Function and Dysfunction of Catalytic Judicial Review in Japan

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I. INTRODUCTION

In *Against Settlement*, the seminal article published in 1984, Owen M. Fiss famously contrasted justice with peace, and attached the former to "adjudication American-style."[1] According to his later formulation, "the animating idea" was "that the purpose of adjudication is not the resolution of a dispute, not to produce peace, but rather justice."[2] And he named Japan as the epitome of the alternative to "adjudication American-style." Hence his justice/peace dichotomy roughly overlaps the contrast between the US and Japan[3]. If left unqualified, this is an oversimplification. But I plan to make this dichotomy the backbone of this paper, for it touches upon an important point and sheds light on the reception of political process theory in Japan.

In this article, I argue that the Japanese judiciary has developed a peculiar style of representation-reinforcement that pursues peace at a considerable cost to justice. In order to situate it in comparative literature, I borrow the

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1 O. M. FISS, Against Settlement, Yale Law Journal 93 (1984) 1073, 1085–1090.

2 O. M. FISS, The History of an Idea, Fordham Law Review 78 (2009) 1273, 1273.

3 FISS, *supra* note 1, 1089–1090.

"catalyst" metaphor from the insightful study of Katharine G. Young.[4] By expanding the scope of the existing process theory, CPPT helps us to comprehend the Japanese catalytic style as one version of representation-reinforcement.

I hasten to add that my story contributes quite little to the main project of CPPT: to explore the way courts protect constitutional democracy. It is not that Japanese democracy has had no opportunity to face malfunctions or threats – quite the opposite – but that the Japanese judiciary has failed to embark on effective intervention to address recent flaws in the political process (at least for now). That said, this paper attempts to learn from Japan's experience indirectly. After depicting the "catalytic" model in Japan, I argue that it was a factor that led to recent failures of the intervention. In other words, the "catalyst" metaphor connotes not only the Japanese judiciary's achievements but also its limits. After all, all catalysts can do is make something change faster. The focus of change needs to lie elsewhere.

This article is divided into 6 parts. Section II considers the differences between CPPT and Ely's theory and sets the stage for the following inquiry. Section III summarizes Japan's current situation, focusing on the failure of judicial intervention in democratic malfunctions. After tracing the development of the Japanese judiciary's "catalytic" function in Section IV, Section V examines its relationship with the recent reluctance to intervene in political process malfunctions. Section VI offers a brief conclusion.

II. ELY, CPPT, AND JAPAN

As Gardbaum pointed out, "Ely's book is self-consciously parochial."[5] Moreover, "many of the threats to democracy around the world today look quite different from the way they did four decades ago in the United States."[6] To fill these gaps, it seems that we need to face more challenges than comparative study would generally deal with.

In hindsight, what differentiates Ely's original version from recent attempts of CPPT is the trust he placed in the democratic process. The nuanced position he took concerning legislative purpose provides a good

4 K. G. YOUNG, A typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review, International Journal of Constitutional Law 8 (2020) 385.

5 S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429, 1430.

6 R. DIXON, A New Comparative Political Process Theory?, International Journal of Constitutional Law 18 (2020) 1490, 1490.

illustration.[7] It is extremely difficult to adapt a theory that presumes a trustworthy democratic process to other situations where such a premise does not necessarily hold true.

It is worth noting that the effort to receive Ely's process theory in Japan lacked *this* sense of difference. Culminating in the middle of the 1990s, the academic debate focusing on Ely's theory shared his presupposition: the basically trustworthy quality of the democratic process. In my opinion, it was not without reason in the context of Japan. At least, it was less problematic in the 1990s than it is in the 2020s.

Unfortunately, the current situation in Japan is not exceptional in that political process malfunctions are pervasive. Consequently, Ely's typology of political process failures proves to be insufficient in comprehending recent developments in Japanese constitutional politics. As in other jurisdictions, attempts at expansion are warranted in Japan. Indeed, out of the five failures Gardbaum proposed to add, four have been discerned in the past decade: legislative failure to hold the executive accountable, government capture of independent institutions, capture of political process by special interests, and non-deliberativeness of the legislature. Amidst a myriad scandals, the Moritomo scandal is most interesting for the present purpose because it involves three of the aforementioned failures[8] and serves as a pivotal background for the convocation of the extraordinary session case. The intricacies of the scandal and these cases will be explored in Section III below.

Before getting into that, some mention should be made about another expansion of scope by CPPT. While Ely's version was a theory confined to judicial review, advocates of CPPT also consider diverse other actors and mechanisms. Among them, the most important to this paper is the media, for it plays an important role in the "catalytic" model. I will return to this point in Section IV.

III. Political Process Malfunctions and Failure of Judicial Intervention in Japan

Since the 1955 system, under which the Liberal Democratic Party (LDP) had held a majority uninterruptedly until 1993, the weakness of political

7 J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980) 125–131, 136–148.

8 The remaining one failure that the *Moritomo* case does not cover is government capture of independent institutions. Examples of this failure includes intervention in the appointment of the Director of the Cabinet Legislative Bureau in August 2013, which was closely related to constitutional politics concerning interpretation of Art. 9. See Y. Hasebe, Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism (2021) 214.

competition and opposition has been an intrinsic feature of Japanese politics. The 2009 election, wherein the Democratic Party of Japan (DPJ) won a landslide victory, was not a turning point in the overarching trajectory. Subsequent to the LDP's resurgence to power in 2012, we observed augmented, rather than diminished, dominance of the LDP. Scheiner and Thies characterized the current situation as "opposition as irrelevance."[9] Indeed, some Diet members of the LDP show their arrogance and hostility toward the opposition without hesitancy. To take just one recent illustration, during the campaign for the House of Councillors election held in 2022, Daishiro Yamagiwa said, "We, officials of the government, don't lend a single ear to proposals that come from people in the opposition." This remark didn't undermine his standing. A month later, he was appointed as Minister of State by Prime Minister Kishida.[10]

Concerning antagonism against the opposition, Shinzo Abe demonstrated resolute leadership. A noteworthy event occurred on the eve of the Tōkyō metropolitan assembly election held in July 2017. Then, the Japanese political scene was amid turmoil precipitated by several scandals, some facets of which I will have an occasion to return to in this Section. Abe conspicuously refrained from delivering a speech on the streets during the campaign. The event unfolded when he delivered his first street speech on the concluding day of the campaign. Facing a chorus of chants calling for his resignation, he hysterically shouted, "We cannot afford to be defeated by such people." But who were "such people?" Although his remark was impulsive and somewhat ambiguous, the opposition parties and their supporters certainly composed the core of "such people." Indeed, he repeatedly referred to the years of the DPJ administration as a "nightmare."[11]

Only against this background of the plight of the alienated opposition can we fully comprehend the significance of *Konishi v. Japan*.[12] After six years of protracted litigation initiated by opposition party politicians, the Supreme Court of Japan (SCJ) rendered a decision regarding the constitutionality of the Cabinet's failure to convene an extraordinary Diet Session[13] in *Konishi* last year. This case is illuminating for three reasons. First, it

9 E. SCHEINER and M. F. THIES, The Political Opposition in Japan, in: Pekkanen/Pekkanen (eds.), The Oxford Handbook of Japanese Politics (2022) 223, 235–238.

10 "山際経済再生相、発言を陳謝" [Cabinet-member Yamagami Apologizes for His Remark], 朝日新聞 Asahi Shinbun, 6 October 2022 (evening edition), 8.

11 "首相、初の街頭応援演説" [Prime Minister Delivers His First Street Speech], 朝日新聞 Asahi Shinbun, 2 July 2017, 2; "「民主党政権は悪夢」首相撤回せず" ['The DPJ's administration was a nightmare,' Prime Minister Refused to Retract His Remark], 朝日新聞 Asahi Shinbun, 13 February 2019, 4.

12 Supreme Court, 3rd petty bench, 12 September 2023, LEX/DB25573040.

involves[13] a blatant disregard for constitutional obligation by the Cabinet, revealing how serious the crisis of Japanese constitutional democracy is. Second, it provides a good example of the typical way constitutional challenges reach courts in Japan. Third, the cautious stance the Court's ruling adopts in the face of political process failure is characteristic of the Japanese judiciary.

The plaintiff, a member of the House of Councillors affiliated with the largest opposition party, alleged that the Cabinet violated Art. 53 of the Constitution[14] by failing to convene the extraordinary session of the Diet in a timely manner in response to a request by opposition members. On 22 June 2017, 120 (of 475) members of the House of Representatives and 72 (of 242) members of the House of Councillors, including the plaintiff, submitted the request for convocation. The Abe cabinet did not convene an extraordinary session until 28 September. Furthermore, on the very day an extraordinary session was convened, the Abe Cabinet dissolved the House of Representatives.

Those Diet members who requested convocation mainly aimed to investigate political scandals, notably the *Moritomo* case. It pertained to the acquisition of government-owned land by an educational institution, Moritomo Gakuen group, which was known for its extreme right-wing views. The group's leader, Yasunori Kagoike, had personal links with some conservative Diet members and the wife of the then Prime Minister, Ms. Akie Abe. Suspicions abounded that the Moritomo Gakuen group received undue favors in the purchase of government-owned land because their pressure influenced official dealings. Several days after the revelation of the scandal, Mr. Abe stated during the parliamentary debate that if the allegations of his or his wife's involvement were true, he would step down as both Prime Minister and Diet member.[15] While distortion of the decision-making process and subsequent concealment were continuously alleged, Abe did almost everything to avoid being questioned squarely. (Note that it was around the same time that he was reluctant to deliver a campaign speech on the streets.) Through protracted denial of the request for session convoca-

13 The Diet is convened only during "sessions". The Constitution distinguishes three different types of sessions, one of which is "extraordinary sessions." The other two types are ordinary sessions (Art. 52) and special sessions (Art. 54 sec. 1).

14 Art. 53 provides: "The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation."

15 H. Murakami [村上裕章], 森友学園事件から見えてくる法的問題 [Legal Issues Emerging from the *Moritomo-gakuen* Case], 法律時報 Hōritsu Jihō 1121 (2018) 64; "首相「売却、関係あれば辞める」" [Prime Minister's Remark: 'If the Scandal is True, I will Quit'], 朝日新聞 Asahi Shinbun, 18 February 2017, 2.

tion for more than 3 months and precipitate dissolution at the beginning of the session, the Abe Cabinet effectively precluded the opposition parties from holding the government accountable.

The text of Art. 53 is far from ambiguous. It clearly prescribes that the Cabinet must convene an extraordinary session if demanded by more than a quarter of either House. Moreover, according to the prevailing view, the purpose of Art. 53 is to secure a minority of Diet members an opportunity to make their opinions reflected in the Diet.

So far, the SCJ agreed. The opinion of the Court explicitly acknowledged that "the Cabinet is obliged to make a decision to convene an extraordinary session when there is a request to convene in accordance with the second sentence of Article 53." However, the SCJ denied all relief sought by the plaintiff: declaratory relief and damages. When dismissing the former, the Court reasoned that the plaintiff's claim fails at the threshold for lack of ripeness. The plaintiff sought a declaration that the next time a request is made to convene an extraordinary session, in which he participates, the Cabinet is obliged to make a decision within 20 days. *Konishi* held that it is uncertain whether a request for an extraordinary session will be made in the future by Diet members including the plaintiff, and if so, when the Cabinet's decision to call an extraordinary session will be made, so the plaintiff failed to show that the injury to him is imminent. Consequently, the Court continued, the plaintiff's claim for declaratory relief does not represent a ripe controversy. On the other hand, the SCJ reached the merits with regard to the damages claim and affirmed the judgment of the court below against the plaintiff. The majority opinion argued that Art. 53 of the Constitution, while obligating the Cabinet, does not guarantee the right of *individual Diet members*. Therefore, regardless of whether the Cabinet violated the Constitution, the plaintiff's claim for compensation should be dismissed. In this way, the SCJ avoided the question of the constitutionality of the specific failure by the Abe Cabinet. Effectively, in spite of the acknowledgement of the Cabinet's obligation, *Konishi* left minimal, if any, room for the judiciary to enforce it or impose sanctions for its breach.

It is relatively easy to discern that the SCJ cautiously chose the mode of decision. The *Konishi* case had two companion cases, and lower court decisions[16] had prepared multiple pathways to follow when *Konishi* came before the SCJ. With the sole exception of the Naha District Court decision, all

16 Naha District Court, 10 June 2020, 判例時報 Hanrei Jihō 2473 (2021) 93; Fukuoka High Court, Naha Branch, 17 March 2022, LEX/DB25572061; Okayama District Court, 13 April 2021, LEX/DB25569359; Hiroshima High Court, Okayama Branch, 27 January 2022, LEX/DB25591582; Tōkyō District Court, 24 March 2021, LEX/DB15569113; Tōkyō High Court, 21 February 2022, LEX/DB25591726.

lower court decisions avoided even discussing this matter directly. Put in this context, the SCJ demonstrated a steadfast commitment to its role to say what the law is by acknowledging the Cabinet's obligation explicitly in *Konishi*.

Using the distinction proposed by Professors Dixon and Issacharoff, which distinguishes "first" and "second" order judicial deferral, the *Konishi* decision can be seen as a typical example of the "implicit, or 'second-order'" mode of deferral. It "allow[s] courts to assert themselves short of a frontal confrontation with the political branches."[17] While the SCJ secured its role to declare the law in *Konishi*, it avoided a decisive confrontation with the ruling parties by refraining from making an overt accusation against the particular action of the Cabinet.

Serving a strategic and inherently political aim of increasing the effectiveness of judicial review, the idea of second-order deferral "applies only for so long as courts lack the political or legal support necessary to deliver decisions that they can reliably predict will be complied with."[18] Considering the accumulation of over 75 years of judicial review in Japan, the fact that the Japanese judiciary has confronted such a predicament requires a certain explanation.

The immediate problem for the SCJ was the recurrent political malpractices. While the *Konishi* case was pending before the Tōkyō High Court, the succeeding cabinet followed the path Abe had laid out. On 17 July 2021, the opposition parties demanded an extraordinary session be convened under Art. 53. Two months passed without the cabinet responding to repeated similar requests, and in September, then Prime Minister Suga announced his resignation. Finally, an extraordinary session was convened on 4 October. However, it was devoted to the purpose of nominating Kishida as prime minister following the result of the LDP leadership election held at the end of September and was adjourned due to the dissolution of the House of Representatives just 10 days after the convening. Thus, the SCJ confronted the situation where faits accomplis had increased the risk of direct confrontation with the political branches that a finding of unconstitutionality would endanger, whereas acquiescence would significantly weaken, judicial authority. The implicit deferral that the *Konishi* decision adopted was a response to such a plight. The irony is that the decision that resorted to the deferral was itself justice delayed. For judicial interventions into political process malfunctions to be effective, they must be timely. In Japan, however, the timing of court decisions tends to be late, as exemplified in the *Konishi* case.

17 R. DIXON/S. ISSACHAROFF, Living to Fight Another Day: Judicial Deferral in Defense of Democracy, Wisconsin Law Review 2016, 683, 687.

18 DIXON/ISSACHAROFF, *supra* note 17, 723.

Furthermore, far beyond the context of the convocation of extraordinary session case, the Japanese judiciary has been faced with a broader problem that the dialogical model it built has ceased to function effectively. The next two Sections will explore the formation and recent dysfunction of that model, or the "catalytic" review in Japan.

IV. The Development of the Catalytic Function of the Japanese Judiciary

The SCJ is a creation of the current Constitution, which has been in force since 1947. Roughly at the halfway point of its history, Yasuhiro Okudaira presented an interesting observation.[19] He focused on the contrast found between what the SCJ did and what the Justices said.

> "While some Supreme Court justices are usually extremely reluctant to declare laws unconstitutional, some of them are willing to express an advisory comment in their concurring opinions suggesting that the legislation in dispute be revised."

The factor which blurred the distinction was the involvement of mass media, which he paid much attention to as well.

> "Interestingly, the mass media are often inclined to highlight such advisory comments. Neither the press nor the general public is ready to distinguish between the authoritative opinion of the Court and the more extrajudicial comments of individual justices."[20]

The scope of his argument can be expanded far beyond "concurring opinions" of Supreme Court Justices. Dissenting opinions and obiter in majority opinions of the SCJ can be examined in the same way. Moreover, Okudaira implicitly took a similar approach to obiter in decisions of lower courts and even to the presence of pending lawsuits. He referred to the effects of those factors as "the extrajudicial effects."[21]

Below, I argue that the extrajudicial effects observed in Japan can be evaluated as a form of representation-reinforcement. In Subsection IV.1, I attempt to situate it in comparative literature by borrowing the concept of "catalytic function" from Katharine M. Young. Subsection IV.2 offers a case study of the catalytic function. After describing a lawsuit that ended with the SCJ's decision of 21 November 1985, the *At-Home Voting* case, I analyze some factors which contribute to the development of the catalytic style.

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19 Y. Okudaira [奥平康弘], 憲法裁判の可能性 [The Potential of Constitutional Litigations] (1995) 135–154. For an English discussion in a similar vein, Y. Okudaira, Forty Years of the Constitution and Its Various Influences: Japanese, American, and European, Law and Contemporary Problems 53 (1990) 17, 43–48.

20 Okudaira, Forty Years, *supra* note 19, 47.

21 Okudaira, [Potential of Constitutional Litigations], *supra* note 19, 136.

1. Extrajudicial Effects and the Catalytic Function of Judicial Review

From the South African Constitutional Court's experience with economic and social rights, Young extracted a five-part typology of judicial review. The five types are as follows: deferential review, conversational review, experimentalist review, managerial review, and peremptory review. The catalyst metaphor relates to this typology in two ways. First, courts can fulfill the catalytic function within a type of judicial review. Explaining the type of experimentalist review, the most insightful category of the five for the purpose of this paper, Young mentioned the metaphor of "catalysts." In the experimentalist review, "[t]he political project is achieved not by prescribing the immediate steps toward a solution but by "nudging," "linking," and "destabilizing" public institutions." It is "more proactive" than the conversational review, "insisting on a different prioritization of interests and the input of a new set of actors within the legislative scheme."[22]

Second, and the more important point for her argument is that the catalytic metaphor captures "certain criteria" which guide the "deliberate choice" of the five forms of judicial review. According to her, the South African Constitutional Court "acts to lower the political energy that is required in order to change the way in which the government responds to the protection of economic and social rights."[23]

Although the main focus of her argument is development in the area of economic and social rights, the catalyst concept is useful to examine the experience of judicial review in Japan generally. The catalytic function, in its first sense distinguished above, fits many features of Okudaira's extrajudicial effects both inside and outside of the economic and social rights context. On the other hand, its second sense indicates important differences between South Africa and Japan. While the South African Constitutional Court uses all of the five types eclectically according to the general conception of the catalytic role, the options for Japanese courts are more limited. Although it is my point that an important part of judicial practice in Japan can be grasped as experimentalist review, Japanese courts clearly overuse deferential review on the whole. Relatedly, the choice of forms is made in different ways. The use of extrajudicial effects by Japanese courts is functionally equivalent to the combination of "the interpretation of the right at hand, the evaluation of the government's actions, and the design of a remedy"[24] in South Africa.

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22 YOUNG, *supra* note 4, 398–401.

23 YOUNG, *supra* note 4, 387, 412.

24 YOUNG, *supra* note 4, 387.

In spite of these differences, the catalytic styles in South Africa and Japan share a crucial feature: the representation-reinforcing role. Young explicitly asserted that the catalytic function has linkages with Ely's representation-reinforcing role. Moreover, she extracted another two implications "that were underemphasized in Ely's account" from the South African experience: the interrelationship between "procedural protections" and "substantive interpretations of constitutional democracy" and the risks of "the pitfalls of judicial overreach and public backlash."[25] In order to examine the development of judicial review in Japan on these three points, the next Subsection offers a case study.

2. The Development of Catalytic Judicial Review and its Background

At issue in *Sato v. Japan*[26] was the constitutionality of the failure to enact laws to establish an At-Home Voting System. The plaintiff was a Japanese citizen living in Otaru City. In 1931, he incurred a back injury in a fall from the roof of his house while shoveling snow. Around 1955, the stiffness in the lower half of his body deteriorated to the extent that even using a wheelchair became very difficult. As a result, the plaintiff was unable to vote in eight elections for the Diet, the Governor, the Prefectural Assembly, the Mayor, and the Municipal Assembly that were held between 1968 and 1972. The At-Home Voting System, once introduced to enable severely handicapped voters to cast votes at home, had been repealed in 1951 on the grounds that it was abused in the local elections of April 1951. The plaintiff brought a state compensation action challenging the unconstitutionality of legislative failure to reestablish such a system.

As the final product of the prolonged litigation, the SCJ flatly rejected the plaintiff's argument. It introduced a distinction between the question of "whether a legislation itself is unconstitutional" and that of "whether the legislative act by the Diet is deemed illegal for the purpose of applying the Law Concerning State Liability for Compensation." In the latter context, according to the SCJ, it is only "in the exceptional events such as enactment of laws clearly contravening the fundamentals of the Constitution" that legislative acts are deemed illegal.[27] The SCJ held that this case cannot be construed as such an exceptional case and the claim should be dismissed. By thus adhering to what Richard Pildes calls "institutional formalism,"[28] the unanimous opinion of the Court did not proceed to the question of "whether a legislation itself is unconstitutional."

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25 YOUNG, *supra* note 4, 417–418.

26 Supreme Court, 1st petty bench, 21 November 1985, 民集 Minshū 39, 1512.

27 20 years later, this doctrine was substantially modified by *Takase et al. v. Japan* (Supreme Court, grand bench, 14 September 2005, 民集 Minshū 59, 2087).

However,[28] such extreme passivism observable in the decision of the SCJ does not matter so much for the purpose of this paper. The preceding rulings of unconstitutionality by the lower courts,[29] despite their refutation by the SCJ, are far more important because of their *de facto* influence. In 1974, the Otaru branch of the Sapporo District Court held that the abolition of the At-Home Voting System was unconstitutional and awarded damages to the plaintiff. Though the judgment of the district court was reversed on appeal, the Sapporo High Court also said explicitly that the legislative inaction was unconstitutional. As the result was not substantially different from what the plaintiff sought – a judicial declaration of unconstitutionality of legislative failure – an attorney for the plaintiff reportedly stated that 90% of the objectives were achieved.[30]

Interestingly, the government took some action as early as 1974. The Diet amended the Public Offices Election Act and instituted the postal voting system just after the decision of the district court. The submission of the bill by the Cabinet even predated it. What prompted such response? It is worth noting that a petition campaign in 1967 had made no sense. It is reasonable to infer that the government wouldn't have been so responsive without the pending lawsuit. Moreover, the tone of the media was remarkable. As Okudaira pointed out, "[g]enerally, the media world is very much in favor of protecting citizens' rights."[31] In the At-Home Voting case, most of the media took a pro-plaintiff stance and condemned the legislature rather directly.[32]

As illustrated above, the accumulation of many informal factors closely linked with the unauthoritative message of courts (or Supreme Court Justices) has a certain influence on decision-making in the political process in Japan. This is the Japanese-style catalytic judicial review. Indeed, the Japanese judiciary very often pursues medium-term equilibrium by "insisting on a different prioritization of interests and the input of a new set of actors within the legislative scheme."

Brief comments about the background of the development of this style are in order. Two points are worth considering. First, the emergence of

28 R. H. PILDES, Political Process Theory and Institutional Realism, International Journal of Constitutional Law 18 (2020) 1497, 1500.

29 Sapporo District Court, Otaru Branch, 9 December 1974, 民集 Minshū 39, 1550; Sapporo High Court, 24 May 1978, 民集 Minshū 39, 1590.

30 "目的の九割は達成" [90% of the Objectives are Achieved], 朝日新聞 Asahi Shinbun, 24 May 1978 (evening edition), 1.

31 OKUDAIRA, Forty Years, *supra* note 19, 47.

32 E.g., "在宅投票制度" [At-Home Voting System], 朝日新聞 Asahi Shinbun, 25 May 1978 (evening edition), 1; "社説 在宅投票制度の整備と「選挙権」" [Editorial: Reestablishment of the At-Home Voting System and 'rights to vote'], 読売新聞 Yomiuri Shinbun, 26 May 1978, 5.

policy-oriented litigation set the stage for the development of the catalytic style. Japan adopts a decentralized judicial review system, so ordinary courts exercise the power of judicial review. Although policy-oriented litigation originally appeared mainly in the context of pollution litigations around 1970, it caused so profound a transformation to the civil procedure as a whole that it affected the style of judicial review. Among many points, the most important for the purpose of this paper is the triumph of settlements. Policy-oriented litigation in Japan was correctly compared with "public law litigation"[33] in the US by contemporary scholars, which revealed several differences between them. Some important aspects of public law litigation such as structural remedies and the managerial role of judges were hardly ever observed in Japan's policy-oriented litigation.[34] It was difficult for Japanese courts to assume them as a matter of institutional design. Relatedly, the function expected of settlements was different between the US and Japan. To the extent that the formal structure of the Japanese judiciary was less flexible, settlements bore a heavier burden in Japan.[35] Judge Kusano classified settlements into three types, one of which was symbolically presented as "settlements as a better solution than judgments." Putting an emphasis on this type, he explicitly acknowledged that justice was ranked inferior to "appropriate resolution of concrete disputes" through bargained-for agreements.[36] His view was a lucid manifestation of the influential trend among judges. Thus, Japanese judges had already been accustomed to pursuing proper resolution outside the formal process leading to judgments by the time the catalytic judicial review emerged.

Second, the response of the legislature to *Sone v. Japan*[37] might have some relevance. Delivered in 1973, it was the first apex court decision that held statutory provisions unconstitutional. The provision at issue was Art. 200 of the Criminal Code, which imposed the death penalty or imprisonment for life for parricide. The SCJ held that it was unconstitutional and applied the regular homicide provision to the accused. At that time, more than 15 years had passed since the creation of the SCJ in 1947. In spite of such cautiousness by the SCJ, the *Sone* decision did not enjoy due respect

33 A. CHAYES, The Role of the Judge in Public Law Litigation, Harvard Law Review 89 (1976) 1281.

34 H. ŌSAWA [大沢秀介], 現代型訴訟の日米比較 [A Japan-U.S. Comparison of Contemporary Litigation] (1988) 112–118, 138–143.

35 For a critical comment, ŌSAWA, *supra* note 34, 195–197.

36 Y. KUSANO [草野芳郎], 訴訟上の和解についての裁判官の和解観の変遷とあるべき和解運営の模索 [Transforming Images of Settlements in Court among Judges and the Pursuit of Proper Judicial Management], 判例タイムズ Hanrei Taimuzu 704 (1989) 28, 29–30.

37 Supreme Court, grand bench, 4 April 1973, 刑集 Keishū 27, 265.

from the legislature. Although prosecutors ceased to apply Art. 200 just after the decision and such a policy was observed afterward as a matter of convention, it was not until 1995 that the Diet abolished the provision. Facing such difficulty, it was admittedly reasonable for the Japanese judiciary to search for a way to cope with constitutional litigations while avoiding direct confrontation with the political branches.

Against the background, we can discern the achievement and problems of catalytic judicial review in Japan. The catalytic style is an ingenious device to fulfill the representation-reinforcement role without risking the authority of courts. In the At-Home Voting case, the Japanese judiciary effectively removed a distortion in the electoral process. Other similar accomplishments were observable in the area of social rights.[38] In still another case, the dispute over the Foreigners' Registration Law, the catalytic review even succeeded in providing a remedy to aliens, a typical example of discrete and insular minorities, without a formal judicial holding of unconstitutionality. Facing the constitutional challenge to the statutory requirement that fingerprints be retaken every five years, the lower courts' decisions showed little sympathy. But the presence of several lawsuits in itself attracted public attention and prompted the Diet to delete the requirement.[39] In most of these cases, a judicial declaration of unconstitutionality would have produced hostility between the courts and the political branches, leading to less favorable results for the political process.

However, what was lost should not be overlooked. Without formal decisions, the development of constitutional precedent is inevitably hindered. As Young pointed out, there is an interrelationship between "procedural protections" and "substantive interpretations of constitutional democracy." If realized at too much cost of the latter, the former cannot be sustainable.

V. The Transformation and Dysfunction of Catalytic Judicial Review

The catalytic style worked fairly well until the early 1990s. Thereafter, it experienced a transformation and dysfunction became prominent, which will be discussed in Subsection V.1. Next, Subsection V.2 returns to the current failure to intervene in malfunctions described in Section II, and attempts to situate it on the development of the catalytic function.

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38 Supreme Court, grand bench, 24 May 1967, 民集 Minshū 21, 1043; Supreme Court, grand bench, 7 July 1982, 民集 Minshū 36, 1235.

39 For an illuminating comment on the development up to 1990, Okudaira, Forty Years, *supra* note 19, 45–46.

1. Dysfunction of the Catalytic Review since Circa 2000

Though the transformation of catalytic review occurred around 2000, it is difficult to specify the case which marked a clear turning point. In order to discern the change, it is necessary to consider more than one case as a unit and situate it in a broader context. That's because judicial behavior itself was less important than the responses (or their absence) from the political branches as the cause of the transformation. Indeed, the Japanese judiciary has mainly clung to the behavioral pattern formed in the 1980s.

With such reservations in mind, a series of cases involving the unequal treatment of illegitimate children under the Civil Code is a useful lens through which to analyze the transformation of the catalytic style. Two decisions of the Grand Bench of the SCJ are especially important: the 1995 decision[40] and the 2013 decision.[41] The statutory provision at issue was Art. 900 of the Civil Code, which set out the intestate share of an illegitimate child at only half of the share of a legitimate child. While eventually struck down by the SCJ in the 2013 decision, it outlived many cases dealing with its constitutionality. The most prominent judicial endorsement of the provision was the 1995 decision, where the SCJ held that the unequal treatment was reasonable and not contrary to the Equal Protection Clause of the Constitution (Art. 14). From the perspective of catalytic judicial review, however, the focus should be on the fact the 1995 decision prompted a strong dissent within the SCJ. Five dissenters expressed their views that Art. 900 of the Civil Code discriminated against illegitimate children in violation of the Equal Protection Clause. Moreover, the newspapers pointed out that another four Justices raised some questions about the reasonableness of the provision in their concurrent opinions and emphasized the importance of a legislative response.[42]

Thereafter, the behavioral pattern of the SCJ was true to the catalytic style, for not just the 1995 decision contained 5 Justices' dissenting opinion, but also as many as 5 decisions of the SCJ[43] that followed the 1995

40 Supreme Court, grand bench, 5 July 1995, 民集 Minshū 49, 1789.

41 Supreme Court, grand bench, 4 September 2013, 民集 Minshū 67, 1320.

42 "社説 民法改正の流れを止めるな" [Editorial: Do not stop the momentum for revision of the Civil Code], 朝日新聞 Asahi Shinbun, 8 July 1995, 5; "非嫡出子の最高裁決定" [The Supreme Court Decision on the Status of Illegitimate Children], 読売新聞 Yomiuri Shinbun, 7 July 1995, 38.

43 Supreme Court, 1st petty bench, 27 January 2000, 判例時報 Hanrei Jihō 1707 (2000) 121; Supreme Court, 2nd petty bench, 28 March 2003, 判例時報 Hanrei Jihō 1820 (2003) 62; Supreme Court, 1st petty bench, 31 March 2003, 判例時報 Hanrei Jihō 1820 (2003) 64; Supreme Court, 1st petty bench, 14 October 2004, 判例時報 Hanrei Jihō 1884 (2005) 40; Supreme Court, 2nd petty bench, 30 September 2009, 判例時報 Hanrei Jihō 2064 (2010) 61.

decision were accompanied by dissenting opinions without a single exception. Those dissenting opinions all shared the basic direction of the dissenting opinion in the 1995 decision. But there gradually appeared the tone of irritation in some relatively late opinions. Justice Saiguchi's dissent in the 2004 decision is a good example. He argued that "the disadvantages suffered by illegitimate children should be remedied by amendment of the statute at the earliest possible time, in accordance with the basic principles of the Constitution, but even without waiting for such amendment, judicial remedies are also necessary."[44] Despite such consistent messages from the judiciary by way of dissenting opinions, the legislature took no action until the unconstitutionality was formally held by the SCJ in 2013. Therefore, the 2013 decision can be understood as the result of the dysfunction of the catalytic style.

Moreover, it is worth noting that the SCJ, even in the 2013 decision, hesitated to overrule the 1995 decision, paying formidable attention to avoid condemning the legislature directly. Instead, the SCJ held that the unequal treatment had lost reasonable ground and became unconstitutional at the latest in July 2001, when the petitioner's inheritance commenced. According to the SCJ, matters to be considered (such as social conditions and public sentiments) changed with time. But the decision did not identify the decisive factor, leaving it ambiguous as to how the legislature failed to address the problem. Some commentators criticized and lamented the SCJ's disregard for the doctrine of stare decisis.[45] Despite the formal holding of unconstitutionality, the development of constitutional precedent was sacrificed again.

Similar patterns of persistent and unsuccessful dissents by some Supreme Court Justices are observable in other issue areas. Dissenting opinions that strongly urged the political branches to take some action appeared in the surname of husband and wife cases[46] and the gender reassignment case.[47] If we extend the corpus to lower courts' decisions, the same-sex

44 Hanrei Jihō 1884, at 41 (Saiguchi, J., dissenting). See, "「非嫡出子の相続差別、救済を」 最高裁 2 判事「違憲」と表明" ['Discrimination against Illegitimate Children should be Remedied,' Two Supreme Court Justices Find 'Unconstitutionality'], 朝日新聞 Asahi Shinbun, 15 October 2004, 37.

45 See, e.g., K. ISHIKAWA [石川健治], ドグマーティクと反ドグマーティクのあいだ [Between Dogmatik and Anti-Dogmatik], in: Ishikawa [石川] and others (eds.), 憲法訴訟の十字路 [Constitutional Adjudications at a Crossroad] (2019) 299, 330–332.

46 *Tsukamoto et al. v. Japan*, Supreme Court, grand bench, 16 December 2015, 民集 Minshū 69, 2586; Supreme Court, grand bench, 23 June 2021, 判例時報 Hanrei Jihō 2501 (2022) 3.

47 Supreme Court, 3rd petty bench, 30 November 2021, 判例時報 Hanrei Jihō 2523 (2022) 5. The SCJ rendered two other important judgments addressing a different

marriage cases[48] can be seen as another example. However, none of them has succeeded in prompting a meaningful legislative response.

Notably, the two most recent SCJ's invalidation of statutory provisions are the result of the dysfunction of catalytic review: the third gender reassignment case and the overseas national review case. In the decision rendered on 25 October 2023,[49] the SCJ held unconstitutional a provision requiring gonadectomy for gender reassignment. Just four years before, the SCJ had confirmed the constitutionality of the same provision.[50] However, true to the catalytic style, the 2019 decision suggested that the constitutionality of the provision requires constant examination. In this case, this warning was embedded within the opinion of the Court. Thus, Justices Onimaru and Miura could add a more assertive call for legislative action in their concurring opinion. They pointed out that the constitutionality of the provision at issue, while confirmed at the time, was coming under suspicion.[51] Nevertheless, the legislature did not show any response, and eventually, the SCJ changed its precedent in 2023.

Hirano et al. v. Japan[52] is another product of the political branches' reluctance to heed the judiciary's voice. *Hirano* held the National Review Act unconstitutional "in that it completely precludes Japanese nationals overseas from exercising the right to review." As early as 2011, the Tōkyō District Court pointed out in a different case that "there were serious doubts about whether it was compatible with the Constitution that the failure to take legislative measures to establish an overseas review system had created a situation in which overseas nationals were unable to exercise their right to review."[53] When the *Hirano* case came before the Tōkyō District Court, it went one step further by arguing that the Act was unconstitutional,[54] to which the media paid close attention.[55] This part of the district court

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statutory requirement for the gender reassignment, which I will discuss in the next paragraph of the text.

48 Sapporo District Court, 17 March 2021, 判例時報 Hanrei Jihō 2487 (2021) 3; Tōkyō District Court, 30 November 2022, LEX/DB25593967; Nagoya District Court, 30 May 2023, LEX/DB25595224; Hukuoka District Court, 8 June 2023, LEX/DB 25595450. But see Ōsaka District Court, 20 June 2022, 判例時報 Hanrei Jihō 2537 (2023) 40. For an analysis of these cases, see Minori Ōkochi's essay in this special issue: A Constitutional Analysis of Same-Sex Marriage Cases: Litigation for Social Change in Japan.

49 Supreme Court, grand bench, 25 October 2023, LEX/DB25573119.

50 Supreme Court, 2nd petty bench, 23 January 2019, 判例時報 Hanrei Jihō 2421 (2019) 4.

51 Hanrei Jihō 2421, at 9 (Onimaru and Miura, JJ., concurring).

52 Supreme Court, grand bench, 25 May 2022, 民集 Minshū 76, 711.

53 Tōkyō District Court, 26 April 2011, 判例時報 Hanrei Jihō 2136 (2012) 13.

54 Tōkyō District Court, 28 May 2019, 民集 Minshū 76, 833.

decision was later affirmed by both the Tōkyō High Court[56] and the SCJ. The Diet failed to respond to such persistent criticism from the judiciary. The Tōkyō District Court decision in the *Hirano* case was bold enough to attack the legislature's disregard of the preceding 2011 Tōkyō District Court decision. However, even this decision ended up highlighting the dysfunction of the catalytic style, because it did not prompt any legislative response. The SCJ omitted the straightforward attack on the Diet from its decision and adopted a fairly mild tone. It seems that the SCJ became extremely cautious to ensure that the political branches respect its decision.

2. The Catalytic Review and Political Competition[57]

One possible interpretation of the transformation explored above is that it has a close relationship with the decline of competitiveness in the political process. Tushnet and Dixon argued that "background political conditions, or political party competition, are likely to matter to both the desirability and stability of any attempt actually to design a system of weak-form review."[58] This view holds true, *mutatis mutandis*, to the catalytic review.

The insight of Tushnet and Dixon resulted from their approach which puts emphasis on substance and function (as opposed to form and structure). They pointed out that the Japanese judiciary developed "sub-constitutional review" by way of statutory construction and administrative review. According to them, this is "more or less the equivalent to weak-form review that has developed in Japan." While the formal structure of the Japanese Constitution "established a system of strong-form review," their approach revealed functional similarities between the practice of Japanese judicial review and weak-form review.[59]

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55 "社説 国民審査 怠慢が招いた違憲判決" [Editorial: National Review, Negligence Resulted in a Judicial Declaration of Unconstitutionality], 朝日新聞 Asahi Shinbun, 4 June 2019, 12; "国民審査に違憲判断 国に立法促す「最後通牒」" [Court's Ruling on the Unconstitutionality of the National Review System: An Ultimatum Urging the Government to Take Legislative Action], 読売新聞 Yomiuri Shinbun, 29 May 2019, 29.

56 Tōkyō High Court, 25 June 2020, 民集 Minshū 76, 887.

57 I suspect that incorporating the argument in this subsection back into the comparative analysis could make the comparison between the South African catalytic review and its Japanese counterpart more fruitful. But it is a larger task than this paper can pursue. For the political context of judicial review in South Africa, see R. Dixon/T. Roux, The Law and Politics of Constitutional Implementation in South Africa, in: Ginsburg/Huq (eds.) From Parchment to Practice: Implementing New Constitutions (2020) 53.

58 M. Tushnet/R. Dixon, Weak-form Review and its Constitutional Relatives: An Asian Perspective, in Dixon and Ginsburg (eds.) Comparative Constitutional Law in Asia (2014) 102, 116–117.

Recognition[59] of such continuity in substance raised a new question about the relationship between judicial review and political competitiveness. In this context, Tushnet and Dixon noted the importance of the judicial appointment process. "Judges are chosen in ways that ensure in practice that they will understand their role to be enforcing a national consensus represented concretely by legislation. They see themselves as faithful agents of the nation and its dominant political party." Tushnet and Dixon drew attention to the differences between competitive party politics and dominant-party systems. In the latter, unlike the former, "the dominant party can be completely opportunistic about the constitution, forcing through whatever policies they prefer and changing the constitution if necessary. Weak-form review is thus generally unsuitable for dominant-party political systems."[60]

My examination of the catalytic review shares this interest in function. By placing it against the background set up by Tushnet and Dixon, two supplementary points can be drawn. First, to the extent that catalytic review fulfills the representation-reinforcement function, the Japanese judiciary retains a little more latitude in how they should be faithful to "the nation." It is worth noting that the SCJ once relied on the pluralist conception of democracy, though such phenomena were unique to the 1980s. The *Sato* decision was typical and eloquent: The SCJ argued that "[u]nder the system of parliamentary democracy adopted under the Constitution, the role of the Diet is to ensure that the legislative process fairly reflects the many opinions and diverse interests that exist among the people, to reconcile those opinions and interests through free debate among the Diet's members, and ultimately to form a unified national will by applying the principle of majority rule."[61] With this regard, it is not wrong to call the SCJ Elyean. Through the catalytic style, the Japanese judiciary has made a substantial contribution to respond to "the many opinions and diverse interests that exist among the people."

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59 TUSHNET/DIXON, *supra* note 58, 104–108.

60 TUSHNET/DIXON, *supra* note 58, 113–115.

61 Minshū 39, at 1515–1516. See also, *Ishiduka et al. v. Japan*, Supreme Court, 3rd petty bench, 20 Jun 1989, 43 Minshu 385, 403 (Ito, J., concurring). In this case, at issue was whether Art. 9 of the Constitution was directly incorporated into the substance of "public order" in the meaning of Art. 90 of the Civil Code, which the SCJ ruled in the negative. Justice Ito, in his concurring opinion, contrasted actual social conditions including "the ways in which people in all walks of life interpret" Art. 9 with an authoritative determination of "which of the many conflicting interpretations of Article 9 is correct," and finding the former relevant to the interpretation of "public order".

Second, the transformation and dysfunction of catalytic review imply the necessity of being sensitive to the degree to which the political process is competitive within the framework of the dominant-party system. Probably, the achievement of the catalytic style up to the 1980s was supported by the relatively competitive character of the political process at that time. Under the 1955 system, the opposition parties (except the Japanese Communist Party) retained a certain amount of influence, either by protest or by accommodation, vis-à-vis the dominant LDP.[62] Factions within the LDP were once engaged in fierce competition, whereas their traditional functions have been seriously undermined since 2012.[63]

My concern is that the experience with catalytic review hinders judicial intervention in political malfunctions. As a matter of psychology, it might be said that judges tend to be stuck in past successes through the relatively well-functioning catalytic style. However, the problem is more serious and fundamental. At present, courts should be conscious of the possibility that they are facing litigations whose stakes are a precondition of the well-functioning catalytic review. If that is the case, adhering to catalytic review could be a ridiculous policy. As Dixon noted, "[i]f courts wait too long to intervene […], it will often be too late for judicial review to play any role in protecting democracy."[64] Allowing for the political branches' perennial reluctance to respond rather leniently, the catalytic style might adversely affect the protection of constitutional democracy.

VI. Conclusion

What is striking about the development of catalytic review in Japan is that its formation preceded the acceptance of Ely's theory by scholars (and even the publication of *Democracy and Distrust*). It is possible to point out the similarity to the situation in the US, where "[t]he early 1970s were a tide-mark point for political process theory at the Supreme Court" and "by the time [*Democracy and Distrust*] was published, political process theory was already on the decline."[65]

Political process theory is rejoined to the stream of case law by CPPT studies, this time on a worldwide scale. My aim is to take part in this pro-

62 Scheiner/Thies, *supra* note 9, 225–227.

63 K. Nemoto, Japan's Liberal Democratic Party: Changes in Party Organization under Shinzo Abe, in: The Oxford Handbook of Japanese Politics, *supra* note 9, 161, 163–170.

64 R. Dixon, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023) 156.

65 A. Tang, Reverse Political Process Theory, Vanderbilt Law Review 70 (2017) 1427, 1439.

ject by making use of the Japanese experience. However, the main subject of this paper is sought in cases up to the 1980s, which are contrasted with the scarcity of useful material in this century.

From this contrast, it's fair to draw such a lesson as the following: Even if a certain degree of competitiveness is maintained at a given point in time, it is dangerous for courts to take this as a given that will continue into the future. Again, the *Sato* case is suggestive. While it pronounced eloquently the pluralist conception of democracy, it did nothing to preserve, let alone improve, political competitiveness. More generally, though I don't have any occasion to explore it in this paper, it should not be overlooked that the Japanese judiciary has been rather indifferent to the protection of freedom of speech.[66]

Herein lies the limit of the catalytic review. It inevitably requires the courts to make a degree of compromise. I do not mean to undervalue the achievements of the Japanese judiciary in fulfilling the representation-reinforcement function through peaceful compromises. However, without the bulwark of "uninhibited, robust, and wide-open"[67] debate on public issues, there is no guarantee that compromises will not damage the core of constitutional democracy.

66 S. MATSUI, The Constitution of Japan: A Contextual Analysis (2011) 210–211.
67 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).