Inclusion among the Japanese People

A Constitutional Perspective

Hiromichi Sasaki[*]

I. Introduction
II. Outline of the Nationality Act
  1. Jus Sanguinis
  2. Acquisition of Nationality "by Birth" and "by Administrative Discretion"
  3. Acquisition of Nationality "by Notification"
III. Context of the 2008 Supreme Court Decision
  1. Background
  2. The 2002 Supreme Court Decision
  3. Question of Constitutionality and Question of Judicial Remedy
IV. Content of the 2008 Supreme Court Decision regarding the Question of Constitutionality
  1. Framework of the Constitutional Judgment
  2. Constitutional Judgment Using the Framework
V. Appraisal of the 2008 Supreme Court Decision regarding the Question of Constitutionality
  1. Framework of the Constitutional Judgment
  2. Constitutional Judgment Using the Framework
VI. Content and Appraisal of the 2008 Supreme Court Decision regarding the Question of Judicial Remedy
  1. Content of the 2008 Supreme Court Decision
  2. Appraisal of the 2008 Supreme Court Decision
VII. Concluding Remarks

I. INTRODUCTION

The Preamble of the Japanese Constitution[1] (which was enacted in 1946) proclaims that "sovereign power resides with the people" and declares that "[w]e, the Japanese people […] do firmly establish this Constitution."

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* Professor of Constitutional Law, Tōhoku University, Graduate School of Law. This work was supported by JSPS KAKENHI Grant Number JP15H03290.

1 *Nihon koku kenpō* [The Constitution of Japan], Constitution/1946. An English translation of the Constitution of Japan is available at *http://www.japaneselawtranslation.go.jp.*

These provisions suggest that logically the Japanese people predate the Constitution.[2] But who are the Japanese people?

The Constitution has no definition of the "Japanese people", however. Instead, Article 10 provides that "[t]he conditions necessary for being a Japanese national shall be determined by law."

This article, in a very limited way, explores the constitutional question of who the Japanese people (or nationals) are. First, we will take a look at the outline of the Nationality Act,[3] which the Diet enacted in 1950 in response to Article 10 of the Constitution. Second, we will review the 2008 Supreme Court decision[4] that found a provision of the Nationality Act in violation of the constitutional principle of equality. Third, we shall appraise the reasoning of the 2008 Supreme Court decision from a constitutional perspective and suggest some answers to the aforesaid constitutional question.

II. Outline of the Nationality Act

1. Jus Sanguinis

In response to Article 10 of the Constitution, the Diet enacted the Nationality Act in 1950. The Act's basic principle is *jus sanguinis* (a Latin phrase meaning "right of blood") rather than *jus soli* ("right of soil"). Article 2, the provision regarding the acquisition of nationality by birth, stipulates as follows:

Article 2. A child shall be a Japanese citizen in the following cases:
(i) If the father or mother is a Japanese citizen at the time of birth,[5]
(ii) If the father died before the child's birth and was a Japanese citizen at the time of death; or
(iii) If born in Japan and both of the parents are unknown or are without nationality.

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2 Further, under the Constitution, Article 15 provides that "the people have the inalienable right to choose their public officials and dismiss them" (para.(1)), and "universal adult suffrage is guaranteed with regard to the election of public officials" (para. (3)). These provisions suggest that at least under the Constitution only "adult(s)" among "the Japanese people" have the right to vote, the right which is at the center of people's political participation.

3 *Kokuseki-hō* [The Nationality Act], Law No. 147/1950. An English translation of the Nationality Act is available at *http://www.japaneselawtranslation.go.jp* .

4 Supreme Court, grand bench, 4 June 2008, Minshū 62, 1367. An English translation of this decision is available at *http://www.courts.go.jp/app/hanrei_en/detail?id=955*.

5 Before the 1984 revision of this Act, item (i) provided: "If the father is a Japanese citizen at the time of birth." The insertion of the phrase "or mother" in this item was a response to Japan's ratification in 1980 of the Convention on the Elimination of All Forms of Discrimination against Women.

As we can see, items (i) and (ii) of this Article stipulate the principle of *jus sanguinis,* and its item (iii) stipulates in a very limited context the principle of *jus soli*.

2. *Acquisition of Nationality "by Birth" and "by Administrative Discretion"*

When Article 2 of the Nationality Act is applied, one acquires Japanese nationality without any required administrative procedure. Roughly speaking, under the Nationality Act, if one does not acquire Japanese nationality by birth, he or she may acquire Japanese nationality only through naturalization. Articles 4 through 10 are the provisions on naturalization. To undergo naturalization, one applies with the Minister of Justice for permission to naturalize.[6] Article 5, para. 1, lists six conditions for *standard naturalization*[7] that a foreign national must meet in order to be permitted to naturalize.[8] This permission is, however, a discretionary act and not a ministerial act, which means that even if a foreign national meets all six of the conditions, the Minister of Justice is still entirely free to deny permission.

3. *Acquisition of Nationality "by Notification"*

Between the acquisition of nationality by birth, on the one hand, and naturalization, on the other hand, the 1984 revision of the Nationality Act pro-

6 Article 4. See also Article 18.

7 The Act also has provisions for *simplified naturalization,* which simplifies or exempts some of the conditions for standard naturalization for those foreign nationals that have a special relationship with Japan. They are specified in Article 5, para. 2, and Articles 6 to 8. In addition, the Act has a provision for *grand naturalization,* which exempts all of the conditions for standard naturalization for those foreign nationals who have "provided a special distinguished service in Japan" (Article 10).

8 Article 5, para. 1 provides as follows:

Article 5 (1) The Minister of Justice may not permit naturalization for a foreign national who has not met the following conditions:

(i) Having continuously had a domicile in Japan for five years or more;

(ii) Being twenty years of age or more and having the capacity to act according to his/her national law;

(iii) Being a person of good conduct;

(iv) Being able to make a living through his/her own assets or abilities, or through those of a spouse or of another relative;

(v) Not having a nationality or having to give up his/her nationality due to the acquisition of Japanese nationality; and

(vi) On or after the date of promulgation of the Constitution of Japan, not having planned or advocated the destruction of the Constitution of Japan or the government established thereunder with force, and not having formed or joined a political party or other organization planning or advocating the same.

vided for a third way to acquire Japanese nationality. The then newly enacted Article 3 (prior to the subsequent 2009 revision),[9] which was titled as the provision for the acquisition of nationality by legitimation, read as follows:

> Article 3. (1) A child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgment by either parent and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death.
>
> (2) The person making notification provided for in the provision set forth in the preceding paragraph shall acquire Japanese nationality at the time of the notification.

As we can see, paragraph (2) of this Article provides clearly that "[t]he person making notification […] shall acquire Japanese nationality at the time of the notification." Although this person does not automatically acquire Japanese nationality by birth, neither is he or she subject to the caprices of administrative discretion as in the case of naturalization.

III. Context of the 2008 Supreme Court Decision

1. Background

It has been construed that in order for Article 2, item (i) of the Nationality Act to be applied, a child must have a legal parent-child relationship with a Japanese father or Japanese mother at the time of birth.

Article 2, item (i) is applied to a child born *in wedlock* to a Japanese father or mother. But what about a child born *out of wedlock* to either a couple with a non-Japanese father and a Japanese mother or a couple with a Japanese father and a non-Japanese mother?

Article 2, item (i) applies to a child born out of wedlock to a Japanese mother (hereinafter referred to as a "Child A") and to a child born out of

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9 As we shall see in this article, the 2008 Supreme Court decision found the provision of Article 3, para. 1 unconstitutional. Responding to this decision, the Diet revised this paragraph the next year. The present Article 3, now titled as the provision for the acquisition of nationality by acknowledged children (no longer by legitimation), reads as follows:

> Article 3. (1) A child who is acknowledged by the father or mother and who is aged under 20 (excluding those who have been Japanese citizens) may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death.
>
> (2) (no revision.)

wedlock and acknowledged by a Japanese father *before birth* (hereinafter a "Child B"); such a child thus acquires Japanese nationality by birth. But Article 2, item (i) is not applied to a child born out of wedlock and acknowledged by a Japanese father *only after birth* (hereinafter a "Child C"), because at the time of birth this child does not have a legal parent-child relationship with his/her father.

For a Child C, Article 3, para. 1 of the revised Act opened up a way to acquire Japanese nationality, albeit not by birth but by notification. But read literally, Article 3, para. 1 applied only to a Child C who had "acquired the status of a child born in wedlock as a result of *the marriage of the parents*" (hereinafter a "Child C1"). Article 3, para. 1 was deemed inapplicable for a Child C *whose parents remain unmarried* (hereinafter a "Child C2"). Thus, the only way left for a Child C2 to acquire Japanese nationality would have been naturalization.[10]

From this point forward, we will focus our attention on a Child C2.

2. The 2002 Supreme Court Decision

a) Allegation of the Appellant

The facts of the 2002 Supreme Court decision[11] were as follows: A Child C2 alleged that the retroactive effectiveness of acknowledgment under the Civil Code (Article 784)[12] also applied to the case of acquisition of nationality and that therefore a Child C2 acquired Japanese nationality under Article 2, item (i) of the Nationality Act retroactively as from the time of birth. This Child C2 alleged that if the retroactive effectiveness of acknowledgment did not apply to the case of nationality, Article 2, item (i) resulted in the distinction that although both a Child B and a Child C were acknowledged by his/her Japanese father, a Child B (who was acknowledged before birth) acquired Japanese nationality by birth but a Child C (who was acknowledged after birth) did not; it was further alleged that this distinction

10 Article 8, item (i) provides for simplified naturalization for a Child C2 who has "a domicile in Japan." It provides as follows:

Article 8. The Minister of Justice may permit naturalization of a foreign national who falls under one of the following items even if that person has not met the conditions listed in Article 5, paragraph (1), item (i), item (ii) and item (iv):

(i) A child (excluding an adopted child) of a Japanese citizen, said child having a domicile in Japan;

(ii)〜(iv) (omitted.)

11 Supreme Court, 2nd petty bench, 22 November 2002, Hanrei Jihō 1808, 55.

12 Article 784 of the *Minpo* [Civil Code], Law No. 89/1896, provides that "Affiliation has retroactive effect from the time of birth; provided that this shall not prejudice a right already acquired by a third party."

was in violation of Article 14, para. 1 of the Constitution,[13] which provides for the basic principle of equality.

b) The 2002 Supreme Court Decision

In the 2002 decision, the Supreme Court concluded that Article 2, item (i) of the Nationality Act was not in violation of Article 14, para. 1 of the Constitution and rejected the allegation that a Child C2 acquired Japanese nationality under Article 2, item (i) of the Nationality Act retroactively as from the time of birth.

c) Framework of the Constitutional Judgment

The Supreme Court laid out the framework for its constitutional judgment as follows. On the one hand, nationality is the qualification for being a member of a particular state, and the determination of who its nationals are falls under the state's inherent power. Article 10 of the Constitution leaves the determination on the content of the requirements for acquisition or loss of nationality to the law-making of the legislative body. On the other hand, Article 14, para. 1 of the Constitution means to prohibit discrimination without reasonable grounds. Consequently, the question of whether any distinction caused by the legal requirements concerning acquisition or loss of Japanese nationality is in violation of this constitutional provision should be judged according to whether the distinction has a reasonable basis.

d) Constitutional Judgment Using the Framework

Using this framework, the Supreme Court judged the constitutionality of Article 2, item (i) of the Nationality Act as follows. First, Article 2, item (i) grants Japanese nationality by birth not whenever a child has a biological blood relationship with a Japanese father or mother but only when a child has a legal parent-child relationship with a Japanese father or mother at the time of birth, with the Court regarding this legal relationship as showing the child's close relationship with Japanese society. Second, the acquisition of nationality by birth is expected to be determined at the time of birth as certainly as possible, and whether a child would be acknowledged by his/her Japanese father after birth is uncertain at the time of birth. Consequently, the fact that Article 2, item (i) does not grant Japanese nationality to a child acknowledged after birth by his/her Japanese father has a reasonable basis. Therefore, Article 2, item (i) does not violate Article 14, para. 1 of the Constitution.

13 Article 14, para. 1 of the Constitution provides that "All of the people 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."

3. Question of Constitutionality and Question of Judicial Remedy

We now turn to the 2008 Supreme Court decision. This time, another Child C2 (the appellant of this case) alleged that a Child C2 acquired Japanese nationality under Article 3 of the Nationality Act at the time of notification to the Minister of Justice. The reasoning for this was structured in two tiers. First, Article 3, para. 1 of the Act established the distinction that although both a Child C1 and a Child C2 have been acknowledged by his/her Japanese father after birth, a Child C1 (whose parents married after his/her birth) acquired Japanese nationality by notification but a Child C2 (whose parents remained unmarried) did not (hereinafter referred to as the "Distinction"), and that the Distinction was in violation of Article 14, para. 1 of the Constitution. Second, the provision of Article 3, para. 1 of the Act was void only with respect to the part that produced the Distinction, and so the remaining part of the provision would grant Japanese nationality by notification to a Child C2.

As we can see, two questions were raised in this case. The first question was whether the Distinction created by Article 3, para. 1 of the Nationality Act was in violation of Article 14, para. 1 of the Constitution (hereinafter the "question of constitutionality"). If the answer to the first question was "yes," then the second question was whether it was permissible for the court to grant Japanese nationality to the appellant based on a constitutional construction of Article 3, para. 1 of the Nationality Act. If not, it would be left to the Diet to decide how to eliminate the unconstitutionality and therefore whether or not to grant Japanese nationality to a Child C2 (hereinafter the "question of judicial remedy").

The majority opinion of the 2008 Supreme Court decision, by a margin of 10 to 5, found the appellant to have acquired Japanese nationality pursuant to the provision of Article 3, para. 1 of the Nationality Act, answering both questions in the affirmative. But there were two dissenting opinions.[14] An opinion written by three dissenting Justices (hereinafter "Dissenting Opinion I") answered both questions in the negative. The other dissenting opinion written by two Justices (hereinafter "Dissenting Opinion II") answered the question of constitutionality in the affirmative and the question of judicial remedy in the negative.

We shall examine both questions in order, beginning with the question of constitutionality. First we will outline the reasoning of the majority opinion, and then we will appraise its persuasiveness and its implications from a constitutional perspective.

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14 There were also four concurring opinions, each written by one Justice, although the concurring opinion written by Justice Imai had the support of three other Justices (they were Justices *Nasu, Wakui,* and *Kondō*). And there was one opinion written by one Justice.

IV. Content of the 2008 Supreme Court Decision regarding the Question of Constitutionality

1. Framework of the Constitutional Judgment

The majority opinion laid out the framework of the constitutional judgment as follows. At first, the majority opinion followed a similar logic as the 2002 decision's, mentioning both Article 10 and Article 14, para. 1 of the Constitution. But eventually the majority opinion, unlike the 2002 decision, put more weight on the latter and laid out a more articulated framework for deciding whether a particular distinction was in violation of Article 14, para. 1. The majority opinion said that "where a reasonable basis cannot be found in the legislative purpose of making such a distinction even if the discretionary power vested in the legislative body is taken into consideration" (hereinafter the "legislative purpose test") or "where a reasonable relevance cannot be found between the distinction in question and the aforementioned legislative purpose" (hereinafter the "relevance test"), "the distinction is deemed to constitute discrimination without reasonable grounds" and is unconstitutional.

The majority opinion next said that it was necessary to "deliberately consider" whether the Distinction had "any reasonable grounds." The expression "deliberately consider" suggests that the court employed at least some degree of heightened scrutiny. The majority opinion grounded this necessity on two points. First, "Japanese nationality is […] an important legal status that means a lot to people in order to enjoy the guarantee of fundamental human rights, obtain public positions or receive public benefits in Japan." Second, whether a child's parents would marry after his/her birth "is a matter that […] cannot be affected by the child's own intention or efforts." Those familiar with the equal protection doctrine of American constitutional law can easily see that these two points are similar to the "fundamental rights" theory and the "suspect classification" theory of this doctrine, theories that are both known to lead to heightened judicial scrutiny.

2. Constitutional Judgment Using the Framework

Using this framework, the majority evaluated the constitutionality of Article 3, para. 1 of the Nationality Act.

First, the majority opinion conducted the legislative purpose test as follows. The legislative purpose of this provision is to provide for "certain requirements that can be the indexes by which to measure the closeness of the tie between the child and Japan, in addition to the existence of a legal parent-child relationship with a Japanese citizen." This legislative purpose "has a reasonable basis."

Second, the majority opinion conducted the relevance test as follows.

The legislators of this provision in 1984 thought that "if the child does not acquire Japanese nationality by birth, he/she is likely to subsequently develop a close tie with a foreign state which is his/her state of nationality," so that "in the case of a child acknowledged by a Japanese father after birth," it is only when his/her parents get married that "the child's life [is] united with the life of the Japanese father and the child obtains a close tie with Japanese society through his/her family life." Furthermore, in 1984 "many [foreign] states that adopted the principle of jus sanguinis made both acknowledgment and legitimation as requirements for granting nationality to children born to fathers who are their citizens." Therefore "according to the socially accepted views and under the social circumstances" of 1984 and "[i]n light of the aforementioned trends in the nationality law systems enforced in foreign states" in 1984, "a certain reasonable relevance can be found between the provision […] and the legislative purpose mentioned above."

However, the majority opinion went on to observe that since that time "the realities of family life and parent-child relationships have changed and become diverse, as seen by the fact that the percentage of children born out of wedlock in the total number of newborn children has been increasing." And "as Japan has recently become more international […], the number of children born to Japanese fathers and non-Japanese mothers has been increasing." "In the case of children whose parents are couples of Japanese citizens and foreign citizens, the realities of their family lifestyles (e.g., whether or not the child lives with a Japanese parent) as well as the views regarding a legal marriage and the ideal form of parent-child relationship based thereon are more complicated and diverse than in the case of children whose parents are both Japanese citizens." So "in the former case, it is impossible to measure the degree of closeness of the tie between children and Japan just by examining whether or not their parents are legally married." Furthermore, "other states are moving toward scrapping discriminatory treatment by law against children born out of wedlock." And after 1984 many foreign states that had previously made both acknowledgment and legitimation requirements for granting nationality to children born to fathers who are their citizens have revised their laws to make only acknowledgment the requirement.

Therefore, "although the legislative purpose itself from which the Distinction is derived has a reasonable basis, reasonable relevance between the Distinction and the legislative purpose no longer exists due to the changes in social and other circumstances at home and abroad."[15]

15 Following the basic argument as in the quoted passages set out in the text above, the majority opinion presented an additional argument, presumably intended as a reinforcement. The majority opinion stated that under the Nationality Act, among all

Consequently, "by the time when the appellant submitted a notification for acquisition of Japanese nationality to the Minister of Justice, at the latest," "the Distinction amounted to unreasonable discrimination, and the provision of Article 3, para. 1 of the Nationality Act was in violation of Article 14, para. 1 of the Constitution in that the provision caused the Distinction."

V. Appraisal of the 2008 Supreme Court Decision regarding the Question of Constitutionality

1. Framework of the Constitutional Judgment

The main question surrounding this Article is who the Japanese people (or nationals) are. From an international law perspective, the answer to this question is that "[i]t is for each State to determine under its own law who are its nationals."[16] The Constitution of Japan addresses this idea in Article 10.

As stated earlier, the majority opinion put weight on Article 14, para. 1 of the Constitution and employed some degree of heightened scrutiny. Dissenting Opinion I, conversely, stressed Article 10 and said that "[w]hether or not to grant nationality […] can be said to be one of the most fundamental sovereign functions. From this viewpoint, we should say that it is left to the broad legislative discretion to formulate requirements for granting nationality." This lenient framework for constitutional judgment is one of the main reasons Dissenting Opinion I reached the conclusion that Article 3, para. 1 of the Nationality Act is constitutional.

The majority opinion, too, affirmed that "when specifying the requirements for acquisition or loss of nationality […] the determination on the

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kinds of children that had a legal parent-child relationship with a Japanese citizen (namely a Child A, a Child B, a Child C1 and a Child C2), only a Child C2 was "not allowed to acquire Japanese nationality by birth or by making a notification unless the marriage of the parents – an act […] that the child can do nothing about – has taken place." The majority opinion said that a Child C2 suffered "considerably disadvantageous discriminatory treatment in acquiring Japanese nationality." "[W]e can no longer find any reasonable relevance between the consequence arising from the Distinction and the aforementioned legislative purpose."

But note that the relevance inquiry reflected in the preceding paragraph is conducted between "the consequence arising from the Distinction"– not "the Distinction" itself, as in the citation in the text to this footnote – and the legislative purpose. I must say that this reasoning is not a judgment using the relevant framework but a deviation from it (see the formulation of the framework for the relevance test as described in the text at IV.1.). The equal protection analysis is about a distinction created by a statute, not its consequence.

16 Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws.

content of these requirements should be left to the discretion of the legislative body." But the majority opinion differed from Dissenting Opinion I in that the former identified a strong side-constraint imposed by Article 14, para. 1 of the Constitution as regards the legislature's discretion, whereas the latter did not. I agree with the majority opinion that constitutional law should function this way.

The majority opinion grounded the necessity for some degree of heightened scrutiny on the two above-described points. But if one puts too much weight on the first point ("Japanese nationality is […] an important legal status"), some degree of heightened judicial scrutiny would always be necessary in cases where equality is demanded relating to the requirements for acquisition or loss of nationality, and the legislature's discretion would be severely restricted. Thus, if one does not admit this consequence and seeks coherency with the 2002 decision, the second point (that his/her parents would marry after his/her birth is "a matter that […] cannot be affected by the child's own intention or efforts") must be deemed decisive.

2. Constitutional Judgment Using the Framework

The majority opinion basically said that the legislative purpose of Article 3, para. 1 of the Nationality Act had a reasonable basis and that in 1984 (at the time of the provision's enactment) a certain reasonable relevance between the Distinction and the legislative purpose existed; however, the opinion went to say that at the latest by 2003 (when the appellant submitted a notification pursuant to the provision), the reasonable relevance between the two no longer existed due to circumstantial changes at home and abroad.

This finding regarding the relevance test was strongly criticized by Dissenting Opinion I. First, as to the circumstantial changes at home, Dissenting Opinion I said that it was true that, as the majority opinion said, "the percentage of children born out of wedlock in the total number of newborn children has been increasing" and "the number of children born to Japanese fathers and non-Japanese mothers has been increasing." But "the increase in these numbers is small," said Dissenting Opinion I, pointing out "according to the statistics" that the former number rose "from 14,168 (1.0%) in 1985 […] to 21,634 (1.9%) in 2003" and the latter number rose "from 5,538 in 1987 […] to 12,690 in 2003." Dissenting Opinion I suggested that because the realities had not changed much, the reasonable relevance between the Distinction and the legislative purpose still existed. Second, as to the circumstantial changes abroad, namely the change in the "trends in the nationality law systems enforced in foreign states," Dissenting Opinion I said that although this kind of fact related to the appropriateness of the provision as a legislative measure, it did not directly relate to the constitu-

tionality of the provision. Additionally, Dissenting Opinion I said, "the percentage of children born out of wedlock exceeds 30% in many of these states, and even in the lower cases, the percentage seems to exceed 10%", with the result that "there is a large difference between these states and Japan in terms of the social circumstances."

On this point, I think Dissenting Opinion I is more persuasive. Thus, if the former Article 3, para. 1 of the Nationality Act should nonetheless be deemed unconstitutional, the justification would not be that the provision no longer satisfies the relevance test because the facts have changed, but that the provision does not satisfy the legislative purpose test in the first place, namely that the legislative purpose itself (providing for "the indexes by which to measure the closeness of the tie between the child and Japan") does not have a sufficiently reasonable basis to justify the Distinction (the core of which is the classification between illegitimate and legitimate children, a classification which is seen as "suspect"). This logic implies that what has changed is not the facts but the norm, or rather, more accurately, that the initial understanding of the norm was wrong.[17]

VI. Content and Appraisal of the 2008 Supreme Court Decision regarding the Question of Judicial Remedy

1. Content of the 2008 Supreme Court Decision

Regarding the question of remedy, the majority opinion reasoned that "if […] the whole part of the provision of Article 3, para.1 of the Nationality Act is made void in order to eliminate the unconstitutional condition arising

17 In light of this justification, the 2013 Supreme Court decision (grand bench, 4 September 2013, Minshū 67, 1320) striking down another type of discrimination against the illegitimate children can be more fully understood. An English translation of this decision is available at *http://www.courts.go.jp/app/hanrei_en/detail?id=1203*.

This decision found the part of the proviso to Article 900, item (iv) of the Civil Code, which provided that the share in inheritance of a child born out of wedlock shall be one half of the share in inheritance of a child born in wedlock (hereinafter this part shall be referred to as the "Provision"), in violation of Article 14, para. 1 of the Constitution "as of July 2001 at the latest." The 1995 Supreme Court decision (grand bench, 5 July 1995, Minshū 49, 1789) had ruled that the Provision was not in violation of Article 14, para. 1 of the Constitution. However, the 2013 decision did not overrule its prior decision. Instead, it stated explicitly that "[i]t does not intend to modify the conclusion drawn by the 1995 Grand Bench Decision."

For a comprehensive analysis of this decision *see* A. Kimura / G. Koziol, Der gesetzliche Erbteil nichtehelicher Kinder – Entscheidung des Obersten Gerichtshofs vom 4. September 2013, in: ZJapanR / J.Japan.L. 39 (2015) 233 *(The Editors)*.

from the Distinction, and the chance to acquire Japanese nationality by making a notification is denied even for a child [C1], this would ignore the purpose of said Act that introduced the system for acquisition of Japanese nationality after birth in order to supplement the principle of jus sanguinis, and it can hardly be imagined as the lawmakers' reasonable intention." "Therefore, it follows that while presupposing the existence of the provision of Article 3, para.1 of the Nationality Act under which a […] child [C1] may acquire Japanese nationality by making a notification, it is necessary to give relief to [a child C2], thereby correcting the unconstitutional condition arising from the Distinction."

The majority opinion said that "[f]rom this viewpoint, […] there is no choice but to enforce the provision of Article 3, para.1 of [the Nationality] Act […] , in terms of its purpose and content, upon a child [C2] […] by considering that even such a child is allowed to acquire Japanese nationality by making a notification if he/she satisfies the requirements prescribed in said paragraph except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents." The majority opinion claimed that this "construction is drawn by, in order to correct the unconstitutional defect arising from the Distinction, avoiding making void the provision of Article 3, para.1 of the Nationality Act as a whole and putting a reasonable construction on it while excluding the part that imposes an excessive requirement and causes the Distinction." By this construction, the majority opinion upheld the appellant's claim.

2. Appraisal of the 2008 Supreme Court Decision

Dissenting Opinion II disagreed with this reasoning, concluding that "[t]he Nationality Act is a law that creates and grants rights." "Without the provisions of the Nationality Act, the definition of Japanese citizens cannot be determined." "Where a person does not satisfy the requirements prescribed in the Nationality Act for acquiring Japanese nationality, […] it is nothing more than the state of non-existence of legislation or inaction on legislation in relation to the provisions of the Nationality Act." Article 3, para. 1 of the Nationality Act provided that a Child C1 may acquire Japanese nationality by making a notification, but it "[did] not contain any provision to the effect that [a Child C2] shall be granted Japanese nationality upon notification." Therefore "in relation to acquisition of nationality by [a Child C2] by making a notification, the current situation is nothing other than the state of non-existence of legislation or inaction on legislation." "[W]hat is unconstitutional is the state of inaction on legislation, or the lack of a provision to grant nationality to [a Child C2] upon notification. While the majority opinion states that what is unconstitutional is the provision of Article 3, para.1

of the Nationality Act per se, we consider that said provision is not unconstitutional at all because it is a provision that is intended to create and grant a right, i.e., grant nationality to legitimated children upon notification." [If] "the state of inaction on legislation […] is found to be an unconstitutional condition but it cannot be corrected through construction and application of law, it is a principle under the Constitution to correct this state through a legislative measure taken by the Diet." "The majority opinion, after all, creates a new requirement for acquisition of nationality that is not stipulated by law and it is in effect equal to legislation by the judiciary." Therefore Dissenting Opinion II considered that "the judgment of prior instance that dismissed the appellant's claim is justifiable and the final appeal should be dismissed."

So whose reasoning is right, the majority opinion or Dissenting Opinion II?

On the one hand, there is the question of "what is unconstitutional." Judging by the equal protection doctrine, "what is unconstitutional" cannot be "the state of inaction on legislation, or the lack of a provision to grant nationality to [a Child C2] upon notification" per se, as Dissenting Opinion II claimed it to be. In equal protection analysis, a court examines whether a different treatment of one group and another group can be considered constitutionally equal. So the comparison between two groups, or the line-drawing between them, is always the matter of concern. Therefore "what is unconstitutional" has to be the Distinction created by Article 3, para. 1 of the Nationality Act, as long as "unconstitutional" means that it violates the equal protection clause of the Constitution. And even if we agree with Dissenting Opinion II that the provision of Article 3, para. 1 was "intended to create and grant a right, i.e., grant nationality to legitimated children upon notification", stating that the Distinction is "unconstitutional" means that it is constitutionally impermissible to "grant nationality to legitimated children upon notification" if the provision maintains the unconstitutional Distinction. Dissenting Opinion II is therefore wrong to say that "said provision is not unconstitutional at all."

On the other hand, there is the question of the nature of Article 3, para. 1 of the Nationality Act. The majority opinion interpreted the provision's "requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents" as "an excessive requirement." This interpretation implied that the provision was originally meant to grant nationality upon notification to both a Child C1 and a Child C2, but that the "excessive requirement" excluded a Child C2 from the scope of the provision. In contrast, Dissenting Opinion II understood the provision as one "that is intended to create and grant a right" to a Child C1 alone. So the abovementioned requirement of the provision is not "an excessive requirement"

at all but a necessary part of the description of the nationality requirements for a Child C1. On this point, I think Dissenting Opinion II is right. There is no denying that the majority opinion exercised a certain amount of "legislation by the judiciary" in order to "avoid […] making void the provision of Article 3, para. 1 of the Nationality Act as a whole" and at the same time "correct the unconstitutional defect arising from the Distinction." We can, however, evaluate the Court's remedy announced in this case as being within the bounds of the court's judicial power and not an infringement upon the Diet's legislative power.

VII. Concluding Remarks

On the constitutional question of who Japanese nationals are, the 2008 decision has illustrated that the constitutional principle of equality has some role to play in answering this question. But this role is a limited one. If the Diet in 1984 had not created a provision for the acquisition of Japanese nationality to a Child C1 by notification (namely Article 3, prior to the subsequent 2009 revision, of the Nationality Act), which later turned out to be unconstitutional, then the constitutional principle of equality could not have found a handhold for itself to work, and the Supreme Court could not have granted Japanese nationality by notification to a Child C2. It should be recalled that the 2002 decision of the Supreme Court confirmed that Article 2 of the Act does not grant Japanese nationality by birth to a Child C (i.e., a child acknowledged after birth by his/her Japanese father, meaning not only a Child C2 but also a Child C1). Consequently, without the creation of Article 3 by the 1984 revision of the Act, naturalization would still be the only way for a Child C to acquire Japanese nationality.

Whether further constitutional limitations other than the equality principle should exist on legislative discretion in deciding who Japanese nationals are is a question to be considered in the future.

Summary

The article addresses an important and overarching problem related to inclusion in a changing context. This is the question of Japanese nationality, how it can be acquired and how exclusive this right is. The author focuses on the changes in Japan's Nationality Act and the related 2008 Supreme Court Decision. The Act of 1950 stipulates jus sanguinis as its basic principle. The only other way to acquire Japanese nationality was through naturalization but the administration related to this procedure is complex and the outcome unpredictable. In 1984, however, a revision of the Nationality Act opened the path to

acquisition of nationality by means of legitimation for a child born out of wedlock and acknowledged by the Japanese father only after birth. Then what about a child who was also born out of wedlock and acknowledged by the Japanese father only after birth, but whose parents remain unmarried? According to the Nationality Act, naturalization would have been the only way to acquire the Japanese nationality. In such a case, the Supreme court in 2008 decided that this is a violation of Article 14, para. 1 of the Constitution (non-discrimination). The Court acknowledged in its reasoning the changing realities of family life and the progressing internationalization of Japanese society. This leads to the question whether the recent jurisprudence related to Japan's Nationality Act heralds a shift from an exclusive to an inclusive society.

(The Editors)

ZUSAMMENFASSUNG

Der Beitrag befasst sich mit dem Erwerb der japanischen Staatsangehörigkeit und der Frage, wie „exklusiv" diese ist, aus der Perspektive des Tagungsthemas der gesellschaftspolitischen „Inklusion". Der Schwerpunkt liegt auf der Änderung des japanischen Staatsangehörigkeitsgesetzes im Jahr 1984 und einer damit zusammenhängenden Entscheidung des Obersten Gerichtshofes aus dem Jahr 2008. Das Gesetz von 1950 knüpft im Prinzip an das Abstammungsprinzip (ius sanguinis) an. Die einzige andere Möglichkeit, die japanische Staatsangehörigkeit zu erwerben, war lange Zeit nur die Naturalisation, die aber ein komplexes bürokratisches Verfahren mit ungewissem Ausgang voraussetzte. Erst die Novelle des Staatsangehörigkeitsgesetzes im Jahr 1984 eröffnete als dritte Möglichkeit einen Erwerb der Staatsangehörigkeit qua Legitimation, wenn das Kind durch die nachträgliche Heirat der Eltern ehelich wurde und von einem japanischen Elternteil anerkannt worden war. Die Frage ist jedoch, was für ein nicht-eheliche Kind gelten soll, das sein japanischer Vater nach der Geburtanerkannt hat, insbesondere wenn eine Eheschließung auch weiterhin unterbleibt. Nach dem Staatsangehörigkeitsgesetz stand in einem solchen Fall nur der Weg über die Naturalisation, nicht aber über eine Legitimation offen. In seiner Entscheidung von 2008 hat der Oberste Gerichtshof festgestellt, dass diese Praxis nicht (länger) mit dem Diskriminierungsverbot des Artikel 14 Abs. 1 der japanischen Verfassung vereinbar sei. Unter anderem berief er sich dabei auf die Veränderungen im Familienleben und die wachsende Internationalisierung der japanischen Gesellschaft. Der Beitrag stellt die Frage, ob dies bereits den Anfang eines Wandels von einer „exklusiven" zu einer „inklusiven" Gesellschaft in Japan indizieren könnte.

(Die Redaktion)