CPPT & Human Rights from Japanese Experience

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I. INTRODUCTION

From our organizers, the theme "CPPT & Human rights" was given to me. Due to constraints of my knowledge on comparative constitutional law, I apologize that I will be reflecting on the theme only from the Japanese constitutional perspective, based on its own experience.

I am convinced that Rosalind Dixon's latest and fascinating book, *Responsive Judicial Review,*[1] constitutes an epoch-making milestone for the further development of judicial review theory around the world. I share with the author the basic idea that "responsive" or "responsiveness" is an indispensable and crucial concept for any contemporary democratic constitutional project. It is particularly so when it works to ameliorate our living society to make it worth protecting and developing, from constitutional law perspectives, for the future.

Obviously, one of the most important features of this book is that, using the term "constitutional court," it attempts to integrate numerous constitutional cases in various jurisdictions around the world whose legal traditions are both Anglo-American and Civil Law. Furthermore, this book is a very challenging one: while it presents a comprehensive framework of every important aspect of the judicial review system, such as its justification, role

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1 R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023).

and function, dysfunction, and so on, it is perfectly open to further, rich development. In fact, the author remarks as follows: "for any small-*n* qualitative work in the field, we should be appropriately provisional and tentative about the conclusions reached, and open to those conclusions being revisited considering the work of other scholars on a broader range of jurisdictions."[2] Thus, Dixon is welcoming "revision and refinement by others"[3] and emphasizes the importance of "dialogue and collaboration."[4] That's why we are here!

So, as a Japanese constitutional scholar and as a part of the "dialogue and collaboration" to be realized, I would like to offer some constitutional materials to consider the significance of *Responsive Judicial Review* in relation to the protection of human rights in contemporary Japanese society.

II. "Discrete and Insular Minority" in Ely's Theory and non-Citizens

Theoretically, Dixon's book is based on a very persuasive well-balanced position between trust in the good functions of democracy and heeding caution about its deteriorations caused by various reasons, through adopting a diversified analysis of its operations. It stands in opposition to the formalistic approach, and is "a values-based and substantive approach"[5] to these questions. On this occasion, I will discuss the problem regarding the protection of human rights in Japan in relation to the practice of judicial review there. Ely's political process theory emphasized the mission of constitutional judges to protect "discrete and insular minorities."[6] In Japan, as well as in other contemporary societies, there live many minorities, such as ethnic, religious, and various sexual minorities, and incidents of discrimination occur against them repeatedly.

Whereas it seems very natural to count non-citizens as a "discrete and insular minority," it was slightly surprising that the book made only a few mentions of issues concerning non-citizens. It is worth bringing to attention the Canadian Supreme Court decisions that invoked Ely's political process theory for their justification from this point of view to protect non-citizens.

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2 Dixon, *supra* note 1, 17.
3 Dixon, *supra* note 1, 17.
4 Dixon, *supra* note 1, 17.
5 Dixon, *supra* note 1, at 135.
6 J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980), especially, ch. 6, 135 ff.

In the case of *Andrews v. Law Society of British Columbia*[7] in 1989, the Law Society of British Columbia did not admit a Canadian permanent resident non-citizen to the British Columbia bar although he met all the other requirements for his admission. Section 15 (1) of the *Canadian Charter of Rights and Freedoms* provides that

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The Supreme Court of Canada declared the non-admission by the Law Society as a violation of the Charter 15(1). In fact, the SCC explained that "The grounds of discrimination enumerated in section 15(1) are not exhaustive." Invoking expressly Ely's *Democracy and Distrust*, Justice Bertha Wilson mentioned "non-citizens permanently resident in Canada forming the kind of 'discrete and insular minority'" formulated in *United States v. Carolene Products Co,* 1938 footnote four, and wrote

"non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'."

In this way, non-citizens must be considered as one of the most important "discrete and insular minorities" in contemporary democratic society.

III. Non-citizens in Japanese Society as a "Discrete and Insular Minority" and Japanese Constitutional Law

Like in many other developed countries, the protection of the human rights of non-citizens is a very important issue in Japanese society. The number of non-citizens living in Japan has increased considerably from the late 1980s. In considering the protection of human rights for non-citizens in Japan, there is an intriguing historical fact that warrants an exploration. In the draft of the Constitution of Japan[8] that was presented to the Japanese government on 13 February 1946 by the General Headquarters, Supreme Commander for the Allied Powers, there were two articles related to the guarantee of equality for non-citizens: "All natural persons are equal before

7 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. cf. G. T. Sigalet, Dialogue and distrust: John Hart Ely and the Canadian Charter, International Journal of Constitutional Law 19 (2021) 569.

8 Constitution of Japan, *https://www.ndl.go.jp/constitution/shiryo/03/076a_e/076a_etx.html*.

the law" (Art. XIII), and "Aliens shall be entitled to the equal protection of law" (Art. XVI). However, the Japanese government did not wish to treat the colonized Korean and Taiwanese peoples (at that time, they were Japanese nationals but became non-citizens after the decolonization of the Korean Peninsula through independence and the return of Taiwan to the Chinese government) who lived in Japan equally, and finally succeeded in eliminating these articles. Due to the "hard work" of Japanese conservative bureaucrats in their negotiations with GHQ, the *Draft Constitution of Japan accepted by the Cabinet*[9] publicly announced on March 6 had succeeded in removing the provision for equal protection of non-citizens. In fact, this provision did not see a revival during the subsequent deliberations in the constitutional amendment process.

Art. 14 of the current Constitution of Japan established on 3 November 1946 provides that "all nationals [すべて国民] are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." Accordingly, there is no mention of non-citizens in the Constitution of Japan. Nowadays, both Japanese majoritarian jurisprudence[10] and doctrines[11] adopt the so-called "nature-theory [性質説]" to clarify the scope and intensity of the guarantee of non-citizens' constitutional rights. This theory asserts that constitutional rights guaranteed by the Constitution should be granted to non-citizens, including those who entered illegally, to the extent that the nature of each constitutional right permits. According to this theory, for instance, it is constitutionally justified that non-citizens do not have the rights to vote and to engage in public services that impose duties on the public or are involved in important policy-making service, considering the principle of popular sovereignty on the ground that popular sovereignty should be understood as self-governance by those holding national citizenship. In contrast, freedom of thought and conscience, freedom of expression, and freedom of religion of non-citizens should be guaranteed without reservation, together with those of Japanese citizens.

There are two different types of serious human rights issues in such a constitutional framework. One is very particular to Japanese contemporary society and the other is derived from the Japanese immigration control system.

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9 Draft Constitution of Japan accepted by the Cabinet on 6 March 1946, *https://www.ndl.go.jp/constitution/shiryo/03/093a_e/093a_etx.html.*

10 マクリーン事件 [*McLean* case]: Supreme Court, 4 October 1978, 民集 Minshū 32, 1223.

11 E.g. N. ASHIBE [芦部信喜], 憲法（第 8 版） [Constitutional Law, 8th ed.] (2023) 94, K. SATO [佐藤幸治], 日本国憲法論（第 2 版） [Textbook on the Constitution of Japan, 2nd ed.] (2020) 163, Y. WATANABE and others [渡辺康行他], 憲法 I（第 2 版） [Constitutional Law, 2nd ed.] (2023) 37–38.

IV. Human Rights Issues of Non-citizens as a Particular Problem in Contemporary Japanese Society

Traditionally, Japan has been an emigration country; it is different from countries such as Australia, the United States, and Canada, which have all been formed through immigration. Therefore, Japanese nationality law adopts the principle of *jus sanguinis.*[12] This means that descendants of non-citizens will never obtain Japanese citizenship even if they were born and grew up in Japan unless they apply for permission to naturalize. The principle of *jus sanguinis* has been maintained without major political and social opposition. In addition, another important aspect is as follows: the Nationality Law prohibits the retention of multiple nationalities. Specifically, it states that "A Japanese national shall lose Japanese nationality when he or she acquires a foreign nationality by his or her own choice" (Art. 11, para. 1), and "A Japanese national having a foreign nationality shall lose Japanese nationality if he or she chooses the foreign nationality in accordance with the laws of the foreign country concerned" (Art. 11, para. 2). To eliminate dual nationality, the law requires the government to issue a "by written notice" to individuals with dual nationality, prompting them to choose whether to maintain Japanese nationality or renounce it (Art. 15, para. 1).[13]

In fact, such a principle causes serious problems for Korean residents in Japan (so called *Zainichi* [在日]). They are Koreans who were forcibly recruited and sent to Japan during the Second World War, as well as their

12 Cf. Art. 2 of Nationality Law (国籍法 *Kokusekihō*) No. 147/1950.

13 In practice, the number of individuals holding dual nationality has been increasing in Japan and various other countries, with a growing number of nations accepting this situation. Against this backdrop, a lawsuit challenging the constitutionality of relevant articles of the Nationality Law have been filed, invoking Arts. 13, 22 para. 1, and 10 of the Constitution, claiming that these provisions infringe upon the "freedom not to renounce Japanese nationality" or the "right to maintain Japanese nationality" for Japanese nationals who wish to hold or acquire another nationality. However, the Tokyo High Court ruled the provisions as constitutional (Tōkyō High Court, 21 February 2023, *https://www.courts.go.jp/app/files/hanrei_jp/937/091937_hanrei.pdf* (in Japanese)), and subsequently, the decision became final after the dismissal of an appeal on 28 September of the same year by the Supreme Court *https://news.yahoo.co.jp/articles/796a955aabc3d51e73e099152b2423d75cd3bc33*. The Tōkyō High Court emphasized the wide legislative discretion entrusted to the National Diet by Art. 10 of the Constitution, stating that "in establishing requirements for the acquisition or loss of nationality, it is necessary to consider various factors, including the historical circumstances, traditions, political, social, and economic conditions of each country". The court affirmed the legitimacy of the legislative purpose, reflecting "the principle of sole nationality" in international law, which had been traditionally dominant, aiming to prevent the occurrence of dual nationality, and upheld the constitutionality of the current relevant nationality law provisions.

descendants. In 2022, there were about 290,000 Koreans – "Special permanent residents" according to the Immigration Law – living in Japan, representing 10% of the foreign population in Japan. On 2 May 1947, the day before the current Constitution went into effect, an edict on alien registration counted Korean residents in Japan as non-citizens for the time being. And in 1952, by an administrative circular, just before the San Francisco Peace Treaty came into force restoring the sovereignty of the Japanese state, the former colonized peoples immediately lost their Japanese citizenship definitively without any confirmation of the presence or absence of their own intentions. This led to their complete loss of political rights. Thus, because of their lack of Japanese citizenship, they constitute a large group of non-citizens. Moreover, they still retain more or less a Korean ethnicity despite the growth of Japanese naturalized people and their increasing assimilation into Japanese society. There is still a traditional Japanese discriminatory consciousness towards these Korean residents, and the discriminatory nature of this behavior persists in everyday life. Korean residents should qualify as a "discrete and insular minority."

Furthermore, there is an assumption in the Japanese Constitution that citizens are homogenous individuals, which is also part of the broader framework of thought in Japanese constitutional law scholarship. Therefore, while initially showing the possibility of recognizing a plurality of peoples, as evident in the foundational works of two leading constitutional scholars of the post-war period, Toshiyoshi Miyazawa and Shiro Kiyomiya,[14] due to the aforementioned assumption constitutional law later became dominated by a binary scheme of Japanese citizens/non-citizens = foreigners. As a result, Japan's past as imperial colonizers was erased from constitutional discourse. Consequently, despite the evident and significant human rights issues faced by people from the former colonies (外地 [overseas territories]) who had lost their citizenship but continued to reside in Japan (外地人 [former residents of overseas territories]) as well as their descendants born in Japan, interest in these issues in constitutional scholarship remained subdued.[15]

14 Cf. T. MIYAZAWA [宮沢], 憲法II(新版) [Constitutional Law II, new ed.] (1974) 313; S. KIYOMIYA [清宮], 憲法I [Constitutional Law I], (3rd ed., 1979) 125–126.

15 Jun FURUKAWA argued, considering such historical context, that repositioning the former "residents of overseas territories" not as general foreigners but as "potential Japanese nationals" is to be required. He contended that concerning post-war compensation issues, compensation for these former residents of overseas territories should be clearly distinguished from compensation for people in China and the former Allied nations. Regarding the debate on political participation rights for settled non-citizen residents, he asserted that the political participation rights of former residents of "overseas territories" should be approached theoretically and policy-

V. Human Rights Issues Derived from Japanese Immigration Control System

Based on the abovementioned "nature-theory," Japanese jurisprudence and majoritarian constitutional doctrine assert that, whereas the constitutional right to enter Japanese territory and the right to stay there are fully granted to Japanese citizens, non- citizens do not have such rights. Art. 22, paragraph 1 of the Constitution of Japan provides that "Every person shall have freedom to choose and change his residence […] to the extent that it does not interfere with the public welfare." The Supreme Court of Japan held in the *McLean* case[16] in 1978 that this paragraph "merely provides for the guarantee of freedom of residence and movement within Japan and has nothing to do with the entry of a non-citizen into Japan. This is based upon the same view that under customary international law, the state has no duty of accepting a non-citizen, and unless there is a specific treaty, the state may freely decide whether to accept a non-citizen into the country, and if a non-citizen is to be accepted, on what condition this should be allowed. Therefore, it goes without saying that non-citizens are not guaranteed the right to enter Japan, but also are not guaranteed the right to stay or continue to stay in Japan as the appellant argues."

A significant issue in Japanese judicial precedent is that the framework established in the *McLean* case decision of the Supreme Court continues to serve as the fundamental idea for judicial control over the immigration system for non-citizens.[17] This decision rendered by the Supreme Court is

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wise not as a general issue for settled non-citizen residents but as an issue related to the political participation rights of potential "Japanese nationals". J. Furukawa [古川], 〔高見勝利との対談〕「外地人」とは何か [Dialogue with K. Takami [高見]: What is the "Residents of Overseas Territories"?], in: Ōishi and others (eds.), 対談集 憲法史の面白さ [Collection of Dialogues: The Fascination of Constitutional History] (1998) 240.

16 *McLean* case, *supra* note 10.

17 Cf. T. Izumi [泉徳治], マクリーン判決の間違い箇所 [Mistakes in McLean Decision], 判例時報 Hanrei Jihō 2434 (2020), 133; A. Kondō [近藤敦], マクリーン判決を超えて [Beyond the McLean Decision], 法律時報 Hōritsu Jihō, 93:7 (2021) 54; A. Kondō 近藤敦, マクリーン判決の抜本的な見直し [A fundamental reconsideration of McLean Decision], 名城法学 Meijō Hōgaku, 70 (2021) 1; K. Obata [小畑郁], 戦後日本外国人法史のなかのマクリーン「判例」[McLean 'Precedent' in the History of Post-War Japanese Non-citizen Law] 法律時報 Hōritsu Jihō, 93:8 (2021) 81; Y. Negishi [根岸陽太], マクリーン判例を支える信念体系 [Belief System Supporting the McLean Decision], エトランデュテ Étrangeté 4 (2022) 103; Y. Negish [根岸陽太], 人権条約の枠内に留まる外国人在留制度 [Residence Systems for Foreigners within the Framework of Human Rights Treaties] エトランデュテ Étrangeté 4 (2022) 139. M. Saitō [齊藤正彰] present a different perspective from the above-cited recent critical readings of *McLean* case decision, offering alternative view-

based on a historical approach to state sovereignty on immigration control. However, it is noteworthy that until the 19th century, immigration control was not considered to be absolute. Moreover, customary international law has developed from the time of the McLean case, because one can say for example that the principle of non-refoulement is integrated into today's customary international law. Furthermore, Japan ratified the "Agreement between Japan and the Republic of Korea Concerning the Legal Status and Treatment of the People of the Republic of Korea Residing in Japan" in 1965 as a "specific treaty" referred to in the *McLean Case* decision. Their legal status as special permanent residents in Japan are guaranteed to a certain extent. While Japan has adopted important international human rights treaties since the *McLean Case* decision, such as the International Covenant on Civil and Political Rights (ratified by Japan in 1979), International Covenant on Economic, Social and Cultural Rights (ratified by Japan in 1979), Convention on the Rights of the Child (1994), Convention on the Elimination of All Forms of Discrimination Against Women (1985), International Convention on the Elimination of All Forms of Racial Discrimination (1995), Convention on the Rights of Persons with Disabilities (2014), United Nations Convention Against Torture (1999), and so on, recent jurisprudence still follows an important part of the *McLean* decision, which is as follows:

"Guarantee of fundamental rights to non-citizens by the Constitution should be understood to be granted only within the scope of such a system of the sojourn of non-citizens and does not extend so far as to bind the exercise of discretionary power of the state […]".

It should be confirmed that Japanese authorities owe a duty to respect *today's* customary international law and relevant international treaties in exercising its discretionary power concerning cases related to non-citizens' entry and stay in Japan, in addition to *traditionally established* customary international law. For instance, when the Minister of Justice exercises his or her discretionary power to give "Special Permission to Stay in Japan" to an illegal immigrant, he or she must take into consideration the forementioned treaties and opinions and recommendations issued by these treaty bodies. However, in general, regrettably, Japanese judges are reluctant to invoke or refer to such international human rights norms and standards and tend to maintain the constitutional framework of the *McLean* case even now. In addition, the Japanese detention and deportation procedures for non-

points. cf. M. Saitō [齊藤正彰], 多層的立憲主義と日本国憲法 [Multilayered Constitutionalism and the Constitution of Japan] (2022) 220.

citizens are very problematic in light of the due process of law clause in the Japanese Constitution, and especially so in long-term detention cases.

Based on such discussions, a recent influential constitutional doctrine argues that it is more appropriate to consider that "the discretion related to the residency control system is constrained by international human rights treaties, rather than considering the international human rights treaties within the framework of the residency control system."[18] Additionally, the nature-theory that presupposes the framework of a political community formed by national citizenship holders has faced criticism, stating that it only serves the function of justifying various unfavorable treatments of actual non-citizens.[19]

VI. Japanese 'Homogeneous' Society and the Judiciary

One cannot say that Japanese society is very sensitive to the protection of minorities' rights because Japanese society is a relatively homogeneous society compared with other industrialized countries. It is not rare that discriminatory acts, including hate speech, occur against Asian non-citizens. In addition, Japanese financial circles are interested only in economic interests when they face non-citizen issues. It means that they consider foreign labor essential and are proactive in welcoming foreign workers to Japan. However, there is a tendency not to pay sufficient attention to human rights issues of these foreign workers during their stay.

As Japan is not an immigration country, Japanese people generally tend to be quite indifferent to the human rights conditions of non-citizens, and there are xenophobic people as well, as in other countries. It is sometimes reported that the treatment of non-citizens in Japanese immigration facilities has many issues, including alleged torture and death cases. A recent tragedy is the Wisuma Incident. A Sri Lankan national in the custody of the Nagoya Immigration Bureau died on 6 March 2021. It was reported that she died despite having repeatedly complained about her deteriorating health without receiving appropriate medical treatment. Japanese prosecution authorities have denied suspicion of criminal responsibility for personnel associated with the Immigration Bureau in the case. This incident has raised a lot of questions about the entire structure of the current Japanese immigration control system.

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18 M. Sogabe [曽我部], 外国人の基本権保障のあり方 [Protection of Fundamental Rights for Non-citizens], 法学教室 Hōgaku Kyōshitsu 483 (2020) 76.

19 K. Yanai [柳井], 外国人の人権論 [Human Rights Theory for Non-citizens], in: Aikyō [愛敬] (ed.), 講座　人権論の再定位 2 人権の主体 [Lectures: Re-positioning of Human Rights Theory 2: Subjects of Human Rights] (2010) 158.

Politically, the major Japanese conservative party, the Liberal Democratic Party (LDP), has been the ruling party for almost 65 years since 1955 and has succeeded in dominating Japanese politics. Hereditary politicians in this conservative party tend to occupy important political posts, including the post of Prime Minister. In the LDP, extreme-right wing groups are quite influential in policy making, and they are very hostile to the protection of human rights in Japan, based on narrow and exclusionary nationalistic sentiments and ideology. The LDP has firmly opposed granting the right to vote at the local level to non-citizens, although many Korean residents in Japan wish to have it.

Furthermore, it is well known that the Japanese judiciary has not been active in adjudging any state act unconstitutional. In fact, since 1947, only 12 stipulations have been struck down by the Supreme Court of Japan as unconstitutional and lower courts tend to follow this stance, though with some exceptions.[20] In such circumstances, it is probably inappropriate to have trust in legislative power and expect a "reasonable democratic disagreement" in it. Professor Dixon wrote that "In some cases, commitments to majority rule may appropriately give way to other conflicting constitutional norms and values such as the rule of law, or the redress of historical disadvantage or injustice."[21] In the Japanese case, commitment to majority rule should give way to international human rights norms and values. As Dixon suggests, it is certain that "historical vulnerability will be a product of a group's social, economic, and political power; and these may vary over time, or point in different directions."[22] Therefore, one must always review the "vulnerability" of a given group in a society to make judicial review appropriately responsive.

How about the concern over democratic backlash if Japanese judicial review intervenes much more actively than now to protect non-citizens' human rights and to guarantee their constitutional rights? It is true that the Supreme Court experienced a rather harsh backlash around 1970, provoked by the political branches, when it rendered a series of constitutional judgements favorable to the protection of the freedom of political expression and that of labor union activities of government employees. At that time, most of them were supporting the Japan Socialist Party, the largest political rival of the LDP. The LDP criticized these judgments and succeeded in having

20 As part of my analysis on this matter, see the following article: H. YAMAMOTO [山元], 司法制度改革と憲法学 [Judicial System Reform and Constitutional scholarship], in: Suami [須網] (ed.), 平成司法改革の研究 [Studies on Heisei Judicial Reform] (2022) 67.

21 DIXON, *supra* note 1, 64.

22 DIXON, *supra* note 1, 135.

the majority of Supreme Court justices radically change the political direction of constitutional jurisprudence in 1973 (Zen-Nōrin Police Duties Execution Law Case)[23]. Such designs were institutionally possible because the Cabinet has the constitutional authority to nominate Supreme Court justices without any intervention from other institutions, political or judicial.[24] Therefore, one can only wonder whether a serious backlash would occur from political circles or from public opinion in Japan today if the Supreme Court of Japan were to act actively for ameliorations of human rights conditions. I think, in general, controversies concerning human rights issues of non-citizens in Japan are not as grounded in the logic of partisan politics than those of the abovementioned issues of protection of government employees' constitutional rights. On this point, human rights issues of non-citizens seem quite similar to the issue of the constitutional protection of same-sex marriage, although one has to remark that some issues, for example the deportation problem of non-citizens and that of the right to vote at the local level of non-citizens, are very controversial subjects between the ruling coalition and opposition parties.

What is noteworthy on this matter is the most recent judgment of unconstitutionality rendered by the Supreme Court regarding the law on special provisions for the treatment of gender identity disorder in Japan.[25] For individuals with gender identity disorder who meet specific criteria, a family court judgment can change their legally recognized gender and gender entry in the family register. One of the criteria was the requirement of "being without reproductive glands or being in a state of permanently lacking reproductive gland function." On October 25, 2023, by reversing the previous Supreme Court precedent in 2019, the Supreme Court judged that this requirement is unconstitutional and invalid under Art. 13 of the Constitu-

23 全農林警職法事件 [Zen Nōrin Police Duties Execution Law Case]: Supreme Court, 25 April 1973,刑集 Keishū 27, 547.

24 However, the following should not be overlooked: Art. 79, para. 2 and 3 provide that "The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter" and "In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed". While there is such a constitutional mechanism for the citizens to directly check nominations by the Cabinet after the appointment, public interest is low, and there has been no Supreme Court justice removed from office so far.

25 性同一性障害者の性別の取扱いの特例に関する法律 *Sei dōitsusei shōgaisha no seibetsu no toriatsukai no tokurei ni kansuru hōritsu* [Law on special provisions for the treatment of gender identity disorder], Law No. 111/2003.

tion.[26] It had compelled individuals who do not require reproductive gland removal surgery to either forfeit the freedom from physical intrusion by accepting intense physical intrusion or to relinquish the crucial legal benefit of having their legally recognized gender aligned with their gender identity. Considering social changes and evolving medical knowledge, the justices of the Court judged unanimously that the constraints on the freedom from physical intrusion guaranteed by Art. 13 of the Constitution[27] were excessive in this context. Generally, this article is interpreted as a provision that comprehensively and supplementally guarantees various significant rights not explicitly protected by other articles.[28] The LDP, as a party, has not issued any criticism in response to this verdict. Therefore, there is a possibility that backlash against this judgment based on political motives may not emerge, at least regarding issues related to sexual diversity.

VII. Conclusion

If the Responsive Judicial Review theory desires to be truly responsive from the perspective of Japanese contemporary society, non-citizens should be clearly recognized as a "discrete and insular minority" and a strong form of judicial review should be applied in cases where the scope of protection of non-citizens' fundamental rights are put into question. I hope that Responsive Judicial Review theory will develop further by incorporating rich constitutional experiences worldwide, including the Japanese one.

26 *https://www.courts.go.jp/app/files/hanrei_jp/527/092527_hanrei.pdf* (in Japanese).

27 It provides that "Their[all of the people] right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."

28 N. Ashibe [芦部信喜], 憲法（第 8 版）[Constitutional Law, 8th ed.] (2023) 122, K. Sato [佐藤幸治], 日本国憲法論（第 2 版）[Textbook on the Constitution of Japan, 2nd ed.]（2020 年）196.