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Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight

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JUDICIAL REVIEW IN JAPAN: AN OVERVIEW OF THE CASE LAW AND AN EXAMINATION OF TRENDS IN THE JAPANESE SUPREME COURT'S CONSTITUTIONAL OVERSIGHT

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While Japan's Constitution broadly grants the Japanese Supreme Court (the "Court") the power "to determine the constitutionality of any law, order, regulation, or official act,"[1] the Court has rarely exerted this power to strike down government legislation or acts. This reluctance is in part due to the very short tenures of the judges on the Court.[2] Since the creation of the Court under Japan's 1946 Constitution (the "Constitution"), there have in fact been sixteen different Chief Justices.[3] Indeed, the frequent turnover on the Court has created a lack of consistency within the case law, limiting the development of clear precedents to guide the application of judicial

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1. KENPŌ [Constitution], art. 81 (Japan).

2. "The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet." KENPŌ, art. 6, para 2.

> The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet. 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 years, and in the same manner thereafter.

Id., art. 79, paras. 1-2. The rules governing the tenures of the Supreme Court Justices is convention. Saibansho-Hō [Court Organization Law], art. 50 provides that the Supreme Court Justices must have significant legal prestige and standing. As such, qualified candidates are usually in their sixties in Japan. Because of this convention, Supreme Court Justices' tenures are ultimately very short.

3. *See infra* figure 1 (listing the Chief Justices of Japan's Supreme Court in chronological order).

review. Owing to the influence of academic theory, however, this trend may be starting to change as recent judgments have begun to offer more detailed reasoning than was customary in the past. This Article will focus on the effect of these trends on the Court's jurisprudence regarding judicial review.

FIG. 1: CHIEF JUSTICES OF THE SUPREME COURT OF JAPAN [4]

Chief Justice	Tenure Period	Significant Cases
Tadahiko Mibuchi	08/04/1947 to 03/02/1950	
Kotaro Tanaka	03/03/1950 to 10/24/1960	
Kisaburo Yokota	10/25/1960 to 08/05/1966	
Masatoshi Yokota	08/06/1966 to 01/10/1969	
Kazuto Ishida	01/11/1969 to 05/19/1973	*Aizawa v. Japan*, *Sumiyoshi K.K. v. Japan*
Tomokazu Murakami	05/21/1973 to 05/24/1976	*Kurokawa v. Chiba Election Commission*
Ekizo Hujibayashi	05/25/1976 to 08/25/1977	
Masao Okahara	08/26/1977 to 03/31/1979	
Takaaki Hattori	04/02/1979 to 09/30/1982	
Jiro Terada	10/01/1982 to 11/03/1985	
Koichi Yaguti	11/05/1985 to 02/19/1990	*Hiraguchi v. Hiraguchi*
Ryohachi Kusaba	02/20/1990 to 11/07/1995	
Toru Miyoshi	11/08/1995 to 10/30/1997	
Shigeru Yamaguchi	10/31/1997 to 11/03/2002	*Case to Seek Damages*
Akira Machida	11/06/2002 to 10/15/2006	*Kakunaga v. Sekiguchi*
Niro Shimada	10/16/2006 to Present	

Despite its status as the "court of last resort,"[5] the Japanese Supreme Court often plays a somewhat secondary role in determining the constitutionality of government acts. This situation is largely the result of the broad legal influence of Japan's Cabinet

4. Table of Chief Justices of the Supreme Court of Japan, http://www.courts.go.jp/saikosai/about/saibankan/hanzi_itiran.html (last visited Feb. 23, 2008) (in Japanese).

5. KENPŌ, art. 81.

Legislation Bureau (*Naikaku-Hosei-Kyoku*). [6] The Cabinet Legislation Bureau ("CLB") is comprised of senior government officials with expertise in specific legal areas who are seconded from various government ministries and agencies.[7] The CLB's formal tasks are to provide legal opinions to the Prime Minister and other legislative officials and to review drafts of bills, regulations, and orders to determine if they are consistent with the constitution and legal precedent.[8] As such, the CLB's purpose is to avoid the type of legal confusion seen in the United States when legislative decisions are found to be unconstitutional by courts after their enactment.[9] Due to the significant influence of the CLB's opinions, [10] the Japanese Supreme Court has almost always upheld government acts, particularly where they involve significant political questions such as legislative districting[11] or voting rights.[12]

Although the propriety of the CLB's involvement in these issues is questionable, the Court has held that the CLB's role in evaluating draft legislation does not violate the Constitution. [13] Indeed, the consultative function of the CLB bears a striking resemblance to the role of France's Council of the State (*Conseil d'Ėtat*), which also assists the executive branch with legal advice. [14] The Japanese Constitution, however, mentions nothing about the CLB's advisory role.

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6. *See* Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau* (Japan Policy Research Inst., Working Paper No. 99, 2004), http://www.jpri.org/publications/workingpapers/wp99.html.

7. *Id.*

8. *See* MAKOTO NAKAJIMA, RIPPOUGAKU [LEGISLATION STUDY] 26–35, 68–73 (Houritubunkasya 2004); Mutsuo Nakamura & Teruki Tsunemoto, *The Legislative Process: Outline and Actors*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 198–200 (Yoichi Higuchi ed., 2001).

9. *See* Samuels, *supra* note 6.

10. *Id.*

11. *See* Kurokawa v. Chiba Election Comm'n, 30 MINSHŪ 223 (Sup. Ct., Apr. 14, 1976).

12. Kakunaga v. Sekiguchi, 59 MINSHŪ 2087 (Sup. Ct., Sept. 14, 2005).

13. *See* Ishizuka v. Japan (*Hyakuri Air Base Case*), 43-6 MINSHŪ 385 (1989); Uno v. Minister of Agric., Forestry, and Fisheries (*Naganuma III*), 36-9 MINSHŪ 9 (1982); Minister of Agric., Forestry and Fisheries v. Ito (*Naganuma II*), 27-8 GYŌSAI REISHŪ 1175 (1976); Japan v. Nozaki Bros. (*Eniwa case*), 9 KAKEISHŪ 359 (Sapporo Dist. Ct., Mar. 29, 1967). *See generally* Toshihiro Yamauchi, *Constitutional Pacifism: Principle, Reality, and Perspective*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 198–200 (Yoichi Higuchi ed., 2001).

14. C. JUSTICE ADM. art. L121-7 (Fr.).

While the Japanese Supreme Court ultimately reviews the constitutionality of many legislative actions, there is little chance that government acts will actually be struck down by the Court.[15] The primary aim of this Article will be to evaluate the Court's passive approach in its review of government action through an examination of the relevant case law. In so doing, the following issues will be highlighted: (1) the lack of coherence among the Court's decisions; and (2) the Court's recent tendency to deliver more detailed legal reasoning in its decisions. Part I of this Article will examine the constitutional basis of the Court's power of judicial review. Part II will then examine the Court's analysis of unconstitutional legislation, with Part III arguing that the Court's decisions in this area have lacked coherence. Ultimately, Part IV will argue that the Court's passive approach towards judicial review is guided by political trends connected to the influence of the CLB.

I. CHARACTERISTICS OF JUDICIAL REVIEW IN JAPAN

A. The Foundations of Judicial Review in Japan

Article 81 of the Japanese Constitution provides that the "Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[16] The literal interpretation of this provision is that the Court has jurisdiction over all government action. As such, the Court has the power to strike down any official act on constitutional grounds.[17]

Immediately following the enactment of the Japanese Constitution in 1946, Professor Souichi Sasaki pointed out that this provision grants the Court authority to not only "determine the constitutionality of any law," but also the abstract authority to *review* any law.[18] Indeed, the Court in 1948 seemed to embrace this broad

15. *See* YŌICHI HIGUCHI, KENPŌ 1 [CONSTITUTION I] 540 (Shohan ed., Seirin Shoin 1998).

16. KENPŌ, art. 81.

17. *See* Komatsu v. Japan, 2 KEISHŪ 801 (Sup. Ct., Jul. 8, 1948).

18. SOUICHI SASAKI, KOKKA KOUI NO JUNSUIGOUKENSEI NI KANSURU KETTEIKEN [AUTHORITY OF THE SUPREME COURT ON THE PURE CONSTITUTIONALITY OF NATIONAL ACTION] (Yuhikaku 1990) [hereinafter SASAKI, AUTHORITY].

view of its powers of judicial review, finding such power constitutionally supported in *Komatsu v. Japan*.[19]

Yet, the Court seemed to retreat from this broad interpretation of its power in 1952:

> Our Supreme Court isn't provided with authority of abstract judgment that even if a regal action has not been taken, we can draw a conclusion on a controversy existing beyond the interpretation of the [C]onstitution or other legislation. Indeed, the Supreme Court has the authority to review the constitutionality of law, but this authority is exercised within the limits of judicial power. On this point, there are no difference[s] between the Supreme Court and lower courts.[20]

Some scholars believe that, based on Article 81 of the Constitution, the Japanese Supreme Court functions similarly to the constitutional courts of Germany and Austria, whose sole function is judicial review.[21] Yet, the prevailing opinion is that the broader interpretation of the Court's powers, first put forth in *Komatsu*, is more persuasive.[22]

B. The Framework of Judicial Review in Japan

1. The Concept of Judicial Power

Before analyzing the relevant cases, it is important to briefly address the historical use of judicial power in Japan in order to understand modern Japanese views of judicial review. The modern

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19. 2 KEISHŪ 801. This case supported its further authority through Article 76, which states in relevant part:

> 1) The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.
>
> 2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.
>
> 3) All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

20. Case Regarding the Nat'l Police Reserve, 6 MINSHŪ 783 (Sup. Ct., Oct. 8, 1952).

21. *See* TAKERU EHARA,KENPŌ—TAKIKEI TO SOTEN [CONSTITUTIONAL LAW—SYSTEM AND POINTS AT ISSUE] 368—73 (Houritubunkasha, 1986); KAKUDO TOYOJI, KENPŌ [CONSTITUTIONAL LAW] 178 (Mineruvashobo, 1973).

22. Hidenori Tomatu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY, *supra* note 8, at 251, 253–55.

judiciary's power is far broader than in previous periods in Japanese history. The Constitution of the Empire of Japan (the Meiji Constitution, effective 1890–1947) established administrative courts that handled all claims against government authorities.[23] This meant that no suit related to government actions could be adjudicated by a court of law. The modern Japanese Constitution, however, prohibits special courts of this kind, denying government agencies final adjudicative authority.[24] Thus, the modern Court's jurisdiction over all government actions is in direct contrast with the prior system, which had a carve-out exemption for cases relating to administrative agencies.

Yet, scholars have varying opinions about the modern Court's proper role. For instance, Souichi Sasaki insists that Article 76, paragraph 1 of the Japanese Constitution distributes authority based on the principle of separation of powers and generally gives the Court an authority equal to the legislative and administrative powers.[25] Professor Kouji Sato, however, interprets the Constitution to say that the essence of judicial power requires Courts to adjudicate cases and controversies but requires disputes peripheral to cases and controversies to be determined by the political branches.[26] Article 3 of the Court Organization Law calls the former a "legal controversy" and the latter a "special authority which is provided in law."[27] By contrast, Professor Kazuyuki Takahashi does not place the essence of judicial power in cases and controversies.[28] Takahashi argues that the judicial function is defined in the Constitution as settling disputes of interpretation and application of law under due process.[29]

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23. MEIJI KENPŌ, art. 61.

24. KENPŌ, art. 76, para. 2.

25. SOUICHI SASAKI, KAITEI NIHONKOKU KENPOU RON [A THEORY OF THE CONSTITUTION OF JAPAN, REVISED EDITION] 352—63 (1952) [hereinafter SASAKI, THEORY]; SASAKI, AUTHORITY *supra* note 18.

26. Kouji Sato named the courts "law's princip[al] organ." *See* KOUJI SATO, KENPOU [CONSTITUTION] 291 (3d ed. Seirin Shoin 1995); *see also* SASAKI, THEORY supra note 25, at 342; SASAKI, AUTHORITY *supra* note 18.

27. Saibansho-Hō [Court Organization Law], Law No. 59 of 1947, art. 3.

28. *See* KAZUYUKI TAKAHASHI, KENPŌ HANDAN NO HOUHOU [JUDGMENT METHOD OF CONSTITUTIONALITY] (Yuhikaku 1995); *see also* KAZUYUKI TAKAHASHI, RIKKEN SHUJI TO NIHON KOKU KENPŌ [CONSTITUTIONALISM AND THE CONSTITUTION OF JAPAN] ch. 16 (Yuhikaku 2005).

29. KAZUYUKI TAKAHASHI, KENPŌ HANDAN NO HOUHOU [JUDGMENT METHOD OF CONSTITUTIONALITY] 359—61 (Yuhikaku 1995).

2. Formal Requirement

In evaluating whether claimants can contest certain government acts, the Japanese Supreme Court has generally adopted a deferential approach towards the political branches, avoiding constitutional questions when decisions could be made on other grounds. This approach mirrors the judicial philosophy first espoused by U.S. Supreme Court Justice Louis Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*,[30] where Justice Brandeis argued that the Court should refrain from evaluating the constitutionality of Congressional acts unless directly required to do so under the facts of the case.[31] Following this deferential approach towards political questions, the Japanese Supreme Court in cases like *Japan v. Nozaki Bros.* (the "*Eniwa* case")[32] has avoided addressing the constitutionality of statutory provisions by finding them beyond the scope necessary to evaluate the issue at hand.[33] The *Eniwa* opinion discussed the relationship between Article 9 of the Japanese Constitution, which renounced the use of warfare as a right of sovereignty,[34] and Article 121 of the Japanese Self-Defense Forces Law, which provides that anyone who destroys SDF weapons, ammunition, aircraft, or other things used for defense, can be punished with up to five years in prison or a fine of up to 50,000 yen.[35] Avoiding the constitutional issue presented by the case, the Court upheld the government action on other grounds, furthering a deferential approach towards the review of government actions.

II. CHARACTERISTICS OF "UNCONSTITUTIONAL" JUDGMENTS

As noted, the constitutionality of laws, orders, regulations, and official acts falls under the jurisdiction of the Supreme Court.[36] Yet, the Court has applied this constitutional oversight only eight times. As will be detailed below, six of these eight cases found an article of

30. 297 U.S. 288 (1936) (Brandeis, J., concurring).

31. *Id.* at 341 (citing Blair v. United States, 250 U.S. 273, 279 (1919)).

32. Japan v. Nozaki Bros. (*Eniwa case*), 9 KAKEISHŪ 359 (Sapporo Dist. Ct., Mar. 29, 1967).

33. *See* MERYLL DEAN, JAPANESE LEGAL SYSTEM 528 (2d ed. 2002).

34. KENPŌ, art. 9 ("[T]he Japanese people forever renounce war as the sovereign right of the nation and the threat or use of force as settling international disputes [and] land, sea, and air forces, as well as other war potential, will never be maintained.").

35. Japanese Self Defense Forces Law, Law No. 165 of 1954, art. 121.

36. KENPŌ, art. 81.

law to be unconstitutional. Through a close examination of these eight cases, some general trends in the Court's application of judicial review begin to emerge.[37]

A. Aizawa v. Japan[38]

The criminal defendant in *Aizawa* contested her death penalty conviction, arguing that Article 200 of the Penal Code, which allowed for the death penalty where defendants were found guilty of killing a parent, was unconstitutional.[39] Faced with a defendant who had killed her father to escape long-term sexual abuse, the Court found that Article 200 of the Penal Code violated Article 14, paragraph 1 of the Constitution, which requires equality under the law.[40] Based on that finding, the Supreme Court reversed the lower court's judgment and reduced the defendant's sentence to two and one-half years of imprisonment with hard labor.[41]

Defendant Chiyo Aizawa had been physically and sexually abused by her father throughout her childhood, even bearing some of his children.[42] Aizawa eventually killed her father in order to escape from him.[43] At the time of her arrest, Article 200 of the Penal Code dictated a sentence of life imprisonment or death for the crime of patricide.[44]

The Supreme Court initially upheld the premise of a heightened penalty for patricide, stating that "killing a parent generally deserves a higher social and moral denunciation than an ordinary homicide and to reflect it upon punishment [is] not immediately unreasonable."[45] However, the Court ultimately held that the

37. For more on case law in Japan, see TAKESHI KOBAYASHI, KENPOU HANREI RON [A STUDY ON THE CASE LAWS OF THE CONSTITUTION OF JAPAN] (Sanseido 2000), Shigenori Matsui, *Saikou Saibansho no Kenpo Hanerei no Hanseiki* [*The Case Laws of the Japanese Supreme Court in Five Decades*], *in* KENPOU 50NEN NO TENBOU II [FIVE DECADES OF SURVEY OF THE CONSTITUTION IN JAPAN II] 203–80 (Kouiji Sato, et al. eds., 1998), and Tomatu, *supra* note 22.

38. 27 MINSHŪ 265 (Sup. Ct., Apr. 4, 1973).

39. *Id.*

40. *Id.*; KENPŌ, art. 14 ("All of the people 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.").

41. 27 MINSHŪ 265.

42. *Id.*

43. *Id.*

44. KEIHŌ, art. 200.

45. 27 MINSHŪ 265.

application of Article 200 to Aizawa's conduct "misconstrued the Constitution in that the said provision is repugnant to Article 14 of the Constitution and is invalid."[46]

I would argue that the Court did not go far enough and should have rejected the constitutionality of a heightened penalty for this type of homicide. In taking into consideration the increased social and moral denunciation generally attached with patricide in Japanese society, the Court allowed modern views of morality to shape its constitutional analysis. In his concurring opinion, Justice Jiro Tanaka argued that Article 200, which still exists in revised form, is unreasonable because it violates equality of law and anti-discrimination principles detailed in Article 14 of the Constitution of Japan.[47]

> Although I agree with the conclusion of this decision . . . I cannot assent to the reasons through which it held Article 200 of the Penal Code void and unconstitutional. The majority opinion says, in short, that Article 200 of the Penal Code is not unconstitutional simply for providing a heightened punishment for the special crime of killing a parent but that this provision violates Paragraph 1, Article 14 of the Constitution because of its extreme severity in relation to the aggravating factor. To the contrary, in my opinion, increasing the maximum penalty for the killing of a parent beyond that prescribed for ordinary homicide is discriminatory and should be held to be repugnant to Paragraph 1, Article 14 of the Constitution, requiring equality under law.[48]

Further, Article 200 also stands in conflict with Article 13 of the Constitution because Article 200 places a higher value on the life of a parent, whereas Article 13 posits that "[a]ll of the people shall be respected as individuals."[49]

46. *Id.*

47. *Id.*

48. *Id.*

49. KENPŌ, art. 13, para. 1.

B. Sumiyoshi K.K. v. Japan[50]

In *Sumiyoshi K.K.*, the Court considered the constitutionality of an act that regulated the location of pharmacies.[51] The lower court denied the plaintiff a license necessary to establish a pharmaceutical store because the application did not meet the stringent geographical restrictions required under the Pharmaceutical Affairs Law. [52] Reversing the lower court's judgment, the Supreme Court struck down the act as unconstitutional.[53] The Court reasoned that the Public Affairs Law did not establish necessary and reasonable regulations to prevent the sale of substandard drugs and that the geographical restrictions were therefore an unconstitutional restriction on the right to pursue a trade under Article 22 of the Constitution.[54]

The Court found that "Article 22, paragraph 1 of the Constitution provides that every person shall have freedom to choose his occupation to the extent that it does not interfere with the public welfare. An occupation is a continuous activity in which an individual engages in order to maintain his own livelihood."[55]

Considering this definition of "occupation," it becomes evident that "occupation must be free not only with respect to independent choice—that is to say, in commencing, continuing and abandoning an occupation—but also free, in principle, with respect to performance itself in the chosen occupation—that is, the form and content of occupational activities."[56] Accordingly, the Court held that "the said provision should be interpreted to include not only freedom to choose an occupation in the narrow sense, but also a guarantee of freedom of occupational activity."[57]

In establishing this broad constitutional right, however, the Court noted that the legislature had the power to pass necessary

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50. 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975).

51. *Id.* (finding that geographical restrictions on pharmacy location unnecessarily and unreasonably restricted plaintiff's freedom of choice of occupation).

52. *Id.*; Yakuji ho [Pharmaceutical Affairs Law], Law No. 145 of 1960, *amended by* Law No. 135 of 1963.

53. A *Koso* appeal is similar to an appeal in the United States judicial system, where a higher court reviews lower court proceedings for error. *See* DEAN, *supra* note 33.

54. Sumiyoshi K.K. v. Japan, 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975).

55. *Id.*

56. *Id.*

57. *Id.*

regulations related to occupational activity.[58] The Court then shed light on the issue by discussing the function and nature of occupational licensing systems:[59]

> Occupational licensing systems permit the carrying on of an occupation only by persons who fulfill conditions set by law and to whom licenses have been given, forbidding this to other persons. They are, as stated above, one form of limitation upon occupational freedom by public authority. The reasons for instituting such licensing systems are many and varied, and whether or not they are acceptable under the Constitution is also, as was previously stated, difficult to discuss in terms of a single standard. However, it should be said that in general licensing systems go beyond simple regulation of the content and form of occupational activities and impose restrictions upon the freedom to choose an occupation itself in the narrow sense.[60]

In providing this level of analysis, the Court provided more detailed reasoning for its judgment than in *Aizawa v. Japan*.[61] The Court found that the stated legislative purpose of the provisions of the Pharmaceutical Affairs Law (*Yakuji ho*) did not exist.[62] Specifically, the Court determined that the requirements under the law were too restrictive to be rationally related to the purpose of preventing the sale of substandard drugs.[63] This type of legal reasoning was new to the Court's judgments and developed out of the constitutional litigation theory which "emerged in constitutional law scholarship" of the 1970s.[64]

C. Kurokawa v. Chiba Election Commission[65]

In *Kurokawa*, the Court considered the constitutionality of the provisions of the Public Offices Election Law on Election Districts

58. *Id.*

59. *Id.*

60. *Id.*

61. 27 MINSHŪ 265 (Sup. Ct., Apr. 4, 1973).

62. *Id.*; *see* HIROMICHI ENDO, *Rippo Jijitu*, *in* CONSTITUTION AS A SWORD (Shinzansha 2007) (discussing the legislative purpose of the provisions of Japanese law within the Supreme Court).

63. 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975).

64. Tomatu, *supra* note 22, at 260.

65. 30 MINSHŪ 223 (Sup. Ct., Apr. 14, 1976).

and the Apportionment of Seats.[66] The provision at issue gave different weight to votes based on where the voter lived.[67] The Supreme Court held this violated the Constitution's requirement that each vote be counted equally.[68] In so doing, the Court found the contested election conducted under the law's apportionment provision to have been unconstitutional but ultimately upheld the results of the election:[69]

> We find that the above-mentioned extreme disproportion of the population to the number of seats under the apportionment provision at issue which existed at the above-mentioned date of the election had been caused by the gradual change in population and had reached the point of contradicting the requirement for the equal franchise long before the date of that election.[70]

The Court emphasized that "[n]o rectification had been made for eight years since the amendment of the Law in 1964, notwithstanding the fact that [the] P.O.E. Law [the Public Offices Election Law] itself provides in the Appendix No. 1 that the Appendix is to be rectified every fifth year after its enactment in accordance with the most recent national census."[71] The Court noted that such rectification is mandated by the Constitution:

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66. Kurokawa v. Chiba Election Comm'n, 30 MINSHŪ 223 (Sup. Ct., Apr. 14, 1976).

67. In this case, the Court discusses the constitution and laws. *See* KENPŌ arts. 13—15, 37, 41—44, and 98; *see also* Public Office Election Law, Law of Apr. 1950, *amended by* Law No. 132 of 1964, art 204, para. 1 ("If a voter or a candidate for public office challenges the validity of an election to membership in the House of Representatives or the House of Councillors . . . he can lodge a complaint with the appropriate local election commission with respect to the election of a member of the House of Representatives and with the Central Election Commission in a case involving a member of the House of Councillors . . . and bring a suit before the (appropriate) high court within thirty days of the date of the election."). Administrative Litigation Law, Law No. 139 of 1962, art 3 provides that

> In a litigation for nullification, if a disposition or decision is [found] to be illegal, but nullification would occasion serious harm to the public interest, and the court deems nullification of the disposition or decision contrary to the public welfare, then taking into account the extent of damage to be incurred by the plaintiff, its indemnification or the degree and method of its prevention, and all other conditions, the Court may dismiss the petition. In such a case, it shall declare in the main text of said judgment that the disposition or decision at issue is illegal.

Further, "[a]s it deems appropriate, the court may declare by way of a ruling before the final judgment that the disposition or decision is illegal." *Id.* at sec. 2.

68. *Kurokawa*, 30 MINSHŪ 223.

69. *Id.*

70. *Id.*

71. *Id.*

> Therefore, it should have been held to contradict the constitutional requirement for the equal franchise at the time of the election at issue. Since the election districts and apportionment of seats are decided after complex and delicate considerations with relation to the whole number of the seats, the apportionment provision thus made is inseparable and a change in a part of the provision has influence on other parts.[72]

Accordingly, the Court held that the entire provision was unconstitutional.

The Court then addressed the particular election in the case, noting that "the election at issue admittedly was conducted under the unconstitutional apportionment provision, but a ruling to nullify its validity for this reason not only has not an immediate effect of rectifying the unconstitutional state of affairs, but also might rather bring about a result which the Constitution does not necessarily purport."[73] Taking these circumstances into consideration, the Court held that:

> [I]t is proper, in accordance with the aforementioned principle of law, to declare only that the election is illegal because it was conducted under the unconstitutional apportionment provision and not to nullify the validity of the election itself. In such a case it is proper to dismiss the demand for the nullification of the validity of the election and to declare in the main text that the election at issue is illegal.[74]

In concluding the decision, the Court held:

> Therefore, the judgment of the court below which held the election valid and dismissed the demand of the Appellant on the merit is illegal in that it made a mistake in the interpretation and application of the Constitution. The Appeal has a good reason solely in this point. Then, the judgment of the court below shall be altered to enter a

72. *Id.*
73. *Id.*
74. *Id.*

judgment to dismiss the demand of the Appellant and to declare in the main text that the election at issue is illegal.[75]

The Court's decision in *Kurokawa* illustrates a so-called "*Jijo*-judgment," where courts find legislative decisions unconstitutional but nevertheless dismiss the claims at issue on policy grounds of protecting public welfare.[76] This type of judgment occurs frequently in Japan,[77] allowing the Court to evaluate the constitutionality of legislative decisions without immediately disrupting the political branches.

D. Hiraguchi v. Hiraguchi *(Forest Land Division Case)*

Relying upon its decision in Sumiyoshi K.K. v. Japan,[78] the Court in 1987 evaluated the constitutionality of Article 186 of the Forestry Law (Shinrin-Hō), which limited private ownership of forests.[79] In *Hiraguchi v. Hiraguchi,* two brothers inherited their father's forest land, each receiving an equal share of the property. While initially they shared the use of the forest, the brothers eventually disagreed over the management of the land. As a result, the younger brother tried to sell his half of the jointly owned forest. Article 186 of the Forestry Law denied this kind of sale for a part owner of less than a majority of the property. Because of this rule, the younger brother claimed that Article 186 of the Forestry Law was unconstitutional under Article 29 of the Constitution of Japan. Evaluating the effect of constitutional property rights over the distribution of common property, the Court held that the restrictions created under Article 186 of the Forest Law were unconstitutional.[80]

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75. *Id.*

76. Toshiaki Sonohara, *Toward a Genuine Redress for an Unjust Past: The Nibutani Dam Case*, 4 MURDUCH UNIV. ELEC. J.L. n.30 (1997), http://www.murdoch.edu.au/elaw/issues/v4n2/sonoha42.html (noting that the *Jijo* judgment allows courts to dismiss suits while declaring their administrative decisions illegal).

77. For cases involving the House of Representatives, see 53 MINSHŪ 1441 (Sup. Ct., Nov. 10, 1999), 39 MINSHŪ 1100 (Sup. Ct., Jul. 17, 1985), and 37 MINSHŪ 1243 (Sup. Ct., Nov. 7, 1983). For cases involving the House of Councilors, see 58 MINSHŪ 56 (Sup. Ct., Jan. 14, 2004), 37 MINSHŪ 345 (Sup. Ct., Apr. 27, 1983), and 18 MINSHŪ 270 (Sup. Ct., Feb. 5, 1964).

78. 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975).

79. 41 MINSHŪ 408 (Sup. Ct., Apr. 22, 1987). The Supreme Court of Japan did not translate this case. *See* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN 327–45(1996)

80. *Id.*

In Japan, some forests are held and managed by local villages, including the sale of parts of these forests to individuals by the entire common property user group.[81] Yet, Article 29 of the Japanese Constitution provides certain individual property protections similar to those attributed to the Takings Clause of the U.S. Constitution.[82] The forest at issue was a jointly-owned property, but Article 186 of the Forestry Law imposed the limitation on the claim of one of the part of owners on the division of the Common Property.

In the *Hiraguchi*, the Court evaluated Articles 22 and 29 of the Constitution, both of which turn on the use of the term "public welfare."[83] From the 1950s to the 1960s, the Supreme Court rarely defined "public welfare" in its reasoning. Indeed, the Court in the 1970s "continued to take a self-restrain[ed]" approach to finding unconstitutionality, rarely extending the scope of a "public welfare" analysis to limit government action.[84]

E. Case to Seek Damages[85]

Yet, the Court's decision in *Case to Seek Damages*, and subsequently in *Kakunaga v. Sekiguchi*,[86] established new trends in the Court's approach towards judicial review. In *Case to Seek Damages*, the Court reviewed parts of Articles 68 and 73 of the Law on Postal Services, which exempted or limited the tort liability of the state for registered mail.[87] Finding that these articles violated the rights of citizens to seek redress guaranteed under the Constitution, the Court ultimately found these provisions to be unconstitutional.[88]

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81. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 65–69 (1990).

82. *See* U.S. CONST. amend. V.

83. Article 22, paragraph 1 of the Japanese Constitution states, "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." Article 29, paragraph 2 states, "Property rights shall be defined by law, in conformity with the public welfare."

84. Tomatu, *supra* note 22, at 270.

85. 56 MINSHŪ 1439 (Sup. Ct., Sept. 11, 2002)

86. 59 MINSHŪ 2087 (Sup. Ct., Sept. 14, 2005).

87. 56 MINSHŪ 1439.

88. *Id.* ("The part of Articles 68 and 73 of the Law on Postal Services which exempts or limits the tort liability of the state for registered mail in cases where the loss has occurred as the result of the intention or gross negligence of the postal worker is against Article 17 of the Constitution.").

The Court's decision in *Case to Seek Damages* significantly altered the judicial theory of Article 17 of the Constitution. Article 17 provides, "Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official."[89] In evaluating the facts behind *Case to Seek Damages*, the Court found that Article 17 prevented the government from limiting a citizen's right to collect damages resulting from negligent or intentional acts by postal workers.[90]

F. Kakunaga v. Sekiguchi[91]

In *Kakunaga*, plaintiffs objected to the government's failure to implement provisions of the Public Offices Election Law, consequently denying Japanese citizens living abroad the right to vote in the 1996 general election for the Japanese Diet.[92] In evaluating the issues raised, the Court addressed the duties of elected officials towards citizens:

> Article 1(1) of the Law Concerning State Liability for Compensation provides that when a governmental official who is in a position to exercise the public authority of the State or of a public body has caused damage to an individual citizen in violation of his legal duties toward that citizen, the State or the public body concerned shall be liable to compensate such damage.[93]

Thus, the Court argued that the issue of whether a legislative omission could be deemed unconstitutional hinged on whether members of the legislature acted in violation of their legal duties towards individual citizens.[94]

In so doing, the Court emphasized that this analysis was separate from the constitutionality of the legislative act itself.

> This issue should be distinguished from the issue of unconstitutionality of the contents of legislation or legislative omission, and even if the contents of legislation

89. KENPŌ, art. 17.
90. 56 MINSHŪ 1439.
91. 59 MINSHŪ 2087.
92. *Id.*
93. *Id.*
94. *Id.*

> or legislative omission were against the Constitution, the legislative act or legislative omission by Diet members would not be immediately deemed to be illegal due to such unconstitutionality. However, in exceptional cases where it is obvious that the contents of legislation or legislative omission illegally violate citizens' constitutional rights or where it is absolutely necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious but the Diet has failed to take such measures for a long time without justifiable reasons, the legislative act or legislative omission by Diet members should be deemed to be illegal under Article 1(1) of the Law Concerning State Liability for Compensation.[95]

Additionally, the Court noted that the appellants residing abroad were "guaranteed by the Constitution the opportunity to vote in national elections, and in order to assure such opportunity to exercise the right to vote, it was absolutely necessary to take legislative measures to establish an overseas voting system."[96] Despite this Constitutional provision, no legislative measures had attempted to implement such a system for more than ten years following the sole attempt to introduce such a bill in 1984.[97] The Court held that "[s]uch a significant omission" qualified as an exceptional case, as mentioned above, and deemed it legislative negligence:

> This legislative omission prevented the *jokoku* appellants from voting in the Election, thereby causing mental distress to them. For this reason, in this case, the claim for state compensation by reason of such illegal legislative omission should be upheld.[98]

This new "legislative omission" theory gave a new tool to lower courts through which to expand the use of judicial review.[99]

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95. *Id.*

96. 56 MINSHŪ 1439 (Sup. Ct., Sept. 11, 2002).

97. *Id.*

98. *Id.*

99. The "legislative omission" theory relates on interpretation of an administrative litigation law. *See* Toshihiko Nonaka, *Supreme Court Precedents and the Lower Court in the Exercise of Judicial Review*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY, *supra* note 8, at 279–92. In contrast, Professor Yoshito Obuki is opposed to this type of judicial review. YOSHITO OBUKI, KENPO-KIHAN NO HENSEI? [CONSTITUTIONAL NORMS GET DENATURED?], *in*

G. *The* Ehime Tamagushi-ryo *Case*[100]

In the *Ehime Tamagushi-ryo* case, the Court evaluated a taxpayer claim against government officials for spending public funds to contribute to the Yasukuni and Gokoku shrines.[101] The Court held that contributions by the governor of Ehime Prefecture to the shrines were unconstitutional because he used funds from the prefecture's public budget to promote a particular religion in violation of Article 89 of the Constitution.[102]

After losing before the Takamatsu High Court, appellant tax payers filed a *jokoku* appeal (comparable to a petition for *certiorari* in the United States).[103] While the total contributions made to the shrines were relatively small—totaling less than $1000 to each site from nine separate donations—and were intended to honor deceased Japanese soldiers, the Supreme Court agreed that the contributions constituted state support for a specific religion:[104]

> [I]t is reasonable to assume that these offerings by a local government to Yasukuni Shrine or Gokoku Shrine, as mentioned above, constitute prohibited religious activities under Article 20(3) of the Constitution, because the purpose of the offerings had religious significance and the effect of the offerings led to support or promotion of a specific religion, and the relationship between the local government and Yasukuni Shrine or other shrines caused by these offerings exceeded the reasonable limit under the social and cultural conditions of Japan. Thus, these disbursements were illegal because they were made to religious activities prohibited by the article.[105]

KENPO NO KISO-RIRON TO KAISHAKU [GENERAL THEORY AND INTERPRETATION OF CONSTITUTIONAL LAW] 428–48 (2007).

100. Shiraishi (*Ehime Tamagushi-ryo*), 51 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997).

101. *Id.* The Yasakunni shrine, which honors those who died while serving in the Japanese military or Self Defense Forces, is a Shinto religious site in Tokyo. *See* Hiroaki Kobayashi, *International Law and Religion Symposium: Religion in the Public Sphere: Challenges and Opportunities in Japan*, 2005 B.Y.U. L. REV. 683, 683. The Gokoku shrine is a Shinto religious site in Ehime. *Id.* at 699.

102. 51 MINSHŪ 1673.

103. *Id.*

104. *Id.*

105. *Id.*

In the *Ehime Tamagushi-ryo* case, the Court applied a purpose and effect standard, first adopted in the *Tsu City Shinto Groundbreaking Ceremony* case,[106] to analyze the constitutional limits of state involvement in religion.[107] The state fails the purpose-effect standard when the purpose and the effect of its religious involvement conflicts with fundamental religious freedom.[108] The Court in the *Tsu City Shinto Groundbreaking Ceremony* case applied the purpose-effect standard to Article 20 of the Constitution,[109] which defines prohibited religious activity as one that promotes or suppresses religion.[110] By contrast, the Court in the *Ehime Tamagushi-ryo* case applied the standard to Article 89 of the Constitution,[111] which prohibits expending public funds or property for the benefit of any religious institution.[112] As such, there is no reasonable link between the *Tsu City Shinto Groundbreaking Ceremony* case and the *Ehime Tamagushi-ryo* case.

H. Nakamura v. Japan[113]

Nakamura involved a forfeiture action involving a ship used in smuggling operations.[114] Japanese customs law allowed for the forfeiture of a third party's property when used as part of a smuggling operation, despite the third party not being a defendant in the underlying criminal proceeding.[115] Under the law, a third party's property could be forfeited without the government providing notice

106. Kakunaga v. Sekiguchi, 31 MINSHŪ 533 (Sup. Ct., Jul. 13, 1977). Many scholars believe that this decision was influenced by *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Chief Justice Burger delivered the opinion of the Court, setting out the so-called *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* at 612–13 (internal citation omitted). But Tomatu argues that "[i]t may be natural for this standard to operate differently in Japan in cases involving separation of church and state." Tomatu, *supra* note 22, at 265.

107. 51 MINSHŪ 1673.

108. Kakunaga v. Sekiguchi, 31 MINSHŪ 533 (Sup. Ct., Jul. 13, 1977).

109. *Id.*

110. KENPŌ, art. 20(3), para. 1.

111. 51 MINSHŪ 1673.

112. KENPŌ, art. 89, para. 1.

113. 16 KEISHŪ 1593 (Sup. Ct., Nov. 28, 1962).

114. *Id.*

115. *Id.* ("Article 118, paragraph 1 of the Customs Law provides that vessels and goods relating to the offenses described in that article, shall be forfeited even where owned by a nondefendant; and there is no provision in the Customs Law or the Code of Criminal Procedure or any other law, providing for notice and the opportunity to excuse or defend.").

or an opportunity to object.[116] Here, the Court held that application of this forfeiture provision was unconstitutional because it violated the third party's property rights and the right to due process of law.

> Article 29, paragraph 1 of the Constitution provides that the right to own or to hold property is inviolable, and Article 31 of the Constitution provides that no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law. So if the ownership of a vessel or a cargo of a nondefendant will, as mentioned above, be affected by a supplementary penal judgment of forfeiture against the defendant, it is necessary to give the nondefendant notice and the opportunity to excuse or defend himself. Without this, depriving him of ownership amounts to the imposition of a penalty impairing the right to own and to hold property without due process of law.[117]

I. Case Laws Trends

In summary, there are certain identifiable trends and influences in the Court's case law. U.S. Supreme Court Justice Brandeis explained judicial limits in his concurring opinion in *Ashwander v. Tennessee Valley Authority*:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.[118]

The Japanese Supreme Court's reliance on the judicial philosophy described by Justice Brandeis has played a significant part in the Court's conservative approach towards judicial review. As Professor Hidenori Tomatu has written, "[N]o one can say that Japan's

116. *Id.*

117. *Id.*

118. 297 U.S. 288, 346 (1936).

Supreme Court has ever made active judgments on constitutional issues."[119]

III. ARE JUDGMENTS OF THE SUPREME COURT COHERENT?

Justices' terms on the Supreme Court expire within a short period.[120] Following the term of Chief Justice Takaaki Hattori in 1982, all Chief Justices—also known as Secretaries of the Supreme Court—largely held laws and enactments to be constitutional because they were judicial bureaucrats with short tenures. The second Chief Justice, Kotaro Tanaka, was an exception. Serving for almost the entire decade of the 1950s, Chief Justice Tanaka was able to be considerably more aggressive with respect to judicial review because of his comparatively long tenure.[121] As such, Chief Justice Tanaka did not hesitate to make political statements through his opinions.[122] The Chief Justices since 1960, however, have had very short tenures—from two to five years[123]—resulting in no political statements from the bench since that time.

A. The Emergence of Ratio Decidendi and the Role of the Cabinet Legislation Bureau

Article 9 of the Japanese Constitution formally renounces the use of warfare as a right of sovereignty and establishes a constitutional bar on the use of military force to settle international

119. Tomatu, *supra* note 22, at 270.

120. *See supra* note 2.

121. *See supra* figure 1.

122. *See* Japan v. Sakata (*Sunagawa Case*), 13 KEISHŪ 3225 (Sup. Ct., Dec. 16, 1959) (discussing the violation of the Special Criminal Law enacted as a result of the Adminstrative Agreement under Article III of the Security Treaty between Japan and the United States). In his Supplementary Opinion, he stated:

> The spirit of pacifism embodied in Article 9 of the Constitution, taken in conjunction with the concept enunciated in the Preamble is immutable. In essence, it forever renounces aggressive war and the use of force as a means of settling international disputes. However, it must not be misunderstood that Japan, by so doing has been, as a matter of course, exempted from the duty of maintaining peace and security in the community of international cooperative entity. Unless we break away from the self-centered premise of placing national interest first, and take the stand that we will adhere to the universal principle of political morality as it is so reflectively stated in the Preamble of the Constitution; that is, unless we give due consideration to the matter from the standpoint of international dimension, It will be an impossible task to interpret Article 9 of the Constitution.

123. *See supra* figure 1.

disputes.[124] The second Chief Justice, Kotaro Tanaka, applied a fairly narrow interpretation of Article 9, upholding the government's development of the National Self Defense Forces against claims that these actions violated the Constitution.[125] In contrast, Chief Justice Kisaburo Yokota, who was an international law scholar with a strong pacifist viewpoint and immediately followed Chief Justice Tanaka, took a very broad interpretation of Article 9 and overturned state actions related to the military.[126] This sort of inconsistency in interpreting key constitutional provisions has limited the significance of the Court. As such, the Court's rulings in the election cases described earlier have ultimately had little impact on the political system in Japan. This lack of long-term significance in fact extends to the Court's decisions on Article 9 of the Constitution and interpretation of the political question doctrine.

Indeed, the oversight role originally designed for the Court in the Constitution[127] has largely been subsumed by the Cabinet Legislation Bureau, whose members regularly consult with the Diet and Prime Minister regarding the constitutionality of proposed laws and regulations.[128] While the propriety of the CLB taking such a significant role in legal consultation to the political branches is ambiguous, the Court has upheld the constitutionality of this arrangement.[129]

The Supreme Court of Japan has upheld the constitutionality of most of the government actions contested before it.[130] Though many scholars criticize this deference to the government,[131] these scholars rarely consider the ultimate effect of the CLB on the Court's

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124. KENPŌ, art. 9 ("[L]and, sea, and air forces, as well as other war potential, will never be maintained.").

125. Tomatu, *supra* note 22, at 258–60.

126. *See* KISABURO YOKOTA, IKEN-SHINSA [UNCONSTITUTIONALITY REVIEW] (Yuhikaku ed., 1968).

127. *See* KENPŌ, art. 81.

128. *See* NAKAJIMA, *supra* note 8, at 26–35, 68–73; Nakamura & Tsunemoto, *supra* note 8, at 198–200.

129. *See supra* note 13.

130. *See* Yasuo Hasebe, *Siho no Sekkyokushugi to Shokyokusshugi: 'Dai 1 Pen Dai 7 Setu Game' ni Kansuru Oboegaki* [*Judicial Activism and Passivism: A Study on the 'Article I, Section 7 Game'*], *in* KENPO NO RISEI [CONSTITUTIONAL REASON] 194ff (T.U.P. 2006).

131. *See, e.g.*, Herbert F. Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT'L & COMP. L. REV. 87 (1980) (discussing the Japanese Supreme Court's restraint in using its power of judicial review).

jurisprudence.[132] The CLB is composed of bureaucrats who have passed a central qualifying examination to become judicial officers of the administrative body.[133] When the Japanese Supreme Court undertakes judicial review, the reviewed laws and orders have already been reviewed by the CLB prior to their passage.[134]

I believe the CLB's political influence is the reason why courts, and especially the Supreme Court, do not readily declare laws, orders, and enactments unconstitutional. The Supreme Court's decisions regarding the constitutionality of legislation involving the military[135] and the rights of workers[136] have consistently upheld the government action at issue, affirming the prior decisions made by the influential CLB. In my mind, these decisions by the Supreme Court are politically influenced by the prior involvement of the CLB. The Court is ultimately protecting the constitutional judgments of an established legal bureaucracy through its deference to the government in the cases discussed. As such, the Court is taking political cues that undermine its constitutional independence from the political branches.

132. Recently, Constitutional Law scholar Yasuo Hasebe examined the interpretation of Article 9 of Constitution of Japan, making a comparative study of the case law of Supreme Court and the interpretation of the Cabinet Legislation Bureau. YASUO HASEBE, KENPOU TOHA NANIKA [WHAT IS A CONSTITUTION?] (Iwanami Shoten 2006).

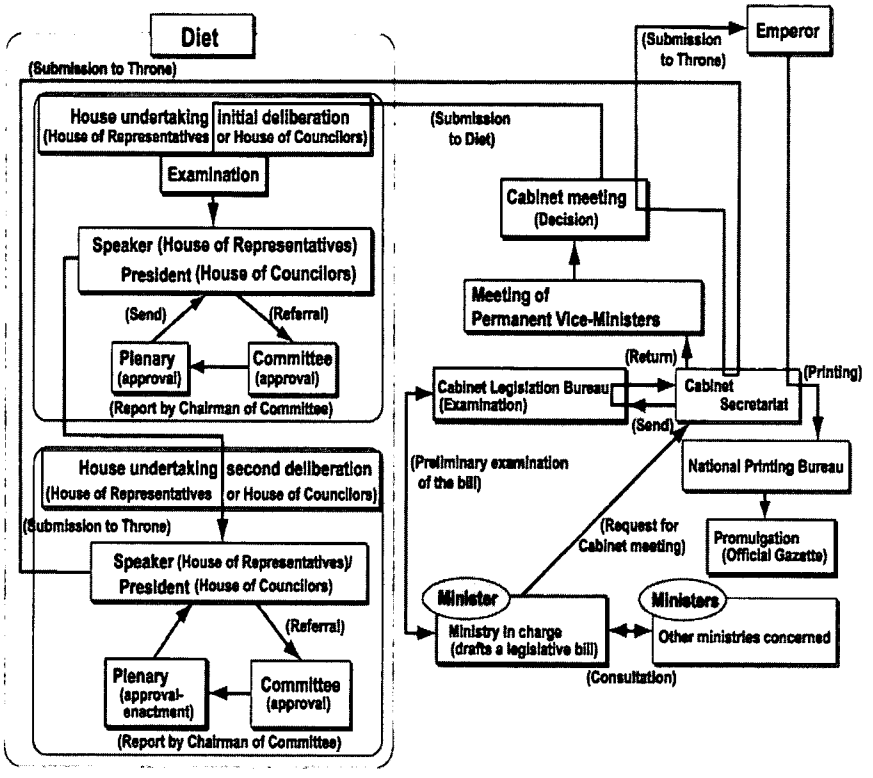
133. *See* Samuels, *supra* note 6; *see also infra* figure 2 (detailing the law-making process in Japan).

134. *Id.*

135. *See* Toshihiro Yamauchi, *Constitutional Pacifism: Principle, Reality, and Perspective in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY, *supra* note 8.

136. *See, e.g.*, *Zen-no-rin Keishoku-ho* Case, 27 KEISHŪ 547 (Sup. Ct., Apr. 25, 1973) (regarding violation of the National Public Service Law providing criminal penalties for public officials who incite acts of dispute).

FIGURE 2: THE LAW MAKING PROCESS IN JAPAN[137]



IV. CONCLUSION

Japan is preparing to adopt a new quasi-jury system in its courts in 2009.[138] Under this new procedural framework, criminal trials will be adjudicated by a panel of three professional judges and six lay citizens (*saiban-in*).[139] This combination of judges and ordinary citizens will deliberate together with "not guilty" verdicts reached by

137. The Law-Making Process, Cabinet Legislation Bureau, http://www.clb.go.jp/english/process.html (last visited Feb. 23, 2008).

138. *See* Kent Anderson & Emma Saint, *Japan's Quasi-Jury (*Saiban-In*) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233 (2005).

139. *Id.* at 233.

a simple majority of the combined group, although "guilty" verdicts will require the vote of at least one judge.[140]

I believe that use of this new quasi-jury system will increase the frequency of "not guilty" verdicts.[141] But more importantly, this new system involving the independent thinking of ordinary citizens might encourage the Japanese judiciary to assert more ideological independence from the country's political branches. As a result, the increase in "not guilty" verdicts may also signal an increase in the number of government actions found to be unconstitutional.

Although the Court has begun to provide more detailed reasoning in its judgments, it is still quite rare for the Court to act as much more than a rubber stamp of approval for the government in cases involving the constitutionality of government action. I believe the influence of the CLB is the underlying cause of this deferential approach by the Court. While new changes within Japan's judicial system may ultimately bring increased independence, this deferential approach will likely to continue in the near future.

140. *See* Norimitsu Onishi, *Japan Learns Dreaded Task of Jury Duty*, N.Y. TIMES, July 16, 2007, at A1.

141. When Japan previously employed a jury-type system in 1928, "not guilty" verdicts were more common. *See* Kanako Ida, *Old Jury System Differs from 'Citizen Judge' Roles*, ASAHI SHIMBUN, Apr. 4, 2008, http://www.asahi.com/english/Herald-asahi/TKY200804040071.html.