OSAKA UNIVERSITY LAW REVIEW No. 64 (February 2017) 1-24

Naturalization as a Constitutionally Protected Institution: Revisiting Article 22.2 of the Japanese Constitution

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Abstract

Naturalization, as the legal process whereby a non-national living in a country may acquire citizenship of that country, has never attracted particular attention by most scholars of constitutional law in Japan. However, naturalization has a significant impact in the protection of foreigners' fundamental rights and in the enhancement of the political accountability of democratic institutions. This research was aimed at providing naturalization with a constitutional pedigree by approaching it as a constitutionally protected institution. In doing so, the article analyzes the traditional concept of 'institutional guarantee' and explores adaptability to the field of fundamental rights of different categories of 'capacity' as used in the sphere of private law. Finally, the article revisits the conventional interpretation of Article 22.2 of the Constitution by challenging the, as of now, uncontroversial assumption that the right to abandon one's nationality only matters to Japanese nationals. Thus, by proposing a new construction of Article 22.2 as the right to have access to Japanese citizenship, the article tries to reconcile the wide discretionary powers granted to the Diet to determine the conditions to be a Japanese national (Article 10 of the Constitution) with the constitutional necessity for a mechanism that allows non-nationals to become fully fledged members of the polity, as a result of having acquired close ties with it. As an Appendix, this paper also includes a partial translation of the Japanese Nationality Act, i.e., Articles 4-10, which regulate the rules of naturalization under Japanese law.

1- Introduction

As a foreigner who has lived in Japan for more than a decade, one of the most regrettable features of the Japanese constitution is its lack of any reference to the status of non-nationals (foreigners and stateless persons), particularly in regard to the protection of their fundamental rights. The Constitution is totally

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silent[1]. By no means however, does this silence imply that the Japanese constitution does not guarantee rights and freedoms to foreigners who live in, work in, or simply visit Japan. On the contrary, most constitutional law scholars and the Supreme Court itself agree that the Constitution also protects fundamental rights to non-nationals. To support this opinion, three arguments are generally put forward:[2]

1. The fundamental rights protected by the Constitution have a pre-constitutional nature, and its guarantee therefore precedes the existence of the State.
2. The constitution itself is based upon the principle of international cooperation.
3. It has become a widely accepted principle of international law that countries should not discriminate between nationals and non-nationals when protecting fundamental rights[3].

If the truth be told, some early interpretations of the Japanese constitution rejected the idea that non-nationals were also entitled to the protection of fundamental rights. These opinions relied on a literal approach to the language of the Constitution, which established, in Chapter 3, a catalogue of the "Rights and

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1) The 'framers' of the Japanese Constitution did not inadvertently omit any reference to the status of non-nationals. In the constitutional draft prepared by SCAP−the document which served as a model for the current constitution−Article XIII determined that "all natural persons are equal before the law", and Article XVI, even more clearly, stated that "aliens shall be entitled to the equal protection of law". It also bears noting that the document known as "Reform of the Japanese Governmental System" (SWNCC-228), issued on January 7, 1946 to describe the policies of the US government regarding the overhaul of the Japanese constitutional system, recommended the inclusion of an "explicit provision in the Constitution for the guarantee of fundamental civil rights both to Japanese subjects and to all persons within Japanese jurisdiction". Regarding why these references to non-nationals were dropped from the constitutional draft adopted by the Japanese government, see K. Takayanagi (*et al.*), *The Drafting Process of the Japanese Constitution*『日本国憲法の制定過程』Yuhikaku (1972) pp. 275 and 431 and R. A. Moore and D. L. Robinson, *Partners for Democracy* Oxford (2002) pp. 129-130.

2) M. Gotô, "Human Rights of Foreigners"「外国人の人権」in O. Makoto and K. Ishikawa (eds.), *Issues on Constitutional Law*『憲法の争点』Yuhikaku (2008) p. 74.

3) *Cf.* the International Covenant on Civil and Political Rights, in Article 2.1, and the International Covenant on Economic, Social and Cultural Rights, in Article 2.2, determining that the rights enunciated and recognized by them should be ensured by state parties to all individuals under their jurisdiction without distinction or discrimination "of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Duties of the People"[4].

The first scholarly opinion that also recognized non-nationals as subjects of fundamental rights looked at the language of the bill of rights to determine the scope of protection. Popularly known as the 'wording-approach' (文言説), this interpretation focused on the different language used by different provisions in the bill of rights, some of which guaranteed particular rights to "every person" (何人)[5], and some of which only protected certain rights to "the people" (国民)[6]. Consequently, the argument goes, the former category of provisions is deemed granted to any person regardless of nationality, whereas the latter only applies to Japanese nationals[7]. The rationale behind this opinion is straightforward, and holds reasonably well in most cases. However, critics contend that the wording-approach leads to contradictions, such as the fact that Article 22.2, which recognizes the 'right to abandon one's nationality' (国籍離脱の自由), is granted to "every person", although the actual subjects of this right are only Japanese nationals[8].

The vast majority of constitutional scholars currently agree that the 'nature' or 'essence' of the fundamental right in question and the status of individual foreigners, should be the criteria to determine which rights are protected for non-nationals and which rights are not[9]. This opinion, commonly known as the 'nature-

4) See, S. Sôichi, *Theory of the Japanese Constitution*『日本国憲法論』Yuhikaku (1949) p. 467. and K. Kojima, *Overview of Constitutional Law*『憲法概説』Ryoshofukyukai (1987) pp. 155-157. These authors assume a negative stance on the issue, but argue that the protection of some fundamental rights could be expanded to also cover non-nationals as a matter of legislative policy, and to the extent that it had become a generally accepted custom among the international community. Y. Hagino, on the other hand, in his *Studies on Fundamental Human Rights*『基本的人権の研究』Horitsubunkasha (1980) p. 64, argues that even though the provisions of fundamental rights are essentially protected only for nationals, they can be applied *mutatis mutandis* to non-nationals as well.

5) Articles 16, 17, 18, 20.1, 20.2, 22.1, 22.2, 31, 32, 33, 34, 35, 38.1, 38.2, 39, and 40.

6) Articles 11, 12, 13, 14, 25, 26.1, 26.2, 27, and 30.

7) T. Irie, *A Reader on the Japanese Constitution*『日本国憲法読本』Umiguchi-shoten (1948) pp. 66-67.

8) N. Ashibe, "The Subject of Human Rights"「人権享有の主体」in N. Ashibe (ed.), *Constitutional Law II- Human Rights (1)*『憲法 II 人権(1)』Yuhikaku (1978) p. 9.

9) The dominant constitutional doctrine identifies the following fundamental rights as not protected to non-nationals: voting rights,−both in national and local elections−; the right to enter and to re-enter the country; the right to an abode; social rights (however, in reality, most social rights are protected to foreigners as a matter of legislative policy), and the right to have access to public service on general terms of equality. Regarding freedom of expression on political affairs it is considered protected, but subject to certain restrictions.↗

approach'（性質説）was also adopted by the Supreme Court in its landmark decision known as the *Mclean Case*. The court argued *"It should be understood that the guarantee of fundamental rights included in Chapter Three of the Constitution extends also to foreign nationals staying in Japan except for those rights, which by their nature, are understood to address Japanese nationals only."*[10)]

Of course, it is one thing to agree that the Constitution guarantees fundamental rights to non-nationals, and a different thing to conclude that the constitutional document makes no distinction between citizens and foreigners. Obviously, the scope of constitutional protection granted to non-nationals is narrower, in Japan as elsewhere, than that granted to Japanese nationals. As a result, the only path for a non-national to achieve full protection of fundamental rights is to become a national, and it is in this respect where naturalization comes into play.

Thus, naturalization, as a way of acquiring citizenship, plays a decisive role in protecting the fundamental rights of non-nationals. Nevertheless, as a matter of course, a thorough investigation of the constitutional foundations of naturalization has been neglected by most constitutional academics of constitutional law. To be sure, it is not uncommon to find accurate descriptions of the basic rules of naturalization in the mainstream constitutional literature[11)]. However, by so doing, scholars tend to see naturalization as merely being one of different ways of acquiring Japanese citizenship, and furthermore simply set up by legislative fiat. And yet, could not naturalization be approached from a genuine perspective of constitutional law? I will try to explore this idea in this paper, and in doing so, I will address four interrelated questions whose answers, I believe, may evoke suggestive insights into the mainstream of Japanese constitutional doctrine:

- Does naturalization exist as a simple legislative choice, or as a constitutional command?
- Can naturalization be understood as a constitutionally protected

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↘See Y. Watanabe, J. Shishidô, K. Matsumoto, and T. Kudô, *Constitutional Law I: Fundamental Rights*『憲法 I 基本権』Nihonhyoronsha (2016) pp. 37-40.

10) Ruling of the Supreme Court (Full Bench) of 4 October, 1978 in *Minshû* vol. 32 no. 7 p. 1223.

11) See K. Satô, *Theory of the Japanese Constitution*『日本国憲法論』Seibundo (2013) p. 109. This author also distinguishes between naturalization *lato sensu* as any way of acquiring nationality after birth, and naturalization *stricto sensu* as the legal process regulated in Articles 4-10 of the Nationality Law (see Appendix).

institution?

- What are the chief functions to be fulfilled by naturalization from a constitutional point of view?
- Is it appropriate to construe Article 22.2 of the Constitution as a provision that guarantees non-nationals a right to have access to Japanese citizenship?

Article 10: Is naturalization a statutory choice or a constitutional command?

Naturalization can be defined as the legal process whereby a non-national living in a country may acquire the citizenship of that country. Naturalization is ubiquitous all over the world as a legal mechanism, although the rules of naturalization vary greatly from country to country. Naturalization may occasionally be conferred by statutory decision; sometimes it may involve an application by the non-national and approval by administrative authorities; most countries usually establish a minimum legal residency requirement, and may specify other requirements such as knowledge of the national language, an oath to obey and uphold that country's laws; and at times, a renunciation of any other citizenship held by the applicant. At any rate, no matter how strict conditions might be, virtually no country in the world completely closes the path of nationality to all foreigners.

That being said, the question arises as to whether naturalization exists *ope constitutionis*, viz., as a command of the constitution, or conversely, it has been established *ope legis*, viz., by decision of the legislature. Indeed, my interest in the topic emerges from the simple question, –admittedly, more theoretical than practical– on whether the National Diet could do away with the naturalization process altogether, or if, on the contrary, naturalization is so embedded in the constitutional system that it must somehow be regulated.

Let us address the question by having a look at what the Constitution says on the matter. The Constitution, in Article 10, determines that "the conditions necessary for being a Japanese national shall be determined by law". Thus, the Constitution vests the legislature with discretionary powers to set out a legal framework on nationality issues[12]. The National Diet has addressed the implementation of Article 10 by enacting the Nationality Law.

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12) The Meiji Constitution followed basically the same principle when it determined in Article 18: "The conditions necessary for being a Japanese subject shall be determined by law".

Prima facie, it can be asserted that the Constitution has left ample room for the legislature to elaborate on a comprehensive nationality scheme. These discretionary powers though, do not amount to *carte blanche* on the issue, so the National Diet is expected to respect certain constitutional principles. A brief account on the historical development of the Japanese Nationality Law will suffice to see how the 'general will', as represented by the National Diet, is ultimately bound by constitutional−and even international law−constraints[13].

In parallel with its constitutional history, Japan has had two different frameworks that have regulated Japanese nationality. The 'old' Nationality Law was enacted on April 1, 1899, and subsequently amended in 1916 and 1924. After Japan's defeat in WWII, the former Nationality Law, with the advent of the new Constitution, was replaced with a 'new' one passed on September 1, 1950. The necessity to adapt its content to a substantially different constitutional system made it easier for the National Diet to re-enact a new Nationality Law rather than having to amend the old one. Three features can particularly be highlighted in the old Nationality Law that rendered it incompatible with the new Constitution.

1. The former law narrowly limited the circumstances under which Japanese citizenship could be abandoned, and even if possible, authorization by the Ministry of Justice was always required. Since the new Constitution, in Article 22.2 granted the right to abandon one's nationality, the current system establishes that those nationals who obtain a new citizenship will abandon their Japanese citizenship.
2. The old Nationality Law had many provisions based upon the institution of 'household' (家制度), which were at odds with the principles of individual dignity and equality of sexes as guaranteed by the Constitution in Article 24. For instance, under the former system the nationality of a married woman should follow that of her husband, according to the principle of the family unit. Marriage and divorce under the new law no longer affect the wife's nationality.
3. The old Nationality Law banned naturalized Japanese nationals from becoming a minister of the state or any other high status public official. Following the principle of equality, as established by the new Constitution

13) As a brief account of the historical development of the Nationality Law, see H. Ooyama, "Multiple Nationality and the Principle of Single Nationality"「重国籍と国籍唯一の原則」in *Rippo to Chosa* No. 295 (2009) pp. 108-111. Retrieved at http: //www. sangiin. go. jp/japanese/annai/chousa/rippou_chousa/backnumber/2009pdf/20090801103.pdf

in Article 14.1, this restriction was not included in the current law.

The Nationality Law underwent important reforms in the 1980s, when Japan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CEDAW, in Article 9.2, determined "States Parties shall grant women equal rights with men with respect to the nationality of their children." Since the Nationality Law, in Article 2.1, only granted Japanese nationality by birthright to children born to a Japanese father, Japan's government was bound to amend the provision so as to also include the mother[14]. However, since this amendment was expected to increase the number of Japanese nationals holding more thanone citizenship, new rules were introduced to avoid multiple citizenship.

More than two decades later, a new amendment of the Nationality Law was prompted by a Supreme Court judgment of July 4, 2008[15]. The Court, declared that Article 3.1 of the Nationality Law ran afoul of the principle of equality before the law as guaranteed by the Constitution in Article 14.1. Article 3.1 of the Nationality Law used to make a distinction in the requisites to acquire Japanese nationality between a) children born out-of-wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth, (for them to become Japanese nationals, they had to acquire the status of children born-in-wedlock through 'legitimation', viz., through the marriage of their parents), and b) children born out-of-wedlock to a Japanese mother and a non-Japanese father, as well as children born out-of-wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father before birth (for them legitimation was not required to become a Japanese national). As a result, Article 3.1 was amended on December 15, 2008, and currently any minor acknowledged by a Japanese father is eligible to acquire Japanese citizenship.

As far as the main topic of this paper is concerned, two sections in the Court's opinion deserve particular attention.

First, regarding Article 10 of the Constitution, the Court argued: *"since nationality is the qualification for being a member of a particular state, and when specifying the requirements for acquisition or loss of nationality, it is necessary to take into consideration various factors concerning each state, including historical*

14) The Nationality Law is premised upon the principle of *ius sanguinis; ius soli* principle has only been adopted to prevent children from becoming stateless when they are assumed to have been born on Japanese soil and their parents are unknown or they have no nationality at all.

15) Ruling of the Supreme Court (Full Bench) of 4 June, 2008 in *Minshû* vol. 62 no. 6 p. 1367.

backgrounds, tradition, and political, social and economic circumstances, the determination of the content of these requirements should be left to the discretion of the legislative body. However, if any distinction caused by the requirements under a law concerning acquisition of Japanese nationality that are specified based on such legislative discretion amounts to discriminatory treatment without reasonable grounds, such a situation, needless to say, raises a question of violation of Article 14.1 of the Constitution."

Thus, it is apparent that the Supreme Court believes that those discretionary powers vested in National Diet by Article 10 of the Constitution are not unlimited but bound by the Constitution itself.

Second, when assessing whether the requirement of legitimation to grant nationality to children acknowledged after birth by a Japanese father was unconstitutional, the Court first affirmed that the purpose behind Article 3.1 was not against the Constitution, since here the legislators were simply trying to determine whether there were 'close ties'（密接な結びつき）between certain individuals and Japan. However, the Court concluded, requiring the Japanese father to marry the non-Japanese mother in order to grant Japanese citizenship to their child born out-of-wedlock, was no longer a reasonable means to determine the exisfence of 'close ties' between the child and Japan, "in the light of the changes in social and economic circumstances in Japanese society, where the realities of family life and parent-child relationships have become so diverse".

The idea of 'close ties' between states and individuals as a litmus test to determine who is entitled to become a national is particularly insightful because the Court seemed to be arguing that the Constitution commands the legislature to grant Japanese nationality to those who are closely tied with the national community, even if ultimately the lawmakers have ample leeway in determining the criteria to verify the 'closeness' of such ties. To put it another way, the Court arguably concluded that individuals who had close ties with Japan should be entitled to Japanese nationality. Hence, if this interpretation is correct, naturalization must be deemed a built-in element of the constitutional system, since it is the mechanism by which citizenship is granted to those who have come to have close ties with Japan. In short, naturalization is to be regulated with a great deal of discretion on the legislature's side, although its very existence has to be respected by it.

Thus, this conclusion serves as an answer to the question on the heading: naturalization has been established *ope constitutionis*. To further explore this idea, the concept of constitutionally protected institutions, or 'institutional guarantee' will be examined in the next section.

2- Naturalization as an 'institutional guarantee'

The concept of *institutionelle garantie* was originally developed as a device to interpret some of the provisions of the Weimar Constitution (1919)[16]. It was introduced in Japan and translated as 'institutional guarantee'（制度的保障）. The term though, can be misleading because the idea of an 'institutional guarantee' in its original understanding did not imply that there was something that should be 'institutionally' or 'systematically' guaranteed by the Constitution, but that the Constitution should protect particular 'institutions' (e.g., churches and universities) from the action of the legislature[17].

An standard account of the Japanese version of the concept can be found in N. Ashibe's *Constitutional Law* (6th Edition), which is probably the most popular textbook on Japanese constitutional law[18]. Ashibe's approach to the concept of an institutional guarantee can be summarized in three basic ideas:

1. The Constitution, along with provisions which are meant to protect particular fundamental rights, also includes provisions that protect certain institutions.
2. The legislature cannot legislate in a way that may infringe on the 'core content' of those institutions.
3. For a particular system or institution to be considered as an institutional guarantee, its core content has first to be clear, and second the relationship between the institution and a particular fundamental right must be close and tightly knit.

Ashibe then goes on to give examples of institutional guarantees by referring to the principle of 'state secularism' (Articles 20.1, 20.3, and 89)[19], the principle of 'university autonomy' (Article 23)[20], the system of 'private property' (Article 29.

16) Carl Schmitt can be considered as the first theorist of the concept. According to Schmitt, the constitution, along with subjective rights, contains provisions to guarantee that certain institutions cannot be eliminated by lawmakers. There are, therefore, institutional guarantees with and without subjective rights attached to them. *Cf.* Carl Schmitt (translated by Jeffrey Seitzer), *Constitutional Theory* Duke University (2007) pp. 208-211.

17) Note that the Japanese word *seido* can be rendered into English either as 'system' or as 'institution'. Although both words are not synonyms –in fact, from an etymological point of view it could be said that a 'system' (from the Greek verb *synhistanai*, literally 'to set together') is made up of various 'institutions' (from the Latin verb *instituere*, literally 'to set up something within'); in this article, I will be using both terms indistinctively, unless otherwise warranted.

18) N. Ashibe, *Constitutional law* (6th Edition)『憲法（第六版）』Iwanami Shoten (2015) p. 86.

19) N. Ashibe, *Constitutional law… op.cit.* p. 159.

20) N. Ashibe, *Constitutional law… op.cit.* p. 171.

1)[21], and the principle of 'local autonomy' or 'home-rule' (Article 92)[22].

When dealing with certain issues on fundamental rights, on the other hand, courts have also drawn on the idea of institutional guarantees. The most representative instance by the Supreme Court is perhaps in its ruling known as the *Ground-breaking Ceremony Case* of July 13, 1977[23]. According to the Court's opinion on the principle of state secularism, "the provisions on religion-state separation are essentially an institutional guarantee; that is to say, they do not directly guarantee freedom of religion *per se*, but attempt to guarantee it indirectly by securing a system in which religion and the State are separate". Also, in its ruling of March 8, 1989, known as the *Repeta Case*[24], on the principle of 'public trials' as established by the Constitution in Article 82, the Court stated that even though "the gist of the matter is to guarantee the conducting of hearings open to the general public in a fair manner as an established system, thus in turn securing the confidence of the people in regard to the trials", the constitutional provision does not include a "right to observe trials, nor does it guarantee the right of spectators to take notes in the courtroom".

It can be argued that, as used by the prevailing constitutional doctrine and by the Supreme Court, the concept of institutional guarantees suffers from some shortcomings.

First, the concept is not univocal, but presents multifarious content. Thus, under the umbrella of 'institutional guarantee', we can identify up to three kinds of constitutional provisions: a) provisions within the bill of rights, such as Article 20 (freedom of religion/state secularism), which recognize a fundamental right and establish an institutional guarantee in a parallel way, b) provisions such as Article 23 (academic freedom/university autonomy) and Article 29 (right to property/system of private property), also within the bill of rights, where the institutional guarantee stems directly from the fundamental right itself, thereby forming an integrated whole, and c) provisions such as Article 82 (the principle of public trials) and Article 92 (the principle of local autonomy), outside the bill of rights, where the idea of 'institution' seems to be resorted to in order to avoid having to consider these provisions as individual rights.

Second, even though mainstream scholars localize their discussion on

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21) N. Ashibe, *Constitutional law… op.cit.* p. 234.

22) N. Ashibe, *Constitutional law… op.cit.* p. 367.

23) Ruling of the Supreme Court (Full Bench) of 13 July, 1977 in *Minshû* vol. 31 no. 4 pp. 539-540.

24) Ruling of the Supreme Court (Full Bench) of 8 March, 1989 in *Minshû* vol. 43 no. 2 p. 92.

institutional guarantees within the arena of fundamental rights, they use as examples in order to illustrate the concept provisions outside the bill of rights that are not directly related to any fundamental right in particular.

Finally, the Supreme Court has approached the concept pragmatically, basically as a means to narrow the scope of standing-to-sue against prospective constitutional litigation. Thus for instance, when the Court argues that the system of state secularism is an 'institutional guarantee' and not *per se* a constitutional right, in practical terms, it is closing the door against individuals trying to sue the state should a public authority act in a way that may contravene the principle. As a matter of fact, the Court has never explained what the content of a particular institution is, nor has it ever bothered itself to provide a general theory on institutional guarantees.

As a result of these shortcomings, the concept of institutional guarantees has come under criticism from some quarters[25]. Some authors have come to see the concept as redundant and totally dispensable as an interpretive device. Critics argue that it is obvious that most constitutional provisions need to be somehow 'institutionalized' or 'systematized' to make them effective, but even if we parted with the idea of institutional guarantees altogether, the prevailing interpretation on provisions such as Articles 20. 1, 20. 3, and 23, will substantially remain unaltered[26].

Notwithstanding the criticisms that the concept of institutional guarantees has accrued among certain scholars, the idea of the existence of constitutionally entrenched institutions seems attractive as an explanatory device on the role to be performed by naturalization within the constitutional structure. In short, the concept of institutional guarantee is useful to vest naturalization with a 'constitutional pedigree'. In particular, the notion of an institution's essential core that cannot be altered by the legislators seems to be especially suggestive.

In this sense, as Ashibe puts it, one condition for an institutional guarantee to be regarded as such is that its essential core has to be clear. What then constitutes the naturalization's 'essential core' that cannot be altered by the legislature?

It could be argued that the essential core of any constitutionally protected institution could be defined in functional terms, viz., trying to identify the function

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25) K. Satô, *Theory of the Japanese Constitution… op.cit.* pp. 125-127.

26) M. Akasaka, "Human Rights and the Theory of Institutional Guarantees"「人権と制度的保障理論」in M. Ooishi and K. Isikawa (eds.), *Issues on Constitutional Law*『憲法の争点』Yuhikaku (2008) p. 71.

or functions to be fulfilled by such an institution. Although this statement needs qualification, I admittedly am proposing to take a somewhat 'functionalist approach' to naturalization, although by using a definition of 'function', which is radically different from the modern notion of the concept as developed by Durkheim and others in the field of sociology. Unlike sociologists, who tend to perceive society as an organic whole that transcends the sum of its parts because they are interrelated through 'functional relationships', the method expounded in this paper is avowedly finalist and teleological[27]. It assumes as a central tenet the intuition that legal institutions do exist to serve a particular function−otherwise they would be dysfunctional−and in doing so Thus, my approach welcomes a 'functionalism of means and ends'. This approach is all the more justifiable considering how courts usually exercise adjudication[28]. Judges generally interpret laws according to a function−sometimes manifest and sometimes able to be inferred through a systematic study of the law− intended by lawmakers, thereby adopting an internal point of view. They are not sociologists seeking for some latent function of the law as a social phenomenon.

How can we then define the function or functions to be fulfilled by naturalization as a constitutionally protected institution? To be sure, individuals may make use of a particular legal institution by pursuing different goals. Thus, when a non-national decide to become a naturalized citizen, he or she may expect this decision will serve different functions. For instance, he or she might want to increase his or her work opportunities; he or she might be seeking for more social stability; he or she might want to be entitled to bring family relatives to the country; or he or she might just want to get rid of the risk of deportation once and for all. Acceptable as these functions may be, they are nevertheless particular and contingent and unfit to be considered as normative (and therefore universal) functions for naturalization as a constitutionally protected institution.

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27) The so called 'functional method' is commonly associated with the field of comparative law, although as R. Michaels has pointed out, in reality, there are various −and even contradictory− scholarly approaches that have been labeled as such. This author has identified up to eight different concepts of functionalism across social disciplines, including one that is apt for comparative law, which in reality is an amalgam of the rest. See R. Michaels, "The Functional Method of Comparative Law", in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* Oxford (2006) pp. 340-363.

28) As far as a judicial review is concerned, the previously described judgement of June 4, 2008 is a paradigmatic example of how the Supreme Court deploys a genuine end-and-means analysis when assessing the constitutionality of a piece of legislation.

In this regard I will single out two key functions in naturalization, as its immutable core. Naturalization must serve 1) as a way of granting non-nationals the full capacity to enjoy rights and freedoms guaranteed by the constitution and 2) as a mechanism for correcting democratic deficits.

First of all, naturalization operates as a mechanism by which individuals who are subjected to the jurisdiction of a certain country, but who due to reasons of birth are excluded from a complete protection of fundamental rights, may achieve the full capacity to enjoy all constitutional protections under the same conditions as nationals. I will enlarge on this idea in the following section by analyzing the concept of 'capacity' in the field of fundamental rights.

Second of all, a democratic deficit is usually understood as any situation in which there is a lack of democratic accountability and control over those who govern by those who are governed. As individuals with restricted or no political rights, non-nationals, especially permanent residents, find themselves in a situation where the authorities empowered to pass the laws they are forced to abide by, are not politically accountable to them. Naturalization in this sense allows non-nationals to become fully fledged members of the body politic, thereby correcting this democratic deficit. Hence, naturalization must be considered to be a built-in constitutional institution with a salutary corrective effect on the democratic system[29]. I believe this idea of naturalization as a mechanism to rectify democratic deficits deserves special attention, not only as a constitutional topic, but also within the broader context of immigrant integration policies. However, since an in-depth discussion on the matter exceeds the scope of this work, I will postpone exploring this idea and leave it to further research.

I will conclude the present section by asserting that if naturalization is regulated in such a way that non-nationals cannot realistically expect to gain access to the whole protection of constitutional rights, a systemic condition of formal exclusion from the political process perpetuates. As a result, naturalization becomes 'dysfunctional', raising thereby constitutional issues.

3- Capacity in the field of fundamental rights

Fundamental rights can be understood as a set of freedoms and protections that a legal system recognizes for all individuals under its jurisdiction, regardless of

29) This is particularly the case in Japan, which can be considered the only advanced industrial democracy with a fourth-generation immigrant problem. See E. A. Chung, *Immigration & Citizenship in Japan* Cambridge (2010) p. 3.

any particular background or circumstances[30]. As legal entitlements, fundamental rights are deemed inalienable; they are so inherently attached to individuals that they cannot be taken away from anyone−they cannot be made 'alien'−even if the bearer of the right has agreed to this. Fundamental rights are thus sacred and absolute, although in reality, the particular exercise of fundamental rights might be restricted according to circumstances such as age and legal status. Thus, minors have limited rights to access information so as to protect them from ideas that could have a negative effect on their psychological development; public servants might have their labor rights restricted to preserve the impartiality of the public sector; inmates might be denied their right to vote out of reasons of public interest; and foreigners may have limited access to welfare benefits simply because the state cannot provide for everyone.

In this sense, the ideas of limiting the exercise of rights and of acting in the legal arena through the intervention of a proxy are a staple of the sphere of private law. The concepts of 'legal personhood', i.e., the capacity of bearing legal rights and duties, and 'legal capacity', i.e., the ability of individuals to independently create, modify, or terminate legal relationships have had currency since the classic era of Roman law. A question arises then as to whether we could make use of these categories as analytical devices in the field fundamental rights guaranteed by a constitution.

I have addressed the issue in an essay on the exercise of fundamental rights during the age of minority[31]. There I devised three interrelated concepts to describe how minors may act as subjects of fundamental rights: 1) constitutional personhood, 2) constitutional entitlement, and 3) constitutional capacity[32].

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30) In practical terms, this definition might also hold good for the concept of 'human rights', and, in fact, both terms 'fundamental rights' and 'human rights' are commonly used indistinctively in Japan. The Constitution itself merges both concepts under the category of 'fundamental human rights'. Be that as it may, since the concept of fundamental rights assumes the existence of an operative domestic legal system, I have preferred to use the term 'fundamental rights'.

31) See L. Pedriza, "The Concept of Capacity in Fundamental Right- the Meaning of Minority" 「基本権における『能力』の概念―未成年期の意義―」in M. Sogabe and K. Akasaka (eds.), *Ideals and Development of Constitutional Reform (Vol. 2)*『憲法改革の理念と展開（下巻）』Shinzansha (2012) pp. 599-611.

32) For an equivalent analytical framework, see B. Aláez Corral, *Minoría de Edad y Derechos Fundamentales* Tecnos (2003) pp. 107-167.

Constitutional personhood

Constitutional personhood can be described as the theoretical and comprehensive capacity recognized for every individual *qua* individual to be a bearer of constitutionally protected rights[33]. This concept is somehow equivalent to that of legal personhood, although there is an essential difference between them. Whereas legal personhood presupposes the existence of an operative system of private law[34], constitutional personhood serves as the foundations upon which the whole system of fundamental rights is built upon. Admittedly, the concept is rife with naturalist overtones, although not more than the very idea of 'human dignity', as popularized by the Universal Declaration on Human Rights to serve as a pivotal concept for human rights discourse. In this sense, constitutional personhood is inalienable, imprescriptible, and indivisible. Furthermore, constitutional personhood is assumed to 'predate' the Constitution, so it has to be recognized for anyone regardless of any legal status. In short, constitutional personhood operates mostly as a theoretical concept brought about out of the necessity to find appropriate anchorage points to secure the whole system of fundamental rights. Nevertheless, the concept is not simply based upon an idealized view of human nature or human reason, but the actual capacity that individuals have to take part in social interactions. In other words, without fundamental rights individuals cannot interact with each other in their social life.

Constitutional entitlement

Constitutional entitlement –or rather 'entitlements'– refers to the actual condition of being the bearer or a particular fundamental right guaranteed by the constitution. In any particular constitutional system then, there may exist as many constitutional entitlements as fundamental rights guaranteed by the constitution. In this sense, whereas constitutional personhood is recognized for any individual *qua* individual, different constitutional entitlements are granted to individuals depending on their respective legal status. To be sure, most fundamental rights (e.g., freedom of expression, freedom of religion, and so on) are recognized as a matter of course, regardless of status. However, among the catalog of rights enshrined in a constitution, there are some that are not granted to everyone. Indeed, under most constitutional systems foreigners are not 'entitled' to vote in national elections, and legal persons are vested with fundamental rights "to the extent that the nature of

33) In a similar vein, see B. Aláez Corral, *Minoría de Edad… op.cit.* p. 107.

34) *Cf.* the Japanese Civil Code Article 3.1 determining "The enjoyment of private rights（私権）shall commence at birth". The Code itself 'creates' legal personhood.

such rights permits"[35].

As far as natural persons are concerned, nationality is the legal status that determines the scope of constitutional entitlements[36]. In other words, being a national is therefore the key criterion to determine who will be entitled to the whole array of entitlements protected by the constitution and who will not. Even today, when more and more states have come to almost equalize non-nationals with nationals, insofar as the protection of fundamental rights is concerned, there is still a category of constitutional entitlements, viz., so-called political rights, whose guarantee remains −admittedly, to a decreasing extent− a matter of legal status, i. e., a matter of nationality.

Constitutional capacity

Constitutional capacity is the ability of an individual to exercise a particular fundamental right (i.e., a constitutional entitlement) by him/herself, without the intervention of a proxy. It goes without saying, that this concept resembles that of legal capacity in the sphere of private law. That being said, it is important to understand that not having a full constitutional capacity regarding certain fundamental rights does not imply there is a lack of constitutional entitlement. Thus, minors,− provided of course, they are nationals− are 'entitled' to voting rights, although their exercise is limited until they reach the age of majority. Unlike nationality, insofar as the exercise of fundamental rights is concerned, minority, viz., a state of affairs where an individual is deemed to be in need of special protection, cannot be considered as a legal status. Let us illustrate the point with a simple example: as a general rule, citizens in the USA can register to vote before they turn 18 if they will reach 18 by Election Day[37]. Considering that registering to vote is in itself part of the electoral process, it can be said that, the fact minors can register to vote before they turn 18 is due to their entitlement to voting rights even during minority.

Among the concepts analyzed above, 'constitutional personhood' and 'constitutional entitlement' can be particularly helpful when trying to understand how naturalization accomplishes its functions. Thus, naturalization serves as a path for non-nationals to achieve full protection of constitutional entitlements.

To use a simile, we can think of constitutional personhood as a piece of land

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35) *Cf.* Basic law for the Federal Republic of Germany Article 19.3.

36) *Cf.* the Japanese Supreme Court's words in the previously described ruling of June 4, 2008, which regarded nationality as *inter alia* "an important legal status (…) to enjoy the guarantee of fundamental human rights, obtain public positions or receive public benefits".

37) https://www.usa.gov/voter-registration-age-requirements

allotted to each individual, which allows its owner to build up a complex structure made up of different constitutional entitlements, as though they were bricks. The extension and condition of each lot of land is exactly the same, although the shape and robustness−or rather 'completeness'−of the structure built upon it depends on each individual being a national or a non-national. For non-nationals, the structure remains unfinished. Nevertheless, since all lots of land are of the same quality, finishing the constitutional structure by adding the missing bricks is always possible. In this sense, naturalization works by aiming at bringing the edifice of constitutional entitlements to full completion. The simile is admittedly simplistic; it nonetheless suffices to illustrate the necessity for acknowledging naturalization as a constitutionally protected institution.

4- Article 22.2 and the right to abandon one's nationality

In Ashibe's understanding of the concept, the *raison d'être* of any institutional guarantee ought to be the promotion of a certain constitutional right− notwithstanding the 'inconvenience' of some institutional guarantees located 'outside the bill of rights'. Then, if naturalization is to be considered as an institutional guarantee, what is the fundamental right to be promoted by it? Obviously, as a legal procedure that gives access to a full set of constitutional entitlements, naturalization has a significant impact on the protection of the constitutional rights of non-nationals. However, even if naturalization enhances the guarantee of all constitutional rights 'at once', it would nonetheless seem that naturalization, in and of itself, is not linked to the protection of any fundamental right in particular. It is my contention though that, as far as the Japanese constitution is concerned, at least one particular right granted in the bill of rights can be pinned down as being directly promoted by the existence of naturalization. Indeed, a systematic study of the constitutional text, including its foundational principles, could lead us to conclude that naturalization can be understood as the institutional guarantee aimed at the protection of the right of abandon one's nationality as established by Article 22.2, although not in the conventional, −and thus far, uncontroversial−way in which this provision has been interpreted. Because if there is one provision in the bill of rights that has brought about the least controversy among constitutional scholars, it is undoubtedly Article 22.2 that states:

"Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate."

To the overwhelming majority of constitutional law academics the right

guaranteed by this provision is essentially a right extended to all Japanese nationals to acquire a different citizenship, yet such freedom does not include a right to become a stateless person[38].

Even scholars who advocate extending the protection of fundamental rights to non-national permanent residents to such an extent almost equivalent to that guaranteed for Japanese nationals, agree with the majoritarian doctrine on the content of Article 22.2 and believe that the right of abandon one's nationality only matters to Japanese people[39].

Indeed, the chief criticism leveled at the so-called wording-approach is precisely this common opinion that even though the Constitution's language guarantees the right to abandon's one nationality to 'all persons', it is the 'nature' of the right to be limited only to Japanese nationals.

In this regard, A. Kondô has launched a formidable critique on this 'article of faith'. By not paying attention to constitutional language, Kondô argues we risk betraying the constitutionalist ideals of guaranteeing rights to individuals by enshrining them in a bill of rights[40]. What is more, according to this author, the dominant nature-approach may lead us to accept unreasonable legislative decisions such as that adopted by Article 6 of the State Redress Law, which limits the right to obtain compensation from the state's wrongdoing to non-nationals on the basis of reciprocity, even though the Constitution in Article 17 grants such a right to 'every person'. Kondô states that it is unfair that an individual who has been unlawfully aggrieved by a public official should let the matter drop simply because the legal system of his or her country of origin does not grant such a right to Japanese nationals[41].

At this point, let us go back to Article 22.2 and try to test the common

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38) As representative authors, see N. Ashibe, *Constitutional law… op.cit.* p. 367, K. Takahashi, *Constitutionalism and the Constitution of Japan* (3rd ed.),『立憲主義と日本国憲法（第３版）』Yuhikaku (2013) p. 245, K. Satô, *Theory of the Japanese Constitution… op.cit.* pp. 109 and 297-298, and M. Ooishi, *Lectures on Constitutional Law II* (2nd ed.)『憲法講義 II（第２版）』 Yuhikaku (2012) p. 122.

39) See N. Urabe, *Classroom of Constitutional Law* (3rd ed.)『憲法学教室（第３版）』Nihonhyoronsha (2016) p. 254.

40) See A. Kondô, *Human Rights and Citizenship of Foreigners*『外国人の人権と市民権』Akashi-shoten (2001) pp. 274-278.

41) A. Kondô, "Rights of Foreigners- Focusing on the Political Participation of Permanent Residents"「外国人の権利―永住外国人の地方参政権を中心に―」in Meijo-hôgaku Vol. 60 Bessatsu (2010) p. 9 retrieved at: http://law.meijo-u.ac.jp/staff/contents/60-sp/60bessatsu28_kondo.pdf

assumption that the right to abandon one's nationality is not guaranteed to foreigners by posing a simple question: To what extent can the Constitution effectively guarantee such a right to a Japanese national?

First, apart from the principle that the law should not allow a citizen to become a stateless person, −which operates as a prohibition and not as a right−the Constitution cannot actually guarantee that a Japanese national can acquire a new citizenship, since this is a decision for a different country to take. Nor conversely, could the Japanese government impede a Japanese national from becoming a citizen of a different country. In fact, a sovereign nation can grant its nationality to a Japanese national regardless of whether the Japanese government might agree with the decision or not. This would not change a single bit, even if the right to abandon one's nationality had not been guaranteed by the Constitution.

Second, assume for instance that Japan restricted naturalization to citizens of a certain country. In this case, the National Diet might have restricted the possibilities for Japanese nationals to acquire that country's nationality if it were granted on the basis of reciprocity.

However, when we analyze Article 22.2 from the perspective of a non-national, things begin to make much more sense. As most scholars agree, Article 22.2 is based upon the principle that individuals should have freedom to choose their nationality[42]. Indeed, this principle is already well entrenched in international law[43]. However, since the Japanese legal system cannot ensure that Japanese nationals may acquire the citizenship of a foreign country, the only entitlement that Article 22.2 of the Constitution, −being it the right to *choose* one's nationality−can effectively guarantee is one that grants foreigners the right to obtain Japanese citizenship.

Obviously, I do not mean that any foreigner in Japan (even illegal immigrants) have a constitutional right to obtain naturalization whenever they feel like it. What I do mean is that the Constitution, as a document committed to the principle of freedom of choosing nationality, commands the legislature to establish a mechanism to grant Japanese citizenship to foreigners when certain conditions are met; and this mechanism is none other than naturalization. In this sense, it can be asserted that, along with the right to abandon one's nationality, −a right which, as

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42) In this vein, see H. Yasebe, *Constitutional Law* (6th ed.)『憲法（第 6 版）』Shinseisha (2014) p. 253.

43) The Universal Declaration of Human Rights in Article 15.2 guarantees "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

we have seen could even be considered somewhat useless from the perspective of a Japanese national−Article 22. 2 grants the right to have access to Japanese citizenship.

This construction of Article 22.2 conforms with the idea of naturalization as a constitutionally protected institution. To be sure, since the Constitution in Article 10 determines that the conditions to acquire Japanese nationality should be determined by law, it must be concluded that the National Diet has broad leeway to regulate the right of foreigners to have access to citizenship. Nevertheless, as the Supreme Court has determined, the discretionary powers vested upon the legislature by Article 10 are not boundless and must respect some constitutional principles. What then are those principles? Although this question requires further research, I consider that three principles should be complied with in order to respect the core content of naturalization as a mechanism for non-nationals to achieve full protection of constitutional entitlements.

I. The law should establish a process of naturalization open to all non-nationals under the conditions of fair equality of opportunity.
II. The law cannot deny naturalization to a particular non-national on the basis that his or her country of origin does not allow citizens to give up their nationality[44].
III. The law cannot deny naturalization, or require harsher requisites from the citizens of a particular country on the basis that such a country does not extend naturalization to Japanese citizens or imposes stricter conditions to them.

5- Conclusion

Throughout this work, I have explored the idoneity of considering naturalization as a constitutionally protected institution. In doing so, I have also singled out granting non-nationals full access to the full array of constitutional entitlements and correcting democratic deficits as the two chief constitutional functions to be achieved by naturalization. Thus, I have stressed the constitutional pedigree of this institution and its extraordinary strength in terms of enhacing rights protection and democratic accountability.

The open language, on the other hand, of Article 10 of the Constitution regarding the conditions to become a Japanese national has permeated the minds of most Japanese scholars of constitutional law to such an extent, that there exists an

44) This principle seems to agree with Article 5.2 of the Nationality Law (see the Appendix).

ingrained opinion that even if, theoretically, the legislators' discretionary powers on regulating naturalization are not absolutely boundless, they are so in practical terms[45]. However, as a constitutionally protected institution, naturalization is not to be understood simply as one of many different ways of obtaining citizenship, but as a necessary mechanism that stems from the ubiquitous distinction between nationals and non-nationals, viz., between full members of society and those who are merely tolerated ones.

In conclusion, we can assert that the Constitution in Article 22.2 grants a right *to* naturalization−not a right *of* naturalization−which consists of protecting the legitimate expectations of non-nationals to gain access to citizenship whenever all the requirements set out by the law are met. Therefore, we can also argue that, in this sense, the discretionary powers of the administrative authorities in deciding who is to become a new national should be circumscribed to ascertain whether these legal requirements have been objectively met by the applicant[46]. It is in this sense when the relationship between the two constitutional provisions, i.e., Articles 10 and 22.2, becomes clear: the former provision directs legislators with the task of establishing the conditions to become a Japanese national and the latter guarantees everyone who has been excluded from Japanese nationality to have access to citizenship whenever the existence of 'close ties' with Japan can be ascertained.

APPENDIX

Japanese Nationality Law

Naturalization[47]

Article 4

A person who is not a Japanese national (hereinafter [called] "an alien") may acquire Japanese nationality by naturalization.

2. The permission of the Minister of Justice shall be obtained for naturalization.

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45) In this regard, note that in the Supreme Court's ruling of June 4, 2008 many dissenting opinions were added, basically stating that it was beyond the powers of judicial review to change the conditions to acquire Japanese nationality as set out by legislators.

46) This idea seems to run counter to the official opinion expressed by the Japanese authorities determining that even if the conditions required by law are met, the Minister of Justice has full discretionary powers to deny naturalization. *Cf.* statement made by I. Nakamura on April 3, 1984 before the Committee on Judicial Affairs of the House of Representatives. See "Proceedings of the Committee on Judicial Affairs of the House of Representatives of the 101st National Diet" n. 5 (1989) p. 17.

47) Adapted from an English translation provided by the Ministry of Justice at http://www.moj.go.jp/ENGLISH/information/tnl-01.html

Article 5

The Minister of Justice shall not permit the naturalization of an alien unless he/she fulfills all of the following conditions:

(1) That he/she has domiciled in Japan for five years or more consecutively;
(2) That he/she is twenty years of age or more and of full capacity to act according to the law of his/her home country;
(3) That he/she is of upright conduct;
(4) That he/she is able to secure a livelihood by one's own property or ability, or those of one's spouse or other relatives with whom one lives on common living expenses;
(5) That he/she has no nationality, or the acquisition of Japanese nationality will result in the loss of foreign nationality;
(6) That he/she has never plotted or advocated, or formed or belonged to a political party or other organization which has plotted or advocated the overthrow of the Constitution of Japan or the Government existing thereunder, since the enforcement of the Constitution of Japan.

2. When an alien is, regardless of his/ her intention, unable to deprive himself or herself of his or her current nationality, the Minister of Justice may permit the naturalization of the alien, notwithstanding that the alien does not fulfill the conditions set forth in item (5) of the preceding paragraph, if the Minister of Justice finds exceptional circumstances in his/her family relationship with a Japanese national, or other circumstances.

Article 6

The Minister of Justice may permit the naturalization of an alien notwithstanding that the alien does not fulfill the condition set forth in item (1) of paragraph 1 of the last preceding Article, provided that the said alien falls under any one of the following items, and is presently domiciled in Japan:

(1) One who has had a domicile or residence in Japan for three consecutive years or more and who is the child of a person who was a Japanese national (excluding a child by adoption);
(2) One who was born in Japan and who has had a domicile or residence in Japan for three consecutive years or more, or whose father or mother (excluding father and mother by adoption) was born in Japan;
(3) One who has had a residence in Japan for ten consecutive years or more.

Article 7

The Minister of Justice may permit the naturalization of an alien who is the

spouse of a Japanese national notwithstanding that the said alien does not fulfill the conditions set forth in items (1) and (2) of paragraph 1 of Article 5, if the said alien has had a domicile or residence in Japan for three consecutive years or more and is presently domiciled in Japan. The same rule shall apply in the case where an alien who is the spouse of a Japanese national has been married with the Japanese national for three years or more and has had a domicile in Japan for one consecutive year or more.

Article 8

The Minister of Justice may permit the naturalization of an alien notwithstanding that the alien does not fulfill the conditions set forth in items (1), (2) and (4) of paragraph 1 of Article 5, provided that the alien falls under any one of the following items:

(1) One who is a child (excluding a child by adoption) of a Japanese national and has a domicile in Japan;
(2) One who is a child by adoption of a Japanese national and has had a domicile in Japan for one consecutive year or more and was a minor according to the law of its [sic] native country at the time of the adoption;
(3) One who has lost Japanese nationality (excluding one who has lost Japanese nationality after naturalization in Japan) and has a domicile in Japan;
(4) One who was born in Japan and has had no nationality since the time of birth, and has had a domicile in Japan for three consecutive years or more since then.

Article 9

With respect to an alien who has rendered especially meritorious service to Japan, the Minister of Justice may, notwithstanding the provision of Article 5, paragraph 1, permit the naturalization of the alien with the approval of the Diet.

Article 10

The Minister of Justice shall, when permitting naturalization, make an announcement to that effect by public notice in the Official Gazette.

2. The naturalization shall come into effect as from the date of the public notice under the preceding paragraph.