

THE CZECH CONSTITUTIONAL COURT AND THE JAPANESE SUPREME COURT – SHOULD THEY BE THE REAL EXAMPLES OF ACTIVISM VERSUS RESTRAINT?

Sawako OBA*

Abstract: *This paper argues whether the Czech Constitutional Court should be the example of Activism, and whether the Japanese Supreme Court should be characterised as the example of Restraint in the context of constitutional justice. For instance, the former has declared numerous laws unconstitutional in the past two decades, while the latter has declared only a limited number unconstitutional in the past 68 years. We will examine the appropriateness of these characterisations by comparing and contrasting their brief histories, competences, and the nomination processes and precedents, in order to discuss their roles in the transitional period towards the new constitutionalism, paying specific attention to the extent politicisation has impacted each Courts.*

Keywords: *Constitutional Court, Supreme Court, constitutionalism, politicisation, transition*

I. INTRODUCTION

Every legal system throughout the world has a historical background and distinctively functions within a greater social system over a long period of time. The modern Czech legal system, as well, can be traced back to the era of the Austro-Hungarian monarchy in the late 18th century. Since then, it has experienced massive regime changes three times within the 20th century. Pursuant to the 1920 Constitution, the first Czechoslovak Republic (1918–1938) was one of the first states, along with Austria, to establish a constitutional court. The Court, however, could not review individual complaints in the field of constitutional and political rights, thus its achievements were not significant. The subsequent regime centralised the state power in the Communist Party, where the legal relationships were simplified and no constitutional court existed¹.

Meanwhile, in the 19th century in Japan, predominantly the Prussians-German law and partly the French law had a great impact on the modernisation of Japanese legal structure. Since then, the country has been influenced by civil law tradition. In addition to the 1889 Constitution of the Empire of Japan, many of the codes and laws adopted around the same time were modelled after the European system. The modern Japanese court system was created by the Act on the Court Organisation in 1890 and the Ministry of Justice supervised the judicial administration. The principle of separation of powers was stipulated in the Constitution, but the judiciary was seen as inferior to the high-level executive officials and in practice, judicial independence was limited. Shortly thereafter, militarism and totalitarianism swept over Japan.

* Sawako Oba, Ph.D., student at Kobe University, Japan. Attorney at Law (on leave). LL.M. (Charles University, Prague), LL.B. (Kyoto University, Japan). This is a revised edition of my LL.M. thesis. I owe many thanks to my supervisor Zdeněk Kühn, for giving me valuable counsels with no hesitation. And also to my colleagues Jen and John. Of course, the responsibility for any errors in this paper lie solely with the author.

¹ There was an attempt to introduce constitutional courts during the Prague Spring, which ended in failure.

After the Velvet Revolution in 1989 and the loss of World War II in 1945, the Czech Republic and Japan, respectively, both faced an urgent needs for democratisation. The role the judicial branches of the two countries played in such democratisation has been perceived as quite different. Generally speaking, the Czech Constitutional Court (hereafter “CCC”) is regarded as an activist Court among Europe and the Japanese Supreme Court (hereafter “JSC”) as an example of judicial passivism. The main purpose of this paper is to examine such a discourse by making comparisons between their brief histories, competences, the nomination processes and precedents, to discuss their roles in the transitional period towards the new constitutionalism, paying specific attention to the extent politicisation has impacted each Courts.

II. ESTABLISHMENT OF THE COURTS

1. The Czech Constitutional Court

Having learnt from Nazism and fascism that their representatives could become oppressive rulers, people wanted a new institution which could fight for their natural rights. Thus after WWII, many European states established Kelsenian styled constitutional courts. Firstly, Austria re-established its Constitutional Court in 1945, followed by West Germany in 1949. That desire now exists in the Czech Republic, as well. During the Communist era Czechoslovakia, people did not trust the authorities, including the judiciary. After the collapse of the Communist regime, the new state could not afford to purge its old judiciary. It was beyond any doubt that the remnant of the surviving judiciary would not serve as the guardian of the new constitutionalism – the movement which puts people’s constitutional rights over state powers. It was indispensable to create, as Michal Bobek says², a “tool of judicial transition”, or an institution to safeguard and materialise the provisions of the new constitution vis-à-vis the remainders of the old regime, as well as the ordinary judiciary. The constitutional court was re-established not just to reincarnate the First Republic or European trend, but because there was a revitalised demand for an institution to protect the restored democratic framework.

The Constitutional Court of the Czech and Slovak Federal Republic (CSFR) was established based on the Federal Constitutional Act (No. 91/1991 Coll.). Due to the dissolution of the CSFR on 1 January 1993, its existence was quite short (January December 1992). The Court issued only 16 decisions, and many of them are quoted by the CCC. Subsequently, the CCC began to work on 15 July 1993. The CCC does not belong to the ordinary court system. It is the first and the last instance for constitutional justice, monopolising the power of controlling the constitutional norm.

2. The Japanese Supreme Court

In 1875 the Court of Cassation, modelled after France, was established in Japan. However, the Court did not have the jurisdiction on administration, military affairs or the Im-

² BOBEK, M. Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe. *American Journal of Comparative Law*. 2009, p. 46.

perial Family and was not equipped with the competencies of constitutional review. The Court consisted of 31-47 judges. Its judgements are still considered as precedents today. After WWII, a new Constitution and a new Court Act took effect on 3 May 1947, abolishing 1890 Act and the Court of Cassation and transferring the judges and the remaining cases to the Tokyo High Court. Finally, the JSC set to work on 4 August 1947 based on that new Act.

Japan did not introduce an independent constitutional court under the new regime, notwithstanding its civil law based foundation. On the one hand, it may have just been a question of the era. Since it was 1945, the post-war reforms had just started in Japan and the idea of the constitutional court was rather new wave in Europe at that time. On the other hand, until April 1952, Japan was under the rule of the General Headquarters of the Allied Forces (GHQ), which basically consisted of Americans who greatly influenced the transition with their common law way of thinking³. Consequently, at the time there was no impetus to create a constitutional court for Japan.

3. Similarities and differences

In some respects the conditions of the transitional environments within Japan and the Czech Republic look quite similar; the old regime judiciaries were not purged, remaining in office with some exceptions, the position of the judiciary and its remuneration improved considerably, and the roles of the Ministry of Justice changed or weakened respectively compared to the old regimes.

In Japan, the power of judicial administration was absolutely transferred to the JSC. The GHQ had made a great effort to implant various American styled reforms toward judicial independence to release the judiciary from the control of the Ministry of Justice. But in reality, the first nomination of the Justices was mostly comprised of the elite judges who were working at the pre-war Ministry as executives. Also, the personnel of the Ministry were simply transferred to the Supreme Court General Secretariat (SCGS), or the central organisation of the current Japanese judicial administration⁴. The structure of the JSC was brand new, but the personnel from the previous regime were preserved. Consequently, the legacy of the pre-war judicial system kept influence over the post-war system. In contrast, in 1993 the CCC was staffed with completely new people – outsiders of the old regime.

Although the Czech Ministry of Justice maintains the competence of the judicial administration of the ordinary judiciary, gradually their control has been weakened. However, the shortcoming in the Czech ordinary judiciary is excessive legal formalism, which is a heritage of the civil law tradition and had been reinforced during Communism to defend against purposeful intervention by the Party. Contrary to what might be imagined, such formalism is rarely seen in the Japanese judiciary.

³ There were some distinctive members in the GHQ who had great knowledge of civil law. One of them was a former German judge Alfred C. Oppler, who had been president of the Prussian court and later escaped to the United States.

⁴ More than 760 professional clerks out of around 22,026 (the quota de jure in 2013, while the number of judges were 3,656 in 2011) are working at the SCGS. At the same time it has a significant function to train a handful of executive judges. To date, most of the Justices, whose prior occupation was a judge have work experience there.

The CCC has been a powerful actor over the past 20 years. It has rendered more than 130 judgements, striking down statutes and a considerable number of declarations as unconstitutional, contrary to decisions of the state authorities including those of the ordinary judiciary. The CCC does not have continuity with the communist era and its jurisdiction is specialised, so it can render progressive judgements to implement the new constitutionalism.

In contrast, while the JSC is, of course, expected to safeguard and enforce the provisions of the new Constitution, it is simply the highest court of the ordinary judiciary with bureaucratic career judges. Moreover, it has continuity with the prior regime. The JSC has rendered only 21 judgements of unconstitutionality in these 68 years. In 9 of those cases a statute was declared unconstitutional. The remaining 12 cases addressed the application of the Constitution, 8 of those cases concerned judicial procedure. The JSC has been criticised for being reluctant to exercise its power of constitutional review against the legislature or the executive branches. The academic literature shows a variety of explanations for the causes of the JSC's unwillingness to exercise the power of constitutional review⁵.

III. COMPETENCES OF THE COURTS

1. Outline of the Japanese Supreme Court and the Czech Constitutional Court

The constitutional review in Japan is decentralised and exercised in the course of the adjudication of concrete cases before the court, so long as the issue needs it to be solved: interpretation of the Constitution is the last resort. There is no abstract review without an actual case in controversy. Naturally, the JSC has the dual functions of being the court of final instance of the ordinary adjudication process as well as the constitutional court.

The Japanese Code of Civil Procedure provides the grounds for the final appeal against a lower court judgement; other than substantive procedural defects (deficiency or inconsistency of *the ratio decidendi*, etc.) it only allows for appeal when there exists an error in the interpretation of the Constitution or some other type of unconstitutionality. In addition to this regular appeal, the JSC may accept a case and treat it as a lawful final appeal provided that the case contains an inconsistency of the case-law or an important matter concerning the interpretation of a statute. In this respect, the JSC has discretion on whether to accept such a petition.

The judgement of the JSC must contain the opinion of every Justice. In practice, when a Justice agrees with the decision of the majority, she simply signs her name to the judgement. Former Justice Tokuji Izumi (2002–2009) has said that dissenting opinions contribute to the quality of the adjudication and to the future adjudication in the lower courts⁶. Former Justice Shigeo Takii (2002–2006) found that 25% of the published judgements in 2008 included individual opinions⁷.

⁵ SATO, I. Saiko-sai wa kawattaka. *Horitsujiho*. 2010, Vol. 82, No. 4, p. 46.

⁶ IZUMI, T. *Watahshino Saikousaibansyoron kenpo no motomeru siho no yakuwari*. Japan, Nihon hyoronsya, 2013, p. 137.

⁷ TAKII, Y. Wagakuni saikousaibansyo no yakuwari wo doukangaeruka. *Horitsujiho*. 2010, Vol. 82, No. 4, p. 55.

In the Czech Republic the Act on the CCC stipulates that a Justice who disagrees with the decision itself or with the reasoning of the Plenum or her Panel has the right to show her dissenting opinion. In practice, the Justices can show both dissenting opinions and concurring opinions. At the beginning, this institution was concerned that this untraditional practice might undermine the authority of its judgements. Nevertheless, the CCC Justices' opinions function in the same way as those of the JSC. According to Kühn, Justices of the first CCC (1993–2003) wrote dissenting opinions to 73 judgements, while the number was doubled in the second CCC (2004–2013) which saw over 140 cases with dissenting opinions, probably due to the widening diversity of the Justices' backgrounds⁸.

Based on Art. 87 of the Czech Constitution, the CCC has rather broad jurisdiction, but the most important competence is judicial review of constitutionality, especially, of legislation. Representation by an attorney is mandatory for cases heard before the CCC (the Act on the CCC (No. 182/1993 Coll.)), primarily to filter superficial or frivolous constitutional complaints, a practice the JSC does not require.

The CCC handles three types of constitutional reviews: the abstract constitutional review, the concrete review and the constitutional complaint. In the abstract review, practically, the President or a group of Deputies or Senators can petition for the annulment of a statute. Only the Plenum is competent to exercise the power of abstract review. When three-fifths of the 15 Justices (9 Justices) vote that the statute in question is incompatible with the Constitutional order or other superior statutes, the CCC declares that it shall be annulled on the date specified in the judgement. According to Radoslav Procházka the requirement is significantly higher than elsewhere in the Central and Eastern European countries⁹. Similar to the German system, Czech abstract review is exercised only after the statute is adopted or promulgated (*a posteriori* review).

The second type of review is the concrete constitutional review. The ordinary courts do not have competence to review the unconstitutionality of legislation by the Parliament (Art.95(2)). When the law being applied in a case before an ordinary court seems to contravene the constitutional order, the judge must submit the matter to the CCC. Meanwhile, she has to suspend the proceeding until the CCC remands the case back with the decision on the validity of the statute. That is because the CCC Justice is bound only by the constitutional order and by the Act on CCC, as opposed to an ordinary judge in the Czech Republic, who is bound by the law and international treaties which are a part of the legal order. Conversely, the Japanese Constitution stipulates that all judges (included the JSC Justices) shall be independent in the exercise of their conscience and are bound by both the Constitution and the laws.

While those two types of review function as the normative controls of the Constitution, the third category, constitutional complaint, serves to remedy the violation of individual constitutional rights¹⁰. The scope of the application of this basis for jurisdiction is not very clear; if a natural or legal person considers that her "fundamental rights and basic free-

⁸ KÜHN, Z. *Czech Republic*. Cambridge University Press, 2015, p. 10.

⁹ According to Procházka, in Poland only three Justices (in a panel) and in Hungary five Justices may under certain circumstances annul a statute. PROCHÁZKA, R. *Mission Accomplished On Founding Constitutional Adjudication in Central Europe*. Central European University Press, 2002, p. 143.

¹⁰ A local government body or a political party could be a petitioner, but this is infrequent.

doms guaranteed by the constitutional order have been infringed as a result of final decision in a proceeding to which she was a party, or some other intervention by a public authority”, they can file a constitutional complaint before the CCC. The CCC has not defined the limits of access to the Court, rather it preserves a variety of possibilities to accept any case as a lawful petition¹¹. A constitutional complaint is impermissible if a complainant has not exhausted all procedural remedies, since it is regarded as a subsidiary function¹². There is an extraordinary way to petition to annul a statute, only if the contested statute which was applied in that complainant’s case was inconsistent with the Constitution.

2. Research Judges and Law clerks

Currently in Japan, 40 Research Judges work for the research division at the JSC and work systematically for the JSC overall. Typically, they have 10-20 years of experience at the lower courts and are equipped with abundant expertise. Specifically, they are promising judges who are carefully selected by the SCGS to support the JSC. Their first task is to screen all the appealed cases to determine for the JSC whether the petition meets the requirements and refer it to a Petit Bench, where the case is assigned. When at least one of the 5 Justices of the Bench concludes that the case should be accepted for final review, the Research Judge drafts the judgement under the instruction of the Chief Justice of that case¹³.

Important JSC judgements appear in the JSC Precedent Commentary with the remarks of the Research Judge in charge. Although the remarks are written as personal opinions, this commentary is regarded as the most authoritative comments on the precedents, widely used by judges, scholars and law students. Takii casts doubt on the authority of these commentaries, since no Justice takes part in their drafting. He himself finds some deviations on the Research Judge’s remarks which can be misleading to the readers as if those debates existed among the Justices¹⁴.

In the Czech Republic, each CCC Justice has 3 to 6 assistants. The work of the assistants has some similarity with that of the Research Judges at the JSC. However, in Japan, Research Judges do not work for an individual Justice, nor can a Chief Justice of a certain case choose and assign a specific Research Judge to take charge. On the contrary, CCC Justices can assign their own assistant the procedural tasks of a Rapporteur Justice, namely to screen the appealed cases and to refuse a submission when a case does not manifestly meet the requirements of the petition, or to let the applicant know and give him a deadline to rectify their petition when the defects in the documents are curable.

Basically, just three Justices of a Petit Bench oversee a case in the CCC. Kühn indicates that “proceedings in thousands of constitutional complaints are controlled by Rapporteurs and their law clerks, with only occasional impetus of two other judges.”¹⁵ Inconsistency

¹¹ For examples, the CCC ruled that they can even review a constitutional act (Pl. ÚS 27/09), which raised a controversy.

¹² Though there are some exceptions like so-called “privileged dignitaries”.

¹³ In this context, the Chief Justice of a case is a rotating role filled by the Justices of that bench. This should not be confused with the Chief Justice of the JSC.

¹⁴ TAKII, Y. Wagakuni saikousaibansyo no yakuwari wo doukangaeruka. *Horitsujiho*. 2010, Vol. 82, No. 4, p. 56.

¹⁵ KÜHN, Z. *Czech Republic*. Cambridge University Press, 2015, pp. 6–7.

of the adjudication can occur. At the CCC, five staff members work for the analytical department, primarily to provide support to the Justices in their decision making, offering mainly comparative analyses of foreign case-law or a specific issue. While the JSC Research Judges' main duty is focused on the unification of the case law, or legal certainty, the CCC seems more interested in developing the methodology.

IV. NOMINATION OF THE JUSTICES

1. Influence of the political branch (Japanese Supreme Court)

Practical appointment process and the first two decades

A Chief Justice is appointed by the Emperor based on the nomination of the Cabinet, and the other 14 Justices are appointed by the Cabinet with the Emperor's authorisation. Under the constitutional principle of the symbolic monarchy, the role of the Emperor has been just ceremonial and hence the Cabinet, namely the Prime Minister, has the substantial power to appoint the Justices. It could be said that the process is indirectly controlled by the House of Representatives within the parliamentary cabinet system.

The Justices do not have a term of office, but they retire when they reach the age of 70. Practically, when a Justice is getting close to the retirement age, the Chief Justice submits a list with 1 to 3 candidates to the PM. Reportedly, the PM has not refused the recommendation of the Chief Justice in recent years. In fact, however, the recommendation process is primarily ceremonial in nature; in reality, before submitting the candidate list, the Secretary General of the SCGS (who is virtually appointed by the Chief Justice) and the Chief Cabinet Secretary negotiate who should be chosen as candidates. In other words, the PM's office and the Chief justice with his close aide, have already reached the conclusion beforehand¹⁶.

Currently, the practice of distributing the 15 Justices' posts is done in the following way; 6 posts are filled by career judges, 4–5 posts by lawyers, 1–2 posts by prosecutors, 2 posts by executive officers 2 posts (one of them is seemingly reserved for the diplomat) and 1 post is reserved for a law professor. The proportion is slightly flexible. In general, the Justices chosen from lawyers and law professors show the liberal tendency, whereas, the Justices chosen from ordinary judges and executive officers tend to render conservative judgements. On some recent occasions, those typical prejudices have not applied. The best examples are two former Justices; Izumi, who was a career judge and Hiroshi Fukuda (1995–2005), a former diplomat, both of whom wrote a considerable number of liberal opinions on the judgements.

When we look back to the first two decades of the JSC, it was the 2nd Chief Justice Kotaro Tanaka (1950–1960), who established the concept of “conservatism”. He went into politics from academia and became a Chief Justice at the time of the Cold War and the Korean War (1950–1953). He was a strong anti-communist¹⁷. The 3rd Chief Justice Kisaburo Yokota (1960–1966), a scholar of international law, once articulated that the declaration of un-

¹⁶ LAW, D. S. The Anatomy of a Conservative Court: Judicial Review in Japan. *Texas Law Review*. 2009, Vol. 87, No. 7, pp. 1545–1593.

¹⁷ YAMADA, T. *Saikousai no ikenhanketsu 'denkano hoto' wo naze nukainoka*. Koubun-sha 2012, p. 43.

constitutionality should be exceptional under the principle of separation of powers¹⁸. His important achievement was on the nomination of the Justices; he made the Cabinet accept the participation of the Chief Justice in the forthcoming nomination process of Justices. When 12 Justices left the JSC successively because of the retirement age or death, liberal Justices filled their posts. In the end, 9 of 15 Justices were considered to be liberal. Thanks to K. Yokota's quiet revolution, the subsequent Masatoshi Yokota Court (1966–1969) turned out to be the most liberal in the history of the JSC. It was high time that the labour movement flourished; the judgements of the lower courts on the matter of fundamental labour rights were liberal and progressive and the M. Yokota Court upheld their decision.

As to the labour movements, the 1947 Act on Civil Service, modelled after the American Act, was revised in the very next year. The GHQ decided to make Japan “the fortress of anti-communism” under the circumstances of the imminent Cold War and the heated labour movements. The revised Act prohibits the public officers from participating in strikes or political activities, and a violator of these provisions of the revised Act can be criminally penalised, which is much stricter than the original American Act¹⁹. The Act drew criticism on the basis that such restrictions violated the Art. 28 of the Constitution, which guarantees the right of workers to organise. The Grand Bench in the 60s ruled that the provision itself was not unconstitutional, however, those accused were not guilty when it was interpreted to have been in harmony with the Constitution. In other words, the labour rights of the public employees continued to be guaranteed, in spite of the revised Act.

The Liberal Democratic Party (LDP) condemned the judgements as “biased”. The Minister of Justice said “[w]e cannot start a fight against the judicial branch, but we need to put the brakes on²⁰.” The Japanese politicians generally pay their respect to the judiciary, hence such an unusual statement shows their great concerns. The country was surrounded by the then Soviet Union, China and North Korea, so protecting itself from the menace of communism was an urgent matter at that time. The labour movement had strong ties with the then Socialist Party and the Communist Party. Conversely, LDP's supporters were mainly the big companies, the building industry and the rural farming villages. Even though the post-war economic development led the population to flow from the villages to the urban areas, because of the malapportionment caused by the population proportional distribution method, which had been based on the 1946 census, the LDP was able to maintain the government.

“Judicial Crisis” around 1970

To further stem the “biased” judicial branch, Kazuto Ishida, who had been a promising judge since he was young, was appointed as the 5th Chief Justice of the JSC (1969–1973). Originally, Justice Jiro Tanaka, known as an authority in the area of administrative law, was regarded as a most likely Chief Justice prospect. However, a former Minister of Justice, who could not stand with the liberal tendency of the JSC and Tanaka's opinions, reportedly

¹⁸ *Ibid.*, p. 72.

¹⁹ *Ibid.*, pp. 106–108.

²⁰ HIGUCHI, Y. *Ikenshinsasei 60 nen no keiken (nihonno baai) – seijiteki soutenmondai heno taiou wo tyushinni. Bulletin of the Japan Academy*. 2007, Vol. 61, No. 3, p. 38.

persuaded the PM to appoint Ishida instead²¹. Ishida met their expectations. When the liberal Justices finished their respective terms of office, the hardliners took their places. In March 1973, Justice Tanaka left the JSC. Although he had worked there for nine years, another three years remained until his retirement age. As a result, beginning with the 1973 judgement on the labour movement case, the JSC totally reversed the liberal precedents since 1966, like the stones of the Othello game. It was akin to the end of the “Prague Spring” for the Japanese judiciary.

In the course of the “normalisation”, an unprecedented incident happened in 1971; Judge Yasuyuki Miyamoto’s application for reappointment was turned down by the SCGS²². It is the only evident example of refusal to reappoint a judge on the grounds of political or ideological reasons²³. Miyamoto was a member of the Japan Young Lawyers Association, established by lawyers and scholars in 1954. In the 1960s, many legal apprentices and judges were also active in the Association. In April 1969, the irritated LDP established a task force on the judicial system to reveal who the “communists” were in the courts. They regard the Association as a sympathizer of the Communist Party. At first, the JSC criticised the LDP, but in November 1969, the SCGS started to persuade the member judges to opt-out of the Association. Finally, the SCGS announced in April 1970 that judges should refrain from participating in any group of a political nature²⁴. Yielding to the pressure, most of the member judges dropped out of the Association²⁵. This time around 1970 is called “the judicial crisis”. In addition to this incident, another affair, which shook the judicial independence, also occurred²⁶. The crisis brought a chilling effect and the judiciary swung towards conservatism, particularly in the fields of political and labour rights.

In spite of the conservative nature of the Ishida Court, on 4 April 1973 it rendered the very first judgement which declared a provision of law unconstitutional. At issue was a provision of the Criminal Code which mandated the death penalty or imprisonment for life as the penalty in cases of homicide against the accused’s direct ancestors, whereas for the other homicide cases, the minimal statutory punishment was imprisonment no less than 3 years. In practice, the sentence was mitigated depending on the case circumstances. But according to the structure of the Code, it was impossible to grant a stay of execution for homicide of the given case in favour of the accused. In keeping with the legacy of Confucianism philosophy, the JSC finally changed its stance by finding the statute was uncon-

²¹ YAMAMOTO, Y. *Saikousai monogatari*. Kodan-sha 1997, p. 376.

²² The term of office for ordinary judges is ten years, but they can be reappointed (Art. 80 of the Constitution and Art. 40 (3) of the Court Act).

²³ Before the Advisory Committee on the Nomination of Lower Court Judges was established in February 2003, just 2 judges had been rejected for reappointment (purportedly some judges were persuaded not to even apply). Reportedly, since 2003 there have been a few judges per year who have had their application refused. Although the reasons are not announced, it is said that the many of the rejected judges were appointed from among lawyers. The former Justice Tokiyasu Fujita (p.165.) points out that they are lacking in the expertise or communication skills, and that there is no case of their political ideology being questioned.

²⁴ The Art. 52 (1) of the Court Act prohibits judge’s diligent engage in political activities.

²⁵ The member judges who did not yield to the pressure received the discriminatory treatment on personnel matters. Vid. ABE, H. *Inuni narenakatta saibankan*. p. 215.

²⁶ So called Hiraga memorandum case. Vid. O’BRIEN, D., OHKOSHI, Y. (eds.). *To dream of Dreams –Religious Freedom and Constitutional Politics in Post war Japan*. University of Hawaii Press, 1996, p. 75. ff.

stitutional²⁷. Immediately, the Supreme Public Prosecutor's Office and the National Police Agency decided not to apply this disputed provision to the applicable cases. The conservatives of the LDP objected to the deletion of the provision. It was more than 20 years later when the provision was actually deleted from the law, when the Criminal Code was modernised in 1995. This has been the only case to date in which the Diet has neglected to take any measure in response to a declaration of unconstitutionality by the JSC.

The judicial branch was not just a weakling in the face of the implied pressures of the politics in the 1970s. On 14 April 1976, the JSC declared the election of the House of Representatives in 1972 unconstitutional because the unequal weight given to the votes of different electoral zones²⁸. Although the JSC did not invalidate the election itself, the judgement was the third case in which they issued a decision of unconstitutionality, as well as the very first decision in the ongoing litigation story of “one vote, one value”. The Diet was shocked by the judgement and immediately started to relocate the apportionment, but it was not enough.

Until the 1970s, politics had exerted its power in the judicial personnel affairs. In the 1980s the Cold War went through détente and tensions were relaxed. Owing to the relatively stable domestic situation, political issues which deeply related to the national interest or LDP policy and attracted people's attention, rarely came up before the courts. The political arms of the government did not have to resort to the violation of the constitutional principles; the separation of powers and the judicial independence was seemingly maintained. At the same time, the “brake” after the judicial crisis was still working well with the judiciary. Some discourse on the subject termed the judicial philosophy as “political neutrality”. Otherwise, the JSC objected to the unfairness of the electoral system, as they believed voting rights were the starting point of the democracy.

Constitutional Justice after the 1980s

In the case of constitutional review or changing of precedents, the Grand Bench would make the decisions. The caseload of the Grand Bench declined as follows; 417 cases in the 1950s, 220 cases in the 60s, 89 cases in the 70s, and then only 17 cases in the 80s. The accumulation of precedents cannot fully explain such a sharp decrease in cases decided by the Grand Bench. It illustrates their attitude to evade constitutional review as much as possible. The 10th Chief Justice Jiro Terada (1982–1985) marginally revitalized the Grand Bench. His Court adjudicated 3 times more cases (though only 7 cases in total) than the previous Court²⁹. Additionally, the Justices' individual opinions could be seen more often, and the opinions were not only of an elevated level of legal debate, but also included personal opinions based on what humane or equitable.

The 13th Chief Justice Toru Miyoshi (1995–1997) stated that judicial power is naturally restricted, since both the legislative and the administrative branches have discretion, and

²⁷ As a matter of fact, the reasoning of unconstitutionality by the majority (8 Justices) was not based on the principle of equality (the purpose of the legislation was questioned by 6 Justices), but based on the proportionality of the punishment, in short.

²⁸ When compared the numbers of the voters per MP in every electoral zone, it was 4.81 voters for one electoral zone, while another was 1 voter.

²⁹ YAMADA, T. *Saikousai no ikenhanketsu 'denkano hoto' wo naze nukanainoka*. Koubun-sha 2012, p. 140.

the judiciary should not intervene to the extent that their discretion matters³⁰. Nevertheless, on 2 April 1997, for the first time in a decade, the Miyoshi Court rendered a judgement of unconstitutionality on the relationship between public money and religion (in this case, “Shintoism”). The deliberation concluded with 13 concurring Justices versus 2 dissenting Justices. Miyoshi was part of the minority, – 9 Justices who were appointed by non-LDP Governments (August 1993–January 1996) made up a significant portion of the majority and 7 Justices expressed their individual opinions in the judgement. This judgement had a great impact not only on the conventional expenditure of many local governments for such religious activities, but also on the LDP, whose ideology endorsed the concept of “state Shintoism”, which had been taken for granted by the previous regime.

The 15th Chief Justice Akira Machida (2002–2006), a former member of the Young Lawyers Association (as were some other Justices), buckled under the pressure from the SCGS in late 1969. The Machida Court rendered 8 judgements from the Grand Bench, one of them was the 7th judgement of unconstitutionality, on the voting rights of overseas residents. This judgement of 14 September 2005 was unprecedented, since it was the first time the JSC acknowledged the legislative inaction of the Diet as unconstitutional and also granted compensation to the litigants. In addition to its judgement on legislative action, the Machida Court also adjudged in 2004, for the first time, administrative inaction as unconstitutional.

In the past decade, the JSC has declared 4 cases of the unconstitutionality of statutes and 2 cases on the application of statutes; meaning that the JSC has rendered 6 out of the total 21 judgements of unconstitutionality and 4 out of total 9 cases of the unconstitutionality of statutes in just past 10 years. Note that the first judgement of unconstitutionality was given in 1973, indeed 26 years after the JSC was established. Toshiyuki Muniesue evaluates that the JSC is gradually getting used to exercising the power of constitutional review³¹. Besides that, the JSC has started to show their orientation toward positive remedies for the private rights in administrative litigation, as well.

It is said that the JSC’s impetus to move in that direction was a recommendation submitted to the Cabinet by the Justice System Reform Council in June 2001, which reported that the function of checks and balances by the judicial branch to the legislature or the executive body had not worked sufficiently. Joji Shishido points out that it would be intriguing if the recent trend toward more active constitutional review was spurred by the criticism of “judicial passivism” by the political branch, which itself should be checked by the judicial branch³². Muniesue believes that the courageous judgement of a district court in May 2001 for the protection of the minority³³ motivated the JSC towards orientation of individual rights³⁴. The lower court judgement harshly condemned the inaction of the Diet and the Minister of Health and Welfare for their prolonged failure to change the Act on treatment of the people who contracted leprosy. The Government could not find any grounds for appeal and conceded the case. It seems that these momenta were compelling

³⁰ Ibid., p. 162.

³¹ Toshiyuki Muniesue, an interview in Yamada, p. 304.

³² SHISHIDO, J. Saikosai to “ikenshinsa no kasseika”. *Horitsujiho*. 2010, Vol. 82, No. 4, p. 59.

³³ 11 May 2001, judgement of the Kumamoto District Court.

³⁴ Toshiyuki Muniesue, an interview in Yamada, p. 302.

to Chief Justice Machida, causing his Court to acknowledge the inaction of the legislature and the administration both for the first time at the JSC level.

2. What about the politicisation? (Czech Constitutional Court)

Any Czech citizen of undisputed integrity, who is eligible for election to the Senate, who graduated university law school and has been active in the legal profession for at least ten years, may be appointed as a Justice of the CCC. A Justice shall be appointed for a period of 10 years by the President of the Republic with the consent of the Senate. Furthermore, the President shall appoint a Chief Justice and two Vice Chief Justices from among the Justices without the Senate's involvement. Clearly, the 1993 Czech Constitution did not follow the German model³⁵, but adopted the American nomination model, namely by giving the primary power to appoint Justices to the President of the Republic and balancing it with the consent of the Senate. Compared to the previous constitutional court systems,³⁶ it could be said that the current Constitution reinforces the power of the President. It gives the Senate power of veto, only to restrain a President who goes too far, while also ensuring the legitimacy of the Justices.

This revision might be the solution to avoid the nomination process becoming a highly political issue, or to prevent power games in the Parliament. Although the nomination process for the Justices remains a political matter, a practice of post-distribution cannot be seen in the Czech nomination process thus far. Since every President of the Republic has their own agenda, the Czech parliamentary government is not that stable and the relationship between the President and the Senate can change over time.

At the same time “this political nature gives justices the legitimacy needed to engage actively in decision- making and assert a counter- majoritarian logic for the protection of basic rights.³⁷” It would be decisive when a Justice, confronted with a political question, can feel secure with the legitimacy of the issue and confident in adjudication. On the contrary, a Chief Justice in the JSC admitted, Japanese judges care to what extent they can intervene in the political questions, when they take into account of the nature of their judicial function, where they are bound by the notion of lacking of direct democratic roots³⁸.

Presidency of Václav Havel (1993–2003)

The first President of the Czech Republic, Václav Havel, dedicated significant time and energy to prepare for the nomination of Justices, understanding the importance of their

³⁵ The Federal Constitutional Court consists of sixteen Justices; the half of them are elected by the Lower House and the other half by the Upper House, each with a two-thirds majority. Their term of office is twelve years. Re-election is not allowed. <http://www.bverfg.de/en/organization/organization.html>.

³⁶ For the Constitutional Court of the Czechoslovak First Republic, The President of the Republic appointed three Justices including a Chief Justice, from among the candidates the Parliaments had proposed. And two were delegated to the Supreme Court and other two were from the Supreme Administrative Court. Each six Justices in the CSFR were represented both Republics, who were approved by the Federal Assembly and appointed by the President of the Republic.

³⁷ KÜHN, Z., KYSELA, J. Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic. *European Constitutional Law Review*. 2006, p. 185.

³⁸ The 14 the Shigeru Yamaguchi (1997–2002) s speech at the The Constitution Research Council at the House of Representatives in May 2003. <http://kokkai.ndl.go.jp/SENTAKU/syugin/156/0128/15605150128003c.html>.

roles and the present system's defects, as well. Havel selected candidates who had not been incorporated into the Communist rule, but rather had foreign experience. The nomination processes progressed relatively smoothly. When the first CCC convened, only 12 Justices had been appointed, 4 of whom had been sitting on the bench in the CSFR Constitutional Court, as well. The remaining 3 Justices were appointed by March 1994. In total, 10 Justices of the 15 had previous experience as a judge.

Presidency of Václav Klaus (2003–2013)

Havel's second term as president was to expire in February 2003 and 9 Justices were about to finish their terms, as well. Havel prepared, for his successor, a detailed list of the possible candidates for the Second CCC to avoid any turmoil in the proceedings. Nevertheless, the second President, Václav Klaus (also the first PM (July 1992–January 1998), totally ignored Havel's suggestions. Klaus himself was not a dissident and he was critical of the first CCC as being overtly activist. However, the Senate at the time was hostile to President Klaus, which thus caused a considerable clash between them over the nomination of next Justices. As a result, the CCC's vacant seats were left unfilled for more than 30 months.

In the first round of nominations, Klaus nominated 3 politicians; one was an MP and a co-drafter of the current Constitution, another was also an MP and a daughter of the first Chief Justice of the CCC, and the last one was Minister of Justice Pavel Rychetský, expelled legal scholar after the Prague Spring. It was controversial whether active or former top politicians could be Justices, though it turned out that the Senators approved those nominations.

July 2003 was the first time the Senate rejected one of Klaus's nominees, a prominent attorney who belonged to the President's group of consultants. The reason for the rejection was not clear³⁹. In August 2003, another 3 nominees were rejected, 2 of them were again the President's legal consultants⁴⁰. In autumn 2003, Klaus renominated the same candidate who once failed to receive the confidence of the Senate, just to be declined again. The tension between Klaus and the Senate was suddenly eased when Klaus's ODS party fared well in the autumn 2004 senatorial elections and occupied almost half of the seats. By then, 7 nominees out of 18, in total, had been rejected. The vacancies were finally filled by the end of 2005.

Klaus's conflict with the Senate was later revived after 3 Justices left the CCC between February 2012 and January 2013. Klaus proposed 2 replacements, but the Senate refused to give either of them its consent. After that, Klaus did not even propose any other replacements, which again left the CCC lacking 3 Justices for a long time. One of the unsuccessful candidates was an ex-MP and a co-author of the ill-famed "opposition agreement" in 1998.⁴¹ The other unsuccessful candidate was a Chief Judge of the Municipal Court of Prague, who had been a member of the Communist Party during the previous regime. Nowadays, it seems that mere membership in the former Communist Party itself does not

³⁹ KÜHN, Z., KYSELA, J. Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic. *European Constitutional Law Review*. 2006, p. 198.

⁴⁰ *Ibid.*, p. 198.

⁴¹ iDnes. cz, 25 April 2012.

http://zpravky.idnes.cz/koudelka-ustavni-soud-senat-d1a-/domaci.aspx?c=A120425_112039_domaci_kop.

justify senatorial rejection of a CCC nominee; indeed one former Communist military prosecutor finally acquired the approval of the Senate and became a Justice in April 2013. The crucial flaw of the aforementioned rejected candidate was that he had a questionable relationship with a notorious political merchant.

Presidency of Miloš Zeman (2013–Present)

In March 2013, President Miloš Zeman assumed office. He started selecting suitable candidates for the seats of Justices even before his inauguration. By the end of January 2013, Zeman had made clear that he would reappoint Chief Justice Rychetský, who used to be a Justice Minister in his Government, for another term from August 2013⁴². Zeman openly stated that he has consulted Rychetský on the nominations of other new Justices⁴³. Interestingly, this practice, similar to that of the JSC in which the head of the executive branch negotiates with the Chief Justice over Justices' nominations, is appearing in the Czech Republic. Zeman has nominated 12 Justices up to now and it has seemingly gone relatively smoothly, except that in August 2013 he nominated the same person who failed to receive Senate support in February 2012 when nominated by President Klaus.

Reappointment of Justice for the Czech Constitutional Court

Another question which Klaus posed was whether a Justice could be reappointed. Both the Constitution and the Act on the CCC are silent on the issue. If a Justice is fully aware of the possibility to be reappointed, there is a risk that she would become reluctant to oppose the politics in the end⁴⁴. The emergency situation created by the large number of CCC vacancies, however, pushed the Senate to approve the Klaus' nomination of 3 former Justices in August 2003 and September 2004. Still, the CCC lacked 4 more Justices. Additionally, during Zeman's presidency, Justice Rychetský was reappointed in August 2013, while almost at the same time the Senate refused to give another Justice consent to be reappointed. Finally, in May 2014, the Senate rejected another nomination of an ex-Justice⁴⁵. It is questionable as a whole, on what basis the 5 Justices were reappointed, while the other Justices were not. The criteria for reappointment appears to be highly political.

3. Sphere of political issues before the Czech Constitutional Court

The CCC showed its interpretation of new constitutionalism in its very first decision upon the constitutionality of the Act on the Lawlessness of the Communist Regime and the Resistance Against It (Pl. ÚS No.19/93). The CCC upheld the Act that calls the Communist regime (1948–1989) illegitimate. The judgement articulated that the Czech Constitution is not value-neutral in the sense of rule of law, which made it constitutional to prosecute those who were responsible for serious official crimes committed during the Communist rule, regardless of the statute of limitations.

⁴² 27 January 2013, Radio Prague, <http://www.radio.cz/en/section/news/news-2013-01-27>.

⁴³ 27 March 2013, Prague Daily Monitor. <http://praguemonitor.com/2013/03/27/zeman-announces-names-four-candidates-constitutional-court>.

⁴⁴ Wojciech Sadurski picks up a suggestive Czech anecdote at his book. *Rights Before Courts*. 2008, p. 14.

⁴⁵ Reportedly, he was tuned down in revenge for his certain decision-making at the CCC.

http://zpravdy.idnes.cz/komentar-ludka-navary-0ub-/domaci.aspx?c=A140530_2069201_domaci_jw.

Justice Vojtěch Cepl (1993–2003) said that “without rehabilitation, lustration, and restitution, there will be no transformation.”⁴⁶ The CCC has actually stood for Cepl’s idea. The lustration law, which screens out, for instance, those who worked for the secret police and bans them from certain public occupations, still remains in force. Although there have been several attempts to draw a judgement of unconstitutionality, the CCC has not changed its stance. Regarding cases involving the restitution act, the CCC has relaxed the restrictive conditions of the law easing recovery by former property owners, in accordance with constitutional principles.

Compared to the JSC, the CCC was willing to discuss the fundamental philosophy of law from the beginning of its country’s new constitutionalism. The CCC declared that “even while there is continuity with ‘old laws’ there is a discontinuity in values from the ‘old regime’” (Pl. ÚS No.19/93). In Japan, however, a class-A war criminal was able to revive his political career and became a PM in 1957. This was because, it appears that no law clearly denying the previous regime was ever introduced.⁴⁷ Instead the legislature just abolished improper pre-war statutes. This might be related to the JSC’s background as most of the JSC Justices are the practitioners – and as mentioned above, only one post is reserved for legal scholars.

One could be suspicious as to whether a Justice in the CCC with a certain political background may feel reluctant to give a judgement which would adversely affect politics, especially as it may effect the possibility of reappointment. However, it is almost impossible to show empirically their deliberative process in the course of adjudication⁴⁸. In the 1990s, there was little conflict between the CCC and politics. Basically the CCC showed restraint and appreciated the course of transition towards new democratic and market economic state and allowed politics to treat legacies of the old regime rather harshly⁴⁹. The CCC reserved for the legislature broad discretion to legislate the socioeconomic arena. The first CCC (1993–2003 summer) annulled, in whole or in part, 64 statutes in total. President Havel utilized the tool of abstract constitutional review 10 times, of which 8 cases were decided in his favour, even if partially⁵⁰. According to Kühn, half of annulments of the

⁴⁶ CEPL, V., GILLIS, M. Making Amends after Communism. *Journal of Democracy*. 1996, Vol. 7, No.4, p. 119.

⁴⁷ Under the instruction of the GHQ, the Purge Directive towards war criminals or collaborators was introduced in 1946. The Directive, however, was not thoroughly exercised especially to the judiciary and the bureaucracy. And more the prohibition was lifted for the most of the purged people, at the latest by 1952, because the GHQ policy turned into the “Red Purge”.

⁴⁸ CHMEL, J. *Politika Na Ústavním Soudě? Vliv politického přesvědčení na hlasování soudců „druhého“ Ústavního soudu*. Studentská vědecká a odborná činnost magisterské studium. Univerzita Karlova v Praze, 2013. Sampled 50 cases out of 282 judgements on abstract constitutional review of the second CCC to find how Justice’s individual ideologies have an impact on their own voting activities. I dare point out that 3 Justices who were reappointed by Klaus and 2 by Zeman, according to his tables, interestingly, all belong to the centre or to the left political wings, who are ready to intervene in the politics when needed. On the contrary, the one Justice who failed to be reappointed belonged to the right wing and tended to hesitate to intervene. But the “exception” could be seen for the other Justice who was not reappointed in 2014.

⁴⁹ Procházka says that the peculiarities of local political development proved highly relevant to the degree of the CCC’s activism, especially during the first electoral term of 1992–1996 (Prime Minister Václav Klaus). PROCHÁZKA, R. *Mission Accomplished On Founding Constitutional Adjudication in Central Europe*. Central European University Press, 2002, p. 144.

⁵⁰ KÜHN, Z. Ústavní Soud České Republiky: Proměny Instituce v Průběhu Dvou Desetiletí. In: Aleš Gerloch, Jan Kysela a kolektiv. *20 let Ústavy České Republiky. Ohlédni zpět a pohled vpřed*. Plzeň 2013, p. 251.

statutes (13 of 26) rendered by the first CCC were issued during the final two and a half years of its term. Meanwhile, the second CCC (February 2004–March 2013) struck down, in whole or in part, 60 statutes in total.⁵¹ President Klaus used abstract constitutional review only once and became a quasi-defendant because of his disregard for constitutional values. The second CCC rendered severe judgements against the President's behaviour, even though most of them were his appointees.

A President wishes to exert his influence as much as possible on the appointment of Justices, however, as we have discussed in the cases of the President Klaus's defeated nominations, when his choice of appointee was too extreme, the veto power of Senate worked strongly to the same degree. Also, once a Justice has been appointed, neither the President nor the Senators have any way to stop her giving decisions undesirable to them for a period of ten years. However, the practice of the reappointment could be misused to control the Justices' decisions.

V. MENTALITY OF THE JUDICIARIES

1. Fight against legal formalism – “Judicial War” (Czech Constitutional Court)

As Bobek describes, at the beginning of the transition, the high courts could not accept the CCC which it viewed as a “strange new ‘political’ body calling itself a court”⁵². The Czech Supreme Court (CSC), as the highest court of the ordinary justice, had a contentious relationship with the CCC, which is out of the ordinary court system but reviews CSC's decisions and often overturns them through the procedure of constitutional complaints. Also, the ordinary judiciary and academia did not hide their hostility toward and disobedience of the CCC, and refused to accept a general binding character of CCC judgements. The series of conflicts came to the climax around 1997. The serial “dispute helped to persuade many judges of the ordinary courts to change their minds and methods of decision-making and respect the precedent-based character of the CCC's judgements”, which *prima facie* settled the “Judicial War”.⁵³

The CCC is nicknamed the “Super Supreme Court”.⁵⁴ The CCC is not hierarchically above the ordinary courts. It is not an appellate court. It gives only a cassational review. Although the CCC may overturn even the final decisions of the highest courts, essentially, they are not authorised to evaluate the way the ordinary courts assess the evidence, even if it cannot be agreed with. Justice Sládeček (2013–Present) said that the CCC “inspects just the constitutionality of the decision. A vast number of complaints seem not to be aware of this relevant fact.”⁵⁵ In practice, the CCC has a word to say regarding the ordinary

⁵¹ *Ibid.*, p. 250.

⁵² BOBEK, M. Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe. *American Journal of Comparative Law*. 2009, p. 53.

⁵³ PROCHÁZKA, R. *Mission Accomplished On Founding Constitutional Adjudication in Central Europe*. Central European University Press, 2002, p. 161.; PŘIBÁŇ, J. The Culture of Constitutionalism and Human Rights in the Czech Legal System. In Wojciech Sadurski (ed.). *Constitutional Justice, East and West*. Kluwer Law International, 2002, p. 381.

⁵⁴ KÜHN, Z. Ústavní Soud České Republiky: Proměny Instituce v Průběhu Dvou Desetiletí. In: Aleš Gerloch, Jan Kysela a kolektiv. *20 let Ústavy České Republiky. Ohlédní zpět a pohled vpřed*. Plzeň 2013, p. 246.

⁵⁵ SLÁDEČEK, V. The Protection of Human Rights in the Czech Republic. *The Rule of law in Central Europe*. 1999, pp. 91–92.

courts' factual findings. According to the CCC, if there is an extreme discrepancy between the evident and its assessment, or the assessment of the facts and the legal conclusion, the right to a fair trial is violated⁵⁶. Consciously the CCC plays the roles not only for the normative control power, but also for individual constitutional rights to a great extent.

The CCC objected the formalism or literalism styles of the ordinary judiciary. As Justice Jiří Zemánek (2014–Present) once pointed out, “[a] tradition of mechanical jurisprudence and statutory positivism had previously discouraged judges from using abstract legal principles, teleological interpretation and comparative, cross fertilizing legal arguments”⁵⁷. Regarding the way of adjudicating, the CCC emphasised the importance of the reasoning in judgement; “[u]nless it is the case when the legal solution is a direct result of the text of law, the general court must explain sufficiently its legal reasoning, if possible by quoting published case law or doctrinal opinions”⁵⁸. The CCC criticised the CSC for an unprincipled and unpredictable change of its case-law and proclaimed that such deviation from its case-law was unconstitutional (I. ÚS No. 526/98). The CCC calls the ordinary judiciary's attention to not just follow the CSC precedent blindly without examining its scope (IV. ÚS No. 200/96).

The CCC has won the “Judicial War” and the CSC and the lower courts have come to take into consideration of the CCC case law more often. This tendency has been accelerated by the Czech Republic's accession to the European Union in May 2004, not only because of the method of applying case law as precedent in EU law, but also owing to other factors, such as the Erasmus exchange programme, for example. Many young law students have since been abroad and learnt the role of case law precedents. In addition to that, the CCC itself has accepted many internship students who have learnt the CCC's way and are incorporating these new perspectives in their practice. This new generation is changing the legal practice in the Czech Republic.

2. Japanese judiciary: law- & policy-making functions

The Japanese judiciary has remembered the overwhelming political power which assaulted it during the “judicial crisis” around 1970, and has since strictly restrained itself in order to keep its distance from politics. It might also potentially be in fear of losing public support by stepping into political questions or objecting to the political decisions. What is hammered into judges as a professional ethic is that they must not only “be fair”, but also are required to “give the impression of being fair by all appearances”. It is unwelcomed in Japanese society for a judge in office, even a Justice, to express in public her own principles and positions, especially her political ideology. People demand the judiciary not be “stained” at all, as their black gown implies. In general, the Japanese judiciary is regarded as quite reliable, because they meet such people's demand. Therefore, it was unbearable

⁵⁶ PROCHÁZKA, R. *Mission Accomplished On Founding Constitutional Adjudication in Central Europe*. Central European University Press, 2002, p. 162.

⁵⁷ ZEMÁNEK, J. The Emerging Czech Constitutional Doctrine of European Law. *European Constitutional Law Review*. 2007, p. 418.

⁵⁸ I. ÚS No. 403/03, The English translation is from Kühn Zdeněk. The Authoritarian Legal Culture at Work: the Passivity of Parties and the International Statements of Supreme Courts. *Croatian Yearbook of European Law and Policy*. 2006, Vol. 2, p. 26.

for the SCGS that the politicians, and consequently the constituency, considered the member judges of the Young Lawyers Associations “communists”. The fact that the member judges appeared “partial” was enough for the SCGS. D.S. Law mentions that the judiciary has to be conservative, because the governments are conservative and eventually most electors are so⁵⁹.

The judiciary’s conservative mentality is also seen in the principle of the legal certainty. Former Justice Masami Ito (1980–1989), who was an authority of common-law, said that the Japanese judiciary takes as much account of case-law⁶⁰ than common-law counterparts, mainly for the purpose of the legal certainty. Ito recalled some experiences at the JSC, in which he showed his opinions during the course of the deliberation and colleagues said that they could not agree with him because there existed incompatible case-law. Ito’s experience was in the 1980s, when the JSC had not started metamorphosing yet. Now, we can find many examples of the judiciary not being blindly bound by the case-law. In spite of this, it would still be said that legal certainty is the institutional philosophy in Japan.

When handling constitutional justice, which is always connected to the interests of many citizens, it comes to the judges’ minds that their task is primarily to solve a legal dispute between the individuals. Takii analyses that those hesitations might have led to the tendency, especially in the past, to overestimate the claims of justification from the political branch⁶¹. To overcome their weakness, the JSC has adopted some techniques to express its opinions of unconstitutionality without making the statute directly null and void.

On the contrary, Daniel H. Foote argues that despite the common perceptions of judicial passivism, the Japanese judiciary has been positively making policies in adjudication, which have had political implications⁶². At this point, the Japanese bureaucracy works well. While demonstrating many examples, Foote concludes that the Japanese courts systematically make policies and it is hard to imagine even in the U.S., this level of judicial activism. If an American court creates a new method or an efficient formula to prompt the litigations, such policy-making is considered *ultra vires* or ignoring the differences among individual cases⁶³. The Japanese counterpart even disregarded the letter of the law, but emphasised the legislative purpose and the facts the courts found. Although the logical structures of such judgements are exhaustive, it is eventually the value judgement or the interests balancing approaches, which leads to the conclusions in favour of a certain right. It is widely accepted almost without any resistance that the judges widen the interpretation of statutes and create law over the legislature’s head. The judges often write about their practical legal theories or the technical analysis based on their experiences, in practice their publications are much more influential than academic papers and it is common in Japan for the legislature to codify such judicial practices.

⁵⁹ LAW, B. (2011/ 2013), p. 90., p. 56.

⁶⁰ ITO, M. *Gakusya to saibankan no aida*. Yuhikaku 1993, p. 49.

⁶¹ TAKII, Y. *Wagakuni saikousaibansyo no yakuwari wo doukangaeruka*. *Horitsujiho*. 2010, Vol. 82, No. 4, p. 54.

⁶² FOOTE, D. H. *Saibanto syakai - siho no “joshiki” saikou*. NTT syuppan, 2006, pp. 211–289.

⁶³ *Ibid.*, pp. 266–267.

VI. THE WORK LOAD OF THE BOTH COURTS

In 1993, only 523 constitutional complaints were made to the CCC. Year by year the number has been increasing dramatically and boosting the workload of the CCC. In 2012 the CCC adjudicated 4,569 cases in total, of which 4,535 cases were constitutional complaints (99.4%). It is no wonder that the CCC is overwhelmed by constitutional complaints. In 2009–2013, an average of 28.1% of the constitutional complaints were against the CSC, and 9.1% were against the Supreme Administrative Court⁶⁴. The remainder of the cases on the docket were seemingly against the final decisions of other courts⁶⁵. The flood of constitutional complaints virtually makes the CCC the Court of fourth instance in the Czech litigation system.

Before the JSC, there are approximately 6,000 civil and administrative cases, and 4,000 criminal cases per year (both including complaints arising from judicial decisions)⁶⁶. Former Justice Tokiyasu Fujita (2002–2010) recalls that approximately 95% of the appealed cases do not meet the requirements or they only allege manifestly unacceptable grounds. Curiously, this figure coincides with the same statistics seen at the CCC⁶⁷. Roughly speaking, the caseloads of the JSC are double that of the CCC, but when we take into account the population differences between the two countries (in 2011, Czech 10.4 million, Japan 127.8 million) and that the Czech Republic has two Supreme Courts, employing nearly 100 judges in total, the proportion of Czech people that ask for a final decision by the CCC is rather immense.

The Federal Supreme Court in the U.S. also handles a similar amount of cases as the JSC, though in the U.S., mainly the law-clerks screen and select them and only 75–80 cases are decided on the merits. In principle, the JSC Justices review all the case records. The system expects the JSC Justices to be workaholic much more than their counterparts. Both Fujita⁶⁸ and Taki⁶⁹ have stated that they used to devote their working hours at the JSC to the routine cases, those 95% “manifestly unfounded”. As a result, they would occasionally find some cases that should be taken up for deliberation, even though a Research Judge had scrutinised and concluded it as a “manifestly unfounded”. Inevitably, they had to bring the founded cases home and examine the record in their “free-time”. Taki professes that when he found a case which he thought would be good to discuss at the Grand Bench, it would come to mind that it would bother two other Petit Benches⁷⁰. There is nothing to stop Justices from deciding a case at their Pettit Benches following the precedents only to avoid opening the Grand Bench.

⁶⁴ The CCC's statistics in 2013.

http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Statistika/Rocni_statisticke_analyzy_2013_-_VSA_2013.pdf.

⁶⁵ BOBEK, M. Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe. *American Journal of Comparative Law*. 2009, p. 54, p. 60.

⁶⁶ The JSC statistics: <http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DMIN1-1.pdf>. (Civil/ Administrative cases in 2012), <http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DKEI01.pdf> (Criminal cases in 2012).

⁶⁷ BOBEK, M. Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe. *American Journal of Comparative Law*. 2009, p. 54.

⁶⁸ FUJITA, T. *Saikosai kaisoroku*. Yuhikaku 2012, p. 65.

⁶⁹ TAKII, Y. *Saikosai wa kawattaka – saibankan no jikokensyo*. Iwanami syoten, 2009, p. 43.

⁷⁰ *Ibid.*, pp. 44–45.

A JSC Justice appointed around the age of 65 will reach at the retirement age of 70 just when she has become familiar with the constitutional case law. Even though “the Justices shall be appointed from the persons who are equipped with the integrities and the extensive knowledge of law, and who are not less than 40 years old⁷¹”, of around 170 Justices to date not a single one has been appointed in her 40s, and since 1964 (Justice Jiro Tanaka) in her 50s. Because the post means the summit of the career path for ordinary judges, they are nominated close to their retirement age – 65 year old, and the other Justices not from the judiciary are also nominated equally in their 60s.

On the other hand the age of CCC Justices range from their 40s to their 70s, though many of them are over 60 years old. 5 Justices are woman, meanwhile the JSC has 3 woman Justices. The CCC has slightly more diversity in its Justices in the areas of age and gender, and beyond that the Justices have enough time to become skilled in constitutional justice during their term of 10 years.

VII. CONCLUSION

When it comes to constitutional litigation in Japan, it is rarely filed before the court. Because such a category does not officially exist, this hypothesis is difficult to prove statistically. We can only look to how many decisions relating to the word “constitution” the JSC has rendered. According to their website, in the past 67 years, the number of those published cases is 483 in civil / administrative litigation and 2,148 involving criminal cases. Roughly speaking, the JSC gives just 40 constitutional judgements per year.

On the one hand, due to the rigid litigation process, it is said that an unconstitutional statute seldom appears in Japan, especially since the Cabinet Legislation Bureau scrutinises every bill the Cabinet wants to propose, from the perspective of the consistency of legal order. Their prior-screening gives a kind of assumption of the constitutionality of the statutes. Actually, most of the 9 statutes which the JSC declared unconstitutional were from legislation in which the MPs took the initiative or were pre-war code, where the present Bureau did not participate. The Czech legislative system does not have such an intensive prior-screening system, which would allow the CCC to find flaws in the legislation more often than the JSC.

On the other hand, the Japanese lawyers usually do not look to the Constitution as source of law which could solve a private dispute. As we have discussed, most of the constitutional complaints before the CCC are against the decisions of the ordinary courts, arguing not just the unconstitutionality but the substance of the case in what is practically the next final appeal. Seemingly, it is coming from people’s distrust of the judges in the lower courts.

It would not be accurate to label the CCC as activist in a radical sense even though the CCC did give some controversial judgements, which broadened its competences, for example, in constitutional acts or international treaties on human right. The CCC, however, gives relatively broad discretion to the political divisions, and it has also introduced some techniques to avoid a direct unconstitutional decision. The CCC does not initiate the ab-

⁷¹ The Art. 41 (1) of the Court Act.

stract review by themselves. The political minority brings it before the CCC, so the frequency depends on the political situation. It actually has declared over 130 unconstitutional decisions to date, but the annual averaged caseload is 5-6 cases, with almost half of them being declared unconstitutional.⁷² The earlier cases are almost entirely due to a peculiarity of the transitional period, where the old law was not fully amended to be in harmony with the new constitutionalism.

Furthermore, by the end of 2013, the ordinary courts submitted over 250 cases to the CCC, but almost the half of them were rejected for procedural reasons or for being manifestly unfounded⁷³. That means while an ordinary judge concludes that the parliamentary legislation to be applied in her pending case contravenes the constitutional order, the CCC finds the legislature's is in harmony with the order.

It is not deniable that the CCC has more active character than the JSC in their adjudication. Still, I would conclude that, despite the differences in the process of the transition, the structures, or the nomination, the CCC and the JSC are not at opposite poles, but the convergence can be seen in the direction of the individual right protection, which meets the demand of the new constitutionalism.

⁷² I used the data from Kühn (2013).

⁷³ KÜHN, Z. *Czech Republic*. Cambridge University Press, 2015, p. 5.