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Court and Constitution in Japan . . . Selected Supreme Court Decisions, 1948-60, by John M. Maki (1964)

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BOOK REVIEWS

COURT AND CONSTITUTION IN JAPAN ... SELECTED SUPREME COURT DECISIONS, 1948-60, by John M. Maki.[1] With translations by Ikeda Masaaki, David C. S. Sissons, and Kurt Steiner. Seattle: University of Washington Press. 1964. Pp. xi, 445. $9.50.

Judicial review in the United States has had a turbulent history. Born out of bitter political conflict between the Republican and the Federalist Parties, it has suffered frequently from various weaknesses; it has undergone the most striking changes from centralism to overemphasis on state rights, from excessive protection of property rights and free enterprise to determined defense of individual freedoms. The manner in which judicial review is being performed, rather than the power itself, has been under continuous attack. Cassandra warnings have made of the danger of judicial supremacy or oligarchy. Recently, the Supreme Court, after having established new barriers against racial discrimination, has been accused of aggressiveness or improper "activism." Nevertheless, judicial review has grown in this country, and it is a strong check on the legislative and executive branches. Its disappearance would change the character of our government to something thoroughly un-American.

The framers of the new Constitution of Japan, whose identity is no longer a secret, followed the British model with respect to the executive branch and its parliamentary responsibility, but established the judiciary along American lines. They adopted the institution of judicial review by providing in Article 81 that the Supreme Court should be the court of last resort with power to determine the constitutionality of any law, order, regulation or official act. Those who wrote this provision into fundamental law of the oriental nation must have expected the adoption of judicial review to contribute to Japan's democratization, which was the principal objective of General MacArthur's occupation in its initial stage. This appears all the more significant since Japan, in contrast to the United States, is not a federal state. Nor does it have prefectural or municipal courts. All Japanese courts are national and under the jurisdiction of the Supreme Court. Students of comparative government agree that judicial review is most important, if not essential, in a federal system. The reason it

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was introduced into a centralized system of government must have been because in the light of past Japanese experience, with the authoritarian predominance of the executive and with the neglect of individual rights for the sake of society as a whole, the revolutionary principles of the new charter called for a judicial guardian.

Seventeen years have passed since the present Supreme Court of Japan came into being, and since then it has performed the prerogative which the judges received as an outright gift, while their American brethren acquired it only by their own efforts. The time has come to explore the fascinating question as to what use the Japanese justices have made of this gift during the first period. Research on this question by the Western student has met linguistic difficulties. To be sure, important decisions have been discussed in analyses written in English. A few have been translated into English by the Secretariat of the Japanese Supreme Court, but there has remained a definite need for a more extensive collection of decisions in translation. With a fine sense of selectivity, Professor John M. Maki of the University of Washington, a well known scholar of Japanese affairs, has chosen twenty-six decisions translated into English. His book also contains a Preface and a valuable Introduction, which examines the pertinent provisions of the Constitution and gives information concerning the organization and work of the courts. Appended are an English translation of the new Constitution, very helpful biographical data about all justices past and present, and a bibliography with references to books and articles consulted in preparation of the volume. Mr. Maki himself translated seven decisions, Professor Ikeda Masaaki of St. Paul's University in Tokyo, ten, David C. S. Sissons, an Australian scholar, eight, while Professor Kurt Steiner of Stanford University contributed the translation of the so-called *Fukuoka Patricide Decision* on which he had previously commented.[2]

Mr. Maki is a political scientist. As a non-lawyer, he is to be congratulated on his courage in penetrating the mysteries of Japanese law and judicial arguments. Although linguistically well equipped for such a task, he must have faced seemingly insurmountable difficulties in reaching a clear understanding of the sometimes lengthy, complex, and ambiguous opinions. Having had ample experience with Japanese jurists, this reviewer appreciates the tremendous effort involved in

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[2] Steiner, *A Japanese Cause Célèbre; The Fukuoka Patricide Case*, 5 AM J. COMP. L. 106 (1956).

following their legal thought process. However, the fact that a political scientist devoted himself to such a project confirms the truth that judicial interpretations of a constitution are not merely legal exercises. They reflect political and social problems of contemporary life. Mr. Maki and his co-translators have achieved the main purpose of this publication: to familiarize English readers with the work of the Court.

Avoiding as far as possible technical legal terms, the translations have attained a high degree of intelligibility. Each decision is introduced by an editorial note summarizing the problem involved and, where necessary, the facts of the case. These summaries are followed by quotations of the pertinent provisions of the Constitution, laws or ordinances. Moreover, footnotes suggest explanations of obscure sections of the opinions and provide other comments.

The collection covers several famous and much discussed decisions. Some of these are: the case of "*Lady Chatterley's Lover,*" in which the Court defined obscenity as a factor excluded from the protection that the Constitution provides for freedom of expression; the *Niigata* and *Tokyo Ordinance* cases involving freedom of assembly and prior restraint; the *Fukuoka Patricide* case in which the Court ruled on an argument that a provision in the Criminal Code which provides that injury inflicted on a lineal ascendant is subject to heavier penalty than the same crime committed against any other person, contrary to the principle of equality under the law, and the *Land Reform* case which was taken to the courts by former land owners who, under the land reform, had been compelled to sell their land for a low price fixed by statute and who argued that this price did not constitute "just compensation" as required by the charter for expropriation for public use. There are some very interesting less known cases in Mr. Maki's collection. Twenty-two are concerned with the nature and limitation of individual freedoms, of which the Japanese Bill of Rights provides a generous catalogue. The choice of cases was obviously motivated by the desire to show the variety of constitutional problems which have faced the Supreme Court. Only four decisions deal with issues other than civil rights. The controversial war renunciation clause played a decisive role in the *Sunakawa* case, in which the constitutionality of the stationing of the United States Forces in Japan was challenged. Two decisions pertain to the scope of judicial review and by limiting it to concrete legal disputes between specific parties, the Court avoided

touching on the politically explosive substantive questions raised: the constitutionality of the National Police Reserve, the first post-war military force of Japan, and the dissolution of the House of Representatives in August 1952. On the latter point Justice Mano wrote a polemic supplementary opinion. He did the same in connection with the last case of the collection, which involved problems of separation of powers and local autonomy. This case was decided on purely technical procedural grounds. Chief Justice Tanaka and Justice Kuriyama dissented.

Of these twenty-six decisions, none declared any law or ordinance unconstitutional. Instead restrictions on civil rights in such enactments were upheld, usually on considerations of public welfare or abuse of freedom. The only instance in which the Court ruled in favor of the challenger of constitutionality was when it refused to admit as evidence the confession of an accused obtained by third degree police methods. Minority opinions were written in ten cases, one justice dissented in three cases, two justices in four, four justices in two, and five justices in one case.

There are few unanimous decisions, however so-called supplementary opinions abound. They correspond to concurring opinions in our terminology. Since they frequently express the strongest disagreement with the arguments supporting the majority decision, though concurring in the result, the Japanese term may be even more appropriate. The separate opinions, whether dissenting or supplementary, show the amazing diversity in the legal and political philosophy of the fifteen justices. They reveal their psychology, and occasionally, their personal antagonisms, apparently inevitable in a collegiate body burdened with heavy responsibility. The history of our own Supreme Court illustrates this truth. It is regrettable that, unlike our practice, the publication of a decision of Japan's highest tribunal does not designate the justice who wrote the majority opinion.

The Introduction of the volume is primarily descriptive. Mr. Maki's concentration on the Suprame Court gives this section of his book its specific value. His statistical data on the continuously increasing work load of the Court and its members with the resulting delay of justice, make clear how inadequate the number of 1,220 courts and 2,387 judges is in a nation of ninety-six million inhabitants, even if one assumes that the Japanese continue, at least to some extent, in their aversion to taking their disputes to the courts.

An important observation could have been made regarding the age of the fifteen justices listed as in office on January 1st, 1959. They were all elderly men. In the meantime an almost complete turnover has taken place on the bench of the Supreme Court. Chief Justice Kotaro Tanaka, who had reached the statutory maximum age of seventy, has been succeeded by Professor Kisaburo Yokota. Eleven associate justices had to retire for the same reason. Only three judges of Mr. Maki's list remain as members of the Court. The youngest of the new appointees is fifty-eight years old, five are between sixty-five and seventy. Although judgeship in a highest tribunal requires maturity and experience, the Japanese predilection for old men appears to be carried too far. One cannot help feeling that some rejuvenation might be beneficial.

I suggest that two matters could have received greater elaboration. The first is the enormous importance of the Court's new jurisdiction over administrative acts. The review, not necessarily from the point of view of constitutionality but as a check on any type of illegality, has been generally authorized in the Administrative Litigation Procedure Law. After the Court of Administrative Litigation was abolished, the regular courts of law not only took over its jurisdiction but assumed much more extensive review authority than the abolished Court possessed.

The second matter is the adoption of the written opinion of the individual judge. The old practice did not facilitate the progressive development of judicial ideas. It consisted in strictly limiting the writing and publication of decisions to the majority opinion, while the overruled dissenters were silenced. The judge in charge of the case had to write the majority opinion even if he belonged to the dissenting minority. This compelled him to express views which he actually rejected. Frequently dissenting opinions in our Supreme Court have become the law of the land after the passage of time. In the case of the Japanese, the introduction of separate opinions has been a particularly interesting experiment in the light of their reluctance to express disagreement openly, a trait characteristic of a nation which values politeness and harmony. Some of the justices have rapidly adjusted themselves to the new practice, of which they have often made vigorous use, while others have not done so. Dissenting opinions have usually been written by the same few justices: Fujita, Mano, and to a lesser degree Kuriyama.

The publication of individual opinions could also serve as a source of information for the people who take seriously their constitutional right of recall of Supreme Court judges. While, in agreement with Mr. Maki, I attribute to such a referendum a symbolical value giving emphasis to popular sovereignty. It may be worth noting that Chief Justice Tanaka expresses the belief that this popular sovereignity has been instrumental in linking the people psychologically with the Supreme Court and in stressing its importance.[3]

A couple of technical points may be added. The new Constitution was not promulgated on May 3, 1947, but that was the date of its coming into force. The promulgation by the Emperor took place six months earlier after the enactment by the Diet, on November 3, 1946.

In describing the jurisdiction of the summary courts, Mr. Maki states that they are prohibited from handing out prison sentences, and cases in which a summary court judge deems it appropriate that such a punishment should be imposed, must be transferred by him to the district court. Article 33 of the Court Organization Law provides in paragraph 2, sentence 1, a modification of the rule that imprisonment or a graver penalty cannot be imposed. Article 33 authorizes the court to punish certain common offenses, such as theft and embezzlement, with imprisonment not exceeding three years. According to paragraph 3 of the same Article, the transfer to a district court is required only "when a summary court deems it proper to impose a punishment exceeding the limits prescribed in the preceding paragraph," which means when the court wants to go beyond the three years allowed in paragraph 2. However, these are very minor oversights in an otherwise clear and thorough exposition, and it is amazing that the author understood unfamiliar legal terminology so well.

The last and most important part of the Introduction, which Mr. Maki characterizes as a "brief and impressionistic critique of the work of the Supreme Court in the area of constitutional interpretation," calls for some critical comments. Two main objections can be made to the author's evaluation. The first is that he minimizes the mission of Japan's highest tribunal and overemphasizes the prerogatives of the Diet. The second is that his judgment on the Court's performance is a panegyric, or to say the least, an apology rather than a critique.

[3] KOTARO TANAKA, THE DEMOCRATIZATION OF JUDICIAL ADMINISTRATION IN JAPAN (1958).

In the case of the first objection, he is quite right in pointing out that in Japan conflicts of a constitutional nature are reduced by the absence of questions of federalism, and that in a system of codified law there is less need and opportunity for creative judicial review than in one of judicial precedents. His further argument, which is that great care had been taken by the Japanese authorities and by the occupation that all laws should reflect the spirit of the new Constitution, has lesser weight. One may doubt that the bureaucrats in the various Ministries, who drafted the bills, immediately grasped this spirit or that constitutionality was considered by the politicians in the Diet to such an extent that would make a judicial check superfluous or less necessary. The controls by the occupation were restricted to patent violations of the charter and could not cover the hidden ones. It is also a well known fact that, in its later period, the occupation greatly relaxed all controls. At this time, democratization was no longer the overriding objective, rather, due to the cold war and the Korean conflict the emphasis shifted to national security and defense against communism. Finally, the occupation ended twelve years ago, while law-making has continued. However, all the minimizing factors are outweighed by the novelty of the constitutional principles which make judicial guardianship absolutely indispensable.

Mr. Maki, on the other hand, reasons that all the new freedoms of the people were introduced to Japan by the occupation, and that the Court had no part in their creation. Since in the area of constitutions and laws everything depends on interpretation, the judicial mission of "eternal vigilance" is, in my opinion, all the more formidable. The author relies on his overoptimistic appraisal of Japan as "a society that is truly free, where the standard freedoms of democracy are widely enjoyed and freely exercised." I am convinced that history will pay even greater tribute to MacArthur, the proconsul of Japan, than to the war hero and that the reform work under his leadership achieved great success, due to a considerable extent to the response of the Japanese people. Although sudden changes are not infrequent in history, I cannot share the belief either that a kind of instant democracy was brewed in the General's headquarters. Stability in the forms of parliamentary government exists but Japan remains in a stage of transition where the forces of real progress struggle with those of the past and with radicalism of the right and of the left.

What strikes me as most puzzling is the author's repeated reference

to legislative supremacy, which he derives from Article 41 of the Constitution. The latter defines the Diet as "the highest organ of state power." This, Maki remarks, "clearly ... places the Diet over the Court." My interpretation is that the clause constituted an additional gesture of respect for the sovereignty of the people and their elected representatives. It did not establish subordination to the Diet of the two other branches nor did it invalidate the articles which embody the doctrine of checks and balances. In contrast to Mr. Maki, I think that this doctrine is well developed in the Constitution of Japan. As the executive branch, the Cabinet is collectively responsible to the Diet but it may, through the Emperor, dissolve the House of Representatives (the controversial question of when this can be done is discussed in Case XXV). The judiciary is subject to appointment by the Cabinet, popular recall, and impeachment. On the other hand, Article 81 makes the Court's function of serving as a check on the two other branches by judicial review abundantly clear. I find it hard to understand Mr. Maki's remark about "the Court's refusal to act as a checkrein on either the legislative or the executive process." I cannot discover any such abdication in the translated decisions. In the *Sunakawa* case, the Court merely held that the determination of the constitutionality of the Security Treaty as a highly political issue was "not adaptable to review by a judicial court."

This reviewer approaches with great reluctance Mr. Maki's evaluation of the Court's performance. Having had a modest part in its establishment, I would be happy if I could fully agree with his extremely favorable judgment. The Supreme Court is still in its formative stage. Considering the often amazing tempo of changes in Japan, its future growth is promising. Looked at from this standpoint, the Court has done better than could have been expected in adjusting itself to the transitional complexities of its first period. To credit it, however, with a full understanding of the spirit of the Constitution, as Mr. Maki does, and with "the bringing together of law and liberty" as a "great and unique ... contribution" is quite another matter.

The author deals with two major criticisms, namely the Court's failure to protect fundamental human rights valiantly and its reluctance to check the power of the two other branches. While admitting their abstract merit, he regards them as based on the expectation that the pattern of the United States Supreme Court would be followed. He believes that the work of the Japanese Court can be appreciated

only within the context peculiar to Japan. When it comes to human rights, one may well challenge this observation. Principles of natural law do not resolve all legal questions but they are generally recognized in the area of "certain inalienable rights." They are reflected in the Constitution of Japan as well as in the Universal Declaration of Human Rights. Moreover, judicial review is not exclusively an American institution. The Supreme Court of India, for example, which is one year younger than its Japanese counterpart, exercises it with considerable vigor.

Interestingly enough, the excessive self-restraint of Japanese justices is being criticized more severely by Japanese than by foreign observers. Justice Fujita's impressive objections to the Court's continuous use of the public welfare test have been supported by Japanese scholars.[4] The overcautious attitude of the majority can, of course, be explained by hierarchical tradition, inadequacy of judicial prestige, conservative temperaments, and a lifelong analytical approach to legal interpretation. The latter is still very conspicuous in the separate opinions of certain justices. Study of the cases in this volume shows that the Court, apart from civil rights problems, had to decide questions of enormous legal and political consequence, and it handled these latter quite wisely and realistically. Our own Supreme Court has not ceased to struggle with the dilemma between individual rights and national security, as shown by the sharp division of opinions in communist cases. The Japanese justices give more than lip service to the importance of constitutional freedoms, but there remains a tendency to refuse protection to their undesirable use and to label this as abuse. The recognition that freedom of expression, even in the form of boisterous assemblies and demonstrations, is the keynote of democracy has not yet induced the Court to replace its vague public welfare test by a stricter standard, such as the clear and present danger concept. There was a timid beginning in this direction in the *Niigata* case but the Court did not further develop this line. Resolute use of civil rights often appears to conflict with the public welfare. The delicate question of just when it becomes an abuse unworthy of constitutional protection is a matter of degree, and a finer criterion is needed to balance the conflicting interests. In the light of Japan's charismatic tradition,

[4] See particularly the penetrating analysis by Professor Ito, Tokyo University, assisted by Professor Nathaniel L. Nathanson, Northwestern University. Ito, *The Rule of Law: Constitutional Development* in LAW IN JAPAN 205 (von Mehren ed. 1963).

the preference of public welfare to individual rights must be taken seriously because the danger exists that it could result in the same situation that prevailed under the Meiji Constitution when fundamental human rights were granted only "within the limits of the law."

I see no reason for pessimism, on the whole. The progressive decisions of several district courts as well as some of the separate opinions of Supreme Court justices augur well for future developments. They show courage, imagination, and understanding of the spirit of the Constitution. We may expect further progress from the new men on the bench. It might be significant to note that in a decision of November, 1962, the Supreme Court declared a provision of the Customs Law unconstitutional because it violated private property rights.

These observations are in no way designed to detract from the great value of Mr. Maki's extremely interesting work and from the fine contribution it makes to our knowledge of Japan's highest tribunal and of the most important and exciting aspects of its performance.

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LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY. Edited by Arthur T. von Mehren.[1] Cambridge: Harvard University Press. 1963. Pp. 706, xxxviii. $15.00.

More than a decade has passed since the end of the American occupation. During this period, Japan has continued to prosper with a highly viable economy and a modern democratic polity. Much of this is attributable to one of the most successful military occupations in all history. America's influence on all aspects of Japanese society was great. How lasting it will be remains an intriguing question. *Law in Japan* is an appraisal of this influence in the law.

The book is an outgrowth of a conference on Japanese law sponsored by the Ford Foundation. At the conference, Japanese legal scholars presented papers describing aspects of the Japanese legal system. These articles have been edited, grouped, and analyzed in the present volume. The articles are arranged in three groups:

(1) "The Legal System and the Law's Processes"; (2) "The

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