Constitutionality of the Japanese Nationality Act: A Commentary on the Supreme Court's Decision on 4 June 2008

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I. INTRODUCTION

A woman from the Philippines came to Japan. She gave birth to a baby born to a Japanese father out of wedlock. Despite the fact that the Japanese father acknowledged the child after birth, the child was not granted Japanese nationality. Both the mother and the child were deemed to have been staying unlawfully in Japan and thus received deportation orders to leave the country. If only the father had acknowledged the child just one day *before* birth! The child would have been granted Japanese nationality by birth and would therefore be free from a deportation order.

This story is not an imaginary tragedy, but the reality for many foreign women over the years. One lawyer representing such a client took an imaginative approach in dealing with the deportation case by letting the client submit the form for the child to acquire nationality and receive the official notice stating that the child did not satisfy the requirements under Article 3 of the Nationality Act.[1] With this notice, the applicant filed a combined suit for the verification of the child's nationality status as well as for quashing the deportation order.[2] The case was disputed on the constitutional basis of the

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1 *Kokuseki-hô*, Law No. 147/1950, as last amended by Law No. 147/2004 (hereinafter Nationality Act). An English translation is available at *http://www.moj.go.jp/ENGLISH/information/ tnl-01.html.*

2 In the aftermath, the deportation case was settled by the granting of a special residency permit. *Shutsu'nyû-koku kanri oyobi nanmin nintei-hô* [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319/1951, as last amended by Law No. 30/2008, Art. 50. An English translation of the version amended by Law No. 43/2006 is available at *http://www.moj.go.jp/ENGLISH/information/icrr-01.html.*

non-discriminatory principle and went all the way up to the Supreme Court en banc, with the landmark judgment handed down on 4 June 2008 rendering unconstitutional the discriminatory treatment against children acknowledged by their father after birth in the absence of the parents' marriage.[3]

This celebrated judgment is not only significant for our understanding as to the constitutionality of Japanese nationality law, but also remarkable in respect of the way in which the Supreme Court provided relief for the applicants affected by an unconstitutional provision. Yet not all the views expressed in the majority judgment were unproblematic. This article, after briefly explaining the legal background leading up to this judgment, clarifies the line of arguments followed by the majority judgment in juxtaposition with the dissenting opinions and critically reviews two main points of controversy, namely, the judicial approach to nationality issues and the role of judicial review on constitutional issues.

II. BACKGROUND

The Japanese Constitution is not explicit as to the conditions that must be satisfied for the acquisition and loss of nationality, but delegates its authority to legislation.[4] Traditionally the Nationality Act follows a *jus sanguinis* rule for natural acquisition of nationality. Under Article 2(1), a child born to a Japanese father or mother at the time of his/her birth is granted nationality by birth. Under the Japanese conflict of laws rules, a child is deemed legitimate where it is the case under the national law of one of the spouses at the time of the child's birth.[5] Thus, in a case where a foreign mother is married to a Japanese father, her child conceived during the marriage is regarded as the child of her husband under Japanese law,[6] and thereby acquires Japanese nationality.

A child born out of wedlock to a Japanese mother and a foreign father is also granted nationality by reason of the child's legal relationship with the mother at birth under Japanese law.[7] Whilst under the Civil Code, the existence of a parent-child relationship

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3 Supreme Court en banc, 4 June 2008, 2002 Hanrei Jihô 3; 1267 Hanrei Taimuzu 92. The judgment is hereafter cited as '2008 Nationality Case', with pages of the Japanese text available at *http://www.courts.go.jp/hanrei/pdf/20080604174246.pdf.*

4 Japanese Constitution (*Kenpô*) of 1946, Art. 10. It reads: 'The conditions necessary for being a Japanese national shall be determined by law'. The English translation is available at *http://www.servat.unibe.ch/law/icl/ja00000_.html.*

5 *Hô no tekiyô ni kansuru tsûsoku-hô,* Law No. 78/2006 (hereinafter Application of Laws Act), Art. 28(1). English translations can be found in: ZJapanR / J.Japan.L. 23 (2007) 227; Yearbook of Private International Law 8 (2006) 427; Asian-Pacific Law and Policy Journal 8 (2006) 138, available at *http://www.hawaii.edu/aplpj/articles/APLPJ_08.1_anderson.pdf.*

6 *Minpô*, Book 4, Law No. 9/1898, as last amended by Law No. 50/2006 (hereinafter Civil Code), Art. 772. An English translation is available at *http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf.*

7 Application of Laws Act, Art. 29(1).

between such a child and the mother requires the mother's acknowledgment,[8] under case law this relationship is automatically established by birth.[9] Issues arise, however, when a child is born out of wedlock to a Japanese father and a foreign mother. This is because the parental relationship of such a child with regard to the father (paternity) is not presumed at birth, but requires an acknowledgment by the father under his national law (*i.e.*, Japanese law in this case). The paternal acknowledgment of the child is therefore subject to a strict application of the Civil Code.

In cases where the Japanese father has been married to a foreign mother or has made a voluntary declaration of his intent to acknowledge the child before birth,[10] the child is granted nationality by reason of the legal relationship that exists at the time of birth under Article 2(1) of the Nationality Act (nationality by birth). Furthermore, as a result of the amendment to the Nationality Act in 1984,[11] a child born out of wedlock to a Japanese father, and without paternal acknowledgment before birth, can still be granted nationality by notification to the Minister of Justice under Article 3(1) if the child is legitimated by paternal acknowledgment after birth as well as the marriage of the father and mother.[12] Thus, those children who are acknowledged by the Japanese father after birth, but whose parents remain unmarried, are left in legal limbo.

However, the issue relating to the nationality status of such children did not surface until recently. When the Nationality Act was amended in 1984, the majority of the foreigners staying in Japan were Koreans and Taiwanese who had come to Japan before World War II when Korea and Taiwan had been under Japan's occupation, and their descendents. They were eligible for a permanent visa (Special Permanent Residency),[13] and therefore did not have a concern as to their own or their children's immigration

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8 Civil Code, Art. 779. 'Acknowledgment' as used herein refers to the practice in some countries of the establishment of parentage of an illegitimate child by the formal act of a parent filing in the family registry, a court decision, or so forth. C.M.V. CLARKSON / J. HILL, Jaffey on the Conflict of Laws (London 1997) 416.

9 Supreme Court, 27 April 1962, 16(7) Minshû 1247.

10 Civil Code, Art. 783(1). In this case the mother's consent is required.

11 See K. HOSOKAWA, Amendment of the Nationality Law, in: The Japanese Annual of International Law 28 (1985) 11; D. WANG, A propos de la nouvelle loi japonaise sur la nationalité, in: Clunet 119 (1992) 45; M. DOGAUCHI, Loi sur la nationalité, in: Rev. Crit. 75 (1986) 579.

12 Civil Code, Art. 789. Under Art. 30(1) of the Application of Laws Act, a child is legitimated either by the national law of the father, mother, or child. However, legitimation logically premises upon the establishment of the parental relationship, which, with regard to the Japanese father, requires an acknowledgment under Art. 29(1). Consequently, even though marriage alone is sufficient to legitimate the child under the mother's or child's national law, as is the case in common law countries, the child is not yet legitimated because of lack of the parental relationship with regard to the Japanese father under Japanese law.

13 *Nihon-koku to no heiwa jôyaku ni motozuki nihon no kokuseki o ridatsu shita mono-tô no shutsu'nyû-koku kanri ni kansuru tokurei-hô* [Act on an Exception of Immigration Control over Persons who Lost Japanese Nationality as a Result of the Peace Treaty with Japan], Law No. 71/ 1991, as last amended by Law No. 73/2004.

status in Japan. Since the 1990s, however, the number of newly arrived foreigners, mainly from Korea, China, the Philippines, and Thailand, has increased significantly. Among them there are many women who have given birth to children with Japanese men,[14] giving rise to the question whether such children can be granted Japanese nationality. Those children are often left with an unlawful immigration status, despite the fact that they are born to a Japanese father.

A question may be posed as to whether the father's acknowledgment of a child after birth has a retrospective effect to the time of his or her birth under Article 2(1) of the Nationality Act by virtue of Article 784 of the Civil Code.[15] It could therefore be argued that the application of the Nationality Act discriminates between those children acknowledged after birth and those acknowledged before birth.[16] The Supreme Court of Japan had already dismissed such a contention, whilst the unconstitutionality of discrimination against a child born out of wedlock in relation to Article 3(1) of the Nationality Act was pointed out in the supplementary opinion.[17] The exclusion of the retrospective effect under nationality law is implicit, as *lex specialis*, in the idea that the nationality of a child is to be confirmed at the time of his or her birth.[18]

It is nonetheless noteworthy that the Supreme Court has in fact recognized an exception to this rule, granting nationality by reason of the acknowledgment after birth in the absence of the parents' marriage, in the case where a notification of acknowledgement before birth should be rejected due to the fact that a foreign mother was married to another man.[19] Yet this decision did not go far enough to cover all children born out of wedlock. The question therefore remained unsettled as to whether the requirement of legitimation is discriminatory and unconstitutional against those children acknowledged by their father after birth in the absence of the parents' marriage. It was against this background that the Supreme Court handed down a landmark decision on 4 June 2008, addressing this unsettled legal issue.

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14 Contrary to this, a number of Brazilians and Peruvians who have come to Japan after the 1990s have given birth to children whose fathers are mainly from the same country as the mother.

15 It provides, however, that the retrospective effect of the acknowledgment does not prejudice a right already acquired by a third party.

16 This issue was also raised by Judge Tahara in the Supreme Court's decision on 4 June 2008, but was dismissed as involving complicated legal issues in many respects. See 2008 Nationality Case, *supra* note 3, 23-24.

17 Supreme Court, 22 November 2002, 1808 Hanrei Jihô 55, The Japanese Annual of International Law 46 (2003) 180 (in English).

18 H. EGAWA / R. YAMADA / Y. HAYATA, *Kokuseki-hô* [Nationality Law] (Tokyo 3rd ed. 1997) 67-68.

19 Supreme Court, 17 October 1997, 51(9) Minshû 3925, The Japanese Annual of International Law 41 (1998) 113 (in English); Supreme Court, 12 June 2003, 56(1) Katei Saiban Geppô 107, The Japanese Annual of International Law 47 (2004) 214 (in English).

III. THE JUDGMENT OF THE SUPREME COURT ON 4 JUNE 2008

A. Constitutionality of the Differential Treatment

The first part of the judgment addressed the substantive aspect of the case as to whether the requirement of legitimation under Article 3(1) of the Nationality Act had a discriminatory effect against those children acknowledged by their father after birth without the parents being married. The majority judgment acknowledged that Article 10 of the Japanese Constitution intended to leave the legislature with discretion in setting the requirements for the grant or loss of nationality. Having taken that into account, however, it was still indicated that the difference caused by the legislative requirements for nationality could well be unjustifiable by reference to Article 14(1) of the Japanese Constitution in cases where the discriminatory treatment had no reasonable ground.[20] In other words, the application of the non-discrimination principle was presupposed irrespective of the ultimate nationality status of those children, which critically stands in contrast to the dissenting opinions.[21]

The majority judgment emphasized the significance of nationality as the legal status essential for the protection of fundamental human rights and for receiving public qualifications as well as public benefit.[22] It also recognized that the marriage of the child's parents is a matter over which the child had no control. In light of those considerations, the majority judgment stated that 'it would require careful consideration as to whether there is a reasonable basis for the differential treatment of children for the purpose of determining their nationality'.[23] There is no denying that illegitimacy of the children indicates a social status within the meaning of Article 14(1) of the Constitution, with discrimination based on that status being deemed unconstitutional only when the differential treatment lacks reasonableness.[24] It is therefore noteworthy that the majority judgment arguably adopted a strict standard test in assessing the reasonableness of differential treatment based on social status.[25]

In considering the reasonableness of the differential treatment, the majority judgment examined the legislative intent behind it, explaining that the child was deemed to be

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20 2008 Nationality Case, *supra* note 3, 4.

21 The dissenting opinion jointly expressed by Judge Yokoo, Judge Tsuno, and Judge Furuta argued that it was state sovereignty that would decide whether to grant protection and legal benefits. See *ibid.,* 32-33. However, see our analysis, *infra* IV.A.

22 In his supplementary opinion, Judge Tahara pointed out the importance of social rights such as the right to education and the right to social security particularly for children. See 2008 Nationality Case, *supra* note 3, 21-23.

23 *Ibid,* 4.

24 Supreme Court en banc, 27 May 1964, 18(4) Minshû 676; Supreme Court en banc, 4 April 1973, 27(3) Keishû 265.

25 As to the strict standard test of Japanese authors, see K. SATÔ, *Kenpô* [Constitutional Law] (Tokyo 3rd ed. 1995) 471; N. ASHIBE, *Kenpô 14-jô 1-kô no kôzô to iken shinsa kijun* [Structure of Article 14(1) of the Constitution and Criteria of Constitutionality], in: Hôgaku Kyôshitsu 139 (1992) 91.

integrated into, and thus had a closer connection to, Japanese society by acquiring the legitimate status through the marriage of his or her parents.[26] It acknowledged that the legislative intent to provide for certain additional conditions other than the establishment of the legal relationship with the Japanese parent was itself reasonable, because the child who had not acquired Japanese nationality by birth was often connected with his or her other state of nationality. Furthermore, it held that the requirement of legitimation as an additional condition had been reasonably related with the legislative intent in light of the social value and circumstances that existed at the time when Article 3(1) was inserted. Yet doubt has since been cast on the requirement of legitimation through the parents' marriage as the criterion against which the strength of the child's connection with Japanese society could be assessed. This is due to the complicated and diversified family lives surrounding children born to a foreign mother, as well as the increase of such children in the changing socio-economic environment.[27] This marked a significant departure from the Court's previous decisions, especially those concerning discrimination over succession, where changing family relationships were considered only by the minority.[28] It will not necessarily result in overturning the previous decisions on the constitutionality of discrimination over succession, for it would otherwise require reduction of the allocation of succession to legitimate children. Nevertheless, the consideration of the family relationship in each particular case, as indicated in the majority judgment of June 2008, is encouraging and even indicative of wider ramifications for other issues of discrimination against illegitimate children.

The reference was also made to the move worldwide to remedy the discriminatory treatment against illegitimate children, as well as to the prohibition of discrimination among children under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).[29] While conceding that there was such a trend in foreign countries, in their joint dissenting opinion, Judge Yokoo, Judge Tsuno, and Judge Furuta cast doubt on whether it would be appropriate to take that into account in deciding the constitutionality of Japanese law, as opposed to the reasonableness of legislative policy.[30]

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26 2008 Nationality Case, *supra* note 3, 5.

27 *Ibid,* 6. However, see Judge Yokoo, Judge Tsuno and Judge Furuta's joint dissenting opinion, *ibid,* 34. They argue that the change of family lives is not so drastic, given that the percentage of children born out of wedlock increased from 1% in 1985 to 1.9% in 2003, and the number of children born to a Japanese father and a foreign mother increased from 5,538 in 1987 to 12,690 in 2003.

28 See, *e.g.*, Supreme Court en banc, 5 July 1995, 49(7) Minshû 1789. Here, the Supreme Court dismissed the contention that Art. 900 of the Civil Code, which entitles a child born out of wedlock to only half of the amount which a legitimate child is entitled to in the case of intestate succession, should be regarded as unconstitutional because of its discriminatory treatment.

29 2008 Nationality Case, *supra* note 3, 7.

30 *Ibid,* 34.

Having decided that the reasonable link could hardly be seen between the legislative intent and legitimation of children through the parents' marriage as the requirement for nationality by notification, the majority judgment concluded that it could not help but declare that illegitimate children acknowledged by their father have been subjected to extremely discriminatory treatment in contravention of Article 14(1) of the Japanese Constitution.[31] It reinforced this view by pointing out the difficulty with justifying the differential treatment on the basis of the different extent to which children acknowledged by their father after birth, as compared to those acknowledged before birth, might be connected to the society through their family life.[32] Furthermore, it justified its conclusion in light of gender equality, given that illegitimate children born to a Japanese mother are granted Japanese nationality by birth.[33]

B. Remedy

The second, and perhaps more controversial, issue addressed by the Supreme Court concerned the procedural aspect of the case – whether the Court had the power to grant the appellant Japanese nationality on the premise that the differential treatment under Article 3(1) of the Nationality Act was unconstitutional. There are two different ways of giving effect to the judgment declaring the unconstitutionality of the marriage requirement under Article 3(1) of the Nationality Act: (1) to render the whole provision invalid; and (2) to render the specific requirement invalid and apply the provision with the exclusion of the marriage requirement.[34]

The majority judgment dismissed the first option, stating that it would undermine the whole purpose of inserting Article 3(1) to complement the *jus sanguinis* principle, and could hardly be justified as a reasonable interpretation in light of the legislative intent.[35] On the basis of this understanding, the majority judgment considered it necessary to remedy the unreasonably discriminatory treatment against illegitimate children acknowledged by their father after birth, having regard to the constitutional principle of equal treatment under law and the fundamental principle of nationality law. As a result, it reached the conclusion that there is no option but to apply Article 3(1) equally to allow

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31 *Ibid,* 8.

32 *Ibid.*

33 *Ibid.* However, see Judge Yokoo, Judge Tsuno and Judge Furuta's joint dissenting opinion, *ibid,* 36. They argue that the relationship between children out of wedlock and their mother is closer than that with their father.

34 Theoretically there may be another way, that is, to declare the provision unconstitutional and leave it to the legislature to rectify the unconstitutionality. However, Article 81 of the Constitution is construed to allow the Court to examine constitutionality for the purpose of resolving the case in question. Japan has no Court of Constitution empowered to review constitutionality independent of resolution of a specific dispute. See Supreme Court en banc, 8 October 1952, 6(9) Minshû 783.

35 2008 Nationality Case, *supra* note 3, 10.

children to acquire nationality after birth once they are acknowledged by their father.[36] This conclusion was also justified as serving the intent and purpose of the provision, which was to grant nationality to those children who not only satisfied the requirement of the *jus sanguinis* principle, but who also possessed certain attributes indicative of a close link with Japanese society, such as the fact that their father is Japanese.[37]

This position was strongly opposed by dissenting judges on the ground that such an interpretation would amount to judicial interference with the legislative function reserved for the legislature. Judge Yokoo, Judge Tsuno, and Judge Furuta in their joint dissenting opinion argue that illegitimate children cannot be granted nationality merely upon acknowledgment by their father, as there is no provision that would allow this. The whole purpose of Article 3(1) was to grant nationality to the children legitimated after birth, although premised upon acknowledgment by their father. Therefore, they argued, this provision would have become nonsense if it was applied without the requirement of legitimation. From this standpoint, the majority judgment was seen as granting nationality without the legislative basis, which would in substance amount to the legislative measure adopted by the Court.[38]

While conceding to the majority judgment that there is no longer a reasonable link between the legislative intent and the requirement of legitimation, the dissenting judges' position was that it was the absence of a legislative provision, and not Article 3(1) of the Nationality Act, that was unconstitutional. The other dissenting judges, Judge Kainaka and Judge Horikago, emphasized that the nature of the Nationality Act generally, and in particular Article 3(1), was to create and confer rights, which did not allow for a partial application of the provision by interpretation.[39]

The majority judgment only noted that such a contention was of no relevance.[40] Yet supplementary opinions expressed by each concurring judge give us a clearer idea as to why the majority preferred the partial application of Article 3(1). The majority judges, with the exception of Judge Fujita, appeared to be in agreement about the premise that Article 3(1) was an intentional exercise of the legislative discretion with a view to excluding a particular group of children, rather than legislative inaction in relation to those children.[41] Judge Imai, with whom Judge Nasu and Judge Wakui concurred, therefore, took the view that the judicial remedy of rendering invalid a part of the provision, as opposed to the whole provision by way of interpretation in compliance with the Constitution, would not amount to the legislative enactment of a new provision.[42] The remedy

36 *Ibid,* 11.
37 This argument may be criticized as a tautology, because the *jus sanguinis* principle means the grant of nationality by the fact that the father (or the mother) is Japanese.
38 *Ibid,* 37.
39 *Ibid,* 40.
40 *Ibid,* 11.
41 See especially Judge Imai supplementary opinion, *ibid,* 18-19.
42 *Ibid,* 19.

granted by the Court in this case was also justified on the basis of the provisional nature unrestrictive of the subsequent legislative exercise of discretion,[43] the unfavourable consequences arising in the case relief was not granted,[44] and the judicial responsibility to provide relief for those who are affected by an unconstitutional, legislative provision.[45]

There is no doubt that the majority judges' interpretation in compliance with the Constitution was carefully constructed. For example, Judge Izumi's opinion started with the examination as to whether the legislative intent was clear that Article 3(1) would have no effect should the requirement of legitimation be removed.[46] With the view that there is no such express intention, Judge Izumi had recourse to interpretive presumptions that the legislative intent was to be in compliance with the constitutional principles and international human rights treaties.[47]

It is interesting to note that Judge Fujita reached the same conclusion by way of interpretation, although starting from the same premise as the dissenting judges. While agreeing in principle with the dissenting judges that there is only limited scope for the judiciary to intervene in the legislative inaction on matters which are left to the discretion of the legislature, Judge Fujita argued that when the legislature had already decided on certain legislative policy and set the basic direction, it would not be unacceptable for the judiciary to undertake an expansive interpretation of the existing provisions to the extent that it would not contravene the basic direction that the legislature has outlined.[48] Having identified the legislative policy to treat illegitimate children acknowledged by Japanese fathers favourably in Article 8 of the Nationality Act,[49] he drew the conclusion that there was no reason why treating non-legitimated children in the same manner as legitimated children for the purpose of the acquisition of nationality should be seen as decisively in contravention to the legislative intent.

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43 Judge Izumi supplementary opinion, ibid, 20-21; Judge Kondo supplementary opinion, ibid, 25-26.

44 Judge Imai supplementary opinion, *ibid,* 19-20.

45 Judge Imai supplementary opinion, *ibid,* 20.

46 *Ibid,* 15.

47 *Ibid,* 15-16.

48 *Ibid,* 28-30.

49 Judge Fujita remarked that Article 8 allows illegitimate children acknowledged by their father to acquire Japanese nationality by simpler procedures than those required for other non-citizens. However, this assumption is contrary to the text of the statute. Firstly, the Nationality Act provides only minimum conditions for discretionary permit of naturalization by the Minister of Justice (Art. 5). Article 8 provides only exemption or reduction of certain conditions such as domicile of more than five years, majority of age, and financial ability. Secondly, the procedure of naturalization is not provided in the Nationality Act but in Article 2 of the Enforcement Order of the Nationality Act that equally applies to all applicants: Order of the Ministry of Justice No. 39/1984, as last amended by Order No. 44/1994.

IV. ANALYSIS

A. The Court's Approach to Nationality Issues

Although the outcome appears simple, and is certainly encouraging, the reasoning behind the decision is not without controversy.

The first point of controversy concerns the starting point of the judgment. While the dissenting opinion's reasoning is premised upon the state sovereignty as the legal basis for the grant and loss of nationality, the majority judgment assumed the application of the non-discrimination principle under Article 14(1) of the Constitution irrespective of the ultimate status of nationality of the children. The majority judgment made this assumption as 'a matter of course'.[50] Yet it would require some explanation as to why the legislative discretion authorized by Article 10 of the Constitution on matters relating to nationality must be subject to the right to non-discrimination.

The reference should be made in this context to the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws.[51] Articles 1 and 2 of the Convention provides:

> Article 1: It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.
>
> Article 2: Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Although this Convention is not ratified by Japan,[52] these provisions reflect the principles of customary international law. According to those principles, nationality is certainly a matter of sovereignty of each state. However, it does not necessarily indicate that the nationality is a matter falling within the exclusive competence of the legislature. The constitutionality of a nationality law is autonomously decided under the legal system of each state. Consequently, doubt should be cast on the dissenting opinion's narrow understanding of sovereignty, deferential to the legislature over the matter of nationality.

Further, as the second sentence of Article 1 of the Convention suggests, the autonomous decision of each state on nationality is subject to the examination by international law.[53] In this respect, the indirect application of international human rights treaties in the majority judgment is unsatisfactory. The majority judgment referred to international

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50 2008 Nationality Case, *supra* note 3, 4.

51 Adopted at The Hague on 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937).

52 The signatories and ratified countries can be viewed via the UN website at *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/treaty-4.asp.*

53 J.M.M. CHAN, The Right to a Nationality as a Human Right, in: Human Rights Law Journal 12(1-2) (1992) 2.

human rights instruments only in the context of the assessment of reasonableness of the differential treatment. The Convention on the Rights of the Child (CRC) requires States Parties to ensure that the rights set forth in the Convention are exercisable under national laws without discrimination of any kind and irrespective of the child's social origin or other status.[54] The CRC provides further that the child shall have the right to acquire a nationality.[55] As a result of combining these provisions, the CRC should be construed as prohibiting discrimination against illegitimate children under nationality law,[56] and could therefore have been directly referred to as the human rights basis for the limitation upon the legislative discretion. It is noteworthy in this respect that Judge Izumi referred to international human rights treaties for the purpose of interpretive presumption, although he considered only the general rule on the prohibition of discrimination.[57] This approach is akin to that found in the statutory interpretation in common law countries.[58]

The reference to the practice in foreign countries would have also required more explanation. The majority judgment appeared to make that reference to reinforce the view that the differential treatment under the existing Nationality Act was no longer reasonable. The dissenting judges criticized this approach, casting doubt on its relevance to the constitutionality of a legislative provision. Such criticism is not warranted, for the majority judgment made reference to foreign practice only for the purpose of assessing the reasonableness of the link between the legislative intent and the differential treatment, and not for directly determining the constitutionality of the provision. None-

54 Convention on the Rights of the Child, adopted at New York on 20 November 1989, 1577 UNTS 3, Art. 2(1) (entered into force 2 September 1990). The CRC was ratified by Japan on 22 April 1994 and entered into force for Japan on 22 May 1994. A similar provision is found in the International Covenant on Civil and Political Rights (ICCPR), adopted at New York on 16 December 1966, 999 UNTS 171, Art. 24(1) (entered into force 23 March 1976). The ICCPR was ratified by Japan on 21 June 1979 and entered into force for Japan on 21 September 1979.

55 Art. 7(1) of the CRC. A similar provision is found in Art. 24(3) of the ICCPR.

56 See the Committee on the Rights of the Child's concluding observations on Japan in 2004, CRC/C/15/Add. 231, paras. 25, 31. The Committee recommended that Japan should 'amend its legislation in order to eliminate any discrimination against children born out of wedlock, in particular, with regard to … citizenship rights'. It further declared its concern about children born out of wedlock to a Japanese father and a foreign mother who 'cannot obtain Japanese citizenship unless the father has recognized that child before its birth, which has, in some cases, resulted in some children being stateless'. See also the UN Human Rights Committee's concluding observations on Japan in 1998, CCPR/C/79/Add. 102, para. 12 (the Committee 'continues to be concerned about discrimination against children born out of wedlock, particularly with regard to the issues of nationality'). For more details, see Y. OKUDA, Nationality of Children Born out of Wedlock under Japanese Law: Recent Developments in the Case Law, in: The Japanese Annual of International Law 48 (2005) 26, 39-42.

57 2008 Nationality Case, *supra* note 3, 15.

58 See, *e.g.*, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24, p. 34, para. 29 (per Gleeson CJ); *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 128 ALR 353, p. 362 (per Mason CJ and Dean J).

theless, it should have been explained why, and to what extent, foreign practice was considered relevant to the assessment of the reasonable link. The comparison to foreign practice is only meaningful when it is made to those countries which, like Japan, adopt the principle of *jus sanguinis* and the system of acknowledgment for paternity of a child born out of wedlock. In fact, foreign countries satisfying those conditions, including France, Belgium, and Italy, have long granted nationality to illegitimate children upon acknowledgment by the father.[59]

B. The Role of Judicial Review: Starting a Dialogue?

This judgment marked the eighth occasion in the long history of the Supreme Court where the unconstitutionality of legislation was declared. There are three cases in which the Supreme Court rendered a legislative provision invalid and hence denied the application of the particular provision to the case in question.[60] There is also a case where the Supreme Court remitted the case to a High Court.[61] In two cases in which the disparity in vote values in different electoral constituencies were declared unconstitutional, the Supreme Court did not render the election results invalid.[62] Here, the Supreme Court drew on the general principle of administrative law that allows courts to refuse revocation of an administrative decision in cases where it would have detrimental effects upon public interests, which, weighing all the relevant factors, the court deems unjustifiable in light of public welfare.[63] In another, more recent case regarding the electoral law, the Supreme Court decided that the legislative inaction leaving Japanese nationals living overseas deprived of their right to vote was unconstitutional,[64] prompting the legislature to amend the electoral law in 2006.[65]

The Supreme Court's decisions tend to be followed by a prompt legislative amendment to rectify unconstitutional provisions, with the exception of the 1973 judgment on

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59 For more details, see OKUDA, *supra* note 56, 28-31.

60 Supreme Court, 4 April 1973, 27(3) Keishû 265 (concerning the heavier penalty for patricide under Article 200 of the Criminal Code in relation to the right to non-discrimination); Supreme Court, 30 April 1975, 29(4) Minshû 572 (concerning the restrictions upon the distance between pharmacy shops under the Drug Administration Act in relation to the freedom of commerce); Supreme Court, 22 April 1987, 41(3) Minshû 408 (concerning the restrictions under the Forest Act in relation to the property right).

61 Supreme Court, 11 September 2002, 56(7) Minshû 1439 (concerning the limitations upon state responsibility under the Postal Services Act in relation to Article 17 of the Constitution that guarantees the right to seek compensation by the state).

62 Supreme Court, 14 April 1976, 30(3) Minshû 223; Supreme Court, 17 July 1985, 39(5) Minshû 1100.

63 This general principle of law is drawn from Article 31(1) of *Gyôsei jiken soshô-hô* [Administrative Court Proceedings Act], Law No. 139/1962, as last amended by Law No. 109/2007.

64 Supreme Court, 14 September 2005, 59(7) Minshû 2087.

65 *Kôshoku senkyo-hô* [Public Offices Election Act], Law No. 100/1950, as amended by Law No.86/2007.

the heavier penalty prescribed for patricide under Article 200 of the Criminal Code; this was left intact until the comprehensive overhaul of the Criminal Code in 1995, which resulted in its deletion. In the transitional period, the Ministry of Justice issues a notice to suspend the operation of unconstitutional provisions. It was therefore expected in the 2008 Nationality Case that the Nationality Act would be promptly amended in conformity with the Supreme Court's decision, which would be retrospectively applied up to a certain period of time. Thus, on the day after the Supreme Court's decision, the Ministry of Justice sent a message to all local bureaus to put all the applications for acquisition of nationality on hold in so far as all the conditions other than the requirement of legitimation are met.[66]

The most controversial aspect of this judgment, as can be seen in the division of opinions among the judges, was whether it was a proper judicial role to provide relief for the applicants through a partial application of Article 3(1) of the Nationality Act. There is no doubt that in practical terms, individual justice was achieved by this judgment, because it would otherwise have left the applicants in legal limbo until the legislation is amended in their favour.[67] On the other hand, in theoretical terms, considerations must be extended to the views expressed by dissenting judges opposing the judicial interference with legislative functions. This division of opinions could well be explained as judicial activism against judicial conservatism, depending on each judge's personal or professional view as to the proper role of the judiciary. Yet it is also possible to understand this division in terms of 'democracy critique' against judicial review of legislation:[68] a small coterie of democratically unaccountable judges should not override the policy preferences of the people's representatives.

The majority judgment, as clarified by supplementary opinions, appears to have attended to such criticisms in two ways. First, it emphasized the absence of an express legislative intent that Article 3(1) would have no effect should the requirement of legitimation be removed. While most of the majority judges then turned to the constitutional principle (or presumption in the case of Judge Izumi),[69] it is noteworthy that Judge Fujita, although starting from a different premise, justified the conclusion that the majority reached as not being decisively in contravention of the overall legislative policy.[70]

Second, although as a supplementary reason, Judge Izumi and Judge Kondo made clear that this judgment would not prevent the legislature from exercising its discretionary power to enact new legislation prescribing a new condition for the children acknowl-

66 There are about 50 applications on hold according to the report made public by the Minister of Justice in an interview held after the Cabinet meeting on 26 August 2008, available at *http://www.moj.go.jp/kaiken/point/sp080826-01.html.*

67 This point was raised and used to justify the majority judgment by Judge Izumi, 2008 Nationality Case, *supra* note 3, 19-20.

68 See, *e.g.*, J. WALDRON, Law and Disagreement (Oxford 1999).

69 2008 Nationality Case, *supra* note 3, 15-16.

70 *Ibid,* 30.

edged by their father after birth to acquire nationality in compliance with the Constitution.[71] On this particular issue, it may not be seen as appropriate to impose any other conditions in place of the requirement of legitimation in light of the constitutional principle of non-discrimination. In fact, it was made clear that there should be no substitutive requirement under Article 3 of the Nationality Act, when the Japanese Government subsequently planned to introduce a bill to amend the legislation in compliance with the Supreme Court's judgment.[72] Yet the mere indication of such possibility in general terms may well be seen as evidence that the judges were conscious of the 'democracy critique' against this judgment.

In common law countries, the 'democracy critique' against judicial review has been responded to by a more organic understanding of its role as the beginning of a 'dialogue' about rights between courts and legislatures, not as a veto over politics. The relationship between the judiciary and the legislature can be regarded as a dialogue, Hogg and Bushell argue, 'where a judicial decision is open to legislative reversal, modification, or avoidance'.[73] They also argued that one of the features that have enabled inter-branch interactions to take place was the guarantee of equality rights under the Canadian Charter of Rights and Freedoms, which can be satisfied through a variety of remedial measures.[74] It is interesting to see whether the Japanese judiciary, even at the highest level,[75] has become more actively engaged in the 'democracy critique' debate, with an attempt to reconcile its authority to hand down the final decision on constitutionality with the imperative of democracy in a dialogic and organic manner.

It is a legitimate question to ask whether the dialogue theory has relevance beyond the particularities of the Canadian Charter's structure and text, and specific features of Canadian history, politics, and institutions.[76] The question will have to be considered in context by reference to the actual capacities and operations of courts and legislatures as well as to the surrounding legal, political, and social cultures. In fact, while the Canadian dialogue theory suggests an institutional account of dialogue that centres on inter-

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71 *Ibid,* 20-21 (Judge Izumi supplementary opinion); ibid, 25-26 (Judge Kondo supplementary opinion).

72 Govt to grant illegitimate kids citizenship, in: The Yomiuri Shimbun, 18 August 2008, available at *http://www.yomiuri.co.jp/dy/national/20080818TDY02301.htm.*

73 See, P.W. HOGG / A.A. BUSHELL, The Charter Dialogue between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All), in: Osgoode Hall Law Journal 35 (1997)75, 79.

74 The other three features mentioned include: (1) the power of legislative override of a judicial decision; (2) reasonable limits on guaranteed Charter rights; and (3) qualification of some rights by reference to fairness and reasonableness. See *ibid,* 82-91.

75 The attempt to democratize judicial decision-making at a lower level has already been on the track with the introduction of the 'lay-judge' system. See K. ANDERSON / L. AMBLER, The Slow Birth of Japan's Quasi-Jury System (*Saiban-in seido*): Interim Report on the Road to Commencement, in: ZJapanR / J.Japan.L. 21 (2006) 55.

76 See L. MCDONALD, Rights, 'Dialogue' and Democratic Objections to Judicial Review, in: Federal Law Review 32 (2004) 1.

branch interactions, the American approach focuses rather on broader society-wide interactions between the judiciary and the people, presumably reflecting on its culture of societal debate.[77] It remains to be seen whether, and in what form, a dialogue can take place in Japanese legal discourse. Yet it is encouraging to see that the Supreme Court took an active role in inter-branch or societal debates on who should be granted nationality, which will hopefully lead to a modest form of dialogue attuned to the Japanese legal, political, and societal cultures.

V. CONCLUSION

The Supreme Court's judgment on 4 June 2008 concerned a very technical question left out in the recent development of nationality law in Japan – whether the requirement of legitimation is discriminatory and unconstitutional against those children acknowledged by their father after birth in the absence of the parents' marriage. In reaching its conclusion, the majority took a bold approach to the application of the non-discrimination principle to nationality issues as well as to the role of judicial review in providing relief for those affected by an unconstitutional provision.

There are still some aspects of the judgment that remain unsatisfactory in its reasoning, as we discussed, especially with regard to the understanding of nationality law from international law and human rights perspectives, as well as the use and analysis of the practice in foreign countries. Nevertheless, the judgment should be commended for paving the way for developing a modest form of dialogue with the legislature on constitutional issues. It is hoped that this judgment becomes a model upon which constitutional issues are actively dealt with by the judiciary, giving impetus for wider debate by the legislature and the public at large.

77 See, C. BATEUP, Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective, in: Temple International and Comparative Law Journal 21 (2007) 1.

ZUSAMMENFASSUNG

Der Beitrag diskutiert das Urteil des Obersten Gerichtshofs vom 4. Juni 2008 über die Verfassungsmäßigkeit von Artikel 3 des Staatsangehörigkeitsgesetzes. Die Entscheidung betraf eine sehr technische Frage, die bei der jüngsten Reform des Staatsangehörigkeitsrechts in Japan ausgelassen wurde – ob nämlich das Erfordernis der Legitimation eine verfassungswidrige Diskriminierung gegenüber den Kindern darstellt, die mangels Ehe der Eltern von ihrem Vater nach der Geburt anerkannt wurden. Bei der Entscheidungsfindung wählte die Mehrheit der Richter einen eindeutigen Ansatz bezüglich der Anwendung des Nichtdiskriminierungsprinzips auf Fragen der Staatsangehörigkeit; gleiches gilt bezüglich der Rolle der Richter, Abhilfe für diejenigen zu schaffen, die von einer verfassungswidrigen Bestimmung betroffen sind.

Die Argumentation bei einigen Problemkreisen des Urteils bleibt jedoch unbefriedigend, vor allem hinsichtlich des Verständnisses des Staatsangehörigkeitsrechts aus der Sicht des internationalen Rechts und der Menschenrechte sowie hinsichtlich der Untersuchung und Anwendung der Rechtspraxis in anderen Ländern. Gleichwohl sollte das Urteil als wichtiger Schritt auf dem Weg zur Entwicklung einer moderaten Form des Dialogs über Verfassungsfragen zwischen Judikative und Legislative anerkannt werden. Es besteht die Hoffnung, dass dies eine Leitentscheidung für einen aktiven Umgang der Judikative mit Verfassungsfragen wird, von der ein Impuls für eine breitere Diskussion durch die Legislative und die gesamte Öffentlichkeit ausgeht.

(Zusammenfassung durch die Red.)