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## [Research note]

# A Recent Case Concerning Article 9 of the Japanese Constitution, in which Plaintiffs' Allegations Were Denied on the Basis that Legally Protected Rights Were Not Violated

Thomas Makoto Naruse\*

### Abstract

This note introduces a case in Tokyo district court. In which case, plaintiffs alleged actions of cabinet and legislature were against Constitution, Plaintiffs claimed their rights (right to live in peace, *jinkakuken*, etc.). However, the court denied plaintiffs claim, because plaintiffs legally protected rights were not infringed. In the course of the judgment, the courts' view on judicial power is shown. This note introduce the case from the perspective of elements of judicial power, especially requirement of concreteness of rights.

*Key words: Judicial Power, Concrete Right, Requirement of Concreteness, Article 76, Article 9, Right to Live in Peace, Ripeness*

### 1. Introduction

This note introduces a case heard by the Tokyo District Court.<sup>1</sup> As we will see below, plaintiffs alleged that actions of the Cabinet and the legislature were against the Constitution. As infringement of legal rights is basically essential for bringing suit in Japan, plaintiffs claimed that their rights (the right to live in peace, *Jinkakuken*,<sup>2</sup> etc.) had been violated. However, the court denied plaintiffs' claim. The judgment denied on various grounds that plaintiffs' rights had been infringed, and we can see the court's view of judicial power within. There, the concept of "concreteness" played a significant role, and we can see aspects of "concreteness" in the judgment. This note introduces the case from the perspective of meaning of "concreteness." While several similar suits were filed all over Japan, this note focuses on the Tokyo District Court judgment and is not meant to be compared to those other cases.<sup>3</sup>

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<sup>1</sup> 2016 (wa) 13525, 1. In this note, cited from following website; Supreme Court of Japan <[https://www.courts.go.jp/app/files/hanrei\\_jp/070/089070\\_hanrei.pdf](https://www.courts.go.jp/app/files/hanrei_jp/070/089070_hanrei.pdf)> (visited Sept. 26, 2022).

<sup>2</sup> *Jinkakuken* is an all inclusive term of legally protected interests which relates personality, such as life, person (body), freedom, honor, trust, etc. Takahashi Kazuyuki and Ito Makoto et al. eds., Houritsugaku sho-jiten [The Dictionary of Law] 713 (Yuhikaku, 5th ed. 2016).

<sup>3</sup> As an article on this case, see Munosue Toshiyuki, *Anpo hosei iken kokubaisosho ni okeru chusho to gutai no kosaku*, in Mouri Toru et al., *Kenpo sosho no jissen to riron* (Hanrei Jiho-sha 2019). This article focuses on so-called *Sokankankeiron*, and shows deep insight on concreteness and present judicial review system, also criticizes this judgment.

## 2. Outline of the Case

On July 1, 2014, the Cabinet of Japan changed the interpretation of Japan's Constitution by means of a Cabinet decision titled "Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People." The right to collective self-defense, which had been prohibited as unconstitutional until then, was granted by that Cabinet decision.<sup>4</sup> Then, on September 19, 2015 and March 29, 2016, two laws which had been enacted based on that Cabinet decision were put in force. In addition, the Self-Defense Force units which had been given the duty of *kaketsuke keigo* ("coming to the aid of a geographically distant unit or personnel under attack"<sup>5</sup>) under the law, were dispatched to the Republic of South Sudan, and a Maritime Self-Defense Force vessel escorted a United States Navy ship to provide weapons protection also under the law. In response to these actions, the plaintiffs alleged that "the Cabinet decision on the bill, the submission of the bill to the Diet by the Cabinet, and the legislative action by the Diet violate the Preamble to the Constitution, Article 9, and Article 96, Paragraph 1 of the Constitution,"<sup>6</sup> and that dispatch of Self-Defense Force units to South Sudan and "the escort of a United States Navy ship by a Maritime Self-Defense Force vessel violates the Preamble to the Constitution, Article 9, and Article 96, Paragraph 1 of the Constitution."<sup>7</sup> They alleged that their rights (the right to live in peace, *jinkakuken*, the right to revise and decide on the Constitution) had been violated and there by suffered mental distress and demanded 100,000 yen for each plaintiff as compensation under Article 1 of the State Redress Act.<sup>8</sup>

The judgment denied all of the plaintiffs' allegations regarding violation of their rights and dismissed the claims.<sup>9</sup> In the following, this note will first discuss the view of judicial power in this judgment and then look at the decisions regarding the right to live in peace and *jinkakuken*.

## 3. This Judgment's View of Judicial Power<sup>10</sup>

Article 76, paragraph 1 of the Constitution of Japan articulates judicial power as "The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law."<sup>11</sup> The Constitution does not in itself define judicial power, which Professor Kiyomiya has defined as "the functions of the state that apply and declare the law to concrete disputes, and decide on such disputes."<sup>12</sup> Although there are differences of expression, this definition is widely shared between academics and in practice. As seen in the definition, the subject of judicial power is limited to "concrete disputes." Article 76 of the Constitution is embodied by Article 3, section 1 of the Courts Act, which defines the authority of the courts as "Courts shall, except as specifically provided for in the Constitution of Japan, decide all

<sup>4</sup> Ministry of Foreign Affairs, Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People <[https://www.mofa.go.jp/fp/nsp/page23e\\_000273.html?fbclid=IwAR2L9ecALHtJW9I0qX22VCTOTo7EUVsDf8zqJgtEgPUTbkdLS2RFxedEUdE](https://www.mofa.go.jp/fp/nsp/page23e_000273.html?fbclid=IwAR2L9ecALHtJW9I0qX22VCTOTo7EUVsDf8zqJgtEgPUTbkdLS2RFxedEUdE)> (Visited Sept. 26, 2022).

<sup>5</sup> *Id.*

<sup>6</sup> 2016 (wa) 13525, *supra* note 1, at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, at 1-2.

<sup>9</sup> *Id.*, at 43

<sup>10</sup> The description below in this section (especially next paragraph), is based on my previous work, so there is some overlap in the content and expression. See, Thomas Makoto Naruse, *Constitutionality of Non-Contentious Cases in Japan*, 1 Japanese Society and Culture 17, at 18-19 (2019).

<sup>11</sup> Nihonkoku Kenpo [Constitution][Kenpo] Art. 76 (Japan).

<sup>12</sup> Kiyomiya Shiro, Horitsugaku zenshu 3 Kenpo I Shinban [Constitutional Law Vol. 1, 2nd ed.] 330 (Yuhikaku 1971).

legal disputes, and have such other powers as are specifically provided for by law.”<sup>13</sup> The meaning of “legal dispute” is understood to be synonymous with “concrete dispute.” The meaning of “legal dispute” in Article 3 of the Courts Act is defined by the precedents of the Supreme Court (in the *Kyoiku chokugo* [Imperial Rescript on Education] case), which states that “a controversy concerning concrete rights or duties, or the existence of legal relations between parties”<sup>14</sup> “...shall be resolved with finality by the application of the law.”<sup>15</sup> These requirements are widely accepted in both academia and in practice as well. Professor Minamino conceptualizes the above views as “the judicial power in Article 76 of the Constitution = concrete disputes = legal disputes under Article 3 of the Courts Act = the requirement presented by the Supreme Court.”<sup>16</sup>

In addition, the case concerning the National Police Reserve, a landmark case regarding the nature and scope of the judicial review system, stated that “under our present system, the decision of a court may be sought only when there exists a concrete legal dispute between specific parties.”<sup>17</sup> Accordingly, Japanese judicial power and the judicial review system are seen as a “private rights model.”

The considerations in this judgment (the Tokyo District Court case) starts from the point that the subject of judicial power is a “legal dispute.” The judgment states that “The judicial power given to the courts by Article 76 of the Constitution refers to the function of adjudicating so-called “legal disputes” (Courts Act, Article 3, Paragraph 1), which can be invoked only when disputes on concrete rights or legal relationships exist.”<sup>18</sup> It also states that “the right to review the unconstitutionality of the law given to the court under Article 81 of the Constitution can be exercised when such judicial power can be exercised,”<sup>19</sup> and “the court does not have the authority to judge the unconstitutionality or illegality of actions taken by the government or the Diet abstractly apart from concrete cases.”<sup>20</sup> In deciding so, this judgment refers to two Supreme Court precedents (Supreme Court 1952 (ma) No. 23, October 8, Judgment of the Grand Bench, *Minshu* Vol. 6, No. 9, p. 783, Supreme Court 1952 (ma) No. 148 April 15, 2016, *Minshu* Vol.7, No. 4, p. 305).<sup>21</sup>

Here, the meaning of “concreteness” becomes the issue. As the meaning of the “legal disputes,” Professor Shibutani divides the first element of the requirement in the *Kyoiku chokugo* case mentioned above into “rights and duties” and “concreteness of interests,” and then states that “concreteness of interests” has two aspects: the maturity of the dispute and the number of people involved in the dispute (individuality).<sup>22</sup> In some cases, those two aspects of “concreteness of interest” co-exists. When requesting the revocation or nullification of laws and regulations, etc. by itself, it is assumed that infringement on the interests of the plaintiff has not materialized, and at the same time, that the impact is not specified and individualized because the impact is widely shared by the public, so that both of the

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<sup>13</sup> Saibanshoho [Courts Act] [Saibanshoho] Art. 3, section 1 (Japan).

<sup>14</sup> Vol.4 No.11, *Saiko Saibansho Gyosei Jiken Saiban Reishu*, 2761 (Sup. Ct., Nov. 17, 1953).

<sup>15</sup> *Id.*

<sup>16</sup> Minamino Shigeru, *Shihoken no gainen [The Concept of Judicial Power]*, in Yasunishi Fumio et al., *Kenpogaku no gendaiteki ronten*, 178 (Yuhikaku, 2nd ed. 2009).

<sup>17</sup> 6-9 *Minshu* 783 (Sup. Ct., Oct. 8, 1952). In this note, cited from the following website: Supreme Court of Japan <[https://www.courts.go.jp/app/files/hanrei\\_jp/366/057366\\_hanrei.pdf](https://www.courts.go.jp/app/files/hanrei_jp/366/057366_hanrei.pdf)> (Visited Sept. 26, 2022)

<sup>18</sup> 2016 (wa) 13525, *supra* note 1, at 33.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Shibutani Hideki, *Kenpo sosho yokenron* 180-83 (Shinzansha 1995).

above aspects (maturity and individuality) coexist.<sup>23</sup>

In order to bring a case to the court, the dispute have to be concerning the party's right or duty. On the requirement of "rights and duties," suits demanding interpretation of law itself or claims based on grievances are shown as examples which do not fulfill this requirement.<sup>24</sup> In addition, to be legally redressed, the claimed right or legal interest has to be concrete, not abstract.

Consideration of concreteness takes place in several stages of law suits. It often considered when assessing standing. However, mental damage claimed at the suits for compensation can be basis for the suit or not is considered by the interpretation of Civil Code or State Redress Act, thus distinguished from the stage of assessing standing.<sup>25</sup>

As seen above, "concreteness" has many aspects; concreteness of the nature and contents of the right or interest, individuality, and ripeness. In this case, all of these viewpoints are represented.

#### 4. Court's Judgment on Plaintiffs' Claims on Infringement of Rights

In a judicial review process, courts determine that 1) whether or not the alleged right or interest is a legally protected right (falls within zone of legal protection); 2) whether or not there is any infringement of the right or legal interest; and 3) whether or not it is permissible.<sup>26</sup> This judgment first states "The judicial power given to the courts by Article 76 of the Constitution refers to the function of adjudicating so-called "legal disputes" (Courts Act, Article 3, Paragraph 1), which can be invoked only when disputes on concrete rights or legal relationships exist."<sup>27</sup> Then states that plaintiffs are alleging infringement of the rights, then goes on to consideration of those claims.<sup>28</sup> Plaintiffs' allegations were dismissed prior to the examination of the "permissibility".

Of the plaintiffs' allegations of infringement of rights, the claims regarding the right to live in peace and the right to amend the Constitution were denied on the grounds that those are not concrete rights (not within the zone of protection). The claims regarding *jinkakuken* were found not within the zone of protection nor not to be infringed. Below, we will examine the judgments of the court. The point of contention regarding the right to amend the Constitution is omitted.<sup>29</sup>

##### a. On Right to Live in Peace

The right to live in peace is defined as "the right to enjoy peace."<sup>30</sup> This right has been asserted since the 1960s<sup>31</sup> and was first asserted in the Eniwa Base case, but the judgment in that case made no mention of constitutional issues including the right to live in peace.<sup>32</sup> After that, although the District Court judgment in the Naganuma case affirmed the right to live in peace, later precedents denied that right.<sup>33</sup> For example, in the judgment of the case concerning the Hyakuri Base, the Supreme Court

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<sup>23</sup> *Id.*, at 181-82.

<sup>24</sup> *Id.*, at 183.

<sup>25</sup> *Id.*

<sup>26</sup> Ichikawa Masato, *Shiho shinsa no riron to genjitsu* [Theories and Actualities of the Judicial Review System in Japan] 365, and 369 (Nippon Hyoronsha 2020).

<sup>27</sup> 2016 (wa) 13525, *supra* note 1, at 33.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 40-41.

<sup>30</sup> Ashibe Nobuyoshi, Kenpo 38 (Takahashi Kazuyuki ed., Iwanami Shoten, 6th ed. 2016).

<sup>31</sup> *Id.*

<sup>32</sup> Kobayashi Takeshi, *Heiwateki seizonken no tenkai* 5 (Nippon Hyoronsha 2021)

<sup>33</sup> *Id.*, at 5-6.

stated that “the peace to which the Jokoku Appellants assert their right in terms of pacifism and the right to live peacefully is an abstract concept that exists as an ideal or goal”<sup>34</sup> Regarding the right to live in peace, whether the preamble to the Constitution offers the norms applicable in court also becomes an issue, but academia generally denies this,<sup>35</sup> and it is also denied in judicial precedents. As seen below, the judgment in this case also and denies the concreteness of the right. The plaintiffs’ claims on the right to live in peace were denied for not being within the zone of protection, because the nature and contents of the right is abstract, not concrete.

This judgment states first that the preamble to the Constitution expresses the basic spirit and principles of the Constitution, and while it can serve as a guideline for interpreting each provision of the Constitution, it cannot be interpreted as investing or guaranteeing concrete rights.<sup>36</sup> Continuing on with the concept of “peace,” the judgment argues that this is an abstract concept that exists as an ideal or goal and is thus abstract, and that the means to realize it are so diverse that they cannot be identified specifically.<sup>37</sup> In this way, the wording of the preamble “does not immediately specify a certain meaning or the means or method to achieve it”<sup>38</sup> and stated that “it is impossible to determine the concrete meaning and contents of rights which serve as norms applicable at the court on the basis of the preamble to the Constitution,<sup>39</sup>” and thus denies it as a concrete right. In response to the plaintiffs’ claim for the right to live in peace based on Article 9 of the Constitution, this judgment states that Article 9 “defines the norms for the governing structure and activities of the state and does not directly guarantee the rights of the people under private law.”<sup>40</sup> In addition, in response to the claim of the right to live in peace based on Article 13 of the Constitution, the court states that Article 13 is “a general comprehensive provision that serves as the basis for guaranteeing interests not explicitly enumerated in the Constitution as new human rights.”<sup>41</sup> The court also states that, however, given the above-mentioned abstract nature of the concept of peace, the right to live in peace cannot be derived from Article 13.<sup>42</sup> As seen above, the claim of the right to live in peace is rejected on the grounds that this right is not a legally protected right because of its abstract nature.

However, there have been some developments regarding the right to live in peace. First, the 2007 Nagoya High Court judgment, which stated that the dispatch of the Air Self-Defense Forces to Iraq was unconstitutional, acknowledged the right to live in peace can be conceived as a concrete right.<sup>43</sup> In that judgment, the right to live in peace is defined as “a fundamental right that underlies all basic human rights and makes it possible to enjoy them.”<sup>44</sup> The court stated that the preamble to the Constitution, which is a legal norm, defines the right directly, and states that the right can be viewed as a multi-faceted right that appears in the form of rights of liberty (*jiyukun*), social rights (*shakaiken*), or political rights (*sanseiken*),

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<sup>34</sup> 43-6 Minshu 385 (Sup. Ct., July 20, 1989). In this note, cited from the following website: Supreme Court of Japan <[https://www.courts.go.jp/app/hanrei\\_en/detail?id=94](https://www.courts.go.jp/app/hanrei_en/detail?id=94)>. (Visited Dec. 17, 2022)

<sup>35</sup> Ashibe, *supra* note 30, at 37-38.

<sup>36</sup> 2016 (wa) 13525, *supra* note 1, at 34.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 34-35.

<sup>41</sup> *Id.*, at 35.

<sup>42</sup> *Id.*

<sup>43</sup> 2006 (ne) 499 (Nagoya Koto Saibansho April 17, 2008). In this note, cited from the following website: Supreme Court of Japan <[https://www.courts.go.jp/app/files/hanrei\\_jp/331/036331\\_hanrei.pdf](https://www.courts.go.jp/app/files/hanrei_jp/331/036331_hanrei.pdf)> (Visited Sept. 26, 2022)

<sup>44</sup> *Id.*, at 22.

depending on the situation.<sup>45</sup> Accordingly, that judgment confirmed that the right to live in peace can be recognized as a concrete right which can be protected through the judicial process.<sup>46</sup> Concerning the concept's abstract nature, the Nagoya High Court judgment pointed out that constitutional concepts are mostly abstract and supplemented by interpretation, as even the concepts of freedom and equality are also abstract.<sup>47</sup> However, the Nagoya High Court judgment stated that, with regard to situations in which the right to live in peace is recognized as a concrete right, "for example, an act of the state that violates Article 9 of the Constitution, namely, the prosecution of war, the use of force, or preparations for war, by which individuals' lives or freedom are infringed upon or under threat of infringement, individuals are exposed to damage or fear caused by actual war, etc., or are compelled to take part in or cooperate in the conduct of war, etc., violates Article 9 of the Constitution, it may be possible to seek remedies from the court."<sup>48</sup> Although the right to live in peace is recognized as a concrete right, conditions to claim this right at the courts are extremely strict, and there is a major hurdle for the recognition of the infringement of that right. Professor Okudaira also points out that such a situation is an extreme circumstance in which individuals are actually involved, and that it is difficult for people living ordinary daily life in Japan to assert that right.<sup>49</sup> In this light, it is virtually impossible for the plaintiffs' allegation in this case (the Tokyo District Court case) to meet the requirements of the aforementioned judgment. However, following the decision of the Nagoya High Court, the Okayama District Court also ruled that the right to live in peace can be recognized as a concrete right,<sup>50</sup> representing some movement in this area.

In addition, the theory has been refined through repeated "dialogue" with judicial precedents.<sup>51</sup> The abstract nature and ambiguity of the concept of peace has been a weak point in argumentation, such as seen in the aforementioned Hyakuri Base case. Professor Kobayashi attempts to substantiate the concept, arguing that the meaning of Article 9 of the Constitution becomes the meaning of the peace therein, and that when acts violate Article 9, that represents infringement of the right.<sup>52</sup> In this case, plaintiffs' claims on the right to live in peace were made based on recent academic theories. Although the judicial precedents denied these claims, the "dialogue" between judicial precedents and academia will continue in the future, and further refinements will be made.

#### b. On *Jinkakuken*

In the plaintiffs' allegations, the claim of *jinkakuken* had a large weight. Claims over *jinkakuken* have been dismissed from the standpoint of both the zone of protection and whether infringement occurred. Let us take a look at each of these below.

#### *Claims denied as not falling within the zone of legal protection*

First, regarding the allegation that "Because of each of the acts in this case, plaintiffs were struck by fear and anxiety of danger to themselves and their families being involved in a war or exposed to

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, at 23.

<sup>48</sup> *Id.*, at 22.

<sup>49</sup> Okudaira Yasuhiro, "Heiwateki seizonken" o megutte, 2008-8 Sekai 96, 105 (2008).

<sup>50</sup> Kobayashi, *supra* note 32, at 18-19.

<sup>51</sup> Professor Kobayashi has summarized recent theories. *Id.*, at 10-12 and works referenced in that article.

<sup>52</sup> *Id.*, at 128.

a terrorist attack, and thus felt mental distress.”<sup>53</sup> In a case where an individual’s inner feelings were harmed, the judgment said, “If the mental distress exceeds the limit that should reasonably be tolerated, there may be an occasion where it should be legally protected as a *jinkakuken*”<sup>54</sup> and “depending on the conditions and extent of the infringement, it can be viewed as a tort.”<sup>55</sup> In addition, in order for the infringement to be deemed to have exceeded the duty of toleration (*junin gimu*), “it is necessary for a person to be in a certain special position by which they suffer serious discomfort, frustration, etc. that cannot occur in normal social life.”<sup>56</sup> However, “The acts in question are policy decisions or legislative acts themselves and affect the people of Japan in general, and the feelings of fear and anxiety about war and terrorist attacks are not caused by plaintiffs specifically or concretely having a special relationship with the acts in question,”<sup>57</sup> and the judgment states that “those fears and anxieties are common to those who share the same view that the acts in question will lead to participation in wars or terrorist attacks.”<sup>58</sup> As above, lack of individuality lead to the conclusion that plaintiffs’ allegations on infringement of *jinkakuken* (mental interest) are not falling within the zone of legal protection because those are within the tolerable limit.

Similarly, regarding the allegation that “because of the acts in question, [the plaintiffs] suffered mental distress due to a crisis of conscience caused by the possibility of becoming involved in the war and becoming a perpetrator who would attack, kill, and injure citizens of other countries,”<sup>59</sup> the judgment states that the actions in question are legislative policies or legislative acts, and it is a matter of course that in an indirect democracy based on majority rule, they do not align with the individual views and beliefs of all citizens.<sup>60</sup> Moreover, the judgment states that plaintiffs’ mental distress is a “righteous indignation that can arise widely among the general public who share the same constitutional interpretation, etc. as the plaintiffs”<sup>61</sup> and states that the mental distress they claim cannot be said to have come about as a result of specifically and concretely having a special relationship<sup>62</sup> with plaintiffs. In addition, the court stated that such mental distress should be recovered through social life such as political activities,<sup>63</sup> and also stated that it “has not exceeded tolerable limits (*junin gendo*) in social life and thus is not recognized as an interest worthy of legal protection.”<sup>64</sup> As such, plaintiffs’ allegations were considered not worthy of legal protection because of lack of individuality and not exceeding tolerable limits. In addition, the assertion that “the trust in Japan of other countries and the people of other countries as a nation of peaceful diplomacy has been damaged”<sup>65</sup> was also determined to be an interest not protected by the State Redress Act, from the perspective of lack of individuality.<sup>66</sup>

As seen above, plaintiffs’ allegation is deemed not to fall within legally protected interests from the viewpoint of individuality and tolerable limit. In certain cases, emotions can also be protected as legal

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<sup>53</sup> 2016 (wa) 13525, *supra* note 1, at 37.

<sup>54</sup> *Id.*, at 38.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, at 38-39.

<sup>59</sup> *Id.*, at 39.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, at 40.

<sup>66</sup> *Id.*



interests. However, in this case, since a Cabinet decision or a legislative act is involved, the range of influence extends to the general public, and a special connection with individual plaintiffs was denied. In addition, the judgment conceives that such feelings are common to people who have the same interpretations, and thus the interests are evaluated as “general” and not “individual.” The point that the act in question was a Cabinet decision or a legislative act is also related to the other factor concerning concreteness, which will be discussed later in this article.

#### *Claims denied as lack of infringement*

Plaintiffs claimed that permitting the exercise of the right to collective self-defense would increase the risk of Japan becoming a party to a war or becoming involved in a war, bringing with it the risk of hostile nations attacking Japan’s homeland or exposure to terrorism by armed groups, thus threatening plaintiffs’ lives and persons (*shintai*).<sup>67</sup> The judgment stated that each of the acts in this case was a legislative act and a Cabinet decision, and that they themselves were not acts that endangered the safety of lives and persons of plaintiffs,<sup>68</sup> and that at the time of the close of the oral argument, “it is not recognized that Japan has become a target of use of force by foreign countries, and in an objective sense, the threat of war or terrorist attacks claimed by the plaintiffs are not imminent, and no concrete danger to the safety of lives and persons has occurred”,<sup>69</sup> thus denying the occurrence of danger. Here, the statement that “at the stage when a specific event that should be subject to the exercise of the right of collective self-defense, etc. (such as a war by the United States) actually occurred, it would for the first time become possible to evaluate whether or not there was an imminent threat of a war or a terrorist attack targeting Japan, but at the present stage, when such an event has not yet occurred, there is not enough to go on to evaluate whether specific danger of infringement of plaintiffs’ life and safety of the person occurred”<sup>70</sup> is noteworthy. From the above statement, we can see the viewpoint of ripeness.

Similarly, plaintiffs also contended that “the right to live in calm and safety without being exposed to health risks, the right to spend a peaceful life while maintaining human dignity, the right to spend an ordinary life without daily life being destroyed”<sup>71</sup> are part of *jinkakukun*, and argued that those rights were infringed by each of the acts in this case. The judgment likewise rejected this claim due to the absence of occurrence of danger.<sup>72</sup>

The above allegations were denied because there was no infringement or threat of infringement of those rights. At the same time, it is noteworthy that the concept of ripeness was presented there. As mentioned earlier, Professor Shibutani grasps maturity (or ripeness) as part of the requirement for concreteness,<sup>73</sup> and it is noteworthy that this judgment denied the danger because the event had not yet occurred. Although there is some debate over ripeness,<sup>74</sup> at the very least, that aspect was strongly evident in the judgment of this case.

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<sup>67</sup> *Id.*, at 35.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, at 36.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, at 37.

<sup>72</sup> *Id.*

<sup>73</sup> Shibutani, *supra* note 22, at 180.

<sup>74</sup> As a view questioning the validity of the concept of ripeness, Tomatsu Hidenori, *Kenpo sosho* 104-06 (Yuhikaku 2nd ed. 2008).

## 5. Conclusion

From what we have seen so far, we can see part of the court's view on judicial power and aspects of concreteness. The dominant view of academics is that government's change of interpretation of the Constitution to allow for the right of collective self-defense is unconstitutional. Accordingly, in this case it was argued that enacting unconstitutional legislation without going through a constitutional amendment infringed the people's "right to amend the constitution."<sup>75</sup> However, the judgment denied the right to amend the constitution per se, and it was not possible to challenge this change of interpretation in the judicial process.

The concept of judicial power that forms the basis of this judgment is rooted in precedent. This judgment was faithful to the self-understanding of the Supreme Court and other judicial bodies. While it was criticized that it would be too late if people cannot seek relief until after a situation has occurred, this judgment illustrates the limit of the private rights model of judicial power, which focuses on post facto relief through dispute resolution. Certainly, such a view of judicial power has limitations in that problems that do not involve rights infringement cannot readily be examined. However, this is a common issue in various countries where the judicial review system is seen as private rights model. The issue of the separation of powers is also involved, and we must consider various ways and factors of adjusting such a deficit. This will be an issue for future study.

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<sup>75</sup> 2016 (wa) 13525, *supra* note 1, at, 40-41.