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Construction of Korean Constitutional Law Article 103's "Conscience of Judge": Comparison with Construction of Japanese Constitutional Law Article 76 Paragraph 3*

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I. Introduction

There are many controversies over the level of discretion a judge may have in trial. According to the *standard Korean language dictionary*, compiled by the National Institute of Korean Language (Republic of Korea), "trial (*jaepan*[재판])" refers to a matter of adjudication of specific litigation cases, carried out officially by a court or a judge.[1] The term "making a judgment" already connotes that it logically requires a judge, whose role is vital in a series of trials. Notably, the Constitution of Korea's Article 103 has substantive legislation which is sourced from the Japanese legislative precedent. Korean Constitution Article 103 and Constitution of Japan

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1) National Institute of Korean Language, Pyojungugeodaesajeon [Standard Korean Language dictionary], https://stdict.korean.go.kr/search/searchView.do (Jan. 17, 2021, 1:00) (In Korean).

Article 76 Paragraph 3 are the only clauses that mention judges' conscience.[2] The Korean Constitution instituted the concept of judges' conscience in the 1962 amendment. Especially, in that Korean Constitution instituted the concept of judges' conscience in the 1962 amendment, it could not be merely comprehended as political or declarative provision.[3]

Naturally, though it might not be considered a substantive matter, most countries admit the possibility that judges' consciences might influence the decision-making process during a trial. For example, in the Anglo-American law (common law) system, federal courts' lawmaking powers have been recognized in many ways.[4] Furthermore, many countries operate a constitutional adjudication system; such systems often leave considerable room for personal interpretation, due to a constitution's abstractness. However, Korea and Japan's cases are distinguishable as the concept of judges' conscience is specifically embodied in the constitutional provision.

There exists, however, the criticism that most Korean academic circles or practitioners overlook the importance of judges' consciences, as judges are interpreted as having merely an "objective and logical conscience requested for [by] legal profession".[5] This is described as the "objective conscience theory," and leads to deficiency in handling problematic situations related to conscience.[6] Judges' consciences are often not being recognized as individual; this belief is used as a thesis arguing for "judicial

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2) Nihonnkoku Kenpo [Constitution of Japan], Art. 76, Para. 3 (Japan). According to the Constitution of Japan Article 76 Paragraph 3, it stipulates that all judges shall be independent in the exercise of their "conscience", which allows the penetration of a judge's conscience into a trial.

3) According to the first Constitution of Korea Article 77, a judge should be independent under the rule of constitution and law. However, in the 1962 amendment, Article 98 stipulated that a judge is independent under constitution, law, and conscience.

4) Amy Coney Barrett, *Procedural Common Law*, 94 Virginia Law Review 813, 814(2008).

5) Nak-in Seong, Heonbeopak [Constitutional Law] 729 (16th ed., 2016) (In Korean); Chul-soo Kim, Heonbeophaksillon [New theory of Constitutional Law] 1654 (21st ed., 2013) (In Korean); Yeong Heo, Hangukheonbeomnon [Theory of Korean Constitutional Law] 1062 (11th ed., 2015) (In Korean) etc.

6) Un-jong Park, *Beopaeseokbangbeobeseo Bon Heonbeop Je103jo Beopgwanui Dongnipgwa Yangsim [Independence and Conscience of the Judges Based on Interpretive Method for Article 103 of the Korean Constitution]*, 57(2) Seoul L. J. 63, 64 (2016) (In Korean).

independence" from authority.[7] This may well come from the authoritarian past of Korea, as within such a regime it would be hard to guarantee the full independence of the judicial branch. Despite this, the importance of this provision has certainly been neglected their intrinsic status from the point of comparative legislative precedent or Korean Constitutional history.

However, this negligence has been changing recently. After the nation's democratization, the judicial branch achieved a certain level of independence from external institutions, and a movement grew to interpret judges' conscience from a new perspective. First of all, surrounding the interpretation that a judge's conscience as a mechanism for the "independence of judges," numerous discussions have developed relating the independence topic to judges' freedom from judiciary organizations. With that said, a judge, on top of having rights to independently deal with their cases, must also be recognized as a member of judiciary powers - the summit of which is the Supreme Court. This means judges have no choice but to obey uniform and objective laws confirmed by the Supreme Court while having some discretion in each case. Currently, there is an ongoing heated discussion regarding how far the limits of judge discretion in individual cases can go.[8] More recently, discussions relating to this topic have grown more aggravated, due to increasingly intense disputes related to, for instance, Supreme Court justices' intervening in lower courts' trials; comments that the system of evaluating judges restricts judges' independence; controversy over the intervention of the national court administration and the Supreme Court in lower courts.[9]

Another pillar of the discussion is over the approach to how judges' consciences can work in more complex or difficult cases ("hard cases"). This discussion is relatively recent, and takes quite a different approach from conventional discussions. While earlier discussions regarded external

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7) Jae-ock Byun, *Sabeopbuui Gwonwi, Geurigo Beopgwanui Yangsim [Authority of Judicial Branch and Conscience of Judge]*, 169 Forum 237, 237 (1987) (In Korean).

8) Duk-yeon Lee, *Heonbeop Je103joeseo Beopgwanui Dongnipgwa Yangsim [Independence and Conscience of Judge—A Comment on the Art. 103 of the Constitution of Korea]*, 38(2) Public Law 349, 358 (2009) (In Korean).

9) Cases which had been controversial were former Supreme Court Justices' intervention toward specific cases, and Supreme Courts' omnidirectional intervention against lower courts' trials.

forces surrounding judges, discussions on hard cases have the key characteristic of paying more attention to the judge's inner processing and their path to reaching a verdict. This discussion aims to reveal how judges' consciences function through the tensions between individual subjectivity and the objectivity of the law.[10)]

Meanwhile, it is very useful to examine Japanese discussions over the interpretation of judges' consciences. The most significant factor is that, as mentioned above, the Japanese constitution is virtually the only legislative case outside of Korea. For instance, in the case of Germany, Article 97 of the Basic Law for the Federal Republic of Germany only stipulates that "[a] judge is independent and bound only by law"—there is no mention of judges' consciences.[11)] In fact, one provision mentioning judges' consciences was made in the German constitution's first draft; however, it was ultimately excluded due to a concern that conscience might be mistakenly reckoned as a separate source of law.[12)] Thus, South Korea and Japan are the only two countries to have provisions regarding judges' consciences, despite the common concerns.

In addition, the usefulness of reviewing cases of Japan stands out far more, even when contemplating how the judges' conscience clauses are included in constitutional amendments. Korea's fifth constitutional amendment in 1962 transferred rights to manage constitutional trials from the Constitutional Court to the Supreme Court. According to Young-seop Lee and Jik-soo Shin, who participated in the amendment process of the fifth constitution, the relocation of constitutional jurisdiction was made because of the importance of judges' character and conscience in the constitutional trial process.[13)] The fact that a clause about conscience was

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10) Min-kyung Song, *Beopgwanui Yangsime Gwanhan Yeongu [A study about Judge's Conscience]*, 58 Supreme Court L. R. 565, 569-570 (2014) (In Korean).

11) Chul-soo Kim et al., Segyebigyoheonbeop [Global Comparative Law] 329 (2014) (In Korean).

12) Duk-yeon Lee, *supra* note 8, at 365. This is also an issue of controversy in Korea and Japan and this essay would suggest those details later. In Korea, this issue is mainly organized in Jong-sup Chong, Heonbeopgwa Jeongchijedo [Constitutional law and political system] 796 (2010) (In Korean); In Japan, this issue is mainly organized in Yukitoki Takikawa, *Nipponnominnsyusyuginotameni [For the democracy of Japan]*, 97 Sekai 132, 134 (1953) (In Japanese).

13) The National Assembly of the Republic of Korea, Heonbeopgaejeongsimuirok [Minutes

included alongside the transition from the German-style "separate constitutional adjudication" to the Japanese-style "subsidiary constitutional adjudication"[14] strongly suggests there is a great likelihood that during the legislation process of the fifth constitutional amendment, Japanese legislative precedent was referred to in drafting the current Korean Constitution's clause of judges' conscience.

In this regard, it is very significant to analyze the Japanese discussion of judges' conscience, and refer this back to Korea's interpretation of the law. Nevertheless, there is a lack of preceding research in Korea which reviews the judgments and theories discussed in Japan. Therefore, this paper will analyze the current interpretation of judges' conscience in Korean law enforcement agencies, and the discussion in academic circles of Korea and how Japan's use and interpretation of the term. Based on this, this essay would like to conclude by introducing some relevant concrete cases in terms of comparative law, and to put forward a proposal regarding the interpretation of judges' conscience, which is mentioned in Article 103 of the Korean Constitution.

II. Context of Korea's Discussion of Judges' Conscience

1. Main Cases Related to "Conscience of Judges" in Korea

It is difficult to find precedents that directly include the definition of judges' conscience itself. However, the Constitutional Court and the Supreme Court of Korea, respectively, have made judgments as to what extent judges can be recognized for their authority to make trials based on their consciences. The Constitutional Court of Korea (hereinafter referred to as the Constitutional Court if there is no other mention) made a decision that:

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of Constitutional Amendment] 381-382, 400-401 (1967) (In Korean).

14) Terms of the Japanese and German constitutional court system are derived from Wen-jiang Guang, Ilbon Heonbeopgwa Heonbeopsoson [Japanese Constitution and Constitutional Adjudication] 49-51 (2020) (In Korean).

> […] the proviso of Article 62 (1) of the Criminal Act provides that a person who was sentenced to imprisonment without prison labor or a heavier punishment and for whom five years have not passed since the completion or exemption of the execution shall not be granted the suspension of the sentence's execution. […] It cannot be said that the right to a legitimate trial is infringed, or that the jurisdiction according to the judge's conscience is infringed.[15)]

This revealed that the law's direct restrictions on the scope of judges' rulings do not violate judges' conscience guaranteed by the Constitution of Korea Article 103.

Furthermore, in a case in which the question is raised of whether the Court Organization Act's provision of disqualification for reappointment based on a judge's rating of service records would violate the constitution, the Constitutional Court made a ruling that:

> If the judge's performance is estimated by the impartial standard, it can serve as a more objective standard than other factors in reasoning the judge's ability to operate the court. Through this, citizens' right to access to courts could be ensured in quality. […] The provision of disqualification for a consecutive term, in this case, cannot be seen as a violation of judicial independence, as the predictability or procedural guarantees related to the judge's identification are not significantly insufficient.[16)]

These precedents can be interpreted in the sense that even if a judges' consecutive term is not achieved by the Supreme Court's rating, that alone does not violate judicial independence. That is, the Constitutional Court indirectly stated that excessively arbitrary judgments by individual judges could be limited by judicial responsibility.[17)]

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15) Constitutional Court [Const. Ct.], 2003Hun-Ba49 & 2005Hun-Ma287 (consol.), June 30, 2005 (KCCR 17-1 876-877) (S. Kor.).

16) Constitutional Court [Const. Ct.], 2015Hun-Ba331, September 29, 2016 (KCCR 28-2 465) (S. Kor.).

17) Jae-hyun Chun, *Gu beobwonjojikbeop je45joui2 je2hang je2ho deung wiheonsowon*

In the case of the Supreme Court of Korea (hereinafter referred to as the Supreme Court), there exists an issue about the system of sentence commissioning. Although the sentencing standards of the Sentencing Commission are not legally binding, as any court's decision which deviates from the standards shall adduce the grounds of its judgement, there exists an argument over whether these standards would encroach upon individual judges' authority to trial by discretion. However, the Supreme Court decided that:

> […] as the sentencing guidelines established by the Sentencing Commission do not have the legal binding power but is expected to have general persuasive power by their propriety in its contents, the mere respect of judges is required when they choose the kinds of punishment and determine the periods of punishment.[18)]

This ruling means that a sentencing commission system without enforcement rights would not undermine "judges' authority to judge according to their conscience".

As such, Constitutional Court and the Supreme Court deny the authority of individual judges to judge based on their conscience, even despite explicit laws. Still, it seems as if those two organizations have indirectly admitted that mandating judges would violate the judge's authority to judge based on their conscience. It also reveals that even if judges are guaranteed the right to judge based on their consciences, this right should be operated only to maintain a judge's proper attitude suitable for the essence and role of a trial, and to reach a conclusion through a fair and reasonable argumentation throughout a whole decision-making process.[19)] It clarified that if a judge intervenes with their personal values or prejudice in a trial under the guise of judges' conscience, in violation of

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[Constitutional Complaint against former Court Organization Act article 45 paragraph 2(2) and etc.], 15 Gyeoljeonghaeseoljip [Commentary of the Constitutional Court of Korea] 599, 625 (2017) (In Korean).

18) Supreme Court [S. Ct.], 2009Do11448, December 10, 2009 (S. Kor.).

19) Jong-sup Chong, Heonbeophakwollon [Principles of Constitutional Law] 1412 (16th ed., 2016) (In Korean).

these principles, then the judgments should be checked sufficiently through an appeal system or a work rating system for judges.

2. Main Theoretical Trends about "Conscience of Judge" in Korea

1) "Objective Conscience Theory" as Majority Opinion

Various theories about this position of precedents have been raised by the academic community. The current main theoretical trend regarding judges' conscience is that of a position generally close to the objective conscience theory.[20] According to this theory, the term "conscience of a judge" is interpreted as a synonym for "by constitution and law", or as an element of "independence". The latter position interprets Article 103 of the Korean constitution as "judges shall follow constitution and law, with independence under their conscience" which comprehends "conscience" as mere emphasis on or modification of independence.[21] In practice, judges' conscience is even taken as meaning that the conclusion of each case subject should be the same no matter which judge it meets. This view leads to the argument that "as each judge makes a judgment solely based on objective conscience, cases subject to trial should come to the same conclusion no matter whom they meet".[22]

These arguments also lead to the assertion that judges should have a dual conscience or dual personalities. One illustrative discussion in this regard was that of the claim raised in the 1970s by An-hee Kang, who served as the chief justice of the Seoul Family Court. He describes a judge as a person who has no choice but to have both a subjective conscience as a human being and an objective conscience as a professional. However, it was further said that, during independent trials, judges should, as a

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20) Un-jong Park, *supra* note 6, at 70.

21) Seok-jeong Kang, *Beopgwaneun du gaeui yangsimeul gajyeoya haneunga?—Heonbeop je103jo beopgwanui tyangsimte gwanhayeo [Should a Judge Have Two Consciences?—A study on the Conscience of the Judge under Article 103 of the Korean Constitution]*, 41 Juris 153, 163-164 (2017) (In Korean).

22) The Chief Justice of the Supreme Court Seung-tae Yang's address at ceremony of newly appointed judges. http://www.scourt.go.kr/supreme/news/NewsViewAction2.work?gcurrentPage=2&searchWord=&searchOption=&seqnum=87&gubun=38). (Jan. 27, 2021, 01:00) (In Korean).

standard, only use the more professional form of conscience. Therefore, according to this position, judges' conscience under Article 103 of the Constitution in fact states that a judge who has various positions and roles as a human being should only use his (her) own conscience as a professional.[23)]

This argument finally leads to an explanation that the mention of "conscience" of Article 103 is virtually meaningless or unnecessary, and is distinct from the "conscience" of Article 19 of the Korean Constitution. Thus, the majority opinion interprets the "conscience" of Article 103 as meaningless in terms of interpretation, and unnecessary in terms of constitutional policy. Proponents of the position also argue that "conscience" of Article 103 should be removed in order to avoid confusion in interpretation, due to the identical use of the word 'conscience' in Article 19.[24)]

Furthermore, this argument holds concern over the notion that Article 103 may be misused, in the form, for instance, of subjective conscience being operated during the trial process. According to this, if the principle of the rule of law is distorted by the adulteration of subjective conscience, then conscience will inevitably move toward harming fair trial and the guarantee of human rights, which is a result against the purposes of the Constitution's original assurance of judges' conscience.[25)]

2) Criticism against Majority Opinion

(1) Subjective Conscience Theory

The oldest theory made against this majority opinion is that of the "subjective conscience theory". It is the longest-running interpretation against objective conscience theory in Japan. This line of argumentation has also appeared in Korea. Tae-yeon Han, one of the scholars with this

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23) Ahn-hee Kang, *Beopgwanui yangsim-beopgwan gaeinui insaenggwantpsegyegwangwa gwallyeonhaeseo [Judge's conscience–relationship with the judge's personal view of life and the world.]*, 4 Pallyewolbo [Monthly Report on a Case] 5, 5-6 (1971) (In Korean).

24) Kwang-seok Cheon, Hangukeonbeomnon [Korean constitutional law] 769 (11th ed., 2016) (In Korean); Jong-sup Chong, *supra* note 12, at 796.

25) Chul-soo Kim, Heonbeophak [Constitutional Law] 663 (3rd ed., 1971) (In Korean).

position, sees judges' conscience as subjective and internal. Therefore, "a judge decides independently according to conscience" is interpreted as a judge applying the law based on legal convictions unique to their own personality during a trial, and as "conscience" referring to the consciousness of human moral obligation. In this sense, judges being bound by conscience are bound by the subjective standards of conscience; this ultimately corresponds to internal freedom from the law. Thus, if a judge's conscience and the law do not correspond, then the judge would insist upon their conscience to refuse to apply the law, but would then take legal responsibility for disobeying the law. On the other hand, by obeying the law in such a case, the judge would then assume moral responsibility. This means that judges are ultimately recognized for their room to judge based on their consciences, even in spite of the law.[26)]

This is a similar position to those of Professor Ryuichi Hirano, a Japanese subjective conscience theorist who will be covered later, and of Jiro Nakamura, justice of the Supreme Court of Japan.[27)] This position is characterized as affirming that the conscience of a judge in Article 103 of the Constitution could work as a separate source of law which is distinct from the written Constitution or law. However, even in this theory, if a judge makes a decision that goes against the law, they must take "legal responsibility"—borrowing Tae-yeon Han's expression—which implies that judges' conscience and the objective law of the text are in competition or confrontation with one another.

(2) Intervention of "Conscience of Judge" within the process of law-making

This theory begins on the premise that the process of interpreting the law by judges is not legal discovery, but is legal formative work. A judge is not a "soulless being" who is merely a "poll-parrot of law". Rather, they are people who mobilize their personality through the performance of comprehension and practice in order to work on legal interpretation. The

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26) Tae-yeon Han, Heonbeop [Constitutional Law] 516-517 (3rd revised ed., 1964) (In Korean).

27) Jiro-Nakamura et al., *Saibannkannno Ryousinnnitsuite [About judges' conscience]*, 20(7) Houno Sihai 2, 6 (1971) (In Japanese) recited from Ryuichi Hirano, *Saibannkannno Kyakkantekiryousinn [Judges' objective conscience]*, 480 Juristo 83, 86 (1971) (In Japanese).

two aforementioned theories questioned whether the conscience of each individual judge was in accordance with these "laws", while presuming that the "law" exists in an objectified form. On the other hand, the position that judges' conscience intervenes in the process of law formation—for now this shall be paraphrased as "intervention theory"—holds that a judge's conscience cannot help but to intervene in the course of legal construction. In the process of forming law, which is a part of interpreting the law, it is inevitably assumed that a judge who works as interpreter inputs their own values into the object of formation. Thus, the realized law is a mixture of law given as latent dynamis and the individual nature of an existing judge.[28)]

Duk-yeon Lee, a proponent of this position, defines the conscience of a judge in several forms.[29)] First of all, he prescribes the judge as a "reflective seeker of the truth". Acknowledging the subjective nature of a judge's conscience, judges who follow their own conscience are bound to contemplate themselves. Judges as human beings also cannot help but to have preformed understandings formed by their own dependencies, or formed based on their environment or tendencies, and are thus bound to use their subjective conscience as a trial norm. Judges must thus reflect on their conscience to metamorphose it into a more reasonable level.[30)]

In addition, a judge shall assume an obligation to remain faithful to the constitution and to the law, even if their conscience may be utilized in the process of interpreting the law. According to this logic, under Article 103 of the Constitution, only the constitution and laws could be adopted as grounds of exclusive and sole judgments, so it should be understood that the clause only guarantees judges' conscience when it is linked to a conscience which follows the Constitution and the law. Although judges' conscience may be involved due to the uncertainty of the law, and its imperfections as specific criteria for justice, this does not mean that the clause allows for interpretation of the law to take place under the control of

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28) Duk-yeon Lee, *supra* note 8, at 362.

29) *See* Duk-yeon Lee, *supra* note 8, at 363-369.

30) H. Sendler et al., *Die Methoden der Verfassungsinterpretation [The method of Constitutional Trial] in* Staatsphilosophie und Rechtspolitik: Festschrift für Martin Kriele zum 65. Geburtstag 481 (B. T. Ziemske eds., 1997) (In German).

judges' personal ideals or values. A judge is burdened with the duty of interpreting the law and disclosing it through adjudication by exercising the freedom given to him (her) within the boundaries of the law. Therefore, it is said that even though it is possible in the theoretic world, it would be impossible in reality for a judge to form any law through interpretation which has significant deviation from the written law, and has lost its rationality.

Lastly, it is adduced that a judge is authorized to use their conscience to interpret the law is premised upon satisfaction for the judge's intellectual responsibilities, the duty of continuous self-renewal efforts, and the responsibility of harvesting conscience. The logic presupposes that for a judge to use their conscience to interpret the law, which corresponds to the formation of law, they must be aware of their unconscious preconceptions, and turn such notions into the dimensions of objective legality. To this end, judges are responsible for continuous self-innovation, while maintaining intellectual levelness to utilize their conscience. This intellectual levelness of maintenance is also thought to be similar to the scholarly conscience involved in "serious and premeditated truth exploration activities".[31)]

This interpretation can be evaluated in the sense that it is an attempt to overcome the limitations of the conventional objective/subjective conscience theories. Those previous theories presupposed that the judge's involvement with their own conscience is contrary to the objective of application of the law. These positions cannot avoid the criticism that they do not accurately embody the process of actual trials, or the process of applying the law to reality. Though the law is always abstract due to its nature, those theories excessively reduce the scope of discussions on judges' conscience by accepting the dogma of an "objectively existing law", which exists regardless of human interpretation.

"Intervention theory" guarantees the radius of judges' conscience by defining the intervention of judges' conscience as an indispensable measure to approach objective legality,[32)] rather the result of structural flaws in the judicial system. Considering the fact that the constitution explicitly defines the "conscience of a judge", this provision cannot be regarded as a

31) For details about logics of intervention theory see Duk-yeon Lee, *supra* note 8, at 367.

32) *See Id.* at 367.

meaningless clause. Thus, judges' conscience can be evaluated as a solution raised by the Korean constitution to deal with difficulties that judges might encounter in the process of interpreting law due to its inherent uncertainties.

(3) Institutional Morality Theory

Institutional morality theory argues that judges' conscience is a judge's moral reasoning about what the law is in a given matter.[33] Min-kyung Song has organized this position manifestly. According to this theory, the question of whether a judge's conscience can exercise practical functions in the process of interpreting the law depends upon whether the law has objectively given answers in advance.[34] However, unlike intervention theories mentioned before, institutional morality theory basically expresses its position that law is always firm, but it is not always obvious. This interpretation, reflecting Ronald Dworkin's position, opposes H.L.A. Hart's claim that the law is an open, uncertain concept.[35]

The theory first distinguishes between cases that individual judges encounter as being "hard cases" from those which are not. In the latter cases, judges may figure out the answers in accordance with the law, and the judge may easily grasp such answers. The trouble usually occurs at the former, as in such cases, for instance, even if an answer given by law exists, said answer does not appear distinctly. In such cases, judges shall follow the "argument of principle", which deals with the problem of degree(decision of the sentence of profit) within the process of legal argument to find answers in hard cases.[36]

Unlike rules that exist in singular forms, principles can exist in various forms and may include competitions of values. Thus, the question of which principles are dominant depend upon the legal, moral, or intellectual weight of each principle. Judges who follow the "argument of principle" theory compare the proportions of these principles in "hard cases", and

33) Min-kyung Song, *supra* note 10, at 565.

34) *Id*. at 571.

35) *Id*. at 591-592.

36) *Id*. at 589.

thereby converge upon the "answer given by law".[37] In such instances, judges should establish standards to adopt principles that are closer to "pre-given answers" when it comes to conflicting principles. However, these realizations cannot be recognized by empirical standards, such as court precedents or specific legislative acts, but may only be recognized by a "sense of appropriateness" developed in the profession and among the public.[38] This theory comprehends that the judges' conscience is mobilized within the process of following these senses.

Throughout this process, the so-called "sense of appropriateness" is embodied through the term "institutional morality". This term, raised by Ronald Dworkin, is explained by "the moral principle inherent in the legal community".[39] Institutional morality has characteristics that are distinguished from other moralities such as 1) ethics as an individual, 2) public morality, and 3) utilitarian morality. First of all, institutional morality is distinguished from the ethics of individuals in that it should be accepted by the general public of the legal community. Furthermore, institutional morality, unlike public morality, is not an expression of momentary opinions at a certain point of time, but is of a more accumulated and enduring nature. Lastly, institutional morality is based on "principles", and is thereby distinguished from the policy approaches of utilitarian morality which aim to "promote the total amount of happiness".[40]

In summary, a judge's judgment based on their conscience is done to interpret the law in light of such institutional morality.[41] At this phase, institutional morality is far from a "personal conscience", as it is not a momentary judgment; it is rather based on principles. Through these factors, judges may be free from concerns that conscience violates the objectivity and stability of the law.

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37) *Id*. at 589.

38) RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 40 (2005).

39) *Id*. at 129.

40) Min-kyung Song, *supra* note 10, at 600.

41) *Id*. at 601.

(4) Necessity of "Conscience of Judge" within the law practice

Another theory states that Article 103 of the constitution reflects a reality of law practice; that it requires the involvement of judges' conscience. This has similar aspects to the "intervention theory" mentioned above. Nonetheless, it suggests a different position from "intervention theory" on the grounds of the interpretation of law, by explaining the historical path that the ideology of independence of judges premises the principle of legal restraint.[42] According to this, judges must obey the law and order as the sum of laws that form a unified and self-fulfilling system, and based on the principles of legal restraint, the independence of judges is guaranteed. In other words, it affirms the objective existence of the law which resides outside of human beings.

Additionally, this theory points out that its own premise has limitations. Unlike during the time when the judicial system was first designed, society is changing rapidly—which reduces the room for the binding mechanism of the law to work, and strengthens the "judges' law". It has also been proposed that this inclination would intensify, considering the complexity of human society.[43]

Eventually, it can be explained that in this state, the judge's interpretation of the law cannot be prevented from heading in the direction of the formation of laws, and that judges' conscience was specified in the constitution due to this practical need. Meanwhile, this theory also puts forward that Article 103 of the Constitution defines the judges' conscience as doing so also means emphasizes the responsibility of their authority to judge by presenting a constitutional basis for the reality that the "judges' law" is bound to exist. As long as it is inevitable for judges to play a leading role in the formation of law, instead of guaranteeing such authority, judges themselves are required to combine the virtues which make their conscience move towards the realization of laws.[44]

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42) Un-jong Park, *supra* note 6, at 75.

43) *See* Un-jong Park, Wae Beobui Jibaeinga [Why the Rule of Law] 217-281 (2010) (In Korean).

44) Un-jong Park, *supra* note 6, at 98.

(5) Objective Conscience of Lawyer exceeding the text

This theory explains that "the conscience of a judge" refers to "law from an objective and professional perspective as a jurist".[45] This interpretation may be misunderstood as a form of the objective conscience theory, due to its use of the term "objective conscience". However, the theories are explicitly different. First of all, this theory is distinguished from the objective conscience theory in that it is an interpretation used to highlight the independent meaning of judges' conscience in Article 103 of the Constitution. As mentioned above, most objective conscience theorists assert that the provision on judges' conscience is a harmful one that can lead to misunderstandings. On the other hand, according to this theory, as long as Article 103 of the Constitution stipulates the judges' conscience, it is believed that an interpretation that specifies its own meaning solely corresponds with the legislative intent of the constitution.[46]

Secondly, this interpretation accepts that the use of "judges' conscience" in Article 103 of the constitution gives judges the authority to form laws against the written law. Article 103 of the constitution allows judges to exercise their "professional and objective conscience", but any law formed by judges through their conscience is a "just law" that goes beyond simple positive law.[47] A typical example of it is that of "natural law". In other words, the conscience of a judge is a conscience of a professional, which has nothing to do with the judge's own personal conscience, and must comply with the constitutional concept that judges are bound by law. However, the law should also have legitimacy, and based on these standards, judges could form a law against the positive law through the authority to judge by

45) *See* Chun-soo Yang, *Beomnyure banhaneun beopyeongseongui jeongdanghwa ganeungseong: ironjeok · siljeongbeopjeong geungeowa injeongbeomwi geurigo hangye [The Possibility of the Justification of 'Contra Legem Interpretation' in South Korea: The theoretical-positive legal arguments and the limits of contra legem interpretation]*, 52 Korean Journal of Law & Society 107, 107-142 (2016) (In Korean).

46) *Id.* at 130.

47) *See* Joel Feinberg, *The Dillemmas of Judges Who Must interpret "Immoral Laws", in* Problems at the Roots of Law: Essays in Legal and Political Theory 3, 3-35 (Joel Feinberg ed., 2003).

conscience.[48]

Finally, this interpretation argues that even if a judge can actually form a law against written law, in order to form it, the logic of social reality, or external logic, must be converted into the internal logic of the legal system.[49] In other words, the expression of judges' conscience under Article 103 of the constitution can be made within the legal system's logic. The explanation goes that if a judge tries to form a law against the positive law based on their own conscience, the formed law must be within the logic of the legal system. Thus, the radius of the judges' conscience under Article 103 of the constitution is limited to that of a conscience as a professional not as the conscience of a member of the general public isolated from their professional position.

(6) Theory of Identicality between Constitution of Korea Article 19 and Article 103

This interpretation criticizes that fact that conventional interpretations do not approach the essence of law, but rather factitiously divide one form of conscience that exists in judges. Since judges' conscience is inherent to individual judges, there is no need for judges' conscience to be divided and locked into the ideas of "objective conscience" and "subjective conscience". Instead, such an approach leads to the misapprehension that judges always face internal conflict during trials, and that they can only make a decision formed by personal values at any given time.[50]

This interpretation asserts that in order to interpret Article 103 of the constitution, one should not simply focus on the 'conscience of judges' itself, but rather on the relationship between law, conscience, and independence. The conscience itself cannot be different from that mentioned in Article 19 of the constitution, but a judge is ceaselessly controlled about the infinite invocations of their conscience by the objective order of law. On the other hand, judges are independent, so even if the objective order of law constantly regulates them, judges would eventually try to act according to their own consciences. Meanwhile, various

48) Chun-soo Yang, *supra* note 45, at 131.

49) *Id.* at 136.

50) Seok-jeong Kang, *supra* note 21, at 182-183.

measures, such as the proposal of virtues or reflection, can be suggested to prevent judges from committing misdeeds that violate the law, which may come from focusing only on their personal consciences.[51)]

3. Feature and Assessment of Current Discussion's Tendency in Korea

The previously mentioned interpretations present different views on whether it is legitimate for a judge to use their own subjective standards of conscience, and views on the scope of applicability of such conscience. It is noteworthy that the "subjective conscience of a judge" addressed in the objective conscience theory is usually focused on the political stance of individual judges. The argument of objective conscience theory, which suggests that judges' conscience can be entrained into trials, and might hinder the rule of law, is based on concerns that judges may ultimately be swayed by their individual political views, and might thus make faulty judgments. Therefore, the interpretation that judges' conscience is the "objective conscience as a professional obeying to the constitution and the law" is a reflection of the established standard that judges should not reflect their personal political views in the ruling.[52)]

Meanwhile, in interpreting judges' conscience as being basically "the objective conscience of a professional", there was the theory acknowledging its separate identity. Unlike the aforementioned objective conscience theory, this view sticks to a position that, since Article 103 of the constitution has related provisions, the independent meaning of individual phrases should be considered; the theory interprets the judges' conscience based on that concept. According to it, judges can form laws which nullify overly immoral or anti-ethical written laws, when interpreting said laws based on their "objective conscience as a jurist", which is justified by Article 103 of the constitution. Furthermore, it proposes that the "natural-law" as one of the representative legal grounds by which judges may form a law against a positive law.

This theory may be more in line with the view that the rule of law

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51) *Id*. at 188.

52) Kyung-ho Lee, Heonbeopgangui [Lecture about Constitutional Law] 407-408 (1st ed., 1959) (In Korean).

should exclude autocracy, in that it tries to set the judges' conscience in the objective and professional areas in a form distinguished from political power. However, it is still questionable whether this can be realized. First, this interpretation renders unconstitutional acts as representative cases in which judges can form laws. However, considering the reality of the Constitutional Court's adjudication on the constitutionality of the statutes system, unconstitutional laws can only be excluded from trials after the process of invalidating law enforcement has taken effect. In addition, it is still questioned whether the "objective conscience as a lawyer" of judges would solely work during the process of finding the "natural law" due to law's own indeterminacy. Besides from this, the criteria for making such decisions would also be left in question.

While the majority supports the interpretation of tying "conscience of a judge" to the framework of "objective and professional conscience", there are still some attempts to widely interpret the scope of judges' conscience. This analysis is again divided into two stances. The first holds that judges' conscience includes the subjective conscience of individual judges. According to this interpretation, it may be meaningless to look at judges' conscience in several parts. This is because the judges' conscience would be formed by their unique personalities over the long run. This theory holds a view that prior discussions made the mistake of viewing one's conscience as being held within a competitive relationship with legality.

This interpretation also presents the National Assembly documents which regard how the concept of judges' conscience had been incorporated into the Constitution as the theory's own basis. According to the minutes of the constitution amendment advisory council, the phrase of "judges' conscience" is incorporated into the Constitution because judges who exercise their rights of judicial review need to "put their everything together to decide upon constitutional issues". Considering this history, the meaning of this phrase that the constitution had previously established must include all forms of a single conscience of judges, expressed in numerous aspects.[53)]

53) During the discussion on the 5th amendment of the Korean Constitution, Jik-soo Shin claimed that "the preparation of the mind of the person in charge of the trial should be included in the list of consideration," and said the Japanese word "*kokoro kamae*" would be the

The other interpretation presupposes that in the real world, the law requires interpretation to find its specific "outlook" in hard cases due to its inherent uncertainty. Thus, an interpreting human is required to judge in this process. As such, this theory suggests that preexisting discussions based on "objectively externalized laws" are unrealistic. However, this view asserts that it is not right for judges to prioritize their personal conscience, thereby hurting objective law and order. Proponents of this theory suggest various measures to solve this problem. These positions were divided into the "intervention theory", which holds that that judges should have virtues as judges, and should implicate conscience into the process of forming laws, and "institutional morality theory", which suggests that judges should rule by considering the proportion of socially formed principles, and finally "introspection theory", which holds that judges should judge with proper conscience developed through constant self-reflection and innovation.

Thus, Korean academic circles' discussions on judges' conscience are diversified. It has already been mentioned above that an overwhelming majority of domestic academic discussions have interpreted judges' conscience as an "objective conscience", ever since judges' conscience was first introduced in the constitution. Since then, as a counter-discussion against the majority position, the discussion was opened that judges' "subjective conscience" should also be considered. However, it is hard to say that this position has gained wide support from academic circles. This was perhaps due to the concern that if an individual judge reflects their personal values upon the ruling, it would not only breach the rule of law, but would also cause serious harm to legal stability.

Still, "objective conscience" also has a problem in that it cannot clarify what 'objective law' is. In particular, it is inappropriate to analyze judges' conscience in Article 103 of the constitution as an "objective conscience", since nowadays the "hard cases" which judges encounter become more diverse with the growing complexity of society.

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equivalent. Meanwhile, he said, "preparation of the mind means personality and belief as a judge". This was presented in response to judge Young-seop Lee's remarks that "the nature and conscience of judges are important in the issue of judicial review." (The National Assembly of the Republic of Korea, *supra* note 13, at 381-382, 400-401).

Therefore, an attempt was made to link a process of judges' law construction with judges' conscience to solve this problem. This interpretation suggested compatibility between the positions of "the law as an *a priori* and objective being" and the "conscience of a judge". Through this, it can be said that it has provided a way to escape some of the concerns that the individual values of judges might be excessively reflected in the process of demonstrating judges' conscience, which might lead to damaging judicial trust and the rule of law.

As such, the Korean theories regarding judges' conscience could be characterized by a rise of complexity and expansion of its scope. This seems to reflect the reality that the pace of change in the written law is bound to be slow compared to the increasing complexity of the cases which individual judges confront. With the positive law bound to lag behind the pace of change in reality, judges would have no choice but to think about practical justice, and this reflects the judges' conscience. Article 103 of the constitution would thus contain both the dimension of constraint and the dimension of freedom, which can be summarized by the adage "freedom comes with the responsibility".[54] As the area of freedom for judges to use their conscience in the process of forming laws and judging expands, the responsibility of judges which corresponds to it also increases. Recently, along with the discussion of judges' conscience, the spryness of the discussion about the so-called "figure of judges" is also a manifestation of this tendency.[55]

III. Context of Japan's Discussion about Judges' Conscience

As such, there have been a number of discussions on the "conscience of judges" in Korea, but most of the discussions have been raised since the 1960s, when a related provision was incorporated into the Korean Constitution. Japan, on the other hand, began discussions much earlier than

54) Un-jong Park, *supra* note 6, at 96.

55) *See* Un-jong Park et al., Baramjikan beopgwansangui jeongnipgwa silcheon bangane gwanhan yeongu [Study on the Establishment and Implementation of Figure of Desirable Judges] Chapter 5 (2015) (In Korean).

Korea, as they have included such a topic within Article 76 (3) of the Constitution of Japan, which took effect in 1947. Japan also went through a similar discussion process to that of Korea, but in the case of Japan, there was an inclination to treat this as a general issue of social science, beyond treating it as a matter of law. This may be comprehended as being in relation to the interdisciplinary tradition of major Japanese universities, which integrate law and social sciences together. However, unlike Korea, which did not have an explicit ruling about this provision, Japan has tended to present an explicit ruling on the judges' conscience first, and only then would the academic interpretation come as follow-up work.

1. Main Cases Related to "Conscience of Judge" in Japan[56)]

The first ruling on the conscience of a judge was a case of a defendant in violation of the Edict on the Exclusion of poisonous Food, Etc. (hereafter referred to as the first poisonous case).[57)] Just a month after this case, judges' conscience became a retroactive issue in the ruling of the case, in reference to the same edict (hereafter referred to as the second poisonous case).[58)] The original trial of the first poisonous case was held at the Tokyo High Court, in accordance with Article 1 of the Enforcement Order of the Tribunal,[59)] as the former Great Court of Cassation of Japan was abolished after the Second World War. The Tokyo High Court rejected the defendant's appeal, so the defendant appealed to the Supreme Court, claiming that the appeal violated Article 76 of the Japanese Constitution, due to "excessive prejudice of guilt during the second trial".[60)] The appeal suggested the outcome was a

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56) Shigeru Minamino, *Saibannkannno ryousinn [Conscience of Judge] in* Kenpohannreihyakusenn II [Review of Hundred Judical Cases II] 384 (Ishikawa Kenzi, Yasuo Hasebe, George Shishido ed., 2019) (In Japanese).

57) Supreme Court of Japan [S. Ct. J.], 2(12) Saiko saibansho keiji hanreishu [Report of Criminal cases] 1565.

58) Supreme Court of Japan [S. Ct. J.] 2(13) Saiko saibansho keiji hanreishu [Report of Criminal cases] 1783.

59) Saibannsyohousikourei [Law of Court], Order No. 24, Apr. 16, 1947 *(Syouwa 22)*, *amended by* Order No. 381, Dec. 20, 1966 *(Syouwa 41)* (Japan).

60) Nihonnkokukennpounosikounitomonau Keizisossyouhouno Oukyuutekisotihounikannsuru Hourei [Act on Emergency Measures of the Code of Criminal Procedure in accordance with the Enforcement of the Constitution] Act No. 76, Apr. 19, 1947

violation of the Constitution, since the judge was bound by the original trial by excluding the defendant's consistent testimony that the evidence was only a confession made the prosecution's hearing, which was stated under coercion.

The Supreme Court ruled the case as follows. Following judges' conscience means that "the judge does not give in to external pressures or temptations of tangible and intangible forms, but follows the common sense and morality of their inner self". Therefore, the court rejected the defendant's appeal by approving the freedom of legal judgment on which evidence to accept or investigate belongs to the full power of the fact-finding proceedings, and is not subject to controversy over conscience.

In the second poisonous case, the defendant made an appeal that is the prior outcome went against the Constitution. The reasoning of the appeal was that judges might decide against their "conscience" since article 4 of the Edict on the Exclusion of poisonous Food, Etc, defined those who violated article 1 of this edict as earning "3 to 15 years in prison, or up to 2,000 yen to 10,000 yen".[61] That is, as there was too much of gap between monetary penalty and imprisonment, judges might be forced to impose an excessively light or severe punishment, even though a proper penalty would be between those punishments

In response, the Supreme Court decided that the question of sentencing is basically a matter of legislative policy or legal depiction, which is made at the discretion of the legislative body. In fact, the Supreme Court suggested a limited interpretation regarding the judges' conscience, stating that "if the entire judge holds a plea according to what they believe to be legitimate within the scope of the valid law, it can be said that it is a trial based on the conscience of the Constitution". For this reason, the court rejected the defendant's appeal, stating that it cannot be disobedience of the judges' conscience to make a trial without considering the intent of appeal's

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(Syouwa 22), *amended by* Act No. 198, Dec. 17, 1947 (Japan).

The body of article 17 paragraph 1 of this law stipulates that trial on an appeal in High Court, would not be appealed again to the Supreme Court unless it has a reason of injustice in deciding Constitutional issues.

61) Yuudoku Innsyokubutsutou Torisimarirei [Edict on the Exclusion of poisonous Food], Edict No. 52, Jan. 30, 1946 *(Syouwa 21)*, *amended by* Edict No. 120, June. 18, 1946 *(Syouwa21)* (Japan).

assumption which would not be possible to occur.

2. Overall Understanding of the Case

How to understand the Japanese Supreme Court's ruling is still a controversial matter. For example, the case of the first poisonous case is particularly controversial. As for the ruling which stated that following the judges' conscience means following the "common sense and morality of one's inner self", the "subjective conscience theory" scholars see this ruling as an expression in support of their own theory.[62] However, "objective conscience theory", which interprets the judges' conscience in Article 76 (3) of the Japanese Constitution as "conscience as a judge" or a "conscience which every judge must have", explains that this ruling is best comprehended under the constitutional history of Japan from Meiji Constitution (Meiji Kenpo). Considering these premises, the theory asserts that the ruling of "the judge […] inner self", be comprehended as presenting the "inner self as the judge"; this would be tantamount to the objective conscience theory.[63] Professor Shigeru Minamino, who supports the theory of privilege, asserts that such a case is consistent with the position of his theory. Said theory states that the authority to trial according to one's conscience is a privilege given to a judge, and the Supreme Court's ruling that a judge may act "following the common sense and morality of their inner self" exactly accords with the theory of privilege.[64] With that said, Professor Yasuo Hasebe, on the other hand, has pointed out that "both subjective and objective conscience theories utilize this case as a precedent to support their theories", which implies that it would be difficult to understand the meaning of the judges' conscience by this case alone.[65]

Additionally, in the case of the second poisonous case, as the status of the "judge" is clearly revealed in the relationship with the National Assembly, the affirmation of a "conscience of the judge" being given to a judge of such a stature can be affirmed more clearly. Those two precedent

62) Ryuichi Hirano, *supra* note 27, at 85.

63) Kouzi Sato, Kenpo [Constitutional Law] 327-328 (3rd ed., 1995) (In Japanese).

64) Shigeru Minamino, *supra* note 56, at 385.

65) Yasuo Hasebe, Kenpo [Constitutional Law] 425 (7th ed., 2018).

cases pointed out that the ground of the appeal was a matter of legislation, citing legislation as a reason for the dismissal of the appeal. In other words, a judge is both a law interpreter and a law enforcement officer, but is not a legislator.[66] Although the law does not correspond to the judge's conscience, this does not mean that the employment of a judge's conscience in a trial is a violation of the constitution per se. Thus, the conscience that judges will exercise within a trial would not be outside of the scope of the law. Though the phrasing of "what they believe to be legitimate" in the ruling seems to advocate for subjective conscience theory, the statement already presupposed a limitation created by "the scope of valid laws". That is, this ruling might come to be comprehended as the Supreme Court of Japan interpreting that the conscience that judges can exercise during the trial process would be limited to objective consciences within the framework of the law.

3. Main Theoretical Trends about "Conscience of Judge" in Japan

Japan's major academic trend towards judges' conscience is similar to that of Korea's. This seems to be due to the influence of the Japanese Constitution on the conscience-related provisions of Article 103 of the Constitution of the Republic of Korea. However, in Japan, despite the fragmentary confrontation between objective and subjective conscience theories, some interpretations attempt novel constructions outside of the realm of the study of constitutional law; this includes legal philosophy (*Rechtspolitologie*), or the study of civil law. Furthermore, some interpretations attempt to formalize the complexity of the judicial process that each judge encounters in comparison to the daily life of ordinary people. Beyond this, as an existential human being, increasingly frequent attempts are made to structure and formulate three-dimensional analyses regarding the processing of judges' stated thoughts and worries, in order to find the meaning of judges' conscience inside of this quantitative analysis. Therefore, this essay will briefly examine the composition of traditional discussions by introducing stances of key scholars and important figures in

66) Kotaro Tanaka, Kyouyouto Bunnkano Kiso [The Basics of Refinement and Culture] 352 (1937).

judiciary criticisms. The essay shall then elaborate upon the newly emerged theory.

1) Subjective Conscience Theory within the traditional discussion structure

Subjective conscience theory suggests that the judges' conscience in Article 76 (3) of the Constitution of Japan is no different from the subjective conscience of judges as individuals guaranteed by Article 19 of the Constitution.[67] This is summarized by the phrasing of the "impossibility of dual-conscience".[68] This theory believes that judges may serve in trials according to their subjective conscience. Representative candidates include criminal law scholar Ryuichi Hirano.[69]

(1) Professor Hirano's theory

Professor Hirano's earliest publication which referred to subjective conscience was *The Criminal Procedure Act* published in 1958.[70] In this book, he suggested an interpretation of the judges' conscience stipulated in Article 76 (3) of the Constitution of Japan; that being the "belief of judges that they are morally correct". He asserted that, if it is unclear what the law is, judges would define "the existing norms" according to their consciences. He went on to claim that judges could even ignore the unjust laws, and could discover legitimate laws according to their consciences.[71]

Hirano also expressed his opinion at a discussion meeting.[72] In the

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67) Nihonnkoku Kenpo [Constitution of Japan], Nov. 3, 1946, Art. 19 (Freedom of thought and conscience shall not be violated.).

68) Details about the impossibility of dual-conscience would be found *in* Yoshikawa Kanzi, '*Saibannkannno Ryousinn' Sono Hoka [Judges' conscience and the others]*, 26(7) Horitsuzihou 719, 720 (1954) (In Japanese). He mentioned in this paper that it is virtually impossible to demand the same person to make judgements by properly dividing one's conscience into two, given that the trial is a personal judgement and the conscience is the premise of the case.

69) Shigeru Minamino, *supra* note 56, at 384.

70) Shigeru Minamino, *Sihouno Dokuritsuto Saibannkannno Ryousinn [Independence of Judiciary and Conscience of Judges]*, 1400 Juristo 11, 11 (2010) (In Japanese).

71) Ryuichi Hirano, KeiziSosyouhou [Criminal Procedure Act] 52-54 (1st ed., 1958) (In Japanese).

72) Itirou Ogawa et al., *Saibannto Saibannkann [Trial and Judges]*, 469 Juristo 20, 35 (1971) (In Japanese). Especially professor Hirano criticized mainly the fact that the objective

paper titled *Objective Conscience of a Judge*, an example of the Self-Defense Forces is used to criticize the theory of objective conscience theory. Some of the "objective conscience" scholars believe that the "right law; the spirit that exists objectively in law" constitutes a conscience of a judge. However if the "right law" on the topic of Self-Defense Forces, for instance, stated that "Self-Defense Forces are allowed", judges would be bound according to the latter part of Article 76 (3) of the Constitution of the State of Japan—be bound by this Constitution and law—, rather than by judges' conscience. By this example, Hirano stressed that judges' conscience is unnecessary as a separate means to maintain the objectivity of a trial.[73)]

He also explained that the biggest difference between the uses of "conscience" of Article 76 (3) and Article 19 of the Japanese Constitution is the distinction between "conscience" and "ideas". He asserted that "conscience", as used in Article 76 (3), is "to state is right whatever you think is right". Whereas "ideas", which correspond to the use of "conscience" in Article 19, are thoughts about "what is right or good". This is a distinguished position among general "subjective conscience" scholars; one which does not differentiate between those two concepts. Thus, according to Hirano's concept, protecting judicial independence and guaranteeing judges' conscience are virtually the same thing. Nevertheless, he also mentioned that Article 76 (3) included rulings on conscience in addition to on the "independence of judges", as there was still room for judges to make judgments, or even to deceive, themselves even when there is no pressure from the surrounding public.[74)]

Hirano claims that Article 76 (3) of the Constitution should be interpreted as utilizing a subjective form of conscience, in terms of judicial institutions. As has previously been stated, according to objective conscience theory, it is the Supreme Court that decides what law is under the Japanese judicial system in cases where a lower court judge interprets the law differently from the Supreme Court, they will be considered to be in violation of their own conscience as a judge. Professor Hirano pointed out that, in this case, the lower court judge, who takes charge of a trial first,

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conscience theory forces a particular kind of idea under the name of conscience.

73) Ryuichi Hirano, *supra* note 27, at 84.

74) *Id*. at 85.

faces the inhumane criticism of 'violation against conscience'. Furthermore, there would be an assertion that any court run by unscrupulous judges would not be fair, which could ultimately lead to the exclusion of many judges from trial, and would make it difficult to guarantee the independence of judges.[75] As Article 76 (3) of the Japanese Constitution guarantees the independence of judges, judicial administrative orders to individual judges should not affect the judge's right to trial.[76] This notwithstanding, if the subjective conscience is excluded, the concern would be that individual judges' independence would be virtually lost to the Supreme Court's judicial administration authority, combined with right over statutory interpretation.

In the end, Professor Hirano's 'subjective conscience theory' can be evaluated as a broad recognition of the scope of judges' discretion. As such, individual judges can be guaranteed independence in the trial of individual cases within the judiciary. It also showed that problems (such as confusion in legal stability and crises of trial fairness) would be solved not by adjusting the definition of conscience, but by emphasizing the meaning and role of restrictions on the duties of judges under Article 76 (3) of the Japanese Constitution. In addition, it seems that Hirano refuted to the concerns that abuse of the judges' subjective conscience would lead to the violation of rule of law by converting the implication of "conscience as individual" of Article 19 of the Japanese constitution as a problem of "thoughts", rather than "conscience".

(2) "Conscience of Judge" interpreted from the view of Civil Law

In civil law academia, a notably amount of scholars have taken a relatively favorable stance towards subjective conscience theory. These contentions are made because of two characteristics of civil cases. First, even if there are cases that do not necessarily conform to a particular theory, it is necessary to save rights through a concrete resolution without an ultimate refuge, such as the declaration of "not guilty". Second, there may be some variations in each case which is distinguishable from the case's predecessors. The fact that judges and lawyers play different roles in

75) *Id*. at 84-85.

76) Ryuichi Hirano, *supra* note 71, at 52.

court also affected this position.

In this regard, Professor Taro Kogayu asserted that, considering the circumstances of jurists - or judges and lawyers - who rotate between precedents and legal texts, a civil law professor who teaches them not only should acknowledge the binding force of the precedents, but must provide the "conventional" methods of interpretation that are currently considered reasonable by the legal community; specifically, the process of a discussion carried out in accordance with the construction methods of lawyers, with texts being limited to laws, precedents, etc., as the starting point of how to present the legal grounds of previous rulings.[77] This is because it is difficult to conventionally apply prior rulings in civil cases when they contain numerous variables.

Therefore, judges should ensure that specific matters are resolved through their discretionary interpretations on as a last resort, and it is the "conscience" ruled in Article 76 (3) of the Constitution of Japan which guarantees such authority.[78] In other words, judges should exercise their conscience as judges to meet the specific legal or moral needs of individual cases, to satisfy gaps which have not been fully assessed by existing precedents and laws. However, as the conscience exercised by judges at this phase would be distinguished from precedents based on the general rulings of sets of judges applied across entire courts; so of course, this notion of conscience certainly contains the subjectivity of the individual judges.[79]

2) Objective Conscience Theory within the traditional discussion structure

Unlike subjective conscience theory, objective conscience theory asserted that it would be possible to divide a judge's conscience into separate parts. It emphasizes that the conscience of a judge in Article 76 (3) of the Japanese Constitution should be construed as acting as a "conscience as a judge", or as a "conscience that should be held by all judges", though these definitions are distinct from Article 19. The main scholars of this

77) Taro Kogayu, *Saibannkannno Ryousinn [Conscience of Judges]*, 71(5) HOUGAKU 545, 546-547 (2007) (In Japanese).

78) *Id*. at 565.

79) *Id*. at 566-567.

theory range from Professor Shigemitsu Dando,[80] to Professor Siro Kiyomiya, and Professor Yukitoki Takikawa, etc. Until now, this theory has been considered to be the majority opinion in the academia of Japan.[81] The "objective conscience theory" gained support not only from within academia, but also from key figures in the Supreme Court of Japan, such as Tanaka Kotaro,[82] and Kitaro Saito,[83] both of whom served as justices of the Supreme Court.

(1) Substantial meaninglessness of Constitution of Japan Article 76 Paragraph 3

Professor Kiyomiya, who is considered to be one of the leading constitutional scholars of post-war Japan, regarded the provision of judges' conscience as meaningless.[84] Unlike previous theories, this theory has virtually invalidated the meaning of the phrasing of judges' conscience. To offer a contrast, judges' conscience had a practical meaning to Professor Hirano, who argued in favor of subjective conscience theory. This was also the case for Professor Dando, even if he asserted that judges' conscience should be objective. In fact, he argued that judges' conscience of Article 76 (3) should be an "objective conscience that each judge should have" as a professional virtue, connoting that Article 76 (3) still has legal substantial meaning. On the other hand, Professor Kiyomiya completely excluded the personal aspects of judges from the entire process of trial. Thus, the role of judges set by the current Japanese Constitution in the lawsuit is merely a law enforcement entity. This interpretation leads to an extreme reduction in the discretion of judges.

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80) Ryuichi Hirano, *supra* note 27, at 83; *See* Shigemitsu Dando, SinnKeiziSosyouhou [Novel Criminal Procedure Act] 37 (5th ed., 1953) (In Japanese).

81) Shigeru Minamino, *supra* note 70, at 11-12.

82) Kotaro Tanaka, *Saibannkannno Ryousinnto Dokuritsunitsuite [About conscience of Judges and Independence]*, 7(1) Housouzihou 1, 6-7 (1955) (In Japanese).

83) Kitaro Saito, *Saibannto Saibannkannno Tyuritsusei [Trial and Judges' Impartiality]*, 26(2) Houritsuzihou 124, 126-127 (1954) (In Japanese). Kitaro is a Supreme Court justice, although he was not a Supreme Court justice at the time of writing this article. However, he had enough experience as a high-ranking judge, including serving as deputy chief justice of the Manchurian Supreme Court in 1945. Therefore, it is difficult to see him as a lower court judge.

84) Siro Kiyomiya, Kenpo I [Constitutional Law I] 291 (1st ed., 1960) (In Japanese).

In addition to this, Professor Takikawa stated that in terms of legislative theory, Article 76 (3) of the Constitution of Japan stipulating judges' conscience was only a harmful phrasing, in that it might allow room for individual judges' subjective consciences to intervene in rulings. The theory claims that even though judges' conscience does not have actual meaning, this redundant literature incurs superfluous misunderstanding that there might be room for judges' subjective outlook on life or on the world would be activated at the trial.[85)]

(2) Professor Naoki Kobayashi's "Framework" Theory

Professor Kobayashi evaluated Professor Kiyomiya's opinion from the standpoint of "objective conscience theory", asserting that it is more correct to interpret the phrasing of judges' conscience in Article 76 (3) of the Constitution of Japan as referring to an objective conscience. The basis for this assessment was that, first, in allowing individual judges to interpret and to apply bold and free laws based on their individual political, religious, and moral beliefs would make it difficult to achieve a unified legal order. Secondly, litigants of the first poisonous case would experience insecurity about the fair application of the law. Finally, the principle of the 'rule of law' calls for the suppression of judges' own subjective beliefs, in order to protect fairness. This may be referred to as the "objective conscience as judges".[86)]

In addition, Kobayashi quoted Paul Güiland's viewpoint, stating that the "independence of judges" in Article 76 (3) of the Constitution of Japan grants not only independence from power, but independence from their subjective beliefs and ideas. In other words, it was interpreted that the professional ethics employed to respect the rule of law and the fairness of a trial are forms of an "objective conscience" of judges, while being another aspect of the principle of "judicial independence".

However, Kobayashi claimed that since there is a tense relationship between judges' duty to obey positive laws while striving for substantial

85) Yukitoki Takikawa, *supra* note 12, at 134.

86) Naoki Kobayashi, *Saibannkannno Ninnmuto Ryousinn—SyokugyouRonnrinoKadai [Judges' assignment and conscience—vocational logics and task]*, 469 Juristo 117, 124 (1971) (In Japanese).

justice, and the specific meaning of judges following the law and independence while abandoning arbitrary elements, would create problems in, for instance, how to address unsuitable or imperfect laws.[87] To solve this problem, Professor Kobayashi applies Professor Hideo Saito's construction. Professor Saito insisted that judges' conscience is a form of "conscience of a judge under the Constitution". This can be referred to as a "framed conscience"[88]. Professor Kobayashi saw this "framing" as a kind of regulatory device that suppresses judges' private elements, and Article 76 (3) of the Constitution of Japan made it mandatory for judges to do so.[89]

In short, Professor Kobayashi's "frame" for judges' conscience was the frame of the vocational ethics that judges should have as professionals. An individual's professional ethics should consider every individual's situation in performing their position's requirements, while having objectivity applied to the assessment of everyone performing that job. This set of ethics may also impose regulations on individuals. But at the same time, it acts as a counter-instrument against unfair demands given to individuals. Therefore, the judges' conscience' prescribed in Article 76 (3) of the Constitution of Japan is basically objective, but it is not the one which excludes judges' circumstances as individuals. That is to say, this interpretation of Article 76 (3) of the Constitution of Japan strongly acknowledges the efficacy of the judges' conscience, and can be estimated as being a theory of finding a balance between the practical circumstances that judges face and legal principles.

(3) Objective Conscience Theory raised by major judges of Japan

In addition to the Supreme Court Chief Justice Ishida and the Supreme Court Justice Saito, Minister Kotaro Tanaka supports the position of the

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87) Paul Güiland, Dienstaufsicht über Richter und die Unabhängigkeit der Gerichte [Supervision of Duties on the Independence of Judges and Courts] (1932) recited from Kotaro Tanaka, HounoSihaitoSaibann [Rule of Law and Trial] 50, 51 (1960) (In Japanese). According to Paul Güiland, the independence of judges included independence from all forces between the state and society, independence from higher government offices, government, parliament, political parties, status, and popularity, especially from one's own self-prejudice and passion.

88) *See* Hideo Saito, KokkaitoSihoukenn [National Assembly and Jurisdiction] 29-120 (1955) (In Japanese).

89) Naoki Kobayashi, *supra* note 86, at 125.

"objective conscience theory". Tanaka's status in the Supreme Court is a highly respected one, as he is the longest-serving Supreme Court Chief Justice. The fact that he has expressed his endorsement for the "objective conscience theory" while serving as a Chief Justice of the Supreme Court is considered to be the support of the Supreme Court itself. This is largely considered to be the main reason that the Supreme Court's ruling is believed to have acknowledged the objective conscience theory. In his paper titled "Judges' Conscience and Independence", published while serving as Chief Justice of the Supreme Court, Tanaka defined judges' conscience as a form of occupational morality, caused by judges' special status. Tanaka also made it clear that this form of conscience (as a professional) should be differentiated from the general citizen's conscience, as guaranteed by Article 19 of the Japanese Constitution.[90)]

According to the paper, the independence of judges is achieved by eliminating all external factors except for the status of judges. In other words, "occupational morality caused by a special status as judges" is a vocational morality that occurs "when you act based on your position as a judge". Thus, personal subjectivity should be excluded. In fact, such professional morality is "following the law blindly without allowing one's subjectivity intervening". What is more, Tanaka has also stressed that each judge should eliminate the possibility of making a judgment by their own personal views, in order to guarantee not only the fairness of trial, but also the independence of the judiciary.[91)] Therefore, judges should comply with the general obligation to comply with professional morality in trial. Article 76 (3) of the Constitution of Japan confirms this.

3) Criticism against traditional theories

(1) Criticism against Objective Conscience Theory

The biggest problem with this theory is that the meanings of "conscience as a judge" and "conscience that every judge should have" are not quite the same. As the categories of the two arguments are basically different; the expression "objective conscience" matches with "conscience

90) Kotaro Tanaka, *supra* note 82, at 6.

91) Kotaro Tanaka, *supra* note 66, at 352-353.

that every judge should have", whereas this is not in harmony with the description of "conscience as a judge". According to this criticism, the former is merely a description of facts—*sein*—regarding conscience as a judge, while the latter regards only imperativeness—*sollen*—for judges. Since Article 76 (3) of the Constitution ranges over the former issue, the ideology of the "objective conscience theory", thus orders judges to replace individual subjective consciences with objective consciences.[92] Professor Dando has also accepted the criticism, and admitted that the two mentioned concepts are indeed different.[93]

There also exists criticism that if the objective conscience of a judge is interpreted as being a particular conscience that any general judge should always have, it would coerce judges to have specific thoughts or beliefs, and this might lead to the justification of menace or discrimination towards non-conforming judges.[94] According to this criticism, it points out that the objective conscience theory has a risk of totalitarianism, in that it might be used as a basis of validating particular creeds or thoughts of each judge.[95] In this regard, some critics say that the "objective conscience theory" is virtually identical to totalitarianism, since it forces judges to have specific objective substances.[96]

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92) Shigeru Minamino, *supra* note 70, at 13.

93) Shigemitsu Dando, *Saibannkannnoryousinn [Conscience of Judge] in* KeiziSaibannnokadai: Nakanotsugio Hannzi Kannreki Syukuga [Task of Criminal Trial: Celebrating Judge Tsugio Nakano's 60th birthday] 12 (Tsugio Nakano, Shigemitsu Dando, Toshio Saitou ed., 1972) (In Japanese).

Professor Dando still points out that in order to exclude the risk of absolutism regime distorting judicial system, common law's tradition of 'stare decisis' still can be adopted as organizing meaning of objective conscience.

94) Miyoko Tsuzimura, Kenpo [Constitutional Law] 439-440 (6th ed., 2018) (In Japanese).

95) Yuuki Tamamushi, *Saibannsyoto Sihoukenn [Court and Jurisdiction] in* Kenpogakunokisoronnri [The Basics of Constitutional Law] 156 (Makoto Arai et al. ed., 2006) (In Japanese).

96) Tetsuzou Sasaki, Saibankannronn [Theory of Judges] 27 (1964) (In Japanese).

According to Sasaki, there is a risk that those judges who don't have specific proper conscience assumed as judges, might be expelled for the reason of disqualification. If so, he worries that Socialistic legal epistemology, Nazi outlook, or Central People Government's policy cognition might be disguised as "objective conscience" to suppress each judge's legal interpretation, which would hinder liberal democracy.

(2) Criticism against Subjective Conscience Theory

Criticism of subjective conscience theory can be divided into two main categories. One is that the objectivity and fairness of a trial may be undermined by a judge who has conducted a trial procedure according to their subjective conscience. The other is that as judges would make judgments according to individual consciences, there might be a risk that the judicial trust of the outside could be damaged.[97)]

In the case of the criticism about objectivity and fairness of a trial, the criticism has been raised that if a judge's subjective tendency is involved in the trial, it would consequently hinder the possibility of a fair trial. This is especially problematic in times of intensified political confrontation. This may lead to a serious crisis in judiciary's political neutrality, in connection with the issue of judges' alignments with specific organizations, ideas, or creeds.[98)]

Regarding the apprehension of judicial trust from the outside world, critics argue that if a judge holds a plea according to their personal conscience, the judiciary, which consists of the Supreme Court as its apex, would ultimately revise the ruling through the employment of higher authority. This, in turn, would incur public distrust towards the judicial branch, by implanting the notion that legal conclusions might be switched depending upon which judge they meet.[99)]

In addition to the damage to the fairness of the trial and judicial trust, the damage to legal stability under the "subjective conscience theory" is also an important ground for criticism. According to subjective conscience theory, all judges can interpret the law according to their own consciences. If so, for those who are subject to the applied laws of individual judges,

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97) At the conference, Ichiro Ogawa intensively raised concerns related to the problem of the objectiveness and fairness of a trial (Itirou Ogawa, *supra* note 72, at 34).

98) Akira Miyake, *Saibannniokeru Seizitohounoronnri [Logic of Law and Politics at the trial]*, 487 Juristo 44, 44 (1971) (In Japanese).

99) At the conference, Kouzi Shindou mainly propounded this criticism. He argued that when a judge makes a ruling as a public figure, there is no fault if he follows his conscience from the position of abandoning an individual aspect and that the operation of the individual subjectivity of the judge can cause problems with the appearance of fairness and complying due process (Itirou Ogawa, *supra* note 72, at 33-34).

there would be a problem in that the aspects of their relief of rights can vary dramatically depending on by which judge they are tried. This also has an adverse effect on the guarantee of people's rights, in that it significantly reduces the predictability of the law. At the same time, it may bring side-effects that burden the Supreme Court, due to increased public distrust of lower courts.

4. Features of the Current Discussion's Tendency Related to "Conscience of Judge" in Japan: Mainly Regarding Numerous "Alternative Theories"

1) Background

From the 1940s to the 1970s, there was a lively debate in Japan regarding judges' conscience. However, since the 1980s, related discussions have disappeared. They then began again in the 2000s.[100] However, this debate has developed in a more complicated way, beyond the simple selection between the subjective conscience theory and objective conscience theory. These various discussions in the Japanese contexts shall be hereto discussed as "alternative theories", in that they are new dimensions of approach that go beyond existing debate. There are two main factors that led to the emergence of various alternative theories, and to the diversification of discussions beyond the previous framework. One was an expanded discussion about the existential role of judges, and meaning of judges as human beings, and the other was a change in the power environment, such as in the political and judicial organizations surrounding judges.

(1) Limit of the competitive structure between the Objective and Subjective Conscience Theories

First of all, criticism was raised that the premise of the conventional discussion itself, which sought to divide judges' conscience into solely

100) Kozi Aikyo, *"Saibankannnoryousinn"nikannsuru Itikousatsu—Hasebeyasuokyouzyuniyoru Monndaiteikiwokeikitosite—[Consideration of Judges' Conscience—Professor Yasuo Hasebe's proposal as an opportunity] in* Kennpounokiteitokennpouronn—Sisou·Seido·Unnyou—Katsutohi Takamisennseikokikinenn [The Basics of Constitutional Law and Studies of Constitutional Law—mainly about thoughts, system, and management—Celebration of Katsuoshi Takami's Seventeeth Birth] 29 (Nobuhiro Okada et al. eds., 2015) (In Japanese).

"objective" and "subjective" consciences, was in reality inappropriate for judges.[101] In this regard, a debate was opened over how "conscience" could be defined. Professor Yasuo Hasebe pointed out that the pre-existed theories were overly dichotomous due to the influence of Hans Kelzen.[102] Hasebe furthermore sought to convert existing discussions by replacing "conscience" with "moral". He suggests that there are three types of morality (hereafter referred to as "three-part moral theory"), which are, 1) moral as conventional wisdom in society, 2) freely chosen thoughts which are guaranteed by Article 19 of the Japanese Constitution, and 3) morality as the work of evaluating the reasons for how to live, which is same as the movement of practical reason (*praktischen*).

Hasebe asserts that the previous debate over judges' conscience is only possible when the concept of conscience is limited to the morality as freely chosen thoughts which are guaranteed by Article 19 of the Japanese Constitution. However, he pointed out that the debate failed to produce a proper discussion about the trial norms that fall into the realms of objectivity and absolutism. This is because the debate only delved into the problem of unstable interpretation under variable conditions, without provoking a discussion of conscience based on the reality of human life. He argued that morality, as the movement of practical reason which cannot be separated from human life, would be meaningful when dealing with the phrasing of "judges' conscience" in Article 76 (3) of the Constitution of Japan.[103] Furthermore, he argued that considering the current tendency towards interpretation over the precedent on the judges' conscience that it both supports "objective" and "subjective" conscience theories, those conventional theories are essentially identical, and thus a new theory about the interpretation of judge's conscience is needed.[104]

(2) Issue in accordance with the Judicial Crisis

In the early 1970s, a number of people participated in the controversy

101) Yasuo Hasebe, Kennpounoennkann [Encircling Constitutional Law] 209 (2013) (In Japanese).

102) *Id*. at 212-214.

103) *Id*. at 210-211.

104) Ryuichi Hirano, *supra* note 27, at 85; Kouzi Sato, *supra* note 63, at 327.

over judges' conscience due to a series of judicial turbulence that culminated in 1971 with the refusal of allowing certain local judges to serve their consecutive terms. Many pointed out that the response of the Supreme Court of Japan at this time violated the independence and consciences of judges, and the debate about the judges' conscience in Article 76 (3) of the Constitution of Japan began in earnest. Since then, the problem was resumed in full swing in the 2000s. This was also the result of the "judicial crisis phenomenon".[105)]

However, the phenomena of the 21st century were somewhat different from those of the 1970s. In the past, controversy arose mainly over direct threats to judges' status, as with not allowing specific judges to reappoint if they had joined particular organizations or engaged in certain political activities.[106)] On the other hand, in this century, problems arose due to the fact that judges were not independent from the judiciary system itself, which restricted their authority to judge according to law and conscience, as the Supreme Court controls judges through "internal assessment". The latter case was a much more secretive issue, to the point that even the judges themselves, those who were restricted, were not always able to grasp it. In order to figure out a solution for this kind of infringement on judicial independence, research on judges' conscience was expanded.

2) Current state of "Alternative Theories"

As shown in a paper written by Professor Shigeru Minamino in 2010, discussions on judges' conscience were actively ongoing at the time in Japan. On this note, Professor Koji Aikyo has suggested Yasuo Hasebe, Shigeru Minamino, and Tsunemasa Arikawa as scholars in the field of constitutional study who review traditional discussions about judges' conscience in terms of the contemporary alternative theories.[107)]

Similar to previous theories, discussions dealing with judges' conscience

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105) Kozi Aikyo, *"Saibankannnoryousinn"to Saibannkann—Kenpourironntekikousatsunimuket e—[Judges' Conscience and Judge—Along with Constitutional Law's logical Consideration]*, 87(11) Houritsuzihou 148, 148 (2015) (In Japanese).

106) Nobuyosi Asibe & Takahasi Kazuyuki, Kenpo [Constitutional Law] 360 (7th ed., 2019) (In Japanese).

107) Kozi Aikyo, *supra* note 100, at 24.

in terms of the judicial system, judicial policy, and independence of judges are mainly dealt with in professor Minamino's "theory of privilege". On the other hand, beyond the question of judicial independence, there are also a number of commentaries linking the attitudes of individual judges, namely on the various situations that judges have encountered in the course of trials, and which regard judges' consciences. In some of the recollections of the Supreme Court justices who formerly worked as scholars, there are several discussions on the attitude and desirable appearances of judges dealing with individual cases; these mainly focused on the relationship between the binding traits of prior trials and judges' conscience.[108] There is also some discussion on the function of judges' conscience as a tool for dealing with so-called "hard cases". In particular, there have been many discussions regarding the latter point, all borrowing from the actively conducted "criticism of legal positivism" in Europe and America, and used to present judges as discoverers of laws, drawn through interpretation, who use judges' Conscience as a tool.

(1) Changing the concept of conscience: theories distinguished from the formal controversial composition between Objective and Subjective Conscience Theories

One of the various discussions of alternative theories is how judges should respond to precedents. Illustratively, Professor Hasebe is at the forefront of this argument. Regarding any judge's attitude towards dealing with "hard cases", Hasebe has said, "each judge should choose from the perspective from which judgment would fit into a form of political morality coherent with the whole legal order."[109]

This theory matches with the reality of the Japanese legal system, which adopts a "subsidiary constitutional adjudication system". Under this system, the Constitution provides a tool to liberate judges from the restraint of fragmentary legal statements and precedents.[110] At certain instances, a

108) *Id*. at 28. Professor Aikyo mainly developed his argument by citing remembrance of those Supreme Court Justices' such as Tokiyasu Huzita or Masami Itou whose former job before a Supreme Court Justice was a scholar.

109) Yasuo Hasebe, Kenpo [Constitutional Law] 416 (6th ed., 2014) (In Japanese).

110) Yasuo Hasebe, *supra* note 101, at 221.

judge shall exercise their "practical reasoning" in the form of conformity with the above-mentioned political morality, in order to derive an interpretation in accordance with the overall legal order. Meanwhile, the "total legal order" that judges' conscience should follow is distinguished from the "subjective conscience" in that it does not originate from the judges' personal morality, as with the "conscience of citizens" described in Article 19 of the Constitution of Japan.

However, as the legal order is still unclear, this leaves no choice but to leave a range of interpretations for judges to try and conclude. On this point, objective conscience theory is differentiated from Hasebe's approach in that objective conscience theory not only sees influencing factors for each judge to follow, but also that individual interpretation of judges should be fundamentally denied, as judges only blindly follow the law. Thus, judges should not project variable personal beliefs onto constitutional issues. However, according to Hasebe, this does not force judges to interpret the law as binding only due to certain laws and precedents. This is because if judges are solely bound by previous precedents or certain laws with inflexible characteristics, this may rather work against the benefit of the overall legal order.[111] For Hasebe, the reference to judges' conscience in Article 76 (3) of the Constitution of Japan is a mechanism that allows judges to make decisions that meet "total law and order" in more complex situations.

Professor Tsunemasa Arikawa, who was influenced by professor Hasebe also makes a similar claim. He argues that the previous discussion over the judges' conscience is nothing but a hypothetical controversy, stemming from a linguistic problem of calling "each judge's firm moral conviction" as "conscience". Arikawa insists upon using "moral conviction" instead of "conscience" in terms of 'something which is incompatible with [the terms] constitution and law". In other words, individual beliefs and judges' conscience are two separate matters.

In addition, perhaps the most problematic point when it comes to the interpretation of Article 76 (3) of the Constitution of Japan is how a judge should handle their moral conviction during the process of judgments

111) *Id*. at 211. Hasebe even argued that those implicitly obeying laws would not be judges.

while still being bound by the Constitution and the law. Professor Arikawa interprets the relevant paragraph as a provision stipulating that the moral conviction of an individual judge is bound by constitution and by law when individual judges follow the nature of a case. In other words, it is also a violation of Article 76 (3) of the Constitution of Japan if judges do not follow the conclusion deduced by their conscience, but they rather uncritically follow the legal order. If this is true, conscience is a sincere decision about how to deal with legal dilemmas, and to find out what would be the proper resolution when legal order and moral conviction are too incompatible to make a balance.[112)]

The core of this theory is the "conflict of the ego" of individual judges. Judges under Article 76 (3) of the Constitution of Japan are only responsible for "the judge's own thorough self-chastisement" which includes the judge's self-conflict process. In other words, Article 76 (3) of the Constitution of Japan is a provision that orders judges to go through the process of discerning what the law is, and ultimately figuring out how the legal order functions under the law and the Constitution.[113)]

If this were to be reorganized into the world surrounding judges, it can be fractured into the private domain of the individual, the public domain as the professional, and the unique domain of transit that exists between the public and private domains. Thus, Article 76 (3) of the Constitution of Japan is a provision that guarantees and orders each judge to conflict in this area of transit, and to draw conclusions between the private and public domains of the judges themselves.[114)] In other words, his theory suggests that the desirable appearance of a judge's vocational ethics, which could guarantee a "third area of judgment", where a judge can consider matters both as individuals and as professionals, but still do not recognize the right to overwrite existing law and order.[115)] This characteristic is similar to an

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112) Tsunemasa Arikawa, *Saibannkannnosekininntowananika [What is Judges' responsibility]*, 157 Hounosihai 42. 46 (2010) (In Japanese).

113) *Id*. at 42-43.

114) *See* Tsunemasa Arikawa, *"Tsuuka"nosisouka Sanford Rabinsonno Kenporonnri [Philosopher of "transit" Sanford Rabinson's logic of Constitutional Law] in* Kennpouronnsyuu Higuchi Youichisennseikokikinenn [Excursions of Constitutional Law: Celebration of Professor Higuchi Yoichi's Seventeeth Birth] under 689 (Tokiyasu Huzita et al., 2004) (In Japanese).

115) Tsunemasa Arikawa, *ZiyuuwomeguruKenpoutoMinpou [Constitutional Law and Civil*

alternative theory of Professor Hasebe's, which not only admits the "independent area for judges to make decisions", but also believes that the absolute "total law and order" that judges must follow cannot be optional.

On the other hand, Professor Arikawa criticizes the Japanese constitutional academia, which lacks discussion on the individual self-conflict of judges. Some, on the other hand, point out that the problem is not in academia, but is in the judiciary, which has grown bureaucratic, and does not acknowledge judges' self-conflicts.[116] According to this position, as judges are subordinated to precedents, they apply the same conclusions to cases in which have factual background different from those of the referenced precedents.

Among judges, the discussion of former Sapporo High Court chief justice Toshio Yokokawa is in line with this position. In his inauguration speech as chief justice of the Utsunomiya local court, he mentioned that judges require special consideration to protect the trust of the general public in order to realize the rule of law.[117] Through this speech, he emphasized that judges' judgments should never be based on their arbitrary positions. This is understood to mean that the authority to trial is never guaranteed to an arbitrary "normative choice authority". However, emphasizing the absolute nature of norms does not impeccably solve the problems of each individual case which judges encounter. This is due to circumstances such as the increasing complexity of cases, which makes it difficult to identify what constitutes the "total law and order" to be applied to trials.

Yokokawa pointed out in his translation of Gustav Radbruch's *Rechtsphilosophie* that the problem arises due to the concept of law not being something which can be easily examined by empirical methods. In

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Law surrounding Freedom], 646 Hougakusemina 42, 42 (2008) (In Japanese).

116) Kozi Aikyo, "*Saibankannnoryousinn" to Saibannkann—Kenpourironntekikousatsunimukete—[Judges' Conscience and Judge—Along with Constitutional Law's logical Consideration] in* "Kokkatohou"no Syuyoumonndai-Le Salon de thorie constitutionnelle [Main Problems of "Country" and "Law"—The Salon of Constitutional Theory] 300 (Miyoko Tsuzimura et al., 2018) (In Japanese).

117) Toshio Yokokawa, *Saibannkannnoryousinntorinnri—Saibannkanntositenotaikenntozikkan nwokisonisita, Monndaienoapproach- [Conscience of Judge—Approaches to issues based on Experience and Realization as a Judge]*, 487 Juristo 34, 35 (1971) (In Japanese).

addition, Yokokawa believed that, in accordance with Radbruch's comprehension of law, since the law is a cultural reality with a meaning which lends itself to legal values, the problem could only be solved by "deduction" from the super-empirical and absolute-value ideology which Radbruch's methodology in interpretation took.[118] In other words, Yokokawa thought that the law can only be embodied through a judge's deductive interpretation, and that due to its nature, the intervention of judges' subjective interpretation would be inevitable.

Then, the task remains to be on the questions of how to interpret the contents of the objective "total legal order", and how to apply it to specific situations. Judge Yokokawa paid attention to the judge's decision-making process of excluding arbitrariness while deliberating conscience in the course of a trial; this whole decision-making process of a judge is nicknamed as the so-called "one-cushion".[119]

This is done to exclude the possibility of arbitrary decision-making of judges within trials, saying that at least "arbitrariness" should not be involved in the conclusion that the judge finally made after conducting the trial. According to Yokokawa, it is impossible to completely rule out judges' usual thoughts—or their subjective conscience as a general individual—because judges are also under the limits of human beings.[120] In particular, this is a proposition that cannot be achieved by a local court judge who has to confirm even the most basic concrete facts amid numerous cases, and the most ambiguous of legal provisions.[121] Nonetheless, judges have the opportunity to rectify their thoughts on what would be an objectively

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118) Gustav Radbruch, Houtetsugakuno Konnponnmonndai (Rechtsphilosophie) [The Basics of Jurisprudence] 44, 45 (Toshio Yokokawa, 1952) (In Japanese).

119) Toshio Yokokawa, SaibanntoSaibannkann-Taikennnimotozukusisakutotannsaku [Trial and Judge—Contemplation and Exploration Based on Experience] 195 (1973) (In Japanese).

120) Toshio Yokokawa, *supra* note 117, at 38.

121) Taro Kogayu, *Minnpouzyounoippannzyoukoutoyoukennzizitsuronn [General provisions and requirements of fact in civil law] in* YoukennzizitsuronntoMinnpougakunoTaiwa [Conversation between Requirements Factualism and Civil Law] 102-103 (Tadasi Ootsuka et al., 2005) (In Japanese).

According to Kogayu there are a lot of situations that each judge should face, and it prominently appears when it comes to the problem of general provision (*Generalklausel*) in civil law (*Id*. at 104.).

existing law in the course of litigation, and as a result, they approach the "total legal order" in the absence of arbitrariness, and make a judgments according to it. Yokokawa's theory could be appraised as being similar to professor Hasebe's, since it not only affirms the "scope of a judge's independent judgment", but it also comprehends that the absolute "total legal order" is already a given, and judges' interpretation processes gravitate towards this order.

To sum up, the alternative theory, led by professor Hasebe, regarding mainly a discussion of the role of judges, can be interpreted as not only "'recognizing the absoluteness of the law itself, but also acknowledging the judge's room for interpretation". In this state, judges' conscience is prominent when a judge encounters a hard case. Judges will be guaranteed to have room for construction on new problems that are difficult to solve, though only in accordance with previous precedents and positive laws, so that they can meet the actual "total legal order". This is a new form of interpretation regarding judges' conscience, made during a time when hard cases are both increased and diversified due to the growing complexity of society.

(2) Theory seeking to guarantee a judge's jurisdiction in accordance with their role: mainly regarding the "Theory of Privilege (Tokkennsetsu)"[122)]

The various theories discussed above presuppose that, in accordance with the provision of Article 76 (3) of the Constitution of Japan, "judges must comply with their consciences", or else that, "the judge should follow their own conscience". This means that the clause should be interpreted as an obligation to the judge. However, the theory of privilege asserts that this paragraph does not have to be considered as an imposition on the duty to judges. The judge is a public official, but unlike other administrations' officials, their privileges are guaranteed under Article 78, Article 80 (2), and Article 76 (3) of the Constitution of Japan. The theory of privilege cites Tatsukichi Minobe's—a prominent figure in the academia of post-war Japanese public law—interpretation of how judicial independence is unique; "unlike administrative officials, judges are not obliged to obey the

122) If there is no other additional explanation then see Shigeru Minamino, *supra* note 56, at 385. This theory is pronounced as *Tokkensetsu* in Japanese.

orders of their superiors and are allowed to exercise their authority".[123] In other words, while the Constitution did not give other public officials the authority to exercise their duties according to their conscience, judges were guaranteed the privilege of the "freedom of invoking conscience" under Article 76 (3) of the Japanese Constitution.[124]

The theory of privilege presents two main benefits. One is the benefit of the concept of conscience given to judges as a privilege for cases of law interpretation disputes. In cases of disputes over the interpretation of the statute, the interpretation itself is left largely under the jurisdiction of the judge. As such, it could be said that the Constitution gives judges the privilege of trial according to the judges' conscience whenever a law interpretation dispute occurs.

The second is a set of policy-based practical benefits for judicial independence. As mentioned above, discussions on judges' conscience usually appear when a judicial crisis occurs. Professor Minamino, who has previously raised this theory, diagnoses that in the current Japanese judicial system, the inside of the judiciary has faced a crisis over "independence of the judiciary". The reason for this was that the position of the chief judge of the court substantially rose due to the introduction of the rating system.[125] This culminated in the reorganization and strengthening of the command and order system in the judiciary as Supreme Court; especially of the court administration office, being set as the Supreme Court's apex. Furthermore, it also led to the development of a hierarchical system from Supreme Court minister to directors, omnibus judges, and ordinary judges.[126] In other words, the theory of privilege interprets judges' conscience as a privilege given to judges in order to return administratively organized courts into courts without hierarchy, as outlined in professor Minobe's theory of judicial structure. Through this, the theory contains judicial policy-based implications which allow individual judges to stand and to make decisions

123) Tatsukichi Minobe, Nihonnkokukenpogennronn [Theory of Constitution of Japan] 407 (1952) (In Japanese).

124) Shigeru Minamino, *supra* note 70, at 14.

125) Hideo Kazita, *Saibannkanronn-Sihounokikitosaibannkann [Theory of Judge—Judicial Crisis and Judge]*, 469 Juristo 189, 190 (1971) (In Japanese).

126) Nobuyoshi Toshitani, *Genndaisihouseisakunodoukoutoseikaku [Trends and Characteristics of Modern Judicial Policy]*, 42(7) Houritsuzihou 8, 13 (1970) (In Japanese).

independently, free from the pressures from within the judiciary.

An interesting point of this theory is that the comprehension of judges' conscience as prerogative is closely interrelated with the concept of jurisdiction. It cites a case on the National Police Reserve of Japan, in that the "notion of jurisdiction is dealing with specific law-suit cases".[127] By citing this, the theory of privilege highlights that as a judge who should make a self-completed decision on each case, they have no choice but to involve all kinds of conscience that they have available to them. Additionally, at this phase, there would be a possibility that inarticulate conscience, which could not be clearly distinguished as either objective or subjective, might be included.[128] That is, as judges have a duty to create concrete solutions for every case, the constitution grants privilege for judges to use every type of their conscience to fulfill the relevant duties.

IV. Proposal about Suitable Analysis of "Judges' Conscience" in Article 103 of the Korean Constitution: Contemplating the Context of Japan's Discussion about Judges' Conscience

As mentioned above, referring to Japan's discussion about judges' conscience in construction is useful when interpreting Article 103 of the Korean Constitution, due to the unique identity of this concept, while being shared by the constitutions of these two specific countries. Both Korea and Japan have had a similar basic pattern of discussion over judges' conscience, which could be summarized as a dichotomous confrontation pattern. However, Japan's discussion has afforded implications about the construction of judges' conscience in three ways which have not been sufficiently organized in academic circles of Korea. First of all, most Korean scholars still apprehend judges' conscience as a problem of imperativeness,

127) Supreme Court of Japan [S. Ct. J.], 6(9) SAIKO SAIBANSHO MINJI HANREISHU [REPORT OF CIVIL CASES] 783.

128) Shigeru Minamino, *Kenpo · Kennpokaisyaku · Kenpogaku, in* KENNPOUGAKUNOGENNDAITEKI RONNTENN [MODERN CONSTITUTIONAL THEORIES] 5, 6 (SHIGERU MINAMINO ET AL. eds., 2009) (In Japanese).

which is encouraged for judges (*sollen*), rather than as a problem of reality which is a separate concept that could be used as a source of judgment (*sein*). Furthermore, in the case of Japan, unlike Korea, some theories have attempted to comprehend judges' conscience not only as their duty, but as their privilege. Finally, there have been numerous attempts to objectify meaning of judges' conscience and the process of how a judge's conscience works.

1. Characteristics of Judges' Conscience: 'Sollen' or 'Sein'

The discussion of judges' conscience in the past began with an intention to protect judges' independence from various authorities surrounding judges. However, with the increasing complexity of society, the complexity of individual events has increased. "Hard cases" have increased considerably. As a result, it has become more difficult for judges to apply firmly objective and explicit laws to individual cases. Considering this reality, an understanding of what the law is must precede judgment in order to understand judges' conscience. According to judge Yokokawa, a law is not something which was simply designed to deal with certain issues. Rather, a law is a cultural reality which a society possesses, and it is a "general concept, fruitful for providing abilities", which is distinguished from the opposing generality scattered across other highly individual facts. Furthermore, the law is a general concept with "inevitability". Therefore, in order to find out the whole meaning of the law, the method of inductiveness solely integrated with experience cannot solve the problem, whereas requesting the method of deduction from the ultra-experiential and absolute-value perspectives of from past works can.[129)]

This is a point about judges' conscience which was newly discovered in Japan, which is distinguished from the former debate of judges' conscience between objective and subjective conscience theory. Both theories could not depart from a premise that judges' conscience acts as a requirement—*sollen*—that each judge should have.[130)] However, nowadays there has developed

129) Gustav Radbruch, *supra* note 118, at 43, 44.

130) *See* Kitaro Saito, *supra* note 83, at 126; Ryuichi Hirano, *supra* note 71, at 52-53. Even though professor Hirano criticized Shigemitsu Dando's insistence that judges' conscience in

a great deal of support for the notion that judges' conscience is a mere description of an occupational logic which is shown by judges during a trial, which functions independently from duties required by judges. Even Chief justice of the Supreme Court of Japan Kazuto Ishida, who is regarded as a supporter of the objective conscience theory,[131] has admitted that it would be hard for each judge to properly sort conscience in a way that could be used in a trial.[132] This matter has also appeared in the *Suita Silent Prayer* case,[133] as the presiding judge Sasaki mentioned that "the immediate response towards thought criminals (*aberzeugungsverbrechen*) is to answer with the spirit of the law, which is given exclusively to the judge, as an elastic command of indictment".[134]

By citing this kind of discussion in Japan, the greatest benefit gained would be that the judiciary can defend judicial independence, even though they make judgments toward problems where numerous values conflict. As minister Tanaka mentioned, the biggest reason for judges to maintain objective consciences is that it could make them guarantee judicial independence from various forces in society, by asserting there would be no other consideration except for that of the legal perspective. However, this has become impossible due to the sky-rocketed of complex, so-called "hard cases". Therefore, by comprehending judges' conscience as a mere fact that is active during any trial, rather than as a requirement upon judges, the judiciary can overcome the pressure of various forces in society which are disguised as demands for judges' conscience. Furthermore, by citing this assertion, a discussion of judges' conscience could overcome the

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Article 76 (3) of the Constitution of Japan means a requirement requested for judges, there would be no difference between both. Because Hirano also comprehends judges' conscience required for judges as individual human beings.

131) Shigeru Minamino, *supra* note 70, at 18.

132) *Meikakunakyousannsyugisyanado Saibannkannnihamukanu Ishida Saikousai Tyoukannga Kennkai [Definite communist and the others cannot be judges-opinion of Chief Justice of the Supreme Court of Japan Kazuto Ishida]*, Asahi Shinbun, May 3, 1970 (*Syouwa 45*), at A1.

133) *Suita Silent prayer* case is an incident that occurred at Osaka District Court. For details of this case see Gyeong-ok Choi, *Ilbonui gukjeongjosagwongwa sabeopgwonui dongnip—Urawamichiko sageongwa Suitamokutou sageoneul jungsimeuro—[Investigate power of parliament in Japan and independence of judicial branch—mainly about case Urawamichiko and Suitamoktou]*, 11(3) Study of Constitutional Law 79, 89 (2005) (In Korean).

134) Yukitoki Takikawa, *supra* note 12, at 133-134.

former argument that judges' conscience is a meaningless or unnecessary clause that should be removed. Considering some theories raised in Korea still describe it as a requirement, though they seem to concede the inevitability of inpouring of judges' conscience at trial, it would be meaningful to refer to Japan's discussions of defining judges' conscience as a description of an occupational logic rather than a requirement.

2. Characteristics of Judges' Conscience: Prerogative Rather than Duty

As the presence of a particular fact doesn't inevitably result in normativity, despite the practical necessity of judges' conscience in the trial process, the status of judges' constitution might be questionable.[135] Professor Minamino answers this question by interpreting the judges' conscience as a clause that grants prerogatives to judges. He admitted that judges' conscience would most likely give judges certain choices within the boundaries of the Constitution and of the law. Furthermore, Minamino has even asserted that in some cases, when the boundaries granted by legislation are uncertain, there even might be a possibility for judges to make judgments against that specific legislation.[136]

Although the objective conscience theorist Kouzi Sato has supported a similar position to that of Minamino, Sato more broadly asserts that the Constitution of Japan entrusted an assignment for judges to interpret each law certainly by their own vocational self-consciousness, due to the influence of experience under Meiji Constitution (Meiji Kenpo) toward legislature of the new Constitution of Japan. Sato also asserted that the law which judges should be bound by is not only a form of legislation, but includes rules, order, regulations, ordinance, and even customary laws, each of which have objective meanings.[137] While Sato has described judges' legal interpretation processes as an assignment, the position would have

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135) Amy Coney Barrett who is the current justice of the Supreme Court of the U.S. also discussed the same problems. She answered this question that it wouldn't be a problem for judges of the Supreme Court to mobilize their personal conscience since it would be already included in voters' consideration of casting ballots (*See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement* 91 Tex. L. Rev. 1711, 1727 (2012-2013).).

136) Shigeru Minamino, *supra* note 128, at 5, 11.

137) Kouzi Sato, *supra* note 63, at 328.

little difference from that of Minamino, since a judge is, in both cases, the one who virtually chooses what defines objective law. Since Sato has enlarged the scope of objective law, in that each judge should take have a source of their decision by imposing a concept of judges' conscience, conscience itself has practically become a favor that judges can invoke during the process of trial.

The description of judges' conscience as judges' prerogative is also seen from the later work of professor Shigemtisu Dando. Professor Dando has asserted that even though objective conscience theory is preferable for the judicial system, the wording of judges' conscience in the Constitution of Japan still hinders ruling out entirely the shadow of judges' subjective conscience in the trial process. According to him, unlike Meiji Constitution (Meiji Kenpo—Constitution of Japan before WWII) which emphasized the independence of the judiciary as a whole, the current Constitution of Japan mainly considers each judge individually. In other words, judges' conscience prescribed in the constitution could also be comprehended as premises of the individual characteristics of each judge.[138] Therefore, by guaranteeing judges' conscience, room is made for each judge to mingle some substantive conscience into the phase of a trial, and this opportunity could be comprehended as being judges' prerogative.

3. Objectification of Judges' Conscience: Signification and Actualization of a Process

1) Objectification of judges' conscience in terms of signification

In Japan, there were also numerous attempts to objectify what judges' conscience is. The main approaches are divided into two methods, which could be distinguished as a problem of terminology, or as a problem of process. First, in the case of terminology, professor Kobayashi has tried to objectify judges' conscience by interpreting it as conscience which has a frame. Even though this theory's goal is to bind judges' conscience within the category of objective conscience, it is still meaningful, since there was a concrete attempt made to exteriorize the meaning and substance of judges'

138) Shigemitsu Dando, *supra* note 93, at 14.

conscience. Judge Yokokawa also tried to clarify the construction of judges' conscience by citing Radbruch's opinion regarding the essence of the law. According to Yokokawa, as Radbruch strictly distinguishes reality from values, it would be important to understand that Radbruch explained the law itself as being a "cultural reality", and not a "value". Since the law is a reality of culture, Yokokawa pointed out the inevitability of preconceptions over the cultural community where a specific law operates. That is, judges' conscience cannot abide inside of legal circles, since it cannot be isolated from the viewpoints of the general public, which are a great part of each cultural community.[139)]

Professor Kogayu, who tried to establish the substance of judges' conscience in civil cases, also tried to objectify it by considering a proper way of making concrete solutions of each case according to the case's characteristics.[140)] That is, each judge could make judgments which diverged from precedents by exercising judges' conscience as a prerogative, and at this phase, what judges should do is to consider characteristics of a particular case in the context of that specific cultural community. Though he proposed a virtual concept named the "convention of lawyers", where this consideration is made, the theory still also contributed to the clarification of judges' conscience. This is true as it not only defined the conscience as a thing which is mobilized within the context of society as a cultural community, and not something simply formed within legal circles.

Professor Hasebe has also tried to clarify the meaning of judges' conscience. He asserted that judges are not machines, and laws are cultural entities which cannot be interpreted as simple summations of matters. Thus, it is not desirable to completely exclude judges' individual discretions. What is important is to ensure that a judge's judgment is 'bound by the constitution and by the law' through the continuous concerns of individual judges. Based on legal recognition organized through the experience of a judge's thinking process, individual judges will form a more general judges' conscience to deductively interpret the law in accordance with a total legal order. This definition is mostly in line with the

139) Gustav Radbruch, *supra* note 118, at 47.

140) Taro Kogayu, Minnpougakuno Yukue [Whereabouts of Civil Law] 152 (1st ed., 2008) (In Japanese).

judges' conscience required by Article 103 of the Constitution of Korea, and Article 76 (3) of the Constitution of Japan, based on the ideology of the rule of law. Utilizing such a conscience as a judge, judges can also meet constitutional demands for specific validity and fairness in the so-called "hard case".

2) Objectification of the process: how is a judge's conscience mobilized within a trial?

There have been many discussions in Japan which have attempted to clarify how judges' conscience could be mobilized within trials. These discussions also addressed which organization system of the judicial branch would be better to fully guarantee judges' conscience. Among them, in the case of the discussion over the trial process, professor Arikawa showed a meaningful opinion. He invented the concept of a domain as "transit", where judges could mediate their personal consciences and logics, as well as vocational consciences. By providing an explanation on the process of how judges' conscience mobilizes, the discussion could contribute to the guaranteeing of judges for mobilizing their consciences, since a transparent chance for verification was granted for outside of legal circles. Considering that most of the discredit towards legal circles, and considering how the trial process is viewed in relation to the opacity of its process, an attempt to clarify the process can also recover trust on judges' conscience from the general public.

Furthermore, there have been numerous systematic attempts made to encourage judges to mobilize their consciences efficiently within trials. For judges, it would take a great deal of experience and training to become this kind of judge, and judicial policy-level considerations and efforts would also be essential. To satisfy this necessity, Japan abolished the assistant judge system, and tried to impose a unitary system of lawyers which could be evaluated as part of its judicial policy-level efforts to implement the constitutional provisions of judges' conscience more practically.[141] Furthermore, in Japan, an attempt has been made to nurture lawyers who

141) Naoto Katagiri, *Kenpougakukaramitasaikousaibannsyosaibannkann(7): hounosihainologistics—Kouiti Yaguti—[Supreme Court Justices seen from view of academics of Constitutional Law: Logistics of rule of law]*, 87(11) Houritsuzihou 142, 147 (2015) (In Japanese).

can deduce the meaning of the law by considering many broader aspects of society.In particular, the introduction of the law school system was an expected attempt towards this goal. The Japanese government tried to foster legal professionals who could make legal judgments while considering various characteristics of society by imposing a duty of effort for each school to fill at least 30% of the law school's total quota with students who majored in fields other than law, or with those who already had practical experience.[142] Those attempts in Japan are forms of institutional support for judges' conscience to be formed transparently and fairly. Such a conscience is the intended to be mobilized in interpreting the law as a cultural reality.

4. Implication for the Construction of Judges' Conscience in Constitution of Korea Article 103: Referring to the Discussions Made in Japan

By citing Japan's discussions as mentioned above, this essay has found that judges' conscience stipulated in Article 103 of the Korean Constitution may be comprehended as existing facts within a trial process, which can appear in the form of judges mobilizing conscience as their own prerogative. In addition, there is a possibility for the conscience of a judge to be clarified in not only the sense of meaning, but also in how it would be formed or mobilized within a trial.

Furthermore, an interesting point of discussion made in Japan was one very similar to that of Dworkin's perspective on law and judges. Therefore, it might be misunderstood that the point is very much so similar to the criticisms against the Japanese majority opinions, such as the institutional morality theory. Yet, it is slightly different in two ways. Firstly, it is much better clarified, and sticks to a firm criterion, in contrast to Dworkin. Dworkin asserts that since judges' status over law is analogous to novelists writing a communal chain of novels, each judge who will interpret the law will add their own interpretations based on their interpretations of customary comprehension of the law.[143] That is, it would be limited to say

142) Chang-rok Kim, *Hangukgwa ilboneseoui 'roseukul' nonui [Debates on 'Law School' in Korea and Japan]*, 48(1) Pusan L. R. 53, 65 (2007) (In Korean).

143) Ronald M. Dworkin, Law's Empire 228-229 (9th ed., 1986).

that there is a strict criterion for legal interpretations, since judges' discretion is entirely guaranteed. However, in the case of the ongoing Japanese discussion, even though it might be uncertain, there is still a certain form of law which each judge should conform to. Judges cannot decide alone upon the substance or interpretation which they follow. Rather, they should contemplate social self-awareness—which could be translated as *kuuki* in Japanese—as part of the construction of law. Because the law is a "cultural reality" of a specific cultural community or society, it may be deduced from those criteria in order to solve particular cases. A judge could invoke judges' conscience when considering the specific nature of each case, and this will lead judges to making specific interpretations of laws suitable to be applied in specific cases through deduction. Still, the position can be distinguished from Dworkin's chain of novels analogy, as it is not a creative interpretation that denies the presence of law as an absolute being,[144] but is rather a deepening of the construction of the law as an absolute being.

Secondly, the current context of judges' conscience in Japan is different from that of Dworkin, since the directions of the logical process are opposite between the two of them. In fact, this feature is related to the first and foremost feature of the current discussion in Japan. According to Dworkin, legal principle lies in a sense of appropriateness developed within the profession and by the public over time.[145] This means that the logical process would be that of induction, which means an aggregation of all types of legal principles and cases. However, the current discussion on judges' conscience in Japan focuses on the logical processes by which each judge can build specific legal principles via a process of deduction from the law as a cultural reality. That is, unlike Dworkin, whose logical process of legal principle comes from synthesizing each case, many current theories or developing theories in Japan have a logical process of deduction itself. This means that absolute criteria exist beyond the synthesization of simple aspects, and the reference to judges' conscience in the constitution is an assurance and authorization for each judge to mobilize their consciences in order to extract the "spirit of law," which can be applied uniquely to

144) *Id.* at 231.

145) Ronald M. Dworkin, *supra* note 38, at 40-41.

individual cases.

In fact, a group of expert advisors who attended a conference on the fifth amendment of the Korean Constitution have already asserted similar intents about judges' conscience discussed in Japan up until today. For example, Young-sup Lee asserted that ensuring the right of judicial review for each judge is required to protect the separation of powers, and judges' conscience is vitally important to realizing this right.[146] Additionally, Jik-soo Shin argued that the right of judicial review could be assigned to the judicial branch under the premise that judges could make judgments by their consciences, which already embody the spirit of law, since it is directly linked to the reality of the trial.[147] In this sense, when judges' conscience is first introduced in the Korean Constitution, there existed the comprehension that it would function as a prerogative for judges who have no choice but to mobilize their consciences within trials. What is more, there was an attempt made to identify it as a tool to invoke the spirit of law in specific cases; usually in judicial review cases. However, initial legislative intent has vanished, and judges' conscience is still comprehended as a requirement for judges, and an inductive synthesization of all cases. This is the reason why the revision of Japan's discussions on judges' conscience is still desirable.

V. Concluding Remarks

Today, the judiciary is facing a new kind of crisis. In particular: the increase in the number of cases, a concern over the intensification of bureaucratization of the trial process due to the need for a more systematic judiciary, and intensification of the complexity of new cases. There have also has been a number of criticisms made, usually from political circles, which suggest that the judicial branch is biased to a specific political party. Various controversies surrounding the judiciary show that this crisis is becoming chronic. Nowadays, courts can no longer be made with only homogeneous members, as they had been the case in the past. The judiciary

146) The National Assembly of the Republic of Korea, *supra* note 13, at 380.

147) *Id*. at 402.

has had no choice but to respond to the demands of the era, while trying to maintain not only the fairness of trials, but also the outward appearance of fairness.

Furthermore, the situation has not been kind to the judiciary. Above all, a serious problem has developed in how to coordinate sharply conflicting values from the judiciary's point of view, as a judge cannot neglect demands for either legal stability or objectivity. This essay intends to show that a solution to this problem is discoverable by examining various interpretations of judges' conscience, especially by reviewing various debates from Japan. When judges are guaranteed a wider area of judgment, away from relying only unmalleable laws, the judiciary can finally find a proper way to confront various values, and judges' conscience would be the constitutional opportunity for granting discretion to the judiciary.

As judicial dependence intensifies around the globe, the scope of judges' judgment has expanded. Nevertheless, Korea and Japan are the only countries that directly refer to judges' conscience within their constitutions. This is also why the interpretation of the Japanese Constitution, the provision of which is similar to that of Korea, should be considered in research of the interpretation of the judges' conscience. At the same time, the fact that Japan has already experienced the judicial crisis and many other historical incidents about the judicial branch that Korea's judiciary is currently experiencing is also a significant reason for referring to the interpretation of the relevant provisions of the Japanese Constitution.

In both Japan and Korea, the orthodoxy is still that of an objective conscience theory. However, while still maintaining that the objectivity of the judiciary cannot be waived, many changes have already been detected in Japan over its conventional position. Under the supposition that a legal and objective conscience in a pure sense without human subjectivity would no longer be possible, there is an assumption which stresses conscience as a professional matter, such as one's conscience as a lawyer, or the attempts which judges endeavor to undertake themselves in order to suppress their subjective bias. This concern leads to the conclusion that judges who detect and apply "legal principles inherent in socially formed moral law" rather than "judges who judge according to the given law" conform to the ideals of a desirable judge.[148)]

Despite this similarity, there are three aspects of the debate that are only

made in Japan which could be helpful for the construction of judges' conscience in the Korean Constitution. They are the distinctions between duty or the description as existence, as well as a differentiation between prerogative and requirement. There is finally the embodiment of the meaning of judges' conscience and process, and of how they could be formed. An interesting point is that even though the "alternative theories" and the "former theories (objective and subjective conscience theories)" of Japan had a competitive relationship, there are still some points when they are interrelated. By embracing those theories made in Japan, the biggest benefit would be to guarantee judicial independence not only from reproach from a political world, but also from the pressures of the judicial branch.

Augmentation of necessity for each judge to intervene deeply in a particular affair has increased the risk that the independence of each judge might be intruded on. Therefore, judges' conscience should be comprehended as a 'prerogative' granted for judges to guarantee judicial independence. Considering the point that attempts to suppress each judge not only happens from the exterior of the judiciary, but also from the judiciary itself, and the other being that Constitution of both Korea and Japan mainly concentrate on each judge, rather than the judiciary as a whole in sense of judicial independence, comprehending judges' conscience as their prerogative would be much suitable for interpretation of this concept.

Room of interpretation should be guaranteed as discretion, but not as a requirement for judges since space with a duty might hinder judges to actively solve cases assigned to them. Article 103 of the Constitution of Korea provides judges with the possibility of such discretion. A judge should be able to find various ways to solve the case given to him. Of course, ultimately that groping should not significantly be deviated from the framework of "constitution and law". But by hanging between the grey zone, judges can realize both substantial and legal justice, which will provide a clue to the solution to the problems that our judiciary is facing today. What is more, to make judges be protected from many aspects of

148) Kozi Aikyo, *supra* note 100, at 26, 27.

social pressure judges' conscience should work as a prerogative or a mere statement of the reality of the court rather than as a requirement.