Constitutional Protection and Guarantee of Rights and Freedoms: The Case of Japan

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I. Bodies and Authorities in Charge of Protecting Constitutional Rights and Freedoms

(1) Courts

General function

Article 76 of the Japanese Constitution states, "The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law." Article 81 provides, "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." As these articles clearly state, the courts are the primary institutions to which the Japanese Constitution confers the power to protect and guarantee constitutional right and liberty, it is through the actual exercise of judicial power that these rights and liberties are guaranteed. By solving actual civil, criminal, and administrative cases, the courts can protect individuals' rights.

As Article 81 defines, the Supreme Court is the court of last resort with power to judge the constitutionality of any laws through the process of applying those laws to concrete law suits. This article of Japanese Constitution was influenced by the concept of "judicial review" in the American Constitution. The exercise of judicial review of constitutionality is limited to protecting rights and freedoms infringed in concrete cases. It is commonly understood that this power is given not only to the Supreme Court, but also to the lower courts; therefore, the courts as a

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whole have the power to protect and guarantee the constitutional rights and liberties of the people.

The Composition and Organization

The courts consist of the Supreme Court and the lower courts such as the high courts, the district courts, the domestic relations courts, and the summary courts. The Supreme Court in Tokyo, is the court of last resort with the power to supervise the inferior courts. The high courts, established in eight major cities, manage appeals against the first judgement of the district courts. The district courts, which have fifty sites, are the courts of first instances as a general rule. The domestic relations court, set up in the same sites with the same rank as the district court, deals only with domestic problems related to family, succession, juvenile crimes and juvenile delinquents (children under twenty years of age). The summary courts, established in five hundreds and seventy-five sites in our country for the purpose of making trials more accessible, are the courts to manage summary proceedings and expedite civil cases in which a petty sum is demanded, or criminal cases in which a slight punishment may be inflicted.

As a rule, a three-trial system has been adopted. A person who objects to the first judgement can appeal to a second, higher court. If he or she is dissatisfied with second trial judgement, they may make another appeal to a third court (which is the Supreme Court in most cases.) By providing for careful consideration, this system is thought to be an important basis for protecting the people's rights and liberties.

Constitutional Law, Article 76 clause 3 states, "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws," thereby protecting the independence of the judicial power. This fundamental rule guarantees that each judge shall be independent from the influence of other national powers, public pressure, and the influence of other judges, and that he or she must try the case considering only the Constitution and the laws. By this means, it

attempts to ensure the fairness of justice. For example, in 1969, when one district court chief judge wrote to another judge advising him to hold in favor of the authorities. (The Ministry of the Agriculture and Forestry), it was cited as an example of intervention against justice. This particulr incident was quite exceptional, and, in general, the basic principle of independence is adhered to. Moreover, the Constitution, by substantially establishing the independence of the judiciary, guards the position of judges (Article 78 says "Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties"). The Constitution, Article 77, invests the Supreme Court with the power to make rules under which it may determine the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs. The rule-making provision is a means of strengthening the independence of the courts. The Supreme Court and the infeior courts are vested on equal terms with the power to control and manage judicial employees and the institution itself.

The Supreme Court consists of one chief judge and fourteen other judges. In total, there are 2670 judges (1360 judges, 609 assistant judges and 791 summary court judges). According to the 1981 statistics there were about 240,000 civil and administrative cases which reached the courts and about 140,000 criminal cases which resulted in trials. It is clear that the number of judges is low in comparison with the number of the cases, so the judges are overworked.

Since the defeat of World War II, when the old Supreme Court (the *Taishinin)* was abolished and the present Supreme Court incorporating the concept of judicial review was founded, there has been a marked distinction between the Supreme Court and the lower courts. During this approximately forty-year period only four times has the Supreme Court found that a law was unconstitutional, while the lower courts have taken a more positive stance in regard to the protection of constitutional rights and in numerous cases they have declared

unconstitutionality.

The Supreme Court has assumed a consistently negative attitude and has narrowly limited the extent of judicial review because of deference towards the legislature and excessive respect towards administrative first decisions. While the theoretical content of constittional decisions has made progress, the actual process of judicial reviews needs to become more aggressive in order to perform the constitutionally mandated duty of protecting human rights.

(2) The Administrative Agency

Article 76 of the Constitution provides "nor shall any organ or agency of the Executive be given *final* judicial power." However, executive administrative agencies while not having the power to make final decisions, can, in the pre-trial period, make judgements on the condition that if their decision is found to be unsatisfactory, it may be appealed to the court for a final decision. This is regulated by Courts-Act article 3, clause 2. Consequently, the Administrative-Discontent Investigation Act provides the procedures by which citizens can complain and appeal for a reinvestigation to the authorities concerned (or to any other authorities) about any action or omission of a public authority. In addition to this general administrative process, the administrative organs which can pass judgement in quasi-judicial proceedings are the National Personnel Authority, the Fair Trade Commission, and the Election Supervision Committee.

(3) Prosecutors

A prosecuting attorney is a national agent who is solely invested with the power of prosecuting criminal cases, and investigating any violations of law that are deemed necessary. The independence of prosecutors from other state agencies is considered crucial for protecting the constitutional rights of individuals because of the very nature of the power that a prosecutor possesses. One of the important functions of a prosecutor is to initiate jurisdictional actions to protect and remedy the constitu-

tional rights and freedoms infringed by crimes. If the actions of prosecutors are influenced by other state authorities, human rights and the independence of judicial power in criminal cases will be seriously damaged.

In Japan, therefore, the Office of Prosecutors has a special position in the Japanese government organization, different from other governmental agencies, although the office itself belongs to the administrative branch. The Minister of Justice can control and supervise budgets and accounts, some personnel affairs, and daily clerical works, but he is not allowed to directly influence the handling of each case. The individual prosecutor does not rely on the power transferred from the Minister of Justice or Attorney General (Chief of the Supreme Public Prosecutor's Office). In some instances, the Minister of Justice can influence them indirectly through the Attorney General. However, as a general rule, each prosecutor is an independent organ that can make decisions on prosecuting affairs, such as the investigation of cases and judicial actions. It can be sid that each prosecutor makes decisions and declares them to the public while representing the state's will. The Office of Public Prosecutors consists of such independent attorneys and it is a unique agency that maintains its firm independence from the Ministry of Justice, its upper governmental organization.

In order to guarantee such a unique position to each prosecutor, the office is firmly protected. He or she may be dismissed only when judged to be incapable of performing official duties because of such reasons as physical and mental incompetence or inefficiency. However, this decision can be made by the appointer only after an examination and a decision made by the "Screening Committee for Prosecutors," an independent committee which consists of eleven members, such as Diet members, prosecutor, judges, private attorneys, officers of the Ministry of Justice and members of the National Academy of Science. Currently, there are 2,096 of such prosecuting attorneys, and 922 prosecuting secretaries who support attorneys. According to the statistics of 1985, the Office of Prosecutors managed 4,538,000

suspects. Therefore, the number of prosecuting attorneys is apparently very small for such a large workload. Moreover, the recent gradual increase in international crimes and high technology crimes has put additional burdens on prosecuting attorneys so that their overworks are clearly recognized.

(The Committee of Prosecution Examinors)

The Committee of Prosecution Examinors is another unique organ in Japan which has the power to check the action of prosecutors. Established in 1948, the committee checks the cases that were not prosecuted and examines if the prosecutor's decision was appropriate or not. The Committee of Prosecution Examinors consists of members elected by lottery from among the electorate, placing the prosecutor's office firmly under the public will. It has been pointed out that this system does not function very well because that the decision of the committee is not vested with any legal binding force. There have been some cases, however, where this committee's opinions changed the original prosecutors' decisions not to prosecute. Many of those cases were related to public interests, for instance, corruption, the misfeasance of civil servants, and the violation of electoral laws. The system, therefore has contributed greatly to the promotion of democracy by focusing the people's will on prosecuting abuses.

II Remedies

When rights and liberties have been restricted, Article 32 of the Japanese Constitution provides, "No person shall be denied the right of access to the courts." The first classification of who has the right of access is a natural person, who is entitled to the fundamental human rights in chapter 3 of the Constitution. Primarily this refers to people who possess Japanese nationality; however, there are certain exceptions, e.g. the Emperor and members of the Imperial Household. The Emperor, partly because of his position as hereditary symbol of the State, has certain fundamental rights restricted. Likewise, the members of the

Imperial Household are restricted in proportion to their intimacy with the Emperor, because of this intimacy and also since in some cases they have the title to succeed him. In addition, certain convicts necessarily have certain rights restricted as well as public officials who are engaged in certain legal public duties. Their rights are restricted, only to the extent reasonable to realize their special aim. As a rule, foreigners have their fundamental human rights protected, but they don't enjoy certain rights like voting, choosing and dismissing public officials, etc.

The second type who has access to the courts is the legal person. With the advance of capitalism, the activity of the legal person has become indispensable. With the exception of certain human rights which only actual individuals are entitled to, the legal person tends to enjoy most constitutional rights. On the whole the category of who is enabled to insist on a remedy for human rights violations to the organs for protecting these rights has been broadened. As regards civil or administrative cases, anyone may bring a suit, but in criminal cases, public prosecutors monopolize the public actions except in certain cases, such as violation of privacy, where it is necessary for the victim or another person other than the victim to bring a suit.

III Bills or Acts which are Examined as to their Correspondence to Constitutional Rights

Article 81 of the Constitution provides that the object of judicial review is any law, order, regulation or official act. The scope covers not only the substantial content but also the procedures of the laws, orders, regulations and official acts. First of all, "any law" includes those laws enacted by the Diet as well as the ordinances of local public assemblies. "Order" is the legal form produced by the administration, for example a government ordinance of the Cabinet, each Minister's ministerial ordinances, as well as the orders of the heads of the local public entities. "Regulation" is a legal form enacted independently such as the regulations of the House of Representatives, the House of Councillors and the Supreme Court. "Official act" mainly consists of

the acts of the executive as well as the Diet, court and local public entities. However, in order not to interfere with the autonomy of the legislative branch, judicial review is not extended to cover certain acts of the Diet such as judging disputes related to the qualifications of its members, bills presented punishing its members and internal parliamentary proceedings, arguments and decisions. As for the courts, their actions such as the issuing of warrants, are subject to judicial review.

Since Article 81 provides nothing about treaties, some scholars recognize them as legitimate objects of judicial review while others deny it. However, even those scholars who argue that a treaty, itself, falls outside the scope of judicial review, recognize that the laws which are enacted to support the treaties may be examined as to their constitutionality. In such cases while the particular law may be judged to be unconstitutional and thus void, the treaty itself cannot be directly addressed. The Supreme Court has ruled that serious political questions, such as the Security Pact between Japan and the United States, cannot be the object of judicial review unless it is clear and evident at a glance that there is a case of unconstitutionality. Contracts, concluded by private persons, may be declared void if they act against "public order" (the Civil Law, Article 90). Therefore, if legal actions result in the violation of basic human right, they may be declared void, because of the violation of "public order", thus preserving these rights.

It is taken for granted that criminal violations of the rights and freedoms by private persons are punishable in accordance with the criminal laws. Contracts, concluded by private persons, may be declared void if they violate fundamental human rights or act against "public order". Legal actions that tend to corrupt public order and morals may be declared void if they will result in the violation of basic human rights, thus preserving these rights.

IV. Sanctioning the Violations

When the Supreme Court exercises its power of judicial

review and rules a law, which regulates or touches upon constitutionally guaranteed rights and freedoms, to be unconstitutional, that particular law, as far as the actual case is concerned, becomes null and void. In this way, if dispositions are found to be unconstitutional the court is, in general, able to cancel them. However, if cancellation will result in a conspicuous conflict with public welfare, the court can, while admitting its unconstitutionality, allow it to stand and reject the claim. For example, the Supreme Court ruled that the unequal distribution of assembly seats resulted in a clear violation of the voting rights of the electorate, and therefore, the provision which regulated the distribution was found to be unconstitutional. However, at the same time, it was declared that any elections having already been held in accordance with this provision should not be declared void, on the grounds that if they were to be declared void, this would result in severe legal and political confusion which might harm publicwelfare. In this case, the court's decision was limited to finding that the actual provisions were unconstitutional.

A lower court has held that unconstitutional acts as well as unconstitutional omissions by the legislative branch are subject to the State Reimbursement Act. Thus, the courts may order reimbursement if it can be shown that unconstitutional actions or omissions led to signficant damage to a person's welfare.

V. The Limits of the Constitutional Pretection

(1) Extraordinary Limits

In the Japanese Constitution there is no provision for a "state of emergency" which gives administrative agencies the extraordinary power to limit the constitutional rights of individuals. According to Article 54, clause 2, when the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session. In other words, ordinarily when the House of Representatives is dissolved, the activity of the whole Diet must cease. How-

ever, if there is urgent necessity, e.g., a budgetary fiscal necessity, the Cabinet can convoke an emergency session of the House of Councillors to deal with the problem. Such "emergency sessions" were held only twice in post-war Japan.

Here the provision of Self-Defense Law 76 give rise to a question. The law provides that the Prime Minister may order the dispatch of self-defense forces, with the recognition of an emergency situation by the Diet or the House of Councillors in an emergency session, in case he or she determines that the country was attacked or is in imminent danger of attack by a foreign military power and the self-defense force is needed to defend the people. Since Article 9, clause 2, of the Japanese Constitution prohibits the maintaining of any military power, most constitutional scholars insist on the unconstitutionality of the self-defense law and this introduces a very important theme in constitutional debate. Under existing circumstances, if the dispatch of the Self-Defense force is admitted by an emergency session of the House of Councillors, self-defense law 103 is automatically invoked and applied. Article 103 provides that the prefectural governors or the Chief of the Self-Defense Agency may, following the dispatch of a self-defense force, control the hospitals and clinics, make use of lands, houses and commodities. The expropriation of commodities may be ordered to traders concerned with production, sale, and transport.

Though there are no penal regulations in case of disobedience, and the application is limited to the traders concerned, it is clear that the rights and freedoms of people may be substantially restricted. This is a special limit to the rights and freedoms which may occur as a result of the emergency session clause in the Constitution.

(2) Ordinary Limits

The Constitution article 11 provides "These fundamental human rights guaranteed to the people by the Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights." Article 97 has a provision with the

same meaning. Since these fundamental human rights existed before the nation was founded, they should be protected against violations and, furthermore, national powers such as the legislature, the judiciary, and the administration cannot infringe on these rights.

The Constitution, Article 13, specifically incorporates this principle as it relates to the national powers by providing that "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other government affairs." The proposition deduced from this Article is that as a general rule the national powers should respect fundamental human rights to the greatest extent possible with the only exception being when the exercise of these rights would be clearly harmful to public welfare. Therefore, the reservation of the laws that the legislature may restrict the fundamental human rights guaranteed by the Constitution, is never allowed. Moreover, public welfare means the benefits of community social life beyond the specific private benefits, therefore, it is not meant to imply some abstract good of a "whole" which is different from each person's own interests.

In general, in order to enjoy peaceful social co-existence, it is necessary to make certain adjustments, since conflicts and contradictions concerning rights and interests do arise. When conflicts arise they must be arbitrated so that the individual's human rights and freedoms are restricted only when they infringe upon public welfare.

Now, since we have admitted the necessity of certain restrictions, the most important criterion for deciding the restriction is the rule of proportion. That is, even if human rights must be limited for the sake of public welfare, any limitations must be the minimum necessary to remove the dangers threatening public welfare. The second is that the reasonableness of a restiction against human rights must be subject to review. Human rights shall not be limited hastily in a case concerning public welfare, but there must be clear and reasonable grounds before human rights may be

restricted, and the means of restriction must also be clear and reasonable. The third criterion is that, in a constitutional suit inquiring about the unconstitutionality of a law which restricts human rights, the responsibility to prove whether the restriction of these rights is constitutional or not, rests with the national powers, not the people.

The Japanese Constitution protects the rights of the people with the thirty-one articles in Chapter Three. The contents of the rights extend to freedoms, fundamental human rights to live, benefit rights, and the franchise. The most general rule of the several criteria is the so-called "double standards." That is to say: While on the one hand, as regards economic freedoms such as the right of property, broad political discretion is allowed to the legislature to limit and restrict certain freedoms, and these restrictive laws are assumed to be constitutional; on the other hand, restrictions to spiritual freedoms such as the freedom of expression are assumed to be unconstitutional. The fact that Article 21 of the Consitution protects freedom of expression and prohibits censorship, while Article 22 clause 1 and Article 29 and clause 2 clearly define restrictions of economic freedom for the protection of public welfare, illustrates the rule of "double standards" on the protection of human rights in the Japanese Constitution.

When we investigate this question in detail, we see that rights and freedoms that do not violate another person's human rights may never be restricted: freedom of thought and conscience in Article 19, freedom of religion in 20, academic freedom in 23, and personal liberty such as freedom from bondage of any kind or involuntary servitude in Article 18, and freedom from the infliction of torture and cruel punishment in Article 36. Furthermore, freedom of expression is so indispensable to the democratic form of government that it is given the preferred position; so that this freedom is guaranteed to the greatest extent possible and shall not be restricted unless its exercise causes a particularly clear danger to public welfare. That is obvious, seeing that there is a provision for the prohibition of censorship and that the "clear and present danger" criterion has been admitted in the precedents.

The protection of the fundamental human rights to live, composed of the right to welfare in Article 25 of the Constitution, the right to receive an equal education in that of 26, and the right to work in 27, has a very important legal value. They were included to effectively guard these freedoms in modern times, and to reflect a basic trait of the modern civic constitution.

The directives that restrict the economic freedoms concerned with human rights to live are appraised constitutionally, and given shape in Article 22 clause 1, and 29 clause 2, which restrict economic freedoms for the purpose of protecting public welfare. Therefore, public welfare includes the concept of the protection of human rights to live, and for the realization of this purpose, wide political discretion is given to the legislature. It goes without saying that actions of the legislature which are abusive beyond absolutely necessary limits, and which restrict rights and freedoms unnecessarily, are never admitted in the Constitution.

Concerning the discretion of the legislative branch over the human rights to live, the judgement of the Supreme Court and the common interpretation of legal scholars are markedly different. The Supreme Court has set precedents allowing the legislative branch very wide discretion in legislating laws that touch upon the human rights to live. In the contrast, academic circles hold a view that the discretion of the legislative branch must be limited by admitting the legal claim of individuals' rights. Those two views are sharply opposd to each other.

The Constitution, Article 31 provides, "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." In this Article the restriction or deprivation of rights and freedoms means criminal penalty; therefore, its main object is directed toward criminal procedures. However, in present times, this Article is also applied to administrative procedures, since we must consider the protection of rights and freedoms against the background of an enlarged and strengthened administration. Procedures must be provided for by law; furthermore, the substance

of procedural laws must also be proper and suitable. This protects the fairness of the procedures, as a whole. In this way, the principle of legality (Nulla poena sine lege, nullun crinen sine lege) is also protected.

The aforesaid is a description of the usual restrictions upon the protection of human rights. I think the more the study of the criteria of judicial review on the each human right advances, the more precisely each rule, standard or criterion for the restriction of human rights will be established.

Article 9 renounces any kind of war and prohibits the maintaining of any military power. This is the epoch-making constitutional principle of pacifism which has been established for the first time in the world. As is generally known, war is the biggest and most concentrated infringement on human rights. Therefore, the constitutional protection of human rights is almost completely realized by Article 9 in the Japanese constitution. It will, however, require a separate treatise to detail the particulars of this issue.

Notes;

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