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The Japanese Judicial System: Thirty Years of Transition

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THE JAPANESE JUDICIAL SYSTEM: THIRTY YEARS OF TRANSITION

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The Japanese legal and judicial system is exemplary. In a single century, Japan has moved from a feudal legal structure through a system of law and practice based on Western European civil law to a legal apparatus following the Pacific War unique in its blending of Continental European and Anglo-American law. Perhaps the most noteworthy dimension of this evolution is the marked change in the governmental role of the judiciary, from a mere component of a medieval administrative apparatus to a guiding organ deriving its powers directly from the Constitution of Japan.

I. HISTORICAL DEVELOPMENT AND STRUCTURE OF THE JAPANESE JUDICIARY

A striking phenomenon of evolving Japanese legal concepts is the relatively brief span of time required for a transition from a decentralized feudal structure of justice administration to a highly sophisticated, centralized judicial system. A process requiring centuries in Western Europe, England, and the United States was compacted into a far briefer period in Japan. In context, evolution of Japanese legal institutions has been but one small part of the transition of Japan from a reclusive island kingdom to a world power. A brief survey of evolving legal institutions is indispensable to an understanding of today's Japanese legal system.

A. The Feudal Era

The tradition of the Japanese Emperor as head of the nation relates back to the sixth century of the Western calendar. It is unlikely, however, that true consolidation of power occurred until the rise of the Tokugawa shogun (military dictators) in the sixteenth century.1 Although a subsidized imperial court continued throughout the Toku-

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gawa era in the nominal capital city of Kyoto, the true seat of power was the shogunal administrative capital at Edo, the forerunner of Tokyo. Although for many purposes local feudal lords (daimyō) ruled over the daily lives of their vassals, the shogunal system assured the vassals' subservience to the shogun as de facto ruler of the nation in the guise of the Emperor's military deputy.²

According to Japanese feudal concepts, there was no clear separation between law and morals. Nor was there a clear separation between administrative and judicial reactions to breaches of customary norms. For most purposes, local lords adjudicated disputes between and contraventions by vassals, even though the latter might not have been physically present in daimyate lands at the time of a contested occurrence. If the appropriateness of a penalty was at issue, or a party or respondent was not a vassal, issues had to be referred to an appropriate shogunal official for disposition. Although in theory each dispute was to be resolved on its intrinsic merits, adjudicators referred to compilations of precedents for guidance.³ How Japanese subjects viewed the system during its three centuries of existence cannot be determined comprehensively, particularly because the Buddhist and Confucian values on which Japanese feudal institutions rested assumed an absolute duty on a subject's part to follow the will of the ruler.⁴ In any event, Hirobumi Ito, called the father of Japan's first (Meiji) Constitution, noted that "judicial matters were conducted with military despotism."⁵

B. The Era of the Meiji Constitution (1889-1947)

The year 1868 saw the reassertion of governmental powers by the imperial throne through the so-called Meiji restoration,⁶ which brought a swift succession of cataclysmic changes to Japanese society. The un-

². W. Beasley, The Modern History of Japan 3-6 (1963) [hereinafter cited as Beasley].
³. See generally I. D. Henderson, Conciliation and Japanese Law 63-125 (1965) [hereinafter cited as Henderson].
⁵. H. Ito, Commentaries on the Constitution of the Empire of Japan 102 (M. Ito trans. 1889) [hereinafter cited as Ito Commentaries].
⁶. Meiji is derived from the name selected by the Emperor Mutsuhito for his reign. Similarly, the designation for the current era, which began in 1925 with the accession of Emperor Hirohito, is Shōwa.
Underlying reasons for the changes were complex, but undeniably a highly important influence was aggressive insistence by western powers that Japan open its ports to foreign trade and establishments. During the first two decades an identifiable judiciary, separate from other organs of administration, began to emerge, as did written criminal and civil codes.

The Emperor Meiji and his principal advisers strongly backed the adoption of a western-style constitution which nonetheless would preserve traditional Japanese values. The drafters of the Meiji Constitution had to confront the placement of the judicial function in a modernized Japanese structure of government. Article 57 of that Constitution provided that the judicial function (shihōken, "judicature" is the usual translation) was to be exercised in the name of the Emperor by courts of law according to law, and that court organization was to be established by law.

As of 1889, independence of the judiciary meant only that the Emperor, instead of personally dispensing justice, caused independent courts to do so free of immediate executive or administrative influence. Courts of law, though, were not the exclusive repository of imperial adjudicative powers. Special courts could be established by law, and no litigation relating to administrative (executive) activity that infringed private rights could be commenced before courts of law.

7. See generally Beasley, supra note 2, at 76-97; Hall, supra note 1, at 243-72; E. Reischauer, The Japanese 78-86 (1977) [hereinafter cited as Reischauer].


10. An excellent history is G. Akita, Foundations of Constitutional Government in Modern Japan 1868-1900 (1967). See also Hall, supra note 1, at 294-99; Takayanagi, supra note 9, at 6-12.

11. Ito Commentaries, supra note 5, at 104 ("This theory has no connection with the doctrine of independence of the three powers, but it is still an immutable principle.").

12. Meiji Const. art. 60. Military courts were the principal objective, but Prince Ito also mentioned special commercial tribunals, Ito Commentaries, supra note 5, at 107-08, although these were not in fact a part of the prewar system. The requirement that such courts be established only by law (i.e., statute) was intended, according to Ito, to forestall "the establishment of exceptional courts placed beyond the control of law, encroaching upon the judicature through the influence of the administrative authority, and wresting from the people the proper courts where justice can be obtained." Id. at 108.
(shihōsaibansho) but, instead, had to be brought in a special Court of Administrative Litigation (Gyōsei saibansho).13

At the apex of the system of law courts established by the Diet (legislature) under the Meiji Constitution was the Daishin'in.14 Below that court were courts of appeal (kōsoin), district courts (chihō saibansho), and ward or local courts (ku saibansho). In addition, designated police officials were empowered to adjudicate summarily minor infractions legislatively classified as police offenses. A protested ruling could be relitigated before a ward court.15

For a time, Japan utilized a jury system.16 Lay participation in adjudication proceedings had not been a feature of traditional Japanese legal administration, however, and there were certain procedural disadvantages to jury trial.17 The law was so infrequently invoked that it was suspended in 1943;18 it was not revived in the 1947 revision of criminal procedural law, although the current Court Law (Saibansho) allows for the possibility.19

13. MEIJI CONST. art. 61. For a discussion of this, see text accompanying notes 98-100 infra.

14. Sometimes noted as Taishin'in, the term has no precise English counterpart. It has been variously translated as Great Court of Judicature, Court of Cassation, and (old) Supreme Court. It consisted of 45 judges sitting in nine panels or chambers of five judges each, generally five civil and four criminal. All civil or criminal panels or the entire court, depending on the nature of the issue, had to hear cases in which the court's precedents might be overruled. See generally QUIGLEY, supra note 8, at 278-79; H. TANAKA, THE JAPANESE LEGAL SYSTEM 53 (1976) [hereinafter cited as TANAKA]; COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, xv-xviii (J. Maki ed. 1964) [hereinafter cited as SUPREME COURT DECISIONS].

15. ISHII, supra note 8, at 462-64, 557-58; QUIGLEY, supra note 8, at 280.

16. JURY LAW (Baishinboshi) (Law No. 50 of 1923, in force from Oct. 1, 1928). See generally MIYAKE, supra note 8, at 5-7; QUIGLEY, supra note 8, at 285-86.

17. No relitigation of factual issues before a kōsoin was possible, and costs of the jury had to be borne by a defendant with means. A court also could disregard a jury's verdict, which was advisory only; a second jury could be convened by a court if the first jury's report was deemed unsatisfactory. S. FUJI, THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW 316-17 (1940) [hereinafter cited as FULI].


19. CT. LAW art. 3(3). Lay persons have roles to play in the justice system as a whole. In civil matters, lay conciliators conduct conciliation proceedings under a special law. CIVIL CONCILIATION LAW (Minji chōteihō) arts. 6-7 (Law No. 222 of 1951). See II HENDERSON, supra note 3, at 218-22, 306. Family courts also call upon persons to assist in certain matters as councillors. In criminal matters, citizen inquests of prosecution (kensatsu shinsakai) are on call to inquire into refusals to institute prosecution (but have the power only to recommend, not mandate, filing of charges, which makes them functionally weaker than the American grand jury on which they were ostensibly patterned). See Meyers, The Japanese Inquest of Prosecution, 64 HARV. L. REV. 279 (1950). Volunteer probation officers are heavily relied on in offender aftercare under special legislation. VOLUNTEER PROBATION OF-
C. The Present Japanese System

Japan’s defeat in the Pacific War and its occupation by the Allied Powers (SCAP) brought major revision of the constitutional law governing the judiciary. Article 76 of the 1946 Shōwa Constitution vests judicial power entirely in the Supreme Court of Japan and in the lesser courts that are established by law. In addition, it forbids establishment of extraordinary tribunals or placement in an executive agency of final judicial power and confirms the independence of judges, except as they are bound by the Constitution and laws of the nation. The method of exercising these powers is examined below. It is clear that the Japanese judiciary now functions much like its American federal counterpart, unlike the prewar Japanese system, which functioned in the pattern of Western European judiciaries.

The Supreme Court of Japan (Saikō saibansho) is established directly by the present Constitution. It consists of fifteen justices, including the chief justice. The entire Court sits as the grand bench (dai hôtei) as required to decide certain questions and as petty benches (shō hôtei) of five justices each to hear routine cases. Below the

FICER LAW (Hogoshihō) arts. 3-7 (Law No. 204 of 1950). A similar system functions under the PROSTITUTION PREVENTION LAW (Baishunbōshihō) art. 25 (Law No. 118 of 1956).

20. Under the Meiji Constitution, a judicial appointment was not considered to be prestigious. The traditional Japanese moral values, which embrace ideals such as personal harmony, compromise, and family ties, were considered to be incompatible with the adversary tradition of the judiciary. A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 86-90, 93-94 (1976) [hereinafter cited as OPPLER]. See generally Maki, The Japanese Constitutional Style, in THE CONSTITUTION OF JAPAN 3, 8-12 (D. Henderson ed. 1969); Saito, The Independence of the Judicial Power in Japan, 3 JAPAN ANN. L. & POL. 83 (1955) [hereinafter cited as Saito]; Takayanagi, supra note 9, at 12-15.

21. See notes 73-99, 112-30 infra, and accompanying text.

22. Japan is a unitary system; all prefectures are part of the national governmental structure and there are no separate prefectural or local courts. REISCHAUER, supra note 7, at 261-62; Beardsley, Japan’s Political System, in TWELVE DOORS TO JAPAN 428, 475-76 (1965). Therefore, it is not federal in the sense of the American system.

Nor has the Japanese system had to cope with assimilation of a different legal structure as, for example, the United States did when Puerto Rico became a commonwealth. See Torres v. Puerto Rico, 99 S. Ct. 2425, 2428-29 (1979). The only possible exception is the reincorporation of the Ryukyu Islands’ legal system, as developed in practice after 1945 under United States civil administration, following reversion to Japanese control. See Tokioka, Reversion of Okinawa and the Problems of Its Judicial System, 16 JAPANESE ANN. INT’L L. 39 (1972). The prereversion system is described in George, The United States in the Ryukyus: The Insular Cases Revived, 39 N.Y.U. L. REV. 785, 787-94, 809 (1964).

23. CONST. arts. 76, 79.

24. Cases that must be heard and decided by the dai hôtei are those involving a constitutional issue on which no Supreme Court precedent exists, those in which a nonconstitutional issue has been decided by a petty bench overruling Supreme Court precedent, those referred to the grand bench by a petty bench because they present issues of great importance, and those in which a petty bench is equally divided, because a four-justice panel can split 2-2 on
Supreme Court are eight high courts (kōtō saibansho) and fifty district courts (with 244 branches). At a coordinate level with district courts is an equivalent number of family courts (katei saibansho), which are a new part of the system patterned generally on an American model. Summary courts (kan'i saibansho) (575 in number), which supplanted the earlier ward courts, comprise the lowest judicial level. Police courts were abolished, for they could not meet the separation of powers requirements of the new Constitution.

II. STATUS OF JUDGES UNDER THE SHŌWA CONSTITUTION

A. Appointment and Tenure

The Meiji Constitution provided that judges were to be appointed from among those holding proper qualifications established by law and that they should remain in office until the mandatory retirement age, unless sentenced to criminal punishment or disciplined according to procedures set by law. Because judges, other than presidents (presiding judges) of the Daishin’in and kōsōin, were employees of the Ministry of Justice, they were appointed as other ministerial officials. Most appointees were recent law department graduates who passed an initial civil service examination, served an eighteen-month probationary period, and then successfully completed a second examination. Relatively few appointees had experience as practicing attorneys. It was reported that, in 1928, of 2,043 judges and procurators, only 133 had practiced law privately.

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25. Ct. Law arts. 31-2—31-5.


27. Const. art. 76(1).

28. See Quigley, supra note 8, at 275, 276-77.

29. Meiji Const. art. 58; Ito Commentaries, supra note 5, at 115 (“In order to remain impartial and fair in trials, the judges ought to occupy an independent position free from the interference of power, and should never be influenced by the interest of the mighty or by the heat of political controversies.”).

30. The Emperor was the nominal source of presiding judge appointments. A minimum of five years of judicial experience was required for appointment to a kōsōin and ten years for the Daishin’in. Public procurators were appointed in an identical fashion and enjoyed the same status protection as judges. Indeed, judicial and procuratorial assignments were made from the same pool of officials. See Quigley, supra note 8, at 277.

31. Id. at 276.
The status of the judiciary is elevated under the Šōwa Constitution. The Emperor appoints the Chief Justice based upon the Cabinet's designations, and the remaining Supreme Court justices are appointed by the Cabinet. All other judicial appointments are made by the Cabinet from a list of persons compiled by the Supreme Court. Persons not so designated are ineligible to serve.

With limited exceptions, no one commences a judicial career without having passed the first national legal examination and having successfully completed the two-year program of the Legal Training and Research Institute. After initial appointment, court assignments are a matter of judicial administration under the control of the Supreme Court. In contrast to the United States, judicial service is normally continued until mandatory retirement age. There has been relatively little movement of practicing lawyers to the bench, although they have completed the same legal apprentice program as judges and public prosecutors. Although the professionalism of the Japanese judiciary is of an extremely high order, as a consequence it has perpetuated traditional barriers between judges and public prosecutors, and between judges and the practicing bar.

Ten of the fifteen Supreme Court justices must have ten to twenty years judicial or legal experience. For the remaining appointees, the law requires only that they be "persons of broad vision and extensive knowledge of law who are not less than 40 years of age." The ration-

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32. CONST. art. 6(2). Parallel provisions concerning the prime minister in article 6(1) confirm the co-equal status of chief justice and prime minister. CONST. art. 6(1); OPLLER, supra note 20, at 89-90.
33. CONST. art. 79(1). See generally Tanaka, The Appointment of Supreme Court Justices and the Popular Review of Appointments, 11 LAW IN JAPAN 25, 26-32 (1978) [hereinafter cited as Tanaka].
34. CONST. art. 80(1); CT. LAW arts. 39-45.
35. Professors and assistant professors of law, as well as certain governmental research and training institute officials, can be appointed as judges, as summary court judges, or as high court presiding judges. CT. LAW arts. 42, 44. Such appointees may not have participated in the usual judicial or legal apprenticeship program.
36. Id. arts. 13, 14, 43. The Legal Training and Research Institute is under the direction of the Supreme Court. Id. art. 14. The Institute program is described in Abe, The Legal Profession in Japan, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 153 (1963); Matsuda, The Japanese Legal Training and Research Institute, 7 AM. J. COMP. L. 366 (1958).
37. CT. LAW art. 14.
38. See DANDO, supra note 26, at 85-99.
39. This has been a chronic problem since the Meiji era. See generally Hattori, The Legal Profession in Japan: Its Historical Development and Present State, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 111, 143-45 (1963).
40. CT. LAW art. 41(1).
ale for these less restrictive requirements is that nonprofessionals would broaden the court's collective outlook, which is particularly important given the significant policy issues the Supreme Court must decide. In fact, this diversity has yet to materialize, for all fifteen justices tend to be from the same professional background.\footnote{See Oppler, supra note 20, at 97 ("The cabinet has regrettably made use of this promising latitude only sparingly. Occasionally, a well known diplomat, for example, . . . has been appointed."); Tanaka, supra note 14, at 555 (only 5 of 63 so appointed through 1975).}

Independence of the judiciary requires protection of judicial status. The basic premise, carried over from the prewar system, is that without their concurrence, judges are not to be dismissed, transferred between courts, suspended from the exercise of official functions, or subjected to salary reductions unless they (1) are impeached according to legally established procedures, (2) do not survive, in the instance of Supreme Court justices,\footnote{Oppl. supra note 12, at 90-91.} review of tenure, or (3) are determined to be physically or mentally incompetent under applicable statutes.\footnote{See Tanaka, supra note 33, at 33-36.} Thus, the expectation remains that judges will serve until the statutory retirement age.\footnote{See Oppler, supra note 20, at 90-91.}

**B. Discipline and Removal**

Although most Japanese judges in fact spend their professional careers on the bench, the postwar system gives no automatic guarantee of tenure. Supreme Court justices are subject to a "Missouri plan"\footnote{See text accompanying notes 45-47 infra.} review by the electorate. This occurs during the first election for the lower house of the Diet held after appointment, and thereafter in similar elections at ten-year intervals.\footnote{See generally Tanaka, supra note 33, at 33-36.} The experience of thirty years under the provision provides results similar to those in the United States—only a small minority of voters favor termination, and no justice has yet been removed from office.\footnote{See Oppler, supra note 20, at 90-91.}

The 1946 Constitution also limits lower court judges to ten-year terms, with a privilege of reappointment until statutory retirement

\footnote{See Oppler, supra note 20, at 97 ("The cabinet has regrettably made use of this promising latitude only sparingly. Occasionally, a well known diplomat, for example, . . . has been appointed."); Tanaka, supra note 14, at 555 (only 5 of 63 so appointed through 1975).}

\footnote{Const. art. 78; Ct. Law art. 48. Const. art. 78 forbids disciplinary action against judges by executive action. The Constitution also requires adequate compensation for judges that cannot be reduced during their terms of office. Const. arts. 79(6), 80(2).}

\footnote{Const. arts. 79(5) (Supreme Court justices), 80(1) (inferior court judges). The statutory age is 70 for Supreme Court justices and summary court judges and 65 for other judges. Ct. Law. art. 50.}

\footnote{Kaneko, supra note 26, at 161, 165-68.}

\footnote{Const. art. 79(2)-(3). Special legislation governs election procedure including written ballots. Law for Popular Review of Supreme Court Justices (Saikōsaibansho saiban kan kokumin shinsahō) (Law No. 136 of 1947). See generally Tanaka, supra note 33, at 33-36.}

\footnote{See Oppler, supra note 20, at 90-91.}
This is not a matter of popular review, however, but rather of judicial administration, ultimately under the direction of the Supreme Court. On an occasion or two, it has been asserted that this power has been used to discourage membership in political organizations that were viewed with disfavor by a majority of the Supreme Court acting in judicial assembly with ultimate control over matters of judicial tenure. This is of course a most sensitive issue. Although, as citizens, judges have constitutional rights warranting responsible participation in the electoral process, it also is true that militant political activity engaged in by judges can endanger the image, if not the reality, of an independent judiciary. Professor Tanaka suggests that the Supreme Court evaluate only purely professional competence, leaving it to the Cabinet, in the exercise of its constitutional power of appointment and reappointment, to consider other factors.

By constitutional provision, the Diet can convene an impeachment court from among its members to hear removal proceedings against a judge. Impeachment procedures are established by a special law. The grounds are serious malfeasance or nonfeasance in office, or misconduct, whether in relation to official duties or not, which tends mark-
edly to impair judicial prestige.\textsuperscript{59} An impeachment court is empowered to restore eligibility for appointment to judicial office at a later time if it believes that restoration is appropriate.\textsuperscript{60}

The constitutional right to an impartial tribunal in criminal cases\textsuperscript{61} requires that judges be subject to exclusion, challenge, and recusal.\textsuperscript{62} This, however, has no bearing on judicial status as such, unless non-compliance is so egregious that it constitutes an independent ground for discipline or removal from office.

III. CONSTITUTIONAL JUDICIAL REVIEW

A. Under the Meiji Constitution

The matter of determining the constitutionality of governmental acts was undreamed of in the time of the shogunate, when no subject could refer to a higher standard than that established through the acts of a ruler and his surrogates. Nor, essentially, did the legal milieu change during the two decades intervening between the Meiji restoration and imperial proclamation of a new Constitution. Because, however, assignment of responsibility to determine whether statutes, administrative orders, or actions (or their want) was a matter of scholarly, if not practical, concern in Western European nations studied by Prince Ito and his colleagues, who were charged with the duty to advise the Emperor on the form that Japan's future Constitution should take,\textsuperscript{63} it became

\textsuperscript{59} CT. LAW art. 49; JUDICIAL IMPEACHMENT LAW art. 2. See generally KANEKO, supra note 26, at 181-82.

In a celebrated case in 1977, an assistant judge pretended to be the Prosecutor General and tape-recorded a conversation with the Prime Minister concerning the Lockheed bribery scandal. He later played back the tapes to newspaper reporters. An impeachment court removed the assistant judge from office. Newspaper accounts appear in Asahi Shimbun, Feb. 21, 1977 (morning edition), March 11, 1977 (evening edition), March 23, 1977 (evening edition). After removal from office, he was convicted, Shibutani Summary Court Judgment of June 9, 1978, 894 Hanreijihō 36, of violating the MINOR OFFENSES LAW (Keihanzalhō) art. 1(15) (Law No. 39 of 1948), punishing misrepresentation of rank, position, etc. He was also convicted, Tokyo District Court Judgment of April 28, 1978, 894 Hanreijihō 28, of violating PENAL CODE (Keiho) art. 193 (Law No. 45 of 1907), covering abuse of official powers. Both convictions are at this writing under appeal.

\textsuperscript{60} JUDICIAL IMPEACHMENT LAW art. 38. See KANEKO, supra note 26, at 186.

\textsuperscript{61} CONST. art. 37(1).

\textsuperscript{62} CRIM. PROC. CODE (Keijisoshōhō) arts. 20-24 (Law No. 131 of 1948); CRIM. PROC. RULES (Keijisoshōkisoku) (Sup. Ct. R. No. 32 of 1948); DANDO, supra note 26, at 57-60; Suzuki, Problems of Disqualification of Judges in Japan, 18 AM. J. COMP. L. 727 (1970).

\textsuperscript{63} Classical European analysis is reflected in Sugihara, The Control of the Constitutionality of Laws Under the Constitution of Japan, 2 HITOTSUBASHI J.L. & POL. 1, 1-3 (1963) [hereinafter cited as Sugihara].
equally a matter of concern in the field of political theory after promulgation of the Meiji Constitution.

Mention has been made of the concept of independence of the judiciary, as courts of law, under the 1889 Constitution. Independence, however, meant only that judges were to be protected in their professional status against administrative action other than criminal conviction or disciplinary punishment, as they exercised the imperial power of adjudication allotted them. But independence of the judicial apparatus is not the same as judicial supremacy. Therefore, determinations of compatibility with fundamental law by any class of officials could be made solely within the sphere of responsibility allocated to it under the Constitution.

In application, this meant that only the Diet could determine the legality of its enactments, and only the administrative apparatus could decide the constitutionality of administrative activity. Ultimate competence to decide the latter issue, however, rested in the Court of Administrative Litigation. The legal judiciary also had to be recognized as having the potential, within a limited scope, to determine issues of constitutionality. By their own decisions, however, both the Daishin’in and the Court of Administrative Litigation denied their authority to declare legislative acts unconstitutional. If independent organs of government disagreed, the Emperor alone could make a binding determination. Conflicts of that sort arose only because different instrumentalities of state had been simultaneously granted the power to exercise imperial authority through the Constitution.

B. Under the Shōwa Constitution

With the promulgation of the 1946 Constitution, Japan summarily

64. See text accompanying notes 11-13 supra.
65. MEIJI CONST. art. 58(2)-(3).
66. Id. art. 57(1). The early experience is covered in ISHII, supra note 8, at 488-89.
67. QUIGLEY, supra note 8, at 45-46.
68. There was a conceptual issue whether only a cabinet minister, as head of a governmental department, or all executive branch employees had the power to determine constitutionality; the functional relationship to the defense of superior orders is apparent. See generally T. NAKANO, THE ORDINANCE POWER OF THE JAPANESE EMPEROR 211-15 (1923).
69. Id. at 231-32.
70. Id. at 232-33.
71. Precedent is cited and discussed in TANAKA, supra note 14, at 686-89; Sugihara, supra note 63, at 3.
72. That logic is the basis of a prewar exposition of judicial authority in FUII, supra note 17, at 385-87. See also R. MINEAR, JAPANESE TRADITION AND WESTERN LAW 132-33 (1970).
aligned herself, or was aligned, with the relatively small group of nations that accord to their judiciaries the power of constitutional review.\textsuperscript{73} Scholars and jurists imbued with the nation's earlier constitutional philosophy found it hard to adjust rapidly to a process that had taken decades to evolve in the United States.\textsuperscript{74} There is also incongruity between the supremacy accorded the courts by the Constitution and a concurrent constitutional assignment to the Diet of the status of "highest organ of state power."\textsuperscript{75} Nevertheless, the role of the Supreme Court is now clear: it has ultimate power to determine constitutional issues, a power shared with lower courts.\textsuperscript{76}

In several significant ways, the Supreme Court of Japan has developed doctrines of constitutional review bearing a close resemblance to those in the United States. One is that there must be an actual case or controversy. In prewar Japan, the Minister of Justice could solicit advisory opinions from judges and public procurators because all in form were public officials subject to his direction.\textsuperscript{77} In contrast, the position of the Court under article 81 of the Constitution is to accept for review only specific cases or controversies. Additionally, a plaintiff or objecting party must be directly affected by the complained of activity.\textsuperscript{78} Nevertheless, a somewhat flexible approach is taken in identifying standing. Thus, proprietors of nearby public bathhouses were allowed to contest issuance of a license to a new bathhouse in their neighborhood.\textsuperscript{79}

\begin{itemize}
\item \textsuperscript{73} "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." \textsc{Const.} art. 81.
\item \textsuperscript{74} D. Henderson, \textit{Foreign Enterprise in Japan} 173-74 (1973) [hereinafter cited as \textit{Foreign Enterprise}]. \textit{See} Sugihara, \textit{supra} note 63, at 3-8, 11-12.
\item \textsuperscript{75} \textsc{Const.} art. 41; K. Kawai, \textit{Japan's American Interlude} 100 (1960).
\item \textsuperscript{76} \textit{See} Dando, \textit{supra} note 26, at 39 ("[I]f the Supreme Court determines that a law or ordinance is unconstitutional, the effect of this extends beyond the specific case. . . . But if a lower court finds that a statute is unconstitutional, this affects only the particular case."); Tanaka, \textit{supra} note 14, at 687.
\item \textsuperscript{77} \textit{See} Quigley, \textit{supra} note 8, at 279.
\item \textsuperscript{78} The leading decision arose from the \textit{Suzuki} litigation, in which a political party official sought to attack the constitutionality under the renunciation of war clause, article 9, of the predecessor to the present Self-Defense Forces. The Supreme Court denied standing. \textit{Suzuki} v. Japan, 6 Sai-han Minshù 783 (Sup. Ct., G.B., April 15, 1953), translated in \textit{Supreme Court Decisions}, \textit{supra} note 14, at 366. The decision is discussed in Nathanson, \textit{Constitutional Adjudication in Japan}, 7 \textit{Am. J. Comp. L.} 195, 196-98 (1958) [hereinafter cited as Nathanson].
\end{itemize}
The court has refused to litigate political questions. In perhaps its most noteworthy invocation of that concept, the Court turned down an attempt to use article 9 of the Constitution to invalidate the presence of American forces in Japan.

The Supreme Court exercises from time to time its constitutional power to invalidate legislation. Its first invocation of the Constitution to that end was in the context of a statute, surviving from the occupation period, which banned communist publications. Although the occupation-directed norm was violated before the peace treaty, the prosecution occurred after. While there was no majority rationale, a majority ruled the law unconstitutional. Some years later, aspects of legislation providing for third-party criminal forfeitures were invalidated. Confiscation without notice infringed on the provisions of the Constitution that state that property rights are inviolable and that criminal penalties, of which forfeiture is a variety, can be imposed only in accordance with procedures established by law. Therefore, statutory procedures had to be revised.

In one instance the Court reversed itself, holding that a provision of the Penal Code (Keihō), dating from 1907, which mandated heavier punishment for killing a lineal ascendant than for the same form of homicide against others, was unconstitutional as violative of the equality and nondiscrimination provision of the Constitution. Ac-

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81. To accomplish the aim of renouncing war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes, Const. art. 9(1), "land, sea, and air forces, as well as other war potential, will never be maintained." Const. art. 9(2).
82. Sakata v. Japan, 13 Sai-han Keishū 3225 (Sup. Ct., G.B., Dec. 16, 1959), translated in Supreme Court Decisions, supra note 14, at 298. See generally Tanaka, supra note 14, at 695-708, 711-16 (background material on Const. art. 9); Oppler, supra note 20, at 327-28 (the reaction of a key SCAP adviser); Wada, Decisions Under Article 9 of the Constitution—The Sunakawa, Eniwa and Naganuma Decisions, 9 Law in Japan 117 (1976).
84. Const. art. 29(1).
85. Id. art. 31.
cordingly, the punishment was reduced to that for ordinary homicide. In other decisions, the court invalidated a statute that permitted refusal of pharmacy licenses for "unsuitable" sites and required revision of legislative apportionments to meet constitutional standards.

The Court also has dealt with citizens' rights under the 1946 Constitution: freedom of thought as affected by private action; political activity by public employees; the claim of citizens and the press to a right of access to information; the extent to which religious organizations can receive reimbursement from public funds; and the elements of a fair administrative hearing. In the field of criminal procedure, the Court seems to have recognized that an exclusionary rule can be invoked on the basis of an unlawful search if necessary to deter unlawful police activity.

Naturally, in a society as complex as Japan's, one can identify many apparent infringements of civil liberties that Americans would expect the United States Supreme Court to resolve if they arose in this country. It is unfair, however, to criticize the Japanese judiciary, and particularly the Supreme Court of Japan, for not attaining after thirty-three years a frequency of constitutional review it took 150 years for the

93. Japan v. Osawa, 757 Hanrei Jiho 30 (Sup. Ct., G.B., Nov. 11, 1974), noted in 8 Law in Japan 205 (1975) (public employees may be prohibited from partaking in political activities).
95. Suminaga v. Sekiguchi, 855 Hanrei Jiho 24 (Sup. Ct., G.B., July 13, 1977), noted in 10 Law in Japan 161 (1977) (payment by municipality to Shintō priests for ground breaking ceremony was proper because the rite was a social custom).
United States to achieve. The fundamental principle of constitutional judicial review is firmly established and is not likely to disappear. What may be emerging is an accommodation between competing standards of judicial independence and judicial supremacy that warrants study in this country. Such will be touched on again at the conclusion of this article.

IV. ADMINISTRATIVE LITIGATION

We have seen how, in pre-Meiji Japan, legal and administrative activities could hardly be distinguished. We also have noted, in considering separation of powers and determination of unconstitutionality, that a significant area of responsibility was reserved for the separate Court of Administrative Litigation. As it was administered, that court did not provide an adequate forum to resolve complaints arising from administrative action. It might have been revised to become a more effective instrumentality, but it never had that chance because of the 1946 constitutional provision banning extraordinary tribunals and assignment to any executive agency of final judicial powers.

Modern Japan relies heavily on a pervasive bureaucracy; as in the United States, citizens are much more directly affected by administrative measures than they are by judicial action. An unusual feature of Japanese administrative practice has been the development of informal procedures, called administrative guidance (gyōsei shidō). These range from encouragement and suggestions to warnings and directives. There is nothing inherently unconstitutional in allowing resolution of administrative problems through such devices as long as, legally speaking, they are preliminary and not final.

Nevertheless, the occupying powers were firm that final resolution of administrative disputes had to occur in courts of law. Consequently, a detailed law, the Administrative Litigation Law, was created to regulate judicial proceedings attacking either activity or inactivity by

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98. See text accompanying notes 10-13, 63-72. supra.
99. See Wada, The Administrative Court Under the Meiji Constitution, 10 LAW IN JAPAN 1, 44-49 (1977) [hereinafter cited as Wada].
100. CONST. art. 76(2).
102. CONST. art. 76(2); CT. LAW art. 3(2).
103. See OPPLER, supra note 20, at 134-36.
104. ADMINISTRATIVE LITIGATION LAW (Gyōseijiken soshōhō) (Law No. 139 of 1962).
Naturally, Japanese courts do not stand in the position of de novo adjudicators of administrative disputes. There is an assumption of validity concerning preliminary administrative determinations, and parties are not allowed to allege in civil litigation that facts were other than as determined in earlier administrative actions. In some contexts, courts must recognize a substantial evidence rule that binds them to accept contested administrative action. The adverse reaction to the extreme delays routinely encountered in prewar administrative litigation has had an echo effect, in the partial relaxation of the requirement that administrative remedies be exhausted before litigation can be commenced.

Thus, as in constitutional litigation in the United States, the present Japanese legal system assumes judicial supremacy. Certainly, finality in executive or administrative determinations is essential to that concept. Japanese social and cultural patterns do not change swiftly, however, and therefore it may be decades before administrative litigation assumes the proportions it has reached in the United States. To keep the matter in perspective, however, intensive administrative litigation in the United States is a phenomenon of perhaps less than fifty years in duration.

V. Judicial Administration: Management of Appellate Caseloads

A. Internal Judicial Administration

Management of court systems has emerged as a matter of major concern in this country in recent years. In Japan, in contrast, the structure for judicial administration long has been embodied in the Court

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107. Called “isolating effect” (shadan kekka) by Professor Kobayagawa. Id. at 10-24.

108. See Hashimoto, supra note 105, at 261-71; Ogawa, supra note 105, at 199-200.

109. See Quigley, supra note 8, at 289; Wada, supra note 99, at 44-45.

110. See Ogawa, supra note 105, at 201-02.

111. See Foreign Enterprise, supra note 74, at 174.

Law. Relatively few problems have arisen under the present Constitution.

The Supreme Court is given, through express constitutional authorization, ultimate responsibility for judicial administration. It does not act, however, in its capacity as a court, i.e., an adjudicating entity, but rather as a justices' conference or judicial assembly (saibankan kaigi). Implementation of policies is achieved through a Supreme Court administrative bureau and several specialized institutes. The Court directly supervises only its own functionaries. High courts and district courts supervise their own staffs and the administration of inferior courts within their territorial jurisdiction, using the judicial assembly device to set policy. Statutes ensure that judicial administration will not affect the exercise of the true judicial function. That this is not an idle concern is demonstrated by certain acts of administration that have impacted on judicial functions exercised by judge members of the Young Jurists Association.

Under the Japanese Constitution, the rulemaking power is a function of judicial administration. Thus far, rules have been developed only to supplement legislative policy or to fill gaps. The Diet still determines basic policy.

Japan shares with most American jurisdictions a problem of separation of powers, e.g., ensuring adequate budgetary support for the judiciary without impairing judicial independence through legislative interference and retaliation. Under the current Constitution, the Cab

113. Const. art. 77(1).
114. Ct. Law art. 12.
115. Id. arts. 13—14, 53—56. The apparatus is described in Dando, supra note 26, at 51-54, and Supreme Court Decisions, supra note 14, at xxii-xxiv.
116. Ct. Law art. 80(1).
117. Id. art. 80(2)-(3). Family and summary courts administer exclusively their own operations. Id. art. 80(4)-(5).
118. Id. art. 20 (high courts); id. art. 29 (district courts). Each court has an administrative bureau. Id. art. 21 (high courts); id. art. 30 (district courts). Family courts are administered like district courts. Id. art. 31-5. The Supreme Court designates a judge to serve as administrator in multiple judge summary courts. Id. art. 37.
119. Id. art. 81. Article 82 provides a complaint mechanism to advance issues of interference. Id. art. 82.
120. See sources cited in note 52 supra.
121. Const. art. 77(1). Public prosecutors are subject to that power, id. art. 77(2), which confirms its inherently administrative character. The court may delegate to lower courts the power to make rules affecting their own practice. Id. art. 77(3).
122. See Dando, supra note 26, at 44.
net is responsible for preparing and transmitting to the Diet an annual budget$^{124}$ for consideration and enactment.$^{125}$ Each national budget is to contain an independent segment governing judicial expenditures, including reserve funds.$^{126}$ The chief control against arbitrary reductions in Supreme Court-transmitted appropriations requests is found in the Public Finance Law,$^{127}$ under which the Supreme Court may request restoration of its original submission. The Cabinet then must forward to the Diet data justifying reduction, in light of which the Diet determines a final appropriation.$^{128}$ Although there is potential for abuse in this or the counterpart American system,$^{129}$ in fact the appropriations process produces no observable impairment of judicial independence.$^{130}$

**B. Delay in Adjudication**

The Constitution of Japan guarantees a speedy trial,$^{131}$ although the constitutional bar, as in this country,$^{132}$ does not arise swiftly.$^{133}$ Trials, at least of serious offenses, often stretch over long periods of time because trial is intermittent: after trial has been formally opened$^{134}$ witnesses are examined, their statements reduced to a written protocol (transcript), and supplementary protocols embodying contested aspects of the original protocol are filed with the court. Although cases requiring more than two days to try are supposed to be heard continuously,$^{135}$ protracted proceedings are the rule rather than the exception. Even

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124. Const. art 86.
125. Id. art. 60.
126. Ct. Law art. 83.
128. See Dando, supra note 26, at 40; Supreme Court of Japan, Justice in Japan 38 (1975).
129. In the late 1940's, legislative committees took up certain pending celebrated cases. Although a Supreme Court communication suggesting possible infringement of judicial independence under separation of powers theory was not formally concurred in by the committees, such activities have not since occurred. See Saito, supra note 20, at 90-93.
130. See also Mikazuki, A Comparative Study of Judicial Systems, 3 Law in Japan 1, 40-41 (1969) [hereinafter cited as Mikazuki].
131. Const. art. 37(1).
though efforts have been made to move to a system of continuous trials,\(^{136}\) they are hampered by the massive backlog of cases undergoing intermittent trial that must be disposed of while new cases are tried without interruption. Nevertheless, some progress appears to have been made.\(^{137}\)

The Japanese system of appeals continues in the high courts essentially on a Western European pattern.\(^{138}\) In 1977, only twelve percent of all first-instance adjudications were appealed,\(^{139}\) and these for the most part were disposed of expeditiously.\(^{140}\)

Further review in the Supreme Court\(^{141}\) differs substantially from the system in prewar Japan because of the changed constitutional status of the Court. The principal statutory grounds for admission of a case on jōkoku appeal are constitutional violations or errors in constitutional interpretation, failure to follow Supreme Court precedent, or, in the absence of Supreme Court authority, incompatibility with Daishin’in precedent.\(^{142}\) Nevertheless, the Court also has discretion to accept cases posing a possibility of a miscarriage of justice.\(^{143}\) Such discretion is the functional counterpart to certiorari in the United States Supreme Court.

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137. In 1976, 82.9% of district court cases were disposed of within six months and 93.4% within a year; in summary courts 96.8% were concluded within a year. JAPAN MINISTRY OF JUSTICE RESEARCH AND TRAINING INSTITUTE, SUMMARY OF WHITE PAPER ON CRIME 24-25 (1978) [hereinafter cited as WHITE PAPER SUMMARY].
138. The Japanese term for initial appeal (kōso) has no precise English language counterpart and therefore usually is not translated; it is based on German Berufung and French appel. See generally DANDO, supra note 26, at 415-33; TANAKA, supra note 14, at 50-51.
139. These statistics and others that follow, unless otherwise indicated, were supplied to the author by Justice Shigemitsu Dando of the Supreme Court of Japan. The highest postwar rate, about 16%, was experienced in 1961-1963.
140. In 1976, 64.1% of all cases were disposed of within one year following institution of prosecution in first-instance courts, and 88.1% within three years. In some instances (2.2%), the remaining cases had been pending for more than seven years. WHITE PAPER SUMMARY, supra note 137, at 25.
141. Jōkoku appeal. The original pattern was French revision or pourvoi en cassation. See generally DANDO, supra note 26, at 433-43; TANAKA, supra note 14, at 51-52; SUPREME COURT DECISIONS, supra note 14, at xxvi-xxvii.
142. CRIM. PROC. CODE art. 405. Civil appeals may be lodged for constitutional violations or for legal errors that clearly affect the outcome of the litigation. CIV. PROC. CODE art. 394.
143. CRIM. PROC. CODE art. 411. Grounds include: material errors in construing or applying statutes or ordinances; unjust and improper imposition of punishment; grossly erroneous factfinding on matters material to judgment; fraud or abuse of judicial processes which would support reopening of procedures, saishin, CRIM. PROC. CODE arts. 435-453, if judgment became final; abolition of or change in punishment; and declaration of a general amnesty.
Attorneys fairly frequently invoke one or more of these article 411 grounds. For a time, so many cases were pending before the court that it fell substantially behind in its work. Indeed, it fell so far behind that a functional restructuring of the Court was advocated in some quarters. Relatively few cases today, however, are accepted by the Court and disposed of favorably to appellants under article 411. The accumulation of undecided article 405 cases has been steadily reduced from a postwar high of 8,600 in 1951 to a 1977 census of 1,007. Because the Court now disposes of more cases than it receives through new filings, the backlog will continue to decline.

VI. CONTEMPORARY TRENDS IN THE DECISIONAL PROCESS

We have seen how Japan's court structure has evolved in one century from a branch of feudal administration to a separate and independent branch of government and have noted representative salient decisions of the Supreme Court under the new order. It may be helpful in passing to note changes in decisional processes that have accompanied evolution of the court system.

In the first years of the Meiji era, a tradition was continued: judges, as a type of administrator, would apply established standards of societal expectation (giri) that did not have to be formalized or communicated to the parties because they knew, or were presumed to know, the standards. In civil matters, reliance on probability of outcome was reflected in the use of standardized forms that usually produced expected results. Such a form of customary law undoubtedly played a significant role in Japanese affairs; indeed, it continues to have an effect in civil litigation.

144. See Supreme Court Decisions, supra note 14, at xxix-xxx. See Mikazuki, supra note 130, at 31-35, for a discussion of inherent problems with the traditional system of appeals.

145. See Supreme Court Decisions, supra note 14, at xxx. A draft proposal appears in Dando, supra note 26, at 541-50.

146. In 1977, only eight cases were reversed on Crim. Proc. Code art. 411 grounds.

147. In 1977, 38.6% of kōso adjudications were contested through jōkoku appeal. Figures on dispositions of that year showed about 85% dismissed as lacking merit and 14% withdrawn by appellants.

148. The term and the concept underlying it have no close Anglo-American counterpart. See generally Noda, supra note 26, at 174-83.

149. Nakamura, supra note 8, at 71-73.


151. Civil Code (Minpo) art. 92 provides that, if a custom differs from legal provisions not concerned with matters of public policy, courts are to recognize such custom if it appears that the parties to a transaction intended to conform to it. See generally Noda, supra note...
The late nineteenth-century introduction of codes derived from European models brought with it a civil law concept of the judicial role. "Judges were regarded as if they were priests who conveyed the oracle of the gods. What judges said had to be listened to carefully as it enunciated the gods' will, not because it was the judges' own statements." As a consequence, a court's role was to clarify issues and facts so that the law could be applied properly. Judgment, therefore, constituted simply an application of general legal principles to the unique facts of a case. Judgment had a binding effect on the parties only and had no formal impact on the resolution of later disputes between different litigants.

Indeed, of greater significance than earlier decisions in identifying the true or actual law was scholarly opinion (gakusetsu). In their emphasis on scholarly opinion, oriental tradition and imported European attitudes coincided. This may account, at least in a functional sense, for the continued judicial reliance on explanations by scholarly authors of the "true" content of legal principles.

The present Constitution by its terms allows continuation of the older tradition, in that judges are independent in the exercise of their...
conscience and are bound only by the Constitution and laws.\textsuperscript{160} Nevertheless, the influence of American practice has induced the Supreme Court of Japan and lower courts to make increasing use of precedent, both in interpreting constitutional provisions and in evaluating earlier decisions of the \textit{Daishin'in}.\textsuperscript{161} True, the facts in a particular case may be of relatively little importance in shaping statements of doctrine, and legislative facts or legislative history seem to play less of a role than in American practice,\textsuperscript{162} but it is manifest that Japanese judges in 1979 use precedent in the manner of English and American judges far more than their predecessors did before 1946.

Because of an increasing recognition that judges play a creative role in shaping legal norms under a precedent-based system, more attention is now given to personal and social factors affecting decisional processes.\textsuperscript{163} Even here, however, the development of theories clusters around schools of thought that often rest on political orientation. This may affect their pragmatic utility.\textsuperscript{164}

Ultimately, the impact of judicial activity can best be measured according to the general acceptance by the populace of judicial mandates and the frequency with which aggrieved citizens litigate. Whether judges are viewed by citizens as figures of respect and sources of authoritative pronouncements has been studied.\textsuperscript{165} Naturally, to the extent that the Japanese do not perceive judges and their doctrinal statements as directive, there is a measure of irrelevance in the judicial function.

Popular attitudes toward courts probably reflect underlying concepts

\textsuperscript{160} Const. art. 76(3). \textit{See} Noda, \textit{supra} note 26, at 226.

\textsuperscript{161} \textit{Justice in Japan}, \textit{supra} note 97, at 15-16. The author notes that evaluating earlier decisions is necessary when code law, \textit{e.g.}, the \textit{Penal Code}, has continued in force after 1946 with only minor amendments.


\textsuperscript{164} \textit{See} How Judges Think, \textit{supra} note 153, at 790-800; Katô, \textit{Logic and Balancing of Interests in Legal Interpretation}, 2 \textit{Law in Japan} 80 (1968); Tokoro, \textit{Saiban no minershûtekitôsei to dokuritsu} (Popular Control and Independence of the Judiciary), 26 Hôshakai 7 (1973).

of law itself. Japanese tradition views law essentially as penal in character, and thus resort to its use is avoided if possible. Legal precedent, accordingly, is not a likely guide for conduct, particularly conduct outside traditional bounds, and courts are not likely sources of acceptable dispute resolution. Moreover, judicial decisions establish concrete rights and liabilities, a consequence incompatible with traditional harmonization of disputes through informal negotiations presided over by a trusted authority figure. Certainly, conciliation and mediation are of far greater importance in contemporary Japan than they are, for example, in the United States. Ever-increasing urbanization and disruption of family and local community ties impair the ability to negotiate mutually acceptable compromises and may well accelerate resort to the courts. It has been argued that even now this trend is observable. Yet, traditions die slowly; Japanese courts will entertain fewer lawsuits than other industrialized nations of comparable population and influence. To that degree, therefore, decisional processes will have a reduced impact.

VII. A COMPARATIVE ANALYSIS

Examining the contemporary Japanese judicial system, one is struck by the aspects it appears to share with the American system and the marked degree to which it has moved away from European counterparts. Nevertheless, caution is required in singling out features of Japanese judicial administration that might be urged for adoption, or readoption, in this country. Despite rapid urbanization, Japan has a highly homogeneous population sharing inherited cultural values. Its governmental structure is centralized and unitary. In contrast, the United States presents an extreme array of cultures and value structures, to the degree that effective government seems to rest on coalitions of minorities rather than a clearly identified majority. The federal system, while perceived as valuable, carries with it decentralization that impedes, if not forestalls, development of an elite corps of governing professionals. Only in the executive branches of the two governments may one perceive a shared phenomenon—an entrenched bureaucracy that, however capable, may be viewed as a mixed blessing. Whether

166. NODA, supra note 26, at 159-60, 165-66.
167. See II HENDERSON, supra note 3, at 243-54; Kawashima, Dispute Resolution in Contemporary Japan, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (1963); Ohta & Hozumi, Compromise in the Course of Litigation, 6 LAW IN JAPAN 97 (1973).
169. See FOREIGN ENTERPRISE, supra note 74, at 196-216 for a discussion of the Japanese bureaucracy as an elite and as a power bloc.
citizens are more in jeopardy from career competents or incompetents is open to debate.

Nevertheless, the high degree of professionalism displayed by Japanese judges and public prosecutors flows from the fact that they all have met very high entry requirements, have served on many courts throughout the country with increasing responsibilities, and have been exposed to close, albeit generally supportive, supervision and performance evaluation by their superiors. The consequence is that justice in Japan is administered by a professional elite.

In contrast, the American system evidences almost extreme autonomy for trial judges. Federal district judges, for example, would rebel against the controls their Japanese counterparts accept as necessary to professionalism. Moreover, the American tradition that judges throughout their tenure serve only in their judicial districts militates against a strong sense of identity with the judiciary as a governmental entity. Efforts in some jurisdictions at centralizing judicial administration through the concept of a single court of justice and increasing attendance by state trial judges at educational programs offered by organizations like the National Judicial College are breaking down somewhat our traditional judicial feudalism. Still, we are far from achieving the esprit de corps found in Japan. Without a centralized judicial administration, which probably would require constitutional revision and which would take generations to achieve, it is difficult to speak of transferring specific technology from the Japanese judiciary to the American judiciary.

Therefore, the main advantage in studying the organization and decisional techniques of Japanese judges is to isolate comparative governmental processes. The constitutional status of the judicial arm in Japan is the product of SCAP influence and was intended to recast that branch of government in the American mold. Therefore, to examine the work of Japanese courts, and particularly the Supreme Court of Japan, through the past thirty years is to test the validity of the presuppositions on which the concept of judicial independence—or supremacy—rests. One's conclusion may be similar to that of the Baptist preacher who, after surveying the tribulations of his congregation,

170. For example, in 1975 only 472 of 27,791 applicants, or 1.7%, passed the national examination rendering them eligible to enter the Legal Training and Research Institute. See note 36 supra and accompanying text. This group comprised the cadre from which assistant judges were drawn two years later. The largest number of passing scores since 1960 has been 554, and the highest percentage has been 4.2%. See TANAKA, supra note 14, at 577-82.

praised God that the Methodists were doing no better. It is not obvious to all observers that the Japanese judiciary has become a realistic model for export to developed and developing countries, precisely because it is a unique product of a unique nation.

Nevertheless, the Supreme Court of Japan and lower courts influenced by it have established as a fact of government their power to stop action or inaction by the other two coordinate branches that infringes citizens' rights guaranteed by the 1946 Constitution. Because neither the administrative arm nor the Diet has a power of final determination under the Constitution, a judgment by a majority of the Supreme Court is indeed the supreme law for the nation. Diet members and officials in the administrative apparatus seem to accept and submit to this, rendering the Court as well as its doctrines supreme in a functional sense. Insofar as submission by the legislature and the administration to judicial pronouncements on constitutional issues has become a fact of Japanese politics, it parallels precisely the American experience. If fewer decisions on constitutional issues have been rendered in Japan than one would have expected in the United States during the same period, that may indicate not indifference on the part of judges to constitutional issues, but rather the efficacy of a smaller number of judicial pronouncements to affect official behavior.

Whether the Japanese judiciary and its precedents are supreme in the view of the mass of Japanese citizens, however, is another question. Intellectuals may reject or ignore them on the basis of adherence to differing ideological schools, variant views of truth and justice, or the persistent attitude that scholarly opinion is at least as important as expressions of opinion and actions by administrators, including judges. Social action and labor groups tend to identify the judiciary with the currently dominant political group and consequently reject on that basis the judiciary's policy statements. Many citizens may perceive all organs of national government, including appellate courts, as so remote that their acts have relatively little operative significance. In short, the Supreme Court may be more paramount within government than in the nation as a whole.

This is an exportable lesson. Judicial mandates designed to affect citizen conduct generally are effective only to the degree that they are voluntarily accepted as valid by citizens. If the populace, or a functional majority of it, is not prepared to conform to the judiciary's expressions of policy, the latter are effective only when the legislative and administrative branches adopt them, and neither branch can afford to divorce itself too far from the value structure embraced by a popular
majority. American judges at times appear to lose sight of this fact. The thirty years of experience of Japanese courts and judges under the Shōwa Constitution, therefore, may be a salutary reminder that supremacy is accorded from below, not appropriated from above.