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Introduction

The judiciary has only a recent history here in Japan. In its modern sense, the judiciary was first set up by the first modern constitution of Japan, the Meiji Constitution of 1889. Yet the system of government under the Meiji Constitution was a constitutional monarchy. The judiciary was thus supposed to exercise judicial power only in the name of the Emperor, and no full independence of the judiciary was guaranteed. It didn't even have jurisdiction over administrative cases (lawsuits attacking the exercise of governmental power), which exclusively belonged to the special Administrative Court. The constitutional guarantee of rights was subject to any legislative restrictions, and the judiciary did not have power to review the constitutionality of legislative acts. In contrast, the Japanese Constitution of 1946, based on the republican separation of powers principle, separated judicial power from legislative and executive powers and assigned it to the judiciary. Moreover, the judiciary under the Japanese Constitution is guaranteed full independence and has jurisdiction over all legal disputes. And finally, the Japanese Constitution guarantees a full range of fundamental rights even against the Diet, and grants the judiciary the power of judicial review. The judiciary is authorized thereby to invalidate legislation and other governmental actions deemed to violate the Constitution.

Apparently, therefore, the judiciary under the Japanese Constitution is

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expected to play a far more extended role . What role then has the Japanese judiciary played in its forty years of history? And what role can and should the judiciary play in the Japanese society? These are the questions I would like to address in this paper.[1]

A Guardian of the Constitution?

In Japan it is widely assumed among commentators that the principal roles of the judiciary are to guarantee the Constitution against any encroachment and to protect individual rights. Equipped with the power of judicial review similar to that exercised by American courts, the Japanese judiciary is authorized to strike down laws and other governmental actions repugnant to the Constitution. It is thereby expected to assure that no branch of government transgresses granted authorities and invades fundamental rights of the people guaranteed by the Constitution. The Court has become, as is often called, a guardian of the Constitution.

Nevertheless, so far, the Japanese judiciary, especially the Japanese Supreme Court, has not exercised its judicial power up to the expectation of these commentators. The Japanese judiciary, it is often claimed, is committed to the philosophy of judicial self-restraint, almost to the point of self-abdication of the power of judicial review itself. There are two reasons for this claim.

First, the Court is very demanding in its threshold requirements. As to the standing requirement, the Court does not find standing unless a plaintiff can show some "legally protected interests" under the relevant specific statutes.[2] Even though a statute may be construed to offer legal protection to a plaintiff, the Court often has refused to find such an interest, claiming that the plaintiff's alleged interest is merely a de facto expectation.[3] More striking is the Court's use of the "political question" doctrine. When a case

1. For the Japanese judicial system and judicial administration in general, *see* Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 Wash. L. Rev. 69 (1984).

2. The judgment of April 8, 1982, Supreme Court, 1st petty bench, Minshuu vol. 36, no. 4, at 594 (the Textbook Censorship Case); the judgment of Sept. 9, 1982, Supreme Court, 1st petty bench, Minshuu vol. 36, no. 9, at 1679 (the Naganuma Case); the judgment of Dec. 17, 1985, Supreme Court, 3rd petty bench, Hanreijihou vol. 1179, at 56 (the Date Power Plant Case).

3. A rare exception is the judgment of Jan. 19, 1962, Supreme Court, 2nd petty bench, Minshuu vol. 16, no. 1, at 57, where the Court admitted standing of a plaintiff, a public bath owner, to challenge the governmental grant of permission to new public bath construction in violation of one of the permission standards, the required distance from the existing facilities.

raises a highly political question which implicates fundamental governmental policy choices, the Court has refused to intervene unless the challenged governmental action unquestionably violates the Constitution. For example, even though the existence of American military force in Japan based on the Japan-United States Mutual Security Treaty was challenged as violating the Constitution (Art. 9), the Court refused to pass upon the constitutional issue by invoking this "political question" doctrine.[4]

Secondly, the Court has been very deferential to the judgment of the Diet. In its forty years of history, only in a handful of cases has the Court struck down legislative actions as unconstitutional. One of them was a confiscation case, and it involved rather a procedural issue. When the government confiscated the clothes which were unsuccessfully shipped to Korea for smuggling without notice and hearing to their owner, the Court found that the confiscation violated Article 29 (property right) and Article 31 (no deprivation of life or liberty and no other criminal penalty except according to procedure established by law).[5] Another case was a parricide case. The Criminal Code imposed severer penalty on parricides as compared to ordinary murders, and the Court found the difference unreasonable and declared the provision to be repugnant to Article 14 (right to equality).[6] Two other cases concerned economic regulation. When the Pharmaceutical Act demanded that a new pharmacy store keep a certain distance from already established stores, the Court concluded that this restriction on the right to choose one's occupation, protected by Article 22, Section 1, could not be held as necessary or as reasonable.[7] And the Court found the

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4. The judgment of Dec. 16, 1959, Supreme Court, grand bench, Keishuu vol. 13, no. 13, at 3225 (the Sunagawa case). Although the existence of the Self Defence Force also implicates an issue of Article 9 violation, a number of lower courts have refused to decide upon its constitutionality by appealing to this doctrine. The judgment of Aug. 5, 1976, Sapporo High Court, Gyoushuu vol. 27, no. 8, at 1175 (the Naganuma Case); the judgment of July 7, 1981, Nagoya District Court, Hanrei-jihou vol. 1003, at 3.

5. The judgment of Nov. 28, 1962, Supreme Court, grand bench, Keishuu vol. 16, no. 11, at 1593.

6. The judgment of April 4, 1973, Supreme Court, grand bench, Keishuu vol. 27, no. 3, at 265. The Criminal Code imposed the death penalty or 3 year to life imprisonment for ordinary murders while it imposed the death penalty or life imprisonment for parricides, with no hope for probation. The defendant, raped by her father and having been forced to live with him, killed her father because he strongly opposed to her marriage when she fell in love with another man. The Court struck down the criminal parricide provision because it inflicted an unreasonably severe penalty on the defendant. Some concurring Judges intimated that it was impermissible in the first place to treat parricide differently from ordinary murders.

7. The judgment of April 30, 1975, Supreme Court, grand bench, Minshuu vol. 29, no. 4, at 572. The Pharmaceutical Act set up a license system for opening a new pharmacy store. One of the

restriction in the Forest Act on a division claim by the joint-owner of the forest unconstitutionally unreasonable.[8]

In no case involving freedom of expression, religious freedom, or other political freedoms, however, has the Court invalidated challenged governmental actions. In early days, when these statutes were challenged, the Court, having stated that constitutional protection of freedom was not absolute and that it must yield to governmental restrictions to protect general welfare, jumped into conclusions that the governmental restrictions were not unconstitutional, without even inquiring whether the restrictions were indeed necessary to accomplish some compelling state interests. The Court simply deferred to the judgment of the Diet.[9] Although in recent days the Court has come to utilize the interest balancing test and to inquire into the governmental objective and necessity of abridgment, the results have been the same, i.e., in favor of the government.[10] The only cases wherein the Court intervened into the political sphere are the reapportionment cases. Faced with gross disproportionality of apportionment, some electors in the underrepresented districts filed a suit attacking the election claiming that the underlying apportionment statute was an unconstitutional violation of the command of equality before the law (Art. 14). The Court agreed. Nevertheless, it refused to vacate the election, even though it declared the underlying apportionment statute to be unconstitutional.[11]

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required conditions for a license was proper distance from existing stores. The Court upheld the license requirement. Yet it thought that the distance condition was not substantially related to nor necessary to its legislative purpose, i.e. protection of public health from the possible danger resulting from the excessive competition.

8. The judgment of April 22, 1987, Supreme Court, grand bench, Minshuu vol. 41, no. 3, at 408. The plaintiff and the defendant were given the forest involved by their father. Normally, the Civil Code allows a division claim by one of the joint-owners. Yet section 186 of the Forest Act prohibited such a claim if the claimant had no more than half the share, apparently for the purpose of stabilizing the forest management by preventing the balkanization of the forest. The Court thought that this restriction on the property right did not contribute to its legislative purpose and held it to be unreasonable and unnecessary.

9. *See, e.g.*, the judgment of May 18, 1949, Supreme Court, grand bench, Keishuu vol. 3, no. 6, at 839 (advocacy of illegal action); the judgment of March 13, 1957, Supreme Court, grand bench, Keishuu vol. 11, no. 3, at 997 (obscenity); the judgment of July 20, 1960, Supreme Court, grand bench, Keishuu vol. 14, no. 9, at 1243 (demonstration). *See* L. BEER, FREEDOM OF EXPRESSION IN JAPAN 152 (1984).

10. The judgment of June 15, 1981, Supreme Court, 2nd petty bench, Keishuu vol. 35, no. 4, at 205 (prohibition of door to door canvasing for election campaign); the judgment of Dec. 12, 1984, Supreme Court, grand bench, Minshuu vol. 38, no. 12, at 1308 (censorship on imported publication). For an overview of some of the recent court decisions, *see* Beer, *Japan's Constitutional System and Its Judicial Interpretation*, 17 LAW IN JAPAN 7, 21–40 (1984).

LEGITIMIZING THE GOVERNMENTAL ACTION?

Some commentators even claim that the Court is now playing a major role not in enforcing constitutional provisions against the government but in legitimizing governmental actions when they are challenged by the citizens. The basis for this claim is that the Court, in more than once, went on to uphold the constitutionality of governmental actions even though it found cases to be unjusticiable. When a labor union challenged governmental refusal to permit a May Day public meeting at the exterior garden of the Emperor's Palace, for instance, the Court held that the case became moot because the May Day had passed and plaintiffs had no longer any legal interests for challenging the governmental action. Yet the Court went on to uphold the constitutionality of the permit refusal.[12] The Court, it is thus said, is not reluctant to intervene but is rather very eager to intervene in order to legitimize governmental actions.

A GUARDIAN OF PROPERTY RIGHTS?

On the other hand, it may be said that the Japanese Supreme Court has now become a guardian of property rights. For while deferring to the judgment of the Deit in reviewing restrictions on political freedoms, it has employed somewhat strict scrutiny to invalidate economic regulations.

Indeed, in its recent decisions on property rights, the Court has developed a bifurcated analysis: strict scrutiny for "preventive" police power restrictions and minimal scrutiny for "affirmative" social welfare legislations. Thus when a statute abridges property rights in order to protect the public safety and health, the Court demands that the statute is substantially related to some important state interests.[13] On the other hand, when a statute

11. The judgment of April 14, 1976, Supreme Court, grand bench, Minshuu vol. 30, no. 3, at 223. *See* Matsui, *The Reapportionment Cases in Japan: Constitutional Law, Politics, and the Japanese Supreme Court*, 33 OSAKA U.L. REV. 17 (1986).

12. The judgment of Dec. 23, 1953, Supreme Court, grand bench, Minshuu vol. 7, no. 13, at 1561. *See also* the judgment of May 24, 1967, Supreme Court, grand bench, Minshuu vol. 21, no. 5, at 1043 (the Asahi Case), wherein the Court concluded that the case became moot because of the death of the plaintiff but it went on to reject the plaintiff's claim that the welfare payment provided by the government was insufficient to meet the constitutional mandate of Article 25.

13. The judgment of April 30, 1975, Supreme Court, grand bench, Minshuu vol. 29, no. 4, at 572 (the Pharmaceutical Act Case).

abridges property rights to promote social welfare, to preserve the good functioning of the economy, or to protect socially vulnerable people, the Court simply defers to the Diet and does not overturn the statute unless it violates the Constitution without doubt.[14] The Court's willingness to employ strict scrutiny in reviewing economic regulation is striking, for it has never employed such scrutiny when reviewing statutes restricting freedom of speech.

This Court's solicitude toward economic freedoms is ironic, as many commentators have argued that the Court should employ strict scrutiny when reviewing restrictions on freedom of speech while it should defer to the Deit when reviewing economic regulations. Although the Court implied that this double standard does apply, it has never actually applied it in cases involving personal freedom. And in reality, as noted above, the Court has employed strict scrutiny only when reviewing economic regulations. Apparently, the Court seems to be more willing to interfere with the Diet's judgment when its decision does not have significant political implications.

The Court's Posture Explained

Why the Japanese judiciary is so unwilling to interfere with the governmental actions when citizens challenge them? Why are they so reluctant to protect rights of individuals, especially political freedoms? Why are they somewhat receptive to claims of property right infringement? Why are they so willing on the other hand to intervene to uphold challenged governmental actions? There are several possible explanations.

The first explanation is political. The reluctance of the Court to exercise the power of judicial review, according to this explanation, is simply a manifestation of the political ideology of Supreme Court Judges. According to the Constitution, the Chief Judge is appointed by the Emperor upon the designation by the Cabinet (Art. 6 II) and other Judges are appointed by the Cabinet (Art. 79). Even though the candidates have to meet statutory qualifications, otherwise the appointment is wholly discretionary, subject

14. The judgment of Nov. 22, 1972, Supreme Court, grand bench, Keishuu vol. 26, no. 9, at 586 (the Retail Store Protection Act Case). *But see* the judgment of April 22, 1987, Supreme Court, grand bench, Minshuu vol. 41, no. 3, at 408 (the Forest Act Case), where the Court invalidated the restriction on property right without making clear which standard did apply.

only to dismissal by the public review, which has never been an effective control on the Cabinet's appointment power. Since the conservative parties have occupied the Cabinet for a long time, Judges — except first appointees — are all appointed by the conservative Cabinets. When we consider the unlikelihood that the ruling conservative party (now the Liberal Democratic Party) will appoint persons unfavorable to its political vision to the Supreme Court, it is only natural that the Supreme Court is deferential to the Diet and the Executive.[15] Even the willingness of the Court to legitimize governmental actions when they are challenged by citizens may then appear as natural. It is only when the invalidation does not cause significant political embarrassment to the Cabinet and the ruling party that the Court is relatively at ease to exercise judicial power. That is why the Court has invalidated statutes only when they infringed property rights.

The second explanation views the Court's posture as tactical. The reluctance of the Court, according to this view, is only a strategy of the Court to solidify the prestige of the judiciary. The United States Supreme Court did not exercise its power so strikingly during its early years. It had to solidify its prestige in order to exercise its power safely and confidently. Only after its power came to be widely accepted that it came to strike down legislation as unconstitutional. Upon comparison, the Japanese Supreme Court has only forty years of experience. It is thus too early, according to this explanation, for the Japanese Court to claim its power, especially in areas having political implications.

One can also point out the institutional limits as well. For the statutory scheme for a suit against administrative actions, the most typical suit involved in constitutional litigation, sets hardly surmontable obstacles to effective judicial relief. First, as to threshold requirements, the Administrative Cases Litigation Act, which sets forth the court procedure in cases against administrative agencies, grants standing only to those who have "legally protected interests" in disputes (Sec. 9). Unlike Americans who can go to the court only upon showing injury in fact under the federal Administrative Procedure Act, the Japanese plaintiff who wants to challenge a governmental action must show that his or her alleged interest is somehow protected by the specific statutes. Moreover, the Act assumes the action for

15. For a study of judicial philosophies of some of the Supreme Court Judges, *see* Urata, *The Judicial Review System in Japan — Legal Ideology of the Supreme Court Judges*, 3 WASEDA BULLETIN OF COMPARATIVE LAW 16 (1983).

judicial revocation as a principal form of action against governmental actions (Sec. 3). In other words, as far as the exercise of governmental power by the administrative agency is concerned, the court only has jurisdiction for a revocation action. There is no provision for an injunction. It has been rather thought that an injunction against adminsitrative agencies violates the separation of powers principle. Moreover, the suit must be filed attacking the administrative "disposition," i.e., the final order of the agency. And the filing of a suit against the governmental action does not prevent the government from exercising its power (Sec. 25). Even though the court is authorized to grant stay against governmental actions, the requirements are strict and the stay may be nullified by the Prime Minister (Sec. 27). And, finally when the revocation of the challenged administrative action would produce highly undesirable consequences, the court is authorized not to revoke that action even if the court found it to be illegal (Sec. 31).[16] Under such a statutory scheme, the citizen plaintiff is extremely hard-pressed to have the court revoke any governmental actions. And the judiciary is extremely reluctant to go beyond statutory authorizations.

THE CONSTITUTION AND CONSTITUTIONAL LAW CONSCIOUSNESS

There are some plausibility as well as limits to each explanation. But is there anything special about the Japanese society for this reluctance of the judiciary? Is it somehow a natural result of the legal consciousness of the Japanese people?[17]

The Japanese society is often said to be a groupist society of homogeneous people. And the Japanese are said to respect harmony and to dislike self-assertions or personal confrontations, thus avoiding a resort to the court for solving the disputes.[18] It may be then possible to say that the Court's

16. For the administrative case litigation procedure in general, *see* Tanakadate, *A Summary of the Limitations on Administrative Adjudication under the Japanese Constitution*, 18 LAW IN JAPAN 108, 110–11 (1986); Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 CORN. INT'L L.J. 37 (1985).

17. For the significance of "legal consciousness" for comparative study, *see. e.g.*, Yasaki, *Significance of "Legal Consciousness" in Regard to Social Facts and Social Institutions*, 31 OSAKA U. L. REV. 1 (1984). *But see* Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOCIETY REV. 219 (1987) (arguing for the necessity of behavioral analysis).

18. *See, e.g.* L. BEER, *supra* note 9, at 101–15 ("individual groupism"). *See also* Wagatsuma & Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOCIETY REV. 461 (1986). Some commentators disagree and insist that the number of litigations and lawyers is not small in Japan and that the Japanese are litigious. *See* Haley, *The Myth of the Reluctant Litigant and the Role of the Judiciary in Japan*, 4: 2 J. JAPANESE STUDIES 350 (1978);

unwillingness to overturn the Diet's act may be regarded as not astonishing in light of these characteristics of the Japanese society. It is natural for the Japanese judges that they prefer not to disturb the judgment of other branches of the government. On the other hand, Professor Haley points out that the lack of law enforcement and a remarkable freedom from legal restraints are the most prominent characteristics of the Japanese society.[19] Law, including the Constitution, serves as mere *tatemae* (guiding principle to be respected) and the actual behaviors of the people are determined by other social controls. It is not then surprising that the Constitution is not an effective constraint on the government. The constitution serves rather as a symbol and, viewed in this light, it may be serving its role without active judicial implementation. Even though most constitutional law scholars are highly critical of the Court's insufficient zealousness to protect fundamental rights, it may be argued that the fundamental rights are well protected in Japan by other governmental institutions and by non-legal sanctions.[20]

Or it may even be argued that the very concepts of individual and individual rights essential to the Western idea of constitutionalism is lacking in the Japanese society.[21] The role of the language and the role of the sacred scripture so characteristic to the Western constitutionalism may be foreign to the Japanese society. Professor Parker, for instance, says that the Constitution and the individual rights play an indispensable role in the United States because Americans have no cultural traditions in common. The Constitution, he says, is the sacred scripture embodying the universal moral principles, and the American insistence on individual rights and personal freedom arises from the need to follow the commands of God. This, he says, is the unique characteristic of the American society and of the United States Constitution. Professor Parker thereby implies that, here in Japan, lacking such a characteristic, the Constitution cannot play the similar role and that

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Haley, *The Role of Law in Japan: An Historical Perspective*, 18 KOBE U.L. REV. 1 (1984); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983). Professor Tanaka argues that both views are overgeneralizations and that Japan should be regarded as in a transitory stage from the traditional society to the modern Western society. Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 U.B.C. L. REV. 2 (1985).

19. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions*, 8: 2 J. JAPANESE STUDIES 265; Haley, *Introduction: Legal vs. Social Controls*, 17 LAW IN JAPAN 1 (1984).

20. *See* Beer, *supra* note 10, at 21.

21. For a difference concerning the idea of the self in Japanese and Western society, *see* J. Smith, *Ajase and Oedipus: Ideas of the Self in Japanese and Western Legal Consciousness*, 20 U.B.C. L. REV. 341 (1986) [also reprinted on 34 OSAKA U.L. REV. 1 (1987)].

constitutional guarantees of individual rights can never be fully realized in Japan.[22] Perhaps we should not expect the Japanese judiciary to perform the same role the United States courts have played thus far.

If these characterizations of the Japanese society and legal consciousness are correct, then two different views on the role of the judiciary appear to follow. On the one hand, one view would say that it is meaningless to expect the Japanese judiciary to intervene to protect fundamental rights of people. For the Japanese judiciary is simply playing its expected role of preserving harmony and order in the society. Japanese commentators are then simply expecting too much from the Japanese judiciary. On the other hand, the opposing view would say that the judicial protection of minority rights are all the more pressing, because the judiciary is the only organ which can protect vulnerable minorities in the Japanese society. Surely the court have to face great difficulties, for it has to protect minorities in a society which is not receptive to such minorities, and with no help either from the support of general public or from the scriptual authority of the Constitution. Nevertheless, if the rights of insular and discrete monorities are to be protected, there is no place other than the judiciary that could perform that task in Japan.

How could the Japanese judiciary perform this task? Recently Professor Ikeda argues that the traditional Japanese society has a unique notion of individual within the society. It is a Buddhist notion of "ichimiwagou" (everyone in harmony), an insistence on harmony by dedication of self to the society. The Western notions of right and individual, he claims, are alien to this Japanese society. Nevertheless, these unique Japanese notions, he implies, may provide a clue to find a way for the judiciary to protect rights of people in the Japanese society.[23]

New Challenge for the Court

Yet even Professor Ikeda's account seems to provide no immediate

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22. Parker, *The Authority of Law in the United States and in Japan*, 33 Osaka U.L. Rev. 1 (1986); Parker, *Law and Language in Japan and in the United States*, 34 Osaka U.L. Rev. 47 (1987); Parker, *Some Reasons for the Extraordinary Authority Which the United States Constitution Has for Americans* (unpublished manuscript).

23. Ikeda, Kenpoushakaitaikei ni tsuite (On the Social System of the Constitution), in Nihon-Koku Kenpou no Riron 1 (1986); Ikeda, Gendai Nihon Shakai to Kenpou — Josetsu (Contemporary Japanese Society and the Constitution — Preface), in 58: 6 Houritsu Jihou 14 (1986).

suggestions for the court to follow in modern Japanese society. For as a part of the growing tendency of urbanization and westernization, the Japanese society is rapidly changing. More and more people have come to be dissatisfied with traditional Japanese way of life stressing harmony and self-dedication and to seek individualistic way of life. The judiciary is now facing the difficult issues rising from this transition.

We can find one clear manifestation of such change in a growing number of assertions of new constitutional rights. Although the Japanese Constitution has an elaborate bill or rights, more elaborate than the United States Constitution, its enumeration of rights have never been perceived as exclusive. Yet since its enumeration is relatively elaborate, there had been no serious inquiry into the source and limits of unenumerated constitutional rights. Recently, however, a growing number of citizens has come to look to the Constitution as a basis for preventing pollutions and challenging tight social controls in private lives of the traditional Japanese society. Since the Japanese Constitution does not contain specific provision for this kind of constitutional rights, commentators have started to invoke the concept of "life, liberty, and the pursuit of happiness" guaranteed by Art. 13 as a textual basis for such rights.[24] The environmental right, the right of privacy, the right to live in peace, and other countless new constitutional rights have been thus asserted before the court.

Thus far, however, the courts have not been receptive to these assertions of new constitutional rights. Although the Court has showed some willingness to accept an informational privacy right,[25] it has never embraced environmental right as a constitutional right. While it was argued that the criminal punishment of personal use of drugs is unconstitutional as the use of drugs in itself is harmless, the Court rejected this argument noting that the use of drugs is not harmless.[26] And when it was claimed that a local ordinance punishing people who had sexual intercourse with boys and girls

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24. Some commentators have attempted to establish a right of privacy as developed by the United States Supreme Court and commentators. *See, e.g.*, Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

25. The judgment of Dec. 24, 1969, Keishuu vol. 23, no. 12, at 1625. *But see* the judgment of Feb. 14, 1986, Supreme Court, 2nd petty bench, Keishuu vol. 40, no. 1, at 48 (upholding the constitutionality of using an electronic device automatically taking a snap shot of a car and a driver when it detects speeding); the judgment of Aug. 25, 1986, Tokyo High Court, Hanreijihou vol. 1208, at 66 (no invasion of privacy by alien registration requirement by finger print).

26. The judgment of Sept. 10, 1985, Supreme Court, 1st petty bench, Hanreijihou vol. 1165, at 183.

of no more than 18 years of age unconstitutionally invaded freedom of sexual intercourse, the Court didn't squarely answer the claim.[27] Similarly when the public school hair grooming policy of requiring "monk head" to male students was challenged, some commentators claimed it to be a unconstitutional deprivation of freedom of hair length or personal appearance. Yet the lower court rejected the challenge.[28]

These cases apparently show the reluctance of the judiciary to expand the range of constitutionally protected rights.[29] Nevertheless, the fact that a growing number of citizens has come to assert such new constitutional rights means that the Japanese people's attitude toward the Constitution is somewhat changing.[30] And this new challenge for the Court evidently forces us to think about the proper role of the judiciary in the Japanese society.

CONCLUSION

Although the Japanese Constitution has granted the judiciary with the power of judicial review, the judiciary has not exercised it up to the expectation of many commentators. There are several backgrounds for this extreme passivity of the Japanese judiciary in guaranteeing fundamental rights of people. The purpose of this Article is to analyse these backgrounds and to think over what role we can and should expect from the Japanese judiciary. Celebrating the fortieth anniversary of the Japanese Constitution, it is certainly an adequate time to reexamine what role the judiciary can and should play in the Japanese society under the Japanese Constitution.

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27. The judgment of Oct. 23, 1985, Supreme Court, grand bench, Keishuu vol. 39, no. 6, at 413. The defendant was convicted and sentenced to 50.000 yen fine because he had sexual intercourse with a 16 year old girl and appealed to the Court alleging that the ordinance was unconstitutionally vague and overborad and that it infringed his constitutional right of sexual intercourse. Yet the Court construed the ordinance as punishing only those who had sexual intercourse by improper seduction or force, thus rejecting the defendant's vagueness and overbreadth claim. The Court didn't directly answer the claim of constitutional right infringement.

28. The judgment of Nov. 13, 1985, Kumamoto District Ct., Hanreijihou vol. 1174, at 48.

29. The judgment of March 26, 1986, Chiba District Ct., Hanreijihou vol. 1187, at 157 (upholding the constitutionality of Alchoholic Beverage Tax Act which prohibits the production of alchoholic beverage for the purpose of self-consumption against the claim of infrigement of one's right of autonomy protected by the Constitution).

30. *See* Matsui, Book Review, 34 AMERICAN J. OF COMPARATIVE LAW 583 (1986).