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INDEPENDENCE OF JUDICIARY AND JUDGES AND TECHNIQUES OF INTERPRETATION IN JAPAN

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President Trump has criticized some of the decisions of the US Supreme Court. He posted critical comments on Twitter and attacked the political attitude of the judiciary rather strongly. Chief Justice Roberts responded saying that the judiciary is politically neutral, is independent of political pressure, and discharges a constitutional responsibility to interpret the law and announce what it is.

This principle of judicial independence is also true of the Japanese judiciary. The Japanese judiciary and constitutional scholars have incorporated US legal studies and have developed skills of legal interpretation to maintain the independence of the judiciary. Not only the judicial branch, but the individual judges are also independent and are

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bound to the law and their professional conscience. Urawa and Naganuma cases present some cases that suspect that the Japanese judiciary and individual judges have been influenced by political considerations. Other cases such as judge Miyamoto case in Chapter 3 have suggested that the office of the Japanese Supreme Court may have an impact on individual judges.

Several interpretive techniques have been helpful tools for judges who have sought to dodge political attacks skillfully in concrete cases in Court Act[1] that is counterparts of term case of controversy in Article 3 of the US constitution. This paper analyses ways of interpretation as used in several cases to deal with attacks from political branches of the government. The Japanese judiciary has developed several techniques for the interpretation of the law in order to maintain the independence of the judiciary and individual judges. Japanese scholars have analyzed theories put forth by Professor Bickel[2], Ely[3], and Tushnet[4], and have found several solutions to fit these theories into the Japanese context.

Although the theories have been imported into the Japanese context from the US, the application of these legal techniques by the Japanese judiciary has not been as famous because the decisions are written in Japanese and are not known outside of Japan. This paper presents the development of the US legal theories of interpretation in Japan. Constitutional scholarship has both supported and attacked the Japanese judiciary by presenting examples of the US Supreme Court and its decisions.

Finally, this paper presents a recent case in which Judge Okaguchi posted a message on Twitter, for which he was subject to disciplinary action by the Supreme Court. He argued that his statement on Twitter

[1] Saibansho hō[Court Act], Act no. 59 of 1947(Japan).
[2] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Yale University 2d ed. 1986) 16-18.
[3] See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University press 1980).
[4] Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008).

was an exercise of his constitutionally protected freedom of expression. The case shows how the Japanese Supreme Court thinks of and envisions a judge, and suggests that its idea of an ideal judge should as seen from the perspective of the general public.

Independence of the judiciary and interpretation of the law

The study of the interpretation of statutes by judges is strongly related to the independence of the judiciary and of individual judges. The judiciary is governed by Articles 76 to 82 in Chapter 6 of the Japanese Constitution.[5] Under the previous Constitution, namely the Constitution of the Empire of Japan (Meiji Constitution)[6], judges exercised judicial power in the name of the Emperor. After the establishment of the current Constitution, the Emperor became the symbol of Japan and the Japanese people, and the judicial power was placed under the sovereignty of the Japanese people.[7] The Chief Justice is appointed by the Emperor through the nomination of the cabinet.[8] The Emperor has no political power, and only exercises formal and ritual matters under the advice of the cabinet.[9] The 14 Justices of the Supreme Court are appointed by the cabinet.[10] Judges of inferior courts are appointed by the cabinet.[11] Usually, the

[5] Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, art. 76 to 82 (Japan).

See also, Yuichiro Tsuji, *Independence of the Judiciary and Judges in Japan*, [2017] Revista Forumul Judecatorilor No.2,88.

Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2987653

[6] Dai Nihon Teikoku Kenpō (Meiji Kenpō) [Meiji Constitution] Nov.,29 of 1890,art.57(Japan) .
[7] Nihon-Koku Kenpō [Constitution of Japan], preamble, art. 1 (Japan).
[8] Id. art.6(2).
[9] Id.art.3,4.
[10] Id. art.79(1).
[11] Id.art.80.

cabinet follows and appoints judges from a list of candidates that is drafted and submitted by the Supreme Court.[12]

The Chief Justice and the 14 Justices themselves of the Supreme Court are reviewed at the first general election of the members of the House of Representatives following their appointment.[13] Judges are dismissed when a majority of the voters favor such a dismissal.[14] Dismissals occur rarely.

The democratic accountability of the judiciary is secured by cabinet appointment and popular review of the Justices of the Supreme Court. The judiciary is at a greater distance from the people than are the executive and the law-making organs. Judges follow only the Constitution, the laws, and their own professional conscience.[15]

Japanese people watch if judiciary is politically independent and sees if through the interpretation of Constitution and statutes by the judiciary and judges secures constitutional order.

1. The Urawa Case and the Parliament

The independence of the judiciary has been a controversial issue since the current Constitution was adopted in 1947.[16] Under the parliamentary system, the parliament, the Diet, directly connects with the Japanese people through elections.[17] Article 41 of the Constitution indicates that the Diet is the highest organ of the government.[18] The Constitution

[12] Id. Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan* [2018] 19 Or. Rev. Int'l. L. 223,242-245.Available at SSRN: https://ssrn.com/abstract=3189962
[13] Nihon-Koku Kenpō [Constitution of Japan], preamble, art. 79(2) (Japan).
[14] Id. art.79(3).
[15] Id. art. 76(3).
[16] Toshihiko Nonaka et.al., KENPŌ II[Constitution II] (Yuhikaku 2012) 240-248.
See Also, Hideki Moto, et al., *KENPŌ KŌGI[Lecture of Constitution]* (Nihon Hyōronsha 2018) 281-286.
[17] Nihon-Koku Kenpō [Constitution of Japan], preamble (Japan).
[18] Id. art. 41 (Japan).

governs the Diet under Chapter 4, the cabinet under Chapter 5, and the judiciary under Chapter 6.[19] It is possible to interpret the term "the highest" under Article 41 to mean that it has strong legal power to subordinate and control the other two branches under the chains of command and order. The Urawa Case exposed this controversy.[20]

In this case, Mrs. Mitsuko Urawa and her husband were so impoverished because of her husband's gambling habits. He sold their land and house to borrow money. Disappointed at her future prospects, Mistuko Urawa strangulated her three children and tried to kill herself. She did not succeed in killing herself and went to the police. In 1948, just after the current Constitution was adopted, she was prosecuted and the Court held her guilty for three years with suspension of execution for three years. She did not have to go to jail if she stayed without committing a crime for three years since the date of the judgment.

This case took place just after the current Constitution was established, and the interpretation of the Constitution became a controversial issue. The Committee on Judicial Affairs in the House of the Councilors published a report criticizing the sentence, claiming that three years with suspension of execution for all three years was too lenient. The Diet argued that the term "highest" meant that the Diet had the legal power to command the other two branches. On the other hand, the judiciary objected to this perspective by arguing that it was a case of political intervention into its affairs.

The focal point in this case was the power of investigation in relation to the government under Article 62.[21] The said provision allows both houses of the Diet to conduct investigations in relation to the government and suggests that either house may demand the presence and testimony of witnesses as well as the production of records. Constitutional scholars have interpreted the term "highest" to suggest that it has no legal power

[19] Id. Chap.4,5. 6.
[20] Nobuo Kōchu, *Urawa Mitsuko Jiken (1948)[Urawa Mitsuko case(1948)]* [1990], Hōgaku Kyōshitu, vol. 121.
[21] Nihon-Koku Kenpō [Constitution of Japan], art. 62 (Japan).

to dominate over the other two branches, and only means that it is emphasized to connect politically with the voters through an election.[22]

Today, this case has taught us that a judge may be influenced by political power even after making his decision.[23] Other judges may face similar situations in the future. In this case, the Office of the Supreme Court protected the individual judges from facing political criticism.[24]

The Diet may exercise its power of investigation to search and review in parallel to identify why this tragedy took place in its capacity as the law-making power. The Diet can prevent similar situations by using its law-making power. At the same time, the Constitution does not allow the political branch to intimidate judges.[25] Today, the scope of the power of investigation relates to a sense of strong administrative power in Japan. However, this is not the focus of this paper. The next section presents the powers of the Office of the Supreme Court to discipline and make regulations for the judiciary and to manage human affairs.[26]

2. Office of the Supreme Court and the independence of judges

The Chief Justice and 14 other Justices should retire at 70 years.[27] After the Justices are retired, like the US Supreme Court Justices, they generally tend to publish papers, books, or even memoirs chronicling their work in the Supreme Court.[28] Some of their writings reflect the

[22] Nobuo Kōchu, *Kokusei chōsaken no kenkyu [Research on power of investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records]* (Hōristubunkasha1990) 62-85.
[23] Id. at 80-81.
[24] Id.
[25] Nonaka, et al. at 145-152. Moto, et al, at 220-223.
[26] Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan* [2018] 19 Or. Rev. Int'l. L. 223, 246-252. Available at SSRN: https://ssrn.com/abstract=3189962
[27] Saibansho hō [Court Act], Act no. 59 of 1947, art. 50 (Japan).
[28] See, Shigeo TAKII , *Saikō saibansho wa kawatta ka [Has the Supreme Court changed?]* (Iwanami shoten 2009). Tokiyasu Fujita, *Saikōsai kaiko roku [The memoirs of the Supreme Court]* (Yuhikaku 2012).

internal circumstances and workings of the Supreme Court. Their perspectives and means of interpreting statutes and the Constitution reflect their background, that is, whether they were judges, prosecutors, attorneys, or professors.[29] Generally, they would agree that the Office of the Supreme Court has rather strong power to support the Justices and to maintain the independence of the judiciary, while performing appropriate functions toward human affairs.[30] Some Justices may agree or disagree with how strongly the Office of the Supreme Court exercises its power with respect to individual judges.[31]

One of the most famous cases is the Naganuma Nike Missile Case.[32] In this case, the judge at the Sapporo District Court reviewed the constitutionality of lifting a ban on national forest reserves for the construction plan of a missile base by the government.[33] The residents argued that the construction of a missile base infringed their right to live in peace that this right was provided in the preamble to the Constitution of Japan. The District Court held that the Self-Defense Force (SDF) was unconstitutional, and had done an illegal act by lifting the ban.[34] The Sapporo High Court dismissed the appeal and held that the standing of residents was disappeared by establishment of a new alternative disaster prevention facility.[35]

Judge Shigeo Fukushima heard this case. Judge Kenta Hiraga wrote a letter to Judge Fukushima, offering his advice as a senior, saying that he

[29] Id. Takii, at 7. Fujita, at 11-16.
[30] Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan* [2018] 19 Or. Rev. Int'l. L. 223, 240-242. Available at SSRN: https://ssrn.com/abstract=3189962
[31] Takii, at 36-38. Fujita, at 165.
[32] Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, Shōwa 52 (Gyo tsu) no. 56, 36 Saikō Saibansho Minji Hanreishu [Minshu] 1679(Japan).
[33] Sapporo Chihō Saibansho [Sapporo Dist. Ct.] Sep.,7, 1973, Shōwa 44 (gyo u) no. 44, Shōwa 44(gyo u) no.23, Shōwa 44(gyo u) no. 42, 298 HANREI TAIMUZU[HANTA] 140(Japan).
[34] Id.
[35] Sapporo Kōtō Saibansho [Sapporo Hig. Ct.] Aug.,8, 1976, Shōwa 48 (gyo ko) no. 2, 338 HANREI TAIMUZU[HANTA] 135(Japan).

should dismiss the argument of the inhabitants. Later the Office of the Supreme Court disciplined Hiraga's letter.[36]

Japanese judges are selected and hired after they undergo rigorous training at the Judicial Training Institute.[37] They serve as judges and work for ten years with the privilege of reappointment.[38] They move to other jurisdictions once every three years. Several academic papers have argued that this transfer has been controlled by the Office of the Supreme Court. It is said that if judges in the inferior court do not adhere to the perspective of the Supreme Court, they are transferred to a rural jurisdiction until their retirement. Judge Fukushima moved to Tokyo just after this decision, but was shifted to a rural jurisdiction without any promotion until he reached the age of retirement.[39] After the Nagaunuma case, Higara was promoted. The independence of this individual judge has been a controversial issue.[40]

The 11th Chief Justice, namely Chief Justice Yaguchi, later mentioned that Hiraga was too honest and had sent a letter out of kindness. He thought that judges did not care about others and merely followed the decisions of the Supreme Court; however, we have to treat this as an opinion of the Chief Justice.[41]

Another case involved Judge Yasuaki Miyamoto in 1971. In this case, the Office of the Supreme Court denied the reappointment of Judge Miyamoto after 10 years of service. The Office of the Supreme Court did not indicate its reasons for this decision. Some studies suggested that the decision was made because he belonged to a liberal group called

[36] Fukushima et.al., *Naganuma jiken hiraga shokan [Naganuma Case, Hiraga Letter]*(Nihonhyōronsha 2009)114. [hereinafter FUKUSHIMA].
[37] Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan* [2018] 19 Or. Rev. Int'l. L. 223, 241-242. Available at SSRN: https://ssrn.com/abstract=3189962
[38] Nihon-Koku Kenpō [Constitution of Japan], art. 79(2) (Japan).
[39] FUKUSHIMA, at 114.
[40] NONAKA, et al.at 243-244. HIDEKI MOTO, et al, at 109.
[41] Kōichi Yaguchi, *Oral History* (Seiwaku kenkyu daigakuin COE seisaku kenlkyu project 2004) 154-155.

the Japan Young Lawyers Association, of which Judge Fukushima was also a member.[42] In the 2000s, one research group interviewed Chief Justice Kōichi Yaguchi, and wrote an opinion piece indicating that at that time, the political factions within the Supreme Court were so divisive and heated that Judge Miyamoto happened to be targeted.[43]

Chief Justice Kōichi Yaguchi left memoir on his work. We can read his perspectives by his writing. Yaguchi was a career judge and was nominated as a Supreme Court Justice in 1984, and later, as the Chief Justice in 1985. From 1969 to 1973, he served in the Office of the Supreme Court, and saw major changes in the constitutional precedents in Kazuto Ishida's Court. When the Miyamoto case took place in 1971, Yaguchi was responsible for human resources.

Yaguchi's recollection of the 5th Chief Justice, namely Chief Justice Kazuto Ishida is helpful in understanding the major changes in the Supreme Court in the 1970s. Japanese constitutional scholars need to find clues to understand how the judges interpreted the Constitution and other statutes in addressing issues that came up after a decision was given.

3. Major changes in the Supreme Court from 1960 to the 1970s in the Ishida Court

Just as the US courts have been known by names such as the Rehnquist Court, or the Roberts Court, Japanese courts have also been named after its Chief Justices. The Ishida Court experienced one of the major changes in both precedents and the interpretation of the law in the history of the Supreme Court of Japan. It is ideal for us to review Japanese society in the 1960s as a background for the student movement and campus

[42] Japan Bar Association, *Resolution to refusal of reappoitment of judge Miyamoto at extraordinary general meeting* (8, May, 2971). Available at:https://www.nichibenren.or.jp/activity/document/assembly_resolution/year/1971/1971_4.html

[43] YAGUCHI, at 161-162.

activism that prevailed in those times. In 1960, the revised Japan-US Security Treaty[44] was ratified under Prime Minister Nobusuke Kishi. Students and other people of Japan marching in protest around the Diet. The Vietnam War followed. The Japanese student movement became so radical that university functions were paralyzed. In 1972, the Asama Sanso case took place. Some students in the Coalition Red Army (the now defunct Japanese armed militant group) took themselves hostage and barricaded themselves in the Asama mountain retreat for ten days. The police broke in and found that the students had killed each other in the name of Sokatu (reflection or summary), which is a test for members to see if they are eligible to be warriors in the Communist revolution. After this case, the student movement began to fade in the 1970s.

Against this radical background, Justice Kazuto Ishida was appointed in 1963 as the associate Justice of the Supreme Court, and was appointed as the Chief Justice in 1969. The Ishida Court vacated past constitutional decisions. In 1966, the Supreme Court[45] interpreted the Local Governmental Official Act (LGOA)[46] in favor of protecting labor rights (Zentei Tokyo Chuyu Jiken). It held that criminal sanctions should be limited to strong illegal activities alone. The LGOA would be constitutional so long as justice interpreted it to limit its scope to the constitutional framework. This interpretation was similar to the concurring opinion[47] put forth by Justice L. Brandies in the 1969 Ashwander decision of the US Supreme Court.

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[44] Nihonkoku to Amerika to no aida no sōgo kyōryoku oyobi annzen hoshō jōyaku [Treaty of Mutual Cooperation and Security between the United States and Japan] June 23, 1960, Treaty No.6, 1960.

[45] Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, Shōwa 41 (a), no. 401,23(5) Saikō Saibansho Keiji Hanreishu [Keishu] 305. (Zentei Tokyo Chuyu Jiken).
See Also, Yuichiro Tsuji, *Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment* (2018) 46 Denv. J. Int'l L. & Pol'y 159.

[46] Chihō Kōmuin hō [Local Governmental Officials Act], Act no. 69 of 2014, arts. 31(1), 61(4) (Japan).

[47] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

In 1973, the Ishida Court[48] vacated the 1966 decision (Zentei Tokyo Chuyu Jiken). The 1973 decision explained that the labor rights of a public official were constitutionally protected, but were subject to strict restrictions to a certain extent because of the uniqueness of public service and the character of the position held by public officials. It was held reasonable to restrict the labor actions of public officials more strictly than that of private companies. Market principles do not work in the context of labor actions of public officials. Labor conditions were fixed by statutes in the Diet and the National Personnel Authority was established to protect public officials as an alternative organization to provide remedies.[49] Labor action by public officials prevent governmental functions and can infringe the rights of the people. The Diet may prohibit certain activities by use of criminal sanction.[50]

In the 1973 decision, Justice Kotaro Irokawa wrote a dissenting opinion.[51] He argued that the prohibition of labor action by public officials was different from criminal sanctions against an illegal action. The Court should have reviewed the manner and the extent of lost interest under Article 28[52] of the Constitution carefully because labor activities are too varied in form and structure for people's lives to be uniformly banned. Justice Irokawa argued that the activities in this case did not constitute any of the prohibited activities if the Court had applied the precedent appropriately.[53]

Justices Jiro Tanaka, Kenichiro Ohsumi, Kosato Sekine, Nobuo Ogawa, and Yoshikatsu Sakamoto wrote opinions.[54] They thought that if the uniqueness of the position of public officials were emphasized too much, it would work not only restrict but would also uniformly ban the

[48] Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, 1968 (a) 2780 (Apr. 25, 1973), http://www.courts.go.jp/app/hanrei_en/detail?id=39 [hereinafter Violation of N.P.S.L case].
[49] Id.
[50] Id.
[51] Id. Irokawa, J.,dissenting.
[52] Nihon-Koku Kenpō [Constitution of Japan], art. 28 (Japan).
[53] Violation of N.P.S.L case. Irokawa, J.,dissenting.
[54] Id. Tanaka,J.,Ohsumi,J.,Sekine,J.,Ogawa,J.,Sakamoto,J., opinion.

labor rights of public officials. The Court neglected various forms of public services and prohibited labor actions under a very abstract term, namely the "infringement of public interest." These Justices argued that the Court neglected that the government could take a system that is representative of a group of public officials and negotiate with the government for labor conditions. Reasonable labor action should be permissible. The Court should have reviewed only political strikes that were clearly outside the scope of protected labor actions.

Japanese constitutional scholars generally criticize this 1973 decision.[55] Justice Jiro Tanaka, who wrote an opinion in this case, later reviewed the case as a major change in the Supreme Court.[56] He served as Justice from 1964 to 1973. The 1973 decision might explain the Judge Fukushima case[57] and case of the reappointment of Judge Miyamoto[58] which occurred in the Ishida Court.

While political branches may exercise their powers to influence the judicial branch, the judiciary itself may change its attitudes by vacating its precedents. A Supreme Court decision works as a guideline for judges of all inferior courts. Even in a civil law country, judges in inferior courts are bound by Supreme Court decisions when they face similar cases in their courtrooms. The problem is that judges in inferior courts follow precedents blindly without looking for differences, without reviewing facts carefully, and without articulating their reasoning. As in common law countries, in civil law countries too, precedents are a legal resource for judges. The problem in the Japanese Supreme Court is that it has not specified the differences with other cases when it comes to reasoning, and cites precedents without any detailed explanations, thereby forcing constitutional scholars to read between the lines.

[55] Jiro Tanaka et al., *Sengo seiji saiban shi roku, VOL.3 [HISTORY OF POLITICS AND JUDGEMENT AFTER THE WAR, VOL.3]* (Daiichi hōki 1980) 193-235.
[56] Id.
[57] Id. at 204-205. On 2, May,1970, President Justice Ishida announced in press conference that ideal judge should follow only constitution, not be anarchist, extreme left wing, pure communist.
[58] Id. at 205-206.

II. The Ashwander Rule in the Japanese Supreme Court

Japanese judges are not directly chosen from among the Japanese people by elections.[59] They are either appointed or nominated by the cabinet,[60] and their position is far from any political influence or association with any of the political branches. Their position requires self-restraint. Judges are motivated to follow the literal meaning of the text of a statute in dispute even though they may have constitutional doubts in the statutes they interpret. This attitude resulted in several controversial issues with respect to constitutional interpretation.

1. Self-incrimination in the car accident and SDF cases

A major case[61] came up under Article 72(1) of the Road Traffic Act,[62] which obligates a person who had a car accident to make a "report of accident" to the law enforcement authorities. Article 38(1)[63] of the Constitution provides that no person shall be compelled to testify against himself. If judges interpret the term "report of accident" in Article 72(1) literally, the person who the caused accident owes a duty to report that he or she caused an accident.

In this case, the defendant did not have a driver's license and was drunk while driving with a waitress without the prior permission of the car owner. He drove with gross negligence, and hit and caused the death of the victim. The defendant argued that Article 72(1) was unconstitutional. The Court limited the scope of the term "report of accident" to the mere details of the time, place, the number of injured people, and the extent of damage caused to law enforcement. The term under Article 72(1) obligates a person to rescue an injured person and follow all the

[59] Nihon-Koku Kenpō [Constitution of Japan], art. 6(2), 79(1) (Japan).
[60] Id.
[61] Saikō Saibansho [Sup. Ct.] May 2, 1962, 1960 (a) no. 636,16(5) Saikō Saibansho Minji Hanreishu [Minshu] 495.
[62] Dōro Kōtsu hō [Road Traffic Act], Act no. 105 of 1960 (Japan).
[63] Nihon-Koku Kenpō [Constitution of Japan], art.38(2) (Japan).

necessary measures detailed under the policy. The Court explained that the term "duty to report" excluded the requirement to disclose the fact that the one reporting the incident had indeed committed the crime. The Court found a construction of the statute to avert a constitutional doubt in the statue in issue.

The next case was the Eniwa Case, which related to the Self-Defense Forces.[64] In this case, two brothers managed a dairy farm in Eniwa city, Hokkaido. The Self-Defense Force camp conducted regular training sessions for target shooting. The SDF and the two brothers arrived at a gentlemen's agreement. The SDF Act[65] has no provision for compensation for noise created by shooting training sessions, but the SDF promised to give the brothers prior notice because the shooting noise frightened the livestock and decreased the production of milk. On one occasion, the SDF conducted training with the use of a cannon without any prior notice. The brothers were angered and intruded into the training site and cut the telecommunications wire under the ground. They were prosecuted under Article 121 of the SDF Act. The Sapporo District Court held that they were not guilty. The main argument was whether the SDF Act was unconstitutional under Article 9[66] of the Constitution. Before the renewal of the Japan-US Security Treaty in 1960, the constitutionality of the SDF had been a controversial issue. Judge Saburo Tsuji avoided making a constitutional interpretation on the issue. He focused exclusively on the terms used in Article 121 of the SDF. It provided criminal sanction for the destruction of defense items such as weapons, ammunitions, and other similar items. The brothers had destroyed the telecommunication wires under the ground, but that did not constitute "other items for defense." He noticed the constitutional question raised by the brothers, but used another statutory construction method to resolve the dispute.

[64] Sapporo Chihō Saibansho [Sapporo Dist. Ct.] March 29, 1967, Shōwa 38 (wa) no. 193,204 HANREI TAIMUZU[HANTA] 219.
[65] Jiei Tai hō [The Self-Defense Force Act], Act no. 165 of 1954, art. 121(Japan).
[66] Nihon-Koku Kenpō [Constitution of Japan], art.38(2) (Japan).

Constitutional studies in Japan have been developed by importing foreign countries' legal approaches such as those from the US, France, and Germany. Japanese constitutional theories have endorsed some and criticized others. Leading scholars from the pre-World War II era, such as Professor Toshiyoshi Miyazawa criticized the Eniwa decision because constitutional review should have come first if a serious constitutional doubt was properly raised in the process of interpretation of statutes. Professor Nobuyoshi Ashibe, a former student of Miyazawa, a constitutional scholar in Japan who focused on the US Constitution, wrote a detailed commentary on constitutional interpretation. Influenced by US constitutional theories, his textbook led the general approach to constitutional interpretation in Japan. He argued that if the freedom of expression or minority rights were at issue, constitutional review should come first. He noted that it is simply impermissible to seek any other clues to avoid a constitutional review.

2. Common sense and constitutional interpretation

After Ashibe passed away, a case pertaining to the freedom of expression was brought before the Supreme Court. [67] In this case, Hiroshima city had passed an ordinance prohibiting motorcycle gangs.[68] The local parliament is permitted to pass ordinances with criminal sanction.[69]

Before proceeding further, it is necessary to first explain the uniqueness of Japanese motorcycle gangs. Usually, they comprise teenagers who mostly do not have licenses to ride motorcycles. They drive recklessly and often use illegally remodeled motorcycles. While driving, they mask their faces and dress up in very aggressive and colorful clothes while also

[67] Saikō Saibansho [Sup. Ct.] Sep. 18, 2007, Heisei 17 (a) no. 1819,61(6) Saiko Saibansho Keiji Hanreishu [Keishu] 601.
[68] Hiroshima bōsōzoku tsuihō jōrei[Hiroshima city ordinance for exclusion of motor cycle gang] .Available at: http://www.city.hiroshima.lg.jp/www/contents/1246440469348/index.html
[69] Chihō Jichi hō[Local Government Act], Act no. 67 of 1947, art.14(3) (Japan).

carrying a long and colorful flag. Sometimes, motorcycle gangs fight each other.

Hiroshima city passed an ordinance with the aim of suppressing this kind of activity.[70] In this case, at 10:30 pm, the defendant, along with 40 people in one motorcycle gang got together at the public square that Hiroshima city managed. They masked their faces and formed a circle, wearing aggressive clothing. They did not follow the orders of the city official to leave the premises at 10:35 pm, and stayed on.

The people watching motor cycle gangs were considered as a support group that endorsed and assisted the motorcycle gang. Article 16[71] of the city ordinance specified the activities that were prohibited: no rallies or assemblies were allowed without prior permission of the owner or the manager of the public place, as they tended to either frighten people or make them uneasy. Article 17[72] provided that in public spaces managed by the city, the city may issue a stay order or may order people to keep off the public space, especially those who wear masks to cover their faces and form circles in which they stand with flags to demonstrate their power. Those who failed to obey or follow such orders were liable for punishment involving imprisonment for no longer than six months or a fine of not more than 100,000 yen.

The defendant argued that the provisions of the city ordinance were unconstitutional, overtly broad, and void on account of vagueness under the due process of the law as established under Article 31[73] of the Constitution.

The Supreme Court[74] held that the defendants were guilty and limited the scope of the meaning of the terms used in the ordinance. It noted that the term "groups" as stipulated in the ordinance may be too broad to

[70] Id.
[71] Id.art.16.
[72] Id.art.17.
[73] Nihon-Koku Kenpō [Constitution of Japan], art.31 (Japan).
[74] Saikō Saibansho [Sup. Ct.] Sep. 18, 2007. Heisei 17 (a) no. 1819,61(6) Saikō Saibansho Keiji Hanreishu [Keishu] 601.

include a non-motorcycle gang, and that the term "prohibited actions" under the ordinance may be too broad to cover activities of non-motorcycle gangs. Nonetheless, the Court noted that it is possible to narrow the scope of a prohibited action to apply to one of the groups that did not follow a city order, to demand that they leave the premises they were on. By referring to Article 1,[75] the purpose of this ordinance was specified as addressing reckless motorcycle drivers and demonstrations that could influence citizens and young people who are expected to grow in a healthy manner. Articles 5[76] and 6[77] addressed groups that teenagers belonged to. The text of the designated order also mentioned clothes that were embroidered or printed with a particular term or name thus implying that the said gang or group had a common identity, and required a city order to outlaw motorcycle gangs alone. By common sense, the prohibited action was limited to the illegal ones, namely the motorcycle gangs, alone.

This decision relates to the right to free speech. It also allows judges to narrow the scope of a prohibited action, using the abstract term "socially accepted common sense" as part of the reasoning for such a prohibition. Furthermore, the Justice included several conditions such as clothes with embroidered or printed terms or names implying a gang or group that were not already written in the ordinance.

This decision would be troublesome in today's Japanese society. For example, young people assemble for the mayor's event. At the coming of age ceremony in January, the mayor also hosts celebratory events in several different city halls. In Kita Kyushu city, many young people dress up in costumes that are similar to those worn by motorcycle gangs. Most of them lead ordinary lives without committing any crime. Several young people save money for several years just for the sake of

[75] Hiroshima Bōsōzoku tsuihō jōrei[Hiroshima city ordinance for exclusion of motor cycle gang] .art.1.
[76] Id. art.5.
[77] Ia. art.6.

celebrating on that one day that marks their 20th birthday, and continue to live life as ordinary citizens after that.

Ashibe established a set of general constitutional theories after World War II. However, he left an open-ended question pertaining to the constitutional interpretation of the freedom of expression and the Ashwander rule. Today, Japanese constitutional studies focus on filling the gap that Ashibe had left behind when he passed away. Arbitrary and capricious interpretations by judges are serious concerns among contemporary constitutional scholars.

III. Judicial activism and restraint in Japan

Professor Hidenori Tomatsu[78] rearranged two camps of constitutional interpretation by referring to US constitutional studies: judicial activism and restraint. Tomatsu used the terms "positive" and "negative" in Japanese. He arranged the two approaches for and against the judicial interpretation of the law and drew a picture for the Japanese people to easily understand the attitudes of the judiciary.

Tomatsu's analysis was helpful in reviewing the decisions of the Japanese Supreme Court. The text of the Constitution indicates that individual judges owe a responsibility to review the cases of the court. They form the basis of the legal assurance and find out what the law says. They are bound by the law and the Constitution, and follow their conscience. Their legal judgments may be informed by other factors as well.

Compared with cases involving judicial review of the decisions of the US Supreme Court, the number of unconstitutional decisions is much

[78] Hidenori Tomatsu, *Kenpō sosō [Constitutional Litigation]* (Yuhikaku 2008).

smaller since the current Constitution was established in 1947.[79] Judicial review in Japan engages only concrete cases and not abstract reviews.[80]

Japanese judges are reluctant to engage in judicial activism because they are career judges and are not chosen by election. They are transferred to other jurisdictions once every three years. Large cities are popular, but not rural areas. As Judge Fukushima's transfer demonstrates, if they do not follow the implied perspective of the Office of the Supreme Court, they do not get any opportunities for promotion. In the Japanese law-making context under the parliamentary system, most bills are drafted by the executive. The bureaucracy in the ministries works to draft bills with the help of the Cabinet Legislative Bureau (CLB).[81] Legal experts at the CLB review bills and send them back to the ministries if they find a defect. Thus, the judiciary seldom holds statutes that are drafted by the CLB unconstitutional. Unlike the US, the Japanese Supreme Court has never rendered decisions unconstitutional in cases involving the freedom of speech.

1. How US theories developed in Japan: The legitimacy of judicial review in Japan

As Tomatsu demonstrated, judges shift between two approaches in interpreting the law. They may either follow the text of the statute literally or they may devise a construction of the statute that may step over the line into law-making power in some cases. This chapter reviews the case of Japanese judges who may use a technique to conceal their actions when they face a counter-majoritarian issue, as noted by Alexander Bickel.[82] Judicial interpretation is an art in the legal

[79] Yuichiro Tsuji, Constitutional Court in Japan, 66 TSUKUBA JOURNAL OF LAW AND POLITICS 65, 68, 72 (2016). Available at SSRN: https://ssrn.com/abstract=2987651.
[80] Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, Shōwa 27 (maa) no. 23, 6(9) Saikō Saibansho Minji Hanreishu [Minshu] 783.
[81] Cabinet Legislation Bureau. Available at: https://www.clb.go.jp/
[82] Bickel, at 16, 24-26.

profession. Japanese constitutional scholars often explain how to read difficult decisions for the benefit of the general public. Judges would not write in their decision that they conjecture political atmosphere. Japanese constitutional scholars developed not only Bickel's theory, but also other prominent theories. It may be intriguing to see how US theories have emerged in the Japanese context.

Professor Hart Ely's political process theory was introduced in *Democracy and Distrust: A Theory of Judicial Review* in 1980. Professor Shigenori Matsui translated his book into Japanese and developed the political process theory within the framework of Japanese judicial review. Professor Matsui argued that if the political process between the legislator and the people is dysfunctional the judiciary needs to intervene to make it work again. When minority rights and free speech are infringed, the judiciary must protect these rights in their decisions. Professor Matsui believed that the Japanese Constitution is also a written contract between the Japanese people and the Japanese government, just as the US Constitution is between the people of the US and the US government. The main document addresses governmental structure, while a supplementary document carries the list of human rights.

Matsui's theory was criticized by several of his colleagues Shojiro Sakaguchi, Masahito Ichikawa[83], specifically his views on how the Japanese Constitution protects autonomous rights such as the right to privacy, how to define dysfunction in the political process, and the drafting history of the Japanese Constitution. Sakaguchi and Ichikawa argued that these areas took different routes from that of the US Constitution, and that Ely did not intend to encourage judicial restraint.

[83] Shōjiro Sakaguchi, *Rikkenshugi to minshu shugi [Constitutionalism and Democracy]* (Nihonhyōronsha 2001) Chapter 5.
Shinichi Doi, *Siho sinsa no minshu shugiteki seitōsei to kenpō no kannnen* , Yonezawa ed. *SATŌ KOJI SENSEI KANREKI KINEN GENDAI RIKKENSHUGI TO SIHOUKEN [Anniversary of 60th birthday of Professor Satō, Modern constitutionalism and judicial power]* (Seirin shoin 1998), 137-139.
Masato Ichikawa, *Saikin no Nijū no kijun ron wo megutte[Analysis on recent two levels of judicial review]*, Ritumeikan daigaku seisaku kagaku vol.3, issue 3, 9-10(1996).

Today, Japanese Constitution doesn't take political process exclusively and political process theory partly explains that the judiciary owes a duty to show how it operates and how it is ready to talk to other political branches of the government.[84] As Hart wrote, it seems that his student Matsui may argue today that human rights has a function to restrict the arbitrary and capricious exercise of governmental power.

Professor Shojiro Sakaguchi is one of scholars who severely criticized Matsui. He developed a theory to defend the legitimacy of the Japanese power of judicial review, and found some clues in the works of Professor Klarman [85] who investigated whether the Constitution was a pre-commitment document and whether judicial review had a function to change the fixed majoritarian balance of contemporary times. Klarman argued that the judiciary engaged in anti-entrenchment judicial review. The legislature may work against the will of the representatives and a temporary majoritarian may seek to maintain political power. Sakaguchi thought that voting rights and free speech rights are indispensable for democratic legitimacy.

Although only two prominent Japanese scholars are reviewed here, it is true that most constitutional scholars feel that they have a mission to see how these foreign theories are developed in Japan. As Sakaguchi argued, the success of US constitutional theories depends on how Japanese political branches are reviewed. It is unfortunate to see that there has been no unconstitutional decision in the context of cases on the freedom of expression in Japan.

The Constitution demands that judges must evaluate the facts and the law and that they must create legal assurance by importing several factors such as academic theories, their own professional experience, and socially accepted ideas which is unique term in Japanese decision. Secret socially accepted ideas are a black box for constitutional scholars. Thus,

[84] Mark Tushnet, *Darkness on the Edge of Town: Contributions of John Hart Ely to Constitutional Theory* (1980) 89 Yale L. J. 1037.
[85] Michael Klarman, *Majoritarian Judicial Review: The Entrenchment Problem* (1997) 85 Georgetown Law Journal 491.

it is a mission for them to identify the factors that create the "legal mind" of judges. New perspectives of Japanese constitutional scholars can change judge's minds in the next constitutional cases.

2. The use of Twitter by a judge

Finally, we need to focus on the issue of independence of judges in the present-day context. The content posted by Japanese Judge Kiichi Okaguchi on Twitter became one of the most controversial cases in recent times. It resulted in disciplinary action before the Supreme Court.

Judges are protected by the Constitution. They exclusively follow the Constitution, the law, and their own professional conscience. A judge's salaries are not reduced during their service.[86] The Diet alone has the authority to impeach judges for whom removal proceedings have been initiated.[87] The body handling this is called an impeachment court and comprises members of both of houses of the Diet. The impeachment court will decide whether to impeach a judge after the indictment committee identifies that the said judge seriously neglected his or her duties or failed grossly in discharging his or her duties, or if it is found that the said judge committed an act that would ruin his or her prestige both inside and outside the court.[88] This impeachment court under Article 64 works as a parliamentary control over the judiciary and Article 79(2) and (3)[89] also provide for the examination of the Supreme Court Justices by the people.

Another disciplinary mechanism operates in the judiciary. Under the Judges Status Act,[90] the judiciary may open proceedings to discipline judges who were either removed from the office of his or her own volition or had committed an inappropriate act while he or she was a

[86] Nihon-Koku Kenpō [Constitution of Japan], art.80(2) (Japan).
[87] Id. art.64(2).
[88] Saibankan Dangai hō[Judge Impeachment Act],Act no. 137 of 1947, art. 2(Japan).
[89] Nihon-Koku Kenpō [Constitution of Japan], art.79(2) and (3) (Japan).
[90] Saibankan Bungen hō[Judges Status Act],Act no. 127 of 1947 (Japan).

judge. Disciplinary action against judges involves only a warning or a non-penal fine of less 10,000 yen. If judges in issue are seated in a District, Family, or Petty Court, they will be disciplined by a disciplinary court that comprises five Judges of High Court. If such a judges are seated at a High Court, they will be subject to disciplinary proceedings before a Grand Bench of the Supreme Court. Judge Okaguchi was seated at the Tokyo High Court.

The disciplinary court hears the arguments of the judge and reviews both fact and evidence before delivering a decision. If the impeachment court is opened in the parliament at the same time, the proceedings of the disciplinary court are temporarily suspended until the impeachment court arrives at a decision.

Before reviewing the Okaguchi case, we should review another famous case. In 1998, Judge Kazushi Teranishi of the Sendai District Court was subject to disciplinary action and was let off with a warning. In October 1997, he posted a comment in a newspaper as one of its readers and expressed his views against the draft bill version of the Act on Wiretapping for Criminal Investigation.[91] The President of the Asahikawa District Court gave him a stern warning. In 1998, he was invited to a symposium on this Bill as a panelist. He asked the Sendai District Court if he was allowed to attend the symposium. The Court did not allow him to attend it because it found that such conduct amounted to prohibited political activity under Article 52 of the Court Act.[92]

Judge Teranishi attended the event as a member of the general audience and not as a panelist. In the questions and comments session, he stood up and declared his identity as a judge, and said that he had originally thought of attending the event as a panelist, but he did not because the Court had sent him a notice warning him of disciplinary action if he participated as a panelist. From his perspective, to say something against the Bill version of the Act on Wiretapping for Criminal Investigation did

[91] Hanzai sōsa no tame no tsūshin bōju ni kansuru hō[Act on Wiretapping for Criminal Investigation], Act no. 137 of 1999.
[92] Saibansho hō [Japanese Court Act], Act no. 48 of 2013, art. 52(1)(Japan).

not constitute prohibited activity within the scope of the terminology in the Court Act. He thus suggested that he would refrain from making a comment as a panelist. He was given a warning.

Judge Teranishi appealed to the Supreme Court, questioning the constitutional validity of Article 52 of the Court Act.[93] The Supreme Court explained that Article 52 of the Court Act was constitutionally valid and the ban on political activity was also valid in law. The Supreme Court explained that Judge Teranishi had made a statement against the Bill in light of the principle of warrant in the symposium. This symposium had continuously aimed to reject the Bill in an organized and planned fashion. The Court concluded that this action on part of the judge constituted a prohibited political activity.[94] This case shows that the Japanese Supreme Court silenced judges even in academic symposia. Japanese judges do not enjoy the freedom of speech in academic conferences and need prior permission from the court. However, judges may publish research papers.

Judge using Twitter

Judge Okaguchi was a Judge at the Tokyo High Court and had published several books on manual fact-finding and requisitioning of facts. In Japan, it is not very common to see publications by judges except for those by Justices of the Supreme Court. Later, Judge Okaguchi admitted that the contents of his books had been a mere chronicle of the commonsense expressions of experienced judges and that he had written it as a guideline for other young judges to follow.

He had repeatedly posted this message about his life or comment about news or judicial cases on Twitter. He was called the "Brief Underwear Judge" because he cosplayed and posted a picture of himself as a muscular man wearing briefs. Once, he posted a picture of himself tied

[93] Saikō Saibansho [Sup. Ct.] Dec.1, 1998, Heisei 10 (bun ku) no. 1, 52(9) Saikō Saibansho Minji Hanreishu [Minshu]1761.
[94] Id.

with a rope and Tweeted it, saying, “When I used to live in Osaka, one queen of SM bar closed her store and came to drink. It was a good chance to be a guinea pig.”(translated by author)

In December 2017, a man aged 29 years had killed a high school student aged 17 years. They worked together in the same convenience store but were not friends. The man was interested in the idea of “choking,” and the police found as many as 420 DVDs on choking in his room.

Judge Okaguchi posted on Twitter, saying, “The guy is sexually excited to see choked girls. The 17 year old girl was killed by such a guy.”(translated by author). The next day, the victim’s family protested against his message. The Tokyo High Court disciplined him again by issuing a warning.

In May 2018, he posted another tweet, this time, pertaining to a case involving a deserted dog. The original owner of the dog had left his dog tied to the fence of a park with a muzzle on. The new owner found the dog muddied in the rain, and brought it back to his house to take care of it. Three months later, the original owner demanded custody of the dog, and argued asserting her ownership.

Judge Okaguchi posted the following tweet: “One protects the neglected dog in the park. Around three month later, the original owner comes and argued saying that it belonged to her. What? You abandoned it for three months? The outcome of this case is…” He linked his tweet to reported news on this case.

The President and the Secretary General of the Tokyo High Court asked Judge Okaguchi to stop tweeting because he had done something similar just two months before. The President stated that if Judge Okaguchi continued to tweet, he would need to initiate stringent discipline proceedings. Judge Okaguchi was silent. The Secretary General then said, “The President asks you to stop. If you do not stop, the disciplinary action will be stricter. Are you ready to accept it? The advice of the President is that if you stop, it shows your attitude of care and

responsibility. Do you recognize what would follow if you refuse to obey him?"

Judge Okaguchi nodded. The President asked him, "Are you going to not stop Twitter even though you resign judge."

Judge Okaguchi agreed not to stop tweet. He was judges of Tokyo High Court. Thus, his disciplinary action is opened in the Supreme Court. In the Supreme Court hearing for his disciplinary action, the Tokyo High Court argued that it had disciplined him because his comment caused emotional damage to the original owner and was disgraceful of the prestige of a judge.[95] Judge Okaguchi responded saying that his meeting with the President and the Secretary General of the Tokyo High Court had intimidated him, and that it was a form of power harassment that infringed his freedom of expression.

The Constitution provides the right of access to courts,[96] and requires open trials during litigation.[97] While litigation is open to the public, if the case is a non-litigation matter, the judge involved can close the proceedings to the public. Judge Okaguchi argued saying that a constitutional right was at issue, and that Article 82(2)[98] provided that constitutional cases pertaining to Chapter 3 of the Constitution which details the list of fundamental rights should be open to the public. The Supreme Court did not accept his argument because these were disciplinary proceedings and were non-litigation cases, on the lines of the Teranishi case. The Teranishi case explained that disciplinary proceeding was protected by special legislation, and did not fall under Article 82(1).

Analysis of the decision of the grand bench of the Supreme Court

The Grand Bench of the Supreme Court decided that Judge Okaguchi's use of Twitter constituted an action that disgraced the honor of the

[95] Saibansho hō [Japanese Court Act], Act no. 48 of 2013, art. 49(Japan).
[96] Nihon-Koku Kenpō [Constitution of Japan], art.32 (Japan).
[97] Id. art. 82(1).
[98] Id. art.82(2).

judiciary.[99] This decision is rather confusing. If a reasonable person reads his Twitter feed, he or she would think that the judge condemned the original owner for bringing legal action to take her dog back. The Tokyo High Court submitted a report and explained that the message he had posted left the original owner emotionally affected.

The Supreme Court seemed to think that Judge Okaguchi had created a misunderstanding among his followers in the deserted dog case. The Supreme Court is obliged to follow the due process of law[100] and even in disciplinary proceedings, prior notice must be given to the person so that he can defend himself.

This decision was given unanimously. However, three Justices, namely Tsuneyuki Yamamoto, Keiichi Hayashi, and Yuko Miyazaki wrote concurring opinions. They criticized the attitude of Judge Okaguchi at the time of the second warning from the Tokyo District Court. His attitude was vicious and had damaged the trust of the people in the judiciary. His use of Twitter in this case was the last straw, as he had exceeded all limits.

The concurring opinion may prevent the other judges from posting on Twitter, as well. Otherwise, it extends to other judges because such other judges observed Okaguchi, and would have remained a specific concern binding Judge Okaguchi's use of Twitter alone and would have left him to lose his professional status as a judge.

Professor Keiko Yoshii argued in the dog case saying that the Lost Property Act provides[101] that the original owner may argue for the custody of her property by asserting her ownership within three months after the loss of such property. In this case, her boyfriend had taken her dog and had tied him to a fence with a muzzle on his face. Just before three months had passed, the original owner reported the loss of the dog

[99] Id. art.49.
[100] Nihon-Koku Kenpō [Constitution of Japan], art.31 (Japan).
[101] Ishiitsubutsu hō[Lost Property Act], Act no. 87 of 1899, revised no. 73 of 2006 (Japan).

and argued that it belonged to her. The Lost Property Act[102] does not stipulate whether her ownership is completely lost when the owner shows her willingness to give up her ownership for three months. In this case, the original owner had left the dog twice. Professor Yoshii criticized the original owner. However, her case analysis is publicly available online.[103] In the meantime, Judge Okaguchi posted his short messages on Twitter and linked one of them to a news item that did not report the original decision. A judge must be careful as communication on Twitter can create a misunderstanding among the general public.

The most troubling aspect of this decision is that the Supreme Court had avoided making a constitutional interpretation even though a constitutional issue was raised properly. This may have been because there was no constitutional scholar among the 15 Justices of the Supreme Court at the material time.

This decision presents the idea of a "faceless judge" in the Japanese judiciary.[104] Japanese people may not want uniqueness in their ideal judges, and may not want individual judges with unique characters. Even after the judicial reforms of 1999, Japanese judges may still continue to remain faceless people in black robes. One of remarkable change is that after judicial reform in 1999, the attitude of Supreme Court might have changed. There were only five cases on unconstitutional on face, and in some cases application of statutes was unconstitutional.

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[102] Id. Art. 2(1) (2) and Art. 3. See also, Minpō [Civil Code], Act no. 89 of 1896, art. 240(Japan).

[103] Keiko Yoshii, *Comment on case for owner of deserted dog case* [2018] Minpō (Zaisanhō), no. 149. Available at https://www.tkc.jp/law/lawlibrary/commentary/2018/07/0727_03_149

[104] Masami Ito, *Saibankan to gakusha no aida [Between Justice and scholar]* (Yuhikaku, 1993)106-137. See also ,
Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan* [2018] 19 Or. Rev. Int'l. L. 223, 243-244. Available at SSRN: https://ssrn.com/abstract=3189962

3. Impeachment and transfer: Is the judge protected or not?

In the US, President Trump criticized and called a judge who ruled against his asylum policy as an "Obama judge."[105] The Chief Justice defended this judge in the ninth circuit and explained as follows:

> "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."[106]

This story is helpful while reviewing the Japanese judge's Twitter case. The ex-owner of a dog complained before the Judge Indictment Committee for Impeachment. She argued that Judge Okaguchi did not send an apology after he was subject to disciplinary action, and that he had caused her emotional damage with his comments.[107] In Japan, anyone may complaint to the Judge Indictment Committee, and this is firmly established in the Japanese Constitution.[108] The committee comprises 20 members of the House of Representatives and the House of Councilors in the Diet. The committee decides whether impeachment proceedings should commence or not. Then, the impeachment court decides whether a judge in issue should be impeached or not.

On April 1, 2019, Judge Okaguchi was transferred to the Sendai High Court.[109] A transfer to a rural area is one of the most critical forms of

[105] New York Times, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*(21, Nov. 2018). Available at: https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html

[106] Id.

[107] JiJi. com, *Okaguchi hanji wo sotsui seikyu* [Complaint to impeach judge Okaguchi](18,March,2019).
Available at: https://www.jiji.com/jc/article?k=2019031801035&g=soc

[108] Nihon-Koku Kenpō [Constitution of Japan], art.64 (Japan).

[109] The Nikkei Shimbun, *Okaguchi saibankan sendai kōsai ni[Judge Okaguchi trasfers to Sendai high court]*(1,April, 2019).
Available at; https://www.nikkei.com/article/DGXMZO43165520R00C19A4CC0000/

disciplinary action.[110] There are only eight high courts in large cities, and Sendai is a big city. It is not certain what occurs next. It is not likely that the Japanese Supreme Court would defend him by arguing in favor of the freedom of expression of a judge. He published a book and criticized the Japanese Supreme Court.[111]

In another case that was similar to the wiretapping symposium case, a judge at the Nagoya Family Court repeatedly criticized the Emperor. Seeing his comments, Hirofumi Kado, a member of the Liberal Democratic Party and a member of the House of Representatives asked the Director of Human Resources of the Japanese Supreme Court in the Committee on Judicial Affairs in the House of Representatives to take action, asking whether Article 99 of the Japanese Constitution obliges judges to observe the Constitution and the law, and noted that Japanese people cannot believe in a judge who disrespects the Emperor as provided for in the Japanese Constitution even though his perspective was a private view.

Director Hotta of the Supreme Court answered saying that the Japanese Supreme Court would conduct an investigation based on the comments made by representative Kado and review the private life of a judge and the freedoms of ideas in Article 19[112] and conscience of a judge in Article 76(2).[113] The judge in issue denied these facts and refuted the idea that he was violation of the judicial code.

In this case, according to a newspaper report, a Judge of the Nagoya Family Court had attended a symposium hosted by some anti-Emperor movement liaison groups in Tokyo in July 2018. He had commented saying that the National Arbor Day in June would be the largest and the first event after the Emperor changed, and expressed that he would

[110] Yuichiro Tsuji, *Forgotten People: A Judicial Apology for Leprosy Patients in Japan* [2018] 19 Or. Rev. Int'l. L. 223, 242-245. Available at SSRN: https://ssrn.com/abstract=3189962

[111] Kichi Okaguchi , *Saikōsaini tsugu [Message to Supreme Court]* (Iwanami shoten 2019).

[112] Nihon-Koku Kenpō [Constitution of Japan], art. 19 (Japan).

[113] Id. art. 76(2).

critically review it. He used an alias to contribute to an article in a newsletter run by the anti-war network. Conservative newspaper argued that his expressions are accumulated to undermines emperor.[114]

Conclusion

The interpretation of the Constitution and the law is a tool used to defend the independence of the judiciary and its judges. These tools act like a defense mechanism that works like a strong wall against the intrusion of the other two political branches.

As a result of language problems, judicial independence and the interpretation of Japanese law is not very well known outside Japan. A review of the interpretation of sensitive terms under the Constitution and other statutes can help readers outside Japan understand that the Japanese judiciary struggles to protect the independence of its judges and the judiciary.

Chapters I and II show that even after a judicial decision is passed, the political branches may intimidate the judiciary and the judges. Even after a decision is given, judges are concerned about dealing with similar cases that may come to them in the future.

Although the independence of the judiciary may have worked well, several cases show that it is suspicious that the independence of individual judges is constitutionally protected to render fair and neutral decision. The Office of the Supreme Court has the strong support of human resources and can change its political attitudes and can subject inferior judges to its strong control. In the 1970s, the Supreme Court changed and began refraining from sending political messages. Chief Justice Yaguchi, the 11th Chief Justice, explained the inner workings and

[114] Sankei Shimbun, *Han tennō sei hanji no hanketsu, jimin kado si sinrai yoserarenu [Mr. Kado of Liberal Democratic Party says that judicial decision by anti- emperor judge has no trust worthy]*(26, March, 2018).Available at: https://www.sankei.com/affairs/news/190326/afr1903260024-n1.html

circumstances within the Supreme Court, and stated that there was no peer pressure within, but indicated that it is necessary to consider that it is the perspective of a Justice, and not that of the judge of an inferior court.

Japanese scholars have imported US constitutional analysis into Japan and have carefully reviewed the mechanism to see whether it worked properly or not. Justice Brandeis in the Ashwander case was introduces in the Japanese SDF cases. Some scholars argued that the supremacy of the Constitution comes before the interpretation of statutes.

One case addressing a young motorcycle gang proves that judges also hesitate to render decisions on unconstitutionality and to offer narrow interpretations of the terms of an ordinance. They believe that doing so results in the loss of both legal predictability and stability. The theory on judicial activism and restraint is well imported into Japan by its constitutional scholars, but it is not certain whether constitutional scholarly analysis is reflected well in judicial decisions. The analysis of constitutional scholarship has brought forth a new dimension of the independence of the judiciary and individual judges.

While writing a judicial decision, unfortunately, the Japanese Supreme Court depends on the spaces between the lines. Judges do not write detailed reasons to explain how precedents are different from the cases they handle. It may help Japanese Justices if they can avoid constitutional interpretation and analysis. Japanese constitutional scholars owe a heavy duty to review judicial decisions as a legal professional art.

The last case on Twitter makes it very difficult for constitutional scholars to support the disciplinary processes deployed by the Supreme Court. Japanese scholars have wanted a clear answer to whether judicial integrity is protected by the freedom of expression, on the lines of how US Chief Justice Roberts defended the US Supreme Court. The Japanese Supreme Court has technically avoided responding to this issue and has left a few concurring opinions that criticize Judge Okaguchi. The Hiraga

case proved that the most pressing issue was the question of which court Judge Okaguchi would be transferred to after serving at the Sendai High Court. Judge Fukushima was transferred to Tokyo just after the Nike case, but moved to rural jurisdictions until he retired.

One possible defense for Judge Okaguchi may have been to attract public opinion to change the image of the ideal judge in Japan, but it is not the official approach of the Japanese Supreme Court. The Japanese Supreme Court owes accountability to the other political branches and the people, especially in terms of identifying what ideal judges should be like in Japan. It is one thing to say that Japanese judges are different from judges in the US. A clear explanation can help constitutional scholars review and identify where the Japanese judiciary is headed. This silent attitude may also be the result of two things: first, the lack of success of the judicial reforms that took place in the late 1990s and second, because of the prevailing perspective that an ideal judge should be faceless. This would need deeper analysis. Otherwise, judicial reforms in 1990s may bear fruit in several unconstitutional decisions in the 2000s.

By reviewing judicial independence in English language, new ideas from outside Japan can be relied on to change the perspective of the Japanese Supreme Court