

Judicial Review in Japan and its Problems

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Abstract

Introduction¹

My name is Koji Tonami, a professor of Waseda University, Japan. My field of study is constitutional law. At first, I would like to ask you to understand that I am not a judge, nor a Japanese government official, but only a scholar of constitutional law. I come here not as a representative of Japan, but merely as a constitutional researcher.

To my regret, no one has come to this Conference² from the Japanese judiciary, especially from the Supreme Court of Japan, which is the last resort of the power of judicial review concerning constitutionality. Moreover, the only Japanese participant here is me. I am sorry for this.

My presentation today, which introduces the Japanese judicial review system and its function both in the past and today, is based only on my

¹ This paper is a draft of my presentation at “The Inaugural Congress of the Association of Asian Constitutional Courts and Equivalent Institutions” in Seoul on July 20-24, 2012. This Congress was organized by the Korean Constitutional Court as a chief founder of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). As one of the speakers I gave the presentation recorded in this paper. Concerning my presentation, see the website <http://www.aaccei.org/ccourt?act=index>.

² The Association of Asian Constitutional Courts and Equivalent Institutions is made up of 14 members from constitutional adjudicative institutions, such as the Constitutional Courts of Korea, Turkey, Russia, Mongolia, Indonesia, Kazakhstan, and the Supreme Courts of the Philippines, Malaysia, and so on. To the inaugural congress were invited 80 judges and officials of constitutional courts and equivalent institutions from 30 different countries. There were only two countries whose participants were academics rather than judges or officials, that is, China and Japan. This is easy to understand in the former case, since China has no Constitutional Court, or system of judicial review. In contrast, Japan sent no Justices of the Supreme Court of Japan, nor former Justices. It was said that the Japanese Supreme Court had declined to attend this Congress. Thus I was invited directly by the Korean Constitutional Court.

own viewpoint, that is, the viewpoint of a scholar who specializes in the theme of judicial review. However, I have done my best to ensure that my presentation is objective and accurate.

1. Judicial Review System in Japan

Before introducing the judicial review system in Japan, I would like briefly to explain the organization and system of judicial power in Japan³.

- (1) All jurisdictions are unified and the judicial system forms a hierarchical system of three levels: the District Court (most typically), the High Court, and the Supreme Court at the pinnacle.
- (2) All the substantial powers concerning the judiciary are concentrated into the Supreme Court, most notably: (a) judgment of final appeals of civil, criminal and administrative actions; (b) rule-making regarding both procedure and practice; (c) judicial administration (appointment, promotion, reshuffling of judges, etc.); and (d) last resort of judicial review.
- (3) There are 15 Justices in the Supreme Court, with 6 Justices being chosen from among judges, 4 from among lawyers, 2 from among public prosecutors, and the remaining 3 from among diplomats, executive officials and scholars. It is difficult to say that this composition is suitable for judicial review.

In such a situation, the Supreme Court was indeed reluctant to use its judicial review power for a long time.

2. Postwar Politics and Judicial Passivism of the Supreme Court

Since the judicial review system started in 1947, up until now there have only been eight cases⁴ where the Supreme Court has struck down statutes as unconstitutional. The Supreme Court has not always been willing to enter into examining the constitutionality of statutes, nor to decide that statutes are unconstitutional.

³ For details of the Japanese judicial system, see the website of the Supreme Court of Japan: "Judicial System in Japan", http://www.courts.go.jp/english/judicial_sys/index.html.

⁴ Recently, the Supreme Court added a unconstitutional judgment, see footnote 11. Then, it becomes nine cases..

The explanation why the Supreme Court has been reluctant to rule that statutes are unconstitutional seems to be based on two grounds, one concerned with political factors and the other institutional factors.

a. Political Factors underlying Judicial Passivism

Regarding political factors first of all, we can find some important political trends unique to Japanese politics.

First, the Liberal Democratic Party (LDP, *Jiminto*) has been the governmental party virtually throughout the post war period. The Liberal Democratic Party has promoted the economic growth of the postwar period in Japan under a strong alliance with the United States. The LDP had held governmental power in opposition to the Socialist Party and the Communist Party until the collapse of socialism around 1990. After 1990 the LDP also retained political power, although in 2009 the Democratic Party (DP, *Minshuto*) obtained political power in place of the LDP. Now the LDP remains the first opposition party⁵. Under such a long and virtually continuous period of government by the LDP, which was supported by the majority of the people, it was indeed difficult for the Supreme Court to make decisions regarding unconstitutionality. In such circumstances judicial review of the Supreme Court had to be in abeyance.

Second, the Constitution of Japan enacted in 1946 was not the symbol of consensus, but rather the subject of controversy, due to views “pro or contra” the revision of the Constitution throughout the post-war period. The Constitution of Japan was enacted based on reaction to militarism before World War 2, and is indeed an outstanding constitution which longs for peace and democracy. We can say that post-war politics were established and have developed based on the new Constitution of Japan. However, the Liberal Democratic Party has insisted on the revision of the Constitution as one of the basic party principles. This principle has been

⁵ As the result of the election of the House of Representatives in 2012, the DP failed to maintain the governmental power, and the LDP gained a majority. LDP president Shinzo Abe once again became the Prime Minister. Now the Abe Cabinet promotes economic growth on the one hand, but on the other, adopts conservative policies such as changing the interpretation of Article 9 of the Constitution of Japan so as to permit the use of the right of collective self-defense.

asserted mainly by the conservative politicians in the LDP, who adhere to the Meiji Constitution; this reflects the fact that the LDP has many politicians with different philosophies, from the left to the right. The most controversial issue was and is the revision of Article 9, which declares that military forces will “never be maintained.” On the other hand, opposition parties and most constitutional law scholars are opposed to the revision of the Constitution. Therefore, the Constitution of Japan which must be the fundamental law of the State became the subject of protection or denial in itself, and also became the symbol of controversy both for and against constitutional reform. With such a post-war political confrontation, the Constitution of Japan was never revised in fact until now. In the end, because of the lack of a fundamental consensus regarding the Constitution of Japan, the Supreme Court exercised self-restraint in deciding the constitutionality of statutes.

Third, in such a political context, many disputes involving constitutional issues were in fact brought to the (Supreme) court. The main constitutional controversies were due to LDP policies ignoring and disregarding the Constitution of Japan, such as the creation of Self-Defense Forces in disregard of Article 9, the control of textbooks by the Minister of Education, the official visits by the prime minister to Yasukuni Shrine, the banning of government officials’ political activities, the banning of government officials’ striking, the compulsion to sing the national anthem in school ceremonies, etc. Since these constitutional disputes meant that political struggles were brought into the courtroom, the (Supreme) court tried to avoid entering into issues of constitutionality, and generally reduced the number of decisions declaring statutes and state actions unconstitutional.

b. Institutional Factors underlying Judicial Passivism

In the above political situation, the (Supreme) court was reluctant to engage in judicial review. Yet its passivity can also be explained by institutional factors.

First of all, we must take into account the legislative structure in Japan. That is, unlike federal states such as the U.S.A. and Germany, the legislative power in Japan is vested in the Diet uniquely. Besides, bills proposed by the Cabinet, which are the most important bills among the

whole legislation, are reviewed in advance by the Cabinet Legislation Bureau. Therefore, bills enacted by the Diet are seldom considered as unconstitutional in the first place. While there are many regulations enacted by local assemblies in each municipal corporation, which amount to 1700 nowadays⁶, no ordinance has been struck down as unconstitutional by the Supreme Court. The most important reason is the constitutional principle that “regulations must not infringe law”, namely regulations should be enacted within the limits of law.

Second, as previously mentioned, we have a unified court system in Japan: the Supreme Court focuses its power on acting as the final appeal court. In connection with this, it is also important that the judicial review system is considered and applied as an incidental system, in which the court examines the constitutionality of statutes not abstractly, but within the constraints of the necessity of solving cases. After a case with constitutional issues is lodged to the court legally, the court examines its constitutionality. However, there were many cases in which the Court would not review constitutionality on the ground that such a review was unnecessary for solution of the case. So there have been very few cases in which statutes were declared unconstitutional.

Third, judicial review depends on the conscience or motivation of justices and judges. The (Supreme) court, which dislikes involving the judiciary in politics, doesn’t want to deal with cases raising constitutional issues, or more precisely cases entailing political confrontation. Besides, the court, especially the Supreme Court, is not technically skilled in processing of cases involving constitutional issues. For the Supreme Court as a final appellate court of civil, criminal and administrative cases, decisions about constitutional issues seem to be work in excess of the norm and too heavy a burden. As a result, there are very few decisions about constitutional issues with precise reasoning, so that the doctrine of standards in judicial review has not developed sufficiently. Thus, the intellectual level of decisions about constitutional issues is not high: excellent decisions do not appear easily.

⁶ During the decade after 2000, the reform of decentralization was going on. As a result of municipal mergers and dissolutions, the number of municipalities, which amounted to 3400 in the past, has been reduced to 1700 currently.

3. Positive Tendencies in Recent Decisions of the Supreme Court

However, the judicial review of the Supreme Court in recent years has become more active in some respects. Since 2000, important decisions striking down statutes have been made, such as the Postal Law judgment⁷ (2002), the overseas voting judgment⁸ (2005), and the Nationality Act judgment⁹ (2008). Especially the latter two judgments were notable because there the Supreme Court undertook the exercise of the power of judicial review actively. Moreover, the Supreme Court suggested the election law of 1993 unconstitutional¹⁰, because the number of elected members of Diet from many election districts was markedly out of balance with the enfranchised populations of the districts in question¹¹.

As for the reason why the Supreme Court has assumed a more active role in judicial review, various opinions have been put forward.

First, judicial reform was carried out during 2000-2003. Although the reform of the judicial review system was not in itself a specific subject of

⁷ Postal Law Case 56 Minshu 1439 (Sup. Ct., GB, Sep. 11, 2002).

⁸ Overseas Voting Case, 59 Minshu 572 (Sup. Ct., GB, Sep. 14, 2005). The Supreme Court declared the absence of an overseas voting system in the Election Act to be unconstitutional. In this decision, the Supreme Court acknowledged two important litigious claims of the plaintiffs, namely it accepted demand for affirmation of unconstitutionality regarding legislative omission on the one hand, but it also awarded damages of ¥5000 to each of 13 plaintiffs because of infringement of their right to vote through the legislative omission.

⁹ Nationality Act Case, 62 Minshu 1367 (Sup. Ct., GB, Jun. 4, 2008). The Supreme Court held Article 3, para.1 of the Nationality Act to be unconstitutional, which provided that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents. The Court stated that Article 3, para.1 would cause a distinction in granting Japanese nationality, and this distinction was in violation of the equal protection principle guaranteed in Article 14, para.1 of the Constitution. In the end, the Court acknowledged that the plaintiff acquired Japanese nationality. See: http://www.courts.go.jp/app/hanrei_en/detail?id=955.

¹⁰ Unbalanced Election District Case 2011, 65 Minshu 755 (Sup. Ct., GB, Mar. 23, 2011).

¹¹ Recently, the Supreme Court declared the unconstitutionality of Article 900, item (iv) of the Civil Code, which described the portion of the child born out of wedlock is to be half of the portion of the child born in wedlock. 67 Minshu 1320 (Sup. Ct., GB, Sep. 4, 2013).

discussion, there was general criticism that the judiciary was far from the people, that judicial processes were too slow, etc. Upon that criticism many reforms were carried out. It can be said that this judicial reform encouraged the Supreme Court to activate judicial review.

Next, the Constitution Research Council was established in both the House of Representatives and of Councilors in the Diet in 2000-2005, where there was an inquiry into the actual conditions and issues concerning the Constitution of Japan. Substantially, this Constitution Research Council was set up on the initiative of conservative politicians seeking the revision of the Constitution. And in the course of discussion, the actual condition of the process of judicial review, especially the current state of judicial passivism, was criticized, and the establishment of a Constitutional Court was argued fairly. Finally in the report of the Constitution Research Council in 2005, the establishing of a Constitutional Court was put forward only as a minority opinion. Nevertheless the discussion in the Constitution Research Council urged the Supreme Court to become aware of its duty with regard to judicial review.

Furthermore, the big change of a political situation in the background should not be overlooked. As the Liberal Democratic Party, which has had political power over a long period of time after the war, lost an election and turned into an opposition party, the political situation and political party regime nowadays has changed a good deal. Now the Supreme Court, which exercised the judicial review power passively with deference to the government and the LDP, turns to carry out the original duty of judicial review positively, with awareness of the importance of its duty as the “guardian of the constitution”.

I hope that such a positive stance by the Supreme Court will continue.

Conclusion

I have chosen the judicial review system as one of the main subjects of my research, and have investigated for years the situation of the judicial review system of Japan, and the means to make it more active, in comparison with the judicial review system of the U.S. and Germany. Up until the 1990s, I proposed the establishing of a new Constitutional Court in Japan. After comparative study of the judicial review system in many

other countries, I became convinced that the system of a Constitutional Court which reviews and decides constitutional issues specially is far superior to the incidental system by the ordinary court, from a both theoretical and practical viewpoint¹².

However, my proposal for the establishment of a Constitutional Court has the support only of a minority. Main critical voices suggest that, if such a judicial review system by a Constitutional Court were to be established in Japan, the Constitutional Court might endorse the constitutionality of statutes one after another, and that it would bring about the politicization of the judiciary system. This criticism of the idea of establishing a new Constitutional Court is powerful, connected with advocacy for protection of the Constitution. The greatest obstacle to foundation of the Constitutional Court is that it would be accompanied necessarily by the revision of the Constitution itself, and the majority of constitutional scholars are opposed to constitutional revision. Moreover, even if constitutional revision were to be accepted from now on, it would be realized at the earliest more than 10 year from now. It would also be uncertain whether a proposal for the establishment of the Constitutional Court would be adopted at that time.

Therefore, in order to support the process of judicial review of Japan, it is indispensable to strengthen the theory and practice of constitutional litigation within the current system of subordinate judicial review by an ordinary court, and to expand the opportunities to review the constitutionality of statutes or state actions by the courts, and especially by the Supreme Court. And for that purpose, it seems that discussions among judges and scholars in the field of constitutional law will be of crucial importance.

A fundamental problem is that Japanese justices or judges tend to keep

¹² The most influential advocator of a Constitutional Court System was Masami ITO, professor of Anglo-American law and constitutional law at the University of Tokyo and former Justice of the Supreme Court. After retiring at 70 years old from the Supreme Court in 1990, he wrote his memoirs under the title *SAIBANKAN TO GAKUSHA NO AIDA* ("Between Judge and Scholar", 1993), in which he pointed out some defects of the Japanese system and praised the active decision making of the Korean Constitutional Court. He concluded the constitutional court system was much better than the incidental system, and that, "in order to activate Japanese judicial review, it is necessary to change the system to a Constitutional Court" (*ibid*, p.137).

a strictly neutral position and are unwilling to engage with citizens in society. Japanese justices or judges seem generally shy of publicity and are reluctant to appear in society.

It is indeed regrettable that no Japanese justices or judges are here at today's conference, which makes offers the opportunity to engage with justices or judges of neighboring countries. It seems to me very important to carry out the comparative study of the process of judicial review from an international standpoint, in order to improve the quality of judicial review and to achieve adequate human rights protection. I hope that in the future more Japanese justices and judges will be willing to promote international exchange.

I thank you for your kind attention.

Postscripts

[1] My report was generally well received, but this was not because of its quality, but rather because it dealt with Japanese judicial review critically from a viewpoint outside of the Judiciary, while other reports made by judges of the various constitutional courts dealt with their respective judicial review systems formally.

After my presentation, I was asked by many participants why Japan doesn't establish a Constitutional Court, and why so much criticism has been directed towards the idea of a Constitutional Court. I couldn't help repeating the argument in my report. Criticism centers on the following points: (1) that merely changing the system would bring about no activism; (2) that such a Constitutional Court would make decisions for the constitutionality but not the unconstitutionality of statutes etc.; (3) that, although the establishment of a Constitutional Court requires constitutional amendment, it is opposed to constitutional amendment in itself; (4) that judicial review by inferior courts must be well considered; and (5) that the power of judicial review is effective exactly in the process of case-law litigation in itself.

However, I am convinced that a Constitutional Court with its own jurisdiction of the constitutional law would achieve the guarantee of civil rights and liberties and the constitutional control of governmental powers.

[2] Finally I would here like to describe my impressions of the Conference.

Although reports and discussions at the Conference did not necessarily bring about fruitful results in every case, the foundation of AACC in itself was an extremely significant achievement. Some remarkable features are as follows.

First, judicial review, or constitutional review or constitutional justice, by constitutional courts has been developing more and more in accordance with world-wide acceptance. Among participants from Asian countries to this Conference, justices and judges of the Supreme Court, on one hand, were from India, Nepal, Bhutan, and Sri Lanka, in the case of South Asia, and Malaysia, Singapore, Brunei, Philippines, in the case of South-East Asia, for a total of 8 countries. (As already noted, no judges attended from Japan and China.) On the other hand, judges of the Constitutional Court came from Korea, Cambodia, Indonesia, Mongolia, Myanmar and Thailand, 6 countries in all, plus from the former Soviet republics of Russia, Tadzhikistan, Kazakhstan, Uzbekistan, Azerbaijan, and Armenia. Simply comparing the number of countries with Constitutional Courts and those with equivalent institutions in the Asian area, the former group amounts to 9, and the latter group to 10. The remarkable point is that, since 1987, when the Korean Constitutional Court was established, all countries introducing a judicial review system have done so in the form of a Constitutional Court, and the same is true of Eastern European countries since the late 1980s. The reason why the Constitutional Court system is dominant in the world is that newly democratized countries intend to control governmental power by means of the strong constitutional review system of the Constitutional Court.

Second, I would like to applaud the exercise of the constitutional review power of the Korean Constitutional Court, which has been contributing to the establishment and development of democratic Government of Korea. After the establishment of the Korean Constitutional Court in 1987, the Court has made many influential decisions actively concerning social and political issues within a strong constitutional jurisdiction, and has become a driving force to promote the democratization of Korea. Now the Korean Constitutional Court is widely upheld and trusted by the Korean people.

Third, by means of active and sufficient exercise of constitutional review, the Korean Constitutional Court has obtained an outstandingly

high reputation in international circles as well. This is evident from the following facts:

--that, according to the explanation of one of its judges, the Korean Constitutional Court often receives visiting guests and investigating delegations from all over the world. They are eager to learn the system and practices of the Korean Constitutional Court.

--that the Korean Constitutional Courts system is said to have become the model of establishment of the Constitutional Court in three separate countries, Mongolia (1992), Indonesia (2003), and Myanmar (2008). The Turkish Constitutional Court has introduced an original review process as prescribed in Article 62, para.1 of the Korean Constitutional Court Act as well.

--that the Korean Constitutional Court has become the host institution successively organizing "The Inaugural Congress of the Association of Asian Constitutional Courts and Equivalent Institutions", which is similar in function to the Conference of European Constitutional Courts.

This Conference was held by the Korean Constitutional Court with the intent that the Korean Constitutional Court will be the leader and central organizer of constitutional review institutions in Asian countries. This intention seems to me to have been fully achieved with the success of this Conference.

