THE JUDICIARY: ITS ORGANIZATION AND STATUS IN THE PARLIAMENTARY SYSTEM

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I

INTRODUCTION

The Constitution of Japan, which became effective on May 3, 1947, drastically reformed the Japanese judicial system.¹ For the first time in the history of Japan, its constitution recognized the principle of separation of powers between the various branches of government. The 1947 Constitution conferred legislative powers on the Diet, placed executive power in the Cabinet, and granted judicial power to the Supreme Court and those inferior courts created by law. The new Constitution gave, also for the first time, exclusive jurisdiction over all legal disputes to the judicial system and empowered the courts to determine the constitutionality of any law, order, regulation, or official government act.

This article examines the role of the Japanese judiciary and its status within Japan's parliamentary system. The article begins with a review of the history of the Japanese judicial system. It then examines the organization of Japan's courts and their respective jurisdictions. Next, its focus shifts to Japan's judges and the process of judicial selection. Finally, the article discusses judicial appointment and its effect on judicial independence. The relationship between appointment and independence is very important because the power of reappointment places certain limitations on judicial independence in Japan.

II

THE JUDICIAL SYSTEM BEFORE THE 1947 CONSTITUTION

Until 1868, Japan was a feudal system governed by the Tokugawa Shogunate. The emperor was a powerless monarch. The Shogunate

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1. In establishing an independent judiciary and a bill of rights, the Constitution introduced new legal concepts that required the creation of new ideographic compounds in the Japanese language to express them. Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS 405, 431 (L. Henkin & A. Rosenthal eds. 1990) (citing Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 1006-07 (1956)); T. McNelly, *Domestic and International Influences on Constitutional Division in Japan 1945-1946*, at 193-94 (Ph.D. dissertation, Columbia University (1952)).

administered a legal system founded on the codification of customary laws, which emphasized consciousness of social status.² There was no distinct line between administrative and judicial functions. Confucianism was adopted as the official ideology and provided moral ideals on which the hierarchical social relationships of Japanese feudalism were founded. Customary law supported the existing social order and legislation normally took the form of administrative directives, regulations, or proclamations that dealt with matters concerning the support of feudal regimes. Japanese laws, for the most part, were a means of constraint or enforcement used by government authorities to achieve government purposes and to maintain a strict code of social behavior and relationships among Japanese people.³ A limited judicial system for dispute resolution between private parties existed, but the rights of individuals were not well respected, and people were expected to obey.⁴

The Shogun was the military leader of Japan and delegated all power to lower feudal lords or administrative entities. For example, "the shogun delegated to the senior council (rojo), which delegated to the finance commission (kanjo bugyo), which delegated to the deputy (daikan), who looked to the village headman (nanushi), who looked to the chief of the five-man group (gonin-gumi kashira), who looked to the househead, who controlled the family members."⁵ To criticize or challenge one's superiors in this chain of command was a serious breach of loyalty and piety. One had no legal right to challenge the authority of one's superiors in a court of law. Courts were not clearly distinguished from administrative offices, and these offices could not accept a petition by a Confucian inferior against a superior without the superior's permission.⁶

In 1868, the Meiji Restoration returned the emperor to power, abolished the shogunate, and eventually resulted in modernization of the legal system. The new structure of the government included a powerful executive supported by a strong bureaucracy, a weak legislature, and a developing judiciary.⁷ In 1871, all civil and criminal cases were placed under the jurisdiction of the Ministry of Justice (Shihosho), which organized a national judicial system.⁸ The highest court (Daishin-in) was officially established in 1875 and modeled on the highest judicial court in France (Cour de cassation).⁹ Under the Imperial Japanese (Meiji) Constitution of 1889, Japan adopted a monarchy as its system of government. The Meiji Constitution was

2. SUPREME COURT OF JAPAN, JUSTICE IN JAPAN 31 (1982) [hereinafter JUSTICE]. The early Japanese codes of law were the Bukeshohatto (1615) and the Shoshihatto (1632). *Id.*

3. Y. NODA, INTRODUCTION TO JAPANESE LAW 35, 37 (A. Angelo trans. 1976).

4. H. TANAKA, THE JAPANESE LEGAL SYSTEM 173 (1976).

5. See Henderson, *The Evolution of Tokugawa Law*, in STUDIES IN THE INSTITUTIONAL HISTORY OF EARLY MODERN JAPAN 203-29, 221 (J. Hall & M. Jansen eds. 1968); See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U.L. REV. 339, 343 (1982).

6. See See, *supra* note 5.

7. See Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 5, 16 (A. Von Mehren & A. Taylor eds. 1963) (Takayanagi was assisted by Thomas L. Blakemore).

8. JUSTICE, *supra* note 2, at 33.

9. *Id.* at 34.

patterned after the Prussian constitution and based on the concept of emperor sovereignty.¹⁰ Although the Constitution allocated legislative power to the Diet, administrative power to the Cabinet, and judicial power to the courts, the three powers were simply aspects of imperial sovereignty. They did not involve true separation of powers, with its implied checks and balances.

Under the Meiji Constitution, the emperor held sovereign power, and the Courts, Diet, and Cabinet exercised their power in the name of the emperor. The Diet had the power to enact laws; Cabinet ministers, acting for the emperor, could also issue rules and regulations that had the force and effect of laws. The judicial system established by the Court Organization Law (Saibansho) of 1890 was modeled on the French and German judicial systems. Those systems limited the jurisdiction of judicial courts to civil and criminal matters involving private parties and assigned jurisdiction for administrative cases to separate administrative courts.¹¹ The judiciary was part of the Ministry of Justice and was organized into four levels: the Grand Court of Judicature (Daishin-in), the court of appeals (kosoin), the district courts (chihō saibansho), and the ward courts (ku saibansho). Ward courts were the courts of first instance over small claims and had "exclusive jurisdiction over bankruptcy, land registration, and noncontentious matters related to family law and succession."¹² They were the only courts over which a single judge presided. The district courts were courts of first-instance, general original jurisdiction, and appellate jurisdiction from the ward courts. The courts of appeal were intermediate appellate courts for the district courts. The procedure in the courts of appeal was to retry cases on appeal for an error in law or factfinding. The highest appellate court, the Grand Court of the Judicature, heard appeals from the courts of appeal and, in cases of very great importance, appeals directly from the district courts. Judges were selected for appellate courts from the lower courts. Decisions were always given by the whole court; no dissenting opinions were announced or published.¹³

The judiciary was under the general supervision of the Ministry of Justice. Although judges were supposedly independent from the Ministry in the exercise of their judicial power, the judiciary was organizationally dependent on it. The Ministry of Justice controlled all budgetary and administrative matters of the judiciary, including the appointment, promotion, transfer, supervision, and dismissal of judges and court officials. The Meiji Constitution of 1889 did not provide for judicial independence and

10. See *See, supra* note 5, at 344.

11. MEIJI CONST. art. 61; D. HENDERSON & J. HALEY, *LAW AND LEGAL PROCESS IN JAPAN* 253 (1978).

12. Taniguchi, *The Post-War Court System as Instrument for Social Change*, in *INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY* 20, 21 (G. DeVos ed. 1984).

13. *Id.* "It has been said, however, that when Daishin-in judges disagreed with the court's opinion, they sometimes put their seals upside down on it." Kawashima, *Individualism in Decision-Making in the Supreme Court of Japan*, in *COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST* 103, 119 n.2 (G. Schubert & D. Daneleski eds. 1969) [hereinafter *COMPARATIVE JUDICIAL BEHAVIOR*].

specifically stated that “[j]udicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.”¹⁴ The judiciary had no power to review the constitutionality of legislation passed by the Diet and was bound by all laws. The concept of absolute imperial sovereignty meant that there was no such thing as an unconstitutional law.

Administrative acts of government were beyond judicial review. Judicial courts could not try cases involving a dispute between private citizens and administrative authorities of government.¹⁵ In most instances, a private citizen’s complaint against a government official or agency required submission to the supervising government office for corrective action of a voluntary nature. Special courts, including an administrative court (*gyōsei saibansho*) and a military court, were established in the executive branch of government and had limited jurisdiction to hear appeals from certain administrative actions of government. The administrative court had jurisdiction only over appeals specifically permitted by statute or order.¹⁶ The courts were quasi-judicial administrative agencies, in which retired government officials served as judges.¹⁷ These courts had different procedural rules from ordinary courts, and no appeal could be taken from their decisions.

The authors of the Meiji Constitution did not envision the Japanese judiciary as a strong independent force in governmental decisionmaking. The judiciary had no power or authority to review actions by the executive or legislative branches of the government. A strong motive for the initial establishment of the judiciary was to persuade Western foreign powers to renegotiate their very favorable and unequal treaties with Japan and especially to abandon extraterritorial privileges established by those treaties.¹⁸ Japan restructured its legal system as part of its program to modernize its society and thus to participate on equal terms in the international economic marketplace and political arena.

Between 1870 and 1900, Japan made tremendous strides in modernizing its legal system. The Japanese followed the European models, particularly the French and German. However, Japanese society as a whole had no knowledge of the new European concepts of rights and duties. European legal codes were predicated on a “society in which every individual is presumed free and

14. MEIJI CONST. art. 57; Taniguchi, *supra* note 12, at 20.

15. MEIJI CONST. art. 61.

16. MEIJI CONST. art. 61; D. HENDERSON & J. HALEY, *supra* note 11, at 254.

17. Taniguchi, *supra* note 12, at 21. This was “a system borrowed from France.” *Id.* Cf. the Conseil d’Etat.

18. Taniguchi, *supra* note 12, at 23. As a result of the lack of knowledge about Western law by Tokugawa officials, the treaties that Japan signed with Western nations were extremely prejudicial to Japan’s national interests. In order to protect its independence, Japan sought to establish a system of government strong enough to discourage Western imperialism. To the Japanese, this meant rapid Westernization of Japan’s legal and political systems on the model of European nations and subsequent revision of these disadvantageous treaties. H. TANAKA, *supra* note 4.

One treaty provision negotiated by the Tokugawa Shogunate stands out as particularly unfavorable to Japanese sovereignty. This provision required that all Westerners accused of crimes in Japan be tried in their home countries. D. HENDERSON & J. HALEY, *supra* note 11, at 75-76.

equal with everyone else . . . and where loyal relationships are created by the exercise of an individual's free will."¹⁹ The new Japanese legal system was not meant to interfere with or to alter the morality of the Japanese people. "Even the most progressive [Japanese] intellectuals toward the end of the Edo period expressed this idea, and their motto was 'western techniques, Oriental morality.' "²⁰ This philosophy as put into practice was described by Professor Yosiyuki Noda as follows:

Although Japan succeeded in faithfully imitating the French and German legal (including judicial) systems, its own culture could not help but give an original character to the system that was received. The rapid Europeanization was limited to the field of state law, which dealt with only a small section of Japanese society. Further, it must not be forgotten that the modernized law was put into operation by men (including judges) whose outlook was determined by a peculiar set of geographical and historical factors For though the law can be changed from one day to the next, the men to whom it is applied and those (including judges) who have to apply it in the future cannot be changed that way! Japan was destined to remain a long time subject to social rules that were quite foreign to the received law.²¹

Like any other position in the Japanese government bureaucracy under the old system, judgeships were career jobs. Judges were paid the same salary as other career bureaucrats of the same rank. Judges, like public prosecutors and lawyers, were recruited through a national examination. Through 1936, persons passing the examination could enter private practice immediately without any further training. Candidates for judges and public prosecutors spent an additional eighteen months in training as judicial apprentices. At the end of this supplemental training period, a second examination determined whether these candidates became judges or public prosecutors.²² After 1936, an eighteen-month apprenticeship was made mandatory for all persons seeking admission to the private-practice bar.²³

Newly selected judges received further on the job training as the junior members of collegial courts. Judges could expect gradual promotion to higher courts. Some judges were transferred to administrative positions in the Ministry of Justice, where they served as bureaucrats supervising the judicial system or preparing legislation for the Diet. After several years of service as bureaucrats, these judges were usually transferred back to the courts.²⁴

Public prosecutors were also considered officers of the court. Their role was modeled after the French legal system's procurator (procureur). They were guardians of the social order and the public good. "Procurators not

19. Y. NODA, *supra* note 3, at 58.

20. *Id.* at 60.

21. *Id.* at 58. "The biggest source of friction which ensued from the introduction of a modern legal system in Japan was legal control of family life [A] sense of incompatibility between tradition and the new law remained. One of the expressions of this feeling was the repeatedly expressed doubt cast on the wisdom of solving disputes about domestic relations by way of formal adjudication in courts." H. TANAKA, *supra* note 4, at 455.

22. Taniguchi, *supra* note 12, at 21.

23. *Id.* at 22.

24. *Id.*

The Constitution gives the Diet and Cabinet the power to appoint and reappoint judges. The Diet allocates funds from the national budget for the judiciary and determines the number of judges in the lower courts, but has never openly used this power to influence the judiciary's decisionmaking process. But, as we shall see later, when the ruling party remains in power over decades, the power of appointment and reappointment infringes on the independence of the judiciary and its decisionmaking process.

Article 98 of the new Constitution declares that the Constitution is the "supreme law of the land."²⁹ Article 81 safeguards rights created in the Constitution by providing that the judiciary shall have the power to determine the constitutionality of any law, order, regulation, or official government action when a question concerning its application is raised in a lawsuit.³⁰ Article 76 provides that the judiciary exercises the "whole judicial power."³¹ Judges are independent and bound only by the Constitution and laws enacted pursuant to the Constitution. Unless they are judicially declared mentally or physically incompetent to perform their official duties, judges cannot be removed from their positions except through public impeachment by the Diet.³² No disciplinary action can be administered against a judge by any executive organ or agency.³³ Salaries of Supreme Court and inferior court judges cannot be reduced during their terms of office.³⁴

subconscious, and this subconscious factor plays an important role in the social life of the Japanese people today.

Y. NODA, *supra* note 3, at 38-39. Long-held habits, beliefs, and attitudes are deeply rooted in the life of the Japanese people. *Id.* at 38.

29. 1947 CONST. art. 98.

30. *Id.* art. 81; *see also* D. HENDERSON & J. HALEY, *supra* note 11, at 253.

31. 1947 CONST. art. 76.

32. 1947 CONST. art. 78.

In implementing this important provision, the Judge Impeachment Law establishes an Impeachment Committee consisting of twenty members of the House of Representatives, which performs the function of indictment, while an Impeachment Court of fourteen judges, seven from each House of the Diet, is in charge of the decision. Impeachment trials must be public. Any person may lodge a motion of impeachment with the Committee, which may also take action on its own initiative. Because of the reluctance of the courts to apply for impeachment procedure, a subsequent amendment imposed the duty on the presidents of inferior courts to notify the Chief Justice of the Supreme Court whenever they consider that there is a reason for removal by impeachment of a judge under their jurisdiction. The Chief Justice must then request the committee to institute an indictment for removal. He is also bound to do so if he has arrived at the same conclusion independently of such notification.

Dismissal of judges for physical or mental incompetency, as well as disciplinary punishment in cases where no removal is deemed necessary, remain within the prerogatives of the courts on the basis of the Law Concerning the Status of Judges and other Court Officials. When a judge of the Supreme Court or of a High Court is involved, decision is rendered by the Supreme Court, in all other cases by the High Court of the district in which the judge holds office. Disciplinary punishment may be a reprimand or a nonpenal fine not exceeding 10,000 yen.

Oppler, *The Reform of Japan's Legal and Judicial System under the Occupation*, 24 WASH. L. REV. 290, 311-12 (1949); *see* Judge Impeachment Law, Law No. 137, 1947.

33. 1947 CONST. art. 78.

34. *Id.* arts. 79(5), 80(2).

The Constitution prohibits the establishment of any special administrative court or extraordinary tribunal. It abolishes former administrative courts and delegates all judicial power to the Supreme Court and the lower national courts under its supervision. The Constitution draws a line between law and administration and, for the first time in Japanese history, makes the judiciary autonomous. The Constitution gives the judiciary the power to review the legality and constitutionality of government administrative actions and legislative enactments, and guarantees each citizen's right to have any "legal controversy" resolved by the judiciary.

Article 77 gives rule-making power for judicial administration to the Supreme Court and shifts responsibility for the supervision of the courts and judges from the Ministry of Justice to the Supreme Court.³⁵ The Supreme Court promulgates the rules of practice, procedure, and administration in the judicial system. These rules and regulations also govern matters relating to attorneys, the assignment of judges to specific courts, the appointment and removal of court officials other than judges, and the financial affairs of the judicial system.

In Japan's parliamentary government, the Chief Justice of the Supreme Court has the same stature as the Prime Minister, the Speaker of the House of Representatives, and the President of the House of Councillors. The Chief Justice is designated by the Cabinet and appointed by the emperor. This imperial appointment endows the Chief Justice with a degree of prestige comparable to that enjoyed by the Prime Minister³⁶ and places the judiciary on an equal footing with the legislative and executive offices of government for the first time in the history of Japan.³⁷

IV

ORGANIZATION OF THE JAPANESE JUDICIAL SYSTEM

The Court Organization Law of April 16, 1947,³⁸ went into effect on May 3, 1947, the same day that the new Constitution was promulgated.³⁹ The Court Organization Law implemented Chapter VI, Articles 76-82, of the Constitution, which provided for a completely new structure and role for the judiciary. The new law divided judicial responsibilities among five different courts: the Supreme Court, high courts, district courts, family courts, and summary courts. Judges play the leading role in all civil and criminal litigation. Witnesses are mainly questioned by the judge; there are no juries. Lawyers often refrain from questioning witnesses if they believe their

35. 1947 CONST. art. 77.

36. T. McNELLY, *POLITICS AND GOVERNMENT IN JAPAN* 150 (2d ed. 1972).

37. The Chief Justice's salary is equal to that of the Prime Minister, and the other justices receive a salary equal to that of the other government ministers. J. NOMURA, *JAPAN'S JUDICIAL SYSTEM* 5 (1981).

38. Court Organization Law, Law No. 59, 1947.

39. The 1947 Constitution was formally adopted by the old Imperial Diet in the fall of 1946.

questioning may offend the judge. Upon his own motion, the judge may initiate any investigation that he considers necessary.⁴⁰

It is important to remember that, unlike the United States federal system, the Japanese judiciary is a national court system. The Supreme Court is the head of the judiciary and can, without delegation from a statute enacted by the Diet, promulgate rules to govern the administration of the judiciary throughout Japan. The General Secretariat of the Supreme Court is the judicial bureaucracy that manages the day-to-day operations of the judicial system. Judges are assigned throughout Japan under uniform regulation to achieve the goal of a homogenous judiciary.⁴¹

A. Summary Courts

The 575 summary courts (kan-i saibansho) located throughout Japan have authority to try civil cases not serious enough to warrant a formal trial and involving claims not exceeding 900,000 yen (approximately \$6000); minor criminal cases punishable by fines and short-term imprisonment; and certain designated criminal cases such as theft and embezzlement. Summary courts can impose only fines and terms of imprisonment not exceeding three years. All summary court cases are heard by a single judge. Judgment can be rendered by the single judge or be issued by the court as a summary order. If the summary court judge believes that a longer term of imprisonment is required for the offense committed, the judge must transfer the case to the district court. An appeal of a summary court ruling can be made to a higher court.⁴²

Special proceedings are sometimes used in summary courts before the actual trial of civil and criminal cases. Upon application from a creditor, the summary court judge may issue an order for payment to the debtor without giving the debtor a hearing (tokusoku procedure). In criminal cases, the judge may impose a fine not exceeding 200,000 yen (approximately \$1400) after examining documentary evidence but before the defendant has any type of hearing or trial. In traffic offense cases, the judge may also impose a fine of 200,000 yen after hearing the defendant's statement in open court and examining the documentary evidence. These pre-trial summary proceedings prior to trial do not deprive the debtor or the defendant of the right to demand a trial.⁴³

Approximately 800 judges serve on the summary courts.⁴⁴ Areas of greater population density have more courts and more than one judge.

40. Taniguchi, *supra* note 12, at 23. In criminal cases, the public prosecutor's role was equally as strong in Japan's French-styled preliminary hearing. The judge determined whether a case should be prosecuted only on the basis of evidence presented by the public prosecutor. *Id.* See also George, *Rights of the Criminally Accused*, LAW & CONTEMP. PROBS., Spring 1990, at 71, 76.

41. H. TANAKA, *supra* note 4, at 450.

42. Court Organization Law, art. 33; SUPREME COURT OF JAPAN, OUTLINE OF THE JAPANESE JUDICIAL SYSTEM 8 (1983) [hereinafter OUTLINE].

43. Court Organization Law, art. 33; OUTLINE, *supra* note 42, at 8.

44. JUSTICE, *supra* note 2, at 15.

Special "summary court judges" are selected by a competitive examination for persons such as court clerks, family court investigators, conciliators, and prosecutors' clerks, who have engaged in legal work for many years.⁴⁵ These persons also must be appointed by the Cabinet after nomination by the Supreme Court.⁴⁶

B. The Family Courts

Family courts, created on January 1, 1949, have jurisdiction over all disputes and conflicts arising out of family relationships and having legal significance. A family court is divided into a family division and a juvenile division. The family division handles disputes in family domestic matters through conciliation conducted by a judge and two conciliators. The juvenile division handles cases involving defendants under twenty years of age. In effect, it functions as a special criminal court. Proceedings in the family court are informal and are not open to the public.⁴⁷ When conciliation fails, a more formal procedure (*shimpan*) is conducted by a judge and ends in a decree.

A divorce action may be commenced in a district court only after conciliation proceedings have concluded in the family division. If attempts to reconcile the parties fail, the parties are encouraged to agree on an equitable termination of all aspects of the marriage relationship. If the spouses cannot agree on an equitable termination of the marital relationship, the spouse seeking the divorce may then commence an action for divorce in a district court.⁴⁸

All criminal cases in which the defendant is a juvenile must first be brought in the juvenile division of a family court. After conducting hearings and reviewing the nature of the offense charged and the available evidence, the judge normally sends juveniles to a training school (reformatory), juvenile home, or child guidance center, or places them on probation under the supervision of a probation officer. The judge may also decide that a juvenile over sixteen years of age should be treated as an adult. If this decision is made, the judge transfers the case to the public prosecutor, who initiates a criminal action against the juvenile in district court or summary court.⁴⁹

Family courts and their branch offices are found in the same locations as district courts. Local sub-branch offices are located with the ninety-six summary courts in remote areas of Japan. There are approximately 200 judges, 150 assistant judges, and 1,500 probation officers assigned to the family courts.⁵⁰

45. Court Organization Law, art. 33; Taniguchi, *supra* note 12, at 28.

46. 1947 CONST. art. 80.

47. Court Organization Law, art. 31; Koji *Shimpan Hō* (Domestic Proceedings Law) arts. 9-16, Law No. 15, 1947; *Shōnen Hō* (Juveniles Law), Law No. 168, 1948, art. 3-31; OUTLINE, *supra* note 42, at 7-8.

48. Court Organization Law, art. 31; Domestic Proceedings Law, arts. 9-16; OUTLINE, *supra* note 42, at 7-8.

49. Court Organization Law, art. 31; Juveniles Law, arts. 3-31; OUTLINE, *supra* note 42, at 7-8.

50. OUTLINE, *supra* note 42, at 7.

C. District Courts

The district court is the court of general original jurisdiction for all cases not under the original jurisdiction of another court. The district court also has appellate jurisdiction over appeals from civil judgments in the summary court. Although district court cases are normally heard by one judge, a panel of three judges sits if the case is deemed very important. In practice, the great majority of district court cases are heard by one judge. In appeals of civil judgments from the summary courts, a three-judge panel is mandatory. There are fifty district courts, one in each of Japan's forty-seven prefectural units except for Hokkaido. Because of its large area, Hokkaido has four judicial districts. Each district court has territorial jurisdiction over its particular judicial district. The district courts have 242 branch offices and approximately 870 judges and 460 assistant judges located throughout the judicial districts.⁵¹

When a three-judge panel delivers a judgment, the individual opinions of judges are not published. There are no announced dissenting opinions if the three judges disagree and cannot reach a consensus opinion. If disagreement arises among the judges, a judgment is written based on the areas of agreement of at least two of the judges. However, the judgment is signed by all three judges to provide a consensus decision.⁵²

D. The High Courts

There are eight high courts (*koto saibansho*), located in Tokyo, Fukuoka, Osaka, Nagoya, Sapporo, Takamatsu, Sendai, and Hiroshima. Each high court has its own territorial jurisdiction over a designated part of Japan and has subject matter jurisdiction over appeals from judgments rendered by district courts and family courts and over criminal verdicts issued by summary courts. When both parties consent, an appeal from a civil judgment in the summary court may be taken directly to the high court. The high courts have original jurisdiction over election disputes, mandamus proceedings, petitions for habeas corpus, and insurrection cases. The Tokyo High Court has exclusive original jurisdiction to review the decisions of such quasi-judicial agencies as the Fair Trade Commission and the Patent Office.⁵³

The approximately 290 high court judges are appointed by the Cabinet from a list supplied by the Supreme Court. Each high court is supervised by a chief judge (president), who is appointed by the Cabinet and given imperial attestation. High courts in areas of greater population density have more judges assigned to them. High court judges are often assisted by specially assigned district court judges. Most cases in the high court are heard by a three-judge panel. However, insurrection cases and disciplinary actions

51. Court Organization Law, arts. 24-26; JUSTICE, *supra* note 2, at 13; OUTLINE, *supra* note 42, at 6.

52. Court Organization Law, art. 26; J. NOMURA, *supra* note 37, at 7.

53. Court Organization Law, arts. 16-18; JUSTICE, *supra* note 2, at 12; OUTLINE, *supra* note 42, at 6.

against a judge are heard by five-judge panels, as required by law. Like the district court three-judge panels, high court judges render a unanimous consensus decision in favor of the majority vote without any dissenting opinions.⁵⁴

E. The Supreme Court

The Supreme Court is Japan's highest court and is located in Tokyo. The Cabinet appoints fifteen judges to the Supreme Court, and the emperor, after one judge is designated by the Cabinet, appoints him as Chief Justice. These appointments are subject to later review and approval by the voters. At the first general election of the members of the House of Representatives following an appointment, voters can vote for or against an appointee.⁵⁵ If a majority of voters vote against an appointee, the justice is automatically dismissed from the Supreme Court. This electoral review, which occurs every ten years thereafter, was intended to assure democratic control over the Supreme Court judicial appointment process in the newly created independent judiciary. However, no justice has ever been removed from office in this manner, and the Supreme Court has not been involved in partisan politics, presumably because the ruling Liberal Democratic Party's ("LDP") long-standing dominance of Japanese politics has given it a monopoly over the appointment of Supreme Court judges.⁵⁶

Persons appointed to the Supreme Court must have broad vision and extensive knowledge of the law and be at least forty years of age. At least ten of the justices must have served as a judge on the high court, district court, or family court for not less than ten years, or have served as a judge of the summary court, public prosecutor, lawyer, law professor or combination thereof for a period of twenty years or more. Five justices need not have any experience as a judge, lawyer, public prosecutor, or law professor. However, they must be persons of great insight with a knowledge of the law.⁵⁷

There are generally five justices selected from among lower court judges and five justices selected from the practicing bar. The other five justices may be former public prosecutors, law professors, or government bureaucrats. In appointing justices from the practicing bar, "great consideration is given to regional balance."⁵⁸ Seniority and hierarchy also play an important role in the selection process.⁵⁹ Justices selected from the lower courts have usually

54. *Id.*

55. 1947 CONST. art. 79(2).

56. Taniguchi, *supra* note 12, at 24. Votes against sitting justices "have rarely exceeded one percent." *Id.* The most votes ever cast against one judge is 11.05%. T. McNELLY, *supra* note 36, at 181.

57. Court Organization Law, *supra* note 38.

58. Tanaka, *The Appointment of Supreme Court Justices and the Popular Review of Appointments*, 11 LAW IN JAPAN: AN ANNUAL 25, 28 (1978).

59. The "ladders" to the Court are fairly well defined; they are also long, and rungs are seldom skipped. In regard to the judiciary, the first and crucial rung . . . was graduation from the law faculty of Tokyo University[, the most prestigious university in Japan]. Graduation from Tokyo University is probably significant to a judge's rise because of influential school cliques

been president of a high court and have served as the secretary general of the General Secretariat of the Supreme Court.⁶⁰ Justices selected from the practicing bar generally have held the position of president or vice-president of a major bar association.⁶¹ The average age for justices at the time of appointment is sixty-two or sixty-three; they serve until the mandatory retirement age of seventy.⁶²

The Supreme Court hears appeals as a Grand Bench, composed of all fifteen justices, or in one of three Petty Benches. Five justices are assigned to each Petty Bench. If a case presents a question in which a new constitutional ruling or judicial precedent may be forthcoming, it will be transferred to the Grand Bench. The quorum for the Petty Bench is three; the quorum for the Grand Bench is nine. However, at the level of the Grand Bench, a majority of eight justices is needed to declare a law or regulation unconstitutional.⁶³

The Supreme Court, which has a very limited first instance jurisdiction, exercises jurisdiction over appeals from the high courts.⁶⁴ In civil cases, the

(gakubatsu) in the judicial bureaucracy, and the Tokyo cliques apparently have controlled promotions through the years. After graduation from Tokyo University, the typical steps upward are: assistant judge, district judge (a long stay in Tokyo is helpful), high court judge, president of one of the lesser high courts, president of the Tokyo High Court, and finally the Supreme Court. Assignment to the Supreme Court as research official (*chosakan*) (rough equivalent of a U.S. Supreme Court clerk) early in a judge's career is helpful, and selection as president of the Legal Training and Research Institute is even better. Sometimes a president of one of the larger high courts, such as Osaka's, has been appointed to the Supreme Court. Although not every president of the Tokyo High Court has gone to the Supreme Court, when there is a vacancy in the Court the Tokyo High Court president is usually the most visible candidate.

Hierarchy appears also to operate in the appointment of lawyers to the Court. Seven out of the first eight lawyers appointed have been presidents of Tokyo or Osaka bar associations, and the eighth was chairman of an important committee of the Japanese Federation of Lawyers. Japanese lawyers told me that when a lawyer on the Court retires, the presidents of the Tokyo and Osaka bar associations are almost invariably considered; but often, it has been said, they have declined appointment in recent years on the ground that it would entail financial sacrifice, more work, and a less interesting life. Different hierarchical patterns to a position on the Court now seem to be developing such as teaching at the Legal Training and Research Institute, working in the Supreme Court Secretariat, or taking a high court appointment. . . . Graduation from Tokyo University helps a lawyer in his rise to the Court, but it is not a necessity. . . .

And hierarchy appears to be important in the appointment of men of learning and experience. Procurators work their way up their own career ladder and come to the Supreme Court when they reach superintendent procurator-general of a large district, or, as in one case, assistant procurator-general. Law professors, with a single exception, have been members of the most prestigious academic group in Japan—the Tokyo University law faculty. The others have risen high in their professions—the former diplomat to the level of ambassador and the legal bureaucrats to the level of director of legislative bureaus in the Diet. All were graduates of Imperial Universities—thirteen from Tokyo and two from Kyoto.

Danelski, *supra* note 28, at 128-29.

60. "[T]here is a view that the justices who were experienced in the administration of the judicial system prior to their appointment tend to be more flexible and to have more open views, and that it is probably for these very qualities they were selected." Tanaka, *supra* note 58, at 29.

61. *Id.*

62. *Id.*

63. Court Organization Law, arts. 9-10; OUTLINE, *supra* note 42, at 5.

64. The Japanese Supreme Court is the court of first instance for the impeachment of the Commissioner of the National Personnel Authority. The Supreme Court also has the power "to decide by itself an action pending in an inferior court for petition for a writ of habeas corpus, by issuing a writ of certiorari to the court." OUTLINE, *supra* note 42, at 4.

main grounds for appeal are constitutional questions and questions of law. In criminal cases, appeals are limited to constitutional questions and judgments conflicting with prior decisions of the Supreme Court or decisions of other high courts. In civil cases, with the agreement of both parties, an appeal may be taken directly to the Supreme Court from a judgment of the district court. In criminal cases, an appeal may be taken directly to the Supreme Court from a judgment of the district court, family court, or summary court, declaring a law, regulation or ordinance unconstitutional. If an appeal lacks sufficient grounds, it is rejected by decision. This is not considered a judgment by the Supreme Court. However, a Supreme Court ruling by either judgment or decision is considered final.⁶⁵

Hearings before the Supreme Court normally involve the examination of documentary evidence, but sometimes the parties are permitted to make oral statements to the Court. When the Court announces a judgment, it seldom gives its reasoning at that time. The text of the decision is later given to the parties and made available to the public. Unlike the decisions of the district and high courts, the decision clearly reports the opinion of each justice.⁶⁶

To assist the Supreme Court justices in their work, lower court judges are selected as judicial research officials (*saikosaibansho chosakan*). These judicial research officials, under the guidance of the justices, research disputed points of law and report their findings back to the justices. They play a major role in the work of the Supreme Court, which usually has approximately 3,000 civil and criminal cases on its docket.⁶⁷

65. J. NOMURA, *supra* note 37, at 5; OUTLINE, *supra* note 42, at 10-11. The Japanese appellate system provides ample opportunity for parties to use it as a device for delay or for forcing a negotiated settlement. The caseload of the Supreme Court has been described as excessive. *Koso* appeals, which are limited to the court of first appeal and to de novo review, permit parties the freedom to introduce additional evidence. *Jokoku* appeals must be filed shortly after the court of first appeal renders judgment and allow review only for errors of law. *Jokoku* appeals are much more freely allowed to the Japanese Supreme Court than similar appeals to the United States Supreme Court. H. TANAKA, *supra* note 4, at 471, 475.

66. The revised Court Organization Law added the requirement that "[t]he opinion of every Supreme Court justice shall be expressed in written decisions." Court Organization Law, art. 11. This reform was very significant because it was a departure from traditional Japanese culture which requires unanimous decisions and considers individual disagreement with the group undesirable and improper. In the pre-1947 Supreme Court (*Daishin-in*), decisions were unanimous and there was no open dissent. Open dissent with majority decisions was not permitted under the old Court Organization Law. Kawashima, *supra* note 13, at 103-04.

67. OUTLINE, *supra* note 42, at 5. Chosen for their ability, these research assistants are likely to be promoted in the judicial hierarchy after serving four or five years on the Supreme Court.

Unlike law clerks in the U.S. Supreme Court, research officials are not assigned to particular justices. The civil and administrative research officials are assigned cases in the order they are docketed and work with the justices to whom they have been assigned on the same basis. . . . Since cases are also assigned to the justices in sequence according to the order in which they are docketed, each of the research officials has an opportunity to work with each of the justices.

Danelski, *supra* note 28, at 121-22.

As previously stated, the Supreme Court is responsible for administration of the judicial system without any intervention by the Diet or Cabinet.⁶⁸ Nationally, there are more than 20,000 employees other than judges under the supervision of the Supreme Court; they include judicial research officials, court clerks, probation officers, court stenographers, court attendants, court executors, and court secretaries.⁶⁹ In carrying out this administrative function, the Court exercises its rule-making power through the administrative offices of the General Secretariat of the Supreme Court. The Supreme Court also administers the Legal Training and Research Institute (Shiho Kenshusho), the Research and Training Institute for Court Clerks, the Institute for Family Court Probation Officers, and the Supreme Court Library.⁷⁰

V

THE SELECTION OF THE JUDICIARY

A. Supreme Court

The Constitution does not set forth any formal process for the selection of Supreme Court justices (except for the chief justice),⁷¹ and the Court Organization Law does not limit the discretion of the Cabinet in appointing justices. Professor Hideo Tanaka of the University of Tokyo Faculty of Law concluded that the drafters of the Constitution and the Court Organization Law intentionally sought to limit the independence of the judiciary through the Supreme Court justice appointment process.⁷²

In making an appointment to the Supreme Court, the Cabinet consults various sources, including the chief justice. However, there is no legal requirement to seek outside opinions. The Court Organization Law established an Advisory Commission on Judicial Appointments (Saibankan Ninmei Shimon Inkaï) to assist in the selection of the first fifteen Supreme Court justices in 1947, but the Commission was discontinued in 1948. All subsequent attempts to establish a similar commission have failed in the Diet.⁷³

68. The Grand Bench convenes weekly as a judicial assembly to discuss matters of judicial administration, and acts through resolutions that are implemented by the General Secretariat of the Supreme Court. J. NOMURA, *supra* note 37, at 5.

69. OUTLINE, *supra* note 42, at 10-11.

70. JUSTICE, *supra* note 2, at 10.

71. 1947 CONST. art. 6(2).

72. According to Professor Tanaka,

[t]he drafters were aware of the possibility of the development of a "judicial oligarchy" as exemplified in the two hundred year history of the American Constitution during which the Supreme Court, exercising the power of judicial review, on several occasions has for long periods followed old-fashioned views of the Constitution and frustrated measures taken by the legislature and the executive, which represent the people directly.

Tanaka, *supra* note 58, at 25-26.

73. *Id.* at 27. "[D]ue to the reluctance of the Japanese people to reject suggestions coming from outstanding figures of public life, such as the committee members, [the commission] virtually had the effect that the power of appointment shifted from the Cabinet, where it belonged constitutionally, to the Committee." Oppler, *supra* note 32, at 309-10 n.62.

As noted above, in general, five of the fifteen Supreme Court justices have been selected from career judges, five from private attorneys, and five from public prosecutors, law professors, or career civil servants specializing in law-related matters. Career judges appointed to the Supreme Court are normally presidents of a high court at the time of appointment. Consequently, they have been promoted through the ranks of the hierarchical personnel system of the Japanese judiciary in a manner similar to government bureaucrats and similar to the manner of judicial promotion under the Meiji Constitution. Private attorneys appointed to the Supreme Court have traditionally risen through the ranks of the Japanese Bar Association (Nichibenren), or a major practicing attorney bar association, such as Tokyo's or Osaka's, to the position of president or vice-president, symbolizing a general consensus of support by members of the private bar. Public prosecutors appointed to the Supreme Court are usually high-ranking officials of the Ministry of Justice. Law professors are typically appointed from the most prestigious faculties of law, most predominantly the University of Tokyo Faculty of Law. Finally, the small number of civil servant appointees include career diplomats and top officials in agencies or ministries.⁷⁴

This method of judicial selection leads to the appointment of elder statesmen who are near the end of their professional careers. Appointment to the Supreme Court may appear to be a final reward for a long and distinguished career of public service. Some question whether high statesmanship should be a characteristic desirable in a Supreme Court judge.⁷⁵

After a Supreme Court justice is appointed, he is constitutionally subject to a review of his appointment and initial performance at the next general election. The emphasis on sovereignty of the people in the Constitution is the underlying reason why Supreme Court justices must face popular review at the polls. In practice, this popular review system makes removal of justices extremely difficult. The review occurs approximately a year and a half after appointment, at a time when a justice has participated in very few decisions. The voters are little concerned with reviewing Supreme Court justices as compared with electing representatives, and the newly appointed justices have not been on the Court long enough to permit an informed decision as to their attitudes and fitness.⁷⁶ The next popular review ten years later, when a lengthy record of performance exists, has very little significance; the average tenure of a judge from appointment to mandatory retirement at age seventy is currently seven to eight years. Therefore, justices are appointed with the expectation that they will serve for less than ten years. Popular review, then, is more a symbolic gesture of sovereignty of the people than an effective check on the appointment of justices by the Cabinet.⁷⁷

74. H. TANAKA, *supra* note 4, at 693-94.

75. *See id.* at 694.

76. Tanaka, *supra* note 58, at 35-36.

77. Oppler, *supra* note 32, at 310; *see also* TANAKA, *supra* note 4, at 694.

B. Inferior Courts

Legal education in Japan begins with admission to a university law faculty. Unlike American legal education, the study of law in Japan is an undergraduate curriculum; the Japanese law faculties' primary purpose is not to prepare persons to enter the legal profession. Of the four-year university education, approximately two years are spent taking general education courses prior to concentrating on the study of law in the last two years. Students are taught some aspects of case analysis as they study the Japanese legal system and its mixture of civil law, common law, and Japanese tradition.⁷⁸ Students are also given a general background of legal knowledge necessary for a career in business or government. Very few graduates of the faculty of law actually become lawyers or judges.

Those graduates who want to become lawyers, judges or prosecutors must pass the National Legal Examination (Shiho-shiken) and qualify to enter the Legal Training and Research Institute ("LTRI"). Approximately 700 of 35,000 applicants pass the examination, which is given once every year. These trainees receive eight months of classroom instruction at the LTRI and sixteen months of field training during which they perform the same kind of work as judges, prosecutors, and attorneys. From each graduating class, "seventy to eighty [students] become assistant judges, thirty to forty become public prosecutors and the rest become practitioners."⁷⁹ Judicial aspirants are then separated from the other trainees.

They receive intensive training, the rationale being that the judges are a special breed of government servant and require a high caliber of legal professionalism Top students at the institute are often persuaded to become judges. . . .

Since 1972, a newly appointed assistant judge receives job training at the Tokyo District Court and also studies at the Japanese Research and Training Institute ("JRTI") for four months. Under the supervision of a presiding judge, he participates

It is, of course, true that if the judicial branch is swayed by the will of the people in every case, it may not fulfill its role, in particular, the protection of the rights of the minority. However, in consideration of the principle that sovereign power resides in the people, it is also undesirable that the judicial branch be isolated from the will of the people for any long period of time in view of the fact that the Constitution of Japan empowers the courts to review the constitutionality of any legislation enacted by the Diet, whose members are elected by the voters. The Constitution attempts to bring the judicial branch closer to the people through the system of popular review.

In other words, if a deadlock situation arises between the judicial branch and the executive and/or the legislative branch, the popular review system would serve as an "emergency exit." There is a view that, since there is no case of a justice being removed from office by the electorate, the review system is useless. However, this is like saying that since there has been no fire and no one has had to escape by the emergency exit, the emergency exit is useless.

Tanaka, *supra* note 58, at 33.

78. Beer, *Constitutionalism and Rights in Japan and Korea*, in CONSTITUTIONALISM AND RIGHTS 225, 239 (L. Henkin & A. Rosenthal eds. 1990).

79. Taniguchi, *supra* note 12, at 29. The number of lawyers in Japan has not increased greatly since the 1960s. Pro se suits are permitted and deemed necessary in some localities where there are few practicing lawyers. Representation by a lawyer is not required at any level of the Japanese court system. "In view of the fact that a substantial amount of litigation is conducted without participation of lawyers on either side or one side, judges must adapt procedure so that any injustice will not result from it." Taniguchi, *Litigation in Japan* 19-20 (unpublished paper).

in collegiate decision making and assists in analyzing legal issues, the facts of a case, sentencing, and opinion writing. Also, since 1974, an assistant judge of less than five years of service has been assigned to a single bench in order to learn how to read trial records, sort out disputed points, deliberate, and draft a court opinion. However, he does not participate in decision making. . . . An assistant judge after the initial five years, is expected to work as a full judge. . . . At the end of ten years, or approximately at age forty, the assistant judge is up for reappointment and promotion to full judge, and sits on the right side of the presiding judge or sits alone in a one-man court.⁸⁰

This unified training program has improved the quality of the private bar and enhanced unity in the legal profession. There is a much better understanding and mutual respect between the private and public bars, including judges and public prosecutors. This respect and mutual understanding were lacking during the period between 1868 and 1946, when candidates for judges, prosecutors, and private lawyers were trained separately.

Only graduates of the LTRI who pass the final qualifying examination can be appointed assistant judges. Assistant judges, who serve with judges on the district and family courts, can serve only as members of a three-judge panel and cannot render a judgment independently. While in theory a person can also be appointed a full judge after ten years of experience as a public prosecutor, practicing lawyer, or law professor, in practice only assistant judges are made full judges.⁸¹ The retirement age for judges of inferior courts is sixty-five.⁸²

Summary court judges are generally selected from a pool of persons with three or more years' experience as assistant judges, public prosecutors, or practicing lawyers. However, other persons of ability are also eligible for appointment as summary court judges.⁸³ Difficulties in recruiting persons for the lower-paid category of summary court judge forced the Diet to raise the retirement age to seventy years.⁸⁴

The courts in Japan are strained to capacity. Excessive caseloads result from a lack of judges. The number of judges has grown very little since 1890; the ratio of judges to the population has fallen more than two-thirds.⁸⁵ The failure of Japan to provide more judges has been clearly a matter of government policy.⁸⁶

80. H. ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 28-29 (1989).

81. *OUTLINE*, *supra* note 42, at 9. After five years and with the approval of the Supreme Court, an assistant judge can serve in the capacity of a full judge. Taniguchi, *supra* note 12, at 30. "The appointment of practicing lawyers to the bench occurred only in the early post-war period, although the practice is strongly advocated by Japanese bar associations." *Id.* However, this argument is not practical because, except for the Supreme Court and its accompanying prestige, the salaries of judges are substantially lower than the income earned by members of the private bar. *Id.*

82. Court Organization Law, art. 50.

83. *OUTLINE*, *supra* note 42, at 9.

84. Court Organization Law, art. 50; Oppler, *supra* note 32, at 311 n.67.

85. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 381 (1978). See Ohta & Hozumi, *Compromise in the Course of Litigation*, 6 LAW IN JAPAN 97-110 (1973).

86. Haley, *supra* note 85, at 385.

VI

JUDICIAL INDEPENDENCE UNDER THE CONSTITUTION OF 1947

The new Constitution explicitly affirms the independence of the judiciary; its promulgation gave new meaning to the concept of judicial independence in Japan. Article 76(3) provides that “[a]ll judges shall be independent in the exercise of their conscience and shall be bound only by the Constitution and the laws.”⁸⁷ With the separation of the judiciary from the Ministry of Justice, the power and prestige of the public prosecutors diminished as the power and prestige of the judiciary increased. In comparison to other government bureaucrats, the salaries of judges increased dramatically. The public prosecutor’s power to control police was eliminated, and public prosecutors’ offices were no longer housed in the same building as the court.⁸⁸ The public prosecutor’s role was limited to criminal prosecutions before the court.

The judicial career path is very bureaucratic. Judges advance in their careers through promotion by the General Secretariat of the Supreme Court. The ultimate danger with this process is that judges seeking promotion may sacrifice their individual judicial independence by not rendering controversial decisions. In a society that prides itself on consensus decisionmaking, conformity, and homogeneity, this tendency can deter the development of a truly independent judiciary. The Supreme Court, made up of appointees by the Cabinet, has the power to refuse to recommend the appointment of an LRTI graduate to the bench or the reappointment of a judge by the Cabinet at the end of a ten-year term.

The Supreme Court’s power of nomination and the Cabinet’s power of appointment are potentially very strong limitations on true judicial independence; lower court judges are subject to reappointment every ten years. The power to nominate, to promote, and to assign judges to the various judicial districts can be used by the Supreme Court in its administrative capacity to influence the decisionmaking process of lower court judges. Retired Chief Justice Takashi Hattori has described this situation as a

potential conflict between the judge’s independence to decide cases and the Supreme Court’s power of administrative supervision. . . . The generally accepted standard is that, while the Supreme Court is not allowed to order a judge to do or not to do something in connection with a case before him on the pretext of administrative supervision, it may issue general instructions to judges with regard to the disposition of judicial business as a whole. If a judge ignores such instructions, then the Court may take measures appropriate to the situation.⁸⁹

The important point about the power of reappointment is that, unlike judicial impeachment or disciplinary proceedings, no reason need be given

87. 1947 CONST. art. 76(3). This meets the definition of judicial independence set forth by Judge Irving Kaufman, Chief Judge for the United States Court of Appeals for the Second Circuit. He states that judicial independence must be “defined to achieve the essential objective of the separation of powers that justice be rendered without fear or bias, and free of prejudice.” Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 701 (1980).

88. Taniguchi, *supra* note 12, at 29.

89. Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69, 82-83 (1984).

for failing to renominate a judge. Both discipline and impeachment require a legal justification acceptable to the legal process in Japan. The power of reappointment is a much more coercive tool in influencing the behavior of lower court judges. Professor Yosiyuki Noda concludes that the Supreme Court's reappointment power makes judges "obliged to fall in with the opinion of the Supreme Court in the exercise of their functions. That includes falling in with its political standpoint Some, therefore, think that the independence of the lower court judges is more apparent than real."⁹⁰

The reappointment process of lower court judges is not simply a formality; the judge's performance of his duties is reviewed every ten years. "Lower court judges are evaluated partly on the basis of work efficiency of case loads and decisions that can withstand review by a higher court."⁹¹ This review examines the political nature of a judge's decisions and may penalize the judge who tries to be too independent and vote his conscience. Review based on these criteria encourages judges to follow precedent in decisionmaking. The review process may also inhibit the natural development and evolution of the law that might take place if the judiciary were truly independent.

As an example, the Japanese Supreme Court has been reluctant to exercise judicial review of government administrative action. This reluctance may stem from the sense of unity with government or may be a product of the desire to avoid confrontations that may jeopardize the status and prestige of the judiciary. The 1947 Constitution makes the Diet "the highest organ of state power" and gives it the power of investigation into the affairs of state, including the activities of the judiciary.⁹² The Supreme Court continues to honor this Diet's position as the highest organ of state power. However, to be truly independent, the judiciary must confront government agencies when necessary to protect rights guaranteed by the Constitution. Knowing that the Supreme Court is reluctant to exercise judicial review in this area and that the Court has complete discretion in exercising the power of reappointment, lower court judges may be discouraged from exercising judicial review of government administrative acts. But the district court judges have repeatedly held laws and government actions unconstitutional and have been subsequently overruled by a high court or the Supreme Court.

90. Y. NODA, *supra* note 3, at 154.

91. H. ITOH, *supra* note 80, at 274.

92. 1947 CONST. arts. 41, 62. In 1948, the Committee of Legal Matters of the Upper House, relying on this latter constitutional provision, started an investigation into an actual criminal case and published a resolution that the court's finding in the case had been erroneous and the punishment too light. The Supreme Court, by a resolution of the Judicial Conference, promptly countered and criticized the action of the Committee as improperly interfering with the exercise of the judicial power and violating judicial independence. Most academic views and public opinion sided with the Court. Since this happening, known as "The Urawa Incident," there fortunately have been no similar occurrences. The legislature seems to show more self-restraint today. The prevailing academic view is that the investigatory powers of the Diet is only supplementary to the legislative and budgetary powers, and cannot be exercised to oversee the activities of an individual judge in a particular case. Taniguchi, *Japan*, in JUDICIAL INDEPENDENCE 205-16 (S. Shetreet & J. Deschênes eds. 1985).

The General Secretariat of the Supreme Court effectively controls all significant aspects of judicial training and administration, including judicial appointments, assignments, promotions, and dismissals. The General Secretariat has complete control over the LRTI. Administrators appointed by the General Secretariat are responsible for the operation of each court. These administrators working with other members of the General Secretariat's bureaucracy monitor the activities and performance of all lower court judges.

Japanese lower court judges are well protected from direct outside influences in exercising their judicial duties, but these judges may feel pressure from the judicial bureaucracy itself. "The judiciary as an independent organization has become a huge bureaucratic body in which judges are constantly moved and promoted."⁹³ Although judges can be transferred from one court to another only with their consent,⁹⁴ a failure to consent may mean the judge is not recommended for a promotion. "More seriously, the judgment of courts could be affected if a judge thinks a certain decision would be frowned upon by the Supreme Court, and fears his promotion might be retarded."⁹⁵ As long as the judiciary takes the form of a civil service, judges are under some influence from the judicial bureaucracy. This bureaucratic control, to some extent, is necessary to maintain independence of the judiciary from the legislative and executive branches of government under the present constitutional scheme.⁹⁶

Judges' performances are monitored and graded by the judicial bureaucracy. Judges who refuse to emphasize conciliation as a means of clearing cases from their dockets may find themselves assigned to some unimportant administrative post or court. "Compromise may be considered as a deceptive means of attempting to reduce excessive judicial workloads through the simplification of justice instead of adopting fundamental measures to eliminate the judge's heavy burdens, such as increasing the number of judges or reforming court procedures."⁹⁷ In exercising its control of the judicial administration, the General Secretariat through the Supreme Court has refused on very rare occasions to nominate a judge for appointment or reappointment. The undisclosed but suspected reason for the refusals was the judge's leftist political or Communist affiliation.⁹⁸

The end of the American occupation of Japan in 1952 was the start of the revisionist debate on the American-style Constitution. Conservative elements within government and the LDP wanted to revise the Constitution and reintroduce nationalist ideology. Chief Justice Tanaka of the Supreme Court was strongly anticommunist, and his appointment as Chief Justice "coincided with the retirement of liberal judges like Tsuyoshi Mano, Katsushige Kotani,

93. Taniguchi, *supra* note 92, at 215.

94. *Id.*

95. *Id.*

96. *Id.* at 216.

97. See Ohta & Hozumi, *supra* note 85.

98. Taniguchi, *Le Cas Du Japon*, in *LE CONTROLE JURISDICTIONNEL DES LOIS* 175-90 (1986). See H. TANAKA, *supra* note 4, at 558-62.

Shunzo Kobayashi, and Tadaichiro Tanimura who had been appointed by the Socialist Katayama Cabinet in 1947.”⁹⁹ In his 1952 annual New Year’s address to the judicial conference of directors and presidents of lower courts, Justice Tanaka said:

The red imperialism of communism has expanded beyond the place of its origin and started to reveal its ambition to conquer the world Anyone who believes in neutrality must be criticized for his lack of moral belief because goodness, justice and freedom can never be compromised with evil, injustice, and slavery.¹⁰⁰

To counter this anticommunist ideology and to protect the Constitution from the revisionist elements of the extreme right, approximately 270 young lawyers, judges, and professors in 1954 established the Young Lawyers Association or *Seihokyo* (Seinen Horitsu Kyokai). “By 1971, [*Seihokyo*] membership had grown to over 2,150 (1500 lawyers, 230 judges, 170 or more [Japan Research and Training Institute] trainees, 250 scholars and intellectuals).”¹⁰¹ The growth in the *Seihokyo* was reflected in the activist judicial behavior of lower court trial judges who made a series of “antigovernment decisions in cases involving such politically hot issues as public safety ordinances, labor-management disputes, and the United States-Japan security treaty.”¹⁰²

The *Seihokyo* was a prominent organization in the early environmental pollution litigation in Japan. The success of this litigation and its widespread publicity revealed to the LDP and conservative elements of the government bureaucracy the true potential of an independent judiciary in bringing about social change. In the environmental litigation, the judiciary had been sympathetic to the human rights of the pollution victims who were receiving no relief from government agencies or compensation from the offending companies. The pollution victims, after years of failure in seeking relief outside of the judicial process, sought relief in the courts. The courts ruled in favor of the victims and ordered the offending companies to pay damages.¹⁰³ Lawyers who were members of the *Seihokyo* represented the plaintiffs in these environmental cases, and judges who were either members of or sympathetic to *Seihokyo* participated in rendering these decisions.

Chief Justice Tanaka was followed by another anticommunist LDP appointee, Chief Justice Kazuto Ishida, during the late 1960s and early 1970s. In 1970, the Ishida Court took disciplinary action against eight *Seihokyo*-affiliated judges.¹⁰⁴

Between 1970 and 1976, twenty-four trainees were denied appointment to judgeships, of which seventeen were YLA (*Seihokyo*) members. On May 2, 1970, Ishida told the press that a person who was an ultranationalist, nihilist, militarist, or communist was not qualified to be a desirable type of judge, at least as a matter of ethics, and urged

99. H. ITOH, *supra* note 80, at 258.

100. *Id.* (citing H. WADA, SAIKO SAIBANSHO RON (ON THE SUPREME COURT) 217 (1971)).

101. *Id.* at 259.

102. *Id.*

103. See J. NOMURA, *supra* note 37, at 6. See also J. GRESSER, K. FUJIKURA & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 34-37 (1981).

104. H. ITOH, *supra* note 80, at 259.

extremely careful use of judicial review. Ishida apparently had in mind some judges who were affiliated with the leftist-oriented YLA (*Seihokyo*) On June 29, 1970, this remark of Ishida was made the grounds for an impeachment lodged against him by twenty-nine legal scholars and lawyers who complained that his remarks against "ists" threatened judicial freedom of thought and conscience. Also, a petition containing the signatures of 2,208 lawyers demanding Ishida's resignation was submitted to the Supreme Court by a group called the liaison conference to protect judicial independence. Like all previous attempts to impeach justices, this charge against Chief Justice Ishida was dismissed by the Diet impeachment committee.¹⁰⁵

The judicial bureaucracy and other extremely conservative political groups then began an intense campaign to discourage judges from affiliating with *Seihokyo*. Secretary General Kishi of the General Secretariat of the Supreme Court urged judges to maintain a position of strict neutrality and to refrain from letting their courtrooms "become arenas in which political opposition to government policies [was] carried out."¹⁰⁶ The national conference of high, district, and family courts then passed a unanimous resolution that judges should withdraw from membership or affiliation with *Seihokyo*. Judges working in the General Secretariat were advised to give up their affiliation with *Seihokyo*. Ten assistant judges attached to the General Secretariat withdrew from *Seihokyo*.¹⁰⁷ Without issuing any explicit directives, a climate was created in the judicial system which made membership in *Seihokyo* extremely detrimental to a successful career as a judge.

The Ishida Court continued its assault on judicial independence in 1971, when Assistant Judge Yasuaki Miyamoto from the Kumamoto District Court was denied reappointment as a district court judge.¹⁰⁸ The Supreme Court did not nominate Judge Miyamoto, a member of *Seihokyo*, for reappointment. The General Secretariat declared that Judge Miyamoto's membership in *Seihokyo* was not the ground for the Supreme Court's refusal to nominate, but refused to give the judge any reasons for the decision.¹⁰⁹ The Supreme Court was widely criticized for its failure to recommend Judge Miyamoto, and some scholars argued that the Supreme Court's action would discourage the freedom and independence of judges and subordinate the judiciary to the influence of politics.¹¹⁰

Another example of bureaucratic interference in the judicial process involves the "Hiraga Memorandum." Farmers in Hokkaido filed suit in the Sapporo District Court against the Minister of Agriculture and Forestry.¹¹¹ The farmers wanted to halt the construction of a Self-Defense Force military base on forest land under the control of the government. A three-judge panel headed by Chief Judge Shigeo Fukushima heard the arguments in this case.

105. *Id.*; see Taniguchi, *supra* note 92.

106. H. ITOH, *supra* note 80, at 260.

107. *Id.*

108. *Id.* at 261-62; Taniguchi, *supra* note 92; Taniguchi, *supra* note 12, at 30.

109. H. ITOH, *supra* note 80, at 261-62; Taniguchi, *supra* note 92. The Supreme Court has complete discretion in this appointment process, and its decisions are virtually unreviewable by any other branch of government.

110. *Id.*

111. *Ito v. Agricultural Minister*, 712 Hanrei Jihō 26 (Sapporo Dist. Ct., Sept. 7, 1973); see Taniguchi, *supra* note 98, at 179.

During the trial, Kenta Hiraga, director of the Sapporo District Court, sent a memorandum to Judge Fukushima and Assistant Judge Hiroshi Hirata, another member of the three-judge panel. The letter offered "friendly advice from a senior colleague" and suggested that Judges Fukushima and Hirata render a decision in favor of the government. Ignoring this "friendly advice", Judge Fukushima, a member of *Seihokyo*, and Judge Hirata rendered a decision favorable to the farmers which was reversed on appeal to the Sapporo High Court.¹¹²

After he publicly announced his decision in the case, Presiding Judge Fukushima brought the memorandum (from Hiraga) to the attention of his colleagues and the judicial conference of his court. It appears that he held the memorandum in strict confidence until after sealing of the decision. Both the Sapporo District Court and the Supreme Court issued statements regretting that Hiraga exceeded the limit of judicial propriety and brought public doubts upon judicial independence and fairness of a trial. Hiraga was transferred to the Tokyo High Court as a disciplinary measure, a measure which looked more like a promotion than a demotion! The Supreme Court also mildly admonished Judge Fukushima when it stated that "judges should not fall into the error of self-importance, but should always be humble enough to try to build up character and competence by exchanging experience and knowledge among themselves." . . . Meanwhile, a Diet impeachment court was formed upon the petition entered by the Tokyo and Sapporo Bar Associations, and on October 9, 1976, voted no impeachment against Hiraga but deferred judgment upon Fukushima until it would have in its hands all the returns on an inquiry it had sent to over 200 judges whose memberships in YLA (*Seihokyo*) was being made a basis for an impeachment inquiry. The majority of the judges who had received such an inquiry refused to respond by not affirming or denying their membership in the YLA (*Seihokyo*). Subsequently, the committee chairman stated that although his committee would not draw the conclusion that a failure to respond to the inquiry would automatically imply membership in the association if the judges did not respond[,] he would have to undertake other means of investigation. The committee dominated [by] the LDP members proceeded to impeach Fukushima on the charge of having violated judicial propriety in publishing the Hiraga memorandum, but suspended the proceedings against him during good behavior. When the Sapporo High Court responded to the Diet decision with a similar oral reprimand to him, Judge Fukushima submitted his resignation by stating that the court abandoned judicial independence and bowed to political pressure. After persuasion by his friends and colleagues, he withdrew his resignation and retracted the above statement¹¹³

The Hiraga memorandum incident and subsequent political pressure from the conservative right wing of the LDP Diet members prompted the Supreme Court and its General Secretariat to use informal advice to encourage judges to withdraw from membership in or affiliation with *Seihokyo*. As a result of pressure from senior judges and the General Secretariat, many younger judges withdrew from *Seihokyo* membership.

Other reported incidents raise suspicions that indirect pressure from the General Secretariat of the Supreme Court, the Diet, and the Cabinet, dominated by the LDP, might endanger the independence of the judiciary.¹¹⁴

112. H. Itoh, *supra* note 80, at 266-68; see Taniguchi, *supra* note 92, at 215-16.

113. H. Itoh, *supra* note 80, at 266-68.

114. Taniguchi, *supra* note 98, at 179. In 1972, the Supreme Court questioned the reappointment of Judge Konno under the jurisdiction of the Nagoya High Court. This judge was also a *Seihokyo* member. The chief judge of the Nagoya High Court conducted a hearing on the judge who subsequently withdrew his application for reappointment. This information is based primarily

The nomination process operates in such a way that nomination by the Supreme Court is tantamount to appointment as a judge; the number of nominated candidates for judicial appointment typically equals the number of vacancies, and the Cabinet essentially appoints those candidates so nominated.¹¹⁵ However, it is too simplistic to conclude that the Cabinet has no impact on the appointment process. In Japan, it would be a major loss of status and prestige for the Supreme Court if one or more of its judicial nominations were rejected or ignored by the Cabinet. Therefore, the formality of the Cabinet appointment process forces the Supreme Court to nominate persons within a minimally acceptable range of qualifications and political beliefs.¹¹⁶

Despite the pressure for conformity imposed by the Supreme Court, lower court judges tend to be more liberal and more protective of fundamental human rights than Supreme Court justices. There is no doctrine of *stare decisis* in Japan; consequently, court decisions, including those of the Supreme Court, do not constitute binding precedent. Lower court judges have the discretion to render decisions that differ from prior Supreme Court decisions on the same subject.¹¹⁷ However, very few lower court decisions have dramatically differed from prior Supreme Court decisions on the subject. In essence, the judicial reappointment system is a check on judicial independence and apparently has the effect of binding lower court judges to decisions rendered by the Supreme Court. This result is probably an unstated goal of the Supreme Court, which would prefer not to have an unpopular decision made by a lower court, or not to make an unpopular decision in overturning a lower court; such decisions receive too much publicity from the

on research conducted under my supervision by a Japanese LLM student at the Duke University School of Law and on conversations with Japanese attorneys. "In 1987, it was revealed that in December 1983, the Supreme Court had summoned judges involved in some forty flood-related suits in various parts of the country, and told them how it would decide in an upcoming verdict concerning government responsibility for river management." K. VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER* 218 (1989). See also Itoh, *supra* note 80, at 249-79.

115. Y. NODA, *supra* note 3, at 153-54.

116. At the 1970 Constitution Day celebration, Supreme Court Chief Justice Kazuto Ishida said that "those who are extreme militarists, anarchists, or clearly communists, do not make suitable judges" H. ITOH & L. BEER, *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70*, at 17 (1978). This statement implies that someone with extreme views would not be recommended for appointment to the judiciary. However, this situation does not differ greatly from the judicial appointment process in the United States. The difference is in the definition of what constitutes an "extreme viewpoint." Ardent advocacy of women's rights or fundamental human rights may constitute an "extreme viewpoint" in Japan. It is doubtful a Thurgood Marshall-type advocate of civil rights could be nominated to the Japanese Supreme Court.

117. When a Supreme Court decision declares a law unconstitutional, the decision does not mean the elimination of the unconstitutional provision; the Supreme Court's decision is only forwarded to the Diet. The Diet can then amend the law, remove it, or do nothing and leave it in effect. Legally, these decisions of unconstitutionality can be applied only to the parties affected by the decision. "Until the Diet acts, the possibility remains that the same question might again be brought before the Supreme Court." Ukai, *The Significance of the Reception of American Constitutional Institutions and Ideas in Japan*, in *CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE* 120 (L. Beer ed. 1988).

media. This publicity could jeopardize the judiciary's status and prestige gained under the Constitution less than fifty years ago.¹¹⁸

VII

CONCLUSION

To ensure a fair judicial process, judges must exercise their authority independently, bound only by the Constitution and the law, free from unreasonable interference by the executive and legislative branches of government and their superiors within the judicial system. Judicial independence is threatened by the Japanese Supreme Court's bureaucratic control over the promotion and appointment process. The Supreme Court is subject to political pressure because its justices are appointed by the Cabinet and its budget and the number of lower court judges are controlled by the Diet. The Cabinet has had a significant role in shaping the Supreme Court because the LDP has been in almost continuous control of the Cabinet and the appointment process since the Constitution of Japan was put in force in 1947.¹¹⁹ Bar associations criticize what has been called the "bureaucratization" of the Supreme Court and the judiciary.¹²⁰ Although it is a power yet to be exercised, the Cabinet can refuse to appoint or to reappoint lower court judges recommended by the Supreme Court. The power to refuse reappointment is ever-present and may inhibit the entire judiciary from rendering controversial political decisions, particularly decisions adverse to the power and prestige of the LDP and to the maintenance of Japan's national and social order.

During its first thirty years, the Supreme Court frequently resorted to its power of judicial review but only rarely exercised it. Only five decisions were rendered holding an administrative regulation, legal procedure, or Diet legislation unconstitutional.¹²¹ Between 1973 and 1976, the Supreme Court held three statutes unconstitutional, but the sudden exercise of its power of

118. Beer, *Japan's Constitutional System and Its Judicial Interpretation*, 17 LAW IN JAPAN 21 (1984).

119. Professor Yoshiaki Yoshida has written that this appointment process makes it difficult for a Supreme Court to carry out its role as a guardian of human rights in cases posing constitutional challenges or on issues over which a majority of the electorate, Diet, or Cabinet express their dissatisfaction. Y. Yoshida, *Asian Constitutions: Characteristics and Present Situations* 14 (1989) (General Report, International Symposium on Asian Constitutions sponsored by Japan Branch of the International Association of Constitutional Law).

120. Taniguchi, *supra* note 12, at 30.

121. D. HENDERSON & J. HALEY, *supra* note 11, at 255 (citing K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, 29 Minshū 572 (Sup. Ct., G.B., Apr. 30, 1975); Aizawa v. Japan, 27 Keishū 256 (Sup. Ct., G.B., Apr. 14, 1973); Nakamura v. Japan, 16 Keishū 1577 (Sup. Ct., G.B., Nov. 28, 1962); Tomabechi v. Japan, 14 Minshū 1206 (Sup. Ct., G.B., June 8, 1960), 7 Minshū 305 (Sup. Ct., G.B., Apr. 15, 1953); Sakagami v. Japan, 7 Minshū 1562 (Sup. Ct., G.B., Oct. 8, 1953)).

In 1973, the Supreme Court declared a Diet statute unconstitutional for the first time. The Court examined whether Article 200 of the Criminal Code unconstitutionally imposed heavier penalties for committing patricide as opposed to regular homicide. The Supreme Court had addressed this same issue in 1950 and upheld the statute on the ground that such discrimination was quite natural. On reexamination 23 years later, the Court held Article 200 unconstitutional because the heavier penalty for patricide violated Article 4 (equality under the law) of the Constitution. This decision was unpopular with members of the LDP because reverence for lineal ascendants is commonly accepted

judicial review did not start the emergence of an activist judiciary. These decisions have not affected significant social change.¹²² However, the reluctance on the part of the Japanese Supreme Court to exercise the power of judicial review should not be criticized. "Whereas the United States Supreme Court used its power of judicial review to invalidate congressional acts only twice in the first sixty-eight years of existence, the Japanese Supreme Court has held five statutes unconstitutional in only half that time."¹²³

The Japanese Supreme Court has been very conservative in its constitutional interpretation and adjudication. Most scholars attribute this conservative trend to the political dominance in postwar Japan of the LDP and to the Supreme Court appointment process. After the initial appointments, all Supreme Court justices appointed under the Constitution of 1947 were appointed by the leadership of the LDP or its conservative forerunners and, for the most part, reflect the social, economic, cultural, and political values of the party membership.

Japan has been in an era of constitutional government in which strong executive powers have been justified on the grounds that such power is necessary to achieve economic success and to catch up to the prosperity of the western world. Strong executive power often results in suppression of political opposition and limitations on judicial independence as law supports economic development at the expense of civil liberties. The judiciary sacrifices the goal of social justice to protect property rights; it is supported in this by the executive and legislative branches of government.¹²⁴

Many Western scholars put great emphasis on the judicial function and its importance for an understanding of law in society.¹²⁵ Some argue that the judiciary is an instrument of social control and preserves the status quo of the economic elite. If one accepts the premise that there are distinct differences between the roles of judges and legislators, then this argument loses force. The legislature formulates and implements social, economic, and political policies that articulate the values of a democratic society. The judiciary's role is much more limited. Although particular judicial decisions may have a significant social, economic, and political impact, such impact is relatively limited and can be circumvented by the legislature if the decisions are so contrary to prevailing values that they inspire significant opposition. If the decisions merely reflect the prevailing trend, then they serve to accelerate change in that direction. Judges resolve individual disputes with reference to

in Japan; the Diet has yet to amend or delete Article 200. Okudaira, *Some Consideration of the Constitution of Japan*, 29 ANNALS INST. SOC. SCI. 90, 107 (1987).

122. Several decisions have not been followed by the Diet. Two decisions in 1976 and 1985 found that a serious discrepancy between population and the number of allotted seats in the House of Representatives was so great that it was constitutionally impermissible. The Diet has failed to correct this apportionment problem. See Hata, *Malapportionment of Representation in the National Diet*, LAW & CONTEMP. PROBS., Spring 1990, at 35.

123. See, *supra* note 5, at 350.

124. Y. YOSHIDA, *supra* note 119, at 13.

125. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984).

precedent and to social, economic, and political conditions, but the judiciary is simply "incapable of receiving the massive data inputs that are indispensable for broad-gauge social engineering."¹²⁶

The Japanese judiciary is not in a position to be an instrument for social, economic, and political change; instead, it performs the conservative task of preserving basic civil liberties guaranteed by the Constitution and recognized by the Diet and a majority of the Japanese population.

126. Lewis, *The Unbalanced Critical Legal Scholars and Their Overbalanced Critics*, 40 MERCER L. REV. 913, 926 (1989).