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Forgotten People: A Judicial Apology for Leprosy Patients in Japan

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ABSTRACT

In 2016, the Japanese Supreme Court apologized for establishing a special tribunal for leprosy patients outside a standard courtroom. The Supreme Court initially admitted that the special tribunal was unconstitutional because the unfair procedure and trials discriminated against leprosy patients. The Supreme Court’s decision to establish exceptional courts at the time was not based on scientific research regarding leprosy. These patients were isolated in sanatoriums until 1996, when Parliament abolished the Leprosy Prevention Law. Then, in 2001, the Kumamoto district court accepted governmental responsibility for the legislative inaction that led to the government’s compulsory isolation policy. The Kumamoto court noted that the statute of limitations started in 2001, when the legislature abolished the Leprosy Prevention Law.

The Office of the Supreme Court is the public office responsible for managing the court’s human resources and facilities, and for rationally and efficiently operating the judicial system in order to exercise judicial power. The duties of the office include: internal control, administration of personnel, budget negotiation, and design of the judicial system.

Since the Japanese Constitution was established, some have argued that the Supreme Court’s power of administration was too enhanced in terms of the individual judges’ independence, as, in some cases, this independence emerged in the Court’s decisions. The Japanese Supreme Court’s official apology is a big step toward judicial integrity. This Article reviews the constitutionality of judicial administration in the leprosy case from the perspective that the legitimacy and validity of the judiciary depends on fairness and justice.

I

THE LEPROSY CASE AND THE SUPREME COURT

In 2016, the Japanese Supreme Court admitted moral responsibility and apologized for the government’s prior treatment of leprosy

patients.¹ The Court released a report detailing how its treatment of leprosy patients promoted discrimination and infringed on human dignity.²

In Japan, since before World War II (WWII) and up until 1996, the government applied a policy of isolation to leprosy patients.³ In 1907, the Meiji government passed a statute⁴ related to leprosy, which led to the forced imprisonment of homeless lepers in the sanatorium.⁵ The homeless lepers suffered serious discrimination and, to avoid imprisonment, they constantly relocated.⁶ In 1929, each prefecture started a campaign called the “No Leprosy Prefecture Campaign” to find and isolate these patients.⁷ Then in 1936, leprosy patients were forced into a national sanatorium by law.⁸

Around 11,000 patients were detained in a national sanatorium between 1936 and 1996.⁹ They were not permitted to marry, have children, or to hold employment outside the sanatorium.¹⁰ In essence, leprosy patients faced significant bias and prejudice—prejudice that was projected onto their relatives such that the families of leprosy patients tried to erase the existence of those patients from their family history in order to escape discrimination themselves.

After WWII, even though an effective medical treatment for leprosy had been developed and research determined that the infectious capacity of leprosy was weak, the government maintained its isolation

1 HANSEN BYOU TO RIYU TO SURU KAITEI BASHO SITEI NI KANSURU CHOUA HOUKOKUCHO [THE INVESTIGATION REPORT REGARDING VENUE OF THE COURT ON THE GROUND OF LEPROSY], 1, (Apr. 2016), http://www.courts.go.jp/vcms_lf/2804chousahouko_kusho.pdf (last visited May 29, 2017), [hereinafter HANSEN REPORT].

2 *Id.* at 1–7.

3 Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

4 Rai yobou ni kansuru ken [Instituting the Leprosy Prevention Law], Law No. 10 of 1907 (Japan).

5 Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

6 *Id.*

7 *Id.*

8 Rai yobou hou [Leprosy Prevention Law], Law No. 11 of 1907 (Japan).

9 Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

10 *Id.*

policy.¹¹ Following the Kumamoto district court's decision in 2001,¹² the office of the Supreme Court began researching how lepers were treated between 1948 and 1972.¹³ The resulting report revealed that the Court established a special tribunal to hear cases for leprosy patients in an isolated sanatorium starting in 1948.¹⁴ Judges were sent to this special tribunal even though Article 76¹⁵ of the Japanese Constitution strictly prohibits the establishment of special tribunals, only allowing an exception for cases involving parties suffering from an infectious disease.¹⁶ The Supreme Court approved ninety-five out of ninety-six applications from 1948 to 1972 for this exceptional tribunal—which was a remarkable feat, as only nine out of sixty-one applications involving tuberculosis patients were approved.¹⁷

The Supreme Court's report concluded that the procedure to establish this tribunal was illegal, that the discrimination against lepers was suspicious, and that the Court's establishment of a special tribunal reinforced the bias and prejudice against the lepers.¹⁸ The report further noted that by 1960, leprosy had been eradicated.¹⁹ Following the report's release, the Secretary General of the office of the Supreme Court publicly apologized on behalf of the Court.²⁰

This Article reviews the Court's apology and the independence of judges through the lens of Japanese constitutional law. One of the most notable aspects of the report is that although the apology was genuine, it came too late to help the victims. In fact, by the time the office of the Supreme Court issued the apology in 2016, twenty years passed since the isolation policy was abolished, and fifteen years passed since the 2001 Kumamoto court decision.²¹ It was not until 2013, when a leper victim group requested review, that the Court began its investigation,

¹¹ Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

¹² *Id.*

¹³ HANSEN REPORT, *supra* note 1, at 1.

¹⁴ *Id.* at 4–31.

¹⁵ *Id.*; NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 76., para. 2 (Japan).

¹⁶ HANSEN REPORT, *supra* note 1, at 7–10.

¹⁷ *Id.* at 4, 8.

¹⁸ *Id.* at 42–56.

¹⁹ *Id.* 32–38.

²⁰ Saikosai Choukan Fukaku Owabi [President of Supreme Court Apology], YOMIURI SHIMBUN (May 3, 2016), <https://mainichi.jp/articles/201604225/k00/00e/040/213000c?mode=print>.

²¹ HANSEN REPORT, *supra* note 1, at 39–42.

even though a 2005 study council report from the Japanese Bar Association already concluded that the special tribunal was illegal.²²

A second notable aspect of the report is that the report was unsatisfactory. The report did not explain why the Court delayed its review, did not provide a complete analysis with respect to suspicion, and did not conclude that the tribunal was unconstitutional. The Court created an expert committee composed of scholars and lawyers who surmised that the special tribunal for leprosy patients was unconstitutional for two reasons: first, the tribunal violated the equal treatment clause provided under Article 14²³ of the Constitution; and, second, the closed trial procedure for this tribunal violated the open trial clause under Article 82.²⁴

Although the Supreme Court heard the expert committee's analysis and noted the committee's opinion in its report, it refrained from concluding that the tribunal was unconstitutional and instead argued that, at the time of the decision, there were no materials or information available to approach the issue differently.²⁵

A third notable aspect of the report is that victim remedies were only quickly provided by the legislature, not by the judiciary itself.²⁶ In 2001, the Diet passed a special compensation statute for leprosy patients, however the patients complained that the Supreme Court did not find its policy unconstitutional.²⁷ As the guardian of the Constitution under Article 98, the Court should have protected those minorities who could not voice their own concerns in Parliament.²⁸ This is because the political process theory for judicial review was imported into Japanese constitutional law studies²⁹ such that when

²² *Hansen byou mondai ni kansuru kenshou kaigi* [Verification Committee Concerning Hansen's Disease Problem], JAPANESE L. FOUND., https://www.jlf.or.jp/work/hansen_report.shtml#saisyu (last visited May 29, 2017).

²³ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 14 (Japan).

²⁴ *Id.* at art. 82.

²⁵ HANSEN REPORT, *supra* note 1, at 1, 5, 8, 17, & 30.

²⁶ Hansen byou ryoyoujo tou ni taisuru hoshoukin no sikyuni kansuru houritsu [Act on Payment of Compensation for Hansen's Disease Recreation Area Residents,], Law No. 63 of 2001 (Japan).

²⁷ KOJI SATO, KENPŌ [CONSTITUTION] 628 (2011).

²⁸ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 98, para. 2 (Japan).

²⁹ SHIGENORI MATSUI, KENPŌ [CONSTITUTION OF JAPAN] 49 (Yuhikaku 2007). Matsui argues that the Constitution of Japan is a document of political process between the government and people. *Id.*

minorities cannot represent themselves in Parliament (the Diet), the judiciary is obligated to be their representative.³⁰

A fourth notable aspect of the report is that the report did not address the fact that the patients' isolation in the national sanatorium was discriminatorily suspicious and infringed on the right to movement under the Constitution.³¹ The Kumamoto district court explained that the right to movement is based on personal rights in Article 13 and economic rights in Article 22 of the Constitution.³² Some lawyers who attended the leprosy tribunals wrote that the patients wanted to leave the sanatorium immediately after entering, noting that the patients were not treated with dignity.³³ The Court's report analyzed only the procedure for creating the tribunal, but not the motivation behind the formation of this special tribunal.³⁴ The purpose of judicial independence under Article 76³⁵ is that neutral judges can hear complaints between parties and announce what the law is on the matter.³⁶ The special tribunal for leprosy patients calls into question the independence of the judiciary, as will be reviewed in Part III of this Article.

In 2016, the families of leprosy patients brought an action to the Kumamoto district court for damages under the State Redress Act (Redress Act).³⁷ The fifty-nine complaints asked for 5,000,000 yen per victim.³⁸ Legislation was passed with respect to the patients, but no compensation was provided to their families. Under Article 17 of the Constitution, the government is liable for the illegal exercise of governmental power by governmental officers.³⁹

³⁰ KOJI SATO, KENPŌ [CONSTITUTION] 628 (2011).

³¹ For an analysis on the right to move, *see* TOSHIHIKO NONAKA, ET AL., KENPŌ I [CONSTITUTION I] 459, 462 (Yuhikaku 2012), [hereinafter NONAKA ET AL. I].

³² NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13 (Japan).

³³ HANSEN REPORT, *supra* note 1, at 23.

³⁴ *Id.* at 42–59.

³⁵ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76, para. 3 (Japan).

³⁶ TOSHIHIKO NONAKA ET AL., KENPŌ II [CONSTITUTION II] 225–44 (Yuhikaku 2012), [hereinafter NONAKA ET AL. II]; SATO, *supra* note 27, at 575.

³⁷ Kokka Baishou Hō [The State Redress Act], Law No. 125 of 1947, art. 1 (Japan).

³⁸ Hansen byou, kazoku ga teiso, shuudan de kokka baishou seikyu, kumamoto chisai [Hansen Disease, Patient Families Brought Action Against Government Under State Redress Act], MAINICHI SHIMBUN (Feb. 15, 2016), <https://mainichi.jp/articles/20160216/k00/00m/040/082000c>.

³⁹ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 17 (Japan).

A. *The 2001 Kumamoto District Court*

Before delving further into the analysis of the Supreme Court's report, it is necessary to review the 2001 Kumamoto district court decision. In this case, the court found the Minister of Welfare liable under the Redress Act, stating that after 1965, it was no longer necessary to maintain the isolation policy, and therefore, Parliament should have passed relevant measures.⁴⁰ Thus, under the Redress Act, Parliament's inaction since 1965 warranted damages; however, the statute of limitation on the claim began running in April 1996, when the leprosy legislation was abolished.⁴¹

Article 41 of the Constitution provides that law-making power belongs solely to the Diet and that such power includes when and how statutes are passed.⁴² Both the action and inaction of the Diet falls under the Redress Act and judicial review; however, it is difficult to assert damages against the Diet, especially for neglecting to enact a specific bill, because the legislature is supposed to represent its constituents.⁴³ Thus, because the Diet has this direct voter connection through elections, the Diet has wide discretion over when and how statutes are enacted.⁴⁴ Voters judge the Diet's actions and inactions through elections; thus, judging the Diet's record does not typically fall under the purview of judicial review.⁴⁵ Under concrete judicial review in Japan, it is difficult to bring litigation to declare or confirm that a legislative action is unconstitutional.⁴⁶ However, it is possible for a plaintiff to assert a claim for damages under the Redress Act.⁴⁷ The Japanese judiciary has no power to obligate the Diet to pass, amend, or abolish bills or exercise alternative powers. In 1985 however, the Court held there was a specific condition under which the government could be held responsible under the Redress Act, and such extraordinary circumstances must involve the Diet's failure to pass a bill it was

⁴⁰ Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

⁴¹ *Id.*

⁴² NONAKA ET AL. II, *supra* note 36, at 9, 75, & 82; SATO, *supra* note 27, at 356–59.

⁴³ NONAKA ET AL. II, *supra* note 36, at 9, 39, & 75–82.

⁴⁴ *Id.* at 282–85.

⁴⁵ *Id.*

⁴⁶ *Id.* at 283–85; NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], arts. 76 & 81 (Japan).

⁴⁷ Saiko Saibansho [Sup. Ct.] Sept. 14, 2005, Heisei 13 (Gyo tsu) nos. 82, 83, (Gyo Hi) nos. 76, 77, 59(7) SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 2087 (Japan). In this case, the Supreme Court held the government liable under the State Redress Act for inaction to amend the Public Official Election Act prohibiting voters from living outside Japan. *Id.*

clearly obligated to pass.⁴⁸ Under this condition, the Diet is required to take legal responsibility for the lack of legislative action taken by individual members of the Diet.⁴⁹

Similarly, the 2001 Kumamoto court decision recognized damages caused by the government's leprosy isolation policy since 1960 and the inaction of the Diet since 1965.⁵⁰ The government under Prime Minister Junichiro Koizumi did not appeal the Kumamoto district court decision.⁵¹ Prime Minister Koizumi apologized and the Japanese Bar Association praised this apology.⁵² It is not common for citizen plaintiffs to win a case against the government under the State Redress Act.⁵³ Such an outcome was due to the fact that when litigation is commenced against the government under the State Redress Act, judges sent to the Ministry of Justice generally represent the government.⁵⁴ Judges are regularly sent for training to the Ministry of Justice for a certain period before returning to the judiciary.⁵⁵ Often, judges who previously represented the government in the Ministry of Justice also hear the case in which the government is sued under the Redress Act.⁵⁶ Thus, under the Redress Act, it is difficult to win a case seeking damages.

B. The Meiji Constitution to the Current Constitution

Under the Meiji Constitution, the Supreme Court (Dai Shin In) was established and the special tribunal and administrative court was

⁴⁸ Saiko Saibansho [Sup. Ct.] Nov. 21, 1985, Showa 50(0) no. 1240, 39(7) SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1512 (Japan). The 1985 Supreme Court case involved a person who was injured while shoveling snow off his roof. Following his injury, the individual could not leave his home to vote, and the Public Official Election Act had abolished home voting (At the time it was abolished, home voting was abused.). *Id.*

⁴⁹ NONAKA ET AL. II, *supra* note 36, at 283–84; SATO, *supra* note 27, at 636–41.

⁵⁰ Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

⁵¹ Hansen byou mondai no souki katsu zenmenteki kaiketsu ni muketeno naikaku souridaijin danwa [Statement by Prime Minister for Rapid and Comprehensive Remedy for Hansen Disease] (May 25, 2001), <http://www.mhlw.go.jp/topics/bukyoku/kenkou/hansen/hourei/4.html>.

⁵² *Id.*

⁵³ NONAKA ET AL. II, *supra* note 36, at 283–84; SATO, *supra* note 27, at 636–41.

⁵⁴ NONAKA ET AL. II, *supra* note 36, at 247; Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* 269 (Philip S.C. Lewis ed., 1994).

⁵⁵ Miyazawa, *supra* note 54, at 269–70.

⁵⁶ *Id.* at 271.

developed.⁵⁷ The Minister of Justice exercised its power of appointment to create the Supreme Court.⁵⁸ The Minister of Justice swayed judges who worked for administrative affairs in the Ministry by promoting those within the Ministry of Justice who rendered decisions in favor of the government.⁵⁹ Thus, those who wanted promotions within the Ministry of Justice rendered decisions in favor of the government.⁶⁰ The administrative court was established in Tokyo, and its decisions were final—no appeals were permitted to the general judiciary.⁶¹ As the *Kojima* case demonstrates in the next Part, although judicial independence was established, the independence of individual judges was comparatively weak under the strong Ministry of Justice.⁶²

After WWII, the previous Supreme Court was abolished and a new Supreme Court began functioning under the current Constitution.⁶³ Under the current Constitution, the Supreme Court and inferior courts (high, district family, and summary courts) were established under Article 76.⁶⁴ The President of the Supreme Court is appointed by the Emperor after the cabinet makes such a designation under Article 6.⁶⁵ Other Justices of the Supreme Court are appointed by the cabinet from a list of people nominated by the Supreme Court and the Emperor subsequently affirms the nominations.⁶⁶ Judges in inferior courts are appointed by the cabinet based on a list of judicial candidates prepared by the Supreme Court under Article 80 of the Constitution.⁶⁷

Unlike the U.S. Constitution, the Japanese Constitution prohibits special tribunals under Article 76(2).⁶⁸ This prohibition contains exceptions for hearing complaints of a specific status as well as certain

⁵⁷ DAINIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [Meiji Constitution, Constitution of the Empire of Japan], at art. 57 (Japan).

⁵⁸ NONAKA ET AL. II, *supra* note 36, at 240; SATO, *supra* note 27, at 62.

⁵⁹ IZUMI TOKUJI, WATASHI NO SAIKOUSAIBANSHO RON [MY PERSPECTIVE ON THE SUPREME COURT], 12–13 (2013).

⁶⁰ Miyazawa, *supra* note 54, at 271.

⁶¹ NONAKA ET AL. II, *supra* note 36, at 235–36; SATO, *supra* note 27, at 62.

⁶² NONAKA ET AL. II, *supra* note 36, at 235–36; SATO, *supra* note 27, at 62.

⁶³ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76 (Japan).

⁶⁴ *Id.*; Saibansho hō [Court Act], Law No. 59 of 1947, art. 2 (Japan).

⁶⁵ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 6 (Japan).

⁶⁶ *Id.* at art. 80.

⁶⁷ *Id.*

⁶⁸ *Id.* at art. 76, para. 2.

cases within the independent jurisdiction of the general judiciary.⁶⁹ The family court and intellectual property court within the high court are not regarded as prohibited special tribunals because these tribunals hear specific kinds of cases, are organized under the hierarchy of the general system of the judiciary, and an appeal to the general judiciary court is available.⁷⁰ These specialized courts are presided over by judges who acquired special training and knowledge that enables them to develop flexible solutions to cases presented to them.⁷¹ Some believe that judges in these courts offer speedier decisions and better remedies than tenured judges in general courts. Cases in these courts may be reviewed by administrative agencies in preliminary trials and appeals to the general judiciary are available.⁷²

II

JUDICIAL ADMINISTRATION AND JUDICIAL INDEPENDENCE

Judicial independence is crucial in order for the judiciary to find applicable laws when dealing with concrete disputes between parties. The following major cases show that the independence of the judiciary and individual judges were in danger of being corroded under the Meiji government. While judicial power was exercised under the name of the Emperor in the Meiji Constitution,⁷³ under the people's sovereignty and Article 76 of the current Constitution, judges were obliged to find and apply relevant law in cases with concrete disputes between parties.⁷⁴ In order to do so objectively, the judiciary and individual judges must function independently of political pressure.⁷⁵ Thus, judges should abide by the law and his or her professional duty.⁷⁶

⁶⁹ Yuichiro Tsuji, *Why Does the Japanese Constitution not Include the Creation of a Special Tribunal?*, 23 SURUGADAI J. L. & POL. 170 (2009).

⁷⁰ NONAKA ET AL. II, *supra* note 36, at 235–36; SATO, *supra* note 27, at 597–98.

⁷¹ NONAKA ET AL. II, *supra* note 36, at 235–36; SATO, *supra* note 27, at 597–98.

⁷² NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 76, para. 2 (Japan); NONAKA ET AL. II, *supra* note 36, at 235.

⁷³ DAINIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [Meiji Constitution, Constitution of the Empire of Japan], at art. 57 (Japan).

⁷⁴ NONAKA ET AL. II, *supra* note 36, at 228–30; SATO, *supra* note 27, at 581–90.

⁷⁵ NONAKA ET AL. II, *supra* note 36, at 240–47; SATO, *supra* note 27, at 575, 581.

⁷⁶ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76 (Japan).

A. Several Major Cases Regarding the Independence of the Judiciary

There are several major cases that question the validity of the independence of the judiciary.⁷⁷ The first case is the *Kojima* case.⁷⁸ Just after the restoration period and the Boshin War, the new Meiji government began.⁷⁹ Prince Nicholai from Russia (later known as Tsar Nicholas II), was attacked by a Japanese police officer in May 1891.⁸⁰ The officer was tried in the district court in Ōtsu and the government insisted on capital punishment, although there was no statute permitting capital punishment for attacks on foreign royalty (the most relevant statute only permitted capital punishment for attacks on Japanese royalty).⁸¹ In Tokyo, the President of the Supreme Court, Iken (Korekata) Kojima, insisted that capital punishment should not be rendered.⁸² This case shows that the judiciary maintained independence from political power. It is questionable whether the President of the Supreme Court in Tokyo may encroach upon the independence of the district court judge in Ōtsu.⁸³

The second case is the *Fukushima* case.⁸⁴ During the Cold War, the government planned to build missile bases in national forests for defense against possible Russian attacks.⁸⁵ Judge Shigeo Fukushima of the Sapporo district court rendered a decision stating that the Self Defense Forces were prohibited from building the missile base and that

⁷⁷ Yuichiro Tsuji, *Independence of the Judiciary and Judges in Japan*, 24 SURUGADAI J. L. & POL., 63, 70–75 (2011).

⁷⁸ SEIICHIRO KUSUNOKI, KOJIMA KOREKATA: ŌTSU JIKEN TO MEIJI NASHONARIZUMU (CHUKŌ SHINSHO), 24–33 (1997), [hereinafter KOJIMA KOREKATA]; see also Tsuji, *supra* note 77, at 70–72.

⁷⁹ KOJIMA KOREKATA, *supra* note 78; see also Tsuji, *supra* note 77, at 71.

⁸⁰ KOJIMA KOREKATA, *supra* note 78; see also Tsuji, *supra* note 77, at 70.

⁸¹ IZUMI TOKUJI, *supra* note 59, at 3–6; KOJIMA KOREKATA, *supra* note 78, at 48–64; NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTION] 347 (5th ed. 2011) [hereinafter ASHIBE].

⁸² *Id.*; NONAKA ET AL. II, *supra* note 36, at 241; KOJIMA KOREKATA, *supra* note 78, at 48–64; SATO, *supra* note 27, at 62–63.

⁸³ NONAKA ET AL. II, *supra* note 36, at 244; IZUMI TOKUJI, *supra* note 59, at 4; Tsuji, *supra* note 77, at 71–72.

⁸⁴ Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, Shōwa 52 (Gyo tsu) no. 56, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679; see generally NONAKA ET AL. II, *supra* note 36, at 282.

⁸⁵ Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, Shōwa 52 (Gyo tsu) no. 56, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (Japan).

Article 9 contravened its construction.⁸⁶ Before rendering this decision, Fukushima received a private note from the director of the district court, Judge Hiraga.⁸⁷ The memo, which was not an order, advised cordially that an unconstitutional decision should be avoided.⁸⁸ Director Judge Hiraga was charged by the impeachment committee, but was still promoted after the charge was dismissed.⁸⁹ Judge Fukushima moved to the Tokyo district court, but was transferred to the family court for a number of years.⁹⁰ He belonged to the Young Lawyers Association (YLA) (*Seinen Houritsuka Kyoukai*) that actively worked for liberal ideology and was influenced by the Communist Party.⁹¹

The third case is the *Miyamoto* case.⁹² Under Article 80, a judge's term lasts for ten years.⁹³ After ten years, the judge can be reappointed.⁹⁴ In 1971, Assistant Judge Miyamoto's reappointment was rejected after his ten-year term ended.⁹⁵ The Supreme Court did not include his name on the list of judges provided to the cabinet for appointment.⁹⁶ When Miyamoto asked why, the Supreme Court did not offer a reason other than that they have discretion regarding who is put on the reappointment list.⁹⁷ Critics alleged that the reason he was not reappointed was because he was a member of the YLA, and argued that such a reason for not reappointing him was discrimination, as it infringed on the right to ideas and thoughts protected under Article 19 of the Constitution.⁹⁸

⁸⁶ Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

⁸⁷ NONAKA ET AL. II, *supra* note 36, at 244, 259; SATO, *supra* note 27, at 617.

⁸⁸ NONAKA ET AL. II, *supra* note 36, at 244, 259; SATO, *supra* note 27, at 617.

⁸⁹ NONAKA ET AL. II, *supra* note 36, at 244, 259; SATO, *supra* note 27, at 617.

⁹⁰ FUKUSHIMA ET AL., NAGANUMA JIKEN HIRAGA SHOKAN [Naganuma Case, Hiraga Letter], 114 (2009), [hereinafter FUKUSHIMA].

⁹¹ J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 21 (2003) (Ramseyer showed LDP control over the General Secretary of the Supreme Court in malapportionment cases.).

⁹² NONAKA ET AL. II, *supra* note 36, at 260.

⁹³ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 80 (Japan).

⁹⁴ *Id.*

⁹⁵ NONAKA ET AL. II, *supra* note 36, at 260.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Rinji soukai:saibankan no sainin kyohi ni kansuru ketsuki [Resolution for Denial of Reappointment of Judges] (1971) (Japan), https://www.nichibenren.or.jp/activity/document/assembly_resolution/year/1971/1971_4.html; RAMSEYER & RASMUSEN, *supra* note 91, at 22–23.

The fourth case is the *Teranishi* case.⁹⁹ Articles 49 and 52 of the Court Act prohibits judges from participating in political activity.¹⁰⁰ Assistant Judge Teranishi was invited to be a panelist on a wiretap investigation bill.¹⁰¹ The director of the district court advised Teranishi that he should not attend.¹⁰² Teranishi ultimately attended as an audience member, not as a panelist on the stage, and the moderator asked for questions from the audience.¹⁰³ Teranishi raised his hand and stated that he was told not to attend as a panelist but given that he was now an audience member, he was not prohibited from asserting his opinion as a citizen in audience.¹⁰⁴ Subsequently, he was reprimanded in a disciplinary adjudication for disciplinary action (*Bungen Shobun*) under the Judge Status Act by the judiciary.¹⁰⁵ The Impeachment Court, convened in the Diet, consists of members of both Houses of the Diet according to Article 64 of the Constitution.¹⁰⁶ Article 78 of the Constitution provides that the disciplinary court is responsible for determining whether judges are “mentally or physically incompetent to perform official duties.”¹⁰⁷ The Supreme Court and the High Court have exclusive jurisdiction, but did not hear an appeal for this disciplinary action.¹⁰⁸ The Supreme Court noted that judges are expected to be politically neutral and independent in order to maintain the people’s trust; thus, a judge’s right to freedom of speech is not absolute due to the restrictions placed upon it by other principles found in the Constitution.¹⁰⁹ To balance the interests lost and acquired by this judicial restriction, the Court reviewed the necessity of the restriction on judicial political participation, the legitimacy of the prohibition’s

⁹⁹ Saikō Saibansho [Sup. Ct.] Dec. 1, 1998, Heisei 10 (Bun ku) no.1, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1761 (Japan).

¹⁰⁰ Saibansho hō [Court Act], Law No. 59 of 1947, arts. 49, 52 (Japan).

¹⁰¹ Saikō Saibansho [Sup. Ct.] Dec. 1, 1998, Heisei 10 (Bun ku) no.1, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1761 (Japan).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Saibankan bungen hō [Judges Status Act], Law No. 127 of 1947 (Japan).

¹⁰⁶ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 64 (Japan).

¹⁰⁷ *See id.* art. 78.

¹⁰⁸ Saikō Saibansho [Sup. Ct.] Dec. 1, 1998, Heisei 10 (Bun ku) no.1, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1761 (Japan).

¹⁰⁹ Saikō Saibansho [Sup. Ct.] Dec. 1, 1998, Heisei 10 (bun ku) no. 1, 52, 9 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1761 (Japan).

purpose, and the reasonable relation of the measure used to achieve the purpose.¹¹⁰

The last case is the *Urawa* case.¹¹¹ In this case, Mrs. Urawa killed her three children and attempted, but failed, to kill herself.¹¹² Her prosecution resulted in a finding of guilt and she was sentenced to three years in prison and three years' suspension.¹¹³ The Committee on Judicial Affairs of the House of Councilors criticized this decision as being too lenient. The Supreme Court responded that the power to investigate under Article 62 may not be exercised to criticize judicial decisions because it would have a chilling effect on judicial decision-making in similar cases in the future.¹¹⁴ The Diet argued that the law-making power under Article 41 takes precedence over the judiciary and the cabinet.¹¹⁵ The judiciary responded that the Diet's exclusive law-making power means it is centrally positioned in relation to voters for law-making, not that the Diet is legally superior to other branches of the government.¹¹⁶

The *Fukushima*, *Miyamoto*, and *Teranishi* cases show that the power of judiciary appointments has been continuously reviewed when the fairness of appointments and reappointments of judges are called into question. The *Fukushima* and *Miyamoto* cases illustrate the strong influence that the office of the Supreme Court has over individual judges through its power of reappointment and transfer.

Interpreting Article 80(1) of the Constitution has been controversial. One interpretation argues that the power of appointment and that of reappointment are identical, such that the reappointment power is

¹¹⁰ Saikō Saibansho [Sup. Ct.] Dec. 1, 1998, Heisei 10 (Bun ku) no.1, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1761; SATO, *supra* note 27, at 619.

¹¹¹ Yuichiro Tsuji, *Law Making Power in Japan-Legislative Assessment in Japan*, 10 (1) KLRI (KOREAN LEGISLATION RESEARCH INSTITUTE) 173–204 (2016); Yuichiro Tsuji, *Legal Issues Presented in a Recent Japanese Book Scanning Case*, 64 TSUKUBA J. L. & POL. 73 (2015).

¹¹² Yuichiro Tsuji, *Law Making Power in Japan-Legislative Assessment in Japan*, 10 (1) KLRI (KOREAN LEGISLATION RESEARCH INSTITUTE) 173–204 (2016); Yuichiro Tsuji, *Legal Issues Presented in a Recent Japanese Book Scanning Case*, 64 TSUKUBA J. L. & POL. 73 (2015).

¹¹³ Yuichiro Tsuji, *Law Making Power in Japan-Legislative Assessment in Japan*, 10 (1) KLRI (KOREAN LEGISLATION RESEARCH INSTITUTE) 173–204 (2016); Yuichiro Tsuji, *Legal Issues Presented in a Recent Japanese Book Scanning Case*, 64 TSUKUBA J. L. & POL. 73 (2015).

¹¹⁴ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 62 (Japan).

¹¹⁵ NONAKA ET AL. II, *supra* note 36, at 145, 243; SATO, *supra* note 27, at 466.

¹¹⁶ NONAKA ET AL. II, *supra* note 36, at 144; SATO, *supra* note 27, at 429–32.

discretionary.¹¹⁷ Another interpretation argues that this discretionary power is restricted.¹¹⁸ Following the ten-year anniversary of the Article's enactment, the status and disqualification of judges were examined.¹¹⁹ Essentially, judges are reappointed except under special circumstances in which the judge's qualifications are called into question.¹²⁰ The power of reappointment is objective and mechanical for any person with reasonable sensitivities who would reach the same conclusion.¹²¹ A third interpretation of Article 80(1) distinguishes the power of appointment from that of reappointment.¹²² Overall, except for the condition provided in Article 78, Article 80 provides that judge's judicial status is protected even after the first ten years, and then, after every subsequent decade, the judge's qualifications are re-examined.¹²³

The *Teranishi* case demonstrates how strongly regulated judges are when it comes to political speech. Similarly, in the *Sarufutsu* case, a postal officer, who was a secretary general of council of the labor union, put up 184 posters of a public office candidate on official notice boards after work. He was allegedly in violation of the Rules of the National Personnel Authority¹²⁴ designated by the National Public Service Act.¹²⁵ The rules of the National Personnel Authority prohibited several political actions, including posting posters of political office candidates.¹²⁶ In balancing the interests gained and lost by these regulations, the Supreme Court found the postal worker's act to be in violation of the National Public Service Act and fined him according to the standard set forth while discussing the purpose of the

¹¹⁷ NONAKA ET AL. II, *supra* note 36, at 250–52; SATO, *supra* note 27, at 399–400.

¹¹⁸ NONAKA ET AL. II, *supra* note 36, at 250–52.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Jinji in Kisoku [Rules of the National Personnel Authority] under Kokka koumuin hō [National Public Service Act], Law No. 120 of 1947 (Japan); Saikō Saibansho [Sup. Ct.] Nov. 6, 1974, Showa 44 (a) no. 1501, 28, 9 SAIKŌ SAIBANSHO KEIJINJI HANREISHŪ [Keishū] 393 (Japan) (called the Sarufutsu Case); ASHIBE, *supra* note 81, at 272.

¹²⁵ Kokka koumuin hō [National Public Service Act], Law No. 120 of 1947 (Japan) (This case has an issue of *carte blanche* that the legislature gives too much power to inferior regulation.).

¹²⁶ Jinji in Kisoku [Rules of the National Personnel Authority] under Kokka koumuin hō [National Public Service Act], Law No. 120 of 1947 (Japan).

prohibition and the relationship between the purpose and prohibited political activities.¹²⁷

B. Changes in the Supreme Court in the 1950s and 60s

The Supreme Court acknowledged many unconstitutional decisions made in the 1950s and 60s.¹²⁸ This was a period of significant social movements and global advancements; for example, during this time period, the Japan-U.S. Security Treaty was renewed in 1960, and the student movement and labor dispute became radicalized.¹²⁹

In 1958, the Nobusuke Kishi government amended the Police Duties Execution Act (PDEA) to regulate citizens' political activities in order to protect public security.¹³⁰ The Act was criticized by newspapers for being overbroad as even private dates of young people could fall under the PDEA's restrictions.¹³¹

In the *Zentei Tokyo chu yu* case of 1966, the Supreme Court stated that government officials enjoyed labor rights like those of employees of private companies.¹³² This 1966 decision overruled the 1953 decision that broadly supported the regulation of public official labor rights.¹³³ In the *Zen nou rin keishoku hou* case of 1969, the Court interpreted statutes to respect labor rights by adopting the *Ashwander* rule out of the U.S. Supreme Court case by the same name.¹³⁴ The *Ashwander* rule states that when the court thinks unconstitutional doubts may arise if the text of a statute is applied to a fact, the court

¹²⁷ Saikō Saibansho [Sup. Ct.] Nov. 6, 1974, Showa 44 (a) no. 1501, 28 (9) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 393 (Japan).

¹²⁸ See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 124–25 (Daniel H. Foote ed., 2007); Saikō Saibansho [Sup. Ct.] April 25, 1973, Showa 43 (a) no. 2780, 27 (4) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547 (Japan) (This case illustrated that Japanese Supreme Court vacated 1965 decision advocating labor right.); Saikō Saibansho [Sup. Ct.] Oct. 26, 1965, Showa 39 (a) no. 296, 20 (8) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (Japan).

¹²⁹ *Kyosan shugisha doumei* [Communist league formed], SHOWA MAINICHI, <http://showa.mainichi.jp/news/1958/12/post-e3f4.html>.

¹³⁰ *Keisatsu kan shokumu sikkou hō* [The Police Duties Execution Act], Law No. 136 of 1948 (No. 94 of 2006) (Japan).

¹³¹ *Keishoku hou kaisei an wo kokkai teishutsu* [The Amended Bill of PDEA is Submitted to the Diet], SHOWA MAINICHI, <http://showa.mainichi.jp/news/1958/10/post-f359.html>.

¹³² Saikō Saibansho [Sup. Ct.] Oct. 26, 1965, Showa 39 (a) no. 296, 20 (8) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (Japan).

¹³³ Saikō Saibansho [Sup. Ct.] Apr. 8, 1953, Showa 24 (re) no. 685, 7(4) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 775 (Japan).

¹³⁴ Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, Showa 43(a) no. 2780, 27(4) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547 (Japan).

may narrow the prohibited activities.¹³⁵ In 1973, the Japanese Supreme Court denied the 1969 application of the *Ashwander* rule.¹³⁶ When the PDEA was submitted to the House of the Representatives in 1958, some leaders from agriculture and forest labor unions (*Zennorin*) incited labor disputes.¹³⁷ The union leaders were prosecuted under the Japanese National Civil Service Act (*Kokka Koumuin Hou*), which interpreted Japanese National Civil Service Law to respect labor rights.¹³⁸ Following these judiciary changes, judges' meetings were made public and discussions regarding civil, criminal, and juvenile cases began.¹³⁹

C. *Leprosy and the Independence of Judges*

These cases reveal that protecting the independence of judges means that judges must be able to exercise their power to uncover what the applicable law is, independent of political influences. The *Naganuma* case illustrates that individual judges are under informal pressure from district court chiefs.¹⁴⁰ With respect to the isolated sanatorium for leprosy, it is doubtful that judicial independence from political pressure was similarly questioned. However, under due process of law, the fairness of judicial decisions should be examined for party patients.¹⁴¹

Allowing trials to be open to the public gives the general public an opportunity to freely criticize the fairness of the trial and its ultimate outcome. The ninety-five cases relating to the national sanatorium might include unfair charges under an unfair proceeding.¹⁴² For

¹³⁵ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936) (Brandeis, J., concurring). For this analysis, see NONAKA ET AL. II, *supra* note 36, at 312; ASHIBE, *supra* note 81, at 370–71.

¹³⁶ Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, Showa 43(a) no. 2780, 27(4) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547. For an analysis of this case, see ASHIBE, *supra* note 81, at 268–71.

¹³⁷ *Id.*

¹³⁸ Kokka koumuin hō [Japanese National Civil Service Act] Law No. 261 of 1950 (No. 69 of 2014) (Japan).

¹³⁹ SATO, *supra* note 27, at 603; *Kakyu saibansho simei simon iinkai* [Advisory Committee on Appointment of Inferior Judges at Inferior Courts], SAIKŌ SAIBANSHO, <http://www.courts.go.jp/saikosai/iinkai/kakyusaibansyo/index.html> (last visited Oct. 30 2017); *Saibankan no jinji hyouka no arikatani kansuru kenkyukai* [Research on Personal Evaluation System for Judges], SAIKŌ SAIBANSHO, http://www.courts.go.jp/saikosai/iinkai/saiban_kenkyu/hokokusho2/index.html (last visited Oct. 30, 2017).

¹⁴⁰ NONAKA ET AL. II, *supra* note 36, at 244; SATO, *supra* note 27, at 617.

¹⁴¹ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 31 (Japan).

¹⁴² HANSEN REPORT, *supra* note 1 at 4, 8.

example, in a murder case, a leper was prosecuted, found guilty, and sentenced to death, even though the defendant was not given an open trial.¹⁴³ Accordingly, the defendant argued that this prosecution and trial was tainted by bias and prejudice.¹⁴⁴

While admiring the Secretary General of the office of the Supreme Court for its apology, we should ardently insist that the judiciary conduct retrials for the deceased if they, or their families, desire compensation for or restoration of their reputations. Though the result may not have legal implications, the moral impact would be significant.

III

AUTONOMY OF THE JUDICIARY

A. *The Office of the Supreme Court*

The office of the Supreme Court is vital for the independence of the judiciary. Article 77 provides the Supreme Court with rule-making powers to control procedures relating to legal practice and matters relating to attorneys, as well as to regulate the internal discipline of the courts and administration of judicial affairs.¹⁴⁵ However, the Diet has exclusive law-making power to enact rules of procedure and practice, rules relating to attorneys, and rules for internal discipline of the courts and administration of judicial affairs.¹⁴⁶ Some argue that internal affairs and judicial administration is exclusive to the judiciary.¹⁴⁷ As is expected, these judicial and statutory authorities may, at times, face competing interests and outcomes.¹⁴⁸

The office of the Supreme Court is tasked with designing the judicial organization, revising statutes, managing human resources, maintaining facilities, accounting and acquiring the budget for the judiciary, and supporting the members of the Supreme Court Justice's

¹⁴³ *Id.* at 1–8. (Expert Committee Opinion); *see also* THE MINISTRY OF HEALTH, LABOR, AND WELFARE, *The Truth of Fujimoto Case*, <http://www.mhlw.go.jp/topics/bukyoku/kenkou/hansen/kanren/dl/4a16.pdf>. In this case, someone threw dynamite into the house of an official at the Senatorial Department and the official was injured. Mr. Fujimoto was arrested and found guilty of the crime. At that time, he was suspected to be a leper. Just after this decision, Mr. Fujimoto ran out of the sanatorium. Three weeks later, the injured official was killed. Mr. Fujimoto was sentenced to death and the criminal procedure was conducted in sanatorium. His family brought action for retrial. *Id.*

¹⁴⁴ HANSEN REPORT, *supra* note 1, at 4, 8.

¹⁴⁵ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 77 (Japan).

¹⁴⁶ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 77, para. 1 (Japan); NONAKA ET AL. II, *supra* note 36, at 252–53; SATO, *supra* note 27, at 611–13.

¹⁴⁷ SATO, *supra* note 27, at 611–13.

¹⁴⁸ NONAKA ET AL. II, *supra* note 36, at 252.

conference.¹⁴⁹ Reflecting the Meiji constitutional experience, judicial power is concentrated in the office and the Justice Conference.¹⁵⁰ The *Naganuma* and *Kojima* cases demonstrate the influence that the office of the Supreme Court has on the independence of judges.¹⁵¹

The Japanese judiciary adopted a career system and law school system similar to the United States in 2004 when Japanese universities established three-year juris doctor programs.¹⁵² The applicants are required to pass a bar examination and spend one year at a judicial training institute.¹⁵³ Only the students with the highest grades become prosecutors or judges.¹⁵⁴

Judges usually transfer to various districts every three years and David Law, a professor at Washington University in St. Louis, thinks that the current docket is excessively large.¹⁵⁵ In 2015, there were around 3,000 judges in Japan. In a mere ten years, the number of lawyers increased from 21,000 to 36,000; however, the number of judges and prosecutors has not increased significantly since 1999.¹⁵⁶ David Law believes that judges who quickly resolve cases have an increased likelihood of being transferred to large, major cities.¹⁵⁷

Some argue that the office of the Supreme Court gives promotional and transfer priority to judges who resolve the greatest number of cases and find in favor of previous Supreme Court holdings.¹⁵⁸ If a judge renders decisions that oppose Supreme Court decisions, such as in *Naganuma*, he or she is transferred to a smaller city and family court,

¹⁴⁹ Saibansho hō [Court Act], Law No. 59 of 1947, art. 12 (Japan).

¹⁵⁰ NONAKA ET AL. II, *supra* note 36, at 228, 235–36; SATO, *supra* note 27, at 625.

¹⁵¹ NONAKA ET AL. II, *supra* note 36, at 244; SATO, *supra* note 27, at 617.

¹⁵² NONAKA ET AL. II, *supra* note 36, at 269–70.

¹⁵³ *Id.*; SATO, *supra* note 27, at 578–79.

¹⁵⁴ *Saibankan no jouken* [Requirement to be Judge], ASAHI SHIMBUN (Apr. 18, 1994); *Shimbun to 9 jou* [Newspaper and article 9], ASAHI SHIMBUN (June 16, 2016).

¹⁵⁵ David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1426, 1461 (2011).

¹⁵⁶ Saibankan Su, Kensatsukan Su, Bengosi Su No Suii [Number of Judges, Prosecutor Number, Lawyer Number] [LAWYERS WHITE PAPERS], http://www.nichibenren.or.jp/library/ja/jfba_info/statistics/data/white_paper/2015/1-3-4_hososansha_suii_2015.pdf (last visited May 29, 2017). The number of the lawyers is around 36,000, prosecutors is 1,900, and judges is 2,944. *Id.*

¹⁵⁷ David Law, *Lessons of Experience in the Enterprise of Constitutional Design: The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1562 (2009).

¹⁵⁸ NONAKA ET AL. II, *supra* note 36, at 257.

not to larger cities such as Tokyo, Osaka, Nagoya, and Fukuoka.¹⁵⁹ According to Miyazawa's analysis, a professor at University of California Hastings and an expert on law and society study, prospective judges are usually sent to the Ministry of Justice for a certain period for personnel exchange and, while there, represent the government in litigation brought under the State Redress Act for events such as floods and earthquakes.¹⁶⁰ Upon their return to the judiciary, these judges make use of their experiences within the Ministry of Justice in litigation against the government.¹⁶¹ Miyazawa indicates that after working for the Ministry of Justice, judges return to the judiciary with pro-government attitudes and decide case accordingly.¹⁶² The judge then loses his or her ability to act as a neutral arbitrator between opposing parties and instead views the case from the perspective of a defender of the government.¹⁶³

Ex-Justice Shigeo Takii¹⁶⁴ believes that because justices lack the experience and resources for judicial administration, they are hesitant to speak up at judicial conferences unless specifically asked to do so.¹⁶⁵ The office of the Supreme Court takes the lead in judicial administration because the president of the Supreme Court is too busy to attend minor court conferences.¹⁶⁶

B. Judicial Review and Nomination of Judges

Japanese students may wrongly believe that the Japanese judiciary follows all the procedures of the U.S. judiciary. It is true that the General Headquarter and Japanese government jointly drafted the current Constitution after adopting the Potsdam Declaration. The Japanese judiciary did not, however, replicate the U.S. judiciary.

Similarly to the United States, Japanese judicial review entails a concrete, not abstract, judicial review.¹⁶⁷ However, compared to the

¹⁵⁹ RAMSEYER & RASMUSEN, *supra* note 91, at 126–27; Miyazawa, *supra* note 54, at 265.

¹⁶⁰ Miyazawa, *supra* note 54, at 263.

¹⁶¹ *Id.* at 269.

¹⁶² *Id.* at 270.

¹⁶³ *Id.*

¹⁶⁴ Shigeo Takii, *Saikou Saibansho Wa Kawattaka* [Has the Supreme Court changed?] 19 (Iwanami Shoten, 2009).

¹⁶⁵ *Id.* at 38.

¹⁶⁶ Tokiyasu Fujita, SAIKOUSAI KAIKO ROKU [The Memoirs of the Supreme Court] 215–20 (Yuhikaku, 2012); Takii, *supra* note 164, at 37.

¹⁶⁷ NONAKA ET AL. II, *supra* note 36, at 274–77; KOJI SATO, *supra* note 27, at 581, 625; Saiko Saibansho [Sup. Ct.] June 8, 1960, Showa 30(o) no. 96, 14(7) SAIKO SAIBANSHO

United States, far fewer decisions are deemed unconstitutional in Japan.¹⁶⁸ One reason for this may be the different ways in which the countries appoint their judges and organize their judicial career system. The Japanese judiciary attempted to reform its configuration of judicial review just after WWII.¹⁶⁹

Professor, and former justice, Masami Ito¹⁷⁰ stated that Japan prefers faceless judges because they are more likely to render uniform decisions without presenting novel arguments, as it is futile to ask career-oriented judges to exercise judicial review diligently.¹⁷¹

Currently, the president of the Supreme Court is nominated by the Emperor under Article 6(2) of the Constitution.¹⁷² In addition, the number of Supreme Court justices is fixed at fifteen by the Court Act.¹⁷³ This number was chosen during the drafting of the Constitution to keep the number of Supreme Court justices equal to the number of cabinet ministers.¹⁷⁴ Only fifteen justices of the Supreme Court are reviewed under the Law of the People's Examination of the Supreme Court Judges¹⁷⁵ and Article 78 of the Constitution. The selection process is called *Kokumin Shinsa*, a recall system which followed the state of Missouri in that judges are fired if the approval vote for firing the judge is superior to that of disapproval of firing.¹⁷⁶ Japanese people are also given an opportunity to evaluate the judges of the Supreme Court. It has been criticized for its ineffectiveness because members of the general public do not even know the justices' names.

MINJI HANREISHU [MINSHU] 1206; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 76 & 81 (Japan).

¹⁶⁸ Law, *supra* note 156, at 1437.

¹⁶⁹ Eiji Sasada, *Shihou katei to minshu shugi* [Judicial Process and Democracy], 63 PUB. L. RES. 110 (2001); IZUMI, *supra* note 59, at 57–88.

¹⁷⁰ Masami Ito, *Saibankan To Gakusha No Aida* [Between Justice and Scholar], 106–37 (Yuhikaku, 1993).

¹⁷¹ Yuichiro Tsuji, *Constitutional Law Court in Japan*, 66 TSUKUBA J. L. & POL'Y, 65 (2016).

¹⁷² NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31 (Japan).

¹⁷³ Saibansho hō [Court Act], Law No. 59 of 1947, arts. 5, 9, & 10 (Japan).

¹⁷⁴ Saikō Saibansho [Sup. Ct.] June 8, 1960, Showa 30(o) no. 96, 14(7) SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1206 (Japan).

¹⁷⁵ Kokumin Shinsa hō [Law of the People's Examination of the Supreme Court Judges], Law No. 94 of 2016 (Japan).

¹⁷⁶ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 78 (Japan); ASHIBE, *supra* note 81, at 340.

Supreme Court justices retire at seventy years old,¹⁷⁷ while inferior court judges retire at sixty-five.¹⁷⁸ Ten justices are selected from the criminal and civil judiciary, and five are selected from a variety of fields and divisions, such as the Cabinet Legislation Bureau, university professors, diplomats, or lawyers.¹⁷⁹ The Supreme Court begins searching for candidates before justices reach retiring age and prepares a list. Ex-Justice Tokiyasu Fujita, who was a professor at Tohoku University, later wrote that candidates for justices are limited to ages sixty to sixty five years old as a custom.¹⁸⁰ The Court adds one additional name to the list of candidates over the number of prospective positions available in the Court.¹⁸¹ This is referred to as the “plus one rule.”¹⁸² The cabinet nominates justices from the list of candidates.¹⁸³ To be eligible for a position as a justice the candidate must be over forty years old and have more than ten years of experience.¹⁸⁴ Ex-Justice Fujita claims that political influence from leading parties does not exist.¹⁸⁵ Former Justice Shigeo Takii, who was selected from the bar association, thinks that justice appointment transparency can be achieved when no significant changes occur within the political parties in Parliament.¹⁸⁶ He argues that new appointments influence shifts in constitutional decisions.¹⁸⁷ Former Justice Tokuji Izumi agrees with Takii that when the Secretary General of the cabinet, *Kanbo choukan*, simply offered a report describing a nominee’s brief career during a press conference, it did not achieve transparency in judicial appointments because the report was too small an opportunity for the Japanese people to learn who their judges are, and the report should note more information such as how the judge has rendered decisions during his or her career.¹⁸⁸

¹⁷⁷ Saibansho hō [Court Act], Law No. 59 of 1947, art. 12 (Japan).

¹⁷⁸ *See id.*

¹⁷⁹ Takii, *supra* note 164, at 4, 7–10.

¹⁸⁰ Tokiyasu Fujita, SAIKOUSAI KAIKO ROKU [The Memoirs of the Supreme Court] 16 (Yuhikaku, 2012).

¹⁸¹ *Id.* at 13–14; Takii, *supra* note 164, at 3–6.

¹⁸² NONAKA ET AL. II, *supra* note 36, at 249–50, 258.

¹⁸³ *Id.*

¹⁸⁴ Saibansho hō [Court Act], Law No. 59 of 1947, art. 41 (Japan).

¹⁸⁵ Fujita, *supra* note 166, at 163–73.

¹⁸⁶ Takii, *supra* note 164, at 6.

¹⁸⁷ *Id.* at 54.

¹⁸⁸ IZUMI, *supra* note 59, at 130.

**C. Judicial Reform in 1999 and Advisory Council for Appointment
in Japan**

The judicial promotion and transfer system has been criticized by constitutional scholars.¹⁸⁹ The Justice System Reforms Council (JSRC) instituted judicial reform in 1999 which promoted transparency by reforming aspects of judicial appointment and evaluations of judges.¹⁹⁰ The judicial reform suggested that the voices of citizens should be more clearly reflected by judges' perspective within the judiciary.¹⁹¹ The Supreme Court established the Judge Appointment Advisory Council (Advisory Council), *Saibankan shimei simon Inikai*.¹⁹² The Advisory Council is comprised of eleven people—five are lawyers, prosecutors, or judges, and six are academic professors.¹⁹³ The Advisory Council reviews the eligibility of judges for appointment, interviews candidates, and sends a report to the Secretary General of the office of the Supreme Court.¹⁹⁴ In addition, there is a regional council with five to nine members that supports the national Advisory Council.¹⁹⁵ Between 1962 and 1964, Japan's Bar Association attempted, but failed to establish this Advisory Council. It was not until the judicial reform of 1999 that such progress was made in the judiciary.¹⁹⁶

The Constitution does not set a term limit for the position of prime minister.¹⁹⁷ Currently, Prime Minister Shinzo Abe is attempting to become the head of his ruling party, the Liberal Democratic Party (LDP).¹⁹⁸ Under the parliamentary system, the head of the ruling party is the prime minister in the cabinet.¹⁹⁹ The prime minister is appointed

¹⁸⁹ NONAKA ET AL. II, *supra* note 36, at 258; Takii, *supra* note 164, at 68-82.

¹⁹⁰ SATO, *supra* note 27, at 575, 581.

¹⁹¹ *Id.* at 577.

¹⁹² *Id.* at 603.

¹⁹³ *Id.* at 603-05.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 604.

¹⁹⁷ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 45 (Japan). Under the parliamentary system, the prime minister is chosen from the members of the Diet. Usually the Japanese prime minister is selected from the lower house (House of Representatives). The constitution provides a two-year term for members of the lower house in the Diet. *Id.*

¹⁹⁸ Justin McCurry, *Shinzo Abe secures strong mandate in Japan's general election*, THE GUARDIAN (Oct. 22, 2017), <https://www.theguardian.com/world/2017/oct/22/shinzo-abe-secures-strong-mandate-in-japans-general-election>.

¹⁹⁹ NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 67 (Japan).

from either of the two Houses of the Diet.²⁰⁰ Generally, the prime minister has been selected from the House of Representatives, whose members' terms last four years.²⁰¹ Under LDP regulation, the term for the head of the party is three years.²⁰²

As previously stated, Supreme Court justices are appointed when they are close to retiring age; thus, many of them only serve for a few years. If Prime Minister Abe's cabinet maintains power until 2019, he may have appointed every one of the fifteen justices on the Supreme Court.²⁰³ This possibility may lead some to question the Supreme Court's judicial independence. Meanwhile, the cabinet makes appointments based on the list prepared by the judiciary. Although it is possible that this was an appropriate exercise of appointment power, others think that the cabinet has the power to make appointments beyond the list made by the Supreme Court.²⁰⁴

The Conservative Party argues for a constitutional amendment to establish a constitutional law court.²⁰⁵

D. Judicial Independence for the Leprosy Case

Miyazawa questioned whether the institutional independence of the judiciary guarantees the independence of individual judges.²⁰⁶ He criticized the amount of power that the Secretary General wields in the office of the Supreme Court.²⁰⁷ He argued that in the Miyamoto reappointment case, the reason Miyamoto's reappointment was denied was clearly political.²⁰⁸ Miyazawa believes that when judges are sent to the Ministry of Justice, their practices and experiences strongly influence administrative law litigation when the government is sued for damage under the Redress Act for acts such as the breakdown of a river bank.²⁰⁹

²⁰⁰ *Id.*

²⁰¹ *Id.* at art. 45.

²⁰² This is the code of the Liberal Democratic Party. See Article 80 of LDP <https://jimin.ncss.nifty.com/pdf/aboutus/organization.pdf>; see also Chapter XVI of Officers-Article 80, Liberal Democratic Party, <http://www.marino.ne.jp/~rendaico/jissen/kiyakuco/tatohanokiyakuco/jimintonokiyakuco.htm>.

²⁰³ Fujita, *supra* note 166, at 15.

²⁰⁴ NONAKA ET AL. II, *supra* note 36, at 258.

²⁰⁵ Ishin no kai (Ishin party of Japan), Constitutional Draft, <https://o-ishin.jp/news/2017/images/90da581ba24723f77027257436ab13c1cec1a1ed.pdf>.

²⁰⁶ Miyazawa, *supra* note 54, at 263.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

Ex-Justice Takii²¹⁰ questioned Miyazawa's theory in regard to a recent amendment to the Administrative Litigation Act.²¹¹ First, a provision was added to permit mandamus actions to seek orders that obligate an administrative agency to issue an original administrative disposition. Second, the court may issue a provisional injunctive order to an administrative agency.

Miyazawa supports his argument regarding the office of the Secretary General's power to relocate inferior court judges to local or family court by using data from river flood cases.²¹² As Law and Kamiya point out, Supreme Court justices can't render decisions without support by research judges.²¹³ These research judges collect materials and make recommendations to justices.²¹⁴ Both Law and Miyazawa indicate that the office of the Supreme Court is influential. Ex-Justice Fujita objects to both Law's and Miyazawa's arguments—arguing that the Supreme Court encourages young judges not to be discouraged by the office of the Supreme Court.²¹⁵ Fujita noted that one proposal to establish a study group for interpreting a new administrative litigation act was discussed, but was stalled over concerns that the Supreme Court may enforce a certain interpretation, and young judges might be hesitant to speak out.²¹⁶

On the other hand, Fujita still might agree with Miyazawa that there are two career paths for judges: one is for judges to transfer to large cities and be promoted, and the other is for judges to be relocated to family courts.²¹⁷

Using data collected from 276 judges, J. Mark Ramseyer, a professor of Japanese Legal Studies at Harvard Law School,²¹⁸ illustrated that the

²¹⁰ Takii, *supra* note 164, at 93, 334.

²¹¹ See Gyousei Jiken Soshou hou [Administrative Case Litigation Act], Law No. 139 of 1962, art.3 (Japan).

²¹² Miyazawa, *supra* note 54, at 280.

²¹³ Law, *supra* note 155, at 1464; see also Masako Kamiya, *Decision Making on the Japanese Supreme Court, Chōsakan, Research Judges Toiling at the Stone Fortress*, 88 WASH. U. L. REV. 1601 (2011).

²¹⁴ Takii, *supra* note 164, at 31–36; IZUMI, *supra* note 59, at 136.

²¹⁵ Law, *supra* note 155, at 1460–61; Miyazawa, *supra* note 54, at 275; Fujita, *supra* note 166, at 164.

²¹⁶ Fujita, *supra* note 166, at 167.

²¹⁷ *Id.* at 168. Fujita thinks that promotion depends partly on personality, such as leadership and cooperativeness. *Id.*

²¹⁸ RAMSEYER & RASMUSEN, *supra* note 91, at 37–43; FUKUSHIMA, *supra* note 90, at 126–27.

office of the Supreme Court has significant influence over judicial career paths. He also showed data that being a member of the YLA had a negative impact on potential transfers. Ramseyer argued that the Japanese judiciary essentially works as an agent of the government's ruling party, the LDP.²¹⁹ According to Ramseyer, by controlling job assignments, the "LDP influenced judges, indirectly to be sure, by promoting some and by not promoting others."²²⁰ Percy Luney, a former professor from North Carolina Central University, agrees.²²¹

John Haley at Washington University St. Louis disagrees with Miyazawa and Ramseyer, arguing that the Japanese judiciary is independent.²²² Haley stresses that the judiciary is autonomous and feels no political pressure from LDP intervention.²²³ Haley also believes that the internal discipline and control exercised in the *Miyamoto* case was successful.²²⁴ Moreover, Haley asserts that the uniformity and continuity of judicial decisions should fix responsible judicial behavior.²²⁵

Miyazawa counters Haley's argument, agreeing with his factual analysis, but focusing on the lack of active movement of judges in the judiciary for the past twenty years regarding the 1966 decision, except in the case of an assistant judge who was reprimanded for his open objection to a law legalizing wiretapping, until judicial reform was implemented.²²⁶ Miyazawa reasons that most applicants for appointment are now conformists, who accept the practices established in the 1970s and 1980s as a given for government bureaucracy.²²⁷

Law looked at interviews conducted with the younger generation in Japan and concluded that two-thirds of those interviewed are likely to be conservative, and a heavy case load may tempt justices to simply

²¹⁹ RAMSEYER & RASMUSEN, *supra* note 91, at 80–81, 126–27.

²²⁰ *Id.* at 127.

²²¹ See Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, in JAPANESE CONSTITUTIONAL LAW 123, 144 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

²²² John Haley, *Judicial Independence in Japan Revisited, The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99, 102–12 (Daniel Foote ed., 2007) (describing generally how appointment to and progression through the judiciary occurs).

²²³ *Id.* at 121, 123.

²²⁴ *Id.* at 122.

²²⁵ *Id.*

²²⁶ Miyazawa, *supra* note 54, at 277–80.

²²⁷ *Id.* at 127.

follow the majority rule.²²⁸ Research judges often attempt to work for the entire court rather than for an individual justice. Thus, if a justice wants to oppose the majority, he or she must collect and prepare evidence and materials to draft his opinion because research judges do not assist justices in writing dissenting opinions.

Ex-Justice Fujita would criticize Luney's, Haley's, and Law's arguments that the Supreme Court wants to maintain a political ideology identical to that of the LDP. Fujita argues that their analysis was outdated given that it was rooted in circumstances that occurred nearly three decades earlier.²²⁹ Fujita admits that in the 1950s and 1960s, the Supreme Court vacated precedents for political reasons, but emphasizes that this rarely occurs in the Japanese judiciary today.

Ex-Justice Koji Miyakawa also disagrees with Law.²³⁰ Miyakawa thinks that the caseload is not as excessively large as Law suggests.²³¹ Miyakawa argues that research judges are useless if justices are capable of writing their own opinions.²³² Izumi, who worked as a research judge for three and a half years, explained that there was so much work to be done that research judges were allocated by case, not to individual justices. Thus, research judges are more likely to focus on shaping opinions among justices under a limited time schedule, as the heavy caseload prevents justices from writing individual opinions.²³³

These analyses are helpful in our review of the judicial apology for the leprosy tribunal, although these former justices and scholars have yet to mention the issue in relatively novel cases. The apology from the office of the Supreme Court is related to the independence of judges and the judiciary as a whole.

As Miyazawa laments, judges are seriously concerned about rendering decisions that might displease the Secretary General. Judges know that the Secretary General has a significant influence on judge

²²⁸ David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1548 (2009).

²²⁹ Fujita, *supra* note 166, at 166–68 (Fujita is afraid of opening research on revised Administrative Case Litigation Act because the office of the Supreme Court may impose its interpretation on young judges.).

²³⁰ Koji Miyakawa (Mark A. Levin & Megumi Honami Lachapelle trans.), *Inside the Supreme Court of Japan—From the Perspective of a Former Justice*, 15 ASIAN-PACIFIC L. & POL'Y J. 196, 196–212 (2014).

²³¹ *Id.* at 205.

²³² *Id.* at 207–08.

²³³ IZUMI, *supra* note 59, at 136–38 (Izumi argues research judges should be allocated to individual Justices.).

transfers and promotions.²³⁴ The personnel exchange between the Ministry of Justice and the judiciary results in judges that are often sent to the Ministry of Justice to defend the government in suits for damages under the Redress Act.²³⁵ This practice encouraged judges to rule in favor of the government.²³⁶

Even though the administrative litigation was amended to allow several claims for provisional mandamus and injunction, these amendments will still be interpreted by the judiciary. Under Miyazawa's analysis, the apology is official and inferior courts should not have to worry about the Secretary General at the office of the Supreme Court, and may accept the suits against the government brought by the leprosy patients' families.

As Izumi argues, the judiciary must protect individual human rights even when it collides with social welfare, and in order to do so, the judicial review must represent the minority whose voices were not heard by Parliament.²³⁷ Izumi was a career judge who served as Secretary General from 1996 to 2000.²³⁸ Thus, I think he believes the Secretary General's apology in 2016 was highly admirable. To maintain its leadership—or as Haley describes, to maintain a united judiciary—the Supreme Court stopped short of alleging that the past action of the Supreme Court was legally wrong. The Secretary General could have determined that the judiciary had unconstitutionally conducted trials under several doctrines of the Constitution. Nonetheless, what leprosy patients may be eager to hear is the moral, rather than the legal, apology.

Ramseyer's argument focuses on instances in which the Secretary General rewarded talented judges who rendered decisions precisely.²³⁹ Ramseyer may argue that the prestige of being a top official in the Supreme Court might have prevented a legal apology, and might also have actively encouraged individual judges in inferior courts in the leprosy case to accept legal responsibility.²⁴⁰

Similar to the Judge Appointment Council, the Supreme Court established an expert council for leprosy. Just as the Judge

²³⁴ Miyazawa, *supra* note 54, at 271.

²³⁵ *Id.* at 269.

²³⁶ *Id.*

²³⁷ IZUMI, *supra* note 59, at 143–44, 254–70.

²³⁸ *Id.* at imprint.

²³⁹ RAMSEYER & RASMUSEN, *supra* note 91, at 95.

²⁴⁰ *Id.* at 21–22 (Ramseyer shows influence of the General Secretary of the Supreme Court on inferior judges.).

Appointment Council sends a report to the Secretary General, the leprosy council advised the Supreme Court that the establishment of a special tribunal was unconstitutional. As Miyazawa's and Ramseyer's analyses of the autonomous power of the office of the Supreme Court demonstrate, the meaning of the Secretary General's apology strongly influences inferior court judges.²⁴¹

Miyakawa examined the function and perspectives of research judges for justices.²⁴² Takii wrote that justices listen to research judges' perspectives.²⁴³ Law might argue that with regard to the leprosy case, an official apology from the judiciary for the past treatment of leprosy patients could be a step forward in recognizing legal liability because the organized hierarchy of the Japanese judiciary would shape policy more effectively than a conflict-based solution judiciary as seen in the United States. Law might also expect that judicial review would be altered by the leprosy case.²⁴⁴ Miyazawa may praise the leprosy report and evaluate it as evidence of the judicial reform that took place in the 1990s that imputed citizens' voices to elitisms for being top officials of the office of the Supreme Court, and Takii describes three unconstitutional decisions that have been rendered post-reform.²⁴⁵ Thus, the leprosy report might be one step forward in a positive evaluation of the judiciary itself. Although it is a pure supposition, Miyakawa may question Law by pointing out that judicial activism does not always have a positive outcome and may not have one in the leprosy case.²⁴⁶

Today, in some cases, career justices actively write their dissenting opinions themselves. Those justices who have experience from time in the office of the Supreme Court as the Secretary General do not need research judges to write concurring or dissenting opinions. For example, several conspicuous opinions were written by career Justice Tokuji Izumi. He wrote a dissenting opinion in a 2007 decision regarding political campaign activity in the 2005 and 2015 House of

²⁴¹ *Id.* at 95; Miyazawa, *supra* note 54, at 268.

²⁴² Miyakawa, *supra* note 230, at 211.

²⁴³ Takii, *supra* note 164, at 35.

²⁴⁴ Law, *supra* note 155, at 1463–64.

²⁴⁵ Takii, *supra* note 164, at 68–82; Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 *ASIAN-PACIFIC L. & POL'Y J.* 89, 90–97 (2001).

²⁴⁶ Miyakawa, *supra* note 230, at 198, 199–200.

Representatives elections and the Political Official Election Act.²⁴⁷ His dissenting opinion reflected the constitutional law theory that emphasizes the judiciary's role as the constitutional guarantee.²⁴⁸ His opinion tried to limit legislative discretion and protect minorities whose voices are not represented in the political process.²⁴⁹

E. A Comparison of Korematsu and the 2017 UN Resolution for the Treatment of Those Affected by Leprosy

Generally, an apology issued by Japan's judiciary is not easily comparable with that of other countries. Nevertheless, the U.S. Supreme Court's decision in *Korematsu* is helpful for reviewing the special tribunal for leprosy patients in Japan.²⁵⁰

In the *Korematsu* case, a Japanese American, Fred Korematsu, was detained in an internment camp during WWII under Executive Order 9066.²⁵¹ The U.S. Supreme Court supported the internment of Japanese Americans in the camps and rejected Korematsu's argument against internment.²⁵² The *Korematsu* case shares several similarities with the leprosy case in Japan.

One similarity relates to how the people discriminated against in both cases were treated. In Japan, leprosy patients were, by law, forced to live in an isolated sanatorium. Even after the leprosy law was abolished, many of the leprosy patients decided to remain in the sanatorium because their parents or other family members—who may have been able to care for them—had passed away.²⁵³ Now, just as the number of witnesses to the Japanese internment camps during WWII have dwindled, so too have the number of inhabitants who used to be residents of the Japanese leprosy sanatorium. One of the legitimate applications of judicial review is to exercise such review on behalf of marginalized minority people. Professor John Hary Ely discussed this

²⁴⁷ Saikō Saibansho [Sup. Ct.] June 13, 2007, Heisei 18 (gyo tsu) No.176, 61(4) Saiko Saibansho Minji Hanreishu [Minshu] 1617 (Japan) (Tokuji Izumi, J., dissenting); IZUMI, *supra* note 61, at 219–26.

²⁴⁸ Saikō Saibansho [Sup. Ct.] June 13, 2007, Heisei 18 (gyo tsu) No.176, 61(4) Saiko Saibansho Minji Hanreishu [Minshu] 1617 (Japan) (Tokuji Izumi, J., dissenting).

²⁴⁹ *Id.*

²⁵⁰ *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁵¹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

²⁵² *See Korematsu*, 323 U.S. 214.

²⁵³ Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748 Hanrei Jihou 30 (Japan).

particular application of judicial review²⁵⁴ in the 1980s and it was imported into Japanese constitutional studies in the 1990s.²⁵⁵

In Justice Roberts' dissenting opinion in *Korematsu*, he stated that the law was unconstitutional because *Korematsu* was interned based solely on his ancestry, without considering evidence or inquiring into his loyalty and good disposition toward the United States. Essentially, Justice Roberts argued that the law violated the requirement of equal treatment under the law.²⁵⁶ Unlike the dissenting opinion of Justice Roberts, the Supreme Court of Japan's report from the special tribunal on the leprosy sanatorium law did not conclude that the law violated equal protection under the Constitution.²⁵⁷

Another similarity can be observed in the policies that supported the isolation of the leprosy patients and the internment of Japanese Americans. The United States established the Japanese American internment camps during WWII. The U.S. Supreme Court supported the congressional decision to incarcerate Japanese Americans on the ground of uncertainty following the Pearl Harbor attack. Similarly, in Japan, the leprosy isolation policy and special tribunal for leprosy patients was maintained pre- and post-war.²⁵⁸ Thus, this isolation policy remained intact, even after Japan rid itself of the Emperor's direct rule and established its post-war Constitution and judiciary under the people's sovereignty in 1947.²⁵⁹ Although research in 1960 revealed that infectivity of leprosy was weak, the Japanese judiciary still approved ninety-five special tribunal applications.²⁶⁰ It is clear from both the *Korematsu* and leprosy cases that bias and prejudice easily overcome weak evidence for supporting the restriction of human rights.

²⁵⁴ JOHN H. ELY, *DEMOCRACY AND DISTRUST* (Harvard Univ. Press, 1981).

²⁵⁵ KOJI SATO & SHINGENORI MATSUI, *MINSHUSHUGI TO SIHOUSHINSA*, [Democracy and Judicial Review] (Seibundou, 1999).

²⁵⁶ *Korematsu v. United States*, 323 U.S. 214 (1944) (Roberts, J., dissenting); Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan); HANSEN REPORT, *supra* note 1, app. (special advisory committee opinion), at 1–10.

²⁵⁷ HANSEN REPORT, *supra* note 1; Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

²⁵⁸ HANSEN REPORT, *supra* note 1, at 7–41; *Korematsu*, 323 U.S. at 218, 221–24.

²⁵⁹ HANSEN REPORT, *supra* note 1, at 35–39.

²⁶⁰ *Id.*; Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

The Kumamoto district court decision encouraged the Diet to pass a statute compensating the leprosy patients.²⁶¹ Unlike the *Korematsu* decision, the Kumamoto district court decision was that of an inferior court, to which the cabinet denied an appeal. Thus, because the cabinet denied the appeal, the Japanese Supreme Court could not hear the case.²⁶² Both Japanese and U.S. courts employ concrete judicial review, such that they only interpret and announce what the law on a matter is between competing parties. Japan finally issued legislative remedies for its leprosy isolation policies in 1996 and 2001. In 1996, the Japanese Parliament abolished leprosy isolation statutes and, in 2001, the legislature released a public apology for its inaction.²⁶³ Similarly, in 1980, the U.S. Congress ordered an investigation of Executive Order 9066. This investigation, conducted by the Commission on Wartime Relocation and Internment of Civilians, concluded in 1983 that the internment of Japanese Americans was not justified by military necessity.²⁶⁴ The Commission recommended a legislative remedy and, accordingly, Congress passed the Civil Liberties Act of 1988.²⁶⁵ President Ronald Reagan signed the law that would provide compensation to survivors.²⁶⁶

These legislative actions demonstrate that the law-making power belongs to the Diet in Japan and Congress in the United States based on those countries' respective constitutions. However, with regard to law-making in the United States, the President must sign a bill to make it effective, while this is not the case with respect to the Prime Minister in Japan. However, in both countries, legislative work takes time, and, when engaging in judicial review, courts permit wide discretion as to when and how a statute is passed.

Since 2008, the Japanese government has submitted several proposed resolutions to the United Nation's Human Rights Council.²⁶⁷

²⁶¹ HANSEN REPORT, *supra* note 1, at 35–39.

²⁶² Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] May 11, 2001, Heisei 10 (wa) no. 764, 1748, Hanrei Jihou 30 (Japan).

²⁶³ HANSEN REPORT, *supra* note 1, at 35–39; Hansen byou ryouyoujo, *supra* note 26.

²⁶⁴ Hansen byou ryouyoujo tou ni taisuru hoshoukin no sikyuni kansuru houritsu [Act on Payment of Compensation for Hansen's Disease Recreation Area Residents,], Law No. 63 of 2001 (Japan).

²⁶⁵ Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

²⁶⁶ *Id.* (codified at 50 U.S.C. § 1989(b) (2012)).

²⁶⁷ MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *Japanese Initiative in the Efforts to Eliminate Discrimination against Persons Affected by Leprosy and Their Family Members*, (July 26, 2017) http://www.mofa.go.jp/fp/hr_ha/page22e_000675.html; *see also* Human Rights Council, Res. 8/13. Elimination of discrimination against persons affected by leprosy

In 2015, the Human Rights Council adopted resolution 29/5 (A/HRC/RES/29/5).²⁶⁸ Under this resolution, member states are required to respect the principles and guidelines for the elimination of discrimination against leprosy-affected persons and their family members.²⁶⁹ These principles and guidelines were drafted by the Human Rights Council Advisory Committee and provide that certain human rights, such as the rights to employment, education, and healthcare, are to be promoted. Though the resolution has no legally binding power, member states should interpret it in a manner consistent with its obligation under international human rights law.²⁷⁰

In June 2017, the Human Rights Council adopted resolution 35/9, a resolution for the “[e]limination of discrimination against persons affected by leprosy and their family members.”²⁷¹ The resolution declares “that persons affected by leprosy and their family members, including women and children, should be treated with dignity and are entitled to the enjoyment of all human rights and fundamental freedoms under customary international law, relevant conventions, and national constitutions and laws.”²⁷²

This resolution might be a pressure from international society to demand a review of the special tribunal for leprosy patients in Japan. Thanks to the office of the Supreme Court’s 2016 apology, the Supreme Court could keep its authority and the prestige of being a top section in the Supreme Court.

CONCLUSION

When the current Japanese Constitution was established in 1947, the most important mission of the judiciary was to separate judicial power from the executive branch. The leprosy case gives rise to the question of whether or not judges can remain independent within the judiciary and not be subject to the pressures of the executive branch.

The leprosy tribunal created serious issues within the Japanese judiciary. The Supreme Court officially announced a judicial apology

and their family members, <http://www.mofa.go.jp/files/000078245.pdf> (last visited Oct. 30, 2017).

²⁶⁸ Human Rights Council Res. 29/5, U.N. Doc. A/HRC/29/L.10 (June 30, 2015).

²⁶⁹ *Japanese Initiative in the Efforts to Eliminate Discrimination against Persons Affected by Leprosy and Their Family Members*, *supra* note 267.

²⁷⁰ *Id.*

²⁷¹ Human Rights Council Res. 35/9, U.N. Doc. A/HRC/35/L.14 (June 19, 2017).

²⁷² *Id.*

from the office of the judiciary by a report in 2015. It did not address legal responsibility or a complete remedy for affected families. Although the current Constitution was influenced by the U.S. Constitution, it is not identical. The current Constitution provides that the organization of the judiciary stands for the independence of the judiciary and its judges. The promotion and transfer systems for judges are established, but it is unclear if they play a part in guaranteeing the independence of the judiciary and its judges. These differences between the U.S. and Japanese constitutions may engender different attitudes when exercising concrete judicial review. In Japan, career judges are faceless and have a set retiring age. In fact, justices hold their positions for such a short time that the Japanese people generally do not remember their names; accordingly, the Law of the People's Examination of the Supreme Court Judges under Article 70 is criticized for its ineffectiveness.

Judges are classified into several ranks, and their salaries are similarly classified such that there exists a wide gap between higher and lower ranks. Judges are transferred every two or three years, which may lead judges to follow implied orders from the office of the Supreme Court in order to benefit from better transfers or promotions. The cabinet appoints judges to the judiciary, but a list of candidates is prepared by the Supreme Court and submitted to the cabinet. Usually, the cabinet follows the list submitted by the Supreme Court.

Some critics allege that judicial review in the Japanese Supreme Court does not work in the same manner as in the U.S. Supreme Court. In addition, the research judges assigned to support the Supreme Court Justices are not allocated to specific Justices; instead they are allocated by case. When writing dissenting opinions, Supreme Court Justices need to write their own opinions without the help of research judges. Justice may tend to write to make the scope of their decision narrow, for fear that their authority unnecessarily falls.

Today, career justices on the Supreme Court tend to write individual opinions that might influence the office of the Supreme Court because the Secretary General position is a path toward Supreme Court justice positions. The office of the Supreme Court supports Justices and its administrative power over personnel affairs is strong. The judiciary reform in 1999 established a committee for the appointment of judges, and hence, this guaranteed some transparency.

The constitutional analysis for leprosy treatment by the Japanese government has not been widely discussed or acknowledged outside Japan. As these patients grow older and pass away, they are forgotten

by society. By shedding light on this unequal treatment, we can bring some solace to those affected and simultaneously fulfill the constitutional law scholar's duty to explain the organization and autonomy of the judiciary to the Japanese public and the rest of the world.

