MARBURY V. MADISON AND THE JAPANESE JUDICIARY

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ABSTRACT

This manuscript examines how Marbury v. Madison influences the Japanese Constitution and the Administrative Case Litigation Act. The missing lesson of Marbury v. Madison in Japan is the fact that judicial review, which is not explicitly mentioned in the U.S. Constitution, is a creation of the judicial branch born out of Marbury v. Madison, and that the case was based on a dispute between the old and new Presidents. The 2004 amendments to the Administrative Case Law Act were expected by the Parliament to stop the executive branch. This makes it clear that the mandate of judicial review is not only to guarantee private rights, but also to realize the public interest. In response to the Parliament's expectation in the Administrative Case Litigation Act of 2004, the courts have shown that public law-related actions serve as a corrective function for the courts when the political process is dysfunctional. The Tokyo High Court, though not the Supreme Court, has condemned the Parliament for not amending the People's Examination of the Supreme Court Judge, which does not allow overseas Japanese to participate. Slowly, the Japanese courts are becoming more proactive in their judgments of the political departments.

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I. INTRODUCTION

The present Japanese Constitution was written post-World War II by the Japanese government and the United States ("U.S.") authorities under General MacArthur. It was drafted in line with the U.S. Constitution, and therefore includes many similar provisions, such as a concrete judicial review. Japan's Court Act also has similar provisions to the U.S. Constitution, such as the resemblance between Japan's judiciary and the Case and Controversy Clause of Article 3 of the U.S. Constitution.[1] Although judicial review is not provided for in the U.S. Constitution, *Marbury v. Madison* established judicial review.[2] Article 81 of the Japanese Constitution allows the judiciary to exercise judicial review.[3] *Marbury v. Madison* held that the Judiciary Act of 1789 gave the Supreme Court jurisdiction, which was unconstitutionally extended to the realm of the Executive. For this reason, Chief Justice Marshall suggested that the judiciary could not force the President to seat Marbury. Today, Japan's executive power is increasing, while parliamentary power to decide fundamental policies for the people is weakening. As a result, Japan is seeing an imbalance between the constitutional separation of powers.

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[1] U.S. CONST. art. III, § 2.
[2] Marbury v. Madison, 5 U.S. 137 (1803).
[3] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 81 (Japan).

The Japanese judiciary mainly exercises concrete judicial review to provide remedies for individual rights and interests in a legal dispute. Similar to the U.S., Japan does not have a constitutional court with exclusive jurisdiction to hear constitutional cases. Furthermore, except for the statutory special litigation termed "objective litigation," Japanese courts cannot review cases where damages are generally shared among the people. To curb the expansion of the administrative state, the Japanese Parliament can pass a statute to extend requirements for litigation, such as an expansion of standing. The Japanese Parliament can also pass laws allowing the judiciary to monitor the government's compliance with objective litigation under the Administrative Case Litigation Act ("ACLA").[4]

Although a key mission of the Japanese judiciary is judicial review in concrete cases, the judiciary can also obligate the government to take certain administrative actions or to declare the government's inactions as illegal after the 2004 ACLA revision. This paper reviews recent administrative cases to examine whether the 2004 ACLA revision works in the same way as *Marbury v. Madison*. Part II discusses why, after World War II ("WWII"), the Japanese courts, while adopting the American-style judicial system, emphasized the private rights model of judicial power in *Marbury v. Madison* and neglected the characteristics of the decision as a dispute between governmental organs. I will then illustrate how the 2004 amendment to the Administrative Case Litigation Act reminded the judicial branch of its mission to realize the public interest through litigation. Part II argues that the Japanese judicial branch is strongly influenced by European law, but was thereafter influenced by American-style jurisprudence post-WWII. This part also demonstrates, through the case of *Marbury v. Madison*, how public law related actions became a tool for courts to utilize when the parliamentary political process became dysfunctional after the 2004 ACLA amendments.

If the right to vote, which links voters to the Parliament, is not exercised, the judicial branch should blame the failure of the Parliament to enact laws regulating the right to vote. The judicial branch changed its attitude after the 1985 decision, which had mostly denied the responsibility of Congress under the State Redress Act, and began to aggressively exercise judicial review to ensure the right to vote.

II. THE JUDICIARY IN THE JAPANESE CONSTITUTION

This paper discusses the uniqueness of the Japanese judicial review system under the Japanese Constitution. After WWII, the Japanese government and the General Headquarters ("GHQ") worked together to draft the current Constitution and execute the amendments of the Constitution of

[4] Gyōsei jiken soshō hō [Administrative Case Litigation Act], Law No. 139 of 1962 (Japan).

the Empire of Japan ("the Meiji Constitution").[5] The Meiji Constitution followed the Prussian Constitution and had no provision for constitutional review where the judiciary reviewed governmental actions or statutes to assess if governmental activity or laws conformed to the Meiji Constitution. However, now, not only does Chapter 6 of the current Constitution provide for a judiciary, but, additionally, Article 76 stipulates that all of the judicial power belongs to the Supreme Court and its inferior courts.[6] Moreover, Article 81 vests the Supreme Court with the power of constitutional review.[7] A 1952 decision of the Japanese Supreme Court[8] explains that inferior courts also have the power of constitutional review. The question presented in this case was whether the Police Reserve Force, the predecessor of the Self Defense Force, was constitutional under Article 9 of the Constitution.[9] In constitutional law classes, students learn that the Japanese judiciary does not have a special tribunal with exclusive jurisdiction for constitutional reviews. Rather, the uniqueness of the judicial review system in the current constitution was born from this drafting history and some early cases after WWII.

A. Marbury v. Madison in Japan and the Type of Litigation under Japanese Law

Marbury v. Madison was one of the most influential cases in the U.S. and Japan. While teaching constitutional review in Japan, one problem for students is that they think that *Marbury v. Madison* is the exclusive leading private rights model (subjective litigation in the ACLA[10]) and was the basis for concrete judicial review. That is, the judiciary exercises constitutional review as per the Case and Controversy clause in Article 3 of the U.S. Constitution.[11]

One of the biggest differences between the Japanese and U.S. Constitutions is that the term "Case and Controversy" does not exist in the Japanese Constitution. Rather, in Japan, legal disputes are dealt with in Article 3 of the Saibansho hō (Court Act).[12] The lesson for Japanese students is that, in the case of *Marbury v. Madison*, the U.S. Supreme Court denied the Judiciary Act of 1789 under the Supremacy of the Law in Article 6, Clause 2 of the U.S. Constitution.[13] Immediately after John Adams lost the U.S.

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[5] DAI NIHON TEIKOKU KENPŌ [MEJI KENPŌ] [Constitution], art. 73 (Japan).
[6] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 76-82 (Japan).
[7] *Id.* art. 81.
[8] Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, Showa 27 (ma) no. 23, 6(9) Saikō SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 783 (Japan).
[9] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 9 (Japan).
[10] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 3-4.
[11] U.S. CONST. art. III, § 2.
[12] Saibansho hō [Court Act], Law No. 59 of 1947, art. 3 (Japan).
[13] U.S. CONST. art. VI, cl. 2.

presidential election to Thomas Jefferson, Chief Justice Marshall struggled to resolve the case and found that the Judiciary Act of 1789 could not force the President to seat Marbury as a judge. Japanese students miss the fact that the birth of constitutional review resulted in a kind of political compromise in *Marbury v. Madison*.

While it is correct that the case of *Marbury v. Madison* led to the origin of form of constitutional review in the U.S., Japanese students misunderstand this case as a symbol of "concrete" judicial review in Japan.[14] Justice Marshall denied the Judiciary Act of 1789, which obligated the President to send a letter to Marbury, appointing him as a judge. By having done so, Justice Marshall avoided a serious political conflict between the two branches under the Supremacy of the Law.[15] Most Japanese students miss the important lesson that the power of judicial review was not written in the U.S. Constitution, but rather, it was the case of *Marbury v. Madison* that led to the creation of both concrete and abstract judicial review. The Japanese Constitution, in Article 81, makes a provision for Supreme Court judicial review.[16] In administrative law studies in Japanese universities, Japanese judicial review is classified into two types of litigation in the ACLA: subjective litigation[17] and objective litigation.[18] Subjective litigation refers to when an individual can contest his or her interests or rights in the ACLA as an action for judicial review of administrative dispositions[19] and public law-related actions.[20] These two types of litigation are equivalent to disputes on the law in Article 3 of the Court Act.[21]

In cases of judicial review of administrative dispositions, that is, named actions for the judicial review of administrative dispositions in Article

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[14] MAKOTO ITO, SIKEN TAISAKU KOZA KENPŌ [EXAMINATION PREPARATION CONSTITUTION] 24 (Kobundo, 2013) (famous reference books used by students in law schools and law departments in Japan only explain that *Marbury v. Madison* established the power of constitutional review and do not explain the conflict between John Adams and Thomas Jefferson, which causes misunderstanding); KOJI SATO, NIHONKOKU KENPŌRON [THE JAPANESE CONSTITUTION TREATISE] 15 (Seibundo 2011). Sato accurately explained that *Marbury v. Madison*, and the example of the U.S., which was one of the first countries to establish judicial review based on the idea that the legislative power was omnipotent, was very unique compared to other countries. According to Sato, the Constitution is "the law" and the law is directly derived from the people. Since the Constitution is also a "law," the final authority to deal with this "law" lies with the courts, where judicial power is vested. The logic of *Marbury v. Madison*, which links the sovereignty of the people and the rule of law, overcame severe political conflicts soon after the founding of the country and became the foundation for the stable development of the United States.

[15] U.S. CONST. art. VI, cl. 2.

[16] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 81 (Japan).

[17] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 3-4.

[18] *Id.* art. 5-6.

[19] *Id.* art. 3.

[20] *Id.* art. 4.

[21] Saibansho hō [Court Act], *supra* note 12, art. 3.

3 in the ACLA, a citizen can allege that governmental action or inaction illegally infringes on their rights. There are six types of this litigation: (1) action for the revocation of the original administrative disposition,[22] (2) action for the revocation of an administrative disposition on appeal,[23] (3) action for the declaration of nullity,[24] (4) action for the declaration of illegality of inaction,[25] (5) mandamus action,[26] and (6) action for an injunctive order.[27] The scope of objective litigation is provided for in the ACLA[28]; it is to review whether the government observes the constitution and law under the rule of law.[29] It is debatable whether, under the current Constitution, the Parliament has limitless power to provide special litigation, such as objective litigation, in addition to concrete judicial review. Professor Koji Sato argues that objective litigation is permissible only if a serious legal conflict between parties is possibly recognized, even in abstract cases.[30] Professor Takehisa Nakagawa also argues that it is easier to understand the concept of jurisdiction if we view it in a concentric circle structure. The core of the judiciary is the "Case and Controversy" clause where the Parliament cannot intervene. Rather, the Parliament may only intervene in the periphery between the core and the outer extension.[31]

After WWII, as the distinction between concrete and abstract judicial review became blurred, Japanese judicial review had begun to hear cases in objective litigation. Part III focuses on whether, under the Japanese Constitution, one of the missions of the judiciary is to provide remedies and to ensure that the government complies with the statutes under the rule of law.

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[22] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 3, para. 2.
[23] *Id.* art. 3, para. 3.
[24] *Id.* art. 3, para. 4.
[25] *Id.* art. 3, para. 5.
[26] *Id.* art. 3, para. 6.
[27] *Id.* art. 3, para. 7.
[28] *Id.* art. 5-6.
[29] *Id.* art. 42; SATO, *supra* note 14, at 587-88. Sato explains that objective lawsuits aim to achieve the public interest. Sato agrees with Nakagawa's assertion that the judicial power is divided into the core, intermediate, and periphery. *Id.* Borrowing Nakagawa's classification, Sato believes that the judicial power in Article 76(1) of the Constitution falls under the core. *Id.* Then, he explains that what the judiciary considers to be its responsibility and what the Parliament delegates to the courts in terms of policy are the intermediate spheres around the core. *Id.* According to Sato, if the core and the intermediate sphere are equipped with the substance of Case and Controversy (conflict of the parties and justiciability), they can be regarded as the same as the dispute on law under Article 3 of the Court Act. *Id.*
[30] SATO, *supra* note 14, at 625.
[31] Takehisa Nakagawa, *Administrative Litigation Law and its Reform*, 63 KŌHŌ KENKYU 124, 127 (2001), http://www.lib.kobe-u.ac.jp/repository/90004166.pdf.

1. Expansion of the Remedy in Article 3 of the 2004 ACLA

The Parliament revised the ACLA in 2004 to expand the scope of the remedy. The recommendations came from the Justice System Reform Council, which had worked on the judicial reform recommendations from 1999 to 2001. 32 The Council proposed that the judiciary should strengthen its role to provide checks on the government, in addition to protecting human rights. The revised ACLA expanded the mission of the judiciary, including the definition of a remedy.33

a. Expansion of Standing

The first revision was regarding the expansion of standing in actions for the revocation of administrative dispositions. Prior to 2004, the judiciary had limited standing as to who could bring a suit to the court, and there was controversy over the definition of standing in Article 9 of the previous ACLA, as legally protected interests or legal interests deserving protection. The former allows for standing of a third-party only when the interests of the third party are provided in a statute for administrative disposition. The latter, on the other hand, permits third-party standing only when the judiciary thinks that the interests of the third party are important in court.

The Supreme Court relaxed the scope of standing in Article 9 of the ACLA from the date of the Thermal Power Plant case in Hokkaido in 1985,[34] the Niigata airport case,[35] and the Monju Nuclear Power Plant case in 1989.[36] On the other hand, the Supreme Court denied standing in the case of the

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[32] Koji Sato was president of Justice System Reform Council from 1999 to 2001.

[33] SATO, *supra* note 14, at 589. Japanese constitutional law has focused on the judicial power to determine the existence or non-existence of legal relations or rights and obligations, and the analysis of the judicial power in Japan has not sufficiently considered the proper resolution of disputes by providing appropriate remedies. In the U.S., there is a unique area of law called the law of remedies along with the substantive and procedural law. In this law of remedies, the court has the function of creating its own law.

[34] Saikō Saibansho [Sup. Ct.] Dec. 17, 1985, Showa 51 (gyo ko) no. 3, 146 Saikō SAIBANSHO SAIBANSHU MINJI [SHŪMIN] 323 (Japan) (a person who merely has the right to operate a fishery in the water surface around such public water surface does not have the standing to sue as a plaintiff. with respect to a lawsuit for the revocation of a land reclamation license under Article 2 of the Public Water Surface Reclamation Act and an approval for completion under Article 22 of the same Act).

[35] Saikō Saibansho [Sup. Ct.] Feb. 17, 1989, Showa 57 (gyo tsu) no. 46, 43(2) Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 56 (Japan). Regularly scheduled aircraft carriers are licensed by the government to operate the business of flying airplanes. *Id.* If the noise generated by the operation of these planes causes significant disturbance to the residents living around the airfield, the residents living around the airfield have the right to file a plaintiff's claim for revocation of the license. *Id.*

[36] Saikō Saibansho [Sup. Ct.] Sep. 22, 1992, Heisei 1 (gyo tsu) no. 131, 46(6) Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 571 (Japan); Tsuji Yuichiro, *Nuclear Power Plant Reactivation in Japan: An Analysis of Administrative Discretion*, 7 LSU J. ENERGY L. AND RES. 51 (2019).

removal of designation of historical sites under the ordinance of cultural protections in 1989,[37] and in the case where Kintetsu railroad users demanded the cancellation of fare increases for the special rapid train in 1989.[38] In the Kintetsu railroad case, in particular, railroad users sought revocation of a decision of fare increase by Ministry of Transport.

Currently, Article 9(2) requires the judiciary to review:[39]

> (W)hen judging whether or not any person, other than the person to whom an original administrative disposition or administrative disposition on appeal is addressed, has the legal interest prescribed in the preceding paragraph, the court shall not rely only on the language of the provisions of the laws and regulations which give a basis for the original administrative disposition or administrative disposition on appeal, but shall consider the purposes and objectives of the laws and regulations as well as the content and nature of the interest that should be taken into consideration in making the original administrative disposition. In this case, when considering the purposes and objectives of said laws and regulations, the court shall take into consideration the purposes and objectives of any related laws and regulations which share the objective in common with said document, said laws, and regulations, and when considering the content and nature of said interest, the court shall take into consideration the content and nature of the interest that would be harmed if the original administrative disposition or administrative disposition on appeal were made in violation of the laws and regulations which give a basis therefore, as well as in what manner and to what extent such interest would be harmed.

In 2005, just after the ACLA was revised, the Japanese Supreme Court expanded standing in the Odakyu railroad case.[40] In this case, Odakyu planned for the construction of an elevated railroad over the street to reduce traffic jams. The residents near the railroad argued that the noise and vibration

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[37] Saikō Saibansho [Sup. Ct.] June 20, 1989, Showa 57 (o) no. 164, 43(6) Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 385 (Japan) (academic researchers whose research focuses on Shizuoka Prefecture-designated historical sites do not have standing to sue for the revocation of the cancellation of the designation of such sites).

[38] Saikō Saibansho [Sup.Ct.] Apr. 13, 1989, Showa 60 (gyo tsu) no. 41, 156 Saikō SAIBANSHO SAIBANSHŪ MINJI [SHŪMIN] 499 (Japan) (a person who lives near the line and buys a commuter pass to use the express service does not have standing in a lawsuit to revoke the approval to raise the fare for the limited express service).

[39] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 9, para. 2.

[40] Saikō Saibansho [Sup. Ct.] Dec. 7, 2005, Heisei 16 (gyo hi) no.114-59 (10) Saikō SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2645 (Japan).

due to the construction caused damage.[41] The judiciary allowed standing of the inhabitants within a certain distance from the railroad.[42] This case illustrates how the Japanese judiciary responded to legislative action over the interpretation of the statute.

b. Mandamus Actions

In actions for the judicial review of administrative dispositions, mandamus actions were newly provided in Article 3 of the ACLA. A mandamus action is a judicial order to the government for a certain administrative disposition or adjudication in cases where the administrative disposition is revoked, or where the government has denied the application of the plaintiff. However, in some cases, the government receives an application but leaves it without any disposition. Since there is, therefore, no administrative disposition, the plaintiff cannot bring an action for judicial review of the administrative disposition.

In the first type of mandamus action, the judiciary does not give the plaintiff a right to file an application with the government. For example, inhabitants near a waste disposal site causing environmental pollution can bring a suit to cancel the permission for a waste disposal site. Article 37-2 of the ACLA allows standing only when serious damages are caused, and there is no alternative way to avoid damages.

The second mandamus action requires the plaintiff to have the right to file an application. The government may take no action to reject the application. This kind of situation occurs when, for example, parents' admission applications for their children to a public pre-school, such as kindergarten, are denied. Another situation is when the government rejects or leaves untouched an application, which has been filed by an applicant, for the post of a public assistant.

To allow this litigation in court, the government would either reject the application or take no action, and the plaintiff would argue that the action or inaction is illegal. If the government takes no action, the plaintiff is required to bring an action for the declaration of nullity. If the government rejects the application, the plaintiff is then required to bring an action for the revocation of administrative disposition or an action for the declaration of nullity. In this mandamus action, standing in Article 9 is required as well.

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[41] Yuichiro Tsuji, *The Legal Issues on Environmental Administrative Lawsuits Under the Amendment of ACLA in Japan*, 1 YONSEI L. J. 341 (2010).

[42] SATO, *supra* note 14, at 631. Sato explained that after the ACLA was amended, the court took a new stance on standing in the Odakyu railroad case. *Id.*

c. Injunctive Orders

The 2004 ACLA provides for an injunctive order where the administrative agency is about to make a certain an original administrative disposition or an administrative disposition on appeal. The plaintiff can seek a judicial order beforehand so that the administrative agency cannot make the disposition. The plaintiff is required to prove that serious damage has been caused and there is no alternative way, other than the judicial order, to remedy the situation.

d. Provisional Injunctive Order and Mandamus Action

Before 2004, there was no special article in the ACLA for either a provisional order of mandamus or a provisional injunctive order. The Parliament added Article 37-5 in the ACLA to create a new action for judicial review of administrative dispositions.[43] A provisional injunction requires the plaintiff to file an injunctive order when a certain decision is given, due to the existence of urgency, to provide a provisional injunctive order to avoid serious damage, as well as on the grounds of merit.[44] On the other hand, the judiciary may deny a provisional injunctive order when the judicial order infringes upon public welfare. The provisional mandamus action requires the urgent necessity to avoid any damage that cannot be compensated, as well as on the grounds of merit.[45] The judiciary may deny a provisional mandamus when it may infringe upon public welfare.[46]

Nobody would have expected that the judicial decision in *Marbury v. Madison* would be exported to a far east country and establish judicial review to observe if an administrative agency adheres to the law. Today, the mission of the current judiciary is to secure the legality of administrative agency actions under the rule of law. By implementing barriers such as standing, as well as requirements such as mandamus actions, the judiciary has protected its separation of powers. Provisions of the ACLA function to prevent the government from exercising an arbitrary and capricious use of power under the rule of law.[47]

III. HOW THE JUDICIARY INTERVENES IN THE POLITICAL PROCESS

The U.S. Supreme Court developed case law in the form of common law, following the footsteps of the United Kingdom. After WWII, the

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[43] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 37, para. 5.
[44] *Id.*
[45] *Id.*
[46] *Id.* art. 37-5, para. 3.
[47] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 3-4.

Japanese judiciary adopted the U.S. legal system; however, before WWII, administrative law and constitutional law studies were influenced primarily by European countries.[48] The current Japanese judiciary is based partly on civil law and partly on common law. Therefore, to define the judicial role clearly, it may be more important to pass or revise statutes rather than following judicial decisions. The ACLA continues to follow the old tradition of civil law countries in Europe.

A. The Origins of Public Law-Related Actions – Why it is Difficult

The ACLA has two kinds of litigation: judicial review for administrative dispositions[49] and public law-related actions.[50] A public law-related action is similar to civil litigation seeking a declaratory judgment; however, it is different in regard to the subject matter of the litigation, which is provided for in administrative or civil law.

A public law-related action is provided for in Article 4 of the ACLA,[51] which is different from the action for the judicial review of administrative dispositions.[52] In the action for judicial review of administrative dispositions, the government exercises its public power against citizens, and the relationship is not equal. Citizens can bring a suit to seek judicial review of administrative dispositions only when the government exercises its public power to change their rights and duties. In a public law-related action, on the other hand, the government and citizens are in equal positions. Citizens can bring a suit for public law-related actions when the government does not exercise its power.

European law has influenced the Japanese judiciary, and the ACLA was originally based on the distinction between public and private law. Administrative law studies have questioned the ACLA's definition of public law-related actions. Professor Tairyu Abe explains that originally, public law-related actions were expected in cases where the government and its citizens were in equal positions, and the relationship was not dominance-subordination.[53] It was based on the distinction between public and private law.[54] Administrative law studies have been based on the belief that the distinction had already disappeared, and found no special law in public law-related actions because public law-related actions are the same as civil litigation, and they are used in rare cases.[55] Before the 2004 revision of the

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[48] KEIKO SAKURAI & HIROYUKI HASHINOTO, GYOSEIHŌ [ADMINISTRATIVE LAW] 250 (2016).
[49] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 3 (Japan).
[50] *Id.* art. 4.
[51] *Id.*
[52] *Id.* art. 3.
[53] TAIRYU ABE, GYOSEIHŌ SAINYUMON [REINTRODUCTION OF ADMINISTRATIVE LAW II] 60 (Shinzansha 2015).
[54] *Id.*
[55] *Id.* at 62.

ACLA, the judiciary could interpret the provisions of the ACLA to allow an action for declaration in cases of public law-related actions between citizens and the government. The 2004 ACLA made provisions for public law-related actions and declaratory judgments.

Public-law related actions refer to the following two types of actions. First, an action for disposition or adjudication that confirms or creates a legal relationship between the parties and in which a specific law provides that one of the parties to the legal relationship shall be the defendant (this is called a formal public-law related action). Secondly, an action for confirmation of a legal relationship under public law and other actions concerning a legal relationship under public law (this is called a substantive public-law related action). Public-law related actions are subjective actions, but they are not actions for the judicial review of administrative dispositions.

Article 4 of the revised 2004 ACLA expects public law-related actions to be available in case there is a revocation of administrative dispositions in a judicial review, or in other words, if there are no administrative dispositions. While amending the ACLA, the Parliament originally tried to expand the scope of remedy to protect the rights of the citizens, taking into consideration the possibility of disputes between the citizens and the government in which judicial review of administrative dispositions is unavailable.[56] As the role of the government increases in the name of a welfare state, there have been such types of disputes. The Parliament had thought that public law-related actions should be used when the court can confirm its interest in a dispute caused by governmental activities. Actions for the judicial review of administrative dispositions in Article 3 of ALCA are lawsuits brought by citizens to contest the exercise of public power by administrative agencies. Therefore, it does not apply when there is no exercise of public power, when there is no disposition.

The public law-related action is expected to be an alternative remedy to a cover action when judicial review of administrative dispositions is not available. In other words, the judiciary reviews to see if a remedy is provided in public law-related actions when an administrative disposition does not exist.

B. Administrative Disposition and Public Law Related Action

Actions for the judicial review of administrative dispositions under Article 3 of the ACLA are actions by citizens against the government when they are dissatisfied with the government's exercise of public power. Unlike actions for the judicial review of administrative dispositions, in public law-related actions, the government and the citizen stand as equals during the litigation. Public law-related actions and actions for judicial review of

[56] SAKURAI & HASHINOTO, *supra* note 49, at 353.

administrative dispositions are both categorized as subjective lawsuits as they contest the activities of the government in relation to individual rights. Both public law-related actions and actions for the judicial review of administrative dispositions are subjective lawsuits that aim at protecting the specific rights and interests of the parties and fall under the scope of judicial power as "disputes on the law."[57]

An administrative disposition is one where the government can restrict or shape the scope of a right or duty directly under the statute.[58] This notion requires a change in the right or duty in a concrete case for the citizen to be able to bring a suit and allege that the administrative disposition is illegal.[59] Therefore, the court may not accept a case because the dispute may be unripe. If a business plans construction, for example, it has not changed the rights and duties of landowners. In this situation, the court will deny administrative disposition because the land has not been taken yet. The court hears a case only after construction starts and the government expropriates the land.

An administrative disposition is decided by the interpretation of a statute in issue by giving power to the government. One approach is to expand the notion of ripeness and administrative disposition. If a citizen uses a revocation of an administrative disposition, he or she can face several limitations, such as a statute of limitations, exclusive jurisdiction, and possible cut-offs from the subsequent litigations. A second approach is through a public law-related action. Unlike a revocation of an administrative disposition, the court reviews the interests for declarations of public law related-actions on a case-by-case basis. Therefore, a citizen can bring a suit even though an administrative disposition is hardly recognized.

The relationship between the government and its citizens is so diverse that in some cases, several types of litigation for administrative dispositions are not as helpful. The Parliament expanded the available litigation in public law-related actions to provide some remedies for the judiciary.

C. Cases on the Constitutional Rights of Voters Living Abroad under the POEA in 2005

Before the Public Offices Election Act ("POEA")[60] was revised in 1998, Japanese citizens who lived outside Japan were not listed in the elector register, and could not vote.[61] In 1998, the POEA was revised and voters who

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[57] Saibansho hō [Court Act], *supra* note 12, art. 3 (Japan).
[58] SAKURAI & HASHINOTO, *supra* note 49, at 74); Saikō Saibansho [Sup. Ct.] Oct. 29, 1964, Showa 37 (o) no. 296, 18(8) Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 1809 (Japan).
[59] *Id.*
[60] Kōshoku Senkyo Hō [Public Office Election Act], Law No. 100 of 1950 (Japan).
[61] *Id.* art. 8 (see supplementary provisions).

lived outside Japan were listed in the elector register. Nonetheless, they could vote in the elections of proportional representation in the House of Representatives, as well as in the elections of proportional representation in the House of the Councilors. However, they could not vote for the election of a single seat in the House of Representatives and the electoral district system (Senkyoku-Senkyo). Voters sought the declaration of nullity pre-1998 POEA, which did not allow voters living abroad, and the declaration of nullity post-1998 POEA, which did not allow for certain elections in both houses in the Parliament. Voters also brought public law-related actions and sought damages under the State Redress Act.[62]

In this case, the Japanese Supreme Court recognized a public law-related action.[63] The Court held that the use of litigation to seek the declaration of nullity pre- and post-1998 POEA was inappropriate. The Supreme Court explained that the right to vote is meaningless if it cannot be exercised, and that the right to vote cannot be restored by contesting to it *after* the right has been violated.[64] Considering the importance of the right to vote, when there is a dispute regarding whether or not there is a right to vote in a specific election, the exercise of voting may have the benefit of confirmation as long as it is recognized as a valid and appropriate means of action to confirm the legal relationship under public law-related actions. In this case, the lawsuit seeking to confirm that the applicant has the right to vote in the *next* election has the benefit of confirmation and is legal and a claim for compensation for legislative inaction is exceptionally allowed. The Court admitted that citizens were eligible to bring public law-related actions to confirm the position of voters in the next election.

The Supreme Court cited a precedent to explain that legislative inaction was under judicial review and that plaintiffs could seek damages under the State Redress Act only if the legislation clearly infringed upon human rights, or if it was a constitutional duty to pass a statute to protect human rights but the legislation failed to do so for a long time without justiciable reason.[65] In this case, because the Parliament did not amend the POEA for over ten years, it was liable under the State Redress Act.

The Parliament amended the POEA in 2006. This case illustrates that the political process should first cope with an amendment of the POEA. The judiciary should intervene only when the political process becomes dysfunctional.[66]

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[62] Kokka Baishō Hō [State Redress Act], Law No. 125 of 1947, art. 1 (Japan).

[63] Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Heisei 13 (gyo tsu) no. 82, 83, (gyo hi) no. 76, 77, 59(7) Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 2087 (Japan).

[64] NIHON KOKU KENPŌ [KENPŌ] [Constitution], art. 15 (Japan).

[65] Saikō Saibansho [Sup. Ct.] Nov. 21, 1985, Showa 53 (o) no. 1240, 39(7) Saikō SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1512 (Japan).

[66] SHIGENORI MATSUI, NIHON KOKU KENPŌ [Constitution of Japan], 56-57, 308, 311-13 (Yuhikaku 2007); *see also* SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN (2010). Matsui

In 1985, the Supreme Court denied governmental responsibility.[67] The 1985 decision explained that members of the Parliament are politically responsible to the people as a whole with respect to legislative action, and that they owe no legal obligation in relation to the rights of individual citizens. The Supreme Court also explained that the requirement for legislative actions of members of the Parliament to be legally liable under Article 1 of the State Redress Act is allowable in exceptional cases, such as when the Parliament enacts a statute even though its content violates the clear language of the Constitution. Therefore, the constitutional scholars thought that it did not allow for state redress action against legislative inaction.[68]

In this case, after a man was met with an accident in 1931, his situation worsened, and he could not walk to cast a vote in 1953.[69] In 1950, the POEA allowed disabled people to vote by mail.[70] In 1951, however, the Parliament abolished voting by mail because it thought that voting by mail was being abused. By 1955, the man who had met with the accident could not move at all. He sued the government for legislative inaction but lost in the Supreme Court. The 2005 decision indicates that the judiciary intervenes in the legislative process to correct political dysfunction by using public law-related actions.

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argues that the Japanese constitution is a document between the Japanese people and the government to embody the political process. *Id.*

[67] MATSUI, KENPŌ, *supra* note 67, at 96-97.

[68] SATO, *supra* note 14, at 639. Sato explains that "when the parliament dare to enact such a law even though the content of the legislation violates the clear language of the Constitution," it makes it virtually impossible to use the State Redress Action in constitutional cases. *Id.*

[69] Mutsuo Nakamura, Zaitaku tōhyō seido haisi iken soshō saikōsai hanketsu [Supreme Court decision on abolishment of home voting (vote by mail) system] 855 JURIST 84 (1986) (explaining that the Supreme Court requires special requirements for constitutional review of all legislative acts, not just legislative inaction, and accusing the Supreme Court of not sufficiently considering the connection between the right to vote and the home voting system); Tokuji Izumi, Zaitaku tōhyō seido haisi iken soshō saikōsai hanketsu [Supreme Court decision on the abolishment of the home voting system] 855 JURIST 90. Izumi was a Justice of the Supreme Court in 2002 and heard the 2005 case on voting rights for Japanese living overseas. In 1986, he was a Research Judge of the Supreme Court, and did not write much on the Supreme Court decision. Rather, he focused on the District and High Court decisions and indicated that voting at home (voting by mail) is a remedial measure by the Parliament to facilitate voting, and that the Parliament is given wide discretion to include its abolition. He lastly wrote that such a remedial measure exists in the U.S. In the 2005 decision, Izumi's dissenting opinion states that since the mental suffering of the petitioners are not suitable for monetary compensation under the State Redress Act, the petitioners' claim for state redress should be dismissed as without grounds, not to mention a judgment on the constitutionality or unconstitutionality of the Public Offices Election Act at the time of this election.

[70] Kōshoku Senkyo hō [Public Offices Election Act], Law No. 100 of 1950, art. 49-50 (Japan).

D. Cases on the Law of the People's Examination of the Supreme Court Judges

In 2019, the Tokyo District Court held [71] that the People's Examination of the Supreme Court Judge violated Articles 15[72] and 79(2)[73] of the Constitution. Article 79(2) provides that people should review the judges of the Supreme Court:[74]

> [a]t the first general election of the members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

This system is provided in Law of the People's Examination of the Supreme Court Judges[75] and is understood as the recall system.[76] People cast a vote and write "X" in the blank box against a name in a list of judges.[77] If an individual writes something else in the blank box, the vote would be void.[78] This review system did not allow people living abroad to cast a vote for review. In 2005, the Supreme Court declared that the POEA provisions violated the Constitution but left the Parliament to amend the POEA.[79] Article 41 of the Constitution gives legislative power to the parliament.[80] Citizens brought a case to argue that it was unconstitutional that the Parliament did not amend the Law of the People's Examination of the Supreme Court judges. The Tokyo District Court tackled this case twice. In 2011, the Tokyo District Court held that there was no governmental responsibility but noted that it might be unconstitutional if the Parliament did nothing.[81] Finally, in 2019, the Tokyo District Court declared it unconstitutional and held the Parliament

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[71] Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333; *see also* Yuichiro Tsuji, *National Referendum and Popular Sovereignty in Japan*, 50 CAL. W. INT'L L. J., 417-57 (2020).
[72] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 15 (Japan).
[73] *Id.* art. 79(2).
[74] *Id.*
[75] Saikō Saibansho Saibankan Kokkumin Shinsa hō [Law of the People's Examination of the Supreme Court Judges], Law No. 136 of 1947 (Japan).
[76] HIDEKI MOTO ET AL., KENPŌ KŌGI [LECTURE OF CONSTITUTION] 277 (Nihon Hyōronsha 2018); *see also* KOJI SATO, KENPŌ [Constitution] 400 (Japan).
[77] Saikō Saibansho Saibankan Kokkumin Shinsa hō [Law of the People's Examination of the Supreme Court Judges], *supra* note 76, art. 15.
[78] *Id.* art. 22.
[79] Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Heisei 13 (gyo tsu) no. 82, 83, (gyo hi) no. 76, 77, 59(7) Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 2087 (Japan).
[80] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 41 (Japan).
[81] Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] April 26, 2011, 2136 HANREI JIHŌ [HANJI] 13 (Japan).

responsible for legislative inaction under the State Redress Act.[82] The government appealed.[83]

In June 2020, the Tokyo High Court confirmed that the restriction of voting is unconstitutional and explained that it would be unconstitutional if voters cannot exercise their rights.[84] The Tokyo High Court also confirmed that the Parliament should have amended the Law of the People's Examination of the Supreme Court Judges.[85] The Tokyo High Court rejected the government's argument that it needed time to prepare and send ballot papers to voters living abroad.[86] Compared to the 2019 decision of the Tokyo District Court, the High Court denied governmental responsibility for legislative inaction and explained that unconstitutionality was not clear in 2017 when the Parliament did not allow voting abroad.[87] These cases indicate that the Japanese judiciary reviews legislative inaction and intervenes to correct dysfunctions in the political process. The judiciary then sends a signal to the Parliament to amend or abolish the statute.

IV. CONCLUSION

The *Marbury v. Madison* case has left a vast heritage. Judicial review was created by a case and the judiciary exercised its power under the name of Supremacy of the Law. As for the studies of the U.S. Constitution, a concrete and abstract review has not been drawn from *Marbury v. Madison*. The Japanese Constitution provides for judicial review in Article 81, and the terms of dispute on the law are provided in statutes rather than in the Constitution. After WWII, the constitutional revolution enabled the judiciary to expand its mission.[88]

The Parliament amended the ACLA in 2004 after it frustrated the judicial decision that interpreted it to limit standing. The Parliament expanded the availability of remedies provided by the judiciary. Specifically, standing was expanded, and actions for the declaration of nullity[89] and actions for the declaration of illegality for inaction[90] were provided. Moreover, subjective

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[82] Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, 2420 HANREI JIHŌ [HANJI] 35 (Japan).
[83] *Id.*
[84] Tōkyō Kōtō Saibansho [Tokyo High. Ct.] June 25, 2020, Reiwa 1 (gyo ko) no. 167, 2460 HANREI JIHŌ [HANJI] 37 (Japan).
[85] *Id.*; *see also* YUKIO OKITSU, RIPPŌ FUSAKUI TO IHŌ KAKUNIN SOSHŌ [LEGISLATIVE INACTION AND ACTION FOR THE DECLARATION OF ILLEGALITY OF INACTION] 4, (Hōritsu Jihō 2020).
[86] Tōkyō Kōtō Saibansho [Tokyo High Ct.] June 25, 2020. Reiwa 2 (gyo ko) no. 167, D1-Law 28282366 (Japan).
[87] *Id.*
[88] HIDEKI MOTO ET AL., KENPŌ KŌGI [LECTURE OF CONSTITUTION] 37 (Nihon Hyōronsha 2018) (judicial review becomes a core of the constitutionalism in the world).
[89] Gyōsei jiken soshō hō [Administrative Case Litigation Act], *supra* note 4, art. 3(4).
[90] *Id.* art. 3(5).

litigation such as mandamus actions and injunctions became available. Public law-related actions are still under research among Japanese scholars and have an advantage because they do not need an expansion of the notion of administrative disposition. Additionally, they do not have a statute of limitations nor do they have exclusive jurisdiction in the ACLA.[91] The Parliament implemented judicial reform in 2004.

On the other hand, the Parliament failed in its constitutional mission as the highest organ and neglected its constitutional duty of law-making.[92] In the 2005 decision where those who live abroad could not vote under provisions of the POEA, the judiciary provided remedies by using a public law-related action. The judiciary owes a constitutional duty to provide remedies to the cases before it and should use public law-related actions for the mission of the judiciary to protect human rights. If the judiciary does not allow relaxation of standing and injunctive orders, then mandamus actions and remedies are not available for citizens. The rule of law requires the judiciary to check political dysfunction. *Marbury v. Madison* has transformed this phase and has thrived in a far east country.

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[91] *Id.* art. 14.

[92] NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 41 (Japan).