Constitutional Perspectives on Changes Occurring in Contemporary Japanese Society (1)

—A Look at Two Landmark Supreme Court Judgments—

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INTRODUCTION

This paper will examine two landmark judgments of the Supreme Court. Both cases are significant in that they represent fundamental dealings with people who are members as well as those who desire to become members of the Japanese society[1]. Both are related to globalization and its effects on the people making them more mobile. The first case that follows involved a dispute on the constitutionality of the Japanese election system that involved Japanese citizens residing overseas. The second case involved a dispute on the constitutionality of the nationality law that required parents to marry if a child was born to a Japanese father and foreign mother out of wedlock and if the father acknowledged the child after birth. The paper will examine the process in which both cases developed and the significance of each judgement on Japanese society.

I. MAINTAINING VOTING RIGHTS ACROSS BORDERS

A. Efforts Involved in Keeping in Line with the Changing Environment

Japanese citizens residing overseas are able to vote using the *Zaigai Senkyo Seido* (hereinafter, Overseas Voters Election System)[2]. This system was first established in 1998 when it initially allowed Japanese citizens residing overseas to vote in the proportional representation elections for the Shugi'in (House of Representatives) and Sangi'in (House of Councillors) elections as a result of an amendment of the *Koshoku Senkyo Ho* (hereinafter, Public Offices Election Law)[3]. Japanese citizens residing overseas were eventually allowed to vote in the single-member district elections after another amendment of the Public Offices Election Law in 2006[4]. The establishment of this system involved a long legislative process that began in 1982 which culminated in a Supreme Court judgment that enabled the Overseas Voters Election System to be corrected[5].

The advancement of globalization created an environment that required Japanese companies to become more international and more mobile. In turn, Japanese companies were sending more and more of their employees overseas, sometimes requiring them to reside there for long term. An important issue that arose from this internationalized environment was how to maintain citizens' voting rights if and when Japanese citizens were to live away from home for an extended period of time. The Public Offices Election Law at the time only allowed citizens of twenty years of age or older to vote in elections only if they were registered with the electoral commission in the district that they resided in for at least three months[6]. In October 1982, the *Senkyo Seido Chosakai* (Research Commission on the Electoral System of the Liberal Democratic Party) decided it was time to adopt an "overseas voting system" and asked the Ministry of Home Affairs to develop a govern-

ment proposal which could be submitted to the Diet for consideration. As the proposal was being developed in 1983, the Ministry of Home Affairs and the Ministry of Foreign Affairs experienced difficulty in agreeing on how this system was to be executed[7]. One issue that was particularly difficult involved how to maintain a fair procedure of voting. The Ministry of Home Affairs felt that a fair voting procedure could be maintained by implementing onsite voting at the foreign consulates instead of votes being sent in by mail. The Ministry of Foreign Affairs initially could not agree with this proposal because of their concern with the burden involved in maintaining the polling stations. However, this conflict was resolved after the Ministry of Foreign Affairs decided to strengthen administration and increase personnel within each of the consulates. Thereafter, legislation proposing an amendment to the Public Offices Election Law (bill for the Overseas Voters Election Law) was submitted to the 101th Diet in April 1984[8].

The 1984 bill for the Overseas Voters Election Law set out to establish a new voter registration system and voting system for overseas voters[9]. To qualify to register under this new system, a prospective voter would be required to have resided over three months in a foreign country and have intentions to move back to Japan in the future. If he/she resided in the foreign country for less than five years since moving there, he/she would have to apply through the foreign consulate of the proper jurisdiction to the local electoral commission of his/her last local address. If he/she resided overseas for over five years, then he/she would have to apply through the foreign consulate of the proper jurisdiction to the local electoral commission of his/her *Honseki* (location of his/her family registry). Registration would be complete only after the local electoral commission approved the application. After the registration is approved, the overseas voter would be allowed to vote between the days of the public announcement for the start of the elec-

tion until five days before election day. The voter's ballot is sent by the consulate to the local electoral commission and is counted in the same way as an absentee ballot. Special national elections to fill a vacancy would, for the time being, not be included in this system. The bill also mentioned that the penalties for election law violations would also apply for the Overseas Voters Election System[10].

During the following year, consideration of this bill was terminated at the committee level due to a more immediate election problem—reapportionment of Diet seats for the House of Representatives—that the government had to resolve, and it was officially abandoned as a result of the dissolution of the House of Representatives thereafter during the 105th Diet in 1986[11].

In 1991, the Liberal Democratic Party announced their intentions in resuming discussion to establish the Overseas Voters Election System. And, in June 1992, the *Gyosei Kaikaku Suishin Shingikai* (hereinafter, Administrative Reform Council) included in their third report a section referring to the securement of election rights for citizens residing overseas. In August 1993, the Minister of Home Affairs under the Hosokawa Cabinet recommended that a bill be created to include the right to vote for citizens residing overseas. A group of Japanese citizens residing in New York gathered 1,600 signatures for a petition demanding the establishment of an overseas voters election system. The petition was sent to the Hosokawa Cabinet in November 1993. In the following year, an organization called the *Kaigai Yukensha Nettowa'aku* (hereinafter, Japanese Overseas Voters Network) was established. In 1995, this organization requested assistance in their movement for human rights remedy to the Human Rights Committee of the Japan Federation of Bar Associations. Thereafter, in March 1996, the Human Rights Committee produced a "Research Report on the Voting System for Japanese Citizens

Residing Overseas[12]." And, in May 1996, the same Committee sent a "Petition for the Establishment of an Overseas Voters Election System for Japanese Citizens" to both Chairpersons of the House of Representatives and the House of Councillors, the Prime Minister, the Minister of Justice, the Minister of Foreign Affairs, and the Minister of Home Affairs[13]. This movement influenced a group of 53 Japanese citizens to bring a suit to the Tokyo District Court in November 1996[14]. The plaintiffs lost in both the District and Higher Courts, but were able to attain a remarkable victory in the Supreme Court. The Supreme Court Judgment ultimately helped to change the electoral system to what it is today.

B. The *Overseas Voters Case*[15]

This case disputed the constitutionality of the Japanese election system[16] that involved Japanese citizens residing overseas. The Public Offices Election Law was amended after the suit was brought to court in 1998. Before the amendment of 1998, Japanese citizens were not allowed to vote if they resided overseas since they would not have an address registered with the *Jumin Kihon Daicho* (hereafter, Basic Residence Registry) in Japan which was a prerequisite to register for the electoral commission to vote in elections. One of the arguments brought to the District Court[17] was that this condition before the 1998 amendment of the Public Offices Election Law deprived Japanese citizens of their election rights and therefore was unconstitutional because it violated Article 14, paragraph 1, Article 15, paragraph 1 and 3, Article 43, and Article 44, as well as Article 25 of the International Covenants on Civil and Political Rights. A second argument was that as a result of failure of the government to correct this unconstitutional condition, Japanese citizens residing overseas were deprived of their right to vote and therefore demanded the government to pay damages (of 50,000 yen) to all

those included in the suit. While the case was being argued at the district court level, an amendment to the Public Offices Election Law was passed by the Diet in 1998 establishing a new Japanese Overseas Citizens Voter Registration System[18]. However, this amendment only partially corrected the system allowing Japanese citizens residing overseas to register to vote[19] for the proportional representation elections for both the House of Representatives and House of Councillors, but for an undetermined period disallowed this right for the single-seat district elections for both Houses[20]. The plaintiffs made an additional claim asking the court for a declaratory judgment confirming that this condition of not allowing Japanese citizens residing overseas to vote in single-seat district elections for both Houses to be unconstitutional. Thereafter, in the plaintiffs' appeal, they asked the Tokyo High Court (in addition to the three arguments presented in the District Court) to confirm that they in fact had a right to vote in the single-seat district elections for both Houses[21].

The plaintiffs' arguments were denied both in the District Court and High Court. The plaintiffs (13 of the 53 original members) thereafter appealed to the Supreme Court and the judgment of the Court was rendered by the Grand Bench on September 14, 2005[22]. The Court's judgment on the issue of constitutionality of the Public Offices Election Law disallowing the right to vote to Japanese citizens residing overseas for not having a local address with the Basic Residence Registry (law before the 1998 amendment) during the October 20, 1996, House of Representative elections was that it violated Article 15, paragraph 1 and 3, Article 43, paragraph 1, and Article 44 of the Constitution[23]. On the issue of the amended law limiting voting rights to only the proportional representation elections of both Houses, the Court judged that it violated the Constitution and that the election rights should have been adjusted to include the single-seat district elections for both

Houses by the next election immediately scheduled after this Supreme Court judgment[24]. Since this period witnessed a remarkable development of communication means of global scale (referring to the internet), the Court could not agree with the government's argument that it would be difficult to appropriately disseminate information to voters overseas to execute a fair election[25]. The Court also confirmed that the Japanese citizens residing overseas had a legitimate case in bringing the issue of eligibility to vote in the next single-seat district elections of both Houses based on their overseas status (voter registration for Japanese citizens residing overseas)[26]. The Court also declared that unless there was a compelling interest by the government to deprive Japanese citizens residing overseas of their voting rights, the Diet would be obligated to pass legislation to guarantee their constitutional right to vote. In cases where there was a clear violation, and in extraordinary instances, Article 1 paragraph 1 of the *Kokkabaisho Ho* (hereinafter, Government Redress Law) may be used to remedy the situation. And, in this case, the Court declared that there was a clear violation, in that, the government's failure in passing legislation and taking over 10 years to do so and not enabling Japanese citizens residing overseas to vote in the 1996 national elections could be considered an extraordinary instance, and therefore the government was liable to pay for damages (solatium) to the amount of 5,000 yen per person[27].

In this case, there were two dissenting opinions as well as one concurring opinion. The joint dissenting opinion by Justices Yoko'o and Ueda denied the plaintiffs' claims of unconstitutionality for both conditions established before and after the 1998 amendment of the Public Offices Election Law, explaining that the concrete decisions made to decide details of the election system to elect the members of both Houses were within the responsibility of the Diet. The Constitution states that the details pertaining

to “the numbers of the members of each House (Article 43, paragraph 2),” “qualifications of members of both Houses and their electors (Article 44),” “electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses (Article 47),” were in principle, within the discretion of the Diet. This is so that the Diet can take responsibility in assuring the administration of a fair election without confusion[28]. Undeniably, all Japanese citizens have voting rights, however, Japanese citizens residing overseas are in a more difficult situation than those domestically situated in that there are social as well as technical constraints that may hinder the assurance of fairness when voting[29]. Also, when the Diet amended the Public Offices Election Law in 1998 to create a new overseas voting registration system, but only included the opportunity to vote in the proportional representation election of both Houses (but not for single-seat district elections of both Houses), the Diet felt that the twelve to seventeen days allowed for the election campaign made it extremely difficult to supply information about the candidates to those residing overseas. Under these circumstances, this decision to limit the election and its efforts in securing an election environment overseas where voters can vote freely, protecting against election violations within the various social and technical constraints was rationally based and could not be considered illegal nor unconstitutional. Justices Yoko’o and Ueda also denied the plaintiffs’ argument that the Diet’s failure in passing legislation to establish an Overseas Voters Election System denied Japanese citizens residing overseas to vote in the 1996 elections and infringed on their right to vote, and therefore the government was not liable to pay for damages under the Government Redress Law.

The other dissenting opinion was written by Justice Izumi. It focused on the disagreement of the majority opinion to accept the argument to pay a solatium to the amount of 5,000 yen per person using the Government

Redress Law because the plaintiffs experienced mental anguish as a result of not being able to participate in the election. In his dissent, Justice Izumi argued that the plaintiffs' real objective to use the Government Redress Law was not to claim damages in financial terms, but was to show the unconstitutionality of the Public Offices Election Law that disallowed the right to vote in elections, and indirectly to suggest the need for legislation to rectify the condition. The Justice added that although the right to vote was a fundamental right oriented to the individual, voting for members of both Houses as a group had a public character to it, so it could not be considered purely individualistic. And, the mental anguish that the plaintiffs' claimed they experienced by not being able to vote reached out to several hundreds of thousand Japanese citizens residing overseas. This claim did not fit well with the concept of redressing damages in financial terms in that it would be difficult to evaluate each's mental anguish[30].

The concurring opinion was written by Justice Fukuda who attempted to refute the dissenting opinions' arguments. In refuting Justice Izumi's dissenting opinion, Justice Fukuda said that he understood the logic of the argument that the claim of damages did not fit well with the concept of the Government Redress Law, however, other than being emotionally satisfied with the decision in rectifying the right to vote, there was no other remedy but to pay a solatium. And, paying damages for the actions or inactions of the Diet and members of the Diet would let them know that if the right to vote which is the foundation of representative democracy is disallowed or infringed in any way, citizens' tax money would be used to pay for damages whatever the amount may be[31].

Justice Fukuda also refuted Justices Yoko'o and Ueda's dissenting opinion. According Justice Fukuda, the legislature was the core of representative democracy. And, the legislature established its legitimacy by "equal, free and

periodic elections." The Diet in almost all cases (*hotondo*) does not have the discretion to disallow or limit the citizens' right to vote from the perspective of maintaining equal, free and periodic elections. Disallowing or limiting citizens' right to vote will jeopardize the authority of the Diet's national powers as the supreme organ of the state, as well as jeopardize the legitimacy of the Diet and members of the Diet. Sovereignty by the people is one of the ideals of the Constitution of Japan and it must not be forgotten that Japan is a nation based on representative democracy. Justice Fukuda asserted in his conclusion that if we are a representative democracy, we must reconsider the idea of not allowing our citizens to vote for the sole reason that they reside overseas[32].

C. The Significance of the Overseas Voters Case

One significant point of this Judgment was that the Justices used strict scrutiny to decide it and, as Professor Yasuo Hasebe has suggested, the Judgment set a "constitutional baseline" that guaranteed all citizens equal opportunity to vote in national elections[33]. In this manner, the government was required to establish election rights actively to meet the demands of the constitutional baseline. In restricting voting rights of Japanese citizens residing overseas, the government needed to show a compelling interest. The majority opinion could not find a compelling interest to justify restrictions in neither before nor after the 1998 amendment to the Public Offices Election Law. In drawing this "constitutional baseline," the dissenting opinion written by Justices Yoko'o and Ueda reached a different approach from that of the majority, in that, it asserted that matters concerning the numbers of members of each House (Article 43, paragraph 2), the qualification of members of both Houses and their electors (Article 44), electoral districts, method of voting and other matters pertaining to the method of election of members of

both Houses (Article 47), in principle, were to be decided based on legislative discretion and were matters within the responsibility of the Diet[34]. But, the concurring opinion by Justice Fukuda refuted Justices Yoko'o and Ueda's dissenting opinion on this point by emphasizing the significance of the Diet's position in a representative democracy—that it established its legitimacy by establishing "equal, free and periodic elections[35]."

Another significant point of this case was its decision to declare unconstitutional the failure of the Diet to act more promptly on the matter (taking over ten years) without a rational reason and using this as a major point to decide for the plaintiffs based on the Government Redress Law[36]. According to the lead attorney for the case, asserting the illegality of not being able to vote during the 1996 Shugi'in Election and the unconstitutionality of the Public Offices Election Law for creating such a condition would be a difficult task since the Supreme Court Judgment of November 21, 1985 (hereinafter, Home Voting System Case), involving a physically disabled voter who claimed that the abolishment of a home voting system and the Diet not reinstating this system violated his right to vote, declared that in cases when the Government Redress Law is used, the government's inaction (in this case, reinstatement of the Home Voting System) must be considered an "extraordinary instance" that clearly violated the provisions of the Constitution in order for the government to be liable to pay damages[37]. In recollection of the case, the lead attorney suggested that in having their claim being approved, the Supreme Court expanded its interpretation of the Home Voting System Case[38].

A point brought up by Professor Munetaka Tanaka is noteworthy. It questioned the reasoning of the Supreme Court's judgment on the issue suggesting the Diet had no rational reason for taking so long to improve the election system after their attempt failed in 1984[39]. Looking chronologically

after 1984 to what caused the possible failure of the Diet to follow up on the issue, Professor Tanaka suggested that the Diet was preoccupied with several high priority reforms. For example, in 1985, the Supreme Court declared that the maximum discrepancy in apportioned seats among different election districts of 1 to 4.40 to be unconstitutional[40]. As a result, the Diet was busy providing legislation to correct the malapportioned district seats. In 1987, the so-called Recruit Incident prompted the government to consider political reform that resulted in radical reforms on the controls of political campaign contributions as well as the election system. Discussions on these issues were finalized in 1994 and laws passed in 1995. In 1996, the first election was administered after the change to the mixed-member electoral system—single-seat member districts and proportional representation constituencies. In lieu of these events, Professor Tanaka suggested that it may be fair to say that the Diet could not be considered to have been totally "negligent" in developing an overseas voters election system immediately after its failure to develop one in 1984[41].

This case confirmed the foundational aspects of Japan's parliamentary democracy stressing popular sovereignty and the right of the people to elect their representatives. In this respect, the government had an affirmative duty in developing an overseas voters election system not only because of the development of the internet environment making communication more accessible on a global scale, but more so because voting is a fundamental right. This is directly in line with the understanding laid out at the end of World War II by the Potsdam Declaration promoting democracy for the future of the Japanese society, as well as, the basic understanding put forth by the Constitution of Japan.

II. THE ISSUE OF NATIONALITY AND INFLUENCES OF INTERNATIONAL PERPSECTIVES

A. The Nationality Law and the Necessary Conditions for Acquiring Nationality

Article 10 of the Constitution of Japan states, "The conditions necessary for being a Japanese national shall be determined by law." In this manner, the Constitution designates authority to the Diet to establish the "conditions necessary" for the acquisition and loss of nationality. For natural acquisition of nationality, Japan has traditionally followed the principle of *jus sanguinis*. Article 2, paragraph 1 of the *Kokuseki Ho* (hereinafter, Nationality Law)[42] states that a child is granted Japanese nationality: 1) When, at the time of its birth, the father or the mother is a Japanese national; 2) When the father who died prior to the birth of the child was a Japanese national at the time of his death; 3) When both parents are unknown or have no nationality in a case where the child is born in Japan.

Under Japanese law, the issue becomes more complicated when a child is born out of wedlock[43]. In cases where a Japanese mother and a foreign father have a child, the child (considered "illegitimate" because he/she is born out of wedlock) is granted Japanese nationality by reason of the child's legal relationship with the mother at birth[44]. In cases where a Japanese father and a foreign mother have a child born out of wedlock, the child is granted Japanese nationality if the father acknowledges paternity before birth[45]. If for some reason the father acknowledges paternity after the birth of the child, nationality would only be granted if the father married with the mother thereafter to acknowledge the legitimacy of the child[46]. Otherwise, the child would only be able to acquire Japanese nationality through the naturalization process[47]. The constitutionality of this differential treatment of

illegitimate children acknowledged by their fathers after birth (Article 3, paragraph 1, Nationality Law) became a legal dispute that culminated in the landmark Supreme Court Judgment of June 4, 2008[48]. The Court's judgment in favor of correcting this condition prompted the Diet to amend the Nationality Law immediately thereafter[49].

B. The Illegitimate Child Nationality Case[50]

The case[51] involved a child who was born between a Japanese father and a Filipino mother out of wedlock. The father acknowledged paternity after the child's birth in 1997. In 2003, the child submitted a notification of nationality to the Minister of Justice, but was denied for reason that the child did not meet the necessary conditions for Japanese nationality by birth[52]. Prior to this case, the mother and child were involved with a deportation case for overstaying the legally permitted period (Administrative Deportation Case No.411 (2002)). The case was settled on January 18, 2005 by the granting of a special residency permit extension for one year by the Minister of Justice[53]. After acknowledging paternity of the child in 1999, the father lived with the mother and child in a so-called "*nai'en* relationship." In this relationship, they also had another child, but in this case, the father acknowledged paternity before the child's birth[54]. The main dispute in the case was whether or not Article 3, paragraph 1 with its requirement of marriage after the father's acknowledgement of paternity of the child after birth violated Article 14, the equality clause, of the Constitution. The Tokyo District Court based its decision on the Supreme Court Judgment of November 22, 2002[55] that used an approach which focused on nationality by birth to prevent unstable nationality decisions. Scholarly opinion at the time suggested that Article 2, paragraph 1 of the Nationality Law unfairly discriminated against children who were acknowledged after birth violating Article 14 of the

Constitution because it denied retrospective effect for them[56]. The 2002 Judgment denied retrospective effect of the acknowledgement of paternity under the Nationality Law although Article 784 of the Civil Code allowed for retrospective effect to the time of the child's birth if there was acknowledgment of the child by either father or mother. The Court noted that the Constitution declared that the Diet was responsible for matters pertaining to the acquisition and loss of nationality, and, any differential treatment would require a rational reason for its establishment[57]. Based on the 2002 Supreme Court Judgment, the Tokyo District Court's decision focused on the reasons behind the differential treatment between legitimate and illegitimate children. The deciding factor was why "marriage" was necessary for only illegitimate children. Lawmakers explained that in addition to the principle of *jus sanguinis* for natural acquisition of nationality, the legislative intent to include marriage was to create a strong family relationship for the children acknowledged after birth and as a result developing stronger connections with Japan and Japanese society. According to the lawmaker's explanation, those children who were subject to Article 3 in many cases had acquired foreign nationality and had close relations with that country. So, therefore, acknowledgment of these children after birth required marriage of the parents to advance a closer connection or bond with Japan and its society[58]. The court, however, refuted this explanation by asserting that a "marriage relationship between mother and father" was not the only way of promoting strong family relationships. The court noted that many "*nai'en* relationships" established after acknowledgement of the child usually provide for a living environment similar to that of a family[59]. In a decision that surprised the attorneys of the case[60], the court declared that there was no rational reason behind the differential treatment between legitimate children within a marriage relationship and illegitimate children within a "*nai'en* relationship" and that this

went against Article 14 of the Constitution. The court gave an expanded interpretation to include "*nai'en* relationships" into the requirement of "marriage of father and mother" (Article 3, paragraph 1), and declared the part that stipulated "legitimate child" (Article 3, paragraph 1) as unconstitutional and granted the child in the case Japanese nationality[61].

The High Court dismissed the case stating that the district court overstepped its bounds of judicial review in that they were making legislation (judicial law-making) by expanding interpretation of law and creating a new requirement for nationality acquisition[62].

The Supreme Court Judgment of June 4, 2008 is the eighth case in which the Court has declared legislation unconstitutional. In doing so, it examined the constitutionality of the differential treatment required under Article 3, paragraph 1, and reviewed the legislative intent of the differential treatment[63]. The Court acknowledged the legislative intent of requiring marriage of the parents when the father of the child was Japanese and the mother was a foreigner, to be an approval of nationality assuring that the acknowledged child would have a life of unity with his/her father who was Japanese and to develop a connection with Japanese society through family life. The decision to include "marriage" into the nationality requirement was also supported by information explaining that there were many countries (during the time of legislative consideration) using the same procedure requiring marriage and acknowledgement of the child for nationality[64]. The Court agreed that the legislative intent was rational in 1984, however, brought up the following points to conclude that the legislative intent at the time of passage of Article 3, paragraph 1 could no longer be accepted[65]:

1) The changes that occurred in the social and economic environment that has affected the life style of the family and parent/child relationships in Japan which has made it difficult in measuring the

effects and impact of marriage on the relationship it has with developing connections with Japan and its society[66];

2) The global trend in eliminating discrimination against illegitimate children, and Japan's ratification of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child[67];
3) The differential treatment resulting in the discrimination of the Japanese father requiring marriage when acknowledging the child after birth, whereas if it were a child born between a Japanese mother and foreign father, nationality would be approved without marriage[68];
4) The recognition that the children involved had no control over the requirement of marriage between their parents[69];
5) The procedure of naturalization provided by Article 8, no. 1 did not allow for attaining nationality automatically, but was dependent on the discretion of the Minister of Justice and did not guarantee naturalization even if the child was qualified[70].

The concurring opinion written by Justice Izumi stated that "a strong legitimate reason" would be needed to prove the necessity for implementing the discriminatory treatment of Article 3 paragraph 1 since it involved social status and gender, hinting that the Court would use "strict scrutiny" or at least a "stricter" standard in its reviewing process[71].

The Court concluded that the differential treatment of Article 3, paragraph 1 as it stood lacked rationality and was an excessive requirement that was not aligned to the social and economic changes within and outside of Japan. It was therefore, unconstitutional and violated Article 14 of the Constitution[72]. As a remedy, the Court concluded that the child be granted

nationality and that Article 3, paragraph 1 be interpreted removing the part that required “the status of a legitimate child by marriage of the father and mother” for children who were born between a Japanese father and foreign mother and have been acknowledged paternity after birth so that they would be allowed to submit a notification for nationality[73].

The joint dissenting opinion of Justice Yoko’o, Justice Tsuno and Justice Furuta opposed the majority opinion stating that the case should have been dismissed and that the differential treatment required by Article 3, paragraph 1 did not violate the Constitution on the grounds that matters pertaining to nationality law—including the issue of legitimate children being able to receive nationality by notification and illegitimate children having to go through the naturalization process to attain nationality, in cases where acknowledgement of the child is done after birth—were within the discretion of the government and that it was within the scope of legislative policy[74]. The dissenting opinion also questioned the majority opinion’s statements that referred to the changes in life style of the family and parent/child relationships in Japan since they did not explain the details of these changes with concrete evidence[75]. The dissenting opinion did agree to the increase in countries, especially in Europe, for their changes in nationality policy to protect illegitimate children. But, added that the European countries had their own unique historic and regional reasons for changing policy as well as more international marriages due to the integration of the regions by the creation of the EU[76]. The dissenting opinion also criticized the majority opinion for taking the naturalization process under Article 8 and the whole system and structure of the nationality law too lightly[77].

The other joint dissenting opinion by Justice Kai’naka and Justice Hirokago refuted the majority opinion’s position by stating that even if Article 3, paragraph 1 was unconstitutional, it should be up to the Diet to

resolve the problem and not the courts. The dissenting opinion opposed the method of remedy which was used because it would be judicial law-making establishing new nationality requirements[78]. Justice Imai's concurring opinion, joined by Justice Nasu and Justice Wakui, tried to support the majority opinions position by stating that the granting of nationality to the illegitimate child after interpreting Article 3, paragraph 1 by removing the problematic part of the paragraph was not creating new law and would not be infringing on the Diet's authority of law making power[79]. Justice Kondo's concurring opinion also agreed with Justice Imai's opinion in that the Court's remedy did not infringe on the Diet's authority[80].

Justice Tahara's concurring opinion agreed with the judgment of the Court, and in support of the children's nationality status, emphasized the importance of nationality acquisition for children below the age of 20 since it involved the right to education and social welfare rights[81].

Justice Fujita wrote an independent opinion that suggested the problem was not related to what the majority opinion referred to as "an excessive requirement," but rather a problem related to "insufficient requirements." The proper remedy would be to supplement the insufficient portions and resolve the unconstitutional condition by rational interpretation. Normally, the Diet would be responsible in resolving the problem in the first instance, however, in cases where the Diet has already provided for legislative policy and nothing has been done to correct the problem (in this case, an unreasonable differential treatment) then a judicial remedy using a rational expanded interpretation of the law could be initiated if it was within the scope of the basic understanding of the legislative policy[82].

C. The Significance of the Illegitimate Child Nationality Case

According to Professor Yasuji Nosaka, one significant point of the case

dealt with the influences caused by international and domestic changes[83]. According to the majority opinion, the differential treatment required by Article 3, paragraph 1 at the time of passage in 1984 (Law no. 45) was considered to be constitutional and in line with the principle of *jus sanguinis* reinforced with a legislative intent to strengthen the family bond between the Japanese father and the illegitimate child and to develop a closer connection or bond with Japan and Japanese society[84]. However, the majority opinion goes on to say that the changes in social and economic environment that occurred since 1984 have witnessed an increase in illegitimate children which has affected the life styles of the family and diversified the parent/child relationships in Japan. Furthermore, the advancement of international exchange has also resulted in more children being born between Japanese fathers and foreign mothers. The life styles that they lead are quite "complex and diversified" compared to that of children born between Japanese parents. Moreover, the global trend in eliminating discrimination of illegitimate children in various countries as well as the prohibition of the discrimination among children advanced by the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are also strong influences[85]. After 1984, many countries have also amended their laws to accommodate illegitimate children with simply acknowledgment of paternity. The majority opinion concluded that with these changes, it was now difficult to defend the rationality behind the differential treatment required in Article 3, paragraph 1[86].

Another significant point of this case involved the Judgment's influence on "future" cases concerning illegitimate children[87]. According to Professor Noriyuki Inoue, the Judgment significantly altered the interpretation of the Supreme Court Judgment of July 5, 1995, which was a precedent in explaining the rational grounds behind the differential treatment given to illegiti-

mate children in terms of family inheritance matters established by Article 900, no 4 (illegitimate children were allowed one half of that of illegitimate children)[88]. The 2008 Judgment can be interpreted to mean that the differential treatment which assigned illegitimate children one half the inheritance of legitimate children could be compared to an index to social value that equated to significant disadvantage/loss experienced by these children and could be judged as irrational and unfair[89]. Thereafter in 2013, the Supreme Court invalidated Article 900, no 4, by concluding that the respect for individuals had become more prominent in the family and that the disadvantages/loss that resulted from matters over which illegitimate children had no control could not be accepted[90].

In relation to previous cases that influenced or supported the outcome of the 2008 Judgment, the Supreme Court Judgment of 2002 is noteworthy[91]. The Court denied retrospective effect for children acknowledged after birth by their Japanese father under Article 2, paragraph 1 of the Nationality Law, but the two concurring opinions, one written by Justice Kameyama and the other one written by Justice Kajitani and Justice Takii mentioned Article 3 to be problematic in requiring "marriage of father and mother[92]." The content of the concurring opinion written by Justices Kajitani and Takii mentioned almost all of the reasons given by the later 2008 Judgment refuting the rationality of the legislative intent stated in 1984. These concurring opinions were not the only voices in stating the problems of the Nationality Law, but surely they were an influential impetus in changing course and even overruling precedents.

CONCLUSION: REALIZING THE CHANGING ENVIRONMENT AND CHANGING PERSPECTIVES

What is the role of the Supreme Court of Japan and how is it to engage

with the Diet, especially when it is to review laws for their constitutionality? In analyzing the cases reviewed by the Supreme Court between 1997 and 2010, Professor Hidenori Tomatsu, explained that since the judiciary as a whole (including the Supreme Court) was limited to reviewing concrete cases or controversies, the judiciary could not be expected to be a leader in reforming future laws or the legal system in general since they were reviewing disputed laws (and actions) and resolving them only after they reached the courts[93]. However, on a more positive note, Professor Tomatsu did suggest in his analysis of the decade of cases that 1) the Supreme Court was quite active in handing down unconstitutional judgments during this decade (five unconstitutional judgments); 2) in handing down unconstitutional judgments, the Court expanded its protection of human rights; 3) the Court used "strict scrutiny" for the first time (in the *Overseas Voters Case*) and other reviewing patterns in other cases that helped develop new standards in resolving legal disputes which promoted discussions in judicial review; and 4) there were significantly more "active" opinion writing by individual Justices of the Court than in the past, including significant dissenting and concurring opinions that may have influential effects on future cases[94]. All in all, Professor Tomatsu concluded that the Court was still very "passive" in deciding on the constitutionality of laws.

One of the reasons for the Court's "passivity," as explained by Professor Hasebe, may come from the way laws are made in Japan, in that, many of the laws (bills) are initially drafted in the *Hosei Shin'gikai* (Consultative Council of Law) under the Ministry of Justice staffed by high-ranking officials from among judges and public prosecutors. And, for the bill to be proposed by the Cabinet, it has to be approved by the Cabinet Legislation Bureau which is also staffed by law experts from the judiciary and the government to check for internal consistency, coherence with the legal system as well as for the

bill's constitutionality[95]. So, it can be generalized that the Court may be reluctant to "actively" decide on the constitutionality of any law since their role may be as Professor Hasebe suggested, "merely to sustain the legislative process by assuring its fairness and transparency[96]."

In conclusion, the efforts of the Supreme Court in sustaining the legislative process will also include a hard look into the legislative facts as well as to consider the concrete changes that have been occurring domestically "and internationally" since the adoption of the disputed laws (provisions) and any other administrative actions. The laws that were invalidated by the Supreme Court in the two cases that were examined in this paper were laws that were considered legal and constitutional at the time of adoption, but were affected by the eventual economic and social and even "global" changes that occurred thereafter. The world, in fact, is changing more rapidly than ever before and Japan is significantly affected by these changes. The "active" dissenting as well as concurring opinions (which sometimes are not noticed at the time of their announcement—a kind of "stealth activism" borrowing the term given by Professor Frank Upham[97]) are significant in indicating possible breakdown or failures in the disputed issues (laws, provisions and actions) brought to the Court. In this respect, the significance of minority opinions cannot be overemphasized. They can assist in discovering minor and sometimes major concerns that need to be seriously debated leading to alterations in previous ways of thinking. This can influence "future" Courts to act more boldly and possibly to change their perspectives to even overrule precedents. And, needless to say, in a constitutional democracy like Japan, the voices of the people will begin the process that will sustain justice and bring the Supreme Court into the spotlight for their role as the "Guardian of the Constitution."

NOTES

1) Issues concerning “membership” and “citizenship” are complex constitutional issues. The limitation of space does not allow us to go into these topics in depth. Discussion on these issues will have to wait for another occasion.
2) See, *Zaigai Senkyo Seido*, Ministry of Internal Affairs and Communications, Japan, website: www.soumu.go.jp/senkyo/hoho.html (Last visited March 2017); See also, *Koshoku Senkyo Ho* (Public Offices Election Law), Chapter 4-2 *Zaigai Senkyonin Meibo* (Overseas Voters Electoral Register).
3) See, Amendment of the *Koshoku Senkyo Ho*, Law No. 47 (1998).
4) See, *Koshoku Senkyo Ho*, Law No. 62 (2006). The amended portion eliminated Supplementary Section 8, for details, see, Kasagi, “Koshoku Senkyo Ho no Ichibu wo Kaisei suru Horitsu (Law Amending One Part of the Public Offices Election Law), 1318 *Jurist* 23 (2006).
5) See, N. Okazawa & K. Tonami eds., *Zaigai Senkyo—Gaikoku Seido to Nihon no Kadai (Overseas Elections—Foreign Systems and Japan's Problems)*, (Infomedia Japan, 1998), p. 432.
6) *Koshoku Senkyo Ho*, Article 21, paragraph 1. Also, before the amendment, Article 15, paragraph 1 of the *Jumin Kihon Daicho Ho* (Basic Residence Registry Law) required local residency to vote which meant that citizens who were sent overseas could not vote for any of the elections because a prerequisite to register with the local electoral commission required each prospective voter to have a local address registered under the local *Jumin Kihon Daicho* (Basic Residence Registry).
7) For a detailed explanation on the legislative process and sequence of events pertaining to the development of the 1984 and 1997 proposals of the Overseas Voters Election Law, see Okazawa & Tonami, *supra* note 5, pp. 433–39.
8) *Id*., p. 433.
9) *Id*.
10) *Id*., pp. 433–44.
11) *Id*., p. 434.
12) *Id*., pp. 487–92. The “Research Report” mentions the following nine points to be considered:
    1) The Preamble of the Constitution states that sovereignty is derived from the people and that the authority of which is exercised by the representatives of the people. And, that the people have the inalienable right to choose and dismiss their public officials;

2) The principle of equality declared in Article 14 (of the Constitution) must be enforced strictly within the framework of election rights;
3) Voting qualifications are established by the Public Offices Election Law (established in 1950, Law No. 100). Article 21 of this law states that the elector qualifies to be registered in the relevant local voting district where he/she has resided for more than three months. This system established by the Public Offices Election Law under the Constitution does not allow election rights for Japanese citizen residing overseas;
4) There are many difficulties involved in the realization of voting rights for Japanese citizen residing overseas, however, unless the government can prove that there is a compelling interest, it is an unfair restriction to completely disallow the execution of election rights just for being overseas;
5) When the present Public Offices Election Law was established in 1950, there were few Japanese citizens residing overseas. However, at present (1992), there are approximately 680,000 Japanese citizens residing overseas and at least 500,000 of them have been disallowed election rights. We cannot allow so many citizens not being able to participate in the political process;
6) The three months domestic residential requirement of the Public Offices Election Law violates Article 25 of the International Covenants on Civil and Political Rights adopted by Japan in 1979;
7) The Public Offices Election Law has been in force for more than forty years without any amendment. The present condition that disallows election rights to Japanese citizens residing overseas goes against the Constitution without any reasonable reason and takes away this right from a significant number of people. The government submitted a bill to the Diet in 1984 to guarantee election rights for Japanese citizen residing overseas. However, the bill was officially abandoned due to the dissolution of the House of Representatives in 1986 and the government's failure in leaving this unconstitutional condition untouched for over 10 years cannot be tolerated;
8) Therefore, the Diet should immediately take measures to adopt legislation to provide election rights for Japanese citizens residing overseas. This should not be limited to one part of the election system, but the right to vote should cover the entire national election system. The right to vote should also be allowed for Japanese citizens residing overseas for long term as well as for permanent residents;
9) In addition to allowing Japanese citizens residing overseas to vote in national elections, they should also be allowed to vote in the National Review for

Justices of the Supreme Court.

13) *Id*., pp. 493–94.

14) *Id*., pp. 434–45. See, Tokyo District Court Decision, October 28, 1999, 59 *Minshu* 2216.

15) Supreme Court Judgment, Grand Bench, September 14, 2005, 59 *Minshu* 2087. For an English commentary of this case, see Matsui, "The voting rights of Japanese citizens living abroad," 5 (2) *Int. J. Const. Law* 332 (2007). A digital copy of the article can be found at: http://icon.oxfordjournals.org/content/5/2/332.full (Last visited March 2017).

16) The Japanese election system for both House of Representatives and House of Councillors is a combination of single-seat member districts and proportional representation constituencies. For an explanation of the election reform of 1994 that changed the electoral system from a single nontransferable vote system into a mixed-member majoritarian system, see F. Rosenbluth & M. Thies, *Japan Transformed-Political Change and Economic Restructuring*, (Princeton Univ. Press, 2019), Chapter 6; also see, Kobayashi and Tsukiyama, "LDP Factions under SNTV and MMM," in N. Batto, Chi Huang, A. Tan, G. Cox, eds., *Mixed-Member Electoral System in Constitutional Context*, (U. of Michigan Press, 2016), pp. 73–101.

17) See, 1999 Tokyo District Court Decision, *supra* note 14, p. 2216.

18) See, Public Office Elections Law (1998, Law No. 47), Chapter 4-2, Article 42, paragraph 1 and 2.

19) *Id*.

20) *Id*., Supplement, Section 8.

21) See, Tokyo High Court Decision, November 8, 2000, 59 *Minshu* 2231.

22) See, 2005 Supreme Court Judgement, *supra* note 15, p. 2089.

23) *Id*., p. 2097.

24) *Id*., p. 2098.

25) *Id*.

26) *Id*., p. 2100.

27) *Id*., pp. 2101–2102.

28) *Id*., pp. 2105–2106.

29) *Id*.

30) *Id*., p. 2109.

31) *Id*., p. 2103.

32) *Id*., p. 2104.

33) See, "Teidan—Zaigai Hojin Senkyoken Daihotei Hanketsu wo Megutte (Three

Party Discussion—Grand Bench Judgment on the Right to Vote for Japanese Citizens Residing Overseas)," 1303 *Jurist* 2 (2005).

34) 2005 Supreme Court Judgement, supra note 15, pp. 2105–2106.

35) For Justice Fukuda's Concurring Opinion, see, *Id*., pp. 2102–2104.

36) The use of the Government Redress Law in challenging the constitutionality of the legislative inactivity opened up a new method in constitutional litigation. See, Teidan *supra* note 33, p. 16.

37) See, Supreme Court Judgment, November 21, 1985, 89 *Minshu* 1512.

38) See, Kitamura, "Zaigai Hojin Senkyoken Sosho Saikosai Hanketsu (Supreme Court Judgment on the Overseas Citizens Election System Case)," pp. 213–214, in Y. Hasebe, ed., *Ronkyu Kempo—Kempo no Kako kara Mirai he* (*Inquiries into the Constitution: Its Diachronic Trajectory*), (Yuhikaku, 2015), p. 201. See, also, Nonaka, "Zaigai Senkyosei Ichibu Iken Hanketsu no Igi to Mondai ten (The Significance and Issues Involved in the Partial Unconstitutionality of the Overseas Voters Election System)" 1303 *Jurist* 18 (2005). According to Professor Toshihiko Nonaka, the Court narrowly tailored the decision to limit the discretion of the Diet in comparison to the Home Voting System Case (1985), and provided for more flexibility in the standard addressed in the Home Voting System Case (pp. 22–23). From an administrative law perspective with similar conclusions, see, Kitamura, "Zaigai Nihonjin Senkyoken Hakudatsu Sosho ni okeru Gyoseiho'jo no Ronten ni tsuite (Administrative Law Issues Concerning the Overseas Japanese Citizens Voting Rights Case)," 1303 *Jurist* 25 (2005).

39) See, Teidan, *supra* note 33, p. 2.

40) Supreme Court Grand Bench Judgment, July 17, 1985, 39 *Minshu* 1100.

41) See, Teidan, *supra* note 33, pp. 6–7.

42) Law No. 88 (2008).

43) See, Sano, "Kokuseki Ho Iken Hanketsu to Kokuseki Ho no Kadai (The Unconstitutionality of the Nationality Law and Issues Concerning the Nationality Law)," 1366 *Jurist* 85, 87 (2008).

44) See, Ho no Tekiyo ni Kansuru Tsusoku Ho (Provision on the Application of Laws), Law no.78 (2006), Article 29, paragraph 1.

45) See, Article 2, paragraph 1, Nationality Law.

46) See, Article 3, paragraph 1, Nationality Law (1984, Law no. 45).

47) See Article, 8 paragraph 1, Nationality Law.

48) Supreme Court Grand Bench Judgment of June 4, 2008, 62 *Minshu* 1367.

49) See, Akiyama "Kokuseki Ho no Ichibu wo Kaisei suru Horitsu no Gaiyo (Outline of the Law that Concerned the Partial Amendment of the Nationality Law)," 1374

Jurist 2 (2009). The law was partially amended on December 5, 2008 (Law no 88). It took effect on January 1, 2009. The provision which included both the "marriage requirement" of the parents and the "proof of the legitimacy status of the child through acknowledgment," was amended to only require "acknowledgement of the child by either father or mother." In addition to this, Article 20 (Nationality Law) was added to include penalties for submitting false information for attaining nationality. The penalty included less than one year in prison or a fine of less than 200 thousand yen.

In relation to voting rights and citizens residing overseas, there is another issue that involves the National Review of Supreme Court Justices after they are appointed. This national review is conducted during the general elections for the House of Representatives (see, Article 79, paragraph 2, 3 and 4 of the Constitution). In a court case questioning the constitutionality of the absence of this national review of Justices after the establishment of the Overseas Voters Election System, the Tokyo District Court denied the plaintiffs' claims by explaining that although there was a dramatic advance in communication technology which questions the absence of the national review of Justices of the Supreme Court for those residing overseas, it cannot be judged that the situation is at an unconstitutional status without more discussion. In addition, the court suggested that a reasonable period time for the Diet to consider legislation to correct the matter has not elapsed yet. The government's explanation for the delay concerns the difficulty in preparation process of the voters' review ballots since the contents (names of the Justices up for review) are confirmed on the same day of the election campaign announcement. See, Tokyo District Court Decision, April 26, 2011, 2136 *Hanrei Jiho* 13. See also, Hatajiri, "Zaigai Nihon Kokumin no Saikosaibansho Saibankan Kokumin Shinsa (Right to the Review of Justices of the Supreme Court for Citizens Residing Overseas)" 1440 *Jurist* (*Juyo Hanrei Kaisetsu* ed.) 14.

50) 2008 Supreme Court Judgment, *supra* note 48, p. 1367. For an English written commentary on the case, see Okuda & Nasu, "Constitutionality of the Japanese Nationality Act: A Commentary on the Supreme Court's Decision on 4 June 2008," 26 *Journal of Japanese Law* 101 (2008). Copy of article is available at: http://sydney.edu.au/law/anjel/documents/2008/ZJapanR26_11_Okuda_Nasu.pdf (last visited April 30, 2017)

51) Actually, two cases were brought together and decided on the same day. Case 1 being District Court Case of April 13, 2005, 1890 *Hanrei Jiho* 27, and Case 2 being District Court Case of March 29, 2006, 1932 *Hanrei Jiho* 51. Both district level decisions ruled that Article 3, paragraph 1 (Nationality Law) which established a

differential treatment for illegitimate children requiring the parents to marry to acquire nationality violated Article 14 of the Constitution. Both cases were overruled in the High Court (appealed case for Case 1, High Court Decision of February 28, 2006, 58 *Katei Saiban Geppo* 47; appealed case for Case 2, High Court Decision of February 27, 2007, can be found at: http://www.courts.go.jp/hanrei/pdf/20071016113022.pdf. (last visited April 30, 2017) This paper will focus on Case 1.

52) 2005 Tokyo District Court Decision, *supra* note 51, p. 27, 31.

53) *Id*., p. 30. The special residency permit was granted according to Article 50 of the *Shutsu'nyukoku Kanri oyobi Nanmin Nintei Ho* (Immigration Control and Refugee Recognition Law) which give the Minister of Justice discretion in extending the stay for special circumstances, in this case the legal proceedings disputing the nationality law.

54) *Nai'en* relationship meaning living together as a family without getting married.

55) Supreme Court Judgment, November 22, 2002, 1808 *Hanrei Jiho* 55.

56) For example, Ninomiya, "Kokuseki Ho ni okeru Kongai-shi Sabetsu no Kento (Examiniation of the Discrimination of Children Born Out of Wedlock within the Nationality Law)," 1078 *Jurist* 49 (1995); Torii, "Hanhi—Kokuseki Hojo, Ninchi ni Sakkyuko wo Mitomenai koto no Gokensei Oyobi Jinken Sho'joyaku he no Tekigosei (Case Analysis—Nationality Law and The Constitutionality of the Denial of Retrospective Effect after Acknowledgement and Its Application to Human Rights Treaties)," 1197 *Jurist* 93 (2001).

57) The Supreme Court Judgment of November 22, 2002 was a harsh opinion from the appellant's point of view, however, two concurring opinions, one written by Justice Kameyama and the other written by Justices Kajitani and Takii are noteworthy since these opinions may have influenced the "future" Courts to change course—especially in influencing the 2008 Supreme Court Judgment reviewing Article 3, paragraph 1 of the Nationality Law. In Justices Kajitani and Takii's concurring opinion, they question the differential treatment between legitimate and illegitimate children and also refer to the "changing values and diversity of the living styles of the family" emphasizing the difficulty in limiting nationality to married parents when they have acknowledged their children after birth. See, 1080 *Hanrei Jiho* 55, 58 (2002).

58) 2005 Tokyo District Court Decision, *supra* note 51, pp. 35–37. According to Professor Kenji Ishikawa, the legislative intent of the differential treatment in Article 3, paragraph 1 and the court's interpretation stressing the need for a closer bond with the family and Japanese society reflect the emphasis of the Japanese social

concept of "*kizuna*." See, Ishikawa, "Kokuseki-ho Iken Daihotei Hanketsu wo Megut'te—Kempo no Kanten kara (1) (The Grand Bench Judgement of the Constitutionality of the Nationality Law—From a Constitutional Viewpoint (1))," 343 *Hogaku Kyoshitsu* 35, 39 (2009).

59) *Id.*, p. 39.

60) See, Okuda, "Kokuseki Ho Iken Sosho ni kansuru Saikosai Daihotei Hanketsu (The Supreme Court Judgment on the Constitutionality of the Nationality Law)," 80 *Horitsu Jiho* 1 (2008).

61) 2005 Tokyo District Court Decision, *supra* note 51, p. 40.

62) See, Tokyo High Court Decision of February 28, 2006, 58 *Katei Saiban Geppo* 47.

63) See, 2008 Supreme Court Judgment, *supra* note, 48.

64) *Id.*, pp. 1372–1373.

65) *Id.*, pp. 1372–1377.

66) *Id.*, pp. 1373–1374.

67) *Id.*, p. 1374.

68) *Id.*, pp. 1375–1376.

69) *Id.*, p. 1376.

70) *Id.*

71) *Id.*, p. 1380. See, "Teidan—Kokuseki Ho Iken Hanketsu wo Megutte (Three Party Discussion—Thinking About the Illegitimate Child Nationality Case)," 1366 *Jurist* 44 (2008). According to Professor Kazuyuki Takahashi, the majority opinion does not directly mention strict scrutiny as their review standard, however, it is believed that when the majority opinion referred to Japanese nationality being an "important legal status" and the need to "review carefully," this meant reviewing with strict scrutiny (p. 55). See also, Hasebe, "Kokuseki Ho Iken Hanketsu no Shiko Yoshiki (The Analytical Framework of the Illegitimate Child Nationality Case)," 1366 *Jurist* 77 (2008). According to Professor Yasuo Hasebe, the majority opinion initially seemed to promote a less strict standard mentioning its review process to examine the "rationality" of the legislative intent behind the differential treatment in Article 3, paragraph 1, but at the same time suggesting a "stricter" standard by mentioning that Japanese nationality is "an important legal status" in that it guarantees fundamental human rights, vests citizens with public qualifications, and allows for public benefits…and mentioning that the rational reason behind the differential treatment in acquiring Japanese nationality "must be reviewed carefully" because the child has no control over his/her status which depends totally on his/her parent's marriage (pp. 77–78); also, Okuda and Nasu, *supra* note 50, p. 105.

72) *Id.*, p. 1377.

73) *Id*., pp. 1377–1380. See also, Ishikawa, "Kokuseki-ho Iken Daihotei Haketsu wo Megutte—Kempo no Kanten kara (2) (Concerning the Grand Bench Judgment of the Constitutionality of the Nationality Law—From a Constitutional Perspective (2))", 344 *Hogaku Kyoshitsu* 40 (2009). In analyzing the Judgment of the Court, Professor Kenji Ishikawa suggested that the decision to declare the "differential treatment" unconstitutional was based on a position of nationality using a "status" perspective instead of a "rights" perspective, and at the same time including arguments of constitutional violations of equality. Its conclusion in a sense followed the analysis of previous Supreme Court precedents relating to nationality. (i.e, Supreme Court, Grand Bench, October 4, 1978, 32 *Minshu* 1223; and, Supreme Court, Grand Bench, January 26, 2005, 59 *Minshu* 128).

74) *Id*., p. 1399.

75) *Id*., p. 1400.

76) *Id*., p. 1401. See also, Harada, "Saikosai Heisei Nijunen Rokugatsu Yokka Daihotei Hanketsu wo Megutte—Shiho no Shiten kara (The Supreme Court Grand Bench Judgment of June 4, 2008—From an Private International Law Perspective)," 341 *Hogaku Kyoshitsu* 7 (2009). Professor Harada suggests that the majority opinions point on the global trends in nationality policy on eliminating discrimination against illegitimate children was not persuasive in that the assertion did not explain the specific countries involved nor why these trends were occurring and to what extent these changes were important to the case. In mentioning this point, the majority opinion needed to explain the changes in nationality law and policy in countries similar to Japan (adopting the principle of *jus sanguinis*) in more detail (pp. 18-19). On this point, see also, Okuda and Nasu, supra note 50, pp. 111–112; Y. Nosaka, *Kenpo Kihon Hanrei wo Yomi'naosu* (*Rereading Basic Constitutional Cases*), (Yuhikaku, 2011), pp. 465–469.

77) *Id*., pp. 1402–1403.

78) *Id*., p. 1408.

79) *Id*., p. 1386.

80) *Id*., p. 1392.

81) *Id*., p. 1388.

82) *Id*., pp. 1395–1396.

83) Nosaka, *supra* note 76, p. 464.

84) See, 2008 Supreme Court Judgment, *supra* note 48, pp. 1372–1373.

85) Professor Teruki Tsunemoto suggests that the Justices may have been influenced by the 1998 Committee Status Report on the concern of the treatment of illegitimate children in Japan (of the International Covenant on Civil and Political Rights)

and the 2004 Children's Rights Committee Status Report (of the Convention on the Rights of the Child) supplied by the law clerk (Hideaki Mori) assisting with the court opinion at the time. See, Tsunemoto, "Kokuseki Ho Iken Hanketsu (The Unconstitutionality Judgment of the Nationality Law)," in Y. Hasebe, ed., *Ronkyu Kempo—Kempo no Kako kara Mirai he* (*Inquiries into the Constitution of Japan: Its Diachronic Trajectory*), (Yuhikaku, 2017), p. 249, 257–258.

86) *Id*., pp. 1373–1374. As mentioned in note 76, some scholars criticize the majority opinion in its reference to international influences suggesting that more explanation (evidence) was needed.

87) See, Inoue, "Todokede ni yoru Kokuseki no Shutoku to Ho no Moto no Byodo (The Acquisition of Nationality by Notification and Equality Under Law)," 217 *Jurist* 74 (2013).

88) *Id*., p. 76.

89) *Id*. Professor Inoue cites the dissenting opinion of Justice Nakashima and others in stating that "This [the differential treatment] could be a serious cause in influencing the public to compare legitimate and illegitimate children to find illegitimate children to be inferior…" For dissenting opinion, see 49 *Minshu* 1804 (1995).

90) Supreme Court Judgment, September 4, 2013, 67 *Minshu* 1320.

91) See, Sano, *supra* note 43, p. 88; Okuda, *supra* note 60, p. 1; Inoue, *supra* note 87, p. 75.

92) 2002 Supreme Court Judgment, *supra* note 55, pp. 58–59.

93) See, Tomatsu, "Iken/Goken no Shinsa no Doko (The Trends of Judicial Review)," 1414 *Jurist* 21 (2011).

94) *Id*., pp. 21–23.

95) See, Hasebe, "The Supreme Court of Japan: Its adjudication on electoral systems and economic freedoms," 5 (6) *Int. J. Const. Law* 296 (2007). A digital copy of the article can be found at: http://icon.oxfordjournals.org/content/5/2/296.full (last visited, February 28, 2017)

96) *Id*., Professor Hasebe's comment is from his concluding remarks based on his thoughts that the main tasks of the Court are oriented toward preserving a pluralist democracy.

97) See, Upham, "Stealth Activism: Norm Formation by Japanese Courts," 88 *Wash. Univ. Law Review* 1493 (2011).