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Judicial Review in Japan

Herbert F. Bolz

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Judicial Review In Japan
By Herbert F. Bolz

Table of Contents

I. INTRODUCTION .................................................................................. 88

II. BACKGROUND: The pre-1946 Constitutional Order in Social, Historical, and
    Political Perspective .............................................................. 94

III. POSTWAR DEVELOPMENT OF JUDICIAL AUTHORITY ............. 97

IV. REASONS FOR JUDICIAL RESTRAINT .................................... 103
    A. The Peace Clause ............................................................... 103
    B. Political Factors ............................................................... 113
       1. Conservative Judicial Appointees .................................. 113
       2. Bureaucratic Unity .......................................................... 113
       3. Unitary v. Federal Political Structure .............................. 115
       4. Attempts to Revise the Constitution ................................. 117
    C. Social Attitudes toward Law and Litigation ......................... 119
    D. Characteristics of the Japanese Legal Profession ................. 120
       1. The Private Bar ............................................................. 121
       2. The Judiciary ................................................................. 122
          a. Small Number of Judges ............................................ 122
          b. Trial Scheduling which Prolongs Litigation ................. 123
          c. Civil Law Orientation ................................................ 123
          d. Occupation's Failure to Purge Judiciary ...................... 125
    E. Parliamentary v. Judicial Supremacy .................................... 127
    F. Impediments Inherent in Judicial Organization .................... 128
       1. Supreme Court's Administrative Duties ......................... 128
       2. Requirements of Court Organization Law of 1947 .......... 129
          a. Brief Tenure on Bench .............................................. 129
          b. Unwieldy Number of Justices .................................... 131
          c. Individual Opinions Mandated .................................... 131
       3. Eight Votes Required to Void Statute .............................. 132
       4. Lack of Contempt Power ............................................... 132
       5. Limited Range of Remedies ............................................ 133
       6. Need to Integrate Extensive Code Revisions ..................... 133

V. RECENT INCREASE IN JUDICIAL REVIEW ............................. 133
    A. Stage of Judicial Development ......................................... 133
    B. Recent Cases ................................................................. 134
    C. Changes in the Legal Profession ....................................... 137
       1. The Private Bar ............................................................. 137
       2. The Judiciary ............................................................... 138
    D. Development of Popular Legal Consciousness ..................... 139

VI. CONCLUSION ............................................................... 141

BIBLIOGRAPHICAL NOTE .................................................. 142
Judicial Review in Japan: The Strategy of Restraint

By Herbert F. Bolz*

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I. INTRODUCTION

In 1947 the American military government imposed a new constitution upon the defeated Japanese nation. Stressing indi-

* For valuable comments and suggestions during the preparation of this article, I am grateful to Professors Chalmers Johnson, John W. Poulos, Rudolf P. Schlesinger and Roger W. Traynor. For her patience, support, and help, I thank Mary Kay Bennett Bolz. For capably typing the manuscript, I thank Cynthia Bufkin and Myrl Northway. I also appreciate Kevin Ward's skillful editorial assistance. The author remains, nonetheless, responsible for errors.

In the text, following the traditional East Asian practice, given names of Japanese nationals are placed after family names. In footnotes, for the sake of uniformity, Western usage is followed, with given names (as necessary) placed before family names.

1. The Constitution of Japan, Nihonkoku kempō in Japanese, is also referred to as the Constitution of 1947 (versus the old Constitution of 1889), as the MacArthur Constitution, and as the Peace Constitution. This current Constitution is also termed the Shōwa Constitution after the reign name of the current emperor, whereas the 1889 Constitution—promulgated in the reign of the Meiji Emperor—is often termed the Meiji Constitution. The 1889 document may also be referred to as the Imperial Constitution.


2. Drafted by Americans under the supervision of General Douglas MacArthur, the Supreme Commander for the Allied Powers, the Constitution was promulgated by the Emperor on November 3, 1946, and became effective on May 3, 1947. The document was
Judicial Review in Japan

individual rights and the rule of law, the new constitution departed radically from the collectivist, authoritarian pattern of prewar Japan. Among other innovations, Article 81 of the new constitution explicitly granted a Supreme Court the power of judicial review. This postwar high court, following its establishment in 1947, was initially cautious in its use of judicial review.

The Japanese Supreme Court has helped to preserve the postwar constitution and its own power by this cautious use of judicial review, notably by avoiding the issue of the constitutionality of Japan’s military, the so-called Self-Defense Forces. Anxious to help stabilize the new postwar regime, the judges who staffed the Court in its early years showed great deference to the judgments of Japan’s parliament, the Diet. As the years passed, it became clear that the new government was stable—perhaps overly stable. As the “new men” of the postwar era came to dominate the Court, and as the social order developed in more “democratic” directions, the Court has become more willing to invalidate legislation.

Since 1973, the Court has taken a more active role. Statutes have been declared unconstitutional on five occasions, in 1953,
From its earliest days, the Court has been roundly criticized in some quarters for its "remarkable reluctance" to exercise judicial review. This school of thought is rooted in fundamental misconceptions of Japanese law and society. Such superficial analysis not only overlooks the powerful forces that initially militated against the vigorous exercise of judicial review, but also discourages investigation into the complex causes of the Court’s eventual assumption of a more active role. If one concludes that the Japanese Court—inexplicably disregarding the clear mandate of the Constitution—was remarkably reluctant in the early (pre-1973) years to engage in judicial review, there is the danger of assuming that the justices have now simply resolved to carry out their sworn duties.

The "remarkable reluctance" school of thought stems primarily from two distorted perceptions of Japanese law and society. On the one hand, some Western observers have betrayed ethnocentric bias and have tended to overlook the Japanese environment by evaluating the Court's actions in terms of American judicial standards. On the other hand, many Japanese commentators, caught up in the passionate rearmament debate in Japan, have evaluated the Court's actions from a committed pacifist viewpoint.

The ethnocentric perspective is well-illustrated by a frank comment of General Douglas MacArthur, the postwar military governor of Japan, who oversaw the drafting of the Constitution of 1947. The Japanese, MacArthur stated in 1951, "measured by the standards of modern civilization... would be like a boy of 12 as compared to our development of 45 years. Like any tuitionary period, they were susceptible to following new models, new ideas.


You can implant basic concepts there. They were still close enough to origin to be elastic and acceptable to new concepts."

In 1960, an American professor evaluated how well the Japanese pupils had followed this new idea of judicial review. This scholar noted that the revolutionary American-written Constitution of 1947 had elevated the Japanese Supreme Court to a new position of authority similar to that of the American judiciary.

Armed with the power of judicial review, and for the first time in its history enjoying an independent status, the Court was indeed in a position to become "keeper of the Constitution". However, the results in the first decade leave much to be desired, at least when considered by Western standards. For the most part the Japanese judiciary has approached its newly conferred powers with timidity, with only an occasional lower court ruling or dissenting opinion from a Supreme Court justice to indicate that a revolution has indeed taken place.

In 1972, a Japanese observer, reaching a similar conclusion for different reasons, characterized the Court's conduct as "abstention from judicial review," rather than merely "self-restraint." This observer expressed the fear that if the Court continued to be "subservient" to the Cabinet concerning Article 9, there would be "no constitutional safeguard against the further escalation of our Defense Forces," even including tactical nuclear weapons and conscription.

Also reflecting the continuing debate on the rearmament issue, a Japanese legal scholar noted: "the people hope that the judges will use the independence of their offices and their consciences to protect the constitution and human rights" by declaring unconstitutional the maintenance of military power by Japan. A sympathetic American commentator demanded in 1975 that rather than


16. Id. at 105. Article 9 is set forth in text accompanying note 59 infra.

continuing to avoid the issue of the Japanese military’s constitutionality, the Japanese Supreme Court “must interpret Article 9, the supreme law of the land, if it is to give life and meaning to the Japanese Constitution.”\(^{18}\)

An Australian commentator, relying heavily on one of the Japanese observers just quoted, described the Japanese Supreme Court in 1975 as “remarkably reluctant to exercise with any vigor the power of judicial review conferred by Article 81 of the Constitution.”\(^{19}\)

This article presents a contrasting interpretation of the Japanese Court’s actions, an interpretation that will focus on 1) the significant impediments to the development in Japan of the powerful American style of judicial review and 2) the important influences that have nonetheless, since 1973, gradually resulted in a more active use of judicial review. The thesis of this article is that the Japanese Supreme Court’s restrained use of the power of judicial review has been a rational strategy designed to preserve or to increase the Court’s political power; that viewing the Court in social and political perspective reveals that this restraint has not been “remarkable.”\(^{20}\)

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19. Stockwin, supra note 2, at 183 (emphasis added). Stockwin does not, however, omit the other side of the story, noting elsewhere (at 187) that given the conservative hue of postwar cabinets, it is “perhaps scarcely surprising” that judges appointed by such cabinets would be cautious in exercising judicial review. The fact that Stockwin relied heavily on Okudaira (supra note 18) may help to explain his “remarkably reluctant” statement.

20. This thesis reflects in part the thinking of Chalmers Johnson in Japan: Who Governs? An Essay on the Official Bureaucracy, 2 JOURNAL OF JAPANESE STUDIES 1 (1975). Johnson suggests the need to conceptualize bureaucracy in Japan as a constant contender for power and to avoid the speculative search for answers to bureaucratic preeminence. Professor Michael E. Smith of Boalt Hall, School of Law, University of California, Berkeley, brought to the author’s attention the idea that the historical behavior of the United States Supreme Court is explainable in terms of a drive for political power. Also, study of the shaky beginnings of the American court made the author impatient with undue criticism of the recently established Japanese court.

The author’s thesis is reinforced by the perceptive comments of two analysts of Japanese judicial behavior. Professor David Danelski remarked that restraint in the Japanese court’s early period may have been its best strategy. Danelski, The People and the Court in Japan, FRONTIERS OF JUDICIAL RESEARCH 45, 72 (J. Grossman & J. Tennenhaus ed. 1969). Professor John O. Haley noted that until the 1975 decision cited in note 10, supra, the Japanese Supreme Court had exercised its power with manifest caution, effectively avoiding political risk even when invalidating statutes, “perhaps rightly” declining nearly always to overturn legislative enactments. Haley, The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion—K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, 8 LAW IN JAPAN 188, 188-89 (1975).
Following this Section introducing the controversy over the role of the Japanese Supreme Court, Section II describes the social, historical and political foundations of the postwar development of constitutional law. This Section focuses upon the powerful, resilient tradition of social conformity and group loyalty.

Section III deals with the development of the power of judicial review, noting that one of the first significant invitations to invalidate a statute was a highly political attack on a fundamental governmental policy.

Section IV deals with the factors that have led to the restrained use of judicial review. The violent controversy over the peace clause is analyzed in Section IV.A. A major postwar political issue, the rearmament controversy has profoundly influenced judicial action.

Section IV.B discusses other political factors, such as the conservative nature of judicial appointees and their role as part of the larger elite bureaucracy. Also treated in Section IV.B is the Court’s response to the central problem in recent Japanese political history: how to control and hold accountable the central government.

Section IV.C describes how social values affect attitudes toward law and litigation.

Section IV.D looks into characteristics of the Japanese legal profession that have militated against more active use of judicial review. Trained in the civil law system of jurisprudence, which stresses technical application of authoritative legal codes, Japanese judges faced great obstacles in learning policy-oriented constitutional adjudication, a feature of the unfamiliar American common law system.

Section IV.E points out the conflict between the idea of judicial review and a constitution which stresses parliamentary supremacy.

Section IV.F describes how the manner in which the judiciary is organized and in which Supreme Court justices are appointed has impeded the use of judicial review. The Supreme Court, for instance, has the distracting responsibility of appointing and disciplining lower court judges. Also, justices are appointed for brief terms, diminishing the opportunity to develop expertise in constitutional law.

Section V discusses the recent increase in judicial review.

Section VI is the conclusion.
II. BACKGROUND

The Pre-1946 Constitutional Order in Social, Historical and Political Perspective.

To appreciate fully the remarkable developments in Japanese law since 1946, it is essential to understand the basic characteristics of the pre-1946 constitutional order, including not only formal institutions, but also the underlying social, historical, and political reality. Pre-war Japan, superficially analyzed, consisted of recognizable western institutions (e.g., monarchy, parliament). The dynamic force, however, was and remains a particularly intense conformity to the social order.\(^{21}\)

It is important to understand traditional Japanese values because these ideals of social conformity and group loyalty stand in stark contrast to the individualist values so strongly reflected in the Constitution of 1947. Given these traditional values, it is scarcely surprising that the Japanese Supreme Court has not chosen to interpret the individual rights clauses of the Constitution as absolute restrictions upon governmental action. It is important also to note how Japan has historically responded to foreign influences. Foreign techniques and ideas which reinforced Japanese values have been embraced; alien ways which threatened harmony and order have been suppressed. In particular, "universal" foreign ideas (such as justice or equality) have been rejected in favor of the ideal of unqualified loyalty to the group. Traditionally, there has been no "higher law" to which an individual could appeal to resist group demands. The community itself has been the source of ultimate value. As Robert Bellah has pointed out, the system of social relations rather than a system of ideas, has always been ultimately sacred in Japan.\(^{22}\)

The postwar reception of the Western legal concept of judicial review must be viewed in light of this traditional antipathy to universal ideals. Applying the universal, individualist principles of the new Constitution to community decisions (i.e., acts of the Diet) via the mechanism of judicial review is a remarkable break with tradi-

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\(^{21}\) T. ISHIDA, JAPANESE SOCIETY 37 (1971).

\(^{22}\) Bellah, Ienaga Saburō and the Search for Meaning in Modern Japan in CHANGING JAPANESE ATTITUDES TOWARD MODERNIZATION 374 (M. Jansen ed. 1965). For more insight into Japanese values, see generally R. BELLAH, TOKUGAWA RELIGION (1957), and R. BELLAH, BEYOND BELIEF (1970) chapters 3, 4, 6 and 7. Bellah explicitly sets forth his concept of the Japanese value pattern at pp. 116-17 of the latter work.
Within the traditional value system, however, there existed a strong element of adaptability which may help to explain the ability of the Japanese judiciary (and indeed the Japanese nation) to change course so sharply after World War II.

Traditional Chinese and Japanese cultures had in common the element of Confucianism, which emphasized the importance of conformity to the social order. In the case of Japan, however, conformity did not mean that attitudes were static, or that there was a reluctance to change the existing situation. Rather, it implied conformity to the changing situation. For instance, at the beginning of the modernization of Japan, the people, led by the governing elite, responded rapidly and almost unanimously to the need for westernization.

This conformity is dynamic in a second respect also: it is competitive. People attempt to out-do one another in attaining group goals.

This ideal of conformity to the group has ancient roots. From prehistoric times, aspects of wet rice culture, such as maintaining irrigation systems, required a high degree of social cooperation and resulted in a strong pressure to conform within the peasant family and the village.

The activist, competitive component of the group ideology stems from "the traditional warrior ethic, which emphasizes the importance of dynamic action, rather than passive adjustment to the status quo." For instance, in the momentous Taika Reform of the seventh century, although government was remodeled along the lines of T'ang China for the purpose of strengthening imperial rule, the potentially revolutionary Chinese concept of the Mandate of Heaven was neglected. According to

23. Ishida, supra note 21, at 37.
24. Id. at 38.
this concept, "as long as a sovereign rules well, he enjoys the Mandate or approval of Heaven, but, should he rule badly, he thereby forfeits the Mandate, and it then becomes legitimate for the people to overthrow him and establish another sovereign in his place."\(^{28}\)

A second challenge to group loyalty occurred in the late sixteenth and early seventeenth centuries in the form of vigorous Christian missionary activity. Although the missionaries were initially tolerated in order to promote trade, they were eventually expelled and their converts persecuted because of fear of the subversive consequences of the Christian doctrine requiring resistance to an unjust ruler.

Following unification of Japan in 1603 by the Shogun Tokugawa Ieyasu (founder of the Tokugawa dynasty), a drastic seclusion policy was enforced to exclude such heterodox ideas. The unity forged by the centuries of isolation persists to this day in social attitudes which stress conformity to group expectations.

In addition to isolating the country, the Tokugawa adopted another means of minimizing conflict among the military aristocracy (the samurai). The samurai were moved from their feudal land holdings to the castle towns, where they were assigned official rather than military duties. This political elite, competing for scarce jobs, came to accept the necessity and validity of "bureaucratic structures and of loyal and effective performance within them."\(^{29}\)

In the mid-nineteenth century, Japan was subjected to a series of humiliating western encroachments.\(^{30}\) The aristocratic bureaucrats who led several provinces joined forces to overthrow the decadent central government, which seemed incapable of responding effectively to the western incursions.\(^{31}\) These provincial leaders "restored" the emperor to his throne, casting out the hereditary Tokugawa shoguns who for centuries had ruled in the name of the emperor. This successful revolt is known as the Meiji Restoration.\(^{32}\)

The new government acted effectively to modernize and thus strengthen Japan vis-à-vis the West. The Meiji oligarchs created a

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30. Itoh & Beer, supra note 1, at 3.
32. Meiji was the name given to the period in which the Emperor Mutsushito reigned, 1868-1912.
centralized state on the European model with a parliament and a very powerful bureaucracy. But two features of this new regime eventually led to its destruction. First, it was calculatedly left unclear whether the military and the Cabinet were responsible to the parliament or to the figurehead emperor. Second, to gain popular support, skillful propaganda techniques were employed to harness popular emotions by portraying the emperor as the transcendent object of loyalty.

When the astute architects of this system passed from the scene, parliament briefly held sway, but then power devolved onto the military. The essentially religious veneration of the emperor gradually intensified. Spiritual mobilization accompanied military and economic mobilization as Japan went to war. The traditional values of conformity and loyalty were molded into an irrational, racist totalitarian ideology. Devotion to this ideology led the Japanese people to crushing defeat in World War II and to an unprecedented, humiliating foreign occupation.33

III. POSTWAR DEVELOPMENT OF JUDICIAL AUTHORITY

Article 81 of the new Constitution provided that “[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act.”

Japanese students of continental law initially proposed that the new Supreme Court adopt the role of a special constitutional

33. The developments of the period from the Meiji Restoration to World War II are summarized in Itoh & Beer, supra note 1, at 3-5, upon which the above discussion is based. The following excerpt captures the essence of the Imperial ideology:

The locus of constitutional sovereignty was the emperor, and during nearly six decades of Japanese life under the Meiji Constitution the centrality of the emperor increased, as the transcendent object of loyalty and as the formal basis of legitimate power for competing political interests. In the latter function, the emperor’s role resembled the usual status that the imperial house had held in the previous 1,000 years.

In Japan’s modern ideology, long and thoroughly disseminated by techniques of education and control, the emperor was viewed with great awe as the more-than-human father of the island family of Japan, with roots deep in Japan’s mythical and historical past. The emperor was above and beyond politics, and worthy of the total self-sacrifice of each of his subjects. However ugly politics and war might become, all blood members of the “national family” (a literal translation of the Japanese term for the State, kokka) could bask together in his benevolent presence, in a warm aura of security, belonging, solidarity, and mentally isolated superiority over other peoples. (Id., footnotes omitted).
Rejecting this continental model, the Japanese Supreme Court first indicated in dicta that it interpreted the new constitution as establishing American style judicial review.\(^3\) The Court announced in 1948 in *Komatsu v. Japan* that "Article 81 of our Constitution should be characterized as an explicit provision adopting the type of judicial review which has been established in the U.S. by way of mere interpretation of the Constitution."\(^3\)

Shortly after the Occupation ended in 1952, the question of whether continental or American style judicial review would prevail was squarely presented. Suzuki Mosaburo, then secretary-general of one of the opposition parties, directly petitioned the Supreme Court to declare the recently established paramilitary police reserve unconstitutional as a violation of Article 9.\(^3\) (This police reserve had been created to replace American troops dispatched from Japan to fight in Korea.)

First, Suzuki argued that the American Supreme Court, lacking express constitutional authority to determine the constitutionality of laws, was limited to reviewing statutes for constitutionality in the process of deciding cases. In contrast, the Japanese Supreme Court, explicitly empowered by Article 81 to determine the constitutionality of any law, must have the authority to pass upon statutes in the abstract, because "surely blanket authority expressly granted must mean something more than no provision at all."\(^3\)

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34. There are two main forms of judicial review, distinguished by the type of court performing the function. Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L. REV. 1017, 1033-34 (1970). The first is the general-jurisdiction court, typified by the United States Supreme Court. In such a court, all types of cases are heard, primarily civil and criminal appeals, many of which involve the issue of constitutionality. The second is the special constitutional court, typified by the Federal Constitutional Court (*Verfassungsgerichtshof*) of West Germany. *See* West German Const., art. 93 et seq. (1947). This type of court originated in Austria in 1920. *See* Austrian Const., art. 140 et seq. (1920). In the latter type of tribunal, only cases involving the constitutionality of laws are heard. Often cases come before such a court in the form of abstract questions such as "Is this law constitutional?"—rather than in actual controversies in which liberty or property is at stake.


36. *Id.*


Second, Suzuki argued that Article 79 was included in the Japanese Constitution precisely because the Japanese court was authorized to function as a special constitutional court. Thus, because the court had such significant powers, it was necessary to provide, in contrast to the United States, for periodic popular review of justices, requiring dismissal if a majority so voted.

Third, Suzuki argued that because of the high qualifications required of justices by Article 41 of the Court Organization Law, they were qualified to issue abstract pronouncements on constitutional issues.

In *Suzuki v. Japan*, a unanimous Court flatly rejected the plaintiff's arguments, holding that the Court had power to consider only constitutional questions raised in concrete legal disputes. The Court noted that though Suzuki based his petition on Article 81, the language of this article only referred to a "court of last resort." The *Suzuki* Court reasoned that if it had the power to make such abstract judgments, statutes would be frequently challenged, possibly resulting in the Court dominating the other two branches of government, "violating the basic principle of democratic government; that the three powers are independent, equal, and immune from each other's interference."

It is noteworthy that this definitive statement on the manner in which judicial review would be exercised arose out of a highly political attack on the government, based on the emotional rearmament issue. Given the unstable domestic scene of 1952 and the fighting raging in nearby Korea, it is not surprising that the Court sought to avoid reaching a result requiring disbanding of the

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40. Article 79 (2)(3) of the Japanese Constitution provides:

(2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

(3) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

41. Article 41(1) of the Court Organization Law provides in part: "Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than 40 years of age." Also, it is provided that ten of the fifteen justices must have been either (a) district or High Court judges with at least ten years of experience, or (b) summary court judges, prosecutors, lawyers, or law professors with at least twenty years experience. The complete text of Article 41(1) is set forth in note 163 infra.

42. Maki, supra note 1, at 364.

43. Id.
police reserve."

The Court’s early perceptions of its role in the political order were thus shaped by the type of cases which came before it. Suzuki, and others, sought to use the Court to emasculate the Cabinet. The Court’s effort to avoid destabilizing the government was reflected in the tone of its doctrinal pronouncement: the language about how each branch is "immune" from interference by the others seems an extreme reaction to Suzuki’s plea. Literal immunity would negate any judicial review of governmental acts. In sum, the Court’s long-standing caution in exercising the power of judicial review, stems to a significant degree from overreaction to radical efforts to use the judiciary to undermine (or at least embarrass) the elected government.

As will be discussed in greater detail below, the Sunakawa case, Japan v. Sakata, later enunciated the political question doctrine as a means whereby the Court could avoid deciding cases concerning major political issues involving powers of the other branches of government.

In Sakagami v. Japan, the Supreme Court declared an act of the Diet unconstitutional for the first time. This case was decided in 1953, about 18 months after the lifting of the Occupation. This decision was of limited significance, however, because it involved a law which was no longer in effect. Also, it is hard to tell what the case stands for, owing to the complex series of laws involved and the multiple opinions written.  

44. E.g., in Tomabechi v. Japan, 7 Minshū 305 (Sup. Ct., G.B., Apr. 15, 1953), cited in Henderson, in CONSTITUTION OF JAPAN, supra note 1, at 122, reprinted in Maki, supra note 1, at 386, the Court refused to hear an appeal by an opposition member of the Diet that a Cabinet order dissolving the lower house was unconstitutional on the ground (citing Suzuki v. Japan, 6 Sai-han Minshū 783 (1952)) that there was no legal dispute.

45. See text accompanying notes 72-78, infra.


48. The Occupation authorities, who had initially freed leftwing political prisoners and otherwise given dissenters free rein, later became alarmed by Communist successes in China and Korea and by vigorous domestic protests. On June 26, 1950, the day after the Communist invasion of South Korea, General MacArthur banned a Communist newspaper called the Red Flag (Akahata) and any successor publications. Implementing MacArthur’s directive, an appropriate Cabinet order was issued by the formal government. Henderson, in CONSTITUTION OF JAPAN, supra note 1, at 128-29.

Sakagami renamed the proscribed newspaper the Voice of Peace (Heiwa no koe) and defiantly continued publication. His conviction for violating the order in question was eventually reversed by the Supreme Court by a vote of ten to four. Though agreeing on the
The second case in which the Court voided a Diet enactment was that of *Nakamura v. Japan.*\(^4^9\) This case is more significant than *Sakagami* because it involved a statute that was effective at the time the decision was rendered.

The defendants in *Nakamura,* attempting to smuggle 18 bales of textiles to South Korea, rendezvoused with a fishing boat off the coast of Kyūshū, Japan's southern-most island. Stormy weather frustrated the defendants' efforts to transfer their illegal cargo aboard the fishing boat. While retreating to the nearby Japanese city of Fukuoka, the defendants were apprehended.

The local district court not only found them guilty of smuggling but also confiscated their boat and cargo under Customs Law Article 118, paragraph one.\(^5^0\) The trial court established that the cargo actually belonged to a third party.

On appeal, the defendants argued in part that confiscation of the goods of a third party, who had not been given notice or a judgment, the majority split six to four on the basis for holding the statutes unconstitutional. (When the Occupation ended, the Cabinet orders under which the defendant had been convicted were extended by a vote of the Diet. These interim statutes were designed to be effective only during the transition to Japanese rule.)

Six justices would have reversed because of technical flaws in the manner in which the Diet tried to extend the validity of the Occupation orders. Four justices perceived no technical flaws, but felt that the newspaper ban was substantively inconsistent with Article 21, the constitutional guarantee of freedom of expression. The four dissenters argued that while the statutes in question could not constitutionally extend the effect of the Occupation order beyond the April 28, 1952, signing of the peace treaty, it was not improper to apply the law to offenses committed during the Occupation. It had been previously decided that the Occupation legal structure existed entirely outside the Japanese Constitution, whether of 1889 or 1947. *Hasegawa v. Japan,* 7 Sai-han Keishū 775, 787-88 (Sup. Ct., G.B., Apr. 18, 1953), cited in Henderson, in *Constitution of Japan,* supra note 1 at 130.


50. Customs Law, Article 118, paragraph one provides:

> Cargo related to the crimes provided in Articles 109 through 111 (crime of importing prohibited cargo, crime of avoiding customs, etc. and crime of exporting or importing without permit), ships or airplanes used in the commission of such crimes, or cargo related to the crime provided in Article 112 (crime of transport, etc. of smuggled cargo, hereinafter referred to as “criminal cargo” in this article) shall be confiscated. However, this shall not apply to criminal cargo owned by a party other than the criminal and when such party comes under any one of the following items:

1. When it is found that he has continuously maintained the criminal cargo as owner without knowing in advance that one or more of the crimes provided in Articles 109 through 112 were to be committed.

2. When it is found that he took possession of the criminal cargo without knowing of the circumstances after one or more of the crimes provided in the preceding item were committed.

(Reprinted in *Itoh & Beer,* supra note 1, at 59.)
hearing, was unconstitutional under Articles 29 (right to own property) and 31 (due process) of the Constitution. Although the Supreme Court affirmed the smuggling conviction without dissent, it voted ten to five to reverse the confiscation order on the grounds urged. Specifically, the Nakamura Court held that property belonging to a third party could not constitutionally be seized without providing notice and a chance to be heard. Lacking such procedural provisions, Customs Law Article 118, paragraph one was invalid.

The Court reasoned that the accused had standing to raise the issue of third party property rights because the defendants had 1) been deprived of possession of the property and 2) been exposed to a possible claim for damages by the third party. The dissenters argued that the defendants lacked standing to assert constitutional rights of a third party.

The Court had, just two years earlier, ruled that such a confiscation could not be attacked on the basis of a third party's rights. Despite the fact that the prevailing view among Japanese lawyers in the early 1960's was that this aspect of the Customs Law was unconstitutional, the Diet failed to amend the statute to provide for a hearing for third parties.

It is significant that the Court appeared to give the Diet an opportunity to amend the statute before declaring it unconstitutional. A similar pattern later occurred regarding reapportionment of the Diet. District lines had not been redrawn since 1947, despite very large shifts in population. In rejecting a 1964 constitutional challenge to the lopsided system, the Court noted that though apportionment was primarily the responsibility of the Diet, the Court would interfere if the degree of malapportionment became serious enough. Indeed, in 1976 the Court took the next step, in-

51. Article 29, paragraph one of the Japanese Constitution provides: “The right to own or to hold property is inviolable.”

52. Article 31 provides: “No person shall be deprived of life or liberty, nor shall any criminal penalty be imposed, except according to procedure established by law.”

53. Henderson, in Constitution of Japan, supra note 1, at 133.

54. Id.


56. Okudaira, supra note 15, at 84.

validating the districting plan in effect during the 1972 election, though declining to invalidate the election itself. 58

IV. REASONS FOR JUDICIAL RESTRAIN T

The following factors have impeded the development in Japan of the powerful American style of judicial review.

* Judicial reaction to radical efforts to achieve unilateral disarmament in the courts after having failed to achieve this goal through the political process.

* Other political factors, including the appointment of conservatives to the Court and the unity of outlook among the official bureaucracy.

* Social attitudes discouraging resort to the legal process to resolve disputes.

* Characteristics of the Japanese legal profession, including the small number of lawyers and judges, lack of experience in constitutional litigation, civil law modes of thought, and the possible continuance in office of judges who had been committed to the militarist regime.

* The necessarily limited use of judicial review in a system based upon parliamentary supremacy.

* Impediments inherent in the pattern of judicial organization, such as the Supreme Court's administrative responsibilities, the justices' short tenure on the bench, and the unwieldy number of justices on the court.

A. The “Peace” Clause

Article 9 of the Japanese Constitution, the famous "Peace" clause, 59 dominates the postwar constitutional landscape much as Mt. Fuji dominates central Japan. Article 9 states:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sover-

59. For an account of the origins and early history of the peace clause, see Stockwin, supra note 2, at 176-81.
eign right of the nation and the threat or use of force as a means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The Japanese Supreme Court has for a generation been under a constant barrage of intense left-wing criticism for its refusal 1) to directly confront the Article 9 constitutional issue and 2) to outlaw the maintenance of military forces in Japan. Right-wing opinion has in turn been critical of the court for failure to definitively uphold the Self-Defense Forces (SDF). For instance, novelist Mishima Yukio committed suicide, denouncing the hypocrisy of the government in failing to amend Article 9 to legalize the SDF.60

A minority of the Japanese public appears to oppose maintaining military power of any sort;61 a majority of academic commentators appear to share this viewpoint.62 This pacifism stems in part from “a continuing, radical reaction to Japan’s mind-numbing defeat in World War II.”63 Military power is linked to memory of utter national failure in the war.

Those Japanese interpreting Article 9 as absolutely banning military power have on several occasions asked the Court to outlaw military forces maintained by the government. For instance, in 1952 a “progressive”64 politician directly petitioned the Supreme Court to overturn the law creating a “police reserve” on Article 9 grounds.65

The Court has avoided extensive use of the power of judicial review in part because it desperately wanted to avoid passing upon the constitutionality of the armed forces.66 Read broadly, Article 9 does forbid military power. Thus, the Court has not only avoided passing on the validity of the SDF, but also hesitated to strike down unrelated statutes for fear that active use of judicial review

60. Okudaira, supra note 15, at 105.
61. Seymour, Japan’s Self-Defense: The Naganuma Case and Its Implications, 47 PACIFIC AFFAIRS 421, 433 (1974-75).
62. Slomanson, supra note 18, at 33, 44.
63. ITOH & BEER, supra note 1, at 5.
64. The term “progressive” is used to refer to the left-wing opposition parties in the Diet.
66. Stockwin, supra note 2, hints at this point at 182.
in other areas would supply ammunition to foes of the Self-Defense Forces.

Over the years, the strength of the SDF has been increased; people have been grown accustomed to the paradox of military might co-existing with Article 9. Thus, the sense of urgency in avoiding declarations of unconstitutionality has diminished.

The Court has shown sound political judgment in avoiding a definitive ruling on the meaning of Article 9. If the Court had outlawed the American bases and the SDF, this ruling would likely have been ignored by the Cabinet; having ignored one judicial decree, the Cabinet would have found it easy to ignore others. At the same time, the legitimacy of the government would have diminished. The other possible result would have been no more palatable; if the Cabinet had acquiesced in the abolition of the SDF, this would have increased Japan’s exposure to domestic insurrection and foreign invasion.

The consequences of a definitive ruling upholding the constitutionality of the SDF would have been no better. The “progressive” forces would have been discouraged from using the legal process to realize their policy objectives, possibly increasing the risk of political violence. Popular respect for the court might have declined. Further, the Court could not, given the terms of Article 9, rationally have said there was no constitutional limit to the armed forces. Yet, how could it set a specific limit to military might? Three hundred thousand troops and no more? Tanks, but not landing craft? Under these circumstances, unqualified endorsement of the SDF might have been perceived as encouraging a drift toward 1930’s-style militarism.

The heated controversy over Article 9 has distracted the Court from consideration of other constitutional issues. Furthermore, the “peace clause” debate has had a profound impact on the Court’s perception of the function of judicial review. As noted above, an early radical attempt to invoke Article 9 to abolish the SDF resulted in a Supreme Court declaration narrowly limiting the scope of judicial review.

Four key cases illustrate judicial handling of the Article 9 hot potato: the Sunakawa case, the Eniwa case, Japan v.

67. See text accompanying notes 38-44 & 63-64 supra.
Sakane, and the Naganuma case.

Sunakawa refused to hold unconstitutional the stationing of American forces in Japan under the 1951 United States/Japan Security Treaty. Eniwa involved the acquittal on statutory grounds of persons who pled an Article 9 defense to a charge of damaging SDF property. Sakane reaffirmed and clarified Sunakawa. Naganuma, following the Sunakawa precedent, refused to declare the SDF unconstitutional.

The landmark Sunakawa case of 1959 grew out of a protest over a plan to extend a runway at the large American air base at Tachikawa, near Tokyo. Demonstrators assembled at the adjacent village of Sunakawa on the parcel of farm land that was to be acquired. Protestors who then entered the base were arrested by Japanese police for trespassing.

At their trial, the defendants challenged on two separate grounds the validity of the special trespass law under which they were charged. First, they argued that the law was invalid because it had been enacted pursuant to the 1951 Security Treaty, which was unconstitutional because it sanctioned the maintenance of American forces in Japan, in violation of Article 9. Second, the defendants contended that the trespass law was invalid because it had merely been promulgated by the Cabinet rather than enacted by the Diet.

In a decision that electrified Japan, the Tokyo District Court on March 20, 1959 acquitted the defendants, accepting both of their principal arguments. Because of the importance of the case, the Tokyo Public Prosecutor at once appealed directly to the Supreme Court, bypassing the Tokyo High Court. Acting with un-

71. Minister of Agriculture and Forestry v. Itō (the Naganuma case), 821 Hanrei Jihō 21 (Sapporo High Ct., Aug. 5, 1976), cited in Haley, Recent Developments, 9 Law in Japan 153 (1976). This case is still pending before the Supreme Court, but the outcome is not in doubt.
With the exception of Sakane, each of these cases customarily bears the name of the town or village in which the matter arose, rather than the name of the parties. Japanese normally refer to cases by the name of the court and the date of decision. See, e.g., Noda, Japan, 1 International Encyclopedia of Comp. L. J-9 (1975).
73. Tanaka, supra note 1, at 709; Maki, supra note 1, at 298-99.
usual speed, the Supreme Court accepted the appeal on April 3, 1959; oral argument was heard on June 3, 1959.

Though a decision was widely expected by the end of the following September, it took three additional months. The reasons for the delay became obvious with the release of the opinion. Though unanimous in reversing the trial court, the justices could not agree on their reasons. Five justices concurred in the "majority" opinion, while the remaining ten justices produced eight additional opinions.

The principal opinion, while not entirely clear, makes the following points in the following order:

1. Article 9 renounces resort to aggressive war, not Japan's inherent right to self-defense. Japan may, therefore, properly enter into international security agreements.
2. Article 9 governs only "war potential" over which Japan has "rights of command and control." Since Japan does not have such power over American forces stationed in Japan, these forces are not "war potential" within the meaning of Article 9.
3. Certain highly political matters are the province of the Cabinet and the Diet; these matters are beyond the scope of judicial review unless patently unconstitutional. The Security Treaty, bearing "an extremely important relation to the basis of the existence of our country as a sovereign nation," is such a political question. (This key portion of the opinion is notably unclear as written.) The Court continued:

   "It is proper to interpret this primarily as a matter that must be entrusted to the decision of the cabinet, which possesses the power to conclude treaties, and of the National Diet, which has the power to approve them; and it ultimately must be left to the political review of the sovereign people."

4. The Court then reiterates its point that American forces do not constitute "war potential" within the meaning of Article 9 (and the preamble to the 1947 Constitution). The Court appears to say, however, that even assuming American forces are war potential, this does nonetheless not violate Article 9 because their only purpose is to repel foreign invasion and suppress foreign-inspired insurrection.
5. Though the administrative agreement authorizing the special

75. Maki, supra note 1, at 303-04.
76. Id. at 305.
77. Id. at 306.
trespass law was not specifically approved by the Diet, resolutions disapproving the agreement were rejected. The trespass law, thus, is valid.

The confusing principal opinion does not make clear why the Court reviewed the constitutionality of the Security Treaty and the administrative agreement in addition to stating that they were not subject to review. Commentators have presumed that the Court was determining whether or not the treaty was "patently un-constitutional" pursuant to the test set forth in point three, above. 78

The opinions themselves, however, leave the impression that the Court was split between advocates of disposing of the case on pure political-question grounds and advocates of substantively reviewing the treaty in light of Article 9. The "majority" opinion thus seems to represent an uneasy compromise between what would appear to be mutually exclusive concepts. It is hard to see what purpose is served by this two-stage political question test. If all matters must pass constitutional muster, even if clearly entrusted to the Cabinet or the Diet, then the doctrine neither gives due respect to coordinate branches of government nor helps the Court avoid certain "hot" questions.

Perhaps the justices of the Sunakawa Court were so emotionally involved with the rearmament question that although basically convinced that the Court should avoid the issue on political question grounds, they could not let the powerful arguments of the trial court go unanswered.

Indeed, discussions of Article 9 among Japanese resemble discussions among Americans of the free speech rights of Nazis (or, during an earlier era, the merits of slavery). Discussions of each topic generate more heat than light. Feelings about Article 9 evidently stem from the many traumatic experiences of the wartime period: hunger, privation, loss of loved ones, the fire bombing of Tokyo, the atomic bombing of Hiroshima and Nagasaki, disappointed expectations, and the humiliation of defeat.

An Article 9 case of lesser importance arose in 1962 in the village of Eniwa in Hokkaido (Japan's northernmost island). 79 Two brothers, who operated a dairy farm on land adjoining an SDF firing range, had complained on numerous occasions to the author-

78. E.g., Okudaira, supra note 15, at 96.
ities that constant noise from the firing range was harming their cows, causing both decreased milk production and miscarriages.\textsuperscript{80}

Their protests ignored, the brothers retaliated by cutting in several places a field telephone line used to signal firing instructions to the training ground.\textsuperscript{81} The brothers were charged with violating the 1954 Self-Defense Forces Law which provided criminal penalties for damage or destruction of "the weapons, munitions, airplanes and such other items as are used for the purpose of defense" by the SDF.\textsuperscript{82}

The opposition parties rallied to the aid of the farmers, seeing another opportunity to place the Cabinet’s defense policy on trial. The farmers pleaded not guilty on the grounds that the SDF violated Article 9. This case aroused much interest in Japan because this was the first direct challenge to the constitutionality of the SDF.

The trial, which took four years, focused on the Article 9 issue, including testimony from government officials and SDF officers. (Trial sessions in Japan are typically scheduled to last no more than one day at a time, with intervening intervals of five or six weeks, during which other matters are heard.)\textsuperscript{83}

Progressive hopes were dashed, however, by the 1967 decision acquitting the brothers on statutory grounds. The trial court held that the phrase "other items used for defense" included only "vital" items such as weapons and airplanes, not such things as telephone lines. Consistent with its policy of avoiding Article 9 litigation, the government did not appeal the decision. (Criminal acquittals are appealable in Japan.)\textsuperscript{84}

In the third Article 9 case, \textit{Japan v. Sakane},\textsuperscript{85} the Supreme Court rejected a contention that the "New Security Treaty"\textsuperscript{86} (the 1960 renewal of the 1951 United States/Japan Security Treaty) violated the peace clause.

Massive nationwide demonstrations were held to protest the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} Wada, \textit{supra} note 17, at 123-24.
\item \textsuperscript{82} Ishimine, \textit{supra} note 80, at 144.
\item \textsuperscript{83} See text accompanying note 156 infra.
\item \textsuperscript{84} See Nagashima, \textit{The Accused and Society: The Administration of Criminal Justice in Japan}, in \textit{Law in Japan} 300-01 (A. von Mehren ed. 1963).
\item \textsuperscript{85} Japan v. Sakane, 23 Sai-han Keishū 685 (1969).
\end{itemize}
\end{footnotesize}
1960 renewal of the treaty. One protest was held in the Sendai courthouse during working hours in the entrance to the High Court chambers. Convicted of inciting public employees to illegal political action, the defendants appealed on numerous grounds.

Disposing of the Article 9 contention, the Sakane court focused on the political question rationale of Sunakawa, recasting the 1959 holding into more intelligible form. The Court held: in passing upon highly political matters which have an important relationship to Japan's existence as a sovereign nation, circumspection is required. So long as the treaty is not clearly contrary to the Constitution, it should not unnecessarily be held unconstitutional. In light of Sunakawa, the Court concluded, the New Treaty would not be deemed to be clearly unconstitutional as violating the intent of Article 9.

Within three months of the 1969 Sakane decision, yet another legal challenge to government foreign and defense policy was mounted. The Japanese government, pursuant to treaties with the United States, had decided to construct a Nike surface-to-air missile base in a national forest near the small town of Naganuma on the northern island of Hokkaido.

After tumultuous public hearings on the question of transferring the land from the national forest to the Air Self-Defense Force, the Minister of Agriculture and Forestry announced removal of the conservation designation on July 7, 1969.11 Construction of the base began that same day. Also that same day, local residents (aided by pacifist groups) filed two separate actions opposing the base in Sapporo District Court (the same court that had decided Eniwa in 1967). Both suits attacked the decision of the Minister of Agriculture and Forestry lifting the national forest designation of the land in question.

The first action sought suspension of the Minister's order on grounds of increased flood danger. The second action sought reversal of the order on the grounds that it was not in the public interest, as required by statute.8 The order was not in the public interest, it was alleged, because establishing a missile base (or any sort of military force) violated Article 9.

87. The following account of the Naganuma case is drawn largely from three sources: John O. Haley's summaries of the case in 9 LAW IN JAPAN 151, 153-54 (1976), Haley, Recent Developments, 6 LAW IN JAPAN 173, 175-76 (1973) and Seymour, supra note 61, at 433.
88. Forest Law (Shinrin Hô), art. 26(2), Law No. 249 (1951) quoted in Haley, supra note 87, 6 LAW IN JAPAN 175.
Judicial Review in Japan

In August, 1969, Judge Fukushima of the Sapporo District Court ordered suspension, as asked in the first suit, but the Sapporo High Court quickly (January, 1970) reversed on the ground that since adequate measures had been taken to prevent flooding, there was no urgent necessity to prevent irreparable damage, as required by statute. Construction of the base was completed in June, 1972.

In the second suit, 27 hearings were held over a four year period. With decision pending in the second suit, also in the hands of Judge Fukushima, the Chief Judge of the District Court wrote Fukushima a letter telling him to dismiss the Article 9 claim, thus igniting a lengthy controversy. After several hearings on the Article 9 question, when Fukushima's antagonistic position had become evident, the government unsuccessfully tried to get him removed from the case.

Finally, in September, 1973, Fukushima handed down the decision that had been anticipated, holding that not only had the forest land been illegally reclassified, but also that the law establishing the SDF violated Article 9. Acting with remarkable independence, Fukushima rejected the political question doctrine of Sunakawa and Sakane:

Whenever the constitutionality of a statute is questioned, the matter inevitably involves a question of a more or less political nature . . . . If one excludes some acts of the government from the scope of judicial review by relying on a dangerously overbroad interpretation of such a vague concept, one might lead the way to closing the doors of the court to people asking for redress for the blundering of the government.

On the very first day of litigation (August 22, 1969), Judge Fukushima had stated that the constitutionality of the SDF should

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90. Administrative Case Litigation Law of 1962, quoted in Haley, supra note 87, 6 LAW IN JAPAN 175.
91. Seymour, supra note 61, at 428.
92. Id. at 427; see note 178 infra.
93. Id.
94. Itō v. Minister of Agriculture and Forestry, 712 Hanrei Jihō 24 (1973); 298 Hanrei Taimuzu 140 (Sapporo Dt. Ct., Sept. 7, 1973), cited in Wada, supra note 17, at 125, summarized in Haley, supra note 87, 6 LAW IN JAPAN 175-76 and excerpted in TANAKA, supra note 1, at 712.
95. TANAKA, supra note 1, at 714.
be judged "in view of what the SDF really are in conjunction with the spirit of the Constitution." Indeed, Fukushima must have ruled as the "spirit" moved him. He certainly did not follow the relevant Supreme Court precedents.

The government offered to consent to a special appeal directly to the Supreme Court, but plaintiffs refused and the case was routinely heard by the Sapporo High Court.

The Court heard nine sessions of oral testimony before abruptly terminating the proceedings. Shortly afterwards, the unanimous three-judge court dismissed the action without reaching the merits of the constitutional issue. The Court held that under relevant statutes, the plaintiffs could bring an administrative action only if they had the required legal interest to sue. Only where the challenged governmental action actually infringed or could be expected to infringe a legal interest was this requirement met. Though the plaintiffs did originally have a sufficiently concrete and individual interest in preserving the watershed for farming and flood control, the Court reasoned "this interest was extinguished by the new water conservation facilities that the government had built." Thus, lacking the requisite legal interest, plaintiffs no longer had standing to sue.

Applying the political question doctrine, the Court reasoned, it is clear that the constitutionality of the SDF is not justiciable unless the SDF are in apparent violation of Article 9. The SDF, the Court concluded, are not in obvious violation of Article 9; this issue depends upon the construction given Article 9.

Despite vocal demands from both the left and the right to definitively resolve the question of the constitutionality of the SDF under Article 9, the Japanese Supreme Court has wisely avoided that thorny question. In the 1959 Sunakawa decision, however, the Court did indicate in dicta that Article 9 did not prohibit defensive measures.

Determination to avoid ruling on the SDF has also tended to make the Court reluctant to actively exercise judicial review in other legal areas. As the Article 9 issue has declined in urgency,

97. The Court Organization Law, art. 3, Law No. 59 (1947), and Administrative Case Litigation Law of 1962, art. 9, Law No. 139, cited in Haley, Recent Developments, 9 LAW IN JAPAN, 151, 154 (1976).
98. Minister of Agriculture and Forestry v. Itō (the Naganuma case) 821 Hanrei Jihō 21 (Sapporo High Ct., Aug. 5, 1976), summarized in Haley, supra note 97, at 153.
however, the Court has become more willing to invalidate acts of the Diet.

B. Political Factors.

1) Conservative Judicial Appointees.

The Liberal Democratic Party (LDP) and its conservative predecessors have dominated Japanese politics since the first post-war parliamentary election was held in 1946. These consistently conservative Cabinets have appointed conservatives to the Supreme Court. These appointees have thus been predisposed to support government actions. Decisions upholding laws which, for instance, discourage anti-government political demonstrations are therefore not "remarkable".

2) Bureaucratic Unity.

It is important to consider, however, more than the partisan political orientations of court appointees. Attention must also be given to the remarkable homogeneity in basic social and political assumptions of Japan's political elite.

Following the Meiji Restoration of 1868, Japanese government was radically restructured along the lines of a centralized European state, including creation of a truly national bureaucracy selected by merit. In the late 19th century, the power of the Meiji oligarchs came under attack from nascent political parties in the Diet. To prevent the political parties from seizing power, the oligarchs deliberately set up an entrenched official bureaucracy, which would make policy on its own.

Two subsequent events further increased the influence of the bureaucracy. First, in the 1930's, central economic planning was in-

100. A center-left coalition government ruled Japan briefly in 1947-48. See Stockwin, supra note 2, at 54-56.
101. Ishida, supra note 21, at 76.
102. E.g., the Tokyo Ordinance decision of 1960, Japan v. Itō, 14 Keishū 1243 (Sup. Ct., G.B., July 20, 1960), cited in Beer, The Public Welfare Standard and Freedom of Expression in Japan in Constitution of Japan, supra note 1, at 230, and reprinted in Maki, supra note 1, at 84. See Beer, supra, for an analysis of the political significance of the "demonstration" decisions. The Court has repeatedly invoked the "public welfare standard" to limit constitutionally-protected individual rights. See Okudaira, supra note 15, at 83-91. Through the above standard, the Court appears to have articulated in constitutional terms the traditional Japanese concern for collective over individual rights. See also note 133 infra.
103. Black, supra note 25, at 265.
stituted to further the war effort. Second, in the postwar era, Occupation policies such as the "purge" of politicians and military officers removed the bureaucracy's competitors for power. Other Occupation policies, such as indirect rule and the extension of economic controls further strengthened bureaucratic influence.

As is the case with the Polytechnique in France, the Japanese political elite attends the same schools, shares the same values, and controls the official bureaucracy. From the late 19th century to the present, the key to leadership positions in government or business in Japan has been a bachelor's degree in law from a prestigious university.

In addition, the system of promotion by seniority (but with adequate allowance for merit)—a system common to virtually all Japanese organizations in the modern sector—assures that those in key positions of power at any one time will be of the identical generation. Thus, whether a man is a business executive, a section chief in the bureaucracy, or a member of the national Diet, the chances are that he will have attended a prestige university, that he will be of a predictable age, and that he will share very much the same values and style of life.

Judges are also members of this political elite and thus share similar educational experiences and political assumptions. Thirty-seven of the forty-nine judges appointed to the Supreme Court between 1947 and 1970 were graduates of the prestigious law faculty of Tokyo University. Judges are thus a manifestation of a single bureaucracy, rather than a separate branch of government.

The "sustained unity of the elite" might come under stress if the LDP loses power in the future. A "conservative" Supreme Court might scrutinize more carefully legislation enacted by a "progressive" Cabinet. In addition to partisan or philosophical

104. ISHIDA, supra note 21, at 73.
105. See ISHIDA, supra note 21, at 74.
107. BLACK, supra note 25, at 269-70.
111. BLACK, supra note 25, at 268.
differences, the demands of bureaucratic territoriality might take on increased urgency. As Chalmers Johnson has noted, "[j]urisdictional disputes appear to be the very life-blood of the Japanese bureaucracy."112

Facing a "progressive" Cabinet, the Court might become more alert to invasions of judicial prerogatives. The Japanese court has in the past resisted interference from other agencies of government. In 1949, for instance, an effort by a Diet committee to rehash an unpopular decision by a lower court was forcefully rebuffed.113

On this occasion, the Judiciary Committee of the House of Councillors (the upper house) had announced an investigation of a trial court's decision to impose a light penalty in an infanticide case.114 In a letter to the committee, the court stated that 1) the Diet had overstepped its authority, 2) the legislative power to investigate granted by Article 62115 of the Constitution did not authorize investigation of the judiciary, and 3) the courts alone were empowered to determine the facts and penalties in legal cases.

3) Unitary versus Federal Political Structure.

A federal political structure is a key factor in the development of powerful national supreme courts.116 Such national tribunals have proven useful in defining the respective powers of national and provincial governments.117

In 1947, Japan presented a quite different environment to the newly-created Japanese Supreme Court. The national government had militarily defeated the last serious provincial challenge to central control in the late 19th century. Today, as in 1947, Japan is a unitary state, with a system of centrally-controlled local administrative districts modeled on the French prefecture.

Thus, the absence of federal/provincial tensions is a factor
which helps to explain why the Japanese Supreme Court has not developed into a highly influential institution. Additional insight may be obtained into the reasons for the Court's actions by more closely examining the tribunal's relationship to the central question in recent Japanese political history. The central problem facing the new American court and nation in the early 19th century was whether the central government would prevail over provincial governments. By contrast, the central problem in Japanese politics has been who controls the powerful central government, especially the entrenched bureaucracy. The brilliant band of revolutionaries that overthrew the shogunate in 1868 designed a very unusual constitutional order in which sovereignty mystically resided in the emperor. The emperor, however, did not rule personally; the Meiji oligarchs ruled in his name. The Cabinet and military were responsible to "the emperor", i.e., the Meiji oligarchs.

In the 1920's, the vacuum created by the eventual deaths of the oligarchs was for a time filled by a system of parliamentary democracy in which the Cabinet was responsible to the Diet. Due in part to the corruption of this system, in the late 1930's the military gradually came to control the central government.

After defeat in World War II, Japan was occupied by the Allies. The Occupation sought to deal with this basic problem of who controlled the central government by clarifying lines of authority in the new Constitution of 1947. The framers made clear that the Diet, elected by the people, was the "highest organ of state power". Notwithstanding the Constitution, many Japanese, horrified by the consequences of military rule, shared a vision of the future involving the recreation of the parliamentary democracy of the 1920's.

The military posed no threat to the constitutional order after 1945. Total demobilization was followed by "purge" edicts which banned all former military officers from holding important posts. Instead, both American Occupation authorities and Japanese officials came to perceive the principal threat to order as coming from the left.

In the early years after the adoption of the United States Constitution, the principal antagonists of the central government had been certain states. The American Supreme Court sought to sup-

118. Article 41 of the Japanese Constitution provides: "The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the state."
port the fledgling federal government by enhancing the power of Congress\textsuperscript{119} and by limiting state authority.\textsuperscript{120}

In the early years of the postwar Japanese Constitution, the principal antagonists of the central government have been leftist political groups. The Japanese Court has sought to support the new government by enhancing the power of the Diet and by limiting the influence of the "progressive" groups.

To achieve its ends, the early American Court (under Chief Justice John Marshall) created\textsuperscript{121} and \textit{maximized}\textsuperscript{122} the power of judicial review. To achieve its ends, the early Japanese Court \textit{minimized}\textsuperscript{123} the explicitly granted power of judicial review.

Several notable Japanese litigants seeking judicial invalidation of Diet-passed laws were members of leftwing political parties that had won insufficient seats in the Diet to carry out their policies.\textsuperscript{124} The Court firmly rejected these and other efforts to undercut parliamentary authority.

4) Attempts to Revise the Constitution.

Especially in the early postwar years, there was some resentment among Japanese in general over the forced adoption of the foreign-authored "Japanese" Constitution. Conservatives additionally objected to that document's radical content.\textsuperscript{125} The document was initially drafted in six days by the Occupation authorities and then presented as a fait accompli to the Japanese government.\textsuperscript{126} Changes were made only with the consent of SCAP.\textsuperscript{127} The Constitution was seen as radical in that it placed heavy emphasis upon individual rights.\textsuperscript{128} Article 14, for instance, states: "All of the peo-

\textsuperscript{119} See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and McCloskey, \textit{supra} note 117, at 57.
\textsuperscript{120} Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
\textsuperscript{121} Marbury v. Madison, 5 U.S. (1 Cranch) 37 (1803).
\textsuperscript{122} Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
\textsuperscript{123} E.g., Suzuki v. Japan, 6 Sai-han Minshū 783 (1952); see discussion in text accompanying notes 38-44 \textit{supra}.
\textsuperscript{124} E.g., Suzuki v. Japan, 6 Sai-han Minshū 783 (1952); and Tomabechi v. Japan, 7 Sai-han Minshū 305 (1953).
\textsuperscript{125} Stockwin, \textit{supra} note 2, at 52, 172, 190.
\textsuperscript{126} Stockwin, \textit{supra} note 2, at 173-77, summarizes the events surrounding the drafting and adoption of the Constitution.
\textsuperscript{127} The American military government is often referred to as "SCAP," the acronym for the Supreme Commander for the Allied Powers, the officer in charge.
\textsuperscript{128} A. Oppler, \textit{Legal Reform in Occupied Japan: A Participant Looks Back} 87-88 (1976).
ple are equal under the law and there shall be no discrimination in political, economic or social relations, because of race, creed, sex, social status or family origin.” In reality, Japanese society was and is strongly hierarchical; traditional sex roles prevail.

As part of the LDP’s efforts to revise the Constitution, a Commission on the Constitution was appointed by the Diet in 1957 to review proposed amendments.

A public opinion poll taken during the Commission’s deliberations revealed that though Japanese opposed revising the Constitution to make the public welfare clauses more clearly restrictive of individual rights, they at the same time felt more emphasis should be placed on public welfare.

The Commission on the Constitution, though boycotted by the progressive parties, chose to make no formal recommendations in its 1964 report. It noted, nonetheless, that amendments had been proposed within the Commission to (inter alia) strengthen public and collective rights against private and individual rights and circumscribe somewhat the powers of judicial review.

Given these public sentiments, it is not surprising that the Supreme Court has interpreted the individual rights provisions of the Constitution narrowly. Had the Supreme Court aroused the ire of the public by expounding an extreme individualist interpretation of the Constitution, the justices would have risked disapproval in the constitutionally mandated decennial plebiscites.

To forestall amendments, and to preserve its own substantial power under the new constitutional order, the Japanese Supreme Court might be expected to moderate such objectionable provisions of the Constitution. The court has in fact interpreted the Constitution to accord more closely with traditional values by means of the “public welfare” doctrine, thus aiding in the document’s assimilation.

129. Article 12 of the Japanese Constitution provides: “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.”

Article 13 of the Japanese Constitution provides: “All of the people shall be respected as individuals. Their right to life, liberty, and pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”


131. Stockwin, supra note 2, at 190.

132. Article 79 (2)(3) is set forth at note 40 supra.

133. In the Tokyo Ordinance decision, supra note 104, for instance, the Court upheld a
The primary reason that the postwar Constitution has never been amended is the difficulty of the amendment process. Amendments must be approved by two-thirds of all members of both houses of the Diet and then approved by a majority of all votes cast in a national referendum. Though heavily outnumbered by the ruling party, the opposition parties have always been able to hold enough seats to block amendments. Any suggested amendment has been met with the response that the next step will be redrafting of Article 9 to permit a return to the dark days of military rule. In fact, legislation has yet to be passed setting up the basic machinery for a national referendum. It has thus been suggested that while Article 9 has not prevented limited rearmament, its presence in the Constitution has done much to prevent amendment of any sort.

C. Social Attitudes Toward Law and Litigation

Japanese have traditionally perceived social reality in terms of duties rather than rights. When European legal codes were being translated into Japanese in the late 19th century, the translators were unable to find an indigenous equivalent to the word "right" as in "legal right", necessitating invention of the word kenri. Japanese have tended to prefer conciliation to litigation as a means of resolving disputes; they also have hesitated to assert
individual rights vis-à-vis the government. Japanese have felt that legal proceedings mean a breakdown in human relations, which many have felt to be supremely important. Since people are more "right conscious" in the United States, they are more likely to take other individuals (or the government) to court. In the United States, many more lawyers are available to aid these litigants. Discussing the development of the common law in A Social History of English Law, Alan Harding quotes the maxim: "'the remedy comes before the right.' But the remedy was provided only because somebody asked for it. The plaintiff continually injected shots of real life into the small and complacent world of legal technique . . . . The law is a dialogue between lawyer and plaintiff." Thus, Professor Kawashima Takeyoshi accounts for certain dysfunctions in the Japanese legal system with the idea that popular legal consciousness has not kept pace with the development of formal legal institutions.

In practice, legal systems respond to social needs. In the words of Justice Byron R. White of the United States Supreme Court: "although legal institutions have educative functions and may reinforce certain interests and weaken others, they have only marginal influence in effecting significant and enduring legal and social change . . . basic change, at least in a country like ours, occurs only with changes in the social order." Thus, it is unrealistic to expect institutions such as the Japanese Supreme Court to make up for lack of "democratic" sentiment amongst the people by showing extra zeal in judicial review. The Supreme Court can consider only issues raised in actual cases.

D. Characteristics of the Japanese Legal Profession

Several characteristics of the Japanese legal profession have militated against the development of activist judicial review on the American model. These characteristics will be considered in the process of discussing, first, the private bar, and second, the judiciary. The third main group, public procurators (or public prosecutors), will not be considered here.

139. Ishida, supra note 21, at 75.
143. Tanaka, supra note 1, in his chapter on the legal profession (chapter 6), discusses
1) The Private Bar.

As the Supreme Court can consider only matters brought before it by litigants through lawyers, it seems clear that the fewer matters that are litigated, the fewer statutes, etc., can be attacked as violative of constitutional protections. However, lawyers are needed to litigate, and there are very few lawyers in Japan. In 1973, there were 10,865 people in Japan for each practicing attorney; in a comparable year, in the United States, there were 587 people for each practicing attorney.\(^{144}\)

The number of Japanese wishing to enter the legal profession is not substantially lower than in the United States,\(^{145}\) yet only about 1% of the Japanese applicants pass their functional equivalent of the bar examination. The official reason for this low pass rate is that it would cost the government too much to fund additional students in the two-year program of legal training (which, unlike that in America, follows the “bar” exam). The Japanese government pays salaries to successful applicants during their training at the official Legal Research and Training Institute. It has been argued, however, that the low pass rate represents instead a deliberate government policy to impede resort to the legal process.\(^{146}\)

Further, Japanese attorneys have traditionally possessed much less social prestige than their American counterparts. The best known American lawyers, such as Louis D. Brandeis before his appointment to the Supreme Court, have often been more important

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144. TANAKA, supra note 1, at 266. These figures may be deceptive in that there are in Japan several types of vocations, members of which, though not permitted to appear in court, do handle law-related business. The “quasi-lawyers” include judicial scriveners (shihō-shoshi), administrative scriveners (gyōsei shoshi), patent agents (benrishi), tax agents (zeirishi), certified public accountants (kōnin kaikeishi), Japanese notaries (kōshōnin) and law graduates not admitted to the bar. A large part of the legal work of governmental agencies and private companies is handled by persons in this final category, graduates of the law department of a university who have not joined the legal profession. In addition, judicial scriveners, who draft documents to be filed in court for persons appearing in pro per, often give legal advice. In the early 1970’s registered quasi-lawyers totalled about 65,000—excluding the law graduate category, on which figures are not maintained. Recognized members of the legal profession at about this same point in time totalled about 13,400. The above discussion is based upon TANAKA, supra note 1, at 563-65; HENDERSON, supra note 106, at 411-12; HENDERSON, FOREIGN ENTERPRISE IN JAPAN 179-85 (1973).


146. Id.
people than the judges before whom they argued. In Tokugawa Japan (1603-1867), by contrast, the legal profession did not exist. The closest occupational group was composed of certain innkeepers in the capital city who—though unable to represent clients in court—customarily ran errands for out-of-town litigants and familiarized them with court procedures. 147 These innkeepers acquired among modern Japanese a (possibly undeserved) 148 reputation for swindling, bribery, and usury. 149

Given the Japanese people's basic conciliatory orientation towards resolving disputes, practicing attorneys in the period between 1868 and 1945 “were looked upon as intruders, meddling uninvited in disputes which otherwise could have been resolved in the traditional spirit of ‘harmony’.” 150 Such popular respect for lawyers as did exist was accorded judges and public procurators as members of the official bureaucracy. 151

In addition, in the postwar period, advocates handled cases poorly at the trial level 152 and often merely asserted constitutional violations on appeal, rather than attempting to persuade the trial court of the relevance of the constitutional right. 153

As will be discussed below, 154 the professional competence and the social standing of attorneys has gradually improved during the postwar years.

2. The Judiciary.

Several characteristics of the judiciary, the second segment of the legal profession, militate against vigorous exercise of judicial review.

a. Small Number of Judges

There are very few judges in Japan compared to the United States. These Japanese jurists have a great many cases to han-

148. HENDERSON, CONCILIATION, supra note 138, at 169.
149. Id.; TANAKA, supra note 1, at 265.
150. TANAKA, supra note 1, at 265.
151. Id.
153. Id. at 131; Okudaira, supra note 15, at 93.
154. See text accompanying notes 236-237 infra.
Judicial Review in Japan

dle, and the consequent lengthy delays discourage resort to litigation.

b. Trial Scheduling Which Prolongs Litigation

Japanese courts, following the civil law custom, schedule trials one day at a time, at monthly intervals (i.e., a matter will be heard on June 1, then not heard again until July 1). This scheduling practice means that the average trial takes two years to complete, thus discouraging lawsuits.

c. Civil Law Orientation

Jurists trained before the war were indoctrinated in the civil law system of jurisprudence, which focuses on interpretation and application of authoritative legal codes rather than on policy-oriented constitutional adjudication, as is characteristic of the American common-law system. These pre-war jurists generally assumed the bench upon graduating from college. They were then (and still are) promoted primarily on the basis of seniority, in contrast to American judges, who typically were (and are) politically appointed to high judicial posts after holding important policy-making positions.

It was recognized in 1946 that such bureaucratically recruited and promoted career judges trained in statutory interpretation would have some difficulty adapting to the creative needs of judicial review. So great was the level of concern in Japan in 1946-47 about the capacity of the civil law-trained career judges to handle judicial review, that special provision was made to limit their influence.

156. Id.
157. Despite recent innovations derived from the common law tradition (e.g., the adversary system), the Japanese system remains fundamentally a member of the civil law family. Rene David and John E.C. Brierly, in MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1968), group national legal systems into four major "families"—Romano-Germanic, socialist, common law, and religious and traditional law.
158. Hattori, supra note 147, at 139.
159. Id. at 121.
161. Hattori, supra note 147, at 132.
162. Hattori, supra note 147, at 133-34.
1. Five of the fifteen Supreme Court justices were not required to be lawyers, so long as they were learned and had some general knowledge of law. The hope was, a Japanese judge who was appointed Chief Justice in 1978 has noted, "that introduction of nonspecialists would make it possible for the Supreme Court to render judgments which are not merely logical products reached from a narrow, technical viewpoint, but are more in accord with community sentiment."

2. Justices of the Supreme Court were to be subject to review in decennial plebiscites. Lower court judges were to be appointed for 10 year terms. Pre-war judges, by contrast, had life tenure.

3. The Legal Training and Research Institute was established to provide continuing education to younger judges and to

163. Court Organization Law, Law No. 59 of 1947, art. 41(1) provides:
Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than 40 years of age. At least 10 of them shall be persons who have held one of two of the positions mentioned in item (1) or (2) for not less than 10 years, or one or more of the positions mentioned in the following items for the total period of 20 years or more:

(1) President of the High Court;
(2) Judges;
(3) Judges of the Summary Court;
(4) Public prosecutors;
(5) Lawyers;
(6) Professors or assistant professors in legal science in universities which shall be determined elsewhere by law.


164. Hattori, supra note 147, at 133.

165. Article 79(2) of the Japanese Constitution, supra note 40; Court Organization Law, Law No. 59 of 1947, art. 39(4) provides: "The appointment of the Chief Justice of the Supreme Court and of Justices of the Supreme Court shall be reviewed by the people in accordance with laws which provide for popular review."

166. Article 80(1) of the Japanese Constitution provides:
The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

Court Organization Law, Law No. 59 of 1947, art. 40(1)(3) provides:
The Cabinet shall appoint presidents of High Courts, judges, assistant judges, and judges of Summary Courts from a list of persons nominated by the Supreme Court.

3. Judges mentioned in paragraph 1, shall, 10 years after their appointment to office, be regarded as having completed their terms of office and may be reappointed.

train newly selected judges.\textsuperscript{167}

In Europe, career judges with such training and experience have had substantial difficulty adjusting after having had the power of judicial review thrust upon them. It has been argued that:

the bulk of Europe's judiciary seems psychologically incapable of the value-oriented, quasi-political functions involved in judicial review. Continental judges are usually "career judges" who enter the judiciary at a very early age and are promoted to the higher court largely on the basis of seniority. Their professional training develops skill in technical application of statutes rather than in policy judgments.\textsuperscript{168}

In postwar Italy, reactionary supreme court judges sabotaged the new constitution, leading eventually to the creation of a special constitutional court composed primarily of persons of diverse background, politically appointed, mostly \textit{not} career judges.\textsuperscript{169}

It is suggested that Japanese judges who were 1) trained primarily in statutory application, 2) career officials, 3) promoted to the Supreme Court largely on the basis of seniority, would similarly have some difficulty learning to review legislation, etc., for constitutionality.

d. \textit{Occupation's Failure to Purge Judiciary}

Unlike many other important public and private officials in early postwar Japan, judges were not "purged" in the late 1940's by the American military government.\textsuperscript{170}

Ushioimi Toshitaka has advanced the following theory concerning how these unpurged judges have affected subsequent legal developments.\textsuperscript{171}

SCAP sought to strengthen judicial independence by removing the courts from the control of the Ministry of Justice. However, whereas much of the old-line leadership of government, business, etc., was replaced with persons not closely identified with the authoritarian, old regime, the judiciary was spared.\textsuperscript{172} "SCAP vested

\begin{itemize}
\item \textsuperscript{167} Hattori, \textit{supra} note 147, at 134.
\item \textsuperscript{168} Cappelletti, \textit{supra} note 34, at 1047.
\item \textsuperscript{169} \textit{Id.} at 1048-50.
\item \textsuperscript{170} On the purge, see E. Reischauer, \textit{Japan: The Story of a Nation} 225 (1970).
\item \textsuperscript{171} This account is drawn from the summary of Ushioimi's theory set forth in Johnson, \textit{supra} note 141, at 416-17.
\item \textsuperscript{172} Professor Kurt Steiner, a onetime member of the Legal Section of SCAP, has
\end{itemize}
the entire authority for judicial administration, including such functions as assignment and transfer of judges to specific courts, appointment and removal of court personnel other than judges, and financial affairs of courts, with the Supreme Court."\textsuperscript{173} Though legally unfettered in its ability to select Supreme Court justices, the Cabinet must appoint lower court judges from a list of persons nominated by the Supreme Court.\textsuperscript{174} (In practice, this list has included the same number of names as available positions, leaving no choice to the Cabinet.)\textsuperscript{175}

The Supreme Court administers judicial affairs through an Administrative Secretariat, staffed by career judges who serve there for several years between assignments on the bench. Ushiomi argues that the unpurged prewar judges came to control the Administrative Secretariat, so whereas the judiciary was freed from the control of the Ministry of Justice, it fell under the control of a new bureaucracy—the Administrative Secretariat of the Supreme Court. He maintains, "[t]he new agency performs exactly the same function as the old, namely, keeping judges in line through bureaucratic pressure and in accordance with the dictates of political authorities in Tokyo."\textsuperscript{176}

From a study of the careers of several hundred judges, Ushiomi concluded that judges attached at one time or another to the secretariat dominate the Japanese judiciary by serving as instructors in the Legal Training and Research Institute, as investigators who check on the performance of subordinate judges and by occupying positions on key precedent-setting courts.\textsuperscript{177}

There are indications that Ushiomi’s hypothesis has some validity, \textit{i.e.}, that judges are being kept in line politically. Pacifist judges have been pressured to resign from certain political groups; one such judge who declined to resign was dismissed.\textsuperscript{178} There is

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\textsuperscript{173} JOHNSON, supra note 141, at 416.

\textsuperscript{174} Court Organization Law, Law No. 59 of 1947, art. 39(1)(2) provides: "1. The Emperor shall appoint the Chief Justice of the Supreme Court as designated by the Cabinet. 2. Justices of the Supreme Court shall be appointed by the Cabinet." JAPANESE CONST. art. 80(1); Court Organization Law art. 40(1), supra note 166.

\textsuperscript{175} Danelski, \textit{The Political Impact of the Japanese Supreme Court} \textit{49 Notre Dame Law} 955, 962 (1974).

\textsuperscript{176} JOHNSON, supra note 141, at 421.

\textsuperscript{177} JOHNSON, supra note 141, at 420-21; see also Okudaira, supra note 15, at 82-83.

\textsuperscript{178} Subordinate judges, it appears, have been evaluated not only in terms of job performance, but also on the basis of political opinions. During the late 1960’s and early 1970’s,
also evidence that Legal Training and Research Institute graduates have been denied appointment as judges solely because of membership in a pacifist organization.\textsuperscript{179}

**E. Parliamentary v. Judicial Supremacy**

Japan's historical experience with parliamentary government has raised suspicions as to the usefulness of a system wherein judges have the last word on the validity of legislation. There is, in addition, a glaring theoretical inconsistency between the concept of parliamentary supremacy based on popular sovereignty and the concept of judicial supremacy via judicial review.\textsuperscript{180}

Considered as a whole, the postwar Constitution by no means supplies a clear mandate for a judicial veto over all government actions.\textsuperscript{181} Article 41, after all, denotes the Diet as the "highest organ of state power" and the "sole law-making organ of the state". Dan F. Henderson, the foremost American student of Japanese law, aptly characterizes this ambiguity as "dual supremacy" of court and Diet.\textsuperscript{182}

Ito\textsuperscript{5} Masami, the eminent constitutional law scholar who was recently appointed to the Supreme Court, has recognized the paradoxical role of judicial review in a democratic system. Though impatient with certain decisions upholding laws limiting freedom of expression, and with the limited use of judicial review, Ito (writing in 1961) noted:

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\textsuperscript{179} A bitter controversy raged over the fact that certain judges were members of the Young Lawyers Association, a "progressive" group formed to defend the Peace Constitution against conservative revision efforts. (This discussion is based on Itoh & Beer, supra note 1, at 16-17; Stockwin, supra note 2, at 187-88; and Okudaira, supra note 15, at 80-82).

The LDP and other conservative groups initially (in 1967-68) campaigned against judges belonging to the group as pro-Communist, citing lower court decisions involving labor disputes and political demonstrations as evidencing left-wing bias. In 1969 Judge Fukushima, a Young Lawyers Association member, enjoined construction of the Nike Missile Base at Naganuma, adding fuel to the fire. The Diet then launched an investigation of judges thought to be members; the secretary-general of the Supreme Court warned that judges joining political organizations might give the appearance of ideological bias. Next, ten younger judges working within the Secretariat resigned from the Association. One other member judge was subsequently not re-appointed at the end of his ten-year term; another judge resigned in protest. See text accompanying note 187 infra.

\textsuperscript{180} Henderson, Modernization, supra note 138, at 441.
Of course, the number of decisions holding laws unconstitutional does not always indicate the efficacy of judicial review. Excessive use of judicial review might threaten the progress of democracy in Japan. In this sense, I cannot support the very high value that some attach to judicial review as a technique of constitutional government..

Indeed, to guard against overzealous use of judicial review, the American Supreme Court has evolved the doctrines that legislation should be presumed constitutional and that the Court should whenever possible avoid ruling upon a constitutional question if a case can be disposed of upon narrower grounds. Justice Louis D. Brandeis stressed the point that judges—as appointed not elected officials—should be scrupulously careful not to substitute their policy preferences for those of elected representatives.

F. Impediments Inherent in Judicial Organization

1) Supreme Court’s Administrative Duties.

In its role as the Judicial Assembly, the Japanese Supreme Court exercises administrative authority over the judiciary. Feeling that control of the judiciary by the Ministry of Justice endangered judicial independence, the framers granted to the high court (in

185. See, e.g., Rescue Army v. Municipal Court, 331 U.S. 549, 568-74 (1947); Constitutional Law, supra note 184, at 83-85.
186. See Ashwander v. Tennessee Valley Authority, 297 U.S. at 354-55. Similarly Johnson praises the “more powerful” postwar judges for not trying “to advance their own political opinions against those of the popularly elected Diet.” Johnson, supra note 141, at 421.
187. Court Organization Law, Law 59 of 1947, art. 12 provides:

1. In its conduct of judicial administrative affairs, the Supreme Court shall act through the deliberations of the Judicial Assembly and under the general supervision of the Chief Justice of the Supreme Court.
2. The Judicial Assembly shall consist of all Justices, and the Chief Justice of the Supreme Court shall be the chairman thereof.
Article 77) the “rule-making power”, under which the Supreme Court “determines rules of procedure and of practice and of matters relating to attorneys, the internal discipline of the courts, and the administration of judicial affairs.”

Although autonomy from the Ministry was indeed achieved, an unintended consequence of this grant of power was to foster a preoccupation with administration, especially personnel management in lower courts. Administrative duties not delegated to the Administrative Secretariat have absorbed time that might otherwise have been spent grappling with constitutional questions.


Three provisions of the hastily-drafted Court Organization Law of 1947 also impede the effective exercise of judicial review.

a. Brief Tenure on the Bench

Perhaps the most serious shortcoming of the 1947 law is setting strict age criteria for appointment and retirement. Appointees must be at least forty (Article 41); retirees, no more than seventy (Article 50). In combination with a firmly established custom of appointing persons in their early 60’s, this requirement has resulted in a rapid turnover of court personnel.

Appointees are selected from persons occupying the top rungs of hierarchical career ladders. It is considered improper to appoint younger men from, for instance, the judiciary because to do so would be an affront to judges who, though graduates from a university in the same year, would still be in much lower positions.

188. See, e.g., the controversy detailed in note 178 supra. The decision to not reappoint the young judge who belonged to the pacifist organization was made by the full court.

189. See OPPEN, supra note 128, at 75-76.


191. Article 50 provides: “Justices of the Supreme Court shall retire upon the attainment of 70 years of age. . . .”


193. Men leave the three ladders only when they reach the compulsory retirement age for the position they then are filling; for presidents of high courts, this is 65; for procurators, 63 or 65; for Tokyo University Professors, 60; and although there is no such limit for attorneys in private practice, their average age at appointment has been 62. Id.

194. See Johnson, The Reemployment of Retired Government Bureaucrats in Japanese Big Business, 14 ASIAN SURVEY 559-60 (1974), for an explanation of this seniority
When an unusually young justice was in fact appointed in the 1950’s, two Supreme Court justices vainly tried on this basis to persuade the justice minister to withdraw the nomination.\textsuperscript{195}

The resulting rapid turnover of justices has made it more difficult to gain experience and to develop expertise in constitutional analysis.\textsuperscript{196} Clearly, terms of seven or eight years limit the possibilities of professional growth.

Creative, activist solutions to complex legal problems require considerable exposure to the problems, adequate time for reflection, and sufficient opportunities (\textit{i.e.}, the “right” cases) in which to enunciate the new legal principles. Consider, for example, Roger Traynor’s pioneering contributions to modern products liability law.\textsuperscript{197} Traynor served on the California Supreme Court from 1940 to 1970. In 1944, in a concurring opinion in \textit{Escola v. Coca Cola Bottling Co.},\textsuperscript{198} Traynor suggested an innovative approach to defective products cases based upon risk allocation. Eventually, in 1963, this approach was adopted by Traynor’s colleagues in \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{199} It is noteworthy that Traynor did not articulate this new approach until he had been on the court for about four years and that the theory did not become law in California until another nineteen years had passed.

The leadership role of the Chief Justice can also be crucial in undertaking innovative approaches to significant legal problems.\textsuperscript{200} Short terms of service would make it more difficult for the Chief Justice to develop the ability to influence colleagues. Consider by contrast the thirty-four year tenure of John Marshall during the most creative years in the history of the United States Supreme Court.

Furthermore, the Japanese custom of appointment of the most senior judges, etc., has guaranteed that the Supreme Court has

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\textsuperscript{195} Danelski, \textit{supra} note 175, at 963.
\textsuperscript{196} Tanaka, \textit{supra} note 1, at 694, makes a similar point.
\textsuperscript{197} This discussion is based upon G.E. White, \textit{The American Judicial Tradition: Profiles of Leading American Judges}, 297-300, 309 (1976).
\textsuperscript{198} 24 Cal. 2d 453 (1944).
\textsuperscript{199} 59 Cal. 2d 57 (1963).
\textsuperscript{200} See F. Frankfurter, \textit{The Commerce Clause} 4-7 (1937). Conversely, Arthur J. Goldberg, former Associate Justice of the United States Supreme Court, feels that the leadership role of the Chief Justice is greatly exaggerated; that the only real authority this person has is to assign the writing of opinions; that even this power is limited because each justice must be assigned his share of opinions to maintain interpersonal harmony. Address by Arthur J. Goldberg, Hastings College of the Law (Feb. 14, 1979).
\end{flushleft}
been staffed, at least initially, predominantly by the most conservative members of the legal profession, i.e., those educated before the war, rather than partially by men of the postwar era. When all justices are of the same age and viewpoint there is much less opportunity for fruitful exchange of generational viewpoints.

b. *Unwieldy Number of Justices*

Article 5 of the Court Organization Law provides for a bench of 15 justices, a most unwieldy number. To counter this problem, the Court splits into three “petty benches” to dispose of routine cases. In any case of constitutional significance, however, only the full fifteen judge court (the “grand bench”) may act.

American experience suggests that 15 is simply too many justices. In 1937, in the United States, Chief Justice Charles Evans Hughes protested against President Roosevelt’s proposal to add six new seats to the nine-man court on the grounds that additional personnel would make discussion and decisionmaking lengthier and more difficult. In 1954, the Japanese Supreme Court in fact proposed that its number be reduced from fifteen to a more manageable nine or eleven, but the Diet did not act.

c. *Individual Opinions Mandated*

Article 11 of the 1947 law (supplemented by Article 12 of the Supreme Court Rules) seems to require that each justice

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202. *Id.*
203. The pre-war high court (the Daishinin) had 32 members. The framers of the 1946 Constitution reduced the number of justices from 32 to 15, to (1) make judicial offices more prestigious and (2) to avoid the clumsiness resulting from too large a decision-making body. Oplker, *supra* note 128, at 89.
206. Court Organization Law, Law No. 59 of 1947, article 11 provides: “The opinion of every judge shall be expressed in written decisions.”
207. Article 12 provides: “Expression of the opinion of each judge on written decisions shall be made giving reasons thereof explicitly,” quoted in 1 SUPREME COURT RULES 31 (1947).
write an individual opinion in each decision. This rule is not literally followed in practice, but it is observed often enough to cause problems. The authors of this provision likely intended to change the policy followed by the pre-war Supreme Court, which did not permit dissenting opinions. This objective has been achieved, but an unintended consequence of this new policy has been to encourage excess verbiage, leading to confusion in many cases as to the precise rationale of the decision.

3) Eight Votes Required to Void Statute.

According to Rule 6, Articles 7 and 11 of the Supreme Court Rules promulgated in 1947, although the Court can render decisions when as few as eleven justices are present, the concurrence of at least eight justice is required to invalidate a statute. Considering the age, state of health and high rate of turnover among justices, this minimum requirement makes it harder to muster the votes needed to strike down a law.

Two additional organizational characteristics are 1) the lack of contempt power available to Japanese courts to enforce their decisions, and 2) the limited range of remedies available to plaintiffs.

4) Lack of Contempt Power.

Postwar courts continue to rely on continental notions of judicial power, which restrict available civil remedies to those provided by statute. If the party against whom judgment has been rendered refuses to comply, the court must rely on procurators to initiate criminal proceedings, because there is no judicial power of con-


209. For instance, in the Sunakawa case, seven "supplementary opinions" (Hosokuiken) and three "opinions" (Iken) were submitted in addition to the opinion of the court. In addition, Henderson notes that the first case in which a Diet enactment was held unconstitutional, Sakagami v. Japan, 7 Sai-han Keishu 1562 (1953), may in a sense be regarded "as Japan's Marbury v. Madison, but its value as a precedent is diminished by the numerous opinions written by the justices . . . [and] by the decision's consequent overall ambiguity . . . ." Henderson in CONSTITUTION OF JAPAN, supra note 1, at 127.

210. Article 7 provides: "The Grand Bench may conduct hearings and render decisions when there are present eleven or more judges." Quoted in I SUPREME COURT RULES, supra note 207, at 29. Article 11 provides: "An accord of opinion among eight or more must be made if a decision is to be made as to the unconstitutionality of a statute, regulation or disposition." Quoted in I SUPREME COURT RULES, supra note 207, at 31.

211. This discussion is based on Haley, supra note 138, at 387-89.
tempt by which the court can enforce decrees on its own motion.

5) Limited Range of Remedies.

The courts accord private citizens a very limited degree of relief in actions against the government. Declaratory relief may be sought against administrative actions. The courts are also authorized to suspend administrative actions, but the Prime Minister may veto any such judicial ruling. There is no clear statutory provision authorizing the courts to order administrative agencies to take affirmative actions, though some commentators support the concept.

6) Need to Integrate Extensive Code Revisions.

Another organizational feature of the new postwar legal order that distracted the Supreme Court from constitutional adjudication was the extensive revision of codes. The Occupation authorities mandated substantial changes in the legal codes that form the centerpiece of Japanese law. Interpretation of the new codes has been a formidable undertaking, to which the civil law-trained justices may well have assigned top priority. Given their training, the justices likely felt more comfortable in applying statutes than in making the relatively unguided policy decisions characteristic of constitutional adjudication.

V. RECENT INCREASE IN JUDICIAL REVIEW

A. Stage of Judicial Development

The American Supreme Court is approaching its bi-centennial. The Japanese Supreme Court was established in 1947. As noted earlier, it is inappropriate to judge the Japanese court by American judicial standards. Similarly, due regard must be given to the relative stages of institutional development.

Though criticized for timidity in the use of judicial review, the Japanese Court has in fact voided more acts of the national legislature than had the United States Court in an equivalent number of

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212. Administrative Case Litigation Law, Law No. 139 of 1962, art. 27.
214. See text, supra page 90.
years in its early period. Between 1790 and 1858 the American Court invalidated two acts of Congress; between 1947 and 1978 the Japanese Court voided five acts of the Diet. Though the early United States Court also declared unconstitutional several very significant state laws, it clearly showed "remarkable" restraint vis-à-vis the national legislature. As the Japanese court has gradually acquired experience in exercising judicial review, it has become more willing to challenge the Diet in significant legal areas.

Several other factors have also led to increased use of the power of judicial review. It has, for instance, become clear that the post-war regime is stable. The Article 9 issue, though still very much alive, has declined in intensity. As these stabilizing changes have occurred, as the Court has become more comfortable in its role as constitutional tribunal, the Supreme Court has predictably become more active in its use of judicial review.

B. Recent Cases

Three recent decisions have overturned statutes. The 1973 Parricide case involved Penal Code Article 200, which man-

215. Danelski has stated that "the Court is coming to political maturity more quickly than many expected, even more quickly than did its American counterpart after which it was modeled.” Danelski, supra note 175, at 980.


217. See notes 7-11 supra. The first two decisions may be interpreted as not involving acts of the Diet. See note 218 infra.

218. The word “statutes” is intended to include administrative regulations, SCAP directives, etc. The Sakagami case (see notes 47 & 48 and accompanying text supra) can be considered as involving the constitutionality of the “statutes of the Japanese Diet” (Henderson, CONSTITUTION OF JAPAN, supra note 1, at 129) or merely “SCAP directives” (Hale,

220. Article 200 of the Japanese Penal Code provides: “A person who kills one of his or her own or his or her spouse's lineal ascendants shall be punished with death or imprisonment at forced labor for life.”
dated a much more severe penalty for murder of a close relative than for ordinary homicide.221 Though a similar statute222 had been upheld in 1950,223 the Court struck down Article 200 on the grounds that the disparity between the penalty for parricide and the penalty for ordinary homicide exceeded that permissible under the equality-under-the-law clause224 of the Constitution.225

Both the 1950 and 1973 cases involved a clear contradiction between traditional morality (i.e., devotion to the family) and universal values (i.e., equal protection under the law). With but one dissenting vote, the 1950 Court had upheld a similar disparate penalty provision as "merely a concrete legal provision, based on the requirements of morality."226 By contrast, in the 1973 case, the Court voted 14-to-1 to overturn the Penal Code Article 200 penalty provision as more severe to an impermissible degree. Six justices would have gone still further, arguing that any difference in penalty based on familial status relationships violated Article 14 of the Constitution. The dramatic change in the Court's treatment of these criminal statutes reflects the gradual transformation of values that has occurred in the postwar era.

The second recent case227 invalidating a statute involved a provision of the Pharmaceutical Affairs Law which placed geographical limitations on the establishment of new pharmacies. Specifically, the provision banned new stores from opening within 100

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221. Article 199 of the Japanese Penal Code, by contrast, provides: "A person who kills another shall be punished with death or imprisonment at forced labor for life or for not less than three years."

222. Article 205 of the Japanese Penal Code provides:
   1. A person who inflicts a bodily injury upon another and thereby causes his death shall be punished with imprisonment at forced labor for a fixed term of not less than two years.
   2. When committed against a lineal ascendant of the offender or his or her spouse, imprisonment at forced labor for life or for not less than three years shall be imposed.


224. Article 14 is set forth in the text at p. 117-118 supra.

225. Some commentators have stated that the Parricide case overruled the 1950 Fukuoka "Patricide" decision by striking down Penal Code art. 200. See Danelski, supra note 175, at 960; McNelly, American Political Traditions and Japan's Postwar Constitution, 140 WORLD AFF. 64 (1977); Stockwin, supra note 2, at 183. The 1950 case, however, involved art. 205(2) of the Penal Code.

226. Maki, supra note 1, at 131.

meters of existing pharmacies. The Court held in 1975 that other licensing and inspection controls adequately protected the public from an alleged threat of debased drugs, and that any additional protection which might flow from geographical restrictions on location was not adequate to outweigh the serious limitation of the constitutional right to pursue an occupation. This case was notable in that for the first time: 1) an earlier constitutional decision was clearly overruled, 2) economic legislation was struck down, and 3) a declaration of unconstitutionality had significant prospective impact, in that other licensing statutes contained similar location restrictions.

The third recent case invalidating a statute involved the apportionment plan of the lower house of the Diet. Despite a huge postwar shift in population from rural to urban areas, the Diet has reapportioned its lower house only twice, in 1964 and 1975. In 1972, one urban district had five times as many voters per elected representative as did a certain rural district with a stable population. The ruling Liberal Democratic Party, generally weakest in major cities, was apparently in no hurry to increase the opposition parties' representation in the Diet.

Earlier, in 1964, the Supreme Court had rejected a claim that the apportionment scheme violated the constitutional guarantee of equality under the law, holding that the disparity of the political value of a vote among districts had not yet reached the point where it could be considered an abuse of legislative discretion. In the Court took the next step, holding that the apportionment plan in effect at the time of the December, 1972 general election violated not only the equality-under-the-law clause, but also the constitu-

228. Article 22(1) of the Japanese Constitution provides: "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."
231. Technically, the Diet was not "reapportioned" since no redistribution occurred—additional seats were simply added.
tional guarantees of universal suffrage and nondiscrimination among candidates. This case was not decided until after the intervening 1975 apportionment. The eight-justice majority declined to invalidate the election absent express constitutional authority for this action. Five justices would have taken this latter step, arguing that there was no other effective way to remedy the violations of the Constitution.

*Kurokawa* is noteworthy as following a pattern in which the Court first signals its dissatisfaction with a certain state of legal affairs to the Diet, and then, in the absence of parliamentary response, takes more decisive action. Though failing to invalidate the election, *Kurokawa* represents a significant shift in the Court's thinking and increases pressure on the Diet to undertake significant electoral reform.

C. Changes in the Legal Profession

The legal profession has undergone several significant changes in the postwar years, changes which help to explain the increased use of judicial review.

1) The Private Bar.

Attorneys in private practice have become increasingly effective in litigation. For instance, trial lawyers' skill in examining witnesses has improved. Japanese attorneys had little opportunity to develop this skill under the pre-war system because the judge did most of the questioning.

Both the social prestige and income of attorneys in private practice has gradually improved since the war, to the point that judicial and prosecutorial posts once much coveted by these attorneys are now considered undesirable, almost certainly because of lower pay and possibly because of lower status.

235. Article 15 of the Japanese Constitution provides: "The people have the inalienable right to choose their public officials and to dismiss them... Universal adult suffrage is guaranteed with regard to the election of public officials."

236. Article 44 of the Japanese Constitution provides: "The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property, or income."


238. E.g., Itoh, supra note 152, at 131.

239. TANAKA, supra note 1, at 552.
The better Legal Training and Research Institute graduates are beginning to enter private practice, reversing the earlier trend of this group to accept public service jobs. There have been demands that the government cease paying salaries to students at the Institute because increasing numbers of these students are seeking employment in the private sector.\(^{240}\)

The ratio of people to lawyers has improved slightly in the postwar years, increasing access to the courts.\(^{241}\) There remain, nonetheless, comparatively few lawyers in Japan.\(^{242}\)

2) The Judiciary.

The judiciary, like the private bar, has undergone several significant postwar changes which help to explain the greater willingness to invalidate laws through judicial review.

First, "the slow processes of the generational replacement of personnel have brought a gradual transformation in outlook."\(^{243}\) Older judges, who trained and served under the Meiji Constitution, have gradually been replaced by younger men whose values crystallized in the postwar era. The defeat in World War II was a great watershed in Japanese history. Postwar Japan has been a much freer,\(^{244}\) more democratic society. Although judges as a group are more conservative in outlook than lawyers in private practice, younger judges are fairly liberal in comparison to jurists trained before the war.\(^{245}\) Younger judges favoring a pacifist interpretation of Article 9 have clashed with older judges. Younger trial court judges have attempted to strike down both the U.S./Japan Security Treaty\(^{246}\) and the Japanese SDF\(^{247}\) as in violation of Article 9.

Another factor that helps to account for increased willingness to invalidate acts of the Diet is the increased prestige of judicial office. In the pre-war era, careers in the administration were seen as more desirable than careers as judges.\(^{248}\) Before the war very few

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240. Noda, supra note 25, at 142.
242. Tanaka, supra note 1, at 287-68.
244. Contemporary Japan is considered to be much freer than most other Asian nations. See Geck, Individual Freedoms in Today's World; Laws and Reality, 1 Hastings Int'l & Comp. L. Rev. 235, 242-45 (1978).
245. Ishida, supra note 21, at 76, 133 n.14.
248. This discussion is based on Danelski, supra note 20, at 46-49. One of the Meiji
of the most talented Tokyo graduates became judges; careers as bureaucrats were seen as more prestigious.\textsuperscript{249} Imperial University Law Faculty graduates could in fact enter the judiciary \textit{without} taking an examination such as that required of candidates for administrative positions. Reflecting in part the increased power and prestige of judicial service, the number of law faculty graduates taking the National Legal Examination has increased dramatically in the postwar years.\textsuperscript{250} Ironically, this improved judicial prestige is attributable to the fact that judges are now popularly regarded as full-fledged government officials, rather than as in pre-war Japan, "step-children of the bureaucracy".\textsuperscript{251}

This increased judicial authority is reflected in the manner in which recent Supreme Court justices have been selected.\textsuperscript{252} Some recent appointees to the Court, although formally selected by the Prime Minister, appear actually to have been chosen by the Court. As indicated previously, the Supreme Court has customarily recommended, subject to the Prime Minister's veto, particular individuals to fill vacancies. Nevertheless, on three occasions between 1970 and 1974, individuals backed by the Chief Justice prevailed over the Prime Minister's choices—a striking example of the strength of the bureaucratic ethic in the judiciary.

D. Development of Popular Legal Consciousness

It appears that popular legal consciousness (to use again Professor Kawashima's phrase)\textsuperscript{253} has begun to catch up with formal legal institutions.

American law has grown much more complex and extensive in the century of modernization following the Civil War. A key factor contributing to this growth has been the breakdown of the family

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  \item reforms in the late 19th century was the establishment of Western-style Imperial universities. The law faculties of these Imperial Universities were designed as training academies for the official bureaucracy. See text accompanying notes 106-10 supra.
  \item 249. Tokyo Imperial University (today Tokyo University) was the most prestigious institution. Daneiski, \textit{supra} note 20, at 46-49.
  \item 251. This phrase is used in SUPREME COMMANDER FOR THE ALLIED POWERS, \textit{POLITICAL REORIENTATION OF JAPAN} 200 (1949), \textit{quoted in} Daneiski, \textit{supra} note 20, at 47.
  \item 252. This discussion is based on Daneiski, \textit{supra} note 175, at 962-63.
  \item 253. See text accompanying note 141 supra.
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and the church as agencies of social control.\textsuperscript{254} Similarly, diminished political solidarity and growing impersonality have led to a greater need for law.\textsuperscript{255} Japan, as a society undergoing modernization, has been subject to some of the same stresses; law appears to be similarly becoming more necessary in Japan.

Since the end of World War II, "democratic" values have become more firmly entrenched in Japanese popular consciousness, owing in large part to the reformed educational system and the free press. Though transformation of values is a very slow process, it seems clear that significant change has occurred. Analysts such as Robert Bellah suggest that the traditional group-centered value system is still dominant in Japan.\textsuperscript{256} More recent empirical studies show that urbanization and associated population mobility have to an extent undermined traditional communities.\textsuperscript{257}

Industrialization and urbanization have also resulted in significant air, water and noise pollution in many parts of Japan. Persons facing serious pollution levels have sought judicial redress of grievances, after more informal methods failed.\textsuperscript{258} Also, in sharp contrast to traditional hierarchical approaches to problem-solving, highly motivated citizens have banded together in grassroots political action groups to attack particular pollution problems in local areas.\textsuperscript{259}

This trend toward vigorous assertion of rights, whether in court or in the political arena, represents a significant shift from the traditional focus on duties to family, to the emperor, etc.

Are Japanese becoming more litigious?\textsuperscript{260} This is a difficult question to answer, especially in light of the division of opinion among commentators as to whether Japanese were ever less litigious than, e.g., Americans.\textsuperscript{261} One view is that the Japanese are becoming more litigious, at least in terms of attitudes toward the legal process, if not in terms of actual numbers of cases filed.\textsuperscript{262}

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255. Id. at 440.
256. Bellah, Values and Social Change in Modern Japan in Beyond Belief, supra note 22, at 116.
258. Tanaka, supra note 1, at 417-28, 443.
260. Litigiousness has been defined as "the propensity to settle disputes through the judicial process." H. Ehrmann, Comparative Legal Cultures 83 (1976).
261. See note 138 supra.
262. Noda, supra note 25, at xii.
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Consistent with this view, is John Haley's argument that more disputes would find their way into court but for institutional constraints discouraging resort to litigation—such as delay stemming from the small number of judges, lack of effective legal remedies, etc.  

VI. CONCLUSION

Initially cautious in its use of the newly-conferred power of judicial review, the Japanese Supreme Court has since 1973 been more willing to invalidate legislation. The Court's initial perception of judicial review was shaped by radical demands that the justices declare the Japanese military to be in violation of Article 9 of the Constitution, the peace clause. Judicial resistance to such pacifist demands affected other legal areas as well, since the court tended to shy away from any action that would undermine or embarrass the new government. As the Article 9 issue gradually declined in explosiveness, and as it became clear that the postwar regime would survive the withdrawal of the American occupying army, the court became more receptive to demands that laws be struck down.

Meanwhile, justices and litigating attorneys alike became more familiar with and skilled in the radically new techniques of constitutional policy-making. Men more open to the new idea of judicial review and less committed to the traditional values came to exercise influence on the Court. Given the civil law orientation of the Japanese legal order and the status of the Diet as the "highest organ of state power", it is likely that the Japanese Supreme Court will continue to exercise far less power through judicial review than does its American counterpart.

Nonetheless, the degree of success that the Court has achieved represents a remarkable break with the past. Testing acts of the Diet in terms of adherence to universal legal principles is a dramatic departure from the traditional ideal of unqualified loyalty to the community. The infusion of such universal principles, rather than weakening the state, as had long been feared, may well contribute to the long-run stability and strength of the Japanese polity.

263. Haley, supra note 138, at 380-86.
264. JAPANESE CONST. art. 41, set forth in note 118 supra.
BIBLIOGRAPHICAL NOTE


For more data on these and other publications, see the bibliographies of the works cited above, as well as Lawrence Beer and Hidenori Tomatsu, *A Guide to the Study of Japanese Law* (1978). Advice on legal research in Japanese language materials may be found in Beer and Tomatsu (passim) and in Tanaka (chapter 11).