judicial review because European supreme courts lack "the compact manageable structure"[20] symbolic of the United States.

Incorporate certiorari into Japan appears difficult. Unlike the US Supreme Court, where each State has its own supreme court, the Japanese Supreme Court hears civil, administrative, and criminal cases as the sole court of final resort.[21] Among the numerous cases transferred to the Supreme Court every year, 95 percent or more are rejected for failure to present sufficient grounds for appeal.[22] However, former justices of the Supreme Court indicate that the examination of grounds for appeal may require circumspection, even if the appeal is rejected.[23] Reforms for reducing the overburdening of the justices' caseload, such as reorganization of Grand and Petty Benches, introduction of the special high court filtering appeals[24] or reinforcement of professional assistants,[25] can be envisaged.

## *3.2 Career Judge System and Constitutional Review*

Second, we focus on an incompatibility between the function of a career judge, characterized as being technical in nature or impartial, and that of a constitutional justice, inevitably considered to be "value-oriented, quasi-political."[26] Cappelletti asserts that "the task of fulfilling the constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes." Therefore, the constitutional court model was diffused in the European continent where the career judge originated. The justices of the American Supreme Court are not career judges, in the European sense, and are equipped with sufficient authority through political nomination and tradition. As observed above, Takayanagi's remarks are similar to those of Cappelletti.

It is pointed out that "for the judges trained in the civil law tradition, the Constitution looks more like a political principle than a legal rule applied by the

[20]Cappellettie (1971, p. 62).
[21]See, Izumi (2013, p. 121).
[22]See, Fujita (2012, pp. 62–63).
[23]See, Takii (2009, p. 47).
[24]See, Sasada (2008, pp. 16–18).
[25]See, Izumi (2013, pp. 136–138).
[26]Cappellettie (1971, pp. 63–64).

judge."[27] If the justices in Japan possess "the weakness and timidity of the continental model,"[28] similar to the European career judges, would the constitutional court model be more preferable to the American model? That was the position of former justice Itoh in 1993. He argues that under the impersonal "faceless judges" of the continental model, constituting an ideal in Japan, it is difficult to expect an active role in constitutional review, which requires the judgement of individual characters. Thus, Itoh recommends the continental constitutional court model.

This type of reform necessitates an amendment to the Constitution, which is difficult to accomplish, and the result remains uncertain. The introduction of the constitutional court system may highlight the "value-oriented, quasi-political" aspect of the constitutional adjudication: therefore, there are concerns about "politicization of justice and judicialization of politics."[29] Whether enough strength exists for the highest court to assume the "value-oriented, quasi-political" role of a constitutional court in Japan must be carefully examined.

As noted above, the justices of the Supreme Court can be recruited from legal professionals other than career judges or from non-legal professionals. This system involves an expectation regarding the sound political and social sense. But this recruitment system does not provide a sufficient basis to enable a constitutional ruling. In continental Europe, a constitutional court can obtain such a basis partly from "political investiture," a designation of non-career judges by political authorities. But the political equilibrium, which mitigates the political character involved in such a nomination, is indispensable for this process to adequately function. Postwar Japan was characterized by the lack of a power shift, which provides the third explanation for the passiveness of the Court.

### *3.3 Political Constellation and "Faceless Judges"*

A change of government can introduce diversity to the composition of the Supreme Court. It can also lessen the pressure over the Court facing a political majority. In Japan, the Liberal Democratic Party (LDP) maintained a majority of seats in both Houses of the Diet from 1955 to 1989 (the "Regime of 55"). The lack of change in government seems to have affected the appointment and the attitude of the justices. Consequently, the Court's task of expressing its identity is difficult when facing the same stable majority in the Diet. Justices of the Supreme Court are not supposed to be legal technicians but are expected to exert their individuality. However, it seems difficult for justices without democratic legitimacy to respond in an expected manner in these conditions. It seems that "The conservatism of Japan's courts is the inevitable result of their longtime and ongoing immersion in a conservative political

[27]Matsui (2011a, p. 148).
[28]Favoreu (1986, p. 9).
[29]Ashibe (1999, p. 289).

environment."[30] The lack of a power shift certainly seems to be a convincing argument for the passiveness of the Supreme Court.[31] The dysfunction of power shift might have excessively underlined "the weakness and the timidity" of the justices.

However, it should also be noted that the Supreme Court has not been necessarily passive in approving the constitutionality of laws suspected their conformity to the supreme law, notably in 1950s and 1970s.[32] "Faceless judges" sometimes revealed their political aspect. Moreover, the justices, including former career judges, sometimes express their individual characters by submitting dissenting opinions, entailing controversies among them.

After the 1990s, the "Regime of 55" concluded and the LDP lost their majority in the Second Chamber–House of Councilors. The coalition government became a convention, and in 2009, the power shift to the Democratic Party of Japan (DPJ) occurred. However, he LDP regained its dominance and opposition parties lost their competitive edge after the general elections in December 2012.

It is important to examine how the change in the political constellation after the 1990s impacted the Supreme Court and the Japanese system of judicial review. Such examination should consider that such a change constitutes one aspect of the wider change of political and social structure and popular sense from the 1990s. In these movements, the Supreme Court moderately began to assume a more active role, but with respect to the protection of fundamental rights, the change is ambiguous despite some remarkable rulings discussed below.

## 4 Ambiguous Changes

### *4.1 Signs of Changes*

The highest court began to assume a more active role in civil, criminal, and administrative cases as the court of last resort: it has already been remarked that there was "substantial judicial creativity" notably in private realms in dealing with non-political issues.[33] Remarkably, individual opinions submitted to decisions also increased considerably. With regard to the constitutional adjudications, the Court censored a provision of law in five cases, since this century. In contrast, it found a provision of law that was unconstitutional only in five cases throughout more than 50 years in the last century. These facts appear to signal a change.

There has been a focus not only on the small number of rulings regarding the constitutionality of law but also on the areas in which an active role by the judiciary

[30]Law (2009, p. 1587).

[31]See, Matsui (2011b, p. 1405) and Sakaguchi (2013, p. 73).

[32]See, Higuchi (1979, p. 183).

[33]Ginsburg and Matsudaira (2012, p. 23).

is notably expected. Additionally, there is scrutiny where constitutional doctrines have underlined the prudent attitudes of the Supreme Court, including restrictions of rights indispensable for maintaining the sound functioning of the democratic process, such as the freedom of speech or the right to vote. This is also the case for discrimination against minorities.

Remarkably, two of the five cases where the Court ruled that a provision of the law was unconstitutional, involved discrimination against children born out of wedlock. Another concerned the restriction on the right to vote. Moreover, the Court declared the apportionment of seats or demarcation of constituencies contrary to the constitutional requirement of equality five times from 2011 to 2015. The power of judicial review by the Supreme Court seems to have finally been activated.

However, the Supreme Court remains prudent or passive in other cases concerning the freedom of thought and conscience and the freedom of speech. In five cases concerning equality of vote, the Court did not rule the electoral law or elections as being unconstitutional but only found that the disparity was contrary to the constitutional requirement of equality. Hence, this was a reserved stance against the political branch.

A constitutional doctrine describes this attitude as small judiciary.[34] The Supreme Court seems to refrain from rulings that might affect "macro constitutional politics" (challenge against the constitutional construction of political branch) by focusing on the realization of "micro justice" (resolution of legal disputes). Such a small judiciary highlights the function of an ordinary court at the expense of constitutional justice.[35] Moreover, this attitude could affect the role that is most expected of the judiciary with the competence of constitutional review: the protection of fundamental rights.

Considering this, the recent rulings of the Supreme Court will be reviewed next.

## *4.2 Skillful Rulings for Remedy*

Two rulings of unconstitutionality concerning discrimination against children born out of wedlock merit examination because of "a reasonable construction" as a remedy.

In 2008, a provision of the Nationality Act was at issue. The Act required legitimation of a child for acquisition of Japanese nationality by notification after birth, prescribed in article 3 para.1., even if the father acknowledged the filiation.[36]

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[34]See, Munesue (2012, pp.171–175) and Sakaguchi (2016, pp.81–83).

[35]Shishido (2015, pp. 264–265).

[36]Supreme Court, Grand Bench, 4 June 2008, 62 *Minshu*, p. 1367 (http://www.courts.go.jp/app/hanrei_en/detail?id=955. Accessed 2 June 2017). The Court deemed that the provision enacted in 1984 had lost its raison d'être because of "changes in social and other circumstances at home and abroad" and determined it as unconstitutional.

The court ruled that the provision was unconstitutional. However, annulment of the provision requiring the legitimation (article 3, para.1), as a whole, made it impossible for the appellant to acquire Japanese nationality. The appellant can only acquire Japanese nationality by a notification prescribed in article 3 para.1. The Court ruled, by inserting "a reasonable construction" in article 3, para.1, the appellant "shall be allowed to acquire Japanese nationality" if the child satisfies the requirements prescribed in the said paragraph," except for the requirement of the legitimation. Consequently, the Court only annulled the requirement of the legitimation included in article 3, para.1, providing a remedy for the appellant.

Further, in 2013, the Court considered a provision of the Civil Code, which stipulated that the share of inheritance for a child born out of wedlock is one-half of the share of a child born in wedlock. The justices unanimously found that this provision is contrary to the constitutional requirement of equality under the law.[37] In this case, concerning the inheritance that commenced in July 2001, the Court put a reasonable construction on retroactivity of the ruling. The Court judged it appropriate to "construe that the judgment of unconstitutionality made by the decision of this case has no effect on any legal relationships" involved in other cases of inheritance commenced after July 2001 that had already been decided. The Supreme Court seems to be attentively concerned about the stability of the legal system.

Next, the ruling concerning the constitutionality of the penal provisions of the National Public Service Act is remarkable.[38] The penal provisions prohibit public officials' "political acts." The Court ruled that the act of distributing political party-issued newspapers performed by "a public official who was not in a managerial position or vested with any discretion in performing duties or exercising power" on days off "cannot be considered to pose a substantial risk of undermining the political neutrality of the public official." Furthermore, the court held that this act "does not correspond to the constituent element of the penal provision," while ensuring that the penal provisions did not violate Article 21 (freedom of speech) and Article 31 (due process of law) of the Constitution. Significantly, this type of ruling, termed constitutional adjudication without explicit constitutional reasoning,[39] reveals the possibility of the skilled small judiciary, as well as its limit. The skillful ruling for remedy, useful for protecting fundamental rights to some extent, is not without inconvenience because constitutional protection of them "only works as a background fact."[40]

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[37]Supreme Court, Grand Bench, 4 September 2013, 67 *Minshu*, p. 1320 (http://www.courts.go.jp/app/hanrei_en/detail?id=1203. Accessed 2 June 2017). Without reviewing the precedent which had held the provision not contrary to the Constitution, the Court rendered the decision of unconstitutionality because of the changes of facts which had supported constitutionality of the provision.

[38]Supreme Court, 2nd Petty Bench, 7 December 2012, 66 *Keishu*, p. 1337 (http://www.courts.go.jp/app/hanrei_en/detail?id=1179. Accessed 2 June 2017).

[39]Shishido (2009, p. 100).

[40]Sakaguchi (2013, p. 70).

Considering these points, the rulings favorable to civil liberties and minorities remain insufficient for establishing a change in the overall passiveness of the Supreme Court. With respect to the freedom of speech or the freedom of thought and conscience, notably in politically controversial cases, the attitude of the highest jurisdiction remains prudent and even conservative. This conventional approach is illustrated by a series of judgments regarding cases involving the national flag and anthem. Specifically, the issue involved the official orders by the principals of public schools that required teachers to stand facing the national flag and sing the national anthem during school ceremonies. The Supreme Court, although admitting that these orders "could somewhat indirectly constrain the individual's freedom of thought and conscience," ruled that the orders were not in violation of the freedoms guaranteed by the Constitution.[41]

## *4.3 The Guarantee of Democratic Process*

The Supreme Court conducted an in-depth review of the right to vote or the value in the equality of vote. In 2005, the Supreme Court found a provision of the electoral law to be unconstitutional. Such a law precluded Japanese citizens, who reside abroad and were without a valid address in any area of a municipality within Japan, from voting in national elections.[42] The most remarkable aspect of this ruling is the strict standard presented by the Court to justify the restriction on the right to vote. The Court stated 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." The rationale for the strict standard was embraced by the ruling of a lower Court, which declared the restriction of the right to vote for an adult ward under guardianship as being unconstitutional.[43]

Analyzing the vote value equality, during the elections of deputies, was highlighted in two rulings under the "medium constituency election system": the multimember and single ballot system. The Court ruled that the district and apportionment provisions were unconstitutional, without invalidating the illegal election.[44] Two additional rulings confirmed the disparity, contrary to the constitutional requirement, while maintaining the legality of the election by providing "a

[41]Supreme Court, 2nd Petty Bench, 30 May 2011, 65 *Minshu*, p. 1780 (http://www.courts.go.jp/app/hanrei_en/detail?id=1106. Accessed 2 June 2017).

[42]Supreme Court, Grand Bench, 14 September 2005, 59 *Minshu*, p. 2087 (http://www.courts.go.jp/app/hanrei_en/detail?id=1264. Accessed 2 June 2017).

[43]District Court of Tokyo, 14 March 2013, 2178 *Hanreijihou*, p. 3.

[44]Supreme Court, Grand Bench, 14 April 1976 (*supra* note 5), Supreme Court, Grand Bench, 17 July 1985, 39 *Minshu*, p. 1100 (http://www.courts.go.jp/app/hanrei_en/detail?id=79. Accessed 2 June 2017).

reasonable period of time" for legislators to rectify the inequality.[45] The judgment of the latter type is called the judgment confirming the situation of unconstitutionality, distinguished from the judgment of unconstitutionality.

In this century, the Supreme Court has become stricter with regard to the equality of vote value in the representation of both the Houses in evidence. As indicated by the March 23, 2011 ruling (Judgment of the Grand Bench), the change is quite visible.[46] For the first time, the Court confirmed the disparity, contrary to the requirements for equality, under the single-member constituency system introduced in 1994 for the elections of deputies. Though the Diet adopted the bill ordering the reapportionment to the independent commission on the day of the dissolution of the lower House, the general election in December 2012 was held under the former electoral districts. After the election, the Reapportionment Bill was adopted. Again, the Supreme Court confirmed the disparity as being contrary to the requirements for equality.[47] In contrast to the rulings by Higher Courts in March 2013, this ruling appears to be more moderate because fifteen rulings judged the disparity as being unconstitutional and two of them invalidated the election. In 2015, the Supreme Court confirmed the disparity as being contrary to the requirements for equality for the third time.[48]

The Supreme Court also rendered the ruling that confirmed the disparity as being antagonistic to the Constitution with respect to the election of Councilors in 2012 and 2014.[49] The Court remarked on the prefecture constituency system stating that "the inflexible use of a prefecture as a unit of constituency has prolonged great inequality in the value of votes" and that "the mechanism itself needs to be reformed" instead of the reapportionment within the mechanism. This type of an explicit request to the Diet is exceptional, especially with the backdrop of the Court's prudent stance toward the political branch.

[45]Supreme Court, Grand Bench, November 7 1983, 37 *Minshu*, p. 1243, Supreme Court, Grand Bench, 20 January 1993, 47 *Minshu*, p. 67 (http://www.courts.go.jp/app/hanrei_en/detail?id=1481. Accessed 2 June 2017).

[46]Supreme Court, Grand Bench, 23 March 2011, 65 *Minshu*, p. 755 (http://www.courts.go.jp/app/hanrei_en/detail?id=1097. Accessed 2 June 2017).

[47]Supreme Court, Grand Bench, 20 November 2013, 67 *Minshu*, p. 1503 (http://www.courts.go.jp/app/hanrei_en/detail?id=1287. Accessed 2 June 2017).

[48]Supreme Court, Grand Bench, 25 November 2015, 69 *Minshu*, p. 2035 (http://www.courts.go.jp/app/hanrei_en/detail?id=1424. Accessed 2 June 2017).

[49]Supreme Court, Grand Bench, 17 October 2012, 66 *Minshu*, p. 3357 (http://www.courts.go.jp/app/hanrei_en/detail?id=1176. Accessed 2 June 2017) and Supreme Court, Grand Bench, 26 November 2014, 68 *Minshu*, p. 1363 (http://www.courts.go.jp/app/hanrei_en/detail?id=1311. Accessed 2 June 2017).

## 4.4 Possible Dialogue with Political Branch

Throughout its rulings in cases involving the equality of vote, the Supreme Court has urged or persuaded the legislature to rectify distortions in the rules of democracy. Nevertheless, the Court appears to have a reserved attitude toward the political branch. Although the Court has often warned the branch about the disparity, in contradiction to the requirements for equality, it has only declared the provision unconstitutional twice, without invalidating the election. The ruling of 2013 indicates that this moderate approach is based upon "the relationship between the judicial power and the legislative power that is assumed by the Constitution," because "the court itself is not authorized to establish a specific system as a substitute but such problematic system is to be corrected through the legislation by the Diet." It remains uncertain whether this moderate method that evaluates the efforts made by the Diet[50] to make a correction will succeed.

This statement, however, deserves reconsideration. The method that evaluates the efforts made by the Diet presupposes "the constitutional order," wherein "the Diet should take necessary and appropriate measures for correction while taking the court's determination into account." The ruling emphasizes that "this would be consistent with the spirit of the Constitution." It reveals the limits of constitutional review exercised within the judicial power, cases, and controversies. The prudence of the highest Court may be justified to some extent from this limit, but perhaps the constitutional review of the Supreme Court, in other areas, such as civil liberties and the freedom of the speech, is not really "consistent with the spirit of the Constitution."

A constitutional doctrine describes these rulings as a dialogue between the judicial branch and political branch (Sasaki 2013). The sentences included in the 2013 ruling quoted above seem to justify the reference to this theory. It is true that the dialogue functions to some extent because the Diet reduced the disparity by reapportionment of a single-member district of deputies or retouched the prefecture constituency system of House of Councilors: this was done by merging the four smallest prefectures into two electoral districts, following the rulings of the Supreme Court. Nonetheless, the response of the Diet remains at a minimum.

Two rulings of December 16, 2015,[51] by the grand bench, illustrate the reserved stance of the small judiciary against the political branch, surrounding a politically controversial issue. The Court held that the provision of the Civil Code, which prohibits women from remarrying for a period exceeding 100 days, was unconstitutional. It is remarkable that the Court censored the provision, whereas it dismissed the appellant's claim (damages against the Diet, which has not amended the provision, supposed to be unconstitutional).

[50] Fujii (2012, p. 406).

[51] Supreme Court, Grand Bench, 16 December 2015, 69 *Minshu*, p. 2427 (http://www.courts.go.jp/app/hanrei_en/detail?id=1418. Accessed 2 June 2017).

However, the Court did not censor Article 750 of the Civil Code, stipulating the same surname system, with the opinions of five justices deeming this Article as being unconstitutional.[52] The Court concluded its judgement by issuing the following significant remark. The court stated that this is a matter "that needs to be discussed and determined by the Diet." In his opinion, Chief Justice Itsuro Terada added that it seems suitable "to leave this issue to a national debate, that is, to the democratic process," and "this approach does not involve such a situation in which fair consideration through the democratic process cannot be expected." It is uncertain whether the Diet, dominated by a conservative majority, would accept the dialogue proposed by the Court.

## 5 Conclusion

Since the beginning of this century, the Japanese Supreme Court has to assume a more active role. However, it still seems that the Court has not yet fully demonstrated its expected role and has maintained a reserved attitude of the political branch as well.

The pivotal question remains whether a constitutional court, specialized in constitutional review, would provide a proper solution for a more effective protection of fundamental rights in Japan. It is certain that the successful implementation of such a system requires an adequate basis. As discussed above the institutional conditions of constitutional review, we here look to non-institutional ones.

The risk of "politicization of justice" is always attached to the system of constitutional review that handles "political law," notably in the case of a constitutional court model. Yoichi Higuchi underlines the importance of the traditional authority of legist or law professors as a source of legitimacy of constitutional justice in continental Europe, compared with the Anglo–Saxon tradition of the authority of lawyers[53]: the significant presence of law professors with independent status constitutes a common characteristic of European constitutional courts.[54] The introduction of the European model would not have a positive result in Japan, wherein such legitimacy does not exist, in addition to the insufficiency of political equilibrium.

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[52]Article 750 stipulates that "a husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage."

The Court argued that although "in view of the current situation in which the overwhelming majority of married couples choose the husband's surname, it is presumed that women are more likely to suffer the abovementioned disadvantages." These "disadvantages can be eased to some degree as such use of the pre-marriage surname as the by-name after marriage becomes popular." Supreme Court, Grand Bench, 16 December 2015, 69 *Minshu*, p. 2586 (http://www.courts.go.jp/app/hanrei_en/detail?id=1435. Accessed 2 June 2017).

[53]See, Higuchi (2007, pp. 463–464).

[54]See, Favoreu (1986, p. 23).

Moreover, could another model be practicable? The observation of Alexis de Tocqueville on the American judicial review in its early period enlightens the essential element. He argued that the weak point of constitutional review by the judicial court could become the basis for strong competency, because the evils of the immense political power entrusted to American courts "are considerably diminished by the obligation which has been imposed for attacking the laws through the courts of justice alone."[55] The small judiciary might provide potential, even though the Supreme Court cannot be expected to address "macro justice."

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[55]de Tocqueville (1900, p. 100).

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