

**(I) Origin of Judicial Constitutional Review, European model and American model**

- In European countries, democracy was established through the struggle between despotic kings and Parliament. Therefore, European people thought that the Legislative (Parliament) represented the sovereign will of the people itself. Legislations by the Legislative were expression of this sovereign will, and nobody had any right to criticize them. The Legislative was so-to-say, *a brain*, the Executive and the Judiciary were *a body* which works on commands from the brain. There was no space for any judicial control of constitutionality of legislations.
- In 20. century, European people had serious experience that the Legislative could fail to obey the principles of democracy and violate Human Rights of the people. After WW II, the Judiciary was vested with a new competence for Judicial Constitutional Review. In Germany, Austria and Italy, a special court was founded for this task. This court is authorized to test any legislation in its constitutionality without any concrete legal conflict. This function is called "Abstract Normative Control" of Constitutionality.
- In the U.S.A., democracy was established through the struggle against Parliament because Parliament did not represent the will of American people, but the will of English government. The independence was achieved under the powerful leadership of the Executive (President). Therefore, the American concept of democracy conceived certain doubt against the Legislative. Its behaviour should be controlled from both sides, by the President and by the Court. In 1803, the competence of the Court for Judicial Constitutional Review was officially acknowledged in a judgement (judge-made law). In the American model, no special court had to be founded. Theoretically, each court in any case has opportunity to test Constitutionality of legislations (Specific Incidental Control or Actual Specific Control). However, this competence should be put into practice only as "last resort" because the authority of the Legislative could be enormously damaged, and political process would be critically disturbed through such interventions by the Judiciary.

**(II) What is a main concern in Judicial Constitutional Review?**

- The purpose of Judicial Constitutional Review is to save fundamental principles and value of democracy, especially Equality and Human Rights of the people. Obvious abuse of the legislative and executive power must be rejected.
- On the other hand, the Legislative or the Executive may have certain justifiable reason behind the appearance of unequal or unfair treatment; they would argue that it is a temporary measure (political discretion) in order to secure final achievement of such principles or value, or they would insist that it is sometimes unavoidable to disadvantage certain individuals for the sake of a whole people (public welfare). Therefore, it is the most important matter to set adequate criteria to determine whether the legislative or executive power is abused or not.
- Such criteria may be distinguished each other according to the nature of concerned principle or value. In 1938, the American Supreme Court established a fundamental distinguishing between restrictions of intellectual or political freedom and limitations of economic activities (Dual Standard Doctrine); Any restriction of intellectual or political freedom must be tested under strict criteria while less strict criteria may be applied to the test of limitations of economic activities.
- Freedom of opinion, speech, or press forms the basis of democracy. So, a quite narrow free space may remain for political discretion. But in concern with economic activities, many complicated factors must be taken into consideration, and the legislative and executive power may enjoy wider freedom of choice for their decisions.

### (III) Value-conflict between Human Rights and Public Welfare

It is said that Human Rights are inviolable. But Human Rights are often restricted in favour of public welfare, and such restrictions are sometimes unavoidable. The essential question is; in which situation and how far may Human Rights be restricted?

#### Basic consideration in the “Dual Standard Doctrine”

- The basic concept of Judicial Constitutional Review contains a general respect for the authority of the Legislative. In regard to the lawmaking task, the Legislative has the priority, and for this task, the Legislative also has to take many other factors than specific legal ones into consideration while the Judiciary has no adequate apparatus for such a task. For this reason, the Judiciary should refrain from intervention into the political process (*Division of Powers*).
- According to such a concept, a wide range of free hand (*discretion*) is granted to the Legislative or the Executive, and the Judiciary normally work on the assumption of the Constitutionality of legislations or governmental decisions. Sometimes, such legislations and decisions contain certain restrictions of Human Rights or fundamental freedom of citizens, and the Legislative and the Executive usually justify such restrictions in name of “*Public Welfare*”.
- Especially, freedom of economic activities (“*absoluteness of property rights*”, “*civil autonomy*” or “*freedom of contract*” in civil law) must be often restricted in favour of “*Public Welfare*”. After “*Great Depression*” in 1929, people experienced malfunctions or negative results of unlimited economic freedom (*free market mechanism*). Sometimes, political interventions into free market mechanism are inevitable in order to secure “*Public Welfare*”. In 1930th. in USA, President *Theodore Roosevelt* introduced a new economic policy (“*New Deal*”) and tried to improve economic situation through political interventions into free market mechanism. But the Judiciary rejected “*New Deal Policy*” because it would violate *freedom of contract*. In 1937, the President finally decided to dismiss all judges from the Supreme Court and appointed new judges who were willing to support “*New Deal Policy*”. This so-called “*New Court*” showed its firm trust in the Legislative and the Executive – “*They must have reasonable grounds for their economic policy*” – and established the assumption of Constitutionality of governmental economic policy; it means that any political decision of the government and its enactment in the economic fields is principally constitutional.
- However, even abuse of the legislative or executive power could be justified with such a general argument, and the basis of constitutional democracy would be threatened through abuse of powers. So, the general assumption of the Constitutionality must be broken if a legislation or governmental decision would lead to an unreasonable violation of fundamental values which the Constitution guarantees to the people. But, in which situation should Judicial Constitutional Review by the Judiciary be activated to break the assumption of Constitutionality? In other words; how should the discretion of the Legislative and the Executive be limited in favour of Human Rights and fundamental freedom of citizens?
- According to the ruling opinion, the guarantee of intellectual freedom may not be “absolute”, and contains similar limitation in favour of Public welfare, too. But it must be more carefully respected because it forms just the basis of constitutional democracy itself.
- Under this consideration, “Dual Standard Doctrine” was born: Strict standard for restriction of intellectual freedom and less strict standard for restriction of economic freedom.
- Principally, Constitutionality of a restriction of intellectual freedom must be tested in each specific case, and may be constitutional only when “clear and present danger” for the public

welfare and security must be feared, or when there is absolutely *no other alternative measure* than such a restriction in order to secure public welfare and security. For justification of such a restriction, it is not enough to mention to a merely general reasonableness between aim (for example, to secure public security or political neutrality of the administration) and measure (for example, to prohibit a public meeting in certain area, or to restrict political activities of public officials).

**Criteria of Constitutionality/Unconstitutionality of restrictions of Human Rights (Dual Standard Doctrine)**

Restriction of intellectual Human Rights (tested with Doubt of <i>Unconstitutionality</i> )	Restriction of Economic Rights (tested under Presumption of <i>Constitutionality</i> )
<b>A: Restriction of elements of Rights</b> The strictest test: “ <i>Void on its Face</i> ” – Test	
<b>B: Restriction regarding contents in exercises of Rights</b> A quite strict test: “ <i>Clear and Present Dangers</i> ” – Test	
<b>C: Restriction regarding the way of exercises of Rights</b> A less strict test: “ <i>Less Restrictive Alternatives</i> ” – Test	<b>D: Restriction to prevent harmful results for public welfare</b> A less strict test: “ <i>Less Restrictive Alternatives</i> ” – Test
	<b>E: Restriction to achieve political goals *)</b> A quite mild test: “ <i>Clear Unreasonableness and Abuse of Power</i> ” – Test

\*) *Why should two levels be distinguished in the restriction of economic freedom?*

Fundamental Human Rights and freedom in modern democracy have even their backside and can cause some negative results. But such results arise rather from the essence or nature of Human Rights and fundamental freedom. They are foreseeable and in certain extent unavoidable. Therefore, these negative results cannot serve as reason for restriction of Human Rights and fundamental freedom. They should be removed or defused through other measures than restrictive ones. In other words, restrictive measures in this field should be more strictly tested than economic measures for specific goals.

**Dual Standard Doctrine and the Constitution of Japan**

- The Constitution of Japan in 1947 introduced a “*New Deal*”-like doctrine. It guarantees the freedom of profession only under the limitation: “*to the extent that it does not interfere with the public welfare*” (Article 22), and set also the property rights under the limitation: “*in conformity with the public welfare*” (Article 29). In regard to other fundamental Human Rights, especially intellectual freedom, the current Constitution of Japan does not clearly mention to any similar limitation. In this sense, the Constitution permits a relatively wide discretion to the Legislative *in economic fields* and allows it to *restrict economic freedom of the people in favour of Public welfare*.

**Topic-(A) Equal treatment under the law (Article 14 of Constitution)**

Article 199 of Japanese Criminal Code provides the punishment against homicide; "A person who kills another shall be punished with death or penal servitude for life or not less than three years."

However, Article 200 provided that a person who kills a lineal ascendant (parents, grandparents and so on; *parricide, patricide, matricide* in English law) shall be punished with death or penal servitude for life.

Furthermore, Article 205 Paragraph (1) provides the punishment against bodily injury resulting in death; "A person who inflicts injury upon another and thereby causes the latter's death shall be punished with penal servitude for a limited period of not less than two years." But its Paragraph (2) provided the punishment of penal servitude for life or not less than three years against a person who injured a lineal ascendant.

Are such different treatments according to the family relations between offenders and victims not unconstitutional?

- **Case:** Miss D was raped by her own father as she was 14 years old, and then he repeated this offence regularly over 10 years. Miss D bore 5 children. Despite of this misery, she got to know a boy friend and wished to marry him. Her father tried to break this friendship and mistreated her. Finally, she killed her father and gave herself up to the police.
- **Judgement:** Miss D should be punished with death or imprisonment for life, but it would be unreasonably too hard for her. In the trial, it was intensively discussed whether Article 200 of Criminal Code was constitutional or unconstitutional. The District Court decided that this article was unconstitutional, but the Appellate Court reversed this judgement. In 1973, the Supreme Court eventually judged that Article 200 was unconstitutional. The Court argued in following way;
  1. Tender sentiment and respect for own ascendants is quite natural and one of the fundamental moral principles of our society. It is a important task of the criminal law to maintain this moral. Therefore, such a provision like Article 200 of Japanese Criminal Code has its reason. In this sense, a different treatment of offenders according to their family relations to victims is not unconstitutional.
  2. However, the hardness of the punishment of Article 200 can not be justified with this consideration, and the discrepancy between Article 199 and 200 is unreasonably too wide. The application of Article 200 to this case is unconstitutional at this point.

As regarding Article 205 Paragraph (2), the Supreme Court judged in another case that the hardness of its punishment did not exceed the limit of reasonableness and it was constitutional.

In any case, the Public Prosecutor stopped to bring charge with Article 200 and 205 Paragraph (2). In 1995, both provisions were deleted in the revised Criminal Code of Japan.

By the way, the Supreme Court considered whether it was a proper task of the criminal law to maintain our natural sentiment and respect for the ascendant or not. But there is another point which should be also discussed, namely the question whether it was reasonable to provide generally a harder punishment of offences against the ascendant without to consider concrete relationship between offenders and victims in each case.

## • Related Cases on Equal Treatment under the Law

### a. Nissan Automobile Case

Nissan Automobile Company had a company rule which provided the compulsory retirement age of employees. According to this rule, a female employee should retire when she reached the age of 50 while a male employee may work until the age of 55. One female employee sued the company for the violation of equality under the law (Article 14 of Constitution).

In the trial, the company insisted that this different treatment of female and male employees has a reasonable ground because female employees can fulfil only simple tasks and their contribution to the company are generally lower than in case of male employees. Tokyo District Court judged in favour of the plaintiff; the difference of gender is not enough to justify a general distinguished treatment of employees. Men and women can perform normal tasks in almost same way until 60. Therefore, such a general rule of the compulsory retirement age constitutes abuse of rights, and violates “public order and good morals” (Article 90 of Civil Code). Tokyo Appellate Court upheld this judgement, and the Supreme Court upheld it, too (judgement of the Supreme Court on March 24, 1981).

Normally, Constitution regulates legal relations among state organs and relations between a state organ and private persons. Constitutional provisions may apply only to laws and their implementation through official authorities. It is still questionable whether constitutional provisions have same effects on relations among private persons (“*Third Effect of Constitution*” or “*Constitutional Effect among Private Persons*”). What may be done when a private person with powerful influence violated Human Rights of another person? In the case cited above, the Courts regarded the company Nissan as a quasi-official organization because it controlled a wide range of company groups and employees, and its behaviours intensively influenced the local society. In other words, the Courts recognized higher social responsibility of large-scale enterprises. Nevertheless, it was denied to apply a constitutional provision directly on this case. Instead, the Courts interpreted Article 90 of Civil Code in accordance with the principle of equal treatment under the law:

#### **Article 90 of Civil Code [Public order and good morals]**

A juristic act which has for its object such matters as are contrary to public order and good morals is null and void.

However, the Supreme Court seldom affirms this indirect application of the constitutional principles. In the following case, the Supreme Court compared *Economic Freedom* and *Intellectual Freedom* (political opinion) in private relations, and judged that it was not illegal to ask an applicants some questions about his political opinion in the employment interview:

### b. Mitsubishi Resin Case

Mitsubishi Resin Industry Inc. employed a man, but after his trial period of three months, the company cancelled the employment with the argument that he did not mention to his political activities during his student days (he was a member of the student organization of Communist Party). He sued the company for the abuse of rights.

District Court judged in favour of the employee (judgement of Tokyo District Court on July 17, 1967), and Appellate Court upheld it with the argument that freedom of political opinion and belief should be guaranteed in any case, and it was allowed to keep such facts secret in the interview (judgement of Tokyo Appellate Court on June 12, 1968). But the Supreme Court gave priority to freedom of contract over freedom of thoughts and belief, and reversed the judgement (judgement of the Supreme Court on December 12, 1973).

### **Topic-(B) Separation of Politics and Religion (Article 20 of Constitution)**

Under the militarism before and during the World War II, the military regime used Japanese traditional religion "Shinto" as a spiritual basis of its expansionist policy and oppressed freedom of political opinion and religious belief. After the War, it was one of the most important principles for democratization of Japanese society to separate politics and religion clearly, namely Article 20 and 89 of Constitution.

#### **a. Christian in Shinto-Shrine Case**

Mrs. F is a Christian. Her husband was an officer of Self-Defence Forces, he died in a work-related accident. Mrs. F held his funeral in a Christian church. However, an association of veteran officers and Self-Defence Agency planned to register his name in a Shinto shrine as a sacred spirit without to ask Mrs. F for her agreement. After his name was really registered, Mrs. F sued the veteran association and Self-Defence Agency for mental damages.

#### **- Judgement**

The District Court recognized the fact that the application for the registration was a collusive act of the association and Self-Defence Agency, and the Court judged that Self-Defence Agency violated Article 20 Paragraph (3) and should pay the compensation to Mrs. F (judgement on March 22, 1979). The Appellate Court affirmed the liability of Self-Defence Agency, too (judgement on June 1, 1982). But the Supreme Court revised the judgement of the Appellate Court, and also rejected the finding of facts of the District Court. The Supreme Court argued as follows (judgement on June 1, 1988);

1. The applicant was the veteran association alone, Self-Defence Agency merely gave indirect support to the association. Therefore, the Agency itself did not violate Article 20 Paragraph (3). It is still to check whether some officials behaved against Constitution.
2. The officials of Self-Defence Forces supported the registration of the dead officer in Shinto shrine in order to improve the morale of the Self-Defence officers. They did not aim to favour Shintoism over other religions. The acts of the officials were therefore not of religious character, and they did not violate Article 20.
3. The association and the Shinto shrine are private organizations and enjoy freedom of religion and belief, too. Their rights should be protected against disturbance from outside. On the other hand, Mrs. F did not suffer from any damages. So, this case does not have any relevance to Article 20.

#### **• Related Cases on Separation of Politics and Religion**

In regard to this topic, separation of politics and religion, there are other several points of controversy. One of them is worship at a Shinto shrine by ministers, especially at "Yasukuni Shrine". This shrine has a special meaning; during the war, Japanese military government declared that spirits of all fallen soldiers and officers of Emperor's Army and Navy would gather together here in "Yasukuni Shrine". So, this shrine was a symbol of Japanese militarism. The list of honoured spirits in this shrine contains also names of war criminals who were responsible for cruel acts of Japanese Army in Asian countries. Despite of this fact, This shrine still enjoys respect of certain parts of Japanese people, especially families of fallen soldiers. Many associations of families of fallen soldiers request regular worship at this shrine by the government. Indeed, many members of the ruling party and ministers visit regularly this shrine. Pacifist groups in Japan suited the government for the breach of Article 20. In 1986, the Supreme Court made a judgement that the worship at Yasukuni Shrine by ministers or other government officials does not violate Article 20. The Court argued as follows;

1. It is not possible to separate official and private status in person of government officials.
2. Government officials as private persons have right to enjoy freedom of religion, too. It is unconstitutional to restrict their freedom even though they have official positions.
3. Their visit and worship at Yasukuni Shrine is therefore constitutional unless this act is obviously performed as “Affairs of State”.

Another point of controversy is Shinto service at a ground-breaking ceremony held officially by local authorities and donation for shrines. The Supreme Court judged that such acts by local authorities are constitutional in so far as the ceremonies did not directly aim to promote Shintoism itself and the amount of donation did not exceed the normal standard.

In 1997, the Supreme Court changed his precedent in regard to the Constitutionality of donation for shrines by local authorities. The Court judged that donations for shrines are not merely a formal fulfilment of moral duties, but a religious performance and is not allowed for public authorities.

### Topic-(C) Restriction of intellectual freedom by Legislative or Executive Powers

As is mentioned in the history of “Dual Standard Doctrine, for justification of restriction of Human Rights and freedom in intellectual fields, it is not enough to mention to a merely general reasonableness between aim (for example, to secure public security or political neutrality of the administration) and measure (for example, to prohibit a public meeting in certain area, or to restrict political activities of public officials). However, Japanese Supreme Court shows its tendency to accept such a general reasonableness between aim and measure as a ground for the Constitutionality of the restriction of intellectual freedom.

#### a) Restriction of Workers' Rights (Judgement of the Supreme Court on October 26, 1966)

- Article 28 of the Constitution guarantees rights of workers to organize themselves and to bargain and act collectively. But the most parts of such basic rights are hardly restricted for public officials with criminal punishment. In 1958, some post office workers had a strike and asked other workers to join in a meeting. They were accused for the breach of the law. The District Court decided in favour of the workers, but the Appellate Court judged that they were guilty.
- In 1966, the Supreme Court reversed the judgement of the Appellate Court with the following argument: Principally, the rights of workers in Article 28 must be guaranteed to all workers including public officials, but because of the nature of their tasks (public services for the people), their rights have to be restricted according to the respective contents of their tasks. Therefore;
  - i) The restriction may be allowed only in the necessary, minimal extent;
  - ii) The restriction may be justifiable only when quite harmful results for the public must be feared if the concerned workers would perform their rights;
  - iii) Punishment in case of illegal performance must be limited to the reasonable extent;
  - iv) Adequate compensation must be guaranteed when the restriction is unavoidable.
- According to these standards, the application of the restriction on this case could not be justified, and is *unconstitutional*. The Supreme Court did not mention the “Dual Standard Doctrine”, but it seemed like that it accepted this doctrine and applied its strict tests of Level (B) and (C) to this case.

#### b) Restriction of Political Activities (Judgement of the Supreme Court on November 6, 1974)

- Political activities are widely restricted for public officials just like their rights as workers. In 1967, a post office worker took part in Socialist party's election campaign on Sunday. He was accused for the breach of the restriction of political activities of public officials. The District Court applied the standards set up by the Supreme Court mentioned above and judged that the application of the restriction on this case was unconstitutional (Article 21 and 31).
- However, the Supreme Court changed its own precedent and judged that the post office worker was guilty. The Court argued as follows: Political activities of public officials must be restricted in order to secure political neutrality of public services. Such restriction may be justified when the [abstract] reasonableness between the aim and such measures is proved, and insofar as the restrictions are limited to a necessary extent. The Supreme Court denied the necessity of detailed test in each case. In other words, the Supreme Court granted a wide range of discretion to the Legislative also in the field of intellectual freedom. This attitude of the Court would correspond



to Level (D) in the “Dual Standard Doctrine” for restriction of economic freedom.

- As a result, the Supreme Court allowed a wide range of discretion to the prosecution authority and “chilling effect” against political freedom among public service workers.

### c) Censorship (Textbooks Screening Case)

If the Legislative enacted a law which allowed public authorities to check contents of expression in advance of its publication and to prohibit certain expressions, it would be a censorship and unconstitutional (Article 21). Such a case would belong to the level (A) of the “Dual Standard Doctrine”. But, it is not so simple to decide whether such a law really provides a "censorship" or not. The definition of censorship is one of the most discussed issues.

- In Japan, school textbooks must be checked by the Ministry of Education, and only books which were approved by the Ministry may be authorized as school textbooks (screening system of school textbooks). In 1963, Professor *IENAGA* wrote a textbook of Japanese history and described the process of the World War II very critically. His book was rejected by the Ministry. He had to rewrite this book, but was requested to correct 300 places. For example, the phrase “Invasion in China” were not appropriate and should be replaced with “Advancement into China”. In 1965, Professor *IENAGA* sued the government for the violation of freedom of expression and claimed the revocation of the decision. He brought similar suit three times until 1984.
- In all instances of all cases, Japanese Courts judged that the textbooks screening system is not a “censorship” in the sense of Article 21. In the judgement on March 16, 1993, the Supreme Court defined the concept of censorship as a system in which administrative authorities check the content of expression in advance of its publication in order to prohibit publication with certain contents. According to this definition, so decided the Supreme Court, the screening system were not any censorship because rejected works may be still published as normal books, and works which were already published are allowed to be tested in this system.
- In other words, Japanese Courts denied to test the textbooks screening system according to the level (A) of the “Dual Standard Doctrine”. But particular decisions of the Ministry should be still checked in the point whether the requests of the Ministry constituted "abuse of power" or not, such a test would correspond to the level (B) of the “Dual Standard Doctrine”. In 1970, Tokyo District Court judged that in certain places the Ministry had gone with the screening too far and tried to force the author to change his thinking itself, and such requests were unconstitutional. The Appellate Court upheld this judgement, but the Supreme Court reversed it and remanded it to the Appellate Court (judgement of the Supreme Court on April 8, 1982).
- Finally in the 3rd case, the Supreme Court judged that the Ministry abused its power in 4 places and violated the freedom of expression (judgement of the Supreme Court on August 29, 1998). In one place, the Ministry had requested to delete the description about the cruel act of the “Troop No. 731” in Manchuria.