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# THE ROLE OF THE SUPREME COURT OF JAPAN IN THE FIELD OF JUDICIAL ADMINISTRATION

Takaaki Hattori*

The Japanese judiciary has evolved only quite recently. The judiciary came into existence in the modern sense after the so-called Meiji Restoration of 1868, which swept away the feudal governmental system under the Tokugawa Shogunate. After a series of patchwork reforms, the Constitution of the Empire of Japan was finally established in 1889. The Constitution set up a constitutional monarchy based upon a separation of powers theory.[1] Implementing legislation[2] was passed which created a modern and unified court structure staffed by trained professionals. This regime endured without significant change for more than fifty years until the end of the Second World War.

The prewar separation of powers did not rise to our present day standard, however. It is true that the prewar judiciary of Japan stood quite steadfast against extra-judicial interference with its decisions, especially from the executive branch and political circles. The best known example of judicial independence was the so-called "Otsu case" of 1891,[3] which occurred soon after the enactment of the Constitution of 1889. In May 1891, in the small city of Otsu, a patriotic policeman attempted to murder the Crown Prince of Russia, later Czar Nicholas II, who was visiting

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1. *See generally* 10 JAPANESE CULTURE OF THE MEIJI ERA, JAPANESE LEGISLATION OF THE MEIJI ERA (Ishii R. ed., W. Chambliss trans. 1958).
2. The most important is Saibansho Kōsei-hō (Court Organization Law), Law No. 6 of 1890.
3. *See* KOJIMA, OTSU JIKEN TENMATSU-ROKU (An Account of the Otsu Case) (1931).

Japan at the time. The government was afraid of disrupting diplomatic relations with Russia, and thus urged the responsible judges of the Great Court of Cassation (the prewar Supreme Court) to impose the death penalty by analogously applying the Penal Code provision for attempted homicide against a member of the Japanese imperial household.[4] The then Chief Justice Kojima strongly rejected the government's demands on the ground that attempted homicide against a member of a foreign imperial family did not fall under the Penal Code provision. The court therefore imposed only a life imprisonment sentence on the policeman, as was provided in the code for attempted homicide against an ordinary person.

Even so, the prewar judges were beholden to the executive branch to some extent. They were appointed by the government,[5] and were under the general supervision of the Minister of Justice,[6] rather than that of the judiciary itself. Accordingly, there was always the possibility of yielding to the bureaucratic influence of the Minister of Justice, or indirectly succumbing to political pressure from the government. In addition, an Administrative Court[7] and military courts[8] restricted the function of the ordinary courts.

This structure of the judiciary was reformed after the Second World War by a new constitution. At this time a more complete separation of powers was instituted and the judicial function was strengthened considerably. Under the Constitution of 1946, which came into effect on May 3, 1947, the courts of Japan were given exclusive judicial power including the power to review legislative and administrative acts. The 1946 Constitution thus granted to Japanese courts for the first time the power to determine the constitutionality of legislative and administrative acts,[9] similar to the American practice of judicial review. It has also vested the Supreme Court with rule-making power, which guarantees court autonomy not only in procedural or judicial areas but also in the field of judicial administration in general.[10]

4. KEIHŌ (Penal Code), Decree of Great Council of State No. 36 of 1880, art. 116, prescribed as follows: "Any person who inflicted or attempted to inflict an injury on the Emperor, the Empress or the Crown Prince shall be punished with death."

5. Under the prewar system, judges, like other government officials, were selected and appointed by the executive branch based on the appointive power of the Emperor. *See* KENPŌ (Constitution) OF JAPAN, 1889, art. 10; Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 67; Naikaku kansei (Cabinet Organization), Imperial Ordinance No. 135 of 1879, art. 5(1)(vii); Kakusho hansei tsusoku (General Rules for Organization of Each Ministry), Imperial Ordinance No. 122 of 1893.

6. *See* Saibansho kōsei-hō (Court Organization Law), Law No. 6 of 1890, art. 135.

7. *See* Gyōsei saiban-hō (Administrative Adjudication Law), Law No. 48 of 1890; Gyōsei saibansho-rei (Administrative Court Ordinance), Imperial Ordinance No. 133 of 1913.

8. *See* Rikugun gunpo kaigi-hō (Army Court Martial Law), Law No. 85 of 1921; Kaigun gunpō kaigi-hō (Navy Court Martial Law), Law No. 91 of 1921.

9. *See* KENPŌ (Constitution) OF JAPAN, 1946, arts. 76, 81.

10. *See id.*, art. 77.

This article focuses on the Japanese Supreme Court's exercise of its power of judicial administration. The article places special emphasis on the management of the judiciary and on rulemaking, both quite novel to the Japanese court.

## I. BACKGROUND

Before discussing judicial administration in Japan, I will briefly describe the Japanese court system. There are three important features of the Japanese judicial system: the organization of courts, the categories of judges, and the selection of judges.

Under the present Constitution Japan has a unitary judicial system with five kinds of courts: one Supreme Court;[11] eight high courts;[12] fifty district courts;[13] fifty family courts;[14] and 575 summary courts.[15] Summary courts resemble small claims courts and justice-of-the-peace courts in the

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11. *See* KENPO (Constitution) OF JAPAN, 1946, art. 76(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 6–8.

12. *See* KENPO (Constitution) OF JAPAN, 1946, art. 77(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 15–17; Kakyu saibansho no setsuritsu oyobi kankatsu kuiki ni kansuru hōritsu (Law Concerning Establishment and Territorial Jurisdiction of Inferior Courts), Law No. 63 of 1947, art. 1.

There are six branches of high courts throughout Japan. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 22(1); Kōto saibansho shibu setchi kisoku (Rules Concerning Establishment of Branches of the High Courts), Supreme Court Rule No. 1 of 1948.

13. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 77(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 23–25; Kakyū saibansho no setsuritsu oyobi kankatsu kuiki ni kansuru hōritsu (Law Concerning Establishment and Territorial Jurisdiction of Inferior Courts), Law No. 63 of 1947, art. 1.

There are 242 branch offices of district courts throughout Japan. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 31(1); Chihō saibansho oyobi katei saibansho shibu setchi kisoku (Rules Concerning the Establishment of the Branches of District Courts and Family Court), Supreme Court Rule No. 14 of 1947, art. 1.

14. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 77(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 31-2, 31-3; Kakyū saibansho no setsuritsu oyobi kankatsu kuiki ni kansuru hōritsu (Law Concerning Establishment and Territorial Jurisdiction of Inferior Courts), Law No. 63 of 1947, art. 1.

There are 242 branch offices and 96 sub-branch offices of family courts throughout Japan. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 31, 31-5; Chihō saibansho oyobi katei saibansho shibu setchi kisoku (Rules Concerning the Establishment of the Branches of District Courts and Family Court), Supreme Court Rule No. 14 of 1947, art. 1; Katei saibansho shutchō setchi kisoku (Rules for Establishment of Sub-branch Offices of the Family Court), Supreme Court Rule No. 32 of 1950.

15. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 77(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 32–34; Kakyū saibansho no setsuritsu oyobi kankatsu kuiki ni kansuru hōritsu (Law Concerning Establishment and Territorial Jurisdiction of Inferior Courts), Law No. 63 of 1947, art. 1.

All or a portion of the judicial business of the 58 summary courts designated by the Supreme Court is temporarily performed by neighboring summary courts in accordance with article 38 of the Court Organization Law.

United States; their jurisdiction is limited to civil cases involving 900,000 yen (approximately $4,000) and minor criminal cases.[16] Family courts are special courts, dealing exclusively with domestic relations and juvenile delinquency cases.[17] They occupy the same level in the system as district courts, and sit in the same cities. District courts are courts of general jurisdiction.[18] High courts are appellate courts, somewhat similar to the federal courts of appeals in the United States, although the nature of both first and second appeals in Japan is quite different from that of the United States appellate courts.[19]

The bench in Japan is classified into five categories of judges (*saiban-kan*): (1) the fifteen Supreme Court justices, including the chief justice; (2) the eight chief judges (presidents) of the high court; (3) about 1350 full judges (*hanji*); (4) about 600 assistant judges (*hanji-ho*); and (5) about 800 summary court judges.[20] The four categories of judges other than Supreme Court justices are generically called "inferior court judges."[21] The distinction between Supreme Court justices and inferior court judges is noteworthy because the method of selection is quite different.

The judges of Japan, except Supreme Court justices and summary court judges, are mostly "career judges." Supreme Court justices are appointed in roughly equal numbers from among three broad groups: (1) inferior court judges; (2) practicing lawyers; and (3) public prosecutors, law professors, or other persons of broad knowledge and experience.[22] Summary court judges are usually appointed from among: (1) persons with certain required knowledge and experience; (2) retired inferior court judges or public prosecutors; and (3) (temporarily or concurrently) assistant judges or full judges.[23]

16. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 33, 34.

17. *See id.* arts. 24, 25.

18. *See id.* art. 31-3.

19. *See id.* arts. 16, 17.

However, the character of appeals to the Japanese high courts is quite different from appeals to the United States appellate courts. On the civil side, appellate proceedings in high courts are treated as a continuation or reopening of the first instance. *See* T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN § 8.02 (1983). On the criminal side, high courts review the law or facts as found in judgments at first instance. *See* S. DANDO, JAPANESE LAW OF CRIMINAL PROCEDURE 415–17 (J. George trans. 1965).

20. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 79(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 5, 15; Saibansho shokuin teiin-hō (Law for Fixed Number of Court Officials), Law No. 53 of 1951, art. 1.

21. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 80; Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 5(2).

22. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 41; *see also* H. KANEKO & M. TAKESHITA, SAIBAN-HŌ (Court Organization Law) 208 (1978).

23. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 44, 45.

While the compulsory retirement age is 65 for ordinary inferior court judges and 63 for public prosecutors, summary court judges may serve until 70. *See* Saibansho-hō (Court Organization Law),

Other inferior court judges, in contrast, normally choose their position as a career. They are appointed assistant judges for a ten-year term after meeting three requirements. Career judges must graduate from the university (law department), pass the national legal examination, and complete two years of professional training required by law at the Legal Training and Research Institute, the only national training institution for the entire legal profession.[24]

After at least ten years service as assistant judges, career judges are usually appointed as full judges for a ten year term.[25] The term is normally renewed[26] so that these judges remain in the judiciary until compulsory retirement at age sixty-five,[27] except for those who may resign earlier for private reasons. They spend most of their lives as judges in a system much like the United States government civil service, except that the Japanese judiciary is managed separately by the Supreme Court. Some judges may be appointed for a few years to administrative positions with the Supreme Court, the Ministry of Justice, or other governmental agencies.

This system, commonly called the "career judge" system or the "career judiciary," can be traced to the origins of Japan's prewar judicial training system. The training system was borrowed from continental countries, mostly from Germany and France, soon after the Meiji Restoration of 1867.[28] The leaders of the Meiji government probably adopted the career judge system without paying much attention to possible alternatives such as the appointive judge system in effect in England or the elective system used in the United States. Moreover, the Meiji government may have adopted a career judge system as a matter of course, since the only training available for judicial officers was in the newly-established law school of the Ministry of Justice and in the law department of the new university. Jurists and lawyers as trained in modern law simply did not exist in the early Meiji period.[29] Additionally, the Meiji leaders may have believed that career judges with long professional training and much experience in trial work were more suitable to conduct effi-

Law No. 59 of 1947, art. 50. Accordingly, retired judges or public prosecutors may be appointed as summary court judges.

24. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 43, 66, 67; Shiho shiken-hō (Legal Examination Law), Law No. 140 of 1949, art. 1.

25. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 42(1).

26. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 80(1).

27. *See id.*, art. 80(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 50.

28. *See* E. HAYNES, THE SELECTION AND TENURE OF JUDGES 171–77 (1944) (training system for judges in prewar Germany).

29. *See* Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY. 114 n.8 (A. von Mehren, ed. 1963).

cient civil and criminal trials than short-term elected or appointive judges with experience from only one side of the bench. Without a jury system in Japan, the judges bore, or at least were expected to bear, heavier responsibilities in directing hearings and formulating issues, especially for the many parties who appeared pro se. The judge alone had to complete the proof-taking, fact-finding, and application of law under the prewar inquisitorial procedure.

Career judges have been criticized as "fossils" or "greenhorns" far removed from the rough and tumble life in the street and therefore prone to hand down judgments that are out of touch with the world.[30] Generally, however, it is accepted that prewar judges fulfilled their mission well and had judicious characters. They were perhaps the most reliable of the bureaucratic organizations in Japan.[31] Thus, the system proved quite durable and continued without change to the end of World War II.[32]

After the war, however, novel proposals were considered. For example, in 1954 the Japan Federation of Bar Associations, the professional organization of practicing lawyers throughout Japan, suggested that all judges and prosecutors be selected from among the members of the bar who had practiced for a particular number of years.[33] In 1961 the Japan Jurist Association, a unique voluntary private organization that brings together certain judges, lawyers, public prosecutors, and law professors, adopted a similar resolution favoring judicial appointments from the bar.[34] In response to such proposals, the prestigious Temporary Investigative Commission on the Judicial System, established by the government in 1962, issued a final report after two years of deliberations. It stated:

> The so-called "unification of the legal profession," which means the principle of selecting judges from among senior members of the bar, is a desirable system also for our country, if it can be smoothly realized. However, the conditions necessary for its realization have not yet been fully established.

30. Enkichi Oki, the Minister of Justice from 1920 to 1922, created a major controversy because he was reported to have made a statement that judges were "fossils." *See* 1716 HŌRITSU SHIMBUN (The Law News) 21 (1920).

31. *See* H. KANEKO & M. TAKESHITA, *supra* note 22, at 58.

32. The procuracy developed a system similar to that for judges, probably for similar reasons.

33. *See* H. KANEKO & M. TAKESHITA, *supra* note 22, at 202.

Professor Kaneko considered this to be an attempt by the lawyers to gain equality to some extent: they had long complained of discriminatory treatment before World War II. A similar proposal was made by members of the bar before the war. *Id.* at 339.

Also noteworthy is the lack of any suggestion that judges should be elected. This probably is a general reflection of the dubious merit of the elective system, especially for Japan.

34. *See id* at 202.

> Accordingly, at this time we should instead plan to improve the present system by taking the merit of the unification system into consideration . . . .[35]

As pointed out in the Commission report, there are many obstacles to a so-called unified legal profession in Japan. For example, there is a tendency towards professional immobility, traditional to Japanese society.[36] Also, there may be difficulties resulting from a change of emotional, economic and living environments that may inhibit individuals from initiating a move from bar to bench in mid-career. Thus, the Japanese judiciary, for better or worse, is still composed mostly of career judges, as it was before the new Constitution.

## II. THE JAPANESE SUPREME COURT'S POWER OF JUDICIAL ADMINISTRATION

I will now turn to a discussion of judicial administration in Japan. In particular, I will discuss the management of the judiciary and the Japanese Court's rulemaking power.

### *A. Management of the Judiciary*

The Supreme Court's management of the judiciary in Japan entails a number of responsibilities. Some of the most important include the selection of judges, the assignment of a judge to a specific court, the promotion of judges, and in-service training and supervision of judges.

#### *1. Selection of Judges*

All Japanese judges are appointed by the cabinet, except the chief justice of the Supreme Court, who is appointed by the Emperor based upon the nomination of the cabinet.[37] The appointive procedure for Supreme Court justices is different from that for the inferior court judges.[38] The cabinet has full powers of selection of Supreme Court justices. However, the prime minister often seeks the opinion of the chief justice, particularly when the prospective justice is a career judge. Or, the prime minister

35. *Id.* at 203.

36. It is a well known fact, even in the United States in recent years, that the lifelong employment system is also common in private companies in Japan.

37. *See* KENPŌ (Constitution) OF JAPAN, 1946, arts. 6(2), 79(1), 80(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 39(1), (2), 40(1).

38. *Compare* KENPŌ (Constitution) OF JAPAN, 1946, arts. 6(2), 79(1) *and* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 39(1), (2) (appointment of Supreme Court justices), *with* KENPŌ (Constitution) OF JAPAN, 1946, art. 80(1) *and* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 40(1) (appointment of inferior court judges).

may, through the chief justice, seek the opinion of the bar association when the prospective justice is a lawyer. The prime minister is by no means bound by such opinion, however. In view of the particular importance of the Supreme Court, the constitution has adopted the doctrine of checks and balances, allowing the cabinet discretion in appointment of the justices. Moreover, the appointment of Supreme Court justices must be reviewed by the people at the first national election following each appointment, and once again after a ten-year term. If the majority of voters favor the dismissal of a justice, the justice loses the position automatically.[39] It is said that this system is borrowed from the "Missouri Plan" in the United States, under which each justice is reviewed on his record by the electorate and does not run against other candidates for the position.[40] Thus, since 1947, Japanese justices of the Supreme Court have been appointed by a system quite different and new to Japan.[41]

Inferior court judges are appointed by the cabinet from a list of persons nominated by the Supreme Court.[42] Their tenure is limited to ten years, with the possibility of reappointment (which usually occurs).[43] The Supreme Court prepares separate lists for each category of judges: chief

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39. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 79(2), (3), (4); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 29(3); *see also* Saikō saibansho saibankan kokumin shinsa hō (Supreme Court Justice Popular Review Law), Law No. 136 of 1947.

The Supreme Court held that the system of Supreme Court justice popular review is not designed to examine whether or not the appointment of the justice itself should be effectuated, but to determine whether or not the justice appointed should be dismissed. *See* Sasaki v. Chairman of the Supreme Court Justice Popular Review Administration Commission, 6 Sai-han minshū 122 (1952). In all popular reviews held so far, however, votes for dismissal have barely reached ten to eleven percent of the total, and no justice has been removed.

40. *See* MO CONST art. V, § 29; A. VANDERBILT, MINIMUM STANDARD OF JUDICIAL ADMINISTRATION 5 (1949).

41. In some Japanese circles, there are arguments against the popular review system based on the grounds that (1) the public cannot evaluate the activities of a justice because judicial duties require a high degree of technical competence, and moreover, the public does not have much opportunity to know the activities of a particular justice, and (2) a considerable expenditure of public funds is needed to review the justices, nearly all of whom are in no way controversial.

However, in view of the importance of the position of the Supreme Court justices, some kind of popular participation in their selection may be appropriate. Therefore, the weight of authority seems to find that an impetuous abolition of this system would be unwise. *See* Saiko saibansho jimu sokyoku (General Secretariat of the Supreme Court), 2 Saibansho-hō chikujo kaisetsu (Commentaries on the Court Organization Law) 29, 30 (1969); H. KANEKO & M. TAKESHITA, *supra* note 22, at 211.

42. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 80(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 40.

43. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 80(1); Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 40.

Under the prewar system, judges were officials for life, with retirement from actual service set at the age of 63. It is said that the present system of 10-year terms has been adopted to prevent judges from becoming idle and complacent because of the security of tenure, expecting rational personnel management to occur only by the normal processes of metabolism. *See* H. KANEKO & M. TAKESHITA *supra* note 22, at 218.

judges of the high court, judges, assistant judges, and summary court judges.[44] The cabinet is not allowed to appoint a person not on the list. Theoretically, it can refuse to appoint persons on the list and require the Court to submit a new list, but it rarely does so. Accordingly, the Supreme Court in fact has the initiative in selecting inferior court judges.

This fact sustains the "career judiciary" and thus makes the Supreme Court's responsibility important in selecting, supervising, training, and continuously educating judges. It is also clear that this is a constitutional device to impose an effective check on political appointment by the cabinet, on the one hand, and an indirect check on arbitrariness of the judiciary, on the other hand, by leaving the final step in the appointment to the cabinet. As a matter of fact, applications from experienced lawyers to become inferior court judges, though possible, are rare because of the institutional environment described above.[45]

Therefore, the lists of nominees for assistant judges and judges are usually prepared and submitted to the cabinet at the time of graduation from the Legal Training and Research Institute in April every year. In other words, a number of new graduates, around seventy in recent years because the vacancies are limited, apply for nomination as assistant judges. Simultaneously, most of the assistant judges who were appointed in April ten years earlier become qualified to serve as judges and are usually nominated as judges. They are normally appointed based upon the lists prepared by the Supreme Court. (However, those assistant judges with ten years of service who were not in actual service for the entire ten years because of illness or other reasons may not be nominated as candidates for positions as full judges.)

The selection of summary court judges is similar to that of judges and assistant judges. Summary court judges are usually nominated and appointed in August of every year, either from among retired judges and prosecutors, or from among persons who have been selected in June or July by the Summary Court Judge Selection Committee of the Supreme Court.[46]

In preparing its lists of nominees for inferior court judges, the Supreme Court is most prudent and cautious about its constitutional responsibility.

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44. *See* Saikō saibansho jimu sōkyoku (General Secretariat of the Supreme Court), at 204, 205.

45. *See* H. KANEKO & M. TAKESHITA, *supra* note 22, at 204, 205.

46. This Committee is composed of Supreme Court justices, the Chief Judge of the Tokyo High Court, the Deputy Procurator General, practicing lawyers, and those with social knowledge and experience. Candidates in this selection process are court clerks who have served for many years, retired government officials, retired business executives, and the like. *See* Kan'i saibansho hanji senkō kisoku (Rules Concerning Selection of Judges of the Summary Court), Supreme Court Rule No. 2 of 1947.

It carefully examines not only whether the applicant satisfies the formal requirements prescribed by law, but also considers his or her aptitude as a judge including the applicant's overall personality, personal history, legal ability, and health.[47] A Supreme Court committee also interviews each applicant. Every effort is made to recruit the ablest and most promising persons to the judiciary. When an assistant judge applies for full judgeship, achievements during the ten years of service will also be taken into consideration. Needless to say, the general practices mentioned above do not preclude the possibility of casual appointments to fill vacancies occurring from time to time.

### 2. *Assignments of Judges to Particular Courts*

The next important matter following the appointment of an inferior court judge is an assignment to a specific court for service. Unlike the American system, but similar to the system in some continental countries, all inferior court judges in Japan are appointed without being assigned to the court where they are to serve. The purpose is to avoid placing a judge on a specific court throughout his entire tenure, which is thought to hamper efficient personnel administration in the judiciary.[48] Instead, the Supreme Court assigns each new appointee to a specific court immediately after appointment.[49]

Since a judge, whether a judge, assistant judge, or summary court judge, is usually required to serve for at least two or three years in the court to which he is assigned, the Supreme Court is careful in making assignments. The Court considers factors such as the desires of the judge, his familiarity or acquaintance with the place to be assigned, judicial vacancies, and the volume of business of the specific court. The Court thus tries to adjust to the interests of both the judge and the court. In assigning newly appointed assistant judges, the Supreme Court has followed a policy of assigning them to large, medium, and small courts in rotation during their ten-year term, though not necessarily in a fixed order. This is to allow inexperienced assistant judges to become acquainted with the work at a variety of courts. This rotation has worked out fairly well so far, with the cooperation of all concerned. It should be added here that, although newly appointed judges may theoretically be assigned to any court without their consent, they may not, once assigned, be removed to a different

47. *See* Saikō saibansho jimu sōkyoku (General Secretariat of the Supreme Court), at 37.

48. *See id.* at 104.

49. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 47.

The number of judges to be assigned to each inferior court is determined by the Supreme Court. This number is changed from time to time after studying the caseload of each court.

court without their consent.[50] In the case of judges, reassignment or change of assignment is generally less frequent.

### 3. *Promotion of Judges*

The promotion of judges is related to assignment of judges. Promotion usually means the transfer of judges from a lower or less important position to a higher or more important position. It also can mean a raise of judicial salary.[51] Since the Japanese judiciary is composed of career judges, promotion is usual for younger judges of some talent. A judge's transfer from one court to another is legally a change of assignment, even if it is done for the purpose of promotion. Therefore, such transfer must be determined by the Supreme Court with the consent of the judge concerned.[52] A raise of a judge's salary is also determined by the Supreme Court.[53] Other kinds of promotion are determined, as appropriate, either by the Supreme Court or by the judges' conference of the court to which the judge concerned has been assigned.

Generally, a judge commences his or her career as an assistant judge immediately after graduation from the Legal Training and Research Institute.[54] The judge will probably first be assigned to a district court to serve as a junior associate judge of one division, as part of a three-judge bench which usually deals with cases too difficult or complex to be handled by a single-judge bench.[55] If the assistant judge has served for five years or more without serious trouble, he or she may then be designated as a "specially-qualified assistant judge" by the Supreme Court. The assistant judge can then hear and try cases alone, like a full judge, under the au-

50. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 48.

51. In Japan, while the salaries of the Supreme Court justices and chief judges of the high courts are, roughly speaking, uniformly fixed for each categoy, the salaries of full judges, assistant judges, and summary court judges are individually determined in accordance with a salary schedule prescribed by law. For example, there are nine grades in the salary schedule for full judges. *See* Saibankan no hōshū nado ni kansuru hōritsu (Law Concerning Compensation of Judges, etc.), Law No.75 of 1948.

In addition to their monthly salary, all judges receive special monthly allowances of about 8% of their monthly base salary, and extra bonuses two or three times a year, up to a total of about one-third of their annual salary.

It is one of the important administrative functions of the Supreme Court to grade the individual judge appropriately, taking into account factors such as his age, length of service, ability, achievement and the like.

52. Saibansho-hō (Court Organization Law), Law No. 59 of 1947, arts. 47, 48.

53. Saibankan no hōshū nado ni kansuru hōritsu (Law Concerning Compensation of Judges, etc.), art. 3 (1948).

54. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 43.

55. The Court Organization Law provides that assistant judges cannot hear or try cases alone but can be members of a collegiate body (a division or a three-judge bench). *See id.*, arts. 26, 27.

thority of a special temporary law.[56] After an assistant judge has completed ten years of service, he or she is qualified to become a full judge.[57] If a full judge has been appointed and serves for several years, he or she may then be assigned as a presiding judge of a division of a district court or a family court, or as a junior member of a divison of a high court. Specially talented judges may later be assigned to become the chief judge of a district court or family court, or the presiding judge of a division of the high court. Only a few excellent and fortunate people will be able to reach the position of the chief judge of a high court near the end of their entire career. Promotions are based mainly on the ability and achievement of the judge concerned. The opinions of a judge's seniors and colleagues may also be given consideration. Since summary court judges serve only on the summary court bench, there are no complex problems concerning assignments and promotions, as in the case of assistant judges and full judges.

Reassignments and promotions are often accompanied by a change of the place of service. Such changes are not only inconvenient to the judges concerned, but are also inefficient in handling judicial business because the judges must be changed during the trial of particular cases.[58] However, such disadvantages are inevitable in the career judge system. Knowledge, ability, and skill of individual judges develop with the passage of time, and the assignment of the right judge to the right position is required for efficient and effective administration of justice. Moreover, judges can learn more through experience in various positions and courts, and through change of work may also refresh themselves and promote efficiency. The Supreme Court's concern is to make reassignments and promotions with minimum disadvantages.

### 4. *In-Service Training of Judges*

In view of its great responsibility in the selection, assignment, and promotion of judges, and in response to the proposal of the Temporary Investigative Commission, the Supreme Court has paid special attention to the so-called in-service training of judges. The prevalence of in-service training in private enterprises and the advocacy of continuing legal education in the United States has also served as incentive to such efforts.

56. *See* Hanjiho no shokken no tokurei nado ni kansuru hōritsu (Law Concerning Special Measures of Authorities of Assistant Judges, etc.), Law No. 146 of 1948, art. 1.

57. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 42(1).

58. This is particularly true on the civil side because generally Japanese courts do not wait to commence a second case until after an earlier case has been finally decided. Rather, the court usually hears several different cases simultaneously on a piecemeal or installment basis. *See* T. HATTORI & D. HENDERSON, *supra* note 19 § 7.04(2).

The most important task of the judiciary is the training of younger, inexperienced assistant judges. In addition to the daily training of junior members of a three-judge bench through hearing and trying court cases, the training for assistant judges is roughly divided into five programs. The first is a comparatively short introductory course given to assistant judges immediately after their appointment. Its purpose is to provide them with a general idea of their future work and to aid them in preparing for judicial service. The other four training programs are seminar-type programs given in the first, third, fourth, and ninth years after appointment. The purpose of these seminars is to prepare the judges for new assignments, or for nominations to become "specially-qualified assistant judges" or full judges. In these programs, judges receive advanced knowledge in special fields of law, skills needed for conducting trials, and a general understanding of law-related sciences. Exchange of opinions with members of other branches of the legal professions is also encouraged in these programs.

Apart from these training programs, which are applicable to all assistant judges, a few promising assistant judges are sent to the United States, England, France, and West Germany every year for comparative study of law and legal systems. Their studies have made a great contribution to the Japanese judiciary. In this regard, we would like to express our deep gratitude to the University of Washington and other universities and institutions for their kind cooperation for many long years.

The purpose of training for full judges is somewhat different than that for assistant judges. The first category of training is a short-term colloquium-type program on subjects of current or special importance. The second is seminars or conferences on the management of court business, the education of younger judges, and the like. The third includes research programs related to special legal problems such as taxation, labor relations, and corporate reorganization. As a part of the second or third program, every year the Supreme Court provides a few judges with the opportunity to make trips abroad to observe the legal system in other jurisdictions. Additionally, the Supreme Court has recently created a training program outside the judiciary. The Court sends a few comparatively young judges to public or private corporations for field study of business transactions and business management for about two months. In the training of summary court judges, many of whom are selected from mature, non-lawyer candidates, the study of legal problems and courtroom practice is emphasized.

In addition to these training programs, the Supreme Court holds national and regional conferences for representatives of all courts several times a year, for the purpose of improving the administration of justice in

general. In these conferences, judges discuss the interpretation of new legislation, selected legal or practical problems, devices for expediting trials, and similar issues. Discussions or opinions expressed in the conferences never bind the judges present, but serve as guides in performing judicial duties.

### 5. *Administrative Supervision of Judges*

The administrative supervision of judges is not under the exclusive control of the judiciary. If a judge seriously violates his or her professional duties, grossly neglects these duties, or commits, inside or outside the office, a misdemeanor that gravely impugns integrity as a judge, he or she may be dismissed by the Judge Impeachment Court composed of Diet members.[59] Also, a judge who violates or neglects his or her duties or commits a misdemeanor inconsistent with the integrity of a judge may be disciplined by a disciplinary court composed of judges.[60] These matters are outside the ambit of the Supreme Court as an organ of judicial administration.

In the exercise of judicial administrative functions, however, if the Supreme Court finds grounds for dismissal for a certain judge, it must require the Judge Indictment Committee of the Diet to indict the judge.[61] Also, the Supreme Court, in a judicial rather than administrative capacity, acts as the court of first and final instance in internal disciplinary cases involving Supreme Court justices and high court judges. The Supreme Court is the court of final appeal in judicial disciplinary cases involving judges of the inferior courts other than high courts.[62]

In addition, the Supreme Court has been vested with general administrative and supervisory power over all judges in Japan.[63] There is a potential conflict here between the judges' independence to decide cases and the Supreme Court's power of administrative supervision. The generally accepted standard is that, while the Supreme Court is not allowed to order a judge to do or not to do something in connection with a case before him upon the pretext of administrative supervision,[64] it may issue general instructions to judges with regard to the disposition of judicial business as a

59. *See* Saibankan dangai-hō (Law of Impeachment of Judges), Law No. 137 of 1947, art. 1. The Impeachment Court is composed of Diet members, seven from the House of Representatives and seven from the House of Councillors. *See id.* art. 16(1).

60. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 49; Saibankan bungen-hō (Judge Disciplinary Law), Law No. 127 of 1947, arts. 3, 4, 8.

61. *See* Saibankan dangai-hō (Law of Impeachment of Judges), Law No. 137 of 1947, art. 15(3).

62. *See* Saibankan bungen-hō (Judge Disciplinary Law), Law No. 127 of 1947, art. 3(2).

63. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 80.

64. *See id.* art. 81.

whole. If a judge ignores such instruction, then the Court may take measures appropriate for the situation.[65]

*B. Rulemaking Power of the Supreme Court of Japan*

Another important role of the Supreme Court in the field of judicial administration is the exercise of rulemaking power, newly conferred upon it by the Constitution of 1946. The prewar Supreme Court had no power to make court rules under the then-existing system. It could prescribe regulations for handling its own business; they were, however, only enforceable with the permission of the minister of justice. Such regulations were quite different from the court rules envisaged under the postwar rulemaking power.[66]

Specifically, the Supreme Court has been vested by the Constitution with rulemaking power with regard to procedure and practice, matters relating to attorneys, internal discipline of courts, and the administration of judicial affairs.[67] Since such power was quite unknown to most Japanese jurists at the time the Constitution was enacted, there were heated discussions among judges, lawyers, and legal scholars with regard to the scope of the subject matter appropriate to such court rules, and the priority between court rules and statutes. As to the former, it is generally considered that, even though procedural in a sense, matters relating to the protection of the accused, the organization and jurisdiction of the courts, party capacity and the like should not be governed by court rules. These matters directly affect the rights or obligations of the parties concerned or the general public, and therefore must be determined by statute through legislative representatives.[68] As to the latter, some people have strongly contended, citing Wigmore's theory, that court rules have priority over statutes so long as the matters fall within the scope prescribed in the constitution.[69] Others have insisted on statutory priority, relying on the

65. *See* Saikō saibansho jimu sōkyoku (General Secretariat of the Supreme Court); 3 Saibansho-hō chikujo kaisetsu (Commentaries on the Court Law), 126, 127, 158–61 (1969); H. KANEKO & M. TAKESHITA, *supra* note 22, at 122, 123.

These measures include, inter alia, a warning not accompanied by a sanction (because sanctions may be imposed against judges only through a disciplinary procedure) by the Chief Justice to the judge concerned, or taking measures necessary for the commencement of disciplinary procedures against the judge concerned.

66. *See* Saibansho-hō (Court Organization Law), Law No. 6 of 1890, art. 125(3).

67. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 77.

68. *See* Saikō saibansho jimu sōkyoku (General Secretariat of The Supreme Court); 1 Saibansho-hō chikujo kaisetsu (Commentaries on the Court Law), 62, 63 (1969); *see also* H. KANEKO & M. TAKESHITA, *supra* note 22, at 112, 113.

69. *See* Wigmore, *Legislature Has No Power in Procedural Field,* 20 J. AM. JUD. SOC'Y 159 (1936); Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally,* 23 ILL. L. REV. 276 (1928).

Constitutional provision which declares the Diet to be the highest and the sole lawmaking organ.[70] The latter seems to be the prevailing opinion recently,[71] even though the Supreme Court itself has not yet clearly ruled on the matter.[72] In practice, however, the Supreme Court is quite active in exercising its rulemaking power, particularly with regard to internal matters of the courts, which include important issues regarding the workings of a career judiciary. In addition to rulemaking vested in the Court by the Constitution, some rulemaking has been delegated to the Court by statutes. While a portion of the current Supreme Court rules (totalling approximately 150) are of a minor or supplementary nature, others contain quite substantial and important provisions.[73] Thus, court rules now constitute one of the important sources of law in Japan, and no one can deal with legal problems properly without consulting the court rules.

The Supreme Court makes its rules at the conference of all of the justices.[74] When prescribing rules of some importance, the Supreme Court usually hears the opinions of the Supreme Court Civil, Criminal, Family or General Rules Consultative Committees consisting of judges, lawyers, government officials, law professors, and other knowledgeable persons.[75] Rules are generally promulgated in the Official Gazette and become effective after twenty days unless another date is prescribed.[76]

70. *See* KENPŌ (Constitution) OF JAPAN, 1946, art. 41.

71. *See* Saikō saibansho jimu sōkyoku (General Secretariat of The Supreme Court), at 64; H. KANEKO & M. TAKESHITA, *supra* note 22, at 117.

72. However, the Supreme Court has held as follows:

> The defendant's counsel contends that the provisions of the Code of Criminal Procedure are unconstitutional and hence void because they violate Article 77 of the Constitution providing that matters relating to procedure must be prescribed by Supreme Court rules. However, it is the precedent of this Court that the delegation to the Supreme Court by the statute of power to provide procedural rules is not prohibited by the Constitution. *See* Shimazaki v. Japan, 4 KEISHŪ (SUP. CT., 2d G.B., P.B., Oct. 25, 1950). This judgment presupposes that criminal procedure can be prescribed by statute. Accordingly, it is clear that the Code of Criminal Procedure is constitutional.

Sato v. Japan, 9 Sai-han keishū 911 (1955).

73. As of Oct. 1, 1983, the number of the Supreme Court rules in force is as follows:

(1) Rules relating to procedure ......... 55
(2) Rules relating to attorneys .......... 2
(3) Rules relating to internal matters .. 93.

74. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 12; *see also* Saikō saibansho jimu sōkyoku (General Secretariat of The Supreme Court), at 63.

75. *See* Saikō saibansho kisoku seitei shimon iinkai kisoku (Rule Concerning the Supreme Court Rules Determination Consultative Committee), Supreme Court Rule No. 8 of 1947.

76. *See* Saibansho kobun hōshiki kisoku (The Rules Concerning the Official Court Documents), Supreme Court Rule No. 1 of 1947, arts. 2, 3.

However, minor and purely internal rules that do not affect the general public (they are called *kitei*, as distinguished from other rules, *kisoku*) are not promulgated, but announced to court officials through the official court news. Their effective date is prescribed in the rule itself.

One problem still exists, however, with respect to rulemaking by the Supreme Court. In Japan, many procedural laws were passed before the promulgation of the present Constitution and many of them are still in effect. Accordingly, court rules have been used to adjust these laws to the 1947 Constitution. A similar problem has on occasion arisen with recent legislation. Thus, the distinction in the procedural system between laws and rules may seem confusing, and may well be inconsonant with the Constitution. It is a problem still unsolved. One possible solution would be to have the legislature refrain from making statutes with regard to matters that could be as well prescribed by the court through the exercise of its rulemaking power.[77]

Finally, it should be added that, in view of the quality and quantity of the Supreme Court's administrative function under the Constitution of 1946, the Court Organizational Law enacted in 1947 has provided a detailed institutional framework of the judiciary consistent with the new Constitution. First, the court rules have provided that the administrative power of the Court must be exercised only through determinations at the conference of all justices, in order to avoid willfulness or partiality, which might be possible if administration were left to the chief justice or a few justices.[78] Only minor or routine matters are entrusted to the chief justice or one or more justices.[79] The conference is held regularly on every Wednesday. The chief justice is always responsible for executing the conference's determinations.

Second, for the purpose of assisting the Court or the chief justice in the exercise of administrative powers, a special organization called the "General Secretariat of the Supreme Court" has been created by the Court Organizational Law.[80] It consists of one secretary general, chiefs of seven bureaus, and about 800 officials including those in charge of court finance and courthouse construction and maintenance (which are also in the hands of the Supreme Court).[81] Some of these officials, including the secretary general, are judges assigned temporarily from inferior courts, unlike most court administrators in the United States. The Secretariat

77. *See* Saikō saibansho jimu sōkyoku, *(General Secretariat of the Supreme Court)*, at 64; H. KANEKO & M. TAKESHITA, *supra* note 22, at 117.

78. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 12; *see also* Saikō saibansho saibankan kaigi kitei (Rules for Supreme Court Justices Conference), Supreme Court Rule (*kitei*) No. 1 of 1947.

79. *See* Saikō saibansho saibankan kaigi kitei (Rules for Supreme Court Justices Conference), Supreme Court Rule (*kitei*) No. 1 of 1947, art. 7.

80. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 13.

81. *Id.* art. 53; Saikō saibansho jimu sōkyoku (General Secretariat of the Supreme Court), Kisoku (Rule No. 10 of 1947).

needs such talent because it is also responsible for drafting court rules and making suggestions for new legislation regarding judicial business.

Third, educational and training institutions for the judiciary are attached to the Supreme Court. The institutions include: (1) the Legal Training and Research Institute, which is in charge of not only judges but all candidates for the bar and procuracy;[82] (2) the Training and Research Institute for Court Clerks;[83] and (3) the Training and Research Institute for Family Court Research Officials, that is, family court caseworkers or probation officers.[84]

## III. CONCLUSION

I have roughly described a few features of the Japanese Supreme Court's power of judicial administration under the Constitution of 1946. The Court has made a strenuous effort in the past three decades or so to realize the ideals of an independent judiciary embodied in the new Constitution. It is true that the Supreme Court has not escaped some criticism. However, no one will deny that the present system of judicial autonomy as it has recently evolved is far superior to the prewar system in which the judiciary was under the general supervision of the minister of justice.

The present system of judicial administration is, so to speak, a sapling which was first cultivated in the Anglo-American tradition. The Japanese Constitution of 1946 has transplanted that tradition to Japanese soil, which had been nurturing a Continental Code and judicial system for more than a century. It is natural to expect that some years and careful cultivation may be needed to make such a transplant grow strong in a different climate.

The postwar legal reform in Japan, including the features that I mentioned here, is an extraordinary undertaking in the history of comparative law. Impetuous or shortsighted judgments about the result are inappropriate and misleading. It is hoped that the Supreme Court of Japan, the Japanese legal profession, and the Japanese people in general will, through patient and enduring efforts and cooperation, guide this great undertaking to its fullest fruition in the interest of justice and human rights.

82. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 14.

This Institute is responsible for both the continuing education and research programs for judges and the training of apprentices for all of the legal professions. These two functions are carried out by the Institute's first and second divisions, respectively. *See* Shihō kenshū-sho kitei (Rules for the Legal Training and Research Institute), Supreme Court Rule (*kitei*) No. 6 of 1947.

This Institute was initially designed to train other court officials as well, but training of other court officials was later transferred to the jurisdiction of the Training and Research Institute for Court Clerks.

83. *See* Saibansho-hō (Court Organization Law), Law No. 59 of 1947, art. 14-2.

84. *See id.*, art. 14-3.