THE DOCTRINE OF JUDICIAL REVIEW IN JAPAN

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I

In the democratic countries of the world, we can see many kinds of judicial systems, which may be classified into two groups; the one group where the court has not a power to review the constitutionality of laws, and the other in which judicial review is established. In the latter group, there are two representative types. The first type is American system, and the model of the latter is the system of constitutional judgement (die Verfassungsgerichtsbarkeit) instituted in Austria in 1920, and in West Germany in 1947. In America when the court, in rendering a decision to a particular case, has a doubt about the constitutionality of the law which is going to apply to the case, it will undertake review of this law. If it finds the law unconstitutional, it will refuse the application of this law to the case. While in the constitutional judgment system, the Constitutional Court (der Verfassungsgerichtshof or das Verfassungsgericht) is organized, differ from ordinary courts, and has proper right and duty to determine the constitutionality of law itself. When the Constitutional Court decides a law unconstitutional, the law is abolished and it loses its general validity.

The courts in America are empowered to review the constitutionality of laws (both the state's and fedral laws). However, such power is only derived from the inferential interpretation of the Constitution, especially Article III, § 2 para. 2, and Article VI, para. 2, and there is no explicit provision in the Constitution to confer upon the court such power. It may be said that this power of the court was established by the decision of Chief Justis Marshall at the instance of the Marbuey v. Madison, and this decision clarified the part of the Constitution, which had remained doubtful owing to the absense of a definite clause in the Constitution regarding this point. At any rate this power of judicial review is recognized

as an authority of the court that has ordinary judicial power; it is said that judicial review is included in the authority of the court. It means that judicicial review should be conducted within the limit of the conception of judiciary, it should not be an action going beyond the limit of ordinary judiciary.

On the other hand, the constitutional judgement now in practice in West Germany and once adopted by Austria in 1920 differs from judicial review of America. The Constitutional Court, which was specially created by the Constitution of these countries, does not hear the ordinary cases. This special court, besides determination of the constitutionality of acts of legislature, takes cognizance of various controversies concerning the Costitution. And the requirement for opening procedure and the effect of the decision of the constitutional judgment is expressively provided by the Constitution or by the laws based upon the Constitution. It is the special action distinctly separated from the action of ordinary courts.

Art. 81 of the new Constitution of Japan adopted 1946 provides as follows: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." And in Art. 98, it is further provided: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity."

In Japan there are opposing opinions on the interpretation of these provisions. For examples: One says, this is the adoption of judicial review of America which has been established after a long period of the experimentation. Another says, it is the system of Japan which is devised after the American model and resembles to the system of constitutional judgement of Europe. The former is more prevalent and among those there are conflicting opinions about some matters such as the requirement for the opening procedure of the review and for the effect of the decision.

The Supreme Court of Japan, hitherto, examined more than once, the constitutionality of laws applicable only to some ordinary concrete cases. But, so far, no law was yet pronounced unconstitutional. Thus the Supreme Court has had no occasion to clarify its stand on the effect of decision holding a law unconstitutional.

But, sooner or later, the Supreme Court will be confronted with the necessity of making its own stand clear.

In order to introduce scholar's opinions on the question in Japan, it might be profitable to glance over the practices and theories of America and Europe, which form the bases of the Japanese opinions.

II

The reason why the American courts review the constitutionality of a law is that such action is thought to be a part of an ordinary proceedings of the court. So the court examines the constitutionality of a law only in connection with some case or controversy, but not the law itself cut off from the ordinary proceeding. In other words, the court takes such action when there is an actual controversy in respect of individual rights. Therefore, the judicial review is not supposed to take place in a fictitious or made suit where there is no representation of actual interests of the plaintiff and dependant,[1] or in a moot case where the plaintiff has no substantial interest to be brought up.[2] Neither will the court give mere opinions on suits, though in some states the court does.[3] At any rate, the review of the constitutionality of a law takes place only when the judgment of a concrete ordinary case occurs, and no law alone aside from a real case becomes the object of the review. In America the constitutionality of a law is not treated as an abstract matter. The constitutionality of a law is not a thing to be generalized, instead, it comes from the judgment of the facts of a concrete case constituting the substance of the judgment: the constitutionality of a law can only be decided in accordance with every individual case. This is the natural restriction deriving from the essence of the judicial power. Then this decision concerns only with the specific interest of the parties concerned, while there arises the question of the general validity of such law that received once unconstitutional decision. Opinions differ on this point.

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1) Chicago and G.T.R. Co. v. Wellman, 143 U.S. 339, 345 (1892)
Muskrat v. U.S. 219 U. S. 346 (1911)
2) Massachusetts v. Mellon, 262 U.S. 447 (1923)
3) Massachusetts, New Hampshire, Maine, Rhodisland etc.

The fist stand: It is contended that as the decision of the unconstitutionality of a law is rendered in respect of a case concerned, the law thus considered unconstitutional loses its applicability only to this case, and the right of parties concerned is decided as if such law was not in existence. Such view might furnish later courts the ground to ignor the law. But this view of the unconstitutionality concerns only with the parties concerned but not with the law itself; the opinion of the court or the ground on which the court bases its judgment might have a force as the precedent to the decision of a similar case, but the law is not abolished.[4] Therefore, according to this stand, an unconstitutional law is also a law or a legislative act. If such a law could be called invalid, it would be invalidity only in respect of the request.[5]

The scholars who take this stand are Professor McLaughlin and others[6] They think the Congress, the Executive, and the Court have the right to interprete the Constitution in their respective fields. Among politicians President Jefferson, Jackson and Lincoln seem to have entertained practically the same view as this.[7] According to this view, the court cannot suppress the will of Congress, which is the representative of the people. They seem to have stood on the principle that the court could not perform any action such as to amend the law passed by Congress. They thought, there should be no such situation in which judges would determine the direction of the politics as the result of Government's obidence to the court's interpretation of the Constitution. But if this thought is thoroughly followed, since the Congress, the Executive and the Court may each for itself be guided by its own opinion of the Constitution, the three organs of the government will be pitted against each other, and the discordance in the interpretation of the Constitution will make the supreme will of a nation ambiguaus, and in an extreme case there will be a danger of disruption of the legal order of a nation.

The second stand: In accordance with the proposition, "no unconstitutional law is valid," a law ruled as unconstitutional should be treated in the same manner as it was never existed, even

4) Shephard v. Wheeling, 30 W. Va. 479 4 S.E. 635 (1887)
5) Allison v. Corker 67 N.J.L. 596 Atlantic 362 (1902)
6) Corwin; The Doctrine of Judicial Review (1914) p. 23
7) Haines; The American Doctrine of Judicial Supremacy (1914) p. 247 ff.

if it was pronounced unconstitutional at the trial of a concrete case against a person. To wit: "an unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as though it had never been passed....."[8]

This stand is also based upon the proposition, "The interpretation of a law is the peculiar and proper official duty of the court". The application of any law must be done by the court and the law interpreted by the court is a true law. The Constitution is also a law and the court interpretes and enforces it. This was what Chief Justice Marshall contended in Marbury v. Madison,[9] Hamilton's reasoning, which took place earlier than this, belongs on the whole to this stand.[10]

Dr. Cooly, further, contended that a law branded as unconstitntional was invalid from the beginning (void ab initio).[11] However, should this "invalid from the beginning" theory be followed thoroughly, there would probably be the legal confusion on some occasions, for, in some cases, it may be no longer possible as a matter of fact to cancel legal effects brought about by the law condemned as unconstitutional. Then if this theory is enforced, a social confusion will result. Thereupon in a way of an amendment to the second stand, an increasing number of men stand on the principle that a law is presumed to be effective until the court dicides it invalid. So, by adopting the so-called de facto doctrine i.e. de facto corporation and de facto officer, any action taken by corporations and officials upon the strength of a law which was yet not decided unconstitutional is considered to be effective.[12]

At any rate, in practice of America, it is a custom that the Congress as well as the Government pay respect to the interpretation of the Constitution by the Supreme Court. Thus, what the court declares is an actual constitution, and out of many decisions of the courts practical constitution of America is born. Then this system is offen

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8) Field; In Norton v. Sheby County, 118 U.S. 425, 454 (1885)
9) Chief Justice Marshall in Marbury V. Madison, 1 cranch 177
10) Hamilton; Federalist No. 78
11) Cooly; Constitutional Limitations 7th ed. 1903 p. 259
12) Mabel v. Nosworth 198 Kp. 847
Lang v. Mayor of Mayonne 74 N.J.L. 455

called "Judicial Supremacy". But, even so, in America there is a rule that the Court exercises nothing but its original function i.s. ordinary judgment to try cases. Therefore, when the court holds some law as unconstitutional, it does not mean that the law was abolished perfectly. And its holding has no power to erase this law out of the Code Book. Moreover the custom that the Congress and the Government obey the Supreme Court's interpretation of the Constitution is not an absolute rule expressively provided in the Constitution. Accordingly, it may be possible upon rare occasions that the Congress, disobeying the court's interpretation of the Constitution, reenacts a similar law as that since was hold unconstitutional by the Suprome Court, and the Supreme Court, after all, changes its interpretation of the Constitution.[13] Such fact as this, that is to say, that the Supreme Court can not always compel the Congress to its interpretation of the Constitution, may be the situation that it does not overstep its proper judicial authority. If such exceptional cases should occur frequently, the similar situation, as was noted in the first stand, would come into being. But should such stand be consistenly always followed, the uniformity of a nation's will would crumble down. On the other hand, a throughgoing observance of the second stand would result in a situation in which the court would commit itself to an act beyond its original judicial power. In fact in most cases the court of America seems to take the second stand, but its standpoint seems to be not so final as to cause a great inconvenience.

III

The system of constitutional judgment of Austria in 1920 and West Germany in 1947 differ from the American system. There are, in the Constitution of these states and in the laws enacted in accordance with the Constitution, the minute provisions as to the organization of the Constitutional Court, the requirements for the opening procedure of the review and the effect of the law hold unconstitutional.

In the continental countries of Europe, generally the constitution, being regarded as a special class of law, is not applied in the

13) Crown; Constitutional Revolution (1946) p. 39 ff.

ordinary court. The ordinary court handles civil and criminal cases and applies laws and ordinances based upon laws. And the administrative litigation is handled by the Administrative Court specially organized. These courts have not power generally to review the constitutionality of the law, as long as it is enacted by the legislature in accordance with the procedures prescribed by the Constitution. Accordingly, these countries, even though they have a rigid constitution, deem that the power of the interpretation of the Constitution is contained in the powers of legislature, which enacts laws in accordance with the Constitution. Then the courts of these countries must apply the law without raising any question as to its constitutionality, so far as legislature passed it thinking it was not contrary to the Constitution. According to the opinion entertained in these countries, though the Constitution is the fundamental law of the nation, it is a law not fit to be enforced by the court, as it is an abstract law and prescribes the matter of political sphere. Therefore the interpretation and application of such a special law must left to the legislature, the representative body of the people. In this way the guarantee of the Constitution is vested in the ligislature. But in some countries of Europe, the demand for making the court the guardian of the constitution by letting it review the constitutionality of laws, like the American system, was growing strong. However, what was realized in these countries of Europe, was not American system but the constitutional judgment system. The typical example is Austria in 1920 and Germany in 1947.

In this system, considering the characteristic nature of the constitution, a special court called "the Constitutional Court" is set up to handle the constitutional question. Therefore, the Constitutional Court takes up not only the constitutional controversies of persons concerning the concrete rights and obligations, but, as its object of judgment, it takes up the law itself. In other words, it takes up the legislative action of the assembly and determines finally whether such action of the assembly is constitutional or not. However, it does not determine the political will but interprets and applys the Constitution. And it starts its work only upon hearing the complaint brought up by somebody. On this point it may be said that the action of the Constitutional Court belongs to a judg-

ment in wider sense of the term.

But, since the action of the Constitutional Court is so a peculiar one, who and how should the complaint be brought up before the Constitutional Conrt is expressively provided. Thus, in accordance with the Austrian Constitution adopted in 1920, the examination of the law of Land could be bronght up by the Federal Government, and the law of Federation could be brought up by the Government of Land for review. Moreover the Constitutional Court could review the law that shall be applied to a definite case brought up before it.[1] But the ordinary courts did not have the power to review laws. Then according to the revision of the Constitution in 1929, the Austrian Supreme Court and Administrative Court, when they, in rendering a decision to a practical concrete case, has a doubt about the constitutionality of the law, could stop the proceedings and bring the law before the Constitutional Court for review.[2] In Austria, however, the people could not bring the law to review directly to the Constitutional Court.

In West Germany the Fedral Government, the Government of Land, and one third of the members of Bundestag can inform against unconstitutional law to the Constitutional Court.[3] Also, when the Superior Courts deem that the law they are going to apply to the practical case under consideration is unconstitutional, they arrest the proceedings and bring the law to the Constitutional Court for review.[4] Furthermore, unlike Austria, an individual or corporation can use, at the Constitutional Court, a law when it infringes upon the individual rights guaranteed by the Constitution. But if the relief could be sought at other courts, it should be righted at these courts at first, and in case no remedies are satisfactory, the final determination may be sought at the Constitutional Court. However, when a case is of a general importance, or the parties concerned, if tried under some other procedure, will suffer a grave advantage, the Constitutional Court may decide it as the first and last instance.[5]

Since such system of constitutional judgment examines the law

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1) 1920 Austrian Constitution Art. 140, para. 1
2) 1929 Austrian Constitution Art. 140, para. 1
3) 1947 The Constitution of West Germany Art. 93, para. 1
4) Same as Supra. Art. 100, para. 1
5) Gesetz über das Verfassungsgericht. Art. 90.

itself, if the Constitutional Court determines a law, or a part of it, unconstitutional, this law or the part of it loses the general validity. However, in Austria, for the sake of convenience, the law condemned unconstitutional was regarded as a invalid law only after this judgment: the effect of decision holding the law unconstitutional did not work retroactively. Therefore, this law was thought to have been valid untill it was pronounced unconstitutional by the Constitutional Court, even if it was unconstitutional. Accordingly, the legal effect, which this law had produced, was valid. Then if the Constitutional Court decided a ceartain law unconstitutional, a definite office must proclaim, and the law losed its validity from the date of the proclamation like that it was abolished by the legislature. However, the Constitutional Court could prolong the validity of the law for some duration of time. According to Austrian Constitution adopted in 1920, the period was limited to not more than 6 months, and not more than one year under the Constitution of 1929[6]. The purpose of the prolongation is that during this period the legislature will legislate a law which will be harmonious to the provisions of the Constitution and take the place of the one that was abolished.

In west Germany if a certain law is decided unconstitutional by the Constitutional Court, the Federal Minister of Justis must promulgate it in the Bundesgesetzblatt.[7] The retrial of a criminal case, which was adjudged by this law, may be permitted in accordance with the Criminal Procedure Code. In other cases unless otherwise provided in the provisions, even if a decision was made by the virtue of the law which was declared invalid, it will remain unchanged where the annulment of the decision is impossible. But such a decision is, nevertheless, unenforceable. Against a compulsory execution the defence is permissible in accordance with the provisions under the Civil Procedure Code[8].

Thus under this system of determining the constitutionality of a law by means of the constitutional judgment, the scope of the invalidity of a law condemned as unconstitntional is explicitly defined, and thus the legal stability is kept almost unimpaired. On

6) 1920 and 1927 Austrian Constitution, Art. 140, para. 3
7) Gesetz über das Verfassungsgericht. Art. 31, para. 2
8) Same as Supra. Art. 79

the other hand, as such action is of a great importance, the organization of the Constitutional Court and the method of election of judges require a careful consideration. In order to give an impartial judgment it is claimed that the election of judges must not be done under the political influence, and a long time guarantee of their independent status is necessary. On the other hand, it is contended that since they are in the position to determine the highest order of a nation, viewing from the democratic principle, it is necessary to elect then to a limited term of the office, by the method in which the will of the people is showed either directly or indirectly. And as a federal system, there are requirements to show the will of Laender. By compromising and synthesizing these demands the Constitutional Court is organized.

According to the Austrian Constitution of 1920 the Nationalrat was to elect the President (Chief Justice), Vice-president, 6 Mitglieder (member) and 3 Ersatzmitglieder (Sub member). The Bundesrat elected 6 Mitglieder and 3 Ersatzmitglieder.[9] And there were no provisions for the qualification of these judges. After all, the different political parties constituting the legislature elected the apportioned number of judges of the Constitutional Court in proportion to the number of seats they occupied in the assembly. Consequently, the Constitutional Court was formed reflecting the numerical strength of the assmbly. However, in the revision of the Constitution, which was effected in 1929, the Federal Government was to recommend the President, the Vicepresident, more than 6 Mitglieder and 3 Ersatzmitglieder, and the Federal President was to appoint them. And these judges must be picked from judges of ordinary courts, from administrative officers, or university professors of the jurisprudence, or of political science. For the remaining 6 Mitglieder and 3 Ersatzmitglieder, the Nationalrat recomended 3 Mitglieder and 2 Ersatzmitglieder; the Bundersrat recomended the rest, and the Federal President appointed them all. All of these judges were required to acqire the knowledge of the jurisprudence and the political science and on top of it they must have had engaged more than 10 years in the profession, which required them to complete study of the above science. And the following persons were prohibited to become judges

9) 1920 Austrian Constitution, Art. 147, para. 2

of the Constitutional Court: Members of the Nationrat, of the Bundesrat, of the Landtag and of other general representative bodies, and also the officers of the political parties, members of the Federal Government and of the Government of the Land.[10] Thus, the independence of the Court from the Government was intensified. In 1934, the Constitutional Court was combined with the Administrative Court and called Bundesgerichtshof.[11]

The Constitutional Court of West Germany consists of two Senats, and each Senat has 12 judges. The 4 of the 12 judges of each Senat are chosen from the judges of the Superior Courts, they serve during the term of their service at these courts. A term of office of other judges is 8 years, the half of them is nominated by the Bundestag, the other half by the Bundesrat, and the Bundespresident oppoints them all. A definete qualification is required of each judge, and none of them is allowed to belong to the Bundestag and the Bundesrat, and the Federal Government and to the similar organizations of states.[12] Thus, the Constitutional Court is constituted with design suitable for its function.

IV

Now in japan regarding the interpretation of the provisions of Art. 81 and 98 of the Japanese Constitution, as was previously mentioned, there are various views influenced by practices and theories of these foreign countries.

In the first place, there are groups of men who insist that these provisions are indicative of Japanese adoption of the American system advocated by some Americans, who upheld the first stand, of which a mention was already made. According to them the Supreme Court reviews the constitutionality of a law only in relation to concrete case under consideration, and if the court decides the law unconstitutional, it will not be applied only to this case. But this law itself is valid still more.

Professor Ukai is the representative of the men, who uphold this stand. He states his opinion to the following effects:

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10) 1939 Austrian Constitution, Art. 149, para. 2, 3, 4
11) 1934 Austrian Constitution, Art. 177 and following.
12) Gesetz über das Bundesverfassungsgericht. Art. 2-5

According to the provision of Art. 98 of the Constitution, no unconstitutional law is valid. It results from the principle that the Constitution is superior to the ordinary law. It is just provision as a matter of course, and have no significance in itself. But the question is who decides a law "unconstitutional", and to what extend is the decision effective. According to Art. 81 of the Constitution, the Supreme Court have the power to determine the constitutionality of any law. But this power of the Supreme Court must be appropriate for a law court. The law court must decide only practical and concrete case concerning parties. Therefore the court have the power to review only such a law that is going to apply to the concrete case concerning parties. So whichever way the decision may be, it is effective only so far as the case under consideration is concerned.

This opinion, he thinks, is right, as it is a proper request for the court not to encroach upon the power of the legislature, taking into consideration Art. 41 of the Constitution, which expressively provides: "The Diet shall be the highest organ of state power and shall be the sole law-making organ of the state". And it is democratic request that judicial review of the court should be restricted from the position and function of the Diet. He also upholds his position by taking two or three other reasons to support his opinion.[1]

The second group of scholars takes the second stand of the American contentions as have been previously mentioned. They uphold the view that the review of the constitutionality of a law is permited only in connection with the trial of a concrete case concerning parties, but the law decided unconstitutional lose its general validity. Professor Kaneko upholds this principle and states his idea in the following manner:

An unconstitutional law is invalid in accordance with Art. 98 of the Constitution. It is a result of its being unconstitutional. Also according to Art. 81 of the Constitution the Supreme Court has the power to determine the constitutionality of any law. But this power should not be limited simply to interpret the Constitution and adjudge the constitutionality usually in his own field. Such power have theoretically not only the Supreme Court but all national

1) Ukai; The Effect of Decions Holding Statute Unconstitutional, in Kokka Gakkai Zassi Vol. 62 No. 2.

organs, for instance the Diet as well as the Cabinet. The fact that Art. 81 of the Constitution has given this power specifically to the Supreme Court must be taken into recognition that this is a peculiar power which no other national organs have. So it must be construed that the decision of the Supreme Court has a general binding effect as a final judgment over all national organs and all matters, and, accordingly, the law held unconstitutional loses its validity absolutely.[2]

Professor Miyazawa, too, entertains about the same opinion as above. He argues: if a law once decided unconstitutional by the Supreme Court is not objectively regarded as invalid, it would cause, first of all, a considerable inconvenience actually. For instance, a person is imposed a tax and he applies to the court, so the court takes action to examine the law. And if it decides the law unconstitutional, the tax suit against the plaintiff, as a matter of course, is cancelled. But if this law is valid objectively still more, as it is insisted, another persons under the same circumstance would be responsible for the tax unless he makes the same complaint against the imposition as was done by the first party. Also persons, who had already paid the tax, could sue for return of the money that they had paid, claiming that what he had paid was an unjust enrichment on the part of the tax office. However, such many claims, in fact, would cause nothing but inconvenience. Further more the purpose of determing the constitutionality of the law is not only to protect interests of the parties concerned, but it rather arms at the correct application of the Constitution.[3]

However, neither of them make clear, as to whether the law decided unconstitutional was invalid at its birth in every case or in some case it had been alive until this decision and become dead only after the decision.

The third group contends that Japan has adopted the system of the constitutional judgment, on the provisions of Art. 81 and 98 of the Constitution. The representative spoksman of this contention is Dr. Sasaki.

According to him, Art. 81 of the Constitution makes the two points clear; firstly, "The Supreme Conrt is the court of last

2) Kaneko; Judicial System, in Kokka Gakkai Zassi Vol. 60 No. 12
3) Miyazawa; Judicial Review of the Court, in The Law Periodical, Vol. 1, No. 4.

resort"; secondly, "The Supreme Court has the power to determine the constitutionality of any law ....." The second point does not only indicate that the Supreme Court has the power to determine the constitutionality of any law merely in connection with a concrete case concerning parties, but that it rather shows that the Supreme Court determines in general way the constitutionality of any law. Art. 99 of the Constitution moreover provides: "The Emperor or the Regent as well as ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution". And Art. 98 provides that all national acts contrary to the Constitution have no legal force. It means that any law contrary to the Constitution have no general validity perfectly, and does not mean that unconstitutional law is invalid only in relation to some suit. However if it is doubtful whether a law is constitutional or not, somebody must determine it. Art. 81 of the Constitution has given the Supreme Court the power to determine it. Then the Supreme Court may determine it, first when it doubts the constitutionality of any law, oder, regulation or official act in relation to some pending case, second when the constitutionality of the law itself and other acts themselves are accused for the Supreme Court. In addition it is clear from the provision that what the Supreme Court performs in this regard is a determination of the constitutionality but not simply review. Accordingly, whichever it may determine, it is implied that everyone should regard this decision as final. But the Supreme Court does not abolish the law but simply determines its unconstitutionality. However the unconstitutional law becomes invalid as the effect of Art. 81.

He argues further: the determination of the constitutionality of a law is the power vested only in the Supreme Court. Inferior courts have not such power as to determine the general constitutionality, but only in relation to judgment of practical and concrete case, they may review the constitutionality of the law which is to be applied to the case. Their judgment of the constitutionality of a law is justifiable only in relation to this case under trial.[4]

The above are the opinions on the question in Japan. I think

4) Sasaki; The Power of the Supreme Court to Determine the Constitutionality of Legislative and Administrative Acts, in Koho Zassi Vol. 11, No. 1

the third stand is the most correct interpretation of the Japanese Constitution. When one reads the Japanese Constitution faithfully and without bias, one would reach the third stand. In case of America, her Constitution makes no definite provision for the question. Consequently, the review of the constitutionality of a law may be undertaken as an action falling in the sphere of an ordinary judgement of a concrete case, but not as action aimed at the law itself, cut off from the case. However, in Japan the Constitution expressively provides that the Supreme Court shall determine the constitutionality of any law and the Constitution does not restrict it only within the ordinary judiciary concerning the concrete case. This act is similar to the constitutional judgment of Austria in 1920, or West Germany in 1947. But in these countries the specially organized court, the Constitutional Court, performs such Act. In Japan our Constitution, without instituting such special court, has empowered the Supreme Court to perform such act. Therefore the Supreme Court is the final resort of an ordinary judgment, as well as the Constitutional Court. Then, as the Supreme Court of Japan has such important power, unlike America, the judges of the Japanese Supreme Court may be dismissed by the people: In Art. 79 para. 2 it is provided "The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representative following their appointment and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner there after, in cases mentioned in the foregoing paragraph, when the majority of the votes favors the dismissal of judges, he shall be dismissed".

However it needs to enact a minutely prescribed procedure in order to perform such constitutional judgment. But now in Japan there is not such procedure law. Therefore, even if the Constitution had made a provision for such a purport, it would be impossible to actually bring such action to the Supreme Court. There is a necessity of early condificafion of the procedure, what might be called "the Code of Constitutional Procedure" like "the Code of Civil Procedure" or "the Code of Criminal Procedure.". So, until such Code is established, after all, the second stand will be suitable to cope with the problem. But it is my opinion that the Consti-

tution, as principle, upholds the system as is advocated by the followers of the third stand, and I help to realize the condification of the procedure based on the third stand.

But there are opinions in opposition to the third stand. As has already been seen, it is expressed that if the system of the third stand were adopted, the Supreme Court might exert pressure on the Diet, violating Art. 41 of the Constitution, which says, "The Diet shall be the highest organ of state power.". However the third stand never maintain that the Supreme Court is higher organ than the Diet. No doubt, the Diet is the highest organ of the state, it makes laws which the court obeys and applys, and it decides the system of the court. But the court could not obey unconstitutional law, because the Diet should obey the Constitution, as above Art. 99 and Art. 98 says. That is to say, the highest is the Constitution, not the Supreme Court. Unconstitutional laws are invalid as effect of Art. 98 of the Constitution. And when a contention arises between persons or state organs about that some law or other act is constitutional or not, somebody must decide it. Art. 81 of the Constitution give the Supreme Court the power to determine it. The Supreme Court is not higher than the Diet, but the Constitution is higher than the law. And the Supreme Court has not the power to order the Diet, but the power to determine the constitutionality of any law by Art. 81. A determination of the Supreme Court that some law is unconstitutional is a interpretation of the Constitution. The invalid of this law is the effect of the Constitution itself, Art. 98 of it. Moreover someone may argue that such stand would give the Supreme Court the power to abolish laws, which is contrary to the provision of Art. 41, which says: "The Diet shall be the sole law-making organ of the state". However, as it has been just mentioned the Supreme Court may determine the unconstitutionality of a law, but it does not mean to abolish it. The Constitution invalidates any unconstitutional law by virtue of its own provision. Therefore the third stand, if taken, by no means violates the spirit of provision of Art. 41 of the Constitution.

It might as well be considered here the objection that may be raised against the third stand from a political stand points. If the Supreme Court has such a great power as that, by deciding the constitutional question of a law, it may come to decide the political

question, which may be hidden in the back of such law. If so, it would run counter to the democratic principle: government by the will of people. This criticism may be raised against judicial review generally, against the first and second stands too, but it may be most severely butted against the third stand. Certainly, the constitutional problem is accustomed to contain the political problem. Therefore, even if the Supreme Court does not determin the problem from a point of political view but determins only from a point of legal view, it may concern the politics. However, above mentioned, the Supreme Court of Japan is controled by the people. That is, the judges of the Supreme Court may be dismissed by the people according to Art. 79, para. 2. So, even if the Supreme Court has such power that the third stand assert, it does not run counter to the principle of democracy and sovereignty of people.

Viewed the merit and demerit of each of the above said stands from the political stand point, the first stand, if it is followed, would bring an legal unstableness, as was pointed out by the scholars who insist on the second stand. In Japan, there is no custom yet that the legislature respects and obeys the court's interpretation of the Constitution. Therefore the danger of the legal unstableness that the first stand would produce in Japan would be larger. On the other hand, if the custom, that the court is bound by the precedent and the legislature and executive obey the court's interpretation without exception, is established, the first stand would, after all, become the same as the second stand.

Then, if the second stand is followed, a law once determined as unconstitutional would lose its general validity. Such determination is in the result a decision about the validity of law itself, and is connected with the public matters. Even such decision is done only in reration to a private event or controversy, many men would be concerned with it. Therefore it is good system that such decision of public matters, even if there is not a private case or controversy, can be requested as the public problem. And it is the third stand, my stand. In the first or second stand, even if some law is doubtful about the constitutionality, no one could accuse this law, until a concrete case in regard to private right arises. But in the third stand, the law itself would be accused at once without the concrete case.

Japanese new Constitution modeled upon American Constitution

in general. But in some points, for the sake of Japanese peculiarity, it made different from American system. Art. 81 and Art. 79 para. 2 are this examples. In America, such as the third stand of Japan can not exist. But in Japan, there can be it from above Article of the Constitution.

The adoption of the new Constitution has begun to democratize all Japanese institutions, but it can not be say that the people has fully and throughly grasped the spirit of democracy. Recently the reactionary influence tends to expand again, and I fear they may make up a half of the Diet members by chance, and legislate a law contrary to the Constitution. At such time a great expectation is placed upon the power of the Supreme Court to determine the constitutionary of a law. Though there may still remain the question whether the judges of the Supreme Court is equal to this demand, at any rate it would be right for present Japan to recognize the system advocated by the third stand.

V

In a word, the system of judicial review of legislation is an expansion of the principle of "rule of law" to acts of the Diet. The adherents of the first stand attempt to establish the rule of law by pushing the principle of the equal division of three powers. But if this principle goes to the bottom too thoroughly, it would break up the unity of a will of state. Then the second stand would become the most practical one to be followed. But if the effect of second stand gets at the root and its idea is spread out, it grows the third stand. However such third stand may be no more the ordinary judiciary, but a new special function of the state, which goes rather beyond the old principle of division of three powers. At any rate it trys to carry out more thoroughly the purpose of rule of law, by expanding the principle of rule of law to the legislative field of the Diet, this is rule of constitutional law.

Formerly, especially in England, the idea of rule of law was to established an order, in which a law properly declared by judges would have supremacy over against the king's despotism. It was an attempt to expel the rule of man and domination of power and establish a world where law rules and reason sways. But to-day the

people have already become the soverign power of a state instead of a despotic king, and Parliament, their representative, has become the highest organ of state. Then the principle of sovereignty of Parliament and rule of law are most fundamental in English constitution, but in England there is no rigid constitution and the former principle is higher than the latter. But in America the rigid constitiont was established, then the principle of rule of law grew the highest principle. In this country, no matter how democratized the legislature and executive may be, they are confined to the legal boundary established by the Constitution, new Japanese Constitution not only modeled but enlarged this American doctrine.

But, though this is the spirit of rule of law, the law that is ruler, after all, is declared by judges, who are not always infallible. If these men interprete the constitution arbitrarily and declare it dogmatically, it would be degenerated into "rule of few men" or "judicial obligarchy". Then in Japanese Constitution, it provides that the judges of the Supreme Court must be recognized or discharged by the people, but this voting is not so often that it would impair the independence of the Court. In this way, the idea of rule of law is harmonized with the principle of sovereignty of the people.

Moreover an intention of this system is to make the fundamental order of a nation stable and fixed. This system would prevent the Constitution from changing with unstableness and fluctuation only by majority of the Diet. This is the demand to protect minority against the abuse of the power by the majority. It is designed to prevent the arbitrary action of the majority party of the Diet. It is restriction of the principle of decision by majority and is guarantee of the individual freedom and humanright.

But of course it does not mean to prohibit to amend the provisions of the Constitution. To invalidate an unconstitutional law is to insure not to mend the Constitution without resorting to the due procedure to amend the Constitution. In other words, this system is, after all, to insure the procedure of amending the Constitution, which is harder than enacting laws. By all means, the Constitution must be upheld, but if it should be amended, the amendment must be carried out constitutionaly only in accordance with the provisions of the Constitution. Art. 96 of the Japanese Constitution provides: "Amendment to this constitution shall be initiated by the Diet,

through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify". Then the action of amendment of the Constitution is no more the object of the constitutional judgment. The amendment of the Constitution is acted and intended by the people itself, only by the people.