ARTICLES

INCOMPLETE REVOLUTIONS AND NOT SO ALIEN TRANSPLANTS: THE JAPANESE CONSTITUTION AND HUMAN RIGHTS

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INTRODUCTION

The Japanese Constitution is an odd case much discussed by students of comparative law and constitutions. Its birth was certainly an unnatural event; drafted primarily in English by Americans over a few days in a country under occupation, it was imposed on an extremely reluctant conservative Japanese government. But procedurally, the enactment of the Constitution was flawless, as all constitutionally mandated procedures were followed. Over the last fifty years, Conservative Japanese politicians have intermittently pointed to the special circumstances of the drafting to criticize the Constitution as an alien transplant, a document replete with western values that does not suit Japan with its group-oriented, homogeneous society based on Confucian values. Some western commentators have echoed this theme. In fact, the sweeping guarantees of human rights have not

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2 The Constitution was promulgated on November 3, 1946 and took effect on May 3, 1947. In English it is often referred to as the 1946 or 1947 Constitution in order to distinguish it from its predecessor, the Meiji Constitution, which was introduced on February 11, 1889 and made effective on November 28, 1890. This practice emphasizes the origin of the present day Constitution as Japan’s defeat in World War II and the subsequent military occupation. Japanese practice, however, does not emphasize the past, but rather underscores that the document belongs to Japan by referring to the present Constitution as simply the Constitution (Kenpō) or Japan’s Constitution (Nihonkoku Kenpō). In contrast, the earlier Constitution is called either the Meiji Constitution (Meiji Kenpō), or the Constitution of the Great Japanese Empire (Dannippon Teikoku Kenpō), in reference to the imperial era in which it was promulgated. This article will follow Japanese practice and refer to the documents as the Japanese Constitution and the Meiji Constitution respectively.

See Dan Fenno Henderson, 53 LAW & CONTEMP. PROBS. 89, 93 (Spring & Summer 1990) (“Much of the force of the conservative revisionist position . . . is buttressed by their argument that the 1947 Constitution was an imposed constitution, not a Japanese Constitution.”).

been fully implemented in the more than fifty years since the adoption of the Constitution. The gap between the apparent guarantees of the Constitution and the actual scope of protection afforded by the Constitution is attributed to a naturalizing or "Japanizing" of the Constitution by interpretation to better suit the Japanese society in which it was planted. This "naturalized" Constitution is also often praised as a pragmatic success. Although in practice it provides far fewer protections for individual rights than seem to be mandated by its provisions or are guaranteed by its American and European models, commentators consider the Constitution a success because of the economic recovery and development of Japan since the end of World War II. Parts of the Liberal Democratic Party (LDP) have made this argument continuously during its almost unbroken rule since 1955.

Certainly the Japanese Constitution is worth consideration both because it is one of the oldest functioning constitutions in the world and one closely watched by its Asian neighbors as a possible model...
It is even possible that those interested in constitutional stirrings in the rest of Asia and Eastern Europe may draw some lessons from Japan's experience with grafting a democratic constitution onto a discredited and collapsing authoritarian system fiercely opposed to change.

But it is not easy to discuss the Japanese Constitution. Virtually every aspect of it, including the summary of facts sketched above, is highly controversial and contested. For example, the apparently minor fact that the Constitution has never been amended elicits diametrically opposed interpretations. The absence of amendment may be seen as proof of the Constitution's stability and the satisfaction of the Japanese people with their fundamental law. On closer examination, however, the failure to amend the text by the legally mandated procedures while simultaneously permitting government actions and practices that violate the Constitution may be a sign of decay, rather than strength, indicating the absence of the rule of law. If interpretation of key parts of the Constitution rests in the hands of the executive, not the judiciary, as is the case with the pacifism provision of Article 9, then the meaning of the Constitution can change with shifting political coalitions, as it now does. In effect, as this article explains, the Constitution often may have been radically and undemocratically amended despite its apparently pristine text.

Also, under dispute are which facts are relevant to an account of constitutionalism in Japan. If one focuses on the events in the capital, Tokyo, and on the opinions of the conservative elite, who have ruled for more than one hundred years with great distaste for popular rule, then a picture emerges of a society and culture with little experience of or use for individual rights, a society based on harmony (wa) in which individuals willingly submerge even their basic needs

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9 See Maki, supra note 5, at 48 (“After more than forty years of experience, not a single grave defect in the structure of government has developed, at least not a defect serious enough to have created the necessity . . . for constitutional amendment.”). But see Smith, supra note 6, at 309 (arguing that a new constitution is the only way to cure Japan's neurosis of history and to enable Japan to assume the responsibilities which accompany its economic prominence).

10 One must note that the prescribed amendment procedure is onerous. The Constitution requires:

Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for the ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

KENPO [Constitution] art. 96(1).

11 See infra notes 129-158 and accompanying text; see also infra notes 98-100 and accompanying text for an overview of efforts to explicitly amend the Constitution.
and desires for the common good, defined by the government as primarily economic development. On this set of facts the Japanese Constitution, with its three basic principles of popular sovereignty, pacifism, and human rights, seems anomalous. But there are other sets of facts and strands in the development of Japanese constitutionalism, discussed more often in the literature on Japanese history than in law journals,¹⁰ that suggest a far more complex picture of a long, indigenous tradition in Japan aspiring to freedom, democracy and human dignity dating back to the emergence of the modern state in the 1860s.¹¹ This dissident tradition made up of various components has been repeatedly overwhelmed by the conservative ruling elite, but it continues even now and is having a significant affect on the course of Japanese constitutional litigation.¹²

The political history of modern Japan, which is to a considerable extent a struggle over the meaning of constitutional law, consists of the struggle between conservative governing elites and the culture they wish to promote, and various movements by ordinary citizens to redefine the values and aims of the state. An understanding of this

¹⁰ For a representative example of this type, see Kendrick F. Royer, The Demise of the World's First Pacifist Constitutions Japanese Constitutional Interpretation and the Growth of Executive Power War, 26 VAND. J. TRANSNAT'L L. 749, 754 (1993) ("After studying primarily German and French legal models, in 1889 the Japanese settled for an imperial constitution modeled after the Prussian monarchical constitution.").

¹¹ For an introduction into this history, see MIKISO HANE, PEASANTS, REBELS, AND OUTCASTES: THE UNDERSIDE OF MODERN JAPAN (1982); TESSA MORRIS-SUZUKI, SHOWA: AN INSIDE HISTORY OF HIROHITO'S JAPAN (1984); THE OTHER JAPAN: CONFLICT, COMPROMISES AND RESISTANCE SINCE 1945 (Joe Moore ed., 1997); REFLECTIONS ON THE WAY TO THE GALLOWS: REBEL WOMEN IN PREWAR JAPAN (Mikiso Hane ed. & trans., 1988).

Terms such as "homogeneous" and "Confucian" are highly contestable and misleading when used to describe the Japanese society. The Japanese society is not homogenous. See, e.g., JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY (Michael Weiner ed., 1997). Moreover, the Japanese government has manipulated the image of Japan, at times trying to persuade the Japanese that their country is multiethnic, and at others times trying to persuade them that it is homogeneous, depending upon which served governmental political objectives. See OGUMA EIJI, TANITSU MINZOKU SHINWA NO KIGEN [THE ORIGIN OF THE MYTH OF THE JAPANESE ETHNIC HOMOGENEITY] (1995); see also TESSA MORRIS-SUZUKI, RE-INVENTING JAPAN: TIME, SPACE, NATION 80-109 (1998) (providing a summary in English of the government's effort).

Confucianism is also complex and some of its strands support more than authoritarian power structures. For example, Chinese communitarianism historically resisted state domination and could form the basis for human rights in China. See WM. THEODORE DEBARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); cf. CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore deBary & Tu Weiming eds., 1998). Some Japanese writers clearly understood the Confucian right to rebel against unjust rule. See YASUNAGA TOSHINOBU, ANDO SHOEKI TO NAKAE CHOMIN [ANDÔ SHÔEKI AND NAKAE CHÔMIN] 135-173 (1978); see also Vera Mackie, Freedom and the Family: Gendering Meiji Political Thought, in ASIAN FREEDOMS: THE IDEA OF FREEDOM IN EAST AND SOUTHEAST ASIA 121, 123 (David Kelly & Anthony Reid eds., 1998) ("[T]he legitimacy of liberal ideas could be challenged by the dominance of Confucianist ideas, which emphasised hierarchy and obedience rather than equality and freedom. But it was also possible to find justification in the Confucian tradition for rebellion against a ruler who did not show the necessary benevolence.").

¹² For a work in English which presents the viewpoints of such dissident Japanese voices, see GAVAN MCCORMACK, THE EMPTINESS OF JAPANESE AFFLUENCE (1996).
ongoing conflict is essential for an understanding of how the Japanese Constitution arose, evolved over the past fifty years and is likely to develop in the future. The struggle between these competing visions of the state and the individual arose at the founding of the modern Japanese state, the so-called Meiji Revolution, and the revolution remains unfinished. Far from being brought by the American occupying forces, notions of democracy and human rights had been percolating inside Japan for generations, growing out of both Confucian and western sources. The occupation forces briefly tipped the balance in favor of the minority tradition of democracy and human rights only to reverse course and come down firmly on the side of the prewar conservatives committed to authoritarian rule. Supported by the United States government, the conservatives and their successors have ruled—by what is often characterized as the iron fist in the velvet glove—almost without intermission until the present. The consequences of almost unbroken conservative rule for the Constitution, and in particular for the effectiveness of its human rights provisions, have been profound.

The tenacity of Japanese individuals and groups committed to the ideals underlying the original thrust of the Japanese Constitution also has been considerable. Their efforts have resulted in waves of litigation first seeking the enforcement of constitutional guarantees, and then, once the judiciary declined to provide effective relief, the enforcement of international human rights treaties. After an initial coolness to such claims, a few lower courts are beginning to recognize them and supply relief accordingly. But the Supreme Court and the

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16 Several Japanese historians argue that the Meiji Revolution is not yet complete. See TANAKA AKIRA, MIKAN NO MEIJI ISHIN [THE INCOMPLETE MEIJI REVOLUTION] (1979); NAKAMURA MASANORI, GENDAI O MANABU: SENGO KAIGAKU TO GENDAI NIHON [A STUDY OF CONTEMPORARY JAPANESE HISTORY: POSTWAR REFORM AND CONTEMPORARY JAPAN] 12-17 (1997).

17 The Japanese Constitution, and indeed all of Japanese postwar history, must be understood in the context of the United States' ongoing intervention in the sovereignty and politics of Japan in order to prevent Japan from becoming a neutralist state. Namely, the intervention was intended to maintain Japan's place in the United States' military strategy for Asia. See SCHALLER, supra note 7, at 38-41 (describing the process of aligning Japan with the United States' foreign policy objectives by adopting the United States-Japan Mutual Security Treaty in 1951). One of the most important aspects of this support involved massive, covert, financial assistance to the LDP by the United States government that allowed the LDP to subvert elections, especially on the island of Okinawa. See id. at 135-36, 140, 159; SMITH, supra note 6, at 17, 27-28, 30. The length of the LDP's rule has been achieved in part by structuring electoral districts so that rural votes have counted up to seven times as much as urban votes. The result is a "mutant democracy in which elections function to deprive voters of their democratic rights." See SMITH, supra, at 28.

18 See infra notes 129-158 and accompanying text (discussing suits brought to enforce Article 9); see infra notes 103-128 and 200-245 and accompanying text (discussing non-Article 9 litigation).

19 See infra notes 277-303 and accompanying text.

20 A political sea change occurred in Japan in the 1990s which included a reopening of debate about the Constitution and human rights. The death of Emperor Hirohito, now posthu-
executive remain fiercely opposed to recognition of legal rights other than those provided under the Constitution as it has been narrowly construed by Japanese courts. The Japanese Constitution and human rights, far from being alien transplants, are caught up in a struggle over the nature of the state that stretches back to Meiji. In that struggle, both sides, the conservatives and the supporters of human rights have drawn on sources from outside for leverage, but the fight is thoroughly Japanese.

Part I of this article briefly sketches the struggle over control of the state before the World War II, which forms the background of the Japanese Constitution. Part II traces the birth of the Constitution and discusses the large number of conflicting forces that lead to a complex compromise. Particular attention is paid to the evolution of the human rights provisions. Part III describes the course of postwar constitutional development and offers an explanation for the highly restrictive interpretations adopted by the Supreme Court. Part IV contains an analysis of the more recent litigation based on human rights treaties, particularly the International Covenant on Civil and Political Rights (ICCPR), and considers the significance of the periodic reporting process before the Human Rights Committee for the implementation of human rights in Japan.

Although culture undoubtedly plays an important part in the unfolding of any society, and certainly does so in Japan, this article concentrates on history. Culture is riven with contradictions based on age, class, gender and political orientation; it is malleable, and subject to conscious creation and manipulation. Attempts to understand the Japanese Constitution without a firm grasp of history omit the political, and so risk the distortions of orientalism. The historical ma-

mously renamed Emperor Showa, must be recognized as an important factor in the reopening of these Constitutional questions. Emperor Hirohito acted as regent for his incapacitated father from 1921 to 1926, and then reigned from 1926 to 1989. After his death, numerous books and historical documents analyzing his reign appeared, resulting in a reappraisal of recent Japanese history within Japan. Such a reexamination of the past was impossible during his lifetime.

Because most English speakers recognized Emperor Showa as Hirohito, his name when he was alive, and many of the sources refer to him in this manner, this article refers to Emperor Showa as Hirohito for the sake of clarity.

Chalmers Johnson cautions westerners against too readily accepting cultural explanations for Japanese politics. For foreign nations attempting to influence Japanese policy making, it is essential to remember that the obstacles to basic change in Japan are almost never what Japanese spokesmen say they are. What stands in the way is not the need for consensus, or an island mentality, or racial and cultural differences. The obstacles to change are invariably political vested interests, but these may be harder to address and to alter than in other political systems. This is so because although the *tatemae* [social convention] of Japan is a constitutional monarchy operating under the rule of law, the *honne* [reality] is a developmental state based on a covert conservative alliance to keep the people docile and preoccupied with nonessential matters. Such a system can change, but only when the status quo has clearly become un-
tix is, of course, crucial in the birth and death of constitutions. The hard question is whose history?

I. THE MEIJI CONSTITUTION AND THE BACKGROUND
OF THE BIRTH OF THE JAPANESE CONSTITUTION

Strictly speaking, one should say that Japan has only ever had one Constitution. The present Japanese Constitution is, in fact, the Meiji Constitution as amended in 1946 pursuant to its specified amendment procedures. The continuity of form is not merely a technicality; even though every article of the Meiji Constitution was replaced, the present Constitution remains profoundly affected by the Meiji period (1868-1912). Specifically, the allied forces decision to govern indirectly through the regime in place at the end of the war meant that the political and legal arrangements established in the Meiji Period directly affected the development of the Japanese Constitution. That inheritance was complex. The period from the founding of the modern Japanese state in 1868 until 1945 was far from harmonious. A great divide over the rights of the individual and the authority of the state developed, resulting in conflict over the development of the Meiji Constitution, the control of freedom of speech and the proper nature of education.

In 1868, after the samurai of the outlying and disfavored Satsuma and Choshu clans successfully displaced the Shogunate, using the Emperor in Kyoto as a talisman, their leaders became the de facto government of Japan. The leaders of the Japanese revolution, faced with what they perceived to be the colonial intentions of the western powers backed up by their technological superiority in armaments, sought to transform Japan’s feudal system of clans and an agrarian economy into a strong, modern state in order to maintain Japan’s independence. One of the triggers which had set off the military rebellion was samurai resentment against the weak Shogunate for negotiating so-called “unequal treaties” with the western powers, which


Article 73 of the Meiji Constitution provided for its amendment:

1. When it has become necessary in the future to amend the provisions of the present Constitution, a project to the effect shall be submitted to the Imperial Diet by Imperial Order [command].
2. In the above case, neither House can open debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

Meiji Renfo art. 73.

See infra note 62 (describing the similarities in structure between the Meiji Constitution and the present Japanese Constitution).

These “unequal treaties” included the Treaty of Edo, July 29, 1858, Japan-U.S., 12 Stat.
provided for the economic exploitation of Japan and humiliating limitations on Japan’s sovereignty, such as extra-territoriality provisions for westerners. The legal system had to be quickly overhauled in order to renegotiate these treaties on an equal footing with the western powers. But such changes did not necessarily entail a written constitution and the Meiji oligarchs hesitated to draft one lest clarification of the structure of government open the way for others to share in political power.

The decline of the Shogunate and the revolution had, however, unleashed powerful forces in Japan. A number of people, both samurai and commoners, believed that the Meiji Restoration would entail a social revolution which would result in participation by the populace in public affairs. When the Satsuma and Choshu leaders set about to carve up the spoils of power among themselves, transforming themselves into the tight-knit group ruling Japan, there was a strong backlash. One manifestation was the Freedom and Popular Rights Movement (Jiyū Minken Undo), which swept the nation, agitating for parliamentary democracy and a constitution. The movement was not merely an urban phenomenon: one result of the movement was the formation of groups even in rural villages to study, discuss and draft a constitution for Japan.

Only since 1968, have scholars realized the extent of the grassroots movement for a constitutional government. In that year, the Japanese historian, Irokawa Daikichi discovered, tucked away in a rural storehouse, a sophisticated draft constitution written by a farmers’ group named the Learning and Debating Society. Now, sixty-eight
such private constitutions, called *shigi kenpō*, have been discovered. These draft constitutions were not mere copies of alien models, but rather were complex blends of a variety of Confucian and Western sources.

The Freedom and Popular Rights Movement reached its apex in 1881. The Meiji oligarchs crushed this along with other allied and genuinely popular movements seeking democracy and a role for the populace in constitution making. The Meiji oligarchs, however, understood that the powerful forces pressing from below for social and political revolution could not be ignored. Under the leadership of Ito Hirobumi, they tried to devise a constitutional system which would limit and contain popular pressure for representative government, in essence creating an illiberal constitution which primarily imposed duties on Japanese citizens as imperial subjects. Nevertheless some provisions for individual rights had to be included in order to gain the international respect from the western powers for the Japanese legal system necessary for a renegotiation of the unequal treaties.

One reason for the long delay in producing the Meiji Constitution was the time needed to create the legal and social framework necessary to constrain the effect of even a limited grant of rights. After an internal power struggle, Ito Hirobumi emerged as the leader of the oligarchs and set out to design the new constitution. The composition of the Meiji Constitution was essentially a private action by Ito and his assistants, later given legitimacy by having the Emperor promulgate it. Ito’s solution to the danger of popular rule evolving from a written constitution was to attempt to mold the persons who would be covered by the Meiji Constitution by establishing a state-

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Japanese language following the translation into Japanese of the U.S. Declaration of Independence, and Mill’s *On Liberty* and the spread of liberal ideas derived from Confucianism and Western thought.

30 See KOSEKI SHOICHI, THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION 26 (Ray A. Moore ed. & trans., 1997). In comparison, the private constitutions drafted in Japan after World War II number in the “teens.” See id.

31 For example, a commoner named Chiba Takusaburo, who served as the teaching assistant in the village elementary school, wrote the Itsukaichi Draft Constitution found by Irokawa. Chiba’s writings show a remarkable gift to utilize the terminology of traditional Confucian writings and imperial proclamations to further a liberal constitutional order. As Irokawa explained, “we see the principles of monarchical absolutism transformed into liberal sentiments with the retention of almost identical vocabulary” in Chiba’s writing. See IROKAWA, supra note 27, at 105.

32 See id. at 39-68.

33 See CAROL GLUCK, JAPAN’S MODERN MYTHS: IDEOLOGY IN THE LATE MEIJI PERIOD 43 (1985) (explaining that the Meiji Constitution and subsequent ministerial decisions were passed “through imperial hands for the sanction of legitimacy remaining, like the scroll [of the Meiji Constitution], unchanged.”). At the ceremony, Ito, President of the Privy Council, handed the text he had written to Emperor Meiji, who in turn handed it as an imperial gift to the Prime Minister. After World War II, Prince Konoe Fuminaro would try to replicate Ito’s actions in detail, including acting without clear authority to draft a constitution. He even chose seclude himself and his aids in a rural retreat to produce the draft, as Ito had done. See KOSEKI, supra note 30, at 14-15.
guided socialization through a tightly controlled, centralized system of compulsory education and a civil code which significantly restructured the Japanese family system. Thus, in rapid succession appeared the Meiji Constitution (1889), a set of education laws, most notably the Imperial Rescript on Education (1890), which set obedience as the goal of education, and the Civil Code (1891), which regulated family life by imposing the samurai family structure on the rest of the populace for the first time in Japanese history.\footnote{One of the innovations of the Meiji government was the extension of patrilineal succession rules from the samurai class to the entire populace. See, e.g., Chizuko Ueno, The Position of Japanese Women Reconsidered, 28 CURRENT ANTHROPOLOGIST 75, 78 (1987).}

Specifically, the Meiji oligarchs tried to control the country by propagating two different theories of the Emperor, and consequentially two theories of the Meiji Constitution, in a two-track educational system. Education for the masses was to include an exoteric doctrine of the Emperor whereby the Emperor was promoted as an infallible, mystical being. Myths, such as the unbroken line of Emperors springing from the Sun Goddess,\footnote{In fact the line has been broken repeatedly, including a major split between two branches of the line, the Northern Dynasty and the Southern Dynasty. See also Irokawa, supra note 27, at 245-311.} were invented from fragments of traditional folk beliefs, Shinto religion and newly minted notions. An esoteric doctrine of the Emperor was taught at schools attended by the future ruling elite. Under this latter theory, best represented by the formulation of Tokyo Imperial University constitutional scholar Minobe Tatsukichi, the Emperor was merely an organ of the state, that is an element in a constitutional order run by humans.

The resistance to control was considerable from groups pressing from below for a more genuinely popular representative system as well as from ultraconservatives opposed to the esoteric doctrine. A battery of laws had to be devised and repeatedly revised to try to contain the resistance. For example, in 1890, the Cabinet promulgated the Public Meeting and Political Association Law, which banned outdoor political rallies. Later, national political organizations were banned. And, as a direct blow to the feminists who had been active in the Meiji Revolution and the now defunct Freedom and Popular Rights Movement, attendance at political meetings by women, as well as foreigners and minors, was made illegal.\footnote{See Lawrence W. Beer, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS AND SOCIETY 56 (1984) [hereinafter Beer, FREEDOM OF EXPRESSION].}

Even the intellectual leaders of the Meiji Enlightenment, the inner circle of the time, split over the proper nature of education in a modern Japan due to differing views of the capacity of ordinary people and the purpose of government. The opposing positions, which persist to the present day in Japan, have come to be characterized as
"enlightenment from above" and "enlightenment from below." The former, best exemplified by the first Minister of Education Mori Arinori, holds that an individual has no value in himself but rather exists only to serve the state, that is the Emperor, and that the interests of state are best served by obedience. Under this position, individuals were encouraged to mobilize themselves to serve the goals of the state, but those goals were to be set only from above. "Enlightenment from below," on the other hand, usually identified with the nineteenth century intellectual and founder of Keio University, Fukuzawa Yukichi, claimed that the modernization of Japan would be best served by encouraging each individual to develop his or her own personal capabilities and an individualized vision of the ends of the State. Education, according to this alternate view, should foster pluralism and personal autonomy.

There was even a period of relative liberalism in government during the so-called Taisho Democracy, which experimented with various political innovations, such as jury trials. But as societal conflict concerning justice for the rural poor grew and ferment in the cities for social reform expanded, the government responded with a battery of repressive laws designed to maintain its power and to quell the new demands of Japanese citizens. Finally, the military gained control of the government in 1935. The theory of the Emperor as an organ of the state was officially suppressed, while its author, Minobe Tatsukichi, was forced out of public life and his publications banned. Political parties were forced into a government-controlled, grand coalition in support of the war effort, opposition groups were suppressed. Opposition leaders were either dead due to official executions or police assassinations, incarcerated, or, for those still at liberty, forced to choose between collaboration with the government or silence. This
was not a culture of harmony or wa. The opposition to the authoritarian regime was silenced, but not destroyed entirely. Its remnants would wait out the war. The balance shifted when the conservatives in power lost the war. The next question was whether they and their program would lose in the ensuing peace."

II. THE BIRTH OF THE PRESENT JAPANESE CONSTITUTION

With the defeat of Japan and the acceptance of the Potsdam Declaration, the future of the Meiji Constitution was in question. Paragraph 10 of the Potsdam Declaration specifically addressed the future of human rights in Japan: "The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese People. Freedom of speech, of religion, and of thought, as well as respect for the fundamental rights shall be established...." The implementation of the Potsdam Declaration in Japan was administered by the Supreme Command of the Allied Powers in the Pacific ("SCAP") lead by General Douglas MacArthur from general headquarters in Tokyo. Given the small number of forces assigned to the occupation the decision was made to govern and carry out the reforms through the existing Japanese government. The wisdom of the decision has been much debated, and the consequences of this strategy clearly impacted on the future of the revised constitution.

Nevertheless, a number of Japanese played a role in the constitution-making process. As in the early Meiji period, numerous non-governmental groups and private individuals produced draft constitutions or proposals, which will be described briefly in Section A. As had also happened in the early Meiji period, the conservatives in

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6 The political activists who laid low waiting for the end of the war were not only urban intellectuals. The newspaper reporter Mark Gayn described visiting with a sharecropper in rural Nagano Prefecture just after the war. The farmer had been imprisoned before the war for union activities and had been warned by his village policeman to "play the fool" during the war and keep quiet. After singing folk songs for the visitor, the sharecropper stunned Gayn by breaking into the Japanese version of a song of the Industrial Workers of the World (the I.W.W. or "Wobblies"):

You will eat, bye and bye,
In that glorious land above the sky;
Work and pray, live on hay,
You'll get pie in the sky when you die.
[That's a lie!]

MARK GAYN, JAPAN DIARY, 114-15 (1948).

"Hideo Tanaka, Making the Constitution of Japan, in DEMOCRATIZING JAPAN, supra note 3, at 107, 108 (quoting Article 10 of the Potsdam Declaration).

"For a classic account of this period, see McNelly, supra note 3. The first priority of the Japanese government was the preservation of the Emperor system, through which they could maintain their power. The Japanese government's first offer during the peace negotiations conditioned acceptance of the Potsdam Declaration on the promise that the Emperor's prerogatives as a sovereign ruler not be compromised. The Allies rejected the offer. See id. at 76.

"See id. at 100-01.
power tried to brush aside the popular offerings and used their own members to draft the constitution within the structure of informal authority and accountability that had been at the heart of the prewar system of government. Those efforts will be sketched below in Section B. SCAP, rejecting the government’s proposals for minimal changes in the Meiji Constitution, considered various NGO drafts and settled on one as a basic framework for its own draft. In the ensuing marathon negotiations over this draft between the Japanese Government and SCAP, key provisions were weakened or removed. Section C traces the evolution of the most important provisions concerning human rights and illustrates the efforts of conservatives to minimize what they could not entirely prevent and shows the genesis of much of the postwar litigation over the scope of constitutional protection for human rights.

The Japanese people as a whole, however, were excluded from the process of constitution-making. Some groups called for a constitutional convention or a referendum on the SCAP inspired document after it had been enacted by the last Imperial Diet under the Meiji Constitution. But, as Section D describes, these moves were blocked by the conservative government, enabling the government and their successors to argue later that the Constitution is an alien transplant imposed by the occupation forces and does not reflect the true wishes of the Japanese people.

A. Private Constitutions Written by Non-Governmental Groups

As was the case in the early 1880s, the possibility in 1945 of a change of government provoked intense activity by individuals and groups to create draft constitutions, stimulating political discussion concerning the future of the Japanese state. Among others, proposals were put forward by the Socialist Party, the Communist Party, the Japan Anarchists League, the conservative Liberal Party, the conservative Progressive Party, and the Constitution Discussion Society.

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47 See KOSEKI, supra note 30, at 65.
48 Censorship was tight under SCAP and General McArthur ordered that the sensitive issue of constitutional revision proceed in absolute secrecy. Newspapers occasionally published leaked information, sometimes with the apparent blessing of SCAP. However, most Japanese citizens did not learn how their Constitution had been drafted until 1951, when the translation of the diary of Mark Gayn, who had covered Asia before the war and returned to Japan in 1945, was published. See KOSEKI, supra note 39, at 1 Gayn provides one of the best accounts of the period from 1945 to 1948 in Japan.
49 Actually, Japanese conservatives did not begin to make this charge publicly until after the execution of a security treaty between Japan and the United States, signifying the clear alignment of Japan with the West in the Korean War. Emboldened by the United States’ encouragement to rearm, the conservative parties began to attack the Constitution, which kept them in power, as an alien document. The irony was not lost on the conservatives.
50 See KOSEKI, supra note 30, at 26-50. The Constitution Discussion Society draft included an article prohibiting military armaments for Japan. Only the personal draft of Takano Iwasaburo,
The most important of the private drafts was one written by the Constitutional Research Association, a group of intellectuals and writers led by Takano Iwasaburo and Suzuki Yasuzo. Takano, an old man at the end of the war, who had lived through the Freedom and Popular Rights Movement and relinquished his post at Tokyo Imperial University to become involved in educational programs for workers, was a committed republican who advocated the abolition of the emperor system. Suzuki, who was forced out of Kyoto Imperial University after being convicted in the first case tried under the Peace Preservation Law, studied constitutional history in prison and, upon his release, wrote, as an independent scholar, a series of books on constitutions and the history of the People’s Rights Movement in the Meiji Period. Although Suzuki advocated a republican government, he thought that a transitional phase was essential and so argued for a two-step approach beginning with a democracy retaining the emperor system followed by a reconsideration of this choice when the country had gained experience with democracy. The Association accepted Suzuki’s view and suggested an immediate revision of the Meiji Constitution to be followed ten years later by the convening of a constitutional assembly to draft a new constitution. The final draft was closely modeled on the Weimar Republic Constitution, including an extensive provision of social rights and the rights to existence, which bears some similarities to the subsequent International Covenant on Economic, Social and Cultural Rights. Under the Association’s proposal, “sovereignty proceeds from the people,” and the Emperor became a symbolic figure, the source of honors and the performer of state rituals.

SCAP, which received several private drafts from various civilian organizations, gave the most attention to the draft offered by the Constitutional Research Association. By mid-January of 1946, a detailed analysis of the Association’s draft was prepared, which listed its “outstanding liberal provisions,” including the sovereignty of the people, the conversion of the Emperor to a figurehead, protection of workers, a referendum system, annual budgets approved by the Diet,

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as distinct from the Constitutional Research Association’s draft which he also authored, called for the abolition of the emperor system and establishment of a republic. See id. at 30-39.

The forces opposed to the conservative government were by no means united or even consistent in their positions. For example, Iwasa Sakutaro, chairman of the Japan Anarchists league, offered on behalf of his organization a preamble dealing with human rights to the influential Constitutional Research Association, but then continued to urge the abolition of all constitutional government. See id. at 36-37. That is, even anarchists, who opposed formal government, felt that establishing human rights as the basis of the Japanese state was so important that they engaged in constitution drafting.

31 See id. at 36-35 (describing Suzuki’s and Takano’s background as well as the process of drafting the Association’s private draft).

32 This law was one of the most significant laws utilized to silence political dissidents. See BEER, FREEDOM OF EXPRESSION, supra note 6, at 65-66, 68.
and an audit bureau. On February 4, 1946, after the collapse of conservative attempts to draft a revised constitution, the Government Section began crafting the present Japanese Constitution with the Association’s document as one of its tools.

B. Private Constitutions Written By Government Affiliated Individuals

Conservative politicians allied with the government also produced drafts of the new Japanese Constitution. The principle writers of such drafts were: Prince Konoe Fumimaro, prime minister three times before the war and minister without portfolio in the first postwar Higashikuni cabinet, and Matsumoto Joji, a commercial law professor from Tokyo Imperial University, who served as director and vice-president of the Manchurian Railway Company in Japanese controlled colonial Manchuria, as well as director general of the Legislative Bureau in the Yamamoto Cabinet and as Minister of Commerce. Despite the linkages Prince Konoe and Matsumoto had developed with the Japanese government, each of their efforts was really a private action without formal governmental authorization. This blurring of the boundary between public and private realms for politically powerful individuals, and the avoidance of clear responsibility by individuals and entities for governmental actions has been dubbed “collective irresponsibility” by the Japanese scholar Maruyama Masao.

Konoe’s effort to draft a new Japanese Constitution was aborted. Konoe had persuaded the Lord of the Privy Seal, Kido Koichi, that he should handle the revision of the Constitution in a capacity similar to that of Ito Hirobumi as a “special appointee” of the Office of the Privy Seal, that is, of the Emperor. However, a power struggle ensued between Konoe, who had no formal office, and the new Shidehara Cabinet over control of constitutional reform which ended when SCAP became concerned about Konoe’s war record and suddenly repudiated Konoe’s work on the Constitution.

A second and more important governmental effort was made by an unofficial body created by the Shidehara Cabinet and chaired by Matsumoto Joji. Technically, the Committee to Study Constitutional Problems was created as a scholarly study group and was not charged with constitutional revision. Nevertheless, after Konoe had been repudiated by MacArthur, the Committee’s chairman, Matsumoto Joji, on his own authority, turned the Committee toward drafting a revi-
sion of the Meiji Constitution. Essentially, the result was the same as the Meiji Constitution with only minor changes. One version, the so-called draft "A", was submitted to SCAP as the government’s official position. Subsequently, SCAP rejected the document and rapidly drafted its own version.

The Japanese Government never truly understood the implications of the Potsdam Declaration and clung to both the Meiji Constitution and the Meiji system of power. Furthermore, the government was unwilling to consider the drafts by other Japanese organizations, let alone the wishes of the general public. The government’s own claim to legitimacy became tenuous. In fact, the country came close to social upheaval when a general strike was proposed to bring down the government, but SCAP intervened and banned collective action to overthrow the old regime. Combined with SCAP’s suppression of union activity, the ban on collective action assured that the prewar leaders would remain in power.


Once consideration of the constitution moved to the last Imperial Diet in the middle of 1946, only minor changes were made to the human rights sections. The debate over the provisions occurred ear-

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37 The Committee, however, was established only by an informal understanding at a cabinet meeting; this "government draft" was not based on any statute or government regulation; it was never formally approved by the cabinet, nor announced by the Committee. Technically, the draft was not even a public document. See id. at 65-66.

38 The Matsumoto Committee, despite its formal charge as a scholarly research body, did no research, except to seek material with which to discredit the Constitutional Research Association’s proposal. The Matsumoto Committee attacked the proposal by claiming that the liberal Weimar Constitution was responsible for the rise of Nazism. See id. at 62-63.

39 The entry from Mark Gayn’s diary for October 6, 1946 aptly reflects the sentiments of the times. He begins by quoting the lead of his newspaper article for that day:

"Two hours after the Diet passed the new Constitution, officially labeled [sic] as democratic, Japanese police today brutally broke up a demonstration of striking radio workers . . . ."

For today should be a great day for Japan—the formal inauguration of a democratic state, based on respect for man’s rights, a state in which no heads are cracked for protesting against wastage of food in a year of hunger, a state in which the laws are put on the books to be enforced by the government, and not sabotaged. It was perhaps symbolic of the great, publicity-made mirage which is the Japanese democracy that the sounds heard on this day were not the cheers of a happy people but the groans of men assaulted by the police.

GAYN, supra note 45, at 336-37.

On the United States’ decision to “reverse course,” see NAKAMURA, supra note 15, at 64-92. In 1948, due to political pressure from Washington, SCAP reversed its policy in order to re-inflate the Japanese economy quickly and to secure Japan as a stable base of operations for an anticipated confrontation with the Soviet Union. SCAP quickly changed from promoting democracy and potentially far-reaching, social change to the support of the prewar military, industrial, and political leaders and their enterprises.

40 This was not true with respect to the issue of pacifism, where the Ashida amendment to
lier and was generally characterized by pressure from SCAP to expand rights and constant opposition from the government to limit the expansion. In certain situations, SCAP itself was divided over which rights should be included. The resulting document reflects an abstract compromise better understood as a compromise between competing visions of a pluralistic democratic society and the Meiji ideal, rather than a conflict between Western and Japanese values.

Although the SCAP draft placed human rights after the chapters defining the Emperor's duties and requiring the renunciation of war, the original draft provided for extensive rights; thirty-one of the

Article 9, generally thought to be minor at the time of its adoption in the Diet debates, invited the question whether the Article's sweeping prohibition against armed forces includes forces for self-defense. This debate still rages on today. See James E. Auer, Article Nine: Renunciation of War, in JAPANESE CONSTITUTIONAL LAW, supra note 5, at 69, 73; KOSEKI, supra note 30, at 201 (“But it is difficult to interpret the statement further as recognizing the maintenance of self-defense potential and therefore as rationalizing the government's subsequent interpretation of Article 9, thus making the Self-Defense Forces constitutional.”). For a summary of academic views on the transformation of the meaning of Article 9, without recourse to its legislative history, see Tomosuke Kasuya, Constitutional Transformation and the Ninth Article of the Japanese Constitution, in 3 GENDAI H6TETSUGAKU 41 (S. Tanaka ed., 2d ed. 1984), reprinted in 18 LAW IN JAPAN 1 (Paul S. Taylor trans., 1986). For a comparison of Japanese and American executive powers, see Royer, supra note 13.

Within SCAP there were conflicts over the proper extent of constitutional protections. For example, Beate Sirota, a young woman in SCAP's Government Section, drafted and fought for comprehensive social welfare rights for women and children, drawing on the constitutions and laws of the Weimar Republic and Scandinavia as models. Although the models used by Sirota were European, the contents of her proposal were what a number of Japanese feminists and union leaders had unsuccessfully sought before the war. Her effort was overruled by her superiors in SCAP on the grounds that such economic and social rights are not of constitutional dimension. Later, during the Diet deliberations on the Constitution, newly elected female members of the Lower House, the first women ever to serve in the Diet, offered an amendment virtually identical to original provisions proposed by Sirota. Just as the American men in power had done, the Japanese male legislators brushed aside the women's proposal. See KOSEKI, supra note 30, at 3. Gender bias and conflicting Japanese ideals of the state, not simply a confrontation of East and West, shaped the Constitution.

Since the new Constitution was to be based on popular sovereignty, pacifism and human rights, it may seem strange that the substantive provisions of the Constitution begin with the Emperor. See KENPO ch. I. This irony is often noted. See, e.g., OKUDAIRA, supra note 7, at 1-3. Whether motivated by considerations of international law, such as the Hague Convention, or merely practical political considerations, SCAP chose to organize the new constitution along the lines of the Meiji Constitution and to follow its amendment procedures. The close parallels in structure are readily apparent:

<table>
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<tr>
<th>Chapter</th>
<th>Mejii Constitution</th>
<th>SCAP Draft</th>
<th>Constitution</th>
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<td>One</td>
<td>The Emperor</td>
<td>The Emperor</td>
<td>The Emperor</td>
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<tr>
<td>Two</td>
<td>Rights and Duties of Subjects</td>
<td>Renunciation of War</td>
<td>Renunciation of War</td>
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<tr>
<td>Three</td>
<td>The Imperial Diet</td>
<td>Rights and Duties of the People</td>
<td>Rights and Duties of the People</td>
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<tr>
<td>Four</td>
<td>The Ministers of State and the Privy Council</td>
<td>The Diet</td>
<td>The Diet</td>
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<tr>
<td>Five</td>
<td>The Judiciary</td>
<td>The Cabinet</td>
<td>The Cabinet</td>
</tr>
<tr>
<td>Six</td>
<td>Finance</td>
<td>The Judiciary</td>
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ninety-two articles granted individual rights. Ultimately, the present-day Constitution contained an extensive revision of criminal procedure rights, and the following key human rights provisions obligating the government to ensure that vulnerable members of society could live with dignity:

<table>
<thead>
<tr>
<th>Article</th>
<th>Provision</th>
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<tr>
<td>13</td>
<td>Article 13, which secures respect for the dignity of individuals</td>
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Since the fiction was that laws and official pronouncements made by the emperor, such as the Meiji Constitution and imperial rescripts, were gifts from an infallible ruler, the postwar government faced a delicate political problem in choosing how to terminate the effectiveness of such documents. After considering petitions to the emperor to cancel the Imperial Rescript on Education or to replace it with a new imperial rescript suitable for a democratic state, the Diet simply dispensed with such an approach and passed a resolution declaring the imperial document null and void. See HORIO, supra note 38, at 131-37. It is often speculated that the Emperor Hirohito's cooperation in the adoption of the Constitution was the price demanded by SCAP for escaping prosecution as a war criminal.

See KENPÔ arts. 31-40. A detailed discussion of this topic falls outside of the limits of this paper. But conflict over the enforcement of the constitution's provisions concerning the rights of the accused and the subsequent recourse to claims based on the guarantees in international human rights treaties, especially Articles 7, 9, 10 and 14 of the ICCPR, to restore or augment the protections of the constitution, parallels the litigation over the enforcement of other human rights in postwar Japan. See infra notes 246-303 and accompanying text.

Other key provisions provide for democratic elections based on universal suffrage, see KENPÔ arts. 15(3), freedom of thought and conscience, see id. at art. 19, and the separation of church and state, see id. at art. 20. These rights also have had a complicated history in postwar Japan. See, e.g., Kanao et al v. Hiroshima Election Comm'n, 39 MINSHI 5, 1100 (Sup. Ct., July 17, 1985) (holding that misapportionment of voting districts is unconstitutional, but providing no remedy), translated in BEER & ITOH, 1970 THROUGH 1990, supra note 8, at 394; Kurokawa v. Chiba Prefecture Election Comm'n, 30 MINSHI 3, 223 (Sup. Ct., Apr. 14, 1976), translated in BEER & ITOH, 1970 THROUGH 1990, supra note 8, at 355 (same). For a discussion of the erosion of church and state doctrine, see DAVID M. O'BRIEN WITH YASUO OHKOSHI, TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN 185-187 (1996).

individual and guarantees the right to life, liberty and the pursuit of happiness; Article 14, which declares that all people are equal under the law; Article 24, which provides for equal rights for husbands and wives; Article 25, which secures the right to a minimum standard of wholesome and cultured living; and Article 26, which secures the right to equal education.

Special consideration, however, should be given to the narrowing of rights in three areas during the drafting process, specifically the introduction of the "public welfare" limitation on individual rights, the subtle retraction of protection given to aliens, and the failure to fully extend rights to women or illegitimate children. Although, the Japanese courts never compare the actual provisions of the Constitution with those in the SCAP draft, the comparison indicates the policy objectives of the Japanese political leaders and provides background to areas of the law that have driven important litigation under the constitution and, more recently, under the ICCPR.65

Articles 12 and 13 of the Constitution contain "public welfare" clauses which have been interpreted by the Supreme Court to impose limits on an individual’s rights.66 These articles provide:

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

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65 See KENPŌ arts. 13, 14, 24, 26.
66 See infra notes 200-245 and accompanying text (discussing the implications of the "public welfare" provisions); see infra notes 277-303 and accompanying text (discussing litigation under the ICCPR).
67 See KENPŌ at arts. 12-13. These two clauses emerged as major limitations on individual rights in the postwar judicial decisions. Two other, less often utilized, public welfare clauses appear in the Constitution to limit freedom of residence and occupation, and property rights:

Article 22
(1) Every person shall have freedom to choose and change his residence and choose his occupation to the extent that it does not interfere with the public welfare.

Article 29
(1) The rights to own or to hold property is inviolable.
(2) Property rights shall be defined by law, in conformity with the public welfare.

Id. at arts. 22, 29.
Article 13
All of the people shall be respected as individuals. Their right to life liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other government affairs.\(^8\)

The explicit balancing of individual concerns against the demands of communal living is a far greater limitation than was proposed by SCAP.\(^9\) The comparable provisions of the SCAP draft were:

Article 9
The people of Japan are entitled to enjoyment without interference with all fundamental human rights.

Article 10
The fundamental human rights by this Constitution guaranteed to the people of Japan result from the age-old struggle to be free. They have survived the exacting test for durability in the crucible of time and experience, and are conferred upon this and future generations in sacred trust, to be held for all time inviolate.

Article 11
The freedoms, rights and opportunities enunciated by this Constitution are maintained by the eternal vigilance of the people and involve an obligation on the part of the people to prevent their abuse and to employ them always for the common good.

Article 12
The feudal system of Japan shall cease. All Japanese by virtue of their humanity shall be respected as individuals. Their right to life, liberty and the pursuit of happiness within the limits of the general welfare shall be the supreme consideration of all law and of all governmental action.\(^10\)

Thus, the obligation of the people in Article 11 of the SCAP version to be active agents combating social dysfunction and promoting the common good was transformed into a legal limitation on individual rights.

There seems to be no clear evidence for the source of this change which is particularly puzzling since the public welfare clauses are ar-

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\(^8\) Id. at arts. 12, 13.

\(^9\) For a distinction between the concept of the "general welfare" in the U.S. Constitution and the "public welfare" clauses in the Japanese Constitution, see BEER, FREEDOM OF EXPRESSION, supra note 37, at 152.

\(^10\) SCAP Draft arts. 9, 10, 11, 12, quoted in KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 305 (1991).
guably some of the most important provisions of the Constitution in postwar constitutional litigation.\(^7\) The Meiji Constitution contained numerous provisions which permitted the limitation of the constitutional rights of an individual by mere statutes, using phrases such as "according to the provisions of law" and "provided for in the law" and "within the limits of the law."\(^7\) The present day Constitution explicitly balances individual rights with public welfare but does not specify how the parameters of that limitation are determined. The judiciary, with its new powers of judicial review, would have to take up the task.\(^7\) This shift should have been an improvement on the prewar system of legislative control over the limits of individual rights,\(^7\) but the postwar judiciary has adopted an extreme deference to the policy decisions of the Diet and consequently the significance of the shift has been greatly diminished.\(^7\)

Following the War, a key constitutional issue to be determined was who the Constitution would protect.\(^7\) After the Meiji Restoration, all people in Japan and its colonies of Taiwan and Korea were encouraged to consider themselves equally "Japanese," in the sense that they were all members of the nation and owed it a duty of loyalty. However, this equality of allegiance did not confer equality of rights. Under the family registration system, the key institution for the recognition of legal citizenship, Japanese citizens were segregated to distinguish clearly between people of Japanese ancestry and those of colonial origin. More than two million people of colonial origin, primarily of Korean descent, were in Japan at the end of the war. They had been brought to Japan as slave labor to work in factories and mines, or had been forced to immigrate to Japan in search of work because of Japan's colonial economic policies. The postwar question of who would be within the reach of the new Constitution was strongly influenced by the presence in Japan of these people of

\(^7\) See, e.g., Maki, The Constitution of Japan, supra note 5, at 51 ("There is no account of how and why the public welfare doctrine was introduced into the Constitution."). Kades was one of the main drafters of the SCAP proposal. See id. at n.18 (quoting a conversation with Charles L. Kades, former Deputy Chief, GHQ SCAP).

\(^7\) For example, Articles 22 and 29 of the Meiji Constitution read as follows:

\begin{quote}
Article 22

Japanese subjects shall have the liberty of abode and of changing abode within the limits of the law.

Article 29

Japanese subjects shall, within the limits of the law, enjoy the liberty of speech, writing, publication, public meetings and associations.
\end{quote}

\(^7\) See KENTÔ, supra art. 81.

\(^7\) See BEER, FREEDOM OF EXPRESSION, supra note 37, at 152.

\(^7\) See Ford, supra note 4, at 26 (discussing the traditional approach taken by the Japanese Supreme Court of restricting fundamental human rights "as a matter of course" when necessary for the "public welfare").

\(^7\) See ROSEKI, supra note 50, at 114-15 (discussing the differences between the SCAP and Japanese draft constitutions with regard to which citizens were protected by the Constitution).
The SCAP draft addressed this issue in two ways: by explicitly extending protection to aliens and by using the somewhat vague and open-ended term "the people of Japan" in its provisions. The SCAP "Subcommittee on Human Rights," which produced the original thirty-one human rights provisions, proposed the following:

Article 13
All Natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic, educational or domestic relations on account of race, creed, sex, social status, caste or national origin.

Article 16
Aliens shall be entitled to the equal protection of the law. When charged with any offense they are entitled to the assistance of their diplomatic representatives and of interpreters of their own choosing.7

The final version proposed by SCAP eliminated the detailed right and retained the general one, as was the case with other protections, such as those for children and pregnant women.70 SCAP's final draft
read:

Article 13
All natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex, social status, caste, or national origin.

Article 14
Aliens shall be entitled to the equal protection of law.\textsuperscript{13}

This broad inclusion of aliens, that is, residents in Japan of Korean and Taiwanese ancestry, within the Constitution’s protection was eliminated in a three-step process. First, the Japanese government prevailed during its negotiations with SCAP in a seemingly minor change in the proposed language of Article 13 from SCAP's "all natural persons" to the government's formula of "all the people" (\textit{kokumin}).\textsuperscript{14} At the same time, the government completely eliminated SCAP's Article 14 and its blanket protection of aliens. The second step came later when the meaning of the term "the people" (\textit{kokumin}) was defined by statute to mean person with Japanese citizenship.\textsuperscript{15} The third step was taken six years after the adoption of the Constitution when the Japanese government, relying on Article 2A of the Peace Treaty with the Allied Powers, issued a notice through the Director General of the Civil Affairs Bureau nine days before the Peace Treaty became effective in 1952. The circular announced that all Koreans, including those residing in Japan, were summarily stripped of Japanese nationality; no choice was permitted.\textsuperscript{16} The question surfaced as to whether the Constitution afforded any protection at all for aliens, including these long-term resident aliens.

The present Constitution provides in pertinent part:

Article 14
All of the people [\textit{kokumin}] 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.\textsuperscript{17}

\textsuperscript{13} SCAP Draft art. 13, 14, \textit{quoted in Koseki, supra note 30}, at 114. Article 13 includes further text not reproduced here.
\textsuperscript{14} The most extensive changes of this sort occurred on March 4-5, 1946 in the marathon negotiations over the final Japanese text to be submitted to the Cabinet. A Japanese government representative, Sato Tatsuo, succeeded in replacing SCAP's translation of "the Japanese People" from \textit{Nihon jinmin} with the phrase \textit{Nippon kokumin}. \textit{See id. at 121-22.}
\textsuperscript{15} \textit{See id. at 122} (explaining that Sato's success in "Japanizing the SCAP draft" later opened the way to a statutory definition of \textit{kokumin}).
\textsuperscript{17} \textit{Kenzō} art. 14(1).
Although there have been attempts to understand such changes in the negotiations as cultural misunderstandings or failures of linguistic ability, such an interpretation is unconvincing. Rather, from the very outset the Japanese government strove to limit legal protections for the basic human rights of non-Japanese. This policy resulted in decades of litigation in the postwar era.

The human rights of another disfavored group in prewar Japan, children born out of wedlock, were affected by a conflict inside SCAP. The Civil Rights Committee fought arduously for an article that would explicitly extend constitutional protection to these individuals. The proposed article stated:

> In all spheres of life, laws shall be designed for the protection and extension of social welfare; and of freedom, justice and democracy. . . . To this end the Diet shall enact legislation which shall: Protect and aid expectant and nursing mothers, promote infant and child welfare, and establish just rights for illegitimate and adopted children, and for the underprivileged.

According to the chief of the Government Section, General Whitney, this “minutia of social legislation” did not merit inclusion into the Constitution. Thus, the Article did not appear in the SCAP final draft or in the final version of the Constitution. With Japan’s ratification

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6 See INOUE, supra note 70, at 266 (“[The Americans] had little knowledge of Japanese history and culture and did not speak Japanese. Consequently they were unaware of the vast cultural and linguistic gap that divided the two sides.”). For a severe criticism of Kyoko Inoue’s conclusions that cultural differences and linguistic incapacities caused these changes, see J. Mark Ramseyer, Together Duped: How Japanese and Americans Negotiated a Constitution Without Communicating, 23 LAW IN JAPAN 123, 126 (1990) (book review) (“Rather than a story about the various social, political, and economic incentives that the negotiators on each side faced, she tells one about two undifferentiated populations: two nations, two societies of several million citizens each, two groups of people that were homogeneous within themselves—yet utterly different from each other. They were two group that never met. Duped together, she implies, they passed a Constitution in substantive silence. . . . It is [a] story that describes neither many Americans I know nor many Japanese.”). The criticism is justified. One of the major negotiators for the Japanese government, Sato Tasuo, is reported to have said that it was the policy of Matsumoto Joji, the author of draft offered by the government, to first remove the “outer prickles from the chestnut and then peel away the bitter outer skin” of SCAP’s draft constitution. This remark is believed to refer to the stripping away of the human rights provisions and, in particular, the human rights of aliens. See Amakawa Akira & Furukawa Atsushi, Shinkenpó no seiritsu: seiteikatei to samazama na kōshō [The Establishment of the New Constitution: The Making Process and Various Proposals], in 1 SENGŌ NIHON NO GENTEN: SENRYO NO GENZAI [THE ORIGIN OF POSTWAR JAPAN: CONTEMPORARY VIEW OF THE OCCUPATION ERA] 168 (Sodei Rinjiro & Takemae Eiji eds., 1992).

8 See KOSEKI, supra note 30, at 119-20 (describing the effort of Sato Tatsuo, acting as proxy for Matsumoto Joji in marathon negotiations on March 4-5, 1946, to eliminate entirely from the constitution the provision for protection of foreigners).

9 See id. at 87-89 (describing the conflict between SCAP’s human rights subcommittee and the coordinating committee); see also supra note 61.

10 SCAP Subcommittee Draft, quoted in KOSEKI, supra note 30, at 88.
of the ICCPR in 1979, the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1985, and the Convention of the Rights of the Child (CRC) in 1994, the question of the state’s obligation towards mothers and children born out of wedlock would reemerge.97

In short, the negotiating process between SCAP and the Japanese government revealed consistent strong opposition of the government against the establishment of human rights. Even within SCAP there were clashes over the necessary scope of rights: lower ranking personnel, who spoke Japanese and had lived in prewar Japan, pressed for greater protections and senior officers sometimes overruled such proposals. The resulting text of the Constitution is silent on the rights of groups disfavored by the government, most notably aliens and illegitimate children. Women gained nominal equality, but without economic and social rights to make that formal equality meaningful. The final document reflects an abstract compromise, not necessarily between Western and Japanese values, but rather between a vision of an open, pluralistic democratic society and the Meiji ideal of government. The precise contours of the constitutionally guaranteed rights would have to be determined by the judiciary.

D. Denial of a Popular Referendum on the Constitution by the Government of Japan

Once the new Constitution came into effect, its fate was left in the hands of those who had strenuously opposed it. More importantly, the revision of the new Constitution, the second-step in the adoption of the Constitution urged by the Constitutional Research Association and required by SCAP’s nominal master the Far Eastern Commission (FEC), was also left in the hands of the incumbent conservative government. On January 3, 1947, Prime Minister Yoshida received a letter from General MacArthur offering the Japanese people another chance to amend the Constitution, this time without the intervention of the Occupation forces through a popular referendum.98 The letter reveals the concern of the foreign powers that the values in the new Constitution be freely accepted by the Japanese and provided a clear opportunity to overcome the undemocratic process of making the constitution. MacArthur wrote “the Allied Powers feel that there should be no future doubt that the constitution expresses both the free and considered will of the Japanese people.”99 Prime Minister Yoshida’s response on January 6, 1947 was

97 See infra notes 277-282; 286-287 and accompanying text.
98 See KOSEKI, supra note 30, at 243-54.
99 The letter stated in full:

Dear Mr. Prime Minister:
laconic in the extreme.\textsuperscript{32}

In fact, Yoshida did nothing. News of the Far East Commission decision to allow a popular referendum did not leak to the Japanese public until March 1948, and momentum for revision did not grow until August 1948, when the Yoshida cabinet fell and was replaced by the Ashida cabinet. Several revision proposals were made by private groups,\textsuperscript{33} but the pressure for revision dissipated when the Ashida cabinet fell suddenly due to a bribery scandal involving, among others, Prime Minister Ashida himself. Shortly thereafter, Yoshida Shigeru returned to power, and as the proposed two-year deadline approached, Shigeru lied to the Diet about receiving a proposal from the FEC allowing for revision of the Constitution.\textsuperscript{44}

Simply stated, the Japanese government did not want to go to its people for a referendum on the new Constitution. It was clear at that time that a majority strongly supported the Constitution,\textsuperscript{37} and the

\textsuperscript{32} In connection with their consideration of political developments in Japan during the course of the past year, the Allied Powers have decided, in order to insure to the Japanese people full and continuing freedom of opportunity to reexamine, review, and if deemed necessary amend the new constitution in the light of experience gained from its actual operation, that between the first and second years of its effectivity it should again be subjected to their formal review and that of the Japanese Diet. If they deem it necessary at that time, they may additionally require a referendum or some other appropriate procedure for ascertaining directly Japanese opinion with respect to it. In other words, as the bulwark of future Japanese freedom, the Allied Powers feel that there should be no future doubt that the constitution expresses both the free and considered will of the Japanese people.

These continuing rights of review are of course inherent, but I am nevertheless acquainting you with the position thus taken by the Allied Powers in order that you may be fully informed in the premises.

With cordial best wishes for the new year,

Most Sincerely,

Douglas MacArthur

Letter from Douglas MacArthur, General in U.S. Army, to Mr. Shigeru Yoshida, Prime Minister to Japan (Jan. 3, 1947), reprinted in KOSEKI, supra note 30, at 243.

\textsuperscript{33} Yoshida replied:

My dear General:

I acknowledge receipt of your letter of January 3rd, and have carefully noted the contents.

Yours very sincerely,

(signed) Shigeru Yoshida.

Letter from Mr. Shigeru Yoshida, Prime Minister of Japan, to Douglas MacArthur, General in U.S. Army (Jan. 6, 1947), reprinted in KOSEKI, supra note 30, at 245.

\textsuperscript{34} See id. at 248-50 (discussing proposals by the Public Law Forum and the Constitutional Research Committee of Tokyo University).

\textsuperscript{35} Prime Minister Yoshida responded to a question from the House Foreign Affairs Committee as follows: "I know nothing about a decision by the Far Eastern Commission. I am not aware of it, but the Government has no intention at the present of amending the Constitution. And if the Ashida Cabinet planned to revise the Constitution, I have not heard about it." Id. at 250.

\textsuperscript{36} As one scholar pointed out:

\textsc{[M]}any other prewar Japanese, from intellectuals and journalists to factory laborers and tenant farmers, had accumulated important experiences with
best that the government conservatives could hope for would be rather minor, technical changes in the text. Moreover, a public showing of support for the Constitution through a referendum would have rendered a substantial, conservative revision in the future more difficult by removing the claim that the Constitution is an alien, imposed document. Given the overwhelming support for the new Constitution, the conservatives elected to wait.

The momentum inside the FEC to press for a review of the Constitution by the Japanese people was also lost as the United States government prepared in the fall of 1948 to take a "reverse course" and rapidly stabilize the Japanese political situation and the economy.\(^6\) The policy entailed the purge of leftists, suppression of trade unions, dropping prosecutions of most prewar leaders for war crimes, and curtailment of the break-up of the prewar industrial combines (zaibatsu). Australia, an ally, pressed for the implementation of the FEC’s plan of the second stage of the two-step process for establishing the Constitution.\(^7\) This second stage, a constitutional convention run by Japanese under a democratic regime, and hoped for by the Constitutional Research Association, never occurred due to the opposition of both American and Japanese conservatives.

Once the Occupation ended in 1952, certain conservative forces attempted to revise the Constitution.\(^8\) The trigger for such a revision was an effort in 1954 to amend the Constitution in order to make it compatible with the 1953 Mutual Security Assistance Act (MSA) agreement between the United States and Japan. Conservatives, however, who have utilized the name LDP since the merger in 1955 of the two major conservative parties, also sought to promote their vision of the family reminiscent of the form imposed by the Meiji government. Likewise, these conservatives sought restoration of the position of the Emperor. This conservative movement waxed and waned for over forty years, but never succeeded in passing any amendment. With the present disorder in the Japanese society and economy, however, the conservative campaign for constitutional revision appears to be gain-
ing momentum once again."

In the postwar era, two possible routes have been open to conservatives, revision by "installments" and revision by reinterpretation. In the former, the government simply acts in incremental steps as if the Constitution has been amended, allowing small changes until gradually the meaning of the Constitution as a practical matter is altered, even if the text is not. The key to the success of this incremental approach is the absence of a judicial response to the gradual encroachments. The latter strategy, in contrast, depends entirely on an active contribution by the judiciary to transform the meaning of the Constitution. The implementation of these strategies did not go unchallenged; waiting in the wings were numerous persons willing to bring lawsuits in order to seek effective implementation of the new Constitution.

III. JUDICIAL RESPONSES TO THE CONSTITUTION

The new Japanese Constitution gives the power of judicial review to the Supreme Court, which in turn delegates that power to the inferior courts. Judicial review of governmental actions was not an established tradition under the former Meiji Constitution. As for the judiciary itself, the major innovation made by the Occupation was an organizational one, namely to shift the judiciary out from under the direct control of the Ministry of Justice and to make it an autono-

99 For the attempts in the early 1990s to revise the Constitution, see MORI HIDEKI ET AL., KENPO "KAISEI" HIHAN [CRITICISM OF CONSTITUTIONAL "REVISION"] (1994). It is hard to convey to readers unfamiliar with Japan the extreme positions of Japanese conservatives pressing for revision and their perserviveness. Human rights are repeatedly misrepresented in respectable publications as a license for violent self-gratification. At present, there are many articles in mainstream newspapers and journals criticizing the human rights provisions of the Constitution as the primary cause of various social problems, such as the recent crimes by a fourteen year old boy in the city of Kobe who beheaded a young boy and assaulted two little girls, killing one of them. Such claims may seem nonsensical to people who have never lived in Japan, but these claims and others of this type are regularly drummed into the minds of the Japanese public by the government and by government affiliated commentators. The effect is not negligible.

Japanese sociologist Yoshio Sugimoto explained the term "installments":

These step-by-step shifts in the interpretation of the same text reflect what Japanese call nashikuzushi, the pragmatic strategy that many Japanese power-holders at various levels use to adapt gradually to changing circumstances. The term nashikuzushi originally meant payments by installments, but in this context it implies players achieve their final goal by making a series of small changes in the meaning of key terms in a document. The technique does not call for alteration of the text itself. The point is not so much the validity of the changing interpretations as the almost imperceptible way in which they have been brought about, little by little.

YOSHIO SUGIMOTO, AN INTRODUCTION TO JAPANESE SOCIETY 252 (1997).

100 Japanese sociologist Yoshio Sugimoto explained the term "installments":

101 See KENPO art. 81 ("The Supreme Court is the court of last resort with the power to determine the constitutionality of any law, order, regulation or official act.").

102 See id. at art. 77(3) ("The Supreme Court may delegate the power to make rules for inferior courts to such courts.").
mous branch of government. At the personnel level, however, no significant changes occurred. Unlike the business and political communities, the judiciary was never purged to remove from positions of authority individuals with dubious records during the war or obvious opposition to the new Constitution.

Moreover, as a result of the judiciary's personnel practices, the prewar generation, educated and raised under the Meiji Constitution, has been disproportionately represented on the Supreme Court. With this background, the judiciary faced a difficult challenge in carrying out its new role under the Constitution in a rapidly-changing Japanese society. In fact the Court has adopted a policy of extreme deference to the legislative and executive branches, so much so that the Japanese legal system, in effect, has returned to that of the Meiji period where laws dictated the content of the Constitution. Since, the judiciary has such a consistent record of supporting the government's positions on rejecting challenges to the government, it is not surprising that questions arise concerning the judiciary's independence.

A. Independence of the Japanese Judiciary

It is not easy to assess whether the judiciary, considered as a whole, has been subjected to undue political influence. Many different types of judges, clerks and administrators work within the system. Furthermore, the Constitution provides for a certain degree of political penetration into the judiciary. The Emperor appoints the Chief Justice of the Supreme Court on the recommendation of the Cabinet, and the Cabinet appoints the other fourteen Justices of the Supreme Court. In addition, the Justices' appointments to the Court are subject to periodic review by the general electorate. Still, the constitutional design conspicuously links the Supreme Court with the political leadership of the country and the electorate, in contrast with the prewar schema, in which the judiciary was embedded in the Min-
Nevertheless, the present constitutional arrangement poses a central question; what is the proper degree of political influence on the courts? Because the Supreme Court has affirmed the constitutionality of all but a handful of laws and the overwhelming number of administrative actions brought before it since 1947, and the LDP has held almost unbroken control of the Diet and the executive, critics have argued that the LDP covertly controls the judiciary. The tightening of political control dates from the late 1960s in response to growing signs of judicial willingness to rule against the government. A purge of judges through direct intervention by the LDP and a subsequent strengthening of indirect controls through the increased power of a centralized judicial bureaucracy raise serious concerns about the independence of the Japanese judiciary from LDP control.

In the late 1960s and early 1970s, Japanese society was in turmoil as citizens questioned the nation's social priorities, recognizing the societal costs evident under LDP rule. As a result, both individuals and citizen groups turned to the judiciary for redress of grievances against the government. The following are examples of some of the well known cases of that era: the Big Four pollution suits, the Niigata Minamata Disease Case, the Yokkaichi Air Pollution Case, the Itai-Itai Disease Case, and the Minamata Disease Case, a series of suits brought by Professor Ienaga Saburo challenging the censorship of school textbooks by the Ministry of Education, and a number of laws.

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See infra notes 159-199 and accompanying text for a series of arguments that the judiciary is too closely tied to the government.

See J. Mark Ramseyer & Frances M. Rosenbluth, Japan's Political Marketplace 178-79 (1993) ("In substance, Japanese judges are agents of LDP principals; in practice, LDP principles treat Japanese agents much as principal-agent theory suggests. LDP leaders use their direct control over judicial appointments and indirect control over the Secretariat to shape judicial decisions.").


These four cases were decided in the period from 1971-73. The plaintiffs prevailed in each case due in part to significant innovations by the judiciary in the area of tort law. See Frank K. Upham, Law and Social Change in Postwar Japan (1987); Julian Gresser et al., ENVIRONMENTAL LAW IN JAPAN 55 (1981); Shiro Kawashima, A Survey of Environmental Law and Policy in Japan, 20 N.C.J. INT'L L. & COM. REG. 231, 242 (1995).

See Judgment of 29 September 1971, Niigata [District Court], 22 KAMINSH5i, Nos. 9 & 10, Extra No. at 1; see also Upham, supra note 110, at 35 (discussing the case); Gresser, supra note 110, at 65.

See Judgment of 20 March 1973, KUMAMOTO [District Court], 696 HANJI 15; see also Upham, supra note 110, at 34, Gresser, supra note 110, at 65.

See, e.g., Ienaga v. Ministry of Education, 604 HANREI Jihō 29 (Tokyo Dist. Ct., July 17, 1970). In 1951, the conservative ruling elite in Japan began to attack the education reforms
bor rights cases. The high water mark of this trend occurred in 1966 with the Supreme Court's decision in the *Tokyo Central Post Office Case*. This case dealt with the particularly sensitive question of the rights of public employees to engage in collective bargaining and to express political opinions other than by voting in public elections. In the postwar era, laws like the Public Enterprise Labor Relations Law (PERL), under which workers were forbidden to encourage fellow laborers to leave their work for activities, such as a union rally, sharply curtailed these important rights. In the *Tokyo Central Post Office Case*, postal union leaders, who incited workers to attend a rally during working hours in anticipation of upcoming wage negotiations, were convicted under PERL. Faced with a challenge to the restriction on free speech, the Supreme Court upheld the constitutionality of the relevant provision of PERL, but also issued a set of interpretive guidelines to the high court on remand with which the court was to reconsider the justifiability of the union leaders' actions. The Supreme Court instigated by SCAP during the Occupation in order to "correct the excesses" of post-war democracy. By 1952, Prime Minister Yoshida announced that the cultivation of patriotism must become the cornerstone of education in Japan. In 1953, the U.S. administration sent Assistant Secretary of State Robertson to review the Japanese government's intentions and he approved of the plan to reorient the education system towards the rearmament of Japan and patriotic education in place of so-called peace education. Then Vice-President Nixon echoed this decision, declaring the peace Constitution a major mistake of American postwar policy. See Horio, *supra* note 37, at 146-48. In 1954-55, the government moved quickly to dismantle key components of the postwar reform, such as local control of schools through elected school boards and the reimposition of a centralized system controlled by the Ministry of Education. Numerous groups opposed what was perceived to be the reconstruction of the prewar education system. The government resorted to force, bringing the special riot police (hidōta) into the Diet to control the uproar over the legislation to replace locally elected school boards with government appointed ones. That legislation, the Law Concerning the Management and Operation of Local Administration, passed by a narrow margin, but companion legislation establishing a tightening of censorship of textbooks was soundly defeated. But by 1958, the Ministry of Education simply imposed the scheme of the defeated textbook legislation by administrative guidance, that is without a statutory basis. The new system would spawn numerous lawsuits, including those brought by Professor Ienaga over the censorship of his history textbook. See id. at 171-212. *But see* BEER, FREEDOM OF EXPRESSION, *supra* note 37, at 243-45, 264-70 (arguing that restraints on freedom of expression more likely due to unintentional cause than intentional censorship).


*See* Toyama et al. v. Japan, 20 KEISHI 8, 901 (Sup. Ct., G.B., Oct 26, 1966) (hereinafter *Tokyo Central Post Office Case*), translated in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970: SELECTED SUPREME COURT DECISIONS, 1961-70, 85 (1978) (hereinafter BEER & ITOH, SELECTED SUPREME COURT DECISIONS, 1961-70); *see also* BEER, FREEDOM OF EXPRESSION, *supra* note 37, at 232 (providing a useful synopsis of the decision). Subsequent citations to this case will consist of the popular name followed by an appropriate citation to the BEER & ITOH translation. Other cases with English translations will be similarly cited. In circumstances where no translation into English is available, the correct Japanese case citation will be provided alongside a secondary source.

The Court reasoned that, "[T]he fundamental rights of workers engaging in public services or in public enterprises involve restrictions different from that of private enterprises only according to the nature of their duties." BEER, FREEDOM OF EXPRESSION, *supra* note 37, at 232. The Court ruled that courts must consider distinctions between "types of work, between legiti-
Court rejected the government's assertion that it held the power to impose severe penalties on any collective refusal to work, no matter how minor the refusal, explicitly introducing the doctrine of proportionality involving governmental actions in the application of the law.\textsuperscript{119}

Thus, by the late 1960s, Japanese judges, including Justices on the Supreme Court, began to rule occasionally against the government. Correspondingly, popular interest focused on how courts would respond to future requests from citizens opposing governmental control. At the same time, the makeup of the judiciary was undergoing a significant transformation: Judges who had been educated in postwar democratic Japan,\textsuperscript{120} were finishing their initial ten-year probationary period as assistant judges,\textsuperscript{121} and were moving into positions of responsibility in the courts.

Some of these judges belonged to a study group called the Young Lawyers Association (YLA or \textit{Seinen Hōritsuha Kyōkai}), which was founded in 1954 by 280 lawyers and 10 judges for the "promotion of the ideals expressed in the present Constitution."\textsuperscript{122} Preservation of the Constitution meant preservation of the constitutional principle of pacifism and enforcement by judicial means of individual rights guaranteed by the Constitution. This might, perhaps somewhat ironically, be characterized as strict construction and the implementation of original intent. These judges, schooled in postwar democracy, came from different political backgrounds, including socialism, the left wing of the LDP, and communism. After a few years, roughly one third of the new assistant judges entering the judiciary each year were YLA members, so that by 1963, 140 judges were members of the organization.\textsuperscript{123} Such judicial members of the YLA started to publish their own periodical on legal issues.

mate labor disputes and political activities, between degrees of illegality and public inconvenience and between mild sanctions and criminal penalties that would be disproportionate for failure to perform a contractual obligation." \textit{Id.} at 231.

\textsuperscript{119} This doctrine of proportionality is central to the ICCPR, which Japan ratified in 1979. The use and interpretation of this doctrine emerged as a major issue in litigation of ICCPR claims before Japanese courts. \textit{See infra} note 274-275, 310 and accompanying text.

\textsuperscript{120} A brief era of so-called peace education after the war was brought to an abrupt halt in 1953 after consultations between Hayato Ikeda, head of the LDP's Policy Research Committee and U.S. Assistant Secretary of State Robertson. This consultation:

\begin{quote}
resulted in a repudiation of the goals of peace education and a strong insistence upon the necessity of patriotic education as part of a program designed to propel Japan's remilitarization. Of course, this gave rise to the contradiction, still visible in Japanese life today, of a form of patriotism that is subordinated to American global interests.
\end{quote}

HORIO, supra note 38, at 143.


\textsuperscript{122} \textit{Id.} at 274.

\textsuperscript{123} \textit{See id.}
In 1968, an article was published in a conservative political journal alleging that certain named judges were members of the YLA and were "communists." The Supreme Court bought copies of the magazine containing the list of judges alleged to be YLA members and distributed them to courts all over the country. Conservative politicians focused on the judiciary; for instance, the Justice Minister called for a crackdown on an "out of control" judiciary. It was in this context, that, in 1969, and incident of direct heavy-handed political intervention occurred in a lawsuit concerning Article 9 of the Constitution. Two scholars bluntly characterize what ensued as an LDP launched witch hunt. A full-scale purge of YLA members from the bench quickly followed. The General Secretariat of the Supreme Court (GS), the administrative arm of the Court employing career judges, asked all judges in the GS to resign from the YLA; the secretary general of the GS prohibited all judges from joining "political organizations" because of the appearance of impropriety and punished those who failed to sever their ties with the YLA. Many judges resigned and the judges' section of YLA dissolved.

B. Article 9 Litigation: Amendment by Installment and the Political Control of the Judiciary

Lawsuits over the constitutionality of Japan's rearmament triggered the crackdown on those judges who enforced the Constitution. A judge who refused to cooperate with the process of amendment by installment set off the direct LDP intervention into the judiciary. Article 9, the constitutional provision requiring pacifism was, and remains, sweeping in scope. In its entirety, Article 9 states:

1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

124 See id. at 275. The Communist Party was, of course, then and is still now a legal political party in Japan. See id.
125 See id. at 275.
126 See infra notes 147-157 and accompanying text for discussion of this case and the repercussions.
127 See RAMSEYER & ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE, supra note 108, at 162.
128 For a detailed summary of this process, see Miyazawa, supra note 121, at 274-77.
129 KENPO art 9.
Yet, Japan now has the second largest defense budget in the world and an extensive military force, and like the rest of the Japanese Constitution, Article 9 has never been amended. The origin and evolution of this provision is controversial, especially since several of the major actors have given contradictory accounts.

The military build-up began shortly after the Japanese Constitution came into force. In 1951, Japan entered into a security treaty with the United States that obligated Japan to maintain a standing military force, the SDF. The conservative leaders split in a complex response. Hard line conservatives favored a full rearmament and a

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159 See Auer, supra note 60, at 83 (describing the Japanese military material in the mid-1990s).
160 See id. at 71. The original suggestion seems to have come from Prime Minister Shidehara but at different times it has suited both American and Japanese participants to either claim or shift responsibility for the provision. See id. at 70-74; cf. Royer, supra note 60, 777-78.

Two amendments to the SCAP version were introduced in committee deliberations in the House of Representatives. The first change, added to the beginning of the first sentence, consisted of the words “aspiring sincerely to an international peace based on justice and order.” The second change, called the Ashida amendment, added to the beginning of the second sentence, consisted of the words “in order to accomplish the aim of the preceding paragraph.” As Ashida explained, without these additions, the blanket prohibition of the provision would have been stark. With the additional language the provision could be interpreted as limiting the prohibition to aggressive war, thereby allowing self-defense. At the time, however, the changes were claimed to have no substantive affect on the scope of the provision. See Koseki, supra note 30, at 192-211.

Initially, SCAP ordered the Japanese government to establish a 75,000-man National Police Reserve (NPR), ostensibly to replace occupation forces withdrawn to serve in the Korean conflict. See Auer, supra note 60, at 74. The NPR was transformed into the National Safety Forces in 1952 and, into its present form, the Self-Defense Forces (SDF) in 1954. See id. at 69.

The subterfuges employed were rather crude; tanks of the NPR were called “special vehicles,” generals from the former Imperial Army were not allowed to join, but men of the rank of colonel and below were accepted. See id. at 74.

The later renewal (actually a major expansion of the U.S.-Japan Security Treaty, often referred in Japanese as AMPO) in the summer of 1960 marked a crossroads in postwar Japanese democracy. The choices were to continue the postwar system established by the United States to subordinate Japanese foreign policy and democratic processes to United States policy objectives or to begin to formulate an independent line based on popular sovereignty. President Eisenhower’s administration pressed hard for the treaty’s “renewal.” Then Prime Minister Kishi, a former class A war criminal who had been abruptly and without public reason released from Sugamo prison in the early days of the occupation as part of the reverse course of United States policy and whose political career had risen swiftly thereafter, ordered police to remove opposition politicians from the Diet Building and then rammed through the renewal of the treaty in the absence of the opposition. His actions provoked massive nationwide protests which were met with a quasi-military response from the government. “The scholar Chalmers Johnson likens the anti-AMPO revolt to the Hungarian revolution of 1956, minus the tanks and troops.” Smith, supra note 6, at 28. Smith goes on to criticize this provocative analogy, arguing that the United States is so mesmerized by the myth of its victory culture that it must resort to analogies of Soviet misdeeds to understand its own misdeeds around the globe. See id.

Ever since the conservative Liberal Party of Yoshida and the conservative Democratic Party of Hatoyama (formerly the Progressive Party) merged in 1955, the resulting LDP has encompassed both policies toward Article 9, including both a limited revision by political reinterpretation to manage United States pressure and a drive for an outright repeal of the provision. See, e.g., Tetsuya Kataoka, The Price of a Constitution: The Origin of Japan’s Postwar Politics 129-62 (1991) (providing a lucid account of this process).
constitutional amendment. Others, wary of United States pressure which permeated the period, favored a limited rearmament while using the constitutional provision as a shield against United States coercion.155 Regardless, the result of the complicated cross currents was rearmament without a formal amendment of Article 9.156 Not surprisingly, groups supportive of the Constitution and opposed to United States' domination of Japanese foreign policy turned to the courts for relief.157

The Japanese judiciary has, with limited exceptions, rebuffed all such litigation. The Supreme Court, relying on a series of mechanisms, including the political question doctrine, creative statutory construction and manipulation of standing doctrine, steadfastly avoided ruling directly on the constitutionality of the SDF and the U.S.-Japan Security Treaty. There have been five major cases:158 Sunakawa,159 Eniwa,160 Sakane,161 Naganuma Nike Missile Base Case,162 and the

Many major conservative politicians have played various roles in this struggle. In 1955, a young Nakasone Yasuhiro even composed the Constitutional Revision Song and tried to promote it by giving personal appearances on television. See id. at 137.155 See Royer, supra note 60, at 779 (discussing the views of Prime Minister Yoshida and former Prime Minister, now Minister of Finance, Miyazawa Kiichi). A limited rearmament strategy would have allowed Japan to focus primarily on economic development while nurturing a small military and its allied industrial base, both capable of rapid expansion if needed. This school of conservative thought opposed amending the constitutional provision in favor of a politically controlled reinterpretation in which military defensive capability would be constitutional. See id. at 787.

But it is a strange rearmament. As one scholar succinctly stated, the rearmament is "clearly complementary to rather than autonomously separate from U.S. military power." See Auer, supra note 60, at 83. Moreover, this nexus of Japanese and U.S. military power, the U.S.-Japan Treaty of Mutual Cooperation and Security, is "the United States' most important security arrangement in the Pacific and... already rivals in importance the United States' ties with the North Atlantic Treaty Association." Id. at 82. This military arrangement both places severe constraints on Japan's foreign policy complicating its relations with its Asian neighbors, and also shields Japan to some extent from charges of reasserting military dominance in Asia. See id. at 83-84.

See id. at 80 ("In the 1950s and 1960s, a significant percentage of citizens questioned seriously the legality of the nation's armed forces... Opposition to the SDF on constitutional grounds developed from three major court cases... ").

For detailed accounts of the five cases, see Bolz, supra note 3, at 104-13; Auer, supra note 60, at 80-82; Royer, supra note 60, at 782-85.

See Japan v. Sakata, 13 Keishû 3225 (Sup. Ct., G.B., Dec. 16, 1959); Auer, supra note 60, at 90 (summarizing case).


relatively recent *Hyakuri Base Case*. The refusal to rule on the constitutionality of Article 9 has been characterized as the judiciary's preference for sending political disputes back to the political process. Such a characterization, however, may not be completely adequate. A strong argument may be made that the judiciary has succumbed to governmental pressure.

Recourse to the political question doctrine and extreme deference to executive authority have serious consequences when applied to a possible violation of pacifism, one of the three fundamental principles of the Constitution. The Constitution was designed to balance the retention of the emperor system by providing strong civilian control of the military in Article 66(2) and Article 9's prohibition on rearmament. It may well be argued that this design has outlived its usefulness and should be revised, but the judiciary's shielding of the government from judicial review of military decisions means that the essential checks and balances of power have shifted decisively. Rather than showing judicial restraint, the judiciary has effectively permitted the fundamental redesign of the Constitution.

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15 See, e.g., Royer, *supra* note 60, at 775. Royer attempts to draw a parallel between the development of the War Powers Clause of the U.S. Constitution and the treatment of Article 9 in the Japanese legal system. See id. at 770-90, 797-98. But the parallel seems strained at best. Although the U.S. judiciary, like many others, rightly hesitates to intrude into foreign policy issues, it has occasionally done so. Moreover, Congress, whose control shifts between parties and is often controlled by a party different from that of the President, has acted under the War Powers Act to counterbalance expanding executive power. In Japan, the LDP has controlled the legislature and the executive during the entire postwar period. The only possible check on executive power is the judiciary, but the judiciary has uniformly refused to check the executive. Instead, it refers such issues to the legislative forum, which is, of course, controlled by the same party as the executive.

16 As one scholar sympathetic to the Japanese Supreme Court's style of postwar constitutionalism admits, the Court's "deference to the judgment of the government is nearly perfect." Ford, *supra* note 4, at 37 (providing statistical analysis of the Court's findings in matters alleging unconstitutionality in criminal matters). That is, the Court has agreed with the national government in almost every case which has come before it.

17 See KENPO art. 66(2).

This process of redesigning the Japanese Constitution has been variously characterized. Some Japanese scholars reconcile the gap between constitutional text and the actual state of things by the term "constitutional transformation" (kenpō hensen). See, e.g., Kasuya, *supra* note 60, at 1 ("Constitutional transformation denotes a change in the meaning of a particular constitutional provision brought about through 'reinterpretation' of the provision . . . "). A more candid assessment comes from a German scholar:

"Regarding the question of the constitutionality of Japan's Self-Defense Forces, one must draw the conclusion that LDP's arguments are not legally sound but simply politically motivated. The lapse of time does not change acts that were in clear contravention of the Constitution at the time of their commission. The position of the LDP is at best a politically expedient distortion of basic concepts of constitutional theory. The LDP wants to
ganuma Nike Missile Base Case is a flash point exposing both the Supreme Court's unwillingness to controvert the government on constitutional matters and the pressures placed on lower judges to follow the government's line.

The conflict behind the Nagunuma Missile Base Case arose when the Minister of Agriculture and Forestry announced that a virgin forest in Hokkaido was to be stripped of its designation as a conservation area so that it could be transferred to the Air Self-Defense for construction of a Nike missile base. Local citizens filed two actions against the Minister. First, the citizens filed an action for suspension of the order on grounds that an increased danger of flood resulted from the watershed loss. Later, plaintiff citizens filed a separate action for the reversal of the order on the grounds that the delisting was not in the public interest, as is required by law, alleging that the construction of the missile base would violate Article 9.

Before the final decision was issued, Judge Hiraga Kenta, the chief judge of the Sapporo District Court, wrote a letter to presiding Judge Fukushima Shiegeo, stating that the judiciary did not have the authority to rule on the constitutionality of the SDF, and asking Fukushima to accept the government's position in the case by dismissing the Article 9 claim. Judge Fukushima publicly revealed this improper pressure, igniting a fierce controversy. The impropriety of the pressure from the head of the Sapporo District Court on Judge Fukushima was shocking, but the consequences of that incident were even more disturbing. At first, the head of the court was simply reprimanded and recalled to Tokyo. Later, however, both Judge Fukushima and his former superior were subjected to impeachment procedures in the Diet because of the pressure applied by conservative politicians. In 1970, the final decision was announced.

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change the Constitution through the political process in lieu of the procedures of article 96.


145 See Nagunuma Nike Missile Case, III, supra note 142, at 85 (discussing early suits).

146 See id. at 89-91.

147 See id.

148 See Miyazawa, supra note 121, at 275. In August 1969, the Sapporo District Court Judge, Shigeo Fukushima, ordered the suspension of the Minister's order. See McNelly, supra note 3, at 99 (discussing Ito v. Minister of Agriculture and Forestry, 23 HANREI JIHÔ 565 (Sapporo Dist. Ct., Aug. 22, 1969)). Within five months, however, the Sapporo High Court reversed Judge Fukushima’s decision on the grounds that there was no urgent necessity to prevent irreparable damage since flood measures had been taken. See Ito v. Minister of Agriculture and Forestry, 5 HANREI JIHÔ 581 (Sapporo High Ct., Jan. 23, 1970); see also supra note 142. The base was subsequently built. During the next four years the second suit filed by the interested citizens went forward. The District Court had jurisdiction to hear the Article 9 claim because decisions are technically binding only on the parties in a case and therefore, in a strict sense, decisions of the higher courts, even the Supreme Court, are not binding as precedent on lower courts. As a result, technically, the Sapporo District Court was free to hear the claim.

149 See Miyazawa, supra note 121, at 275.

150 See id.
the court was not reprimanded. The impeachment proceedings were dropped and he subsequently joined the Tokyo High Court, the most prestigious position outside of a Supreme Court appointment. Yet the Prosecuting Committee of the Diet severely reprimanded Judge Fukushima and left his impeachment suspended. His career did not advance and he resigned before the mandatory retirement age. Undeniably, the disproportionate punishment of the whistleblower was due in part to a larger political struggle within the judiciary. The same Diet Committee mounted official inquiries against 213 other judges for their alleged membership in the YLA, and shortly thereafter, the General Secretariat of the Supreme Court asked all the member judges to withdraw from the YLA.

In 1973, Judge Fukushima ruled that the law establishing the SDF violates Article 9 and that the forest had been illegally delisted. He rejected application of the political question doctrine as it was then formulated, in a famous passage:

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

The High Court, as is customary in Japan, heard witnesses in nine hearings and then, in what was a very unusual action, abruptly terminated the hearings and quickly ruled that the plaintiffs had no standing to sue. The Supreme Court affirmed the High Court’s ruling.

The political message was clear: The doors of the Japanese courts are firmly closed against Article 9 cases and judges who ruled against the government in politically important cases did so at their peril.

C. Mechanisms for Political Control of the Japanese Judiciary

A number of authors argue that the government through the Chief Justice of the Japanese Supreme Court and the General Secretariat of the Supreme Court (“GS”) exercises excessive control over

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Note 154 See Naganuma Nike Missile Site Case, I, supra note 142, at 90-112.

Note 155 See id. at 93-94.

Note 156 See TANAKA, THE JAPANESE LEGAL SYSTEM, supra note 41, at 714 (reprinting Naganuma Nike Missile Case, I).

Note 157 See Naganuma Nike Missile Site Case, II, supra note 142, at 112, 114.

Note 158 See Nike Missile Site Case, III, supra note 142, at 127-29.

Note 159 Overseen by a chief administrator called the secretary general, the GS is divided into seven bureaus: general affairs, personnel affairs, accounting, civil cases, criminal cases, administrative cases, and family cases. The approximately forty-five judges working full-time in the GS
lower court judges by utilizing a series of complex mechanisms. These persuasive arguments include both anecdotal based accounts, such as Professor Miyazawa's seminal article, and more statistically based articles provided by U.S. scholars, including Professor Ramseyer and his collaborators.100 The effect of these mechanisms, which include ideologically based screening of applicants, punitive use of reappointments and transfers, and judicial conferences designed to influence decisions, is to encourage judges to interpret the constraints imposed on the government and the Diet narrowly and to rob the constitution of its vitality.

The GS offers several rationales for this centralized authority in the hands of a few judges selected by co-option.101 First, the GS argues that the judiciary is the politically weakest branch of government and hence needs full-time staff to defend its independence and integrity. Second, GS staff needs special administrative skills and “political sensitivity” when dealing with governmental agencies, political parties and other outside forces. Third, since GS administrative work is so difficult, GS judges deserve preferential treatment in local court assignments. Finally, judges with a proven ability to deal with complex issues should be given preferential treatment. Such administrative arguments make sense, but the problem is whether this centralized authority has been co-opted politically.

Judges in Japan are recruited directly from the national government’s Legal Training and Research Institute (“LTRI”) (Shihō Kenshūsho).102 Judges must serve a ten-year probationary period before being promoted to a full judgeship and full judges are subject to reappointment every ten years.103 In addition, judges are transferred between courts an average of three times during each ten-year appointment.104 The promotional course from smaller courts in less prestigious locations to desirable assignments in the Tokyo and Osaka High Courts, along with the accompanying and significant in-

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100 See Miyazawa, supra note 121, at 267.
101 For an easily available and detailed, yet anecdotal, account in English examining the issue of the documented administrative control of judges, see Miyazawa, supra note 121. For a contrasting, American contribution consisting of a more statistically-oriented account, based on rational choice theory, see Ramseyer & Rosenbluth, Japan’s Political Market Place: supra note 108, at 161-81: see also J. Mark Ramseyer & Eric Rasmusen, Judicial Independence in a Civil Law Regime: The Evidence From Japan, 13 J. L. Econ. & Org. 259 (1997). This latter paper contains an excellent bibliography of both English and Japanese sources on this topic.
102 See id. at 264-65. The LTRI has been called Japan’s only law school. Individuals who have completed an undergraduate degree, usually in law, must pass the rigorous LTRI entrance exam and then successfully complete the Institute’s two-year course before being qualified to become an assistant judge, a state attorney or a lawyer. See id.
103 See id. at 265.
104 See id.
crease in pay, is clearly defined.\textsuperscript{165}

Since there are no publicly acknowledged standards for the recruitment, retention or promotion of judges, each phase of judiciary advancement becomes an opportunity for the government through the GS to exercise control over the judiciary. Indeed, judges in the GS are promoted faster and, often, to higher-level positions than non-GS judges, with many ultimately becoming Supreme Court Justices.\textsuperscript{166} For example, the last four Supreme Court Justices were all GS judges.\textsuperscript{167} In particular, the post of Secretary General of the GS is frequently seen as a critical stepping stone to the Court.\textsuperscript{168} Judges in the GS often spend most of their careers in the GS, before sitting only briefly as judges in lower courts, and later on the Supreme Court.

The appointment process provides an initial mechanism of control by facilitating the political screening of candidates who wish to enter the judiciary. The standard of appointment is not disclosed publicly and the Supreme Court does not give reasons for refusals.\textsuperscript{169} Since 1970, approximately fifty candidates believe that they were rejected because of their political thoughts or beliefs.\textsuperscript{170}

The threat of denial of reappointment and discriminatory transfers are additional mechanisms to punish judges who do not tow the ideological line of the GS.\textsuperscript{171} Denial of reappointment occurred only once, in 1971 to Judge Miyamoto Yasuaki, an active member of YLA. Then, a year after Miyamoto’s dismissal, YLA member Konno Toshio of the Nagoya Family Court heard that he would suffer the same fate and resigned.\textsuperscript{172} The Supreme Court stated publicly that Miyamoto’s YLA membership was “not the only reason.” The other factor may have been Judge Miyamoto’s unusual decision to go to prison to interrogate radical students.\textsuperscript{173}

Some commentators, including John Haley, have criticized the logic of concluding that selective reappointment operates to subtly control or limit the decision making of the lower court judges. Haley admits that since the denial occurred during a time of heightened...

\textsuperscript{165} See id. at 265-66.
\textsuperscript{166} See id. at 267.
\textsuperscript{167} See id.
\textsuperscript{168} See id. at 267-68.
\textsuperscript{169} See HIROSHI ODA, JAPANESE LAW 96 (1993)
\textsuperscript{170} In 1994, Kamisaka Naoki’s case gained public attention. After being rejected without any given cause, he sued the Supreme Court for appointment as a judge (1994) and sued the government for damages (1995). See O’BRIEN, supra note 64, 136-37. The first case was rejected without hearings in Tokyo District Court and Tokyo High Court and is now pending before the Supreme Court. See id. at 136. The damages suit is pending before Osaka District Court.
\textsuperscript{171} See id. at 274-77.
\textsuperscript{172} See RAMSEYER & ROSENBLUTH, JAPAN’S POLITICAL MARKETPLACE, supra note 108, at 165.
\textsuperscript{173} But some observers suggest that Miyamoto was merely a slow, mediocre judge. See id. If so, he must have been remarkably inefficient since no other judge has been refused reappointment in the postwar era. The lack of any other such public dismissals may be due, in part, to doomed judges resigning to avoid the humiliation of being refused reappointment as Judge Konno did. See id.
radical student activity, Judge Miyamoto was probably denied promotion in order to curb the YLA's influence.¹⁸⁴ Haley, however, emphasizes that the denial was immediately followed by widespread public outcry and opines that no sitting judge has been denied reappointment and promotion for political purposes since Judge Miyamoto.¹⁸⁵ He concludes that the backlash effectively precludes the further use of reappointment for political purposes.¹⁸⁶

Professor Ramseyer and his collaborators, however, provide a more nuanced explanation, acknowledging that although denial occurred only once, this single time was likely enough to cause a chilling effect among lower court judges.¹⁸⁷ Creating a chilling effect allows a certain amount of slack in the system to keep the cost of controlling the system within bounds and, conceivably, to maintain the appearance of judicial independence. Ramseyer wrote:

They do not punish all deviant judges—but they do not need to do so: in England, as Voltaire reminds us, “it [was] thought well to kill an admiral from time to time to encourage the others.” So long as principals set the punishment high enough, they can constrain their agents with less than full enforcement.¹⁸⁸

The key recognition is that by controlling the GS the LDP controls judicial careers without being seen to intervene and thus minimizing the political costs of control.¹⁸⁹ That is, “the ideal judges are those with the reputation for independence . . . who actually tow the party line.”¹⁹⁰

Furthermore, it seems reasonable to connect the tightened political screening at the recruitment phase with the fact that no assistant judge since 1971 has been refused reappointment.¹⁹¹ Lastly, technically judges cannot be transferred against their will,¹⁹² but in fact refusal of a proposed transfer would unquestionably harm a judge’s future career and so most accept these orders issued under the name of the Supreme Court. Because the course of promotions is so clear, punitive transfers are obvious.¹⁹³

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¹⁸⁴ See Haley, supra note 103, 10-11.
¹⁸⁵ See id.
¹⁸⁶ See id.
¹⁸⁸ Id. at 162.
¹⁸⁹ See RAMSEYER & Rasmusen, Judicial Independence, supra note 160, at 268. The political costs of heavy handed, direct intervention may be high as Ramseyer and Rasmusen suggest, but in the same instances, such as the case of Judge Fukushima, the LDP has been willing to pay that price. See id.
¹⁹⁰ Id. at 262.
¹⁹¹ See Miyazawa, supra note 191, at 266.
¹⁹³ Miyazawa traces the downward career pattern of a judge who held, contrary to the Supreme Court, that the prohibition of door-to-door canvassing for political campaigning was un-
The GS uses two other mechanisms to ensure favorable treatment of the government's position: dispatching of judges outside the judiciary and judicial conferences. The GS dispatches judges in small but increasing numbers to governmental agencies other than the Ministry of Justice, such as private law firms and major business corporations. Many more judges are dispatched to work as state attorneys in the Ministry of Justice itself, primarily on civil and administrative cases in which the government is a party, as well as in the Ministry's bureau of civil legislation. In 1991, according to Professor Miyazawa, "the heads of the Justice Ministry bureaus of solicitors [state attorneys] and civil legislation and a majority of solicitors working at the Justice Ministry headquarters and local solicitor's offices are loaned judges."

The GS argues that these practices give new judges, who often have had little prior employment experience before graduating from the LTRI, a chance to better comprehend the inner workings of Japanese society. But Miyazawa and other Japanese critics strongly agree that the real purpose is to promote the government's perspective among judges. In addition, the Justice Ministry lends prosecutors to the judiciary as judges, usually to the major courts of Tokyo and Osaka. Similarly GS-loaned judges are often assigned specifically to the Ministry of Justice sections which deal with administrative suits against the government.

Furthering the suspicion that this exchange is designed to encourage ruling in favor of the government, some of these judges, after returning from a tour in the Ministry of Justice, appear to be assigned to particular cases in order to achieve specific outcomes. As constitutional. See Miyazawa, supra note 121, at 271. Readers with American training must remember that Japanese lower court judges have the power in subsequent cases to hold differently than the Supreme Court. For example, one the three judges discussed by Miyazawa, Abe Haruhiko, held in 1972, in opposition to the Supreme Court's earlier ruling, that the heavier criminal penalty for killing one's parent than for killing non-ancestors was unconstitutional. In 1973, the Supreme Court changed its position and adopted Abe's position.

184 See id. at 269, 271-74.
185 See id. at 269 (indicating that the practice of dispatching judges to firms & corporations serves, in part, to promote governmental perspectives among judges).
186 See id. Miyazawa notes that judges lent to the Ministry of Justice to serve as state attorneys handle civil and administrative cases. Because the career track of the Ministry of Justice favors those who have worked as criminal prosecutors, Ministry lawyers are generally unwilling to handle non-criminal cases. Judges fill this void.
187 Id. at 269.
188 See id.
189 See id. Japanese Supreme Court Justices have also risen by this route. An extreme case is Justice Kagawa, who worked only one month as a judge and then was dispatched to the Ministry of Justice where he spent the next twenty-nine years. He then returned to the judiciary, serving three and a half years in prestigious posts such as chief judge of the Tokyo High Court, and then became a Supreme Court Justice.
190 See id. Miyazawa reports that of the 264 prosecutors loaned to the judiciary from 1975 to 1989, eighty one percent were assigned to these two cities (67% to Tokyo and 14% to Osaka).
191 See id. at 270.
an illustration, Miyazawa offers the example of the Nagara River litigation. Flooding from this river heavily damaged two towns in the Gifu prefecture, Anpachi and Sunomata, and led to the filing of two lawsuits against the national government, which was responsible for the management of major rivers. In 1982, in a decision that received nationwide attention, a three-judge panel of the Gifu District Court, headed by Chief Judge Akimoto, held the national government liable for flood damage to the Anpachi plaintiffs. Subsequently, Chief Judge Watanabe Takeo replaced Judge Akimoto, although Watanobe’s background contrasted markedly with that of Akimoto. Judge Watanabe worked from 1975 to 1980 as a state attorney at the Ministry of Justice headquarters, rising to the head of administrative litigation and then advancing on to the Tokyo High Court. It was highly unusual, however, for judge with a background like Judge Watanabe’s to be sent to sit as a district court judge, particularly in the less prestigious locale of Nagoya. In 1984, a three judge panel, including Judge Watanabe and the same two judges who had participated in the Anpachi decision, issued a decision in the Sunomata case decisively against the plaintiffs.

It appears that the undue governmental influence interfered with the resolution of cases such as the Nigara River litigation. Given that the most significant structural innovation of Japan’s post-war government was the separation of the judiciary from the direct control of the Ministry of Justice, the practice of swapping prosecutors and judges, as well as the seeming assignment of judges to achieve pro-government results, appears to have seriously undermined this intended organizational separation. The change is brought about not by public deliberation in the Diet or popular values, but by the efforts of judges controlling the bureaucracy of the judiciary, the GS. Far from being independent, the judiciary seems to be driven by the GS into the embrace of the bureaucracy of the executive and the Ministry of Justice, which, given the virtually unbroken rule of the LDP, means the control of the LDP.

Lastly, Professor Miyazawa suggests that judicial conferences contribute to the General Secretariat’s control of judges and judicial decisions. Until 1970, these conferences were forums of free discussion. Each court selected its own representative and records of the conferences were published and available to the public. After 1970, however, matters changed. Lower courts have been ordered to send judges handling specific cases to a conference considering that topic

192 See id. (describing the flood and resulting litigation).
193 See id. The subsequent careers of the two chief judges suggest the power of the GS to manipulate judges. Judge Akimoto’s career took a decisive downward turn when he was subsequently transferred to a Numazu branch of the Shizuoka District Court. Similarly, Judge Watanabe was recalled to the Tokyo area to the Tokyo District Court and then the Yokohama District Court.
194 See id. at 271.
and records are no longer publicly available. Even the identities of the participants are not disclosed in documents meant for internal circulation. The rationale for such conferences is that lower courts lack the time and resources to analyze complex cases without support from the GS. Although the conferences offer advice, the opinions expounded by the GS are presented as the official position of the various bureaus that prepared them. The message to the lower courts seems clear. Many judges, according to Professor Miyazawa, "now consider these conferences as chances to ask the GS to tell them about its policies." In a legal system where higher court decisions are not binding on future cases, this orchestration of policy can be seen as a means to ensure a pro-government consistency in decisions.

Professor Haley disagrees. In fact, he attacks the views of Miyazawa, who is of course Japanese, and Ramseyer, in particular, dismissing their criticisms of the GS as "American" and as failing to give due regard to the civil law background of the Japanese system. Instead, Haley claims that it is the considerable power of the GS that ensures judicial conformity. Japanese judges, he maintains, although not as individually autonomous as British, American, or French judges, together create a cohesive system for defining Japanese law which would be precluded by increased independence. Indeed, Haley

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150 Id. at 272. The evidence for this is a GS document entitled "Materials on Handling Civil Damage Suits Against the Government Caused by Floods," which was circulated to district and high courts in March, 1985 and which accidentally came into the possession of an attorney in 1987. The document originated at a GS judicial conference held in December, 1983, one month before the Supreme Court would hand down the major ruling severely limiting governmental responsibility in flood damage cases. Professor Miyazawa concludes that the GS was informing lower court judges of a major ruling before it occurred to encourage them to decide their cases in conformity with the future law. Given the secrecy of the conferences, one is left wondering about how common such guidance may be. See id. at 271-72.

151 See Haley, supra note 103, at 17.

152 Haley’s claim that the GS intervention creates valuable uniformity must be critically evaluated in terms of history. As a counter-example, one of the most important consequences of the purge of the judiciary and the corresponding exercise of tighter control by conservative judges was the reversal of the Tokyo Central Post Office Case. See Tokyo Central Post Office Case, supra note 117, at 85. This case established totality of the circumstances and proportionality analysis for determining the right to strike. See Taisuke Kamata, Adjudication and the Governing Process: Political Questions and Legislative Discretion, in JAPANESE CONSTITUTIONAL LAW, supra note 7, at 151, 161. But in 1973, the Supreme Court abandoned this approach in the All-Japan Agriculture and Forestry Workers Union case. See Tsuruzono v. Japan, 27 KEISHUKISHI 547 (Sup. Ct., G.B., Apr. 25, 1973). The Court cited to "a policy of comprehensive restriction of public worker rights based on a literal interpretation of statutes and disregard of the substantial diversity among types of public employees in Japan." Kamata, supra, at 162.

153 See Haley, supra note 103, at 14. Haley, however, misrepresents the way political power is exercised by the LDP. He recounts the unquestioning trust of Prime Minister Kaifu in the recommendation of outgoing Chief Justice Yaguchi Koichi of Kusaba Ryohachi as the "judiciary’s choice" to be the next Chief Justice as "typical" and thus proof that, in general, LDP politicians have not influenced the judiciary. Yet, such an anecdote actually supports the position of critics who see undue LDP control of the judiciary. Under Prime Minister Kaifu the political situation became so unstable that loss of power by the LDP seemed possible. To forestall the possibility that a non-LDP administration might appoint a Chief Justice, Kusaba, a relatively young Supreme Court Justice was selected so that his potentially long tenure as Chief Justice would en-
emphasizes the intentions of judges in the GS to preserve the independence of the judiciary by thwarting judicial rulings that would offend the LDP and lead to more direct, heavy-handed political intervention by political power-brokers. Even if one accepts Professor Haley’s arguments, his claim is troubling. In effect, he argues that the insiders in control of the Japanese Judiciary have imposed policies and legal doctrines favorable to the LDP in order to forestall direct imposition of the LDP’s policies; the outward appearance of independence is saved so long as the judiciary does not offended the political power center. But this is Ramseyer’s point: the LDP benefits politically by securing its policy objectives by judicial agents who seem to be independent. The effect is the same; the process is more efficient. The issue is not one of culture or the appreciation of stability, but rather whether the Japanese judiciary will enforce the Constitution.

D. The Supreme Court and Its Impact on the Constitution

Given the tight control exercised over the Judiciary, attention must be directed at those decisions of the Japanese Supreme Court outside the context of Article 9 where the Court has used its power to overturn laws as unconstitutional. The analysis is however short. Since 1947, the Court has only found laws to be unconstitutional six times. Many scholars have criticized the Court for its seemingly excessive restraint in finding laws unconstitutional as well as the lack of impact of the cases in which the Court did so rule. Two of the six rulings dealt with the regulation of economic rights. In Hiraguchi v. Hiraguchi, for example, the Court struck down a law restricting the partitioning of co-owned forests. In Sumiyoshi, Inc. v. Governor, Hiroshima Prefecture, known as the Pharmacy Case, the economic regulation mandated a certain distance between pharmacies in order to prevent the danger of supplying defective medicines as a result of heightened competition or instability of business. The Court in the Pharmacy Case found such a causal connection to be unreasonable and held that the law violated Article 22’s guarantee of freedom of

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20. See Haley, supra note 103, at 18.
23. See Hiraguchi, supra note 201, at 327-45.
24. See Pharmacy Case, supra note 201, at 188-99; see also Mutsuo Nakamura, Freedom of Economic Activities and the Right to Property, in JAPANESE CONSTITUTIONAL LAW, supra note 5, at 253, 260 (describing the Supreme Court’s reasoning in the Pharmacy Case).
occupation. The law in the third case, the *Patricide Case* of 1973, was found unconstitutional on a technicality. Although the majority found the law's purpose, to punish murderers of lineal ascendants more severely than the murderers of other victims, to be constitutionally permissible, the Court held that the difference in punishment imposed was discriminatory and hence unconstitutional. In *Nakamura v. Japan*, the Court held that property belonging to a third party could not be seized without providing notice and the section of the Customs Law which permitted seizure without such notice was unconstitutional. Finally, the Court has twice ruled that voter misapportionment is unconstitutional, but in both cases the Court refused to provide any remedy, such as invalidating the elections. Both voting rights cases had potential social importance, but the Court's policy of declaring widely disproportionate electoral districts unconstitutional, without invalidating the elections, has meant in practice that such violations remain beyond the aid of the judiciary. The Court, for fear of invalidating the legislation passed by the representatives selected in the challenged elections, preferred merely to urge the legislative branch to reform electoral districting laws.

Such a small body of decisions with virtually no impact on Japanese society has led some Japanese scholars to conclude that the Supreme Court is unwilling to impose the rule of law on governmental

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204 See *Pharmacy Case*, supra note 201, at 188-99.
206 See id. (holding that the disparity between death or life imprisonment for murderers of lineal descendants and a minimum sentence of three years imprisonment for the murder of other victims, was discriminatory).
208 See *Kanoa et al v. Hiroshima Prefecture Election Comm'n*, supra note 64; *Kurokawa v. Chiba Prefecture Election Comm'n*, supra note 64.
209 Unfortunately, the Japanese courts refused to grant any remedy in these voting rights cases other than urging the Diet to mend its ways. The Diet has not responded enthusiastically to such judicial invitations. See *JAPAN TIMES*, Aug. 11, 1998, at 2. Although districts were redrawn in the mid-1990s, the gap between densely and thinly populated voting districts for the important, single seat districts of the House of Representatives has remained and even, recently, widened to a maximum of 2.4 to 1. See *id*. As of March 31, 1998, out of the 300 single-seat districts, 74 had more than twice the population of the nation's smallest constituency, an increase from 59 such districts a year ago, according to the Home Affairs Ministry. See *id*. The rural No. 3 constituency in Shimane Prefecture (the territory of LDP boss Takeshita Noboru) has only 242,544 residents; the most populous and most underrepresented district is the urban No. 14 constituency in Kanagawa Prefecture with 582,401 residents. See *id*.

For the upper house or House of Councillors, the Supreme Court was reluctant to declare an election unconstitutional even though the imbalance between the weight of votes in some districts exceeded 5 to 1. See *Judgment of 27 April 1983*, 37 MINSHI 345. Finally, the Supreme Court held that a ratio of 6.59 to 1 was unconstitutional. See *Judgment of 11 September 1996*, 922 HANREI TIMES 96. But the court did not declare the election unconstitutional, and gave the Diet another period to remedy the problem. See *id*. So for the upper house, the constitutional line falls somewhere between 5 and 6.59 to 1.
power. On the other hand, the courts seem quite willing to use their power to maintain governmental power. Perhaps the most extreme example is the *Nishiyama v. Japan* case. A newspaper reporter named Nishiyama Takichi obtained politically sensitive information from his lover, a Foreign Ministry employee, concerning the secret terms of the reversion of Okinawa from the United States to Japan. The government had lied, saying there were no secret agreements to the reversion when in fact it had covertly agreed to pay 5 million dollars to the Okinawans for land damage. The Supreme Court came to the dubious conclusion that Nishiyama’s news gathering activities were illegal in light of the “spirit of [the] whole legal order.”

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In contrast, when faced with constitutional claims by individuals to welfare rights under Articles 25, 26, 27 and 28, the Court has been exceedingly unwilling to recognize governmental obligations. The key constitutional provision is Article 25(1), which sets forth the right to a decent life. This provision, from the Constitutional Research Association’s draft constitution used by SCAP, was added to the Constitution during the Diet’s deliberations at the suggestion of the Socialist Party. The leading case on the right to a decent life, however, handed down by the Supreme Court in 1948, concluded that Article 25(1) was merely a programmatic declaration that does not confer a judicially enforceable right. Succeeding cases dealing with specific

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209 See, e.g., Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, in *JAPANESE CONSTITUTIONAL LAW*, supra note 5, at 173, 182-84. Urabe argued:

The Supreme Court of Japan does not seem to consider it important to sustain the rule of law against governmental power. In the past forty or more years of history, there have been only five cases in which the Supreme Court has declared a statute unconstitutional. As there is no evidence that the Japanese legislature is particularly faithful to the Constitution, only five (sic) cases in forty years is too small a number. This fact proves that the Supreme Court of Japan has almost no idea that governmental action should be bound strictly by the Constitution. If the core of the rule of law is that governmental power be bound by law, and if the rule of law is to be realized through the judicial process, the scarcity of court decisions that have ruled statutes unconstitutional indicates that the rule of law is not realized in practice in Japan.

Id. at 182.


211 See id. at 545-46.

212 See id. at 546; see also Urabe, supra note 210, at 182. But see, for a different characterization of the case, *BEER, FREEDOM OF EXPRESSION*, supra note 37, at 303-05.

213 Article 25(1) states in applicable part that “[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living.” *KENPÔ* art. 25(1).

214 See Akira Osuka, *Welfare Rights*, in *JAPANESE CONSTITUTIONAL LAW*, supra note 5, at 269, 271 (“Current clause 1 . . . was added later during the discussions at the Constitutional Diet (Kenpô Gikia) upon proposal by the Socialist Party.”)

215 See judgment of 29 September 1948, Supreme Court, 2 KEISHI 1235. For a discussion of the main theories of the right to a decent living, see Osuka, supra note 64, at 272-79.
welfare rights have also met with similar resistance. Restrictions on freedom of speech are particularly severe. In 1973, at the time of the purge of the judiciary, the Tokyo Central Post Office Case, which had permitted some flexibility in the political activities of public employees, was overruled in the All-Japan Agriculture and Forestry Workers Union (Zennōrin) Case. The Supreme Court accepted the authority of NPA rules and rejected all distinction among public employees and their work as a basis for permitting political activity. In 1974, the Supreme Court sanctioned the use of criminal prosecution to prevent public employees from engaging in electoral activities. In the Sarufutsu Case, the Supreme Court overturned an acquittal and confirmed a conviction of a postal worker for putting up six political posters on a public bulletin board during his off-work hours. That is, public employees, even non-managerial ones without policy responsibilities, are criminally liable for any electoral activities, even those which do not affect their work performance and are done outside of work hours and off the work site. The electoral actions of all citizens are also severely restricted. For example, the absolute prohibition of door-to-door canvassing under the Public Offices Election Law (Kōshoku Senkyo Hō), a ban which has been in place since 1925, has repeatedly been found constitutional under the public welfare doctrine because of the mere possibility of bribery. The absolute ban on such person-to-person contact in electioneering, unique among industrialized democracies, is particularly oppressive because the law contains so many other restrictions on campaigning.

The main mechanisms used by the Court to avoid ruling statutes unconstitutional are, in addition to the political question doctrine, the public welfare clauses of Articles 12 and 13 of the Constitution, and deference to legislative and executive discretion. A fourth mechanism, seen in the voting rights cases and used with greater frequency in recent lower court decisions, is to find a constitutional violation as applied but offer no remedy other than, to seek redress.
Some scholars have attempted to chart the Court's use of these various doctrines. Beer's claim, for instance, is that the public welfare clause was used excessively in the early years of the Constitution's history, but that recently this practice has stopped. Such a charitable interpretation, however, is not borne out by the facts. The public welfare clauses are still used with regularity to justify executive decisions. There seems to be more justification in the claim that the courts have moved away from the political question doctrine in favor of a more general rationale of deference to the legislature. This shift has the advantage of de-emphasizing the effect of judicial self-restraint and the political sensitivity of a challenged law in favor of adopting the democratically determined choices of the Japanese people. Professor Taisuke Kamata characterizes the shift in approach:

Today, courts prefer to apply the legislative discretion doctrine rather than the political question doctrine when they intend to avoid constitutional adjudication or to refrain from interfering with decisions of the political branches of government. According to the courts' reasoning, under the legislative discretion test, courts refrain from interference with legislative judgment but retain the power to settle constitutional questions. If courts apply the political question doctrine, however, they may have to refrain completely from determining constitutional questions that arise in those cases, and the political departments or the people themselves may have to make judgments on questions of constitutionality.

In practice, however, when Japanese courts apply the legislative discretion doctrine, they only formally retain the power to settle constitutional questions in that area of contested values. The retained power is in fact not exercised, as courts refrain from addressing such issues.

The mechanisms for avoiding constitutional adjudication are not themselves problematic, although their extensive application and the low standard of review used to assess the reasonableness of a legislative or administrative determination are causes for concern. These concerns are especially prevalent when the issue before the Court involves human rights, a fundamental principle of the Constitution and one that often entails either a restraint on the exercise of governmental power against an individual or a governmental obligation to exert itself on behalf of classes of individuals disfavored by society. The

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253 See Okudaira, supra note 7, at 18-19.
254 See, e.g., BEER, FREEDOM OF EXPRESSION, supra note 37, at 152.
255 See id.
256 See Kamata, supra note 197, at 157.
257 Id.
government claims that there is no defined standard for public welfare; rather it must be determined on a case by case basis. As for deference to the legislature and the executive, although the Court very rarely will refuse to defer to unreasonable legislative or executive determinations, as in the 1975 Pharmacy Case, or more commonly will try to mitigate the unfair effects of a general rule by innovative interpretation, overwhelmingly, the Court holds rules constitutional even when it finds "a degree of arbitrary judgment" in them. One scholar characterized the causes and nature of the limited role of the Japanese judiciary as follows:

Japan has been in an era of constitutional government in which strong executive powers have been justified on the grounds that such power is necessary to achieve economic success and to catch up to the prosperity of the Western world. Strong executive power often results in suppression of political opposition and limitations on judicial independence as law supports economic development at the expense of civil liberties. The judiciary sacrifices the goal of social justice to protect property rights; it is supported in this by the executive and legislative branches of government. The judiciary is not in a position to be an instrument for social, economic, and political change; instead, it performs the conservative task of preserving basic civil liberties guaranteed by the Constitution and recognized by the Diet and a majority of the population.

A similar statement could have been made about the judiciary under the Meiji Constitution. Despite the change of constitutions after World War II, the Japanese judiciary has not been effective in enforcing important parts of the Constitution.

The degree to which the Court will sacrifice constitutionally protected civil rights in order to defer to executive discretion can be best illustrated by the difficult case of a legal alien's freedom of speech. In McLean v. Justice Minister, the plaintiff, an American citizen teaching English in Japan, challenged the Justice Minister's refusal to renew his visa based on the plaintiff's participation in lawful political

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\(^{140}\) See, e.g., Judgment of 19 March 1982, Supreme Court, 36 MINSHū 432 (Sup. Ct., Mar. 19, 1982) (holding that special circumstances warrant recognition of paternity even though legally required deadline of three years had already passed).

\(^{141}\) See Kamata, supra note 197, at 168.


demonstrations.  Although Mr. McLean committed a technical violation of the Alien Registration Act by failing to notify authorities of a change in his place of employment, the lower courts and the Supreme Court focused upon the Minister's decision to consider the undesirable nature of the plaintiff's political activities. Mr. McLean had participated in meetings and demonstrations to protest against the Vietnam War, a Diet bill on immigration control, and the United States-Japan Security Treaty. Although McLean was a mere participant, rather than a leader in these events, all of which were entirely peaceful and lawful, the Ministry of Justice, in the name of the Minister and using its broad discretionary powers, found that these activities were undesirable for Japan and the Japanese people. The plaintiff argued that the Minister's decision constituted an abuse of discretion and a violation of Articles 14 (equal protection), 16 (right of peaceful petition), 19 (freedom of thought and conscience) and 21 (freedom of assembly and association) of the Constitution. The Court disagreed. The Court recognized that the guarantees of fundamental human rights contained in Chapter Three of the Constitution applied to foreigners, but with significant limitations because aliens are permitted to live in Japan only at the discretion of the Minister of Justice:

Consequently, it is appropriate to interpret the constitutional guarantee of fundamental human rights to aliens as going no further than the system described above, a guarantee of a limitation on the State's discretion [to decide] whether or not to allow them to stay in Japan. . . . Even when the conduct of aliens during their stay is in accord with the Constitution and is lawful, if the Minister of Justice determines that the conduct of the alien is undesirable for Japan from the perspective of propriety, or if it is inferred from the said conduct that there is danger in the future that the said alien will behave in a way harmful to Japan's interests, this does not amount to depriving the alien of constitutional protection.

Since the constitutional protection for an alien, even for conduct "in accord" with the Constitution, extends only as far as the Ministry of Justice permits, the issue then became the standard for the limitation of the state's discretion. The Court articulated a very low standard for constitutional review, which remains the controlling law today. The Minister's discretion is limited only by a factual mistake.

253 See id. at 472-73.
254 See id. at 477.
255 See id. at 473.
256 See id. at 478.
257 See id. at 474.
258 See id. at 474.
259 See id. at 477.
260 Id.
such as a case of mistaken identity, or his own "clearly unreasonable" evaluation of the facts. This standard is an extreme version of the rational basis test; the person challenging the determination must show that the administrative decision is manifestly devoid of reason. Consequently, such administrative decisions are virtually immune from judicial reversal. While the Constitution does apply to aliens, the scope of protection for foreigners is entirely dependent on what the Ministry of Justice, assuming its decision is not manifestly irrational, determines to be appropriate.

The McLean rule, and the Japanese courts' inaction regarding constitutional protection for aliens, falls far short of SCAP's original proposal to specifically include aliens under the Constitution. They are also inconsistent with the seemingly innocuous negotiations between SCAP and the reigning Japanese government over the phrases "people of Japan" or "the Japanese." The McLean standard is indicative of the Court's incorporation of post-war governmental policy into constitutional law doctrine. As a result, by the late 1970s, constitutional protections for both Japanese and aliens had reached a low point.

There are many theories to account for the decline in human rights by the Japanese courts in the forty years after the Constitution became effective. The civil code legacy from before the war, institutional inertia, and the cultural values of the ruling elite, including the bureaucratic elite of the judiciary, all played significant roles in this decline. For a complete picture of the development in human rights protections, however, one must also see these events in their larger historical context. Forces pressing for social transformation to build a "democracy from below" were blocked. By refusing to enforce the Constitution, the judiciary, lead by the GS and the Supreme Court, did not so much Japanize the Constitution, as help to amend it. Especially through extensive use of the doctrine of deference to the executive and legislature, Japanese courts have, to a large extent, restored the key element of the Meiji Constitution. Once again executive actions and statutes determine the scope of Constitutional

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20 See id. at 476 ("If [either the decision lacked a factual basis or the evaluation of the facts was unreasonable], then it can be said that there was a violation of law, as the Minister's decision would have exceeded the scope of his discretionary authority.").

21 Japanese lawyers refer to the McLean standard as the fool's (baka) standard; only if the Minister of Justice's act is clearly the act of a fool will the courts intervene.

22 Article XVI of the American Draft of the Constitution granted much broader protections. See supra notes 76-86 and accompanying text discussing the narrowing of protections for aliens during the constitutional drafting process.

23 See Okudaira, supra note 7, at 31 (presenting the traditional and narrow concept of judicial power and bureaucratization of the Supreme Court inhibiting judicial review); Tomatsu, supra note 200, at 202 (arguing that the difficulty in obtaining compliance from the Diet and the executive branch causes judicial reluctance to develop standards for heightened scrutiny).

24 For a detailed discussion of how the development of democracy was stymied in post-war Japan, see IROKAWA, supra note 27, at 121.
protection. Each of the three basic principles, including popular sovereignty, pacifism, and human rights have become pale shadows of their original dimensions in 1946.\textsuperscript{38}

IV. INTERNATIONAL HUMAN RIGHTS LAWS AND THE JAPANESE CONSTITUTION

In the late 1970s and early 1980s, external events occurred which gradually affected the guarantees of fundamental human rights in Japan and may help restore the scope of legal protection for human rights to the dimensions imagined by many at the birth of the Constitution.\textsuperscript{39} The United Nations, as part of its initial mandate to establish an international bill of rights, sponsored the drafting of a series of international human rights treaties. The political pressures at the end of World War II to establish human rights on a firm legal basis, which had come to bear in Japan via SCAP’s involvement in the drafting of the Japanese Constitution, also influenced the nascent United Nations. After delays caused by East-West confrontations and First and Third World conflict, draft treaties began to emerge and new drafting projects were undertaken. Japan ratified a selection of these human rights treaties, including: the International Convention on Civil and Political Rights (ICCPR) (entered into force for Japan, June 21, 1979); the International Convention on Economic, Social and Cultural Rights (ICERS) (entered into force for Japan, June 21, 1979); the Convention Relating to the Status of Refugees (CR) (entered into force for Japan, January 1, 1982); and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (entered into force for Japan, July 25, 1985). Finally, Japan ratified the Convention on the Rights of the Child (CRC) (entered into force for Japan, May 22, 1994).\textsuperscript{40}

A. Conflict Over the Impact of the ICCPR on Japanese Domestic Law

\textsuperscript{38} Consideration of popular sovereignty, and the position of the Emperor under the Constitution, falls outside the limits of this paper, but this principle, like pacifism and human rights, has been significantly eroded. For a survey of the emperor system under the Constitution, see Yōichi Higuchi, The Constitution and the Emperor System: Is Revisionism Alive?, in JAPANESE CONSTITUTIONAL LAW, supra note 5, at 57. For a subtle analysis of the relationship between the emperor and the Japanese in the postwar period, see IROKAWA, supra note 27, at 108-37.

\textsuperscript{39} Japanese lawyers and various citizens groups quickly began to explore the possibilities of international human rights treaties as a source of enforceable rights. For an early assessment of the potential of the ICCPR, see Lawrence Repeta, Introduction to the First Five Issues of “Citizens’ Human Rights Reports” by the Japan Civil Liberties Union, 20 LAW IN JAPAN I (1987).

\textsuperscript{40} Japan has not ratified a number of other human rights treaties, most notably the First and Second Optional Protocols of the ICCPR. For a complete list of the treaties and ILO conventions which Japan has not ratified, see Yūji Iwasawa, International Human Rights Adjudication in Japan, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 223 (Benedetto Conforti & Francesco Franconi eds., 1997).
Great controversy persists, both inside Japan and around the world, over whether such treaties represent universal or merely western values. Nevertheless, the Japanese government ratified these documents on behalf of the Japanese people after conducting what were by its own account careful reviews of its legal system to ensure compliance. Furthermore, the government of Japan made no significant reservations to these treaties.

Duly ratified treaties have the force of law in Japan under Article 98(2) of the Constitution, which states: "[T]reaties concluded by Japan and established laws of nations shall be faithfully observed." As a matter of abstraction, the government, courts and the majority of scholars, all agree that this provision means that treaties are incorporated into the Japanese domestic legal system. Therefore, the ICCPR, which is immediately legally binding on state parties and provides detailed rights for individuals, should be an important part of the Japanese legal system.

The majority of Japanese scholars have adopted the concept of...

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247 See Iwasawa, supra note 247, at 223.
248 Japan made only one minor reservation to the ICCPR. Japan reserved to right to interpret the term "police" in Article 22(a) to included fire fighters. Consequently, the right to strike for fire fighters may also be restricted or prohibited by law.
249 See Iwasawa, supra note 247, at 227.
250 The impact of other treaties is contested in Japan. Brushing aside the interpretation that the ICESCR imposes certain minimal core obligations (such as non-discrimination) immediately on all state parties regardless of their level of development, the Government of Japan claims that because the obligations of the ICESCR are to be progressively enforced, Japan has no legal obligations under the treaty. The Government also denies it has any legally binding obligations under the CRC.
251 The greatest area of contention is the implementation of the ICCPR. The Government, Supreme Court and the Ministry of Justice all strongly resist ratifying the First Optional Protocol to the ICCPR, which provides for individual complaints to the Human Rights Committee, on the theory that the interpretations of the ICCPR found in the "views" or quasi-case law issued by the Human Rights Committee under the First Optional Protocol, somehow, do not apply to Japan if it does not ratify the protocol. The Ministry of Justice regularly argues in Japanese courts that the Japanese judiciary need not pay heed to the interpretations of the scope of rights guaranteed in the ICCPR found in the views or interpretive general comments of the Human Rights Committee. The Supreme Court expresses alarm that ratifying the First Protocol would mean that the Human Rights Committee becomes a court of fourth impression. Such fears seem exaggerated. Other civil law legal systems have successfully faced the issue of integrating international human rights law into their systems. See Alexander H. E. Morawa & Christoph Schreuer, The Role of Domestic Courts in the Enforcement of International Human Rights—A View from Austria, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, supra note 247, at 175; Bruno Simma et al., The Role of German Courts in the Enforcement of International Human Rights, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, supra note 247, at 71. The literature on the issue of sovereignty and international human rights obligations is burgeoning. See, e.g., Henry Burmester, National Sovereignty, Independence and the Impact of Treaties and International Standards, 17 SYDNEY L. REV. 127 (1995); Jacques Robert, Constitutional and International Protection of Human Rights: Competing or Complementary Systems?, 15 HUM. RTS. L. J. 1 (1994); Johan D. van der Vyver, Sovereignty and Human Rights in Constitutional and International Law, 5 EMORY INT’L. L. REV. 321 (1991).
self-executing treaties, and at least one scholar argues for a two-stage analysis of "direct applicability." Japanese courts, however, have rarely engaged in such analyses, preferring instead to decide on the applicability of a treaty without resorting to detailed discussion of self-execution or direct applicability. Since the scope of the rights guaranteed by the ICCPR is, in many instances, broader than those constitutional rights narrowed by judicial interpretation, the ICCPR, and possibly other human rights treaties, effectively rejuvenated litigation over the breadth of human rights protection in Japan. The issue is most sharply drawn when the right guaranteed by the ICCPR conflicts with Japanese statutory law. Furthermore, since constitutional doctrines, such as the public welfare clauses and judicial deference to legislative and executive discretion, have been repeatedly used to uphold the constitutionality of statutes that severely limit protected rights, courts also find themselves drawn into questions of direct conflict between the Constitution and the ICCPR.

Even on the issue of treaty-statute conflict, the Japanese government has taken contradictory positions. In the international forum, the government guaranteed that Japanese courts would enforce the rights guaranteed by the ICCPR over domestic statutes. In 1992, the government stated in a report to the Human Rights Committee:

If laws, regulations, or official acts violate the provision of fundamental human rights of the Constitution or ICCPR, it is possible for the people to bring an action against the violating legislative organs, the administrative organs and/or the judicial authorities. The court usually plays a major role in the remedy if the rights of the people [are] infringed, or are likely to be infringed, in contravention of the Constitution or ICCPR.

The court is authorized to judge whether laws, regulations or official acts infringe the Constitution or ICCPR or not.

In Japanese domestic courts, however, the government has either dismissed ICCPR claims by individuals out-of-hand, or argued that the scope of ICCPR protections must be identical with the scope of protections guaranteed by the Constitution. The courts generally have agreed. A former Supreme Court Justice characterized the Supreme Court's attitude to arguments based on the ICCPR as "extremely half-hearted" and the response of Japanese courts as a whole

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25 Unfortunately, Japanese judges are not well prepared for such adjudication. The Legal Training and Research Institute provides future judges, state attorneys and lawyers with only a single one-hour lecture on Article 98(2). See supra note 162 and accompanying text for a discussion of the LTRI. Litigants must regularly instruct judicial panels in even the most basic matters of human rights treaty law.
26 Third Periodic Report: Japan, supra note 226, at paras. 16-17.
as "highly negative."\(^\text{257}\) One scholar summarized the three common responses offered by the courts to claims based on international human rights law up until 1994: the court either (1) simply ignored arguments based on human rights law; (2) reached a decision based on the standard interpretation of the Japanese Constitution and summarily dismissed arguments based on international human rights law; or (3) are simply reluctant to find violations of human rights law.\(^\text{258}\) In short, despite a constitutional injunction to respect international treaties, the courts consistently maintained the position that the ratification of the ICCPR had not changed the state's obligations towards individuals within its territories.

As a result of this divergence, the Human Rights Committee expressed skepticism about the government of Japan's claims that Japanese courts were effectively enforcing the ICCPR.\(^\text{259}\) In its observations on Japan's Third Periodic Report, the Committee stated:

The Committee believes that it is not clear that the Covenant would prevail in the case of conflict with domestic legislation and that its terms are not fully subsumed in the Constitution. Furthermore, it is also not clear whether the "public welfare" limitation of articles 12 and 13 of the Constitution would be applied in a particular situation in conformity with the Covenant.\(^\text{260}\)

The Japanese government's claim that the scope of the rights guaranteed under the ICCPR and under the Japanese Constitution are identical is clearly wrong. The most obvious example is the contract between the protection of the fundamental human rights of aliens granted under the ICCPR and their protection under the Japanese Constitution. In contrast with the McLean constitutional rule,\(^\text{261}\) the ICCPR in Article 2(1) states, in language reminiscent of the SCAP draft proposal,\(^\text{262}\) that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth

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\(^\text{257}\) See Iwasawa, supra note 247, at 264 (quoting Ito, Kokusai jinken Hō to Suibansho [International Human Rights Law and the Courts], KOKUSAI JINKEN 9-10 (1990)).

\(^\text{258}\) See id.


\(^\text{260}\) See id. at para. 105.

\(^\text{261}\) See supra notes 232-242 and accompanying text discussing the McLean opinion.

\(^\text{262}\) See supra notes 76-86 and accompanying text.
or other status.\footnote{1999}

The Committee on Human Rights, charged with overseeing the implementation of the ICCPR, found, in a view issued pursuant to its powers to guide state parties under the First Optional Protocol of the ICCPR, that nationality, or alienage falls within the category of “other status.” In General Comment 15, the Committee stated bluntly: “In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness . . . . Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”\footnote{2000} But in Japan, the courts either assume that ICCPR guarantees are identical to Japanese Constitutional rights or they apply Japanese doctrines for determining the scope of constitutional rights, such as the public welfare doctrine or, in the case of aliens, the very low reasonableness standard of judicial review. There is no legal basis for these approaches. The reasoning diverges from the standard methodology for the interpretation of treaties which would base the interpretation of a treaty on international, not domestic, law.

In addition to the protection of aliens, the scope of ICCPR guaranteed rights is broader than constitutional rights in several other areas. Only a few representative examples will be mentioned here. The mandate in Article 26 for equal treatment on the basis of sex, social origin, and birth provides legal bases for women, outcastes (buraku), as well as persons born out of wedlock to demand equal treatment from the government and governmental action to end discrimination by private actors.\footnote{2001} No similar legal guarantees exist in Japanese domestic law.\footnote{2002} Articles 9 (liberty and security of person) and Articles 14 (procedural guarantees in civil and criminal trials) would require significant changes in Japanese laws and governmental practices if fully implemented. Article 9(3), for example, provides the accused with the right to bail while awaiting trial. In Japan, however, requests for pre-indictment bail are universally rejected on the grounds that no such institution exists in Japan. Post-indictment bail is extremely difficult to obtain; approximately eighty percent of indicted people await trial in custody.\footnote{2003} Article 9(4) provides for a right

\footnote{1999} ICCPR, supra note 78, at art. 2(1)


\footnote{2001} See ICCPR, supra note 78, at art. 26.

\footnote{2002} Article 2(1) of the ICCPR obliges State parties both “to respect and ensure” the rights recognized in the Covenant to all individuals within its territory and jurisdiction. See id. at art. 2(1). The Human Rights Committee in its general comment 2, paragraph 1, emphasizes that these terms require a State party to both refrain from violating rights and to act positively to ensure the enjoyment of rights.

\footnote{2003} See Japan Federation of Bar Associations, Alternative Report to the Fourth Periodic Report of Japan on the International Covenant on Civil and Political Rights 57 (Sept. 1998). Relying on official gov-
to a court proceeding to challenge the legality of one’s arrest or detention. But the Habeas Corpus Law enacted in 1948 restricts coverage to persons who have been bodily restrained “without any procedure established by law,” and does not cover cases where the custody is illegal as a substantive, as opposed to a procedural, matter. Moreover, Article 4 of the Habeas Corpus Rules, which implement the Habeas Corpus Law, limits protection to cases where there was either no legal grounds for custody or the law or ordinance was obviously violated and all other remedies have already been exhausted. The limitations make the availability of habeas corpus relief all but meaningless. Article 14 of the ICCPR mandates adequate access to counsel to prepare a defense, but such access is severely restricted in Japan. Treatment in Japanese prisons, in particular, clearly fall far short of the obligations of the ICCPR. Most importantly, Article 2(3) requires a State Party to ensure an effective remedy for violation of ICCPR guaranteed rights and to ensure that the competent authorities in fact enforce such remedies—which is far from the practice in Japan.

Conflict between the Constitution and the ICCPR is not inevitable. The Japanese government clearly could implement its claim that the constitutional rights track the ICCPR’s guarantees by limiting the
scope of the public welfare limitation introduced into the Constitution by the government during negotiations with SCAP. In its recently submitted Fourth Periodic Report, the government of Japan seems, momentarily, to take that position, but in fact it hedges:

The Constitution, which refers only to the “public welfare” as grounds for restricting human rights, seems to be different from the International Covenant on Civil and Political Rights which specifies the grounds for restricting individual rights. However, the Constitution applies substantially the same grounds as the Covenant, through elaborating the content of the concept of “public welfare”

The Constitution is Japan’s supreme law, and supersedes the Covenant in domestic effect. However, since the Constitution can be interpreted as covering the same range of human rights as the Covenant, as outlined above, there can be no conflict between the Constitution and the Covenant.

The government implies that there is not a mismatch between constitutional and ICCPR guaranteed rights, that the public welfare doctrine is shorthand for the specific limitations spelled out in the Covenant’s substantive provisions and that there “can be no conflict” between the two sources of law. Groups and individuals inside Japan strongly disagree with this claim by the government, most notably the Japan Federation of Bar Associations and the Japanese Civil Liberties Union. In addition some Japanese judges disagree with this claim. Around the time of the public rebuke of the Japanese judiciary by the Human Rights Committee in 1993-94, a few judges began to recognize and enforce claims based on the ICCPR.

B. Judicial Responses Since 1993

Around 1993 a shift in lower court opinions appeared as these courts began to recognize international human rights principles in their opinions. Despite pressure from litigants and the Human

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Footnotes:

274 But not all claims can be harmonized. For example, Article 20 of the ICCPR obliges State Parties to prohibit by law propaganda for war, and any advocacy of national, racial or religious hatred. Japan has no such laws and has been criticized by the Human Rights Committee for failure to enact such statutes. See id. at art. 20.


Rights Committee, recent Supreme Court decisions make it unclear whether this trend will continue. The lower courts seem to have begun to change around 1993 and as a result the situation is rather fluid. One possibility is a repeat of the 1970s when lower courts diverged from the direction of an extremely conservative Supreme Court only to be brought back into line by overturned cases and punishment of disobedient lower court judges. Another possibility, however dim, is that the Japanese judiciary as a whole is changing with Japanese society and that the Supreme Court along with the lower courts may be tentatively exploring the principled implementation of the human rights treaties ratified by Japan. Because the temporal sequence seems important, the cases will be discussed in chronological order, even though in two instances both a district court decision and the related high court ruling are both described.

To make the shift clear, it may be useful to summarize a typical, pre-1995 lower court case illustrating the dismissive treatment given to claims based on international human rights treaties Japan has ratified. On May 23, 1991, the Tokyo District issued a decision on the legality of treating children born out of wedlock differently from legitimate children in domicile registrations. A couple living in Musashino City, who chose not to register their marriage with the city since registering would have required one of them to adopt the other's surname, had a child and sought to register its residency with the city. The city, acting under a city ordinance issued under its discretionary authority under the law, listed the child in the register merely as a child (ko), rather than as the first son/daughter of the parents. The parents challenged the city's action, relying on: Articles 13 and 14 of the Constitution; Articles 17 (interference with privacy and the family), 24 (prohibition of discrimination against chil-

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See Judgment of 23 May 1991, Tokyo District Court, 761 HANREI JIHÔ 174. Japanese citizens are required by law to be registered as members of a family (koseki system), and as domiciliaries of the city or town in which they reside. The legal regulation of the family system has been revised to bring it into conformity with the present Constitution. See Hideo Tanaka, Legal Equality Among Family Members in Japan—The Impact of the Japanese Constitution of 1946 on the Traditional Family System, 53 S. CAL. L. REV. 611, 634 (1980) (explaining the reorganization of the family to fit in with the new Constitution). But see Tamie L. Bryant, For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan, 39 UCLA L. REV. 109 (1991). The residential registration system (jiminhyô) is established under the Residential Registration Law (jimin kihon daichô hô) with a certain degree of discretion to municipalities over the details of the registers.

In this case, on appeal, the Tokyo High Court found that the city's treatment of the plaintiff had been unreasonably discriminatory. Because the city's practice changed and every child is now registered merely as a "child" (ko), the Tokyo High Court dismissed the appeal for lack of standing. See Judgment of 22 March 1995, Tokyo High Court, 1529 HANREI JIHÔ 29. This case exactly spans the transition in judicial posture discussed in this section.

For the requirement of one surname and its impact, see Bryant, supra note 277, at 150-53.

The use of the term "child" in this context, rather than a term which indicates sex and birth order, would clearly indicate that the child is illegitimate. Since copies of the residential register must be produced for many transactions in Japan, such as entering school or moving into rented housing, the illegitimacy of the child would be publicized.
dren based on birth) and 26 (equal protection) of the ICCPR; and Article 25(2) of the Universal Declaration of Human Rights. The Tokyo District Court held that there was no violation of any of these provisions. The judges reasoned that since the Civil Code, which provides that a marriage is effective only upon registration with the government, distinguishes between legitimate and illegitimate children, and the purpose of this distinction (protection of the family) is proper, hence the city’s ordinance was reasonable. There was no attempt to state the standard of reasonableness nor to distinguish between the standard of reasonableness under the Constitution and that under the ICCPR provisions.

But on June 23, 1993, the Tokyo High Court handled a claim based on the ICCPR and the Convention of the Rights of the Child in a far different manner.320 The plaintiff, born out of wedlock, challenged a provision of the Civil Code which states that the intestate share guaranteed by law to an illegitimate child shall be one-half of the share guaranteed to a legitimate child. He claimed that this distinction violated Article 14(1) of the Constitution, Article 24 of the ICCPR, and Article 2(2) of the Children’s Rights Treaty among others. The Tokyo High Court found that the provision violated the Constitution, but went on further to state that the legitimate objective of protecting the family must be reconciled with respect for the human rights of illegitimate children.321

This stunning decision from the Tokyo High Court, which is second only to the Supreme Court in prestige, received a lot of attention. When two more decisions in favor of plaintiffs who relied on international human rights law appeared in 1994, there seemed to be the beginning of a trend.

The first case, decided by the Nara District Court involved another consequence of Japan’s differential treatment of illegitimate children.322 According to an administrative directive involving the application of the Child Support Payment Law (Jidō Fuyo Tente Hō), a child born out of wedlock loses the right to receive child support payments from the state if the biological father legally recognizes the child as his own. Thereafter, the child can only receive benefits if the father willfully abandons support for more than one year. If the biological parents are married and then divorce, however, the child may receive public support immediately. In this case, the mother argued that the loss of benefits to her child reflected unequal treatment that violated

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320 See Judgment of 23 June 1993, Tokyo High Court, 1465 Hanrei Jihibō 35; Iwasawa, supra note 247, at 283.

321 The court’s reasoning is not completely clear, but it seems to use ICCPR and CRC as means to interpret the constitutional provision. See Iwasawa, supra note 247, at 283 (quoting a portion of the decision). Actually the CRC would not have been effective in Japan until almost a year later, in May 1994, but the court seemed to take into consideration the contents of the treaty in its reasoning.

Article 14(1) of the Constitution, Article 24(1) of the ICCPR and Article 2(1) of the Children’s Rights Treaty. The Nara District Court agreed. It held that the directive violated the Japanese Constitution. Although the District Court found that there was no need to address the treaty based claims, the allegations of international law violations seemed to influence the court’s interpretation of the Constitution.

The second case decided by the Osaka High Court was the high water mark for this line of cases and merits a detailed description. The plaintiff, a Korean political leader, refused to be fingerprinted again when he applied for a replacement of his damaged registration card, as the Alien Registration Law required. In the police investigation following his refusal, the plaintiff admitted in a signed statement all the alleged facts and produced trial appearance guarantees signed by politicians and community leaders. The police already possessed the only other evidence, the original, laundry-damaged card. The plaintiff, however, declined repeated requests to appear for “voluntary” questioning, arguing there was no legitimate reason for interrogation since the only remaining issue was purely legal: whether the fingerprinting requirement was valid? The police secured an arrest warrant and seized the plaintiff at home in the early morning hours. At the police station, the plaintiff was strip-searched, forcibly fingerprinted, and held for the day. While in custody, he was interrogated by both the police and a public prosecutor; yet, because all relevant facts had already been admitted, both sessions were brief. The plaintiff claimed the arrest was an illegal abuse of authority and that the legal requirement of fingerprinting requirement for alien registration violated Articles 13 and 14 of the Constitution, and Articles 7 (degrading treatment) and 26 (prohibition against discrimination/equal protection) of the ICCPR. Thus, the central issue raised at trial was the correct method of interpreting the scope of protection under international human rights treaties.

The Osaka High Court held that the arrest violated the Criminal Procedure Law and that the fingerprinting requirement of the Alien Registration Law violated Articles 13 and 14 of the Constitution, and Articles 7 (degrading treatment) and 26 (prohibition against discrimination/equal protection) of the ICCPR. The court also held that there is an accepted method of interpreting the ICCPR under international law

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and that, despite apparent similarities in terminology between the Covenant and the Constitution, Japanese constitutional analysis and Japanese legal doctrines should not be used to determine the meaning of the Covenant. The court also noted that the ICCPR significantly expands individual rights in Japan since the protection against degrading treatment is not a part of Japanese domestic law. The court awarded to the plaintiff 400,000 yen in compensation, an unusually large amount to be awarded against the state in a human rights case at the time. The defendants, Kyoto Prefecture and the national government, appealed to the Supreme Court, where the decision was overturned.

Even before the Supreme Court’s decision in the fingerprinting case, the Japanese Supreme Court may have signaled its displeasure with this developing line of case law in a delphic opinion in July of 1995. The Supreme Court ruled en banc, by a ten to five margin, that the Civil Code provision allowing an illegitimate child to inherit only half the share to which a legitimate child is entitled is constitutional. The majority did rule on ICCPR guaranteed rights, but referred in passing to Article 24 of the ICCPR. The five dissenting justices asserted the importance of Article 26 of the ICCPR, indicating that the Court was divided on the appropriate legal weight to be given to human rights treaties in the Japanese legal system.

Later in 1995, a three-judge panel of the Osaka High Court, headed by the same chief judge who had authored the 1994 ground-breaking fingerprinting/police abuse decision, Judge Yamanaka Noriyuki, overruled the Nara District Court decision invalidating the differential provision of public support for legitimate and illegitimate children. The holding possibly reflects the Supreme Court’s negative signal. The Osaka High Court held that the right to social security, found in Article 25 of the Constitution, is subject to wide legislative discretion and that the differential treatment based on a child’s illegitimacy is within that legislative discretion and, therefore, did not violate the ICCPR.

Despite setbacks in the area of family law, pressure from the lower

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254 See Gov't Appeals Ruling Over Arrest of Fingerprint Refusers, supra note 283.
255 See id; see supra notes 302 and accompanying text for discussion of the Supreme Court’s decision.
256 See Judgment of 5 July 1995, Supreme Court, 1540 HANREI 3; see also Discrimination Against Illegitimate Child Constitutional, KYODO NEWS INT’L, July 10, 1995, available in LEXIS, IAC (SM) Newsletter Database (TM), Japan Policy & Politics. The plaintiffs were different from those in the 1991 Tokyo District Court case, see supra note 277 and accompanying text, but the challenged provision, Civil Code art. 900, was the same.
257 See Judgment of 5 July 1995, Supreme Court, 1540 HANREI 3.
258 See Judgment of 21 November 1995, Osaka High Court, 1559 HANREI JIHÔ 26, rev’d Judgment of 28 September 1994, Nara District Court, 1559 HANREI JIHÔ 31; see also supra note 282 and accompanying text.
259 See KENPO art. 25 (“In all spheres of life, laws shall be designed for the promotion and extension of social welfare, and security, and of freedom, justice and democracy.”).
courts to recognize and to enforce ICCPR-based rights has continued in two other legal realms: the rights of prisoners and the rights of minorities. Individuals incarcerated in Japan have very limited access to the outside world. A prisoner in Tokushima prison who sought to bring a civil suit for damages against the national government for alleged violent treatment by warders had difficulty consulting with his team of three lawyers. The prison rules provided that only the lawyer appealing the original conviction could meet with the prisoner without a prison official present. Since the consultations at issue did not concern a criminal appeal, the prisoner's conversations about the civil suit against the prison had to be carried out in the presence and hearing of prison officials. Furthermore, the regulation limited lawyers' visits to a thirty-minute maximum. The prisoner and his attorneys sued, arguing that these prison rules violated Article 14(1) of the ICCPR, which provides the right to equality before the courts and tribunals, by interfering with the attorney-client relationship. The Tokushima District Court agreed. It broadened the application of the ICCPR in the Japanese legal system and placed it above statutes in terms of legal import. The court held that the rules themselves were legal because they allowed for exceptions in special circumstances with the permission of the head of the prison, but further held that the regulation should be interpreted in accordance with the ICCPR and that the prison head must not have discretionary power to determine under what circumstances exceptions should be permitted. The court further concluded that consultations between prisoners and lawyers for civil cases should be freely permitted, except where there is reasonable cause for restriction, such as in the case of criminal defense consultations. In the instant case, the court found that the imposition of a 30-minute limit was illegal under Article 14(1) of the ICCPR and violated the prisoner's constitutional right to consult an attorney and the lawyers' implied constitutional right to defend a client. However, the court determined that the presence of the guard during the attorney-client consultation was legal. The court awarded modest monetary compensation to the prisoner and each of his attorneys.

In March of 1997, the Sapporo District Court delivered its decision in the Ainu Rights case. The Ainu, an indigenous people of Northern Japan, are physically and culturally distinct from the major-

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21 The court awarded the prisoner 500,000 yen and 100,000, 200,000 and 350,000 yen respectively to his three lawyers.
In the Nibutani area of Hokkaido, the prefectural government confiscated sacred Ainu land for the construction of a public dam. The Ainu who formerly owned the land sued the Hokkaido Committee for Expropriation, asking the Court to void the Committee's decision to confiscate this land, and arguing that the decision violated Article 13 of the Constitution and Article 27 of the ICCPR, both of which protect minorities. The Sapporo District Court agreed that the taking of the land violated both provisions of the Constitution and the ICCPR, but the court failed to provide the plaintiffs with a remedy. Since the dam had already been built, the Court concluded that the Ainu ruins and religious sanctuary were unrecoverable. Furthermore, the court concluded that destruction of the dam would not benefit the public welfare. Although technically this decision advances recognition of human rights through the direct application of the ICCPR, the government hailed the case as a victory.


See id. at para. 16.

See id. at para. 17.

See id. at para. 37.

See id. at para. 35-37.

The statutory ground for the ruling was Article 31 of the Administrative Litigation Act which provides that if revocation inflicts extreme damage on the public interest and the court, considering all the circumstances, including the damage to the plaintiffs, finds that revocation is not in conformity with the public welfare, then the court may declare that the administrative decision is illegal but nevertheless still dismiss the suit. There was no monetary award because Hokkaido Prefecture had, when the expropriate was executed, deposited funds with the Bureau of Law Affairs which could be withdrawn at will by the plaintiffs. See id. at para. 37.

Given the difficulty in obtaining a restraining order to suspend construction of public works such as a dam (a "preliminary disposition" comparable to a temporary restraining order for public works requires a showing of "obvious necessity" for a suspension of the order) and the drawn-out process of civil litigation in Japan where a trial typically takes two years to reach a decision, it is quite possible that a court will again recognize that the rights of a minority group have been violated but fail to provide a remedy.

The inadequacy of the protection of minority rights in Japan was discussed extensively during the hearing on the Fourth Periodic Report before the Human Rights Committee in October 28-29, 1998. See infra notes 305-310. The Japanese government took the position that the rights of minorities in Japan are respected because they have exactly the same rights as other citizens. Committee member Sheinin of Finland pointed out that the ICCPR contains a specific provision for the protection of minorities (Article 27) because of a special need for the protection of their rights. He then cited the Nibutani Dam Case with its underlying public welfare rationale to justify the refusal of a remedy as a case in point:

And here the government, and partly also the court, used the justification of public welfare, as it is generally used in the interpretation of the Japanese Constitution. And this is precisely the point—the need for Article 27 of the Covenant is caused by the fact that minorities require protection beyond the test of public welfare of common good. And our Committee has in its case law under Article 27 emphasized that the test is not the public welfare, the test is the welfare and continued benefit of the minority culture in question, is in particular the culture of indigenous people. So of
Finally, the appeal of the Tokushima prisoner's case resulted in an even firmer stance by the Takamatsu High Court against the state's intrusion into the attorney-client relationship. The Court generally affirmed the lower court decision but went further with respect to the presence of guards to listen to the consultation, ruling that in some cases, including the instant one, the presence of a guard is illegal.

A turning point may have come in this line of cases, however, with a decision by the Supreme Court in the appeal of the Osaka High Court decision in the abusive arrest case discussed above. On September 7, 1998, the Supreme Court overturned the decision holding that given the plaintiff's background of links to a political organization, it could not be said that there was manifestly no reason to arrest him after he had declined five times to be interrogated voluntarily. The Supreme Court made no finding of a positive reason for the arrest, only that it could not be said that it was apparent that there was no reason to arrest him. That is, the usual standard in Japanese constitutional law of extreme deference to the executive was applied. Despite extensive arguments by the plaintiff's attorneys on the ICCPR claims, the very short decision by the Court contains absolutely no reference to the ICCPR, not even a reason for not dealing with the plaintiff's claims. The practice of rejecting a claim without addressing it is not unusual in the Japanese judiciary, but it takes on extra significance in this case given the apparent momentum in the lower courts to broaden the scope of individuals' rights in Japan through the recognition of the rights provided in the ICCPR. The Supreme Court seems to be sending a chilling signal to the lower courts.

C. Recent Evaluation of Japanese Compliance Before the Human Rights Committee

The use of international human rights law by groups and individuals pressing for the protection of human rights in Japan means
the government of Japan must be publicly accountable in an international forum for its actions. Only six weeks after the Supreme Court ignored the ICCPR claims in the abusive arrest case discussed above, the government of Japan defended its human rights record and its implementation of the ICCPR before the Human Rights Committee. Japanese NGOs were well represented with more than 120 counter reports submitted to the Committee. Despite the fact that the Committee had five years earlier in its concluding observations to the hearings on the Third Periodic Report expressed eight principle subjects of concern and had made four specific recommendations for change, the government of Japan in the intervening time had taken virtually no action. The Committee found the arguments made by the government representatives even more frustrating. Repeatedly, the representatives simply asserted that they considered their domestic laws and practices, which do not conform to Covenant, to be reasonable. One representative even flatly informed the Committee that the differential treatment of children born out of wedlock with respect to intestate share is not unreasonable and hence not a violation of Article 24 or 26 of the ICCPR. The representative made this argument even though the Committee had informed the government five years earlier in concluding observations that “discrimination in their right to inherit is not consistent with Article 26 of the Covenant.” The Chair, Madame Chanet, countered in her final statement that the government of Japan seems to misunderstand the role of the Committee and that there is some sort of “blockage” in the positions taken by the government.

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534 Since Japan has not declared under Article 41 of the ICCPR its acceptance of the Committee’s competence to mediate complaints against Japan by other states, or ratified the First Optional Protocol, which provides for complaints by individuals to the Committee, the only mechanism for the international monitoring of Japan’s implementation of the ICCPR is periodic reporting to the Committee under Article 40.


537 See Christine Chanet, Chairperson, Remarks at the Human Rights Committee Meeting on the Fourth Periodic Report (Oct. 28-29, 1998) (on file with Author). The Committee was especially distressed by the representatives use of statistics to justify human rights violations. For example, the government sought to show that its extremely restrictive prison rules were not violative of human rights because in a sampling of prisoners surveyed at their time of release in 1997 and 1998 nearly 80 percent stated that they had not found the prison rules very difficult. Committee member Kretzmer of Germany responded:

I do want to put on the record my reaction to one approach of the Japanese delegation, and I am referring to the use of statistics in order to justify human rights violations. Human rights are not dependent on opinion polls, and therefore I must say right now that representing us with statistics
The Committee responded by issuing an unusually long and detailed set of concluding observations that contain thirty principal subjects of concern and recommendations. The Committee once again attacked the public welfare limitation on human rights as "vague and open-ended;" criticized the government's position that its restrictive domestic laws were "reasonable discrimination;" and cited several specific laws which should be changed or abolished, such as the requirement under the Alien Registration Law that permanent residents aliens carry an alien registration card at all times, the issue rejected by the Supreme Court six weeks earlier. The Committee pointed to numerous areas where the ICCPR is not yet properly implemented, such as the rights of aliens, persons in custody, children born out of wedlock, women, prisoners, especially those on death row, police investigations including the practice of obtaining confessions under duress, Habeas Corpus limitations, the restriction of freedom of expression by the Central Labor Relations Commission and the refusal of the government to compensate disabled women who had been subjected to forced sterilization. The Committee strongly urged two institutional changes: an extensive educational program for training judges, prosecutors and administrative officers in the government's obligations under the ICCPR, and the establishment of an independent authority for the investigation of human rights violations with the power to give redress to complainants. Essentially, the Committee urged the government really to carry out its obligations under the Covenant and provide truly effective remedies to violations of human rights, starting with a reform of the judiciary.

Chanet summed up the present situation at the close of the hearing when she criticized the government's dismissive attitude towards the views of Japanese NGOs and pointed out the convergence of which show that treating people in the manner that has been described and that has not been denied by the Japanese delegation, that a large number of people accept that is not in my mind an acceptable reply.


See generally Japan, Human Rights Committee, 1998 Concluding Observations, supra note 305.

See id. at paras. 8, 11. The government delegation antagonized the Committee by misleading it. When asked for actual court cases that showed the recognition rights guaranteed under the ICCPR by courts and the effective implementation of the Covenant, a government spokesman cited the Osaka High Court decision in the abusive arrest of a fingerprint refuser and the Takamatsu High Court decision on prisoner rights. See supra note 301 and accompanying text. But he did not inform the Committee that in both cases the government sought to overturn these decisions and that the Supreme Court had six weeks earlier overturned the Osaka High Court decision. When the delegation from the Japanese Federation of Bar Associations informed the Committee of these facts, Committee member Rajsoomer Lallah of Mauritius, himself a former Supreme Court Justice, obtained the unusual permission to ask a follow-up question right to cross examine the delegation about its misleading statements. The delegation could not provide a reply to his questions. The government simply does not take seriously its reporting obligation under the ICCPR.
views of the Committee and Japanese NGOs. As in the winter of 1946, the indigenous human rights movement once again finds support and encouragement from a source outside Japan in a struggle with an extremely conservative regime that is truly hostile to human rights. Once again, the balance is teetering. Unfortunately, it is difficult to see progress on human rights in the near future because after the close of the hearings the government promptly announced that it would not implement the recommendations of the Committee. Also unlikely in the near term is a serious commitment by the Japanese judiciary to broaden the protection of human rights against government encroachments either through a direct application of Covenant rights or a reappraisal of constitutional protections in the light of the government’s obligations under international human rights treaties. However, the various NGOs and individuals committed to popular sovereignty and human rights in Japan do draw strength from outside confirmation of their efforts. Already articles analyzing the Committee’s position are appearing in popular and scholarly journals; new waves of lawsuits and educational programs will undoubtedly follow. At stake ultimately will be control of the Constitution and its human rights component. The fight is not over alien influences, but over the control of the state.

CONCLUSION

Far from being a mere alien transplant that failed, the Japanese Constitution is an important element of an ongoing process of social change in Japan that has been unfolding for more than one hundred years. The Japanese Constitution, with its explicit, albeit qualified, commitment to human rights, arose from many forces within Japanese society, the balance of which has been tipped by the United States, first in favor of pacifism and enforceable individual rights, and later in favor of remilitarization and the reimposition of centralized, conservative authority under the LDP over popular sovereignty. As a result, Japanese society has become politically centralized, with a moribund democracy and little public deliberation of the country’s policies and goals. The consequences for the legal system have been a gradual reinterpretation of the Constitution to reduce its requirements to what the LDP-controlled Diet and executive say they are.

51 See Chanet, supra note 308.
willing to do, a result eerily reminiscent of the Meiji Constitution. A by-product of this process apparently is the serious, albeit bureaucratic and thus somewhat obscured intrusion of political manipulation of the Japanese judiciary by the power brokers of the LDP.

Given such a grim picture it is all the more remarkable that Japanese citizens, including socially marginalized individuals, resident aliens and their lawyers have continued over the last fifty years to turn to the courts for the enforcement of constitutional guarantees. A considerable sector of the Japanese population maintains that vision of the Constitution as a source of personal and legal rights and as a set of limitations on the exercise of power by the legislative and executive branches, despite a growing case law to the contrary. As constitutional avenues atrophied, these individuals and groups pressing from below for social change have turned increasingly to international human rights law to interpret, supplement or replace constitutional guarantees.

Japan is at a critical juncture. Its postwar economic and political mechanisms have outlasted their usefulness and now obstruct the orderly development of Japanese society. As Japanese society enters a period of convulsive change, the Constitution will assume increasing importance as a framework for containing an orderly struggle over the restructuring of Japanese society. The concern is that the Constitution has been so weakened and eviscerated as a meaningful document that it cannot fulfill this role. As one famous Japanese legal scholar, Professor Okudaira, wrote in 1993:

> At the moment, I cannot systematically describe and clearly evaluate what constitutes the characteristics of the function (instead of the text) of the Japanese Constitution and whether these characteristics, if any, bode well or ill for the future of Japan. Nevertheless, I am somehow rather more optimistic than pessimistic about the healthy development of modern constitutionalism in Japan—on the condition that it will not confront an unexpected, extraordinary crisis, either political or economic, in or out of the country's domain.¹³

Constitutionalism in Japan is strong enough for the ordinary shocks of life but may not be sufficient for severe or revolutionary conditions. One can only hope that Professor Okudaira is wrong and that the sectors of Japanese society which support the Constitution and its ideals will prevail as the Meiji Revolution continues to unfold in Japan.

¹³ See Okudaira, supra note 7, at 32.
CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

Japan*

19 November 1998

1. The Committee considered the fourth periodic report of Japan (CCPR/C/115/Add.13 and Corr. 1) at its 1714th to 1717th meetings (CCPR/SR.1714-1717), held on 28 and 29 October 1998, and adopted the following concluding observations at its 1726th and 1727th meetings (CCPR/C/SR.1726-1727), held on 5 November 1998.

A. Introduction

2. The Committee expresses its appreciation for the frank and forthright replies given by the delegation to the issues raised by the Committee and the clarifications and explanations given in answer to the oral questions put by the members of the Committee. The Committee is also appreciative of the presence of the large delegation representing various branches of the Government, which demonstrates the seriousness of the State party in meeting its obligations under the Covenant. The Committee also commends the State party for having given wide publicity to its report and to the work of the Committee. It welcomes the large number of lawyers and non-governmental organizations present during the discussion of the report.

B. Positive aspects

3. The Committee commends the Government for the ongoing process of bringing its legislation into line with the provisions of the Covenant. It welcomes the enactment of the Law on the Promotion of Measures for Human Rights Protection, as well as amendments to other laws such as the Equal Employment Opportunities Law, the Standard Labour Law, the Immigration Control and Refugee Recog-

nition Act, the Penal Code, the Child Welfare Law, the Election Law and the Entertainment Business Law, and the draft bill aimed at punishing Japanese nationals involved in child prostitution and child pornography.

4. The Committee notes with satisfaction the establishment, at Cabinet level, of the Council for the Promotion of Gender Equality, aimed at investigating and developing policies for the achievement of a gender-equal society and its adoption of the Plan for Gender Equality 2000. The Committee also notes the measures being taken by the human rights organs of the Ministry of Justice to deal with the elimination of discrimination and prejudice against students at Korean schools in Japan, children born out of wedlock and children of the Ainu minority.

5. The Committee welcomes the abolition of restrictions on women’s eligibility to take the national public service examination, the abolition of discriminatory compulsory retirement, and of dismissals on grounds of marriage, pregnancy or childbirth.

C. Principal subjects of concern and recommendations

6. The Committee regrets that its recommendations issued after the consideration of the third periodic report have largely not been implemented.

7. The Committee stresses that protection of human rights and human rights standards are not determined by popularity polls. It is concerned by the repeated use of popularity statistics to justify attitudes of the State party that may violate its obligations under the Covenant.

8. The Committee reiterates its concern about the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of “public welfare”, a concept which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant. Following upon its previous observations, the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant.

10. More particularly, the Committee is concerned that there is no independent authority to which complaints of ill-treatment by the police and immigration officials can be addressed for investigation and redress. The Committee recommends that such an independent body or authority be set up by the State party without delay.

11. The Committee is concerned about the vagueness of the concept of “reasonable discrimination”, which, in the absence of objective criteria, is incompatible with article 26 of the Covenant. The Committee finds that the arguments advanced by the State party in support of this concept are the same as had been advanced during the consid-
eration of the third periodic report, and which the Committee found to be unacceptable.

12. The Committee continues to be concerned about discrimination against children born out of wedlock, particularly with regard to the issues of nationality, family registers and inheritance rights. It reaffirms its position that pursuant to article 26 of the Covenant, all children are entitled to equal protection, and recommends that the State party take the necessary measures to amend its legislation, including article 900, paragraph 4, of the Civil Code.

13. The Committee is concerned about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools. The Committee draws the attention of the State party to General Comment No. 23 (1994) which stresses that protection under article 27 may not be restricted to citizens.

14. The Committee is concerned about the discrimination against members of the Ainu indigenous minority in regard to language and higher education, as well as about non-recognition of their land rights.

15. With regard to the Dowa problem, the Committee acknowledges the acceptance by the State party of the fact that discrimination persists vis-à-vis members of the Buraku minority with regard to education, income and the system of effective remedies. The Committee recommends that the State party take measures to put an end to such discrimination.

16. The Committee is concerned that there still remain in the domestic legal order of the State party discriminatory laws against women, such as the prohibition for women to remarry within six months following the date of the dissolution or annulment of their marriage and the different age of marriage for men and women. The Committee recalls that all legal provisions that discriminate against women are incompatible with articles 2, 3 and 26 of the Covenant and should be repealed.

17. The Committee reiterates the comment made in its concluding observations at the end of the consideration of Japan's third periodic report that the Alien Registration Law, which makes it a penal offence for alien permanent residents not to carry certificates of registration at all times and imposes criminal sanctions, is incompatible with article 26 of the Covenant. It once again recommends that such discriminatory laws be abolished.

18. Article 26 of the Immigration Control and Refugee Recognition Act provides that only those foreigners who leave the country with a permit to re-enter are allowed to return to Japan without losing their
residents status and that the granting of such permits is entirely within the discretion of the Minister of Justice. Under this law, foreigners who are second- or third-generation permanent residents in Japan and whose life activities are based in Japan may be deprived of their right to leave and re-enter the country. The Committee is of the view that this provision is incompatible with article 12, paragraphs 2 and 4, of the Covenant. The Committee reminds the State party that the words “one's own country” are not synonymous with “country of one's own nationality”. The Committee therefore strongly urges the State party to remove from the law the necessity to obtain a permit to re-enter prior to departure, in respect of permanent residents like persons of Korean origin born in Japan.

19. The Committee is concerned about allegations of violence and sexual harassment of persons detained pending immigration procedures, including harsh conditions of detention, the use of handcuffs and detention in isolation rooms. Persons held in immigration detention centres may remain there for periods of up to six months and, in some cases, even up to two years. The Committee recommends that the State party review the conditions of detention and, if necessary, take measures to bring the situation into compliance with articles 7 and 9 of the Covenant.

20. The Committee is gravely concerned that the number of crimes punishable by the death penalty has not been reduced, as was indicated by the delegation at the consideration of Japan's third periodic report. The Committee recalls once again that the terms of the Covenant tend towards the abolition of the death penalty and that those States which have not already abolished the death penalty are bound to apply it only for the most serious crimes. The Committee recommends that Japan take measures towards the abolition of the death penalty and that, in the meantime, that penalty should be limited to the most serious crimes, in accordance with article 6, paragraph 2, of the Covenant.

21. The Committee remains seriously concerned at the conditions under which persons are held on death row. In particular, the Committee finds that the undue restrictions on visits and correspondence and the failure to notify the family and lawyers of the prisoners on death row of their execution are incompatible with the Covenant. The Committee recommends that the conditions of detention on death row be made humane in accordance with articles 7 and 10, paragraph 1, of the Covenant.

22. The Committee is deeply concerned that the guarantees contained in articles 9, 10 and 14 are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the
23-day period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defence counsel under article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect. The Committee strongly recommends that the pre-trial detention system in Japan should be reformed with immediate effect to bring it in conformity with articles 9, 10 and 14 of the Covenant.

25. The Committee is concerned that the substitute prison system (Daiyo Kangoku), though subject to a branch of the police which does not deal with investigation, is not under the control of a separate authority. This may increase the chances of abuse of the rights of detainees under articles 9 and 14 of the Covenant. The Committee reiterates its recommendation, made after consideration of the third periodic report, that the substitute prison system should be made compatible with all requirements of the Covenant.

24. The Committee is concerned that rule 4 of the Habeas Corpus Rules under the Habeas Corpus Law limits the grounds for obtaining a writ of habeas corpus to (a) the absence of a legal right to place a person in custody and (b) manifest violation of due process. It also requires exhaustion of all other remedies. The Committee is of the view that rule 4 impairs the effectiveness of the remedy for challenging the legality of detention and is therefore incompatible with article 9 of the Covenant. The Committee recommends that the State party repeal rule 4 and make the remedy of habeas corpus fully effective without any limitation or restriction.

25. The Committee is deeply concerned about the fact that a large number of the convictions in criminal trials are based on confessions. In order to exclude the possibility that confessions are extracted under duress, the Committee strongly recommends that the interrogation of the suspect in police custody or substitute prisons be strictly monitored, and recorded by electronic means.

26. The Committee is concerned that under the criminal law, there is no obligation on the prosecution to disclose evidence it may have gathered in the course of the investigation other than that which it intends to produce at the trial, and that the defence has no general right to ask for the disclosure of that material at any stage of the proceedings. The Committee recommends that, in accordance with the guarantees provided for in article 14, paragraph 3, of the Covenant, the State party ensure that its law and practice enable the defence to have access to all relevant material so as not to hamper the right of defence.

27. The Committee is deeply concerned at many aspects of the prison
system in Japan which raise serious questions of compliance with articles 2, paragraph 3 (a), 7 and 10 of the Covenant. Specifically, the Committee is concerned with the following:

(a) Harsh rules of conduct in prisons that restrict the fundamental rights of prisoners, including freedom of speech, freedom of association and privacy;

(b) Use of harsh punitive measures, including frequent resort to solitary confinement;

(c) Lack of fair and open procedures for deciding on disciplinary measures against prisoners accused of breaking the rules;

(d) Inadequate protection for prisoners who complain of reprisals by prison warders;

(e) Lack of a credible system for investigating complaints by prisoners; and

(f) Frequent use of protective measures, such as leather handcuffs, that may constitute cruel and inhuman treatment.

28. The Committee is concerned that the Central Labour Relations Commission refuses to hear an application of unfair labour practices if the workers wear armbands indicating their affiliation to a trade union. Such an action contravenes articles 19 and 22 of the Covenant. The Committee's view should be brought to the attention of the Central Labour Relations Commission.

29. Despite the amendment to the Business Entertainment Law, trafficking in women and insufficient protection for women subject to trafficking and slavery-like practices remain serious concerns under article 8 of the Covenant. In light of information given by the State party on planned new legislation against child prostitution and child pornography, the Committee is concerned that such measures may not protect children under the age of 18 when the age limit for sexual consent is as low as 13. The Committee is also concerned about the absence of specific legal provisions prohibiting bringing of foreign children to Japan for the purpose of prostitution, despite the fact that abduction and sexual exploitation of children are subject to penal sanctions. The Committee recommends that the situation be brought into compliance with the State party's obligations under articles 9, 17 and 24 of the Covenant.

30. The Committee continues to be gravely concerned about the high incidence of violence against women, in particular domestic violence and rape, and the absence of any remedial measures to eradicate this practice. The Committee is troubled that the courts in Japan seem to consider domestic violence, including forced sexual intercourse, as a normal incident of married life.
31. The Committee, while acknowledging the abolition of forced sterilization of disabled women, regrets that the law has not provided for a right of compensation to persons who were subjected to forced sterilization, and recommends that the necessary legal steps be taken.

32. The Committee is concerned that there is no provision for training of judges, prosecutors and administrative officers in human rights under the Covenant. The Committee strongly recommends that such training be made available. Judicial colloquiums and seminars should be held to familiarize judges with the provisions of the Covenant. The Committee's general comments and the Views expressed by the Committee on communications under the Optional Protocol should be supplied to the judges.

33. The Committee urges the Government to take action on the ground of these concluding observations and to consider them in the preparation of the fifth periodic report. It also recommends that the State party continue reviewing its laws, and making appropriate amendments, so as to bring its legislation into full conformity with the Covenant. The Committee recommends that the State party take measures to provide remedies to victims of violations of human rights and, in particular, that it ratify the Optional Protocol to the Covenant.

34. The Committee expects that in implementing these concluding observations the State party will engage itself in a dialogue with all domestic interested parties, including non-governmental organizations. The Committee urges the State party to ensure the wide dissemination of its report and of these concluding observations.

35. The Committee has fixed the date of submission of Japan's fifth periodic report to be October 2002.