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CIVIL JUSTICE AND THE CONSTITUTION: LIMITS ON INSTRUMENTAL JUDICIAL ADMINISTRATION IN JAPAN

Mark A. Levin[†]

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.¹

Abstract: Numerous works have shown how central judicial administrators in Japan may ideologically influence the nation's lower court judges. This piece draws upon these reports to analyze and frame these circumstances as "instrumental judicial administration," qualitatively distinguishing the various means used by administrators and reflecting on their degrees of impact on civil procedural justice. Then, moving from description to prescription, the work provides a thorough consideration of the underlying legal context, broadly drawing from constitutional text and history, statutory text, and case law, before launching a search for solutions in its conclusion. Although the immediate focus is on how instrumental judicial administration emerges in the Japanese civil justice system, the approach here is broadly applicable for studies of the roles of judges and functions of courts generally.

I. INTRODUCTION: THE ARTS OF DESIGNING MEN²

In the United States, we recognize a fundamental constitutional right to due process in civil litigation which derives from the Fourteenth Amendment of our Constitution.³ Of course, the devil lies in the details and the interpretation of that right is subject to vigorous debate,⁴ but few

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This paper is dedicated to the memory of Chief Justice William S. Richardson, whose legacy in promoting justice continues through the Law School that he envisioned to reality. *Aloha* CJ.

¹ *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

² "Independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves." THE FEDERALIST NO. 78 (Alexander Hamilton).

³ "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

⁴ Compare *Caperton v. A. T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009) *with id.* at 2252 (Roberts, C.J., Scalia, J., dissenting).

would argue with the singular “axiomatic” principle that “[a] fair trial in a fair tribunal is a basic requirement of due process.”⁵

The existence of such a right and the essential nature of the principle is easy to understand. No civil litigation system will attain any meaningful degree of legitimacy if it is lacking a governing regime of basic procedural fairness.⁶ Johannes Chan, University of Hong Kong Faculty of Law Dean, sources this value in Western society back as far as the Old Testament story of Adam and Eve⁷ and through to the Magna Carta.⁸ Accordingly, this right is vitally recognized as a global norm in the Universal Declaration of Human Rights⁹ and the International Covenant on Civil and Political Rights.¹⁰

Not surprisingly, Japan has also enshrined the notion of procedural fairness in civil justice into its legal system, with direct ties into its constitutional language, treaty obligations, and statutory provisions. The leading formulation of this emerges in Article 32 of the Constitution of Japan (“Constitution”) which simply provides: “No person shall be denied the right of access to the courts.”¹¹ Just as United States constitutional language gives name to the Due Process doctrine, this provision gives name to the legal doctrine as it is known in Japan—*saiban wo ukeru kenri*.¹²

Of course, constitutional ideals never perfectly describe real world practices.¹³ Like that of the United States, Japan’s reality demonstrates

⁵ *Id.* at 2259 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

⁶ See, e.g., J. A. Jolowicz, *On the Nature and Purposes of Civil Procedural Law*, in INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE: ESSAYS IN HONOR OF SIR JACK I.H. JACOB Q.C., 27, 37 (I.R. Scott ed., Sweet & Maxwell 1990) (“The importance of achieving justice between individual litigants is in no way diminished by recognition that the process of litigation, considered as a whole, serves at least two other ends, connected but distinct, and that their attainment should be included in the purposes of procedural law. First, *civil proceedings serve to demonstrate the effectiveness of the law. . .*”) (emphasis added).

⁷ Johannes Chan, Keynote Address for the Inaugural East Asian Law and Society Conference in Hong Kong (Feb. 5, 2010) 1 (transcript on file with author) (tracing the right to fair hearing “to the Old Testament when God provided Adam and Eve a chance to be heard before he condemned them for taking the forbidden fruit.”)

⁸ *Id.* at 1-2 (quoting MAGNA CARTA art. 29, “No Freeman shall be . . . disseised of his Freehold, or Liberties, or free Customs, . . . but by lawful judgment of his Peers, or by the Law of the Land.”).

⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, UN Doc. A/RES/217 (III) (Dec. 10 1948) [hereinafter UDHR].

¹⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 14 and 26, U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16 1966) [hereinafter CCPR].

¹¹ KENPŌ, art. 32. This standard English translation poorly captures the Japanese language nuance. A more accurate translation might read “the right to obtain judicial hearings” or perhaps even “the right to obtain justice in the courts.” See text and sources cited *infra* notes 114-115.

¹² KENPŌ, art. 32; see generally SHIGENORI MATSUI, SAIBAN WO UKERU KENRI [THE RIGHT OF ACCESS TO THE COURTS] (Nihon Hyoronsha 1993).

¹³ Perhaps the most dramatic dichotomy was the one between the utopian idealism of the Constitution of the Soviet Union with the reality that could be found there. Contrast KONSTITUTSIIA SSSR (1977) [Konst. SSSR] [USSR Constitution] (1936) with ALEKSANDR ISAEVICH SOLZHENITSYN, THE

flaws; important writings on the courts and society in Japan provide substantial evidence that procedural fairness for some civil litigants in Japan suffers from serious defects.¹⁴ This article seeks to explain the doctrinal legal context of those circumstances by looking to the legal texts and case law concerning Japan's relevant constitutional provisions, treaty obligations, and statutory enactments, including relevant historical events. More importantly, this article aims to rise up from the problems towards a search for solutions. Its ultimate goal is a remedial inquiry into what can and should be done to address these problems.

In short, this article explores the legal foundations of procedural civil justice in Japan as they relate to an evident history of a practice labeled “instrumental judicial administration.” Part II begins by defining that concept as used in this writing and then presents the available evidence, suggesting that: 1) instrumental judicial administration is active in Japan's judicial processes, and 2) it detrimentally impacts the fairness of the results attained by litigants in a range of socially significant cases. Part III extensively reviews the law that ostensibly governs these circumstances, including constitutional doctrine, treaty obligations, and statutory provisions, looking first to protections for procedural civil justice and then to the structural foundation for Japan's unified centralized system of judicial administration that makes instrumental judicial administration so easily accomplished. Finally, Part IV concludes the paper by briefly laying out a framework for remedies and policy solutions—whether by actions of individual litigants, by the enactment of new laws, or by the judiciary's internal reform.

II. POWERS: INSTRUMENTAL JUDICIAL ADMINISTRATION

A. *The Metaphorical Thumb on the Scale*

In this paper, I use “instrumental judicial administration” to mean *mechanisms or actions employed by judicial administrators to intentionally bias adjudicatory processes in favor of a particular party or result despite lacking authority as to the disposition of the subject case or class of cases.* In other words, instrumental judicial administration contemplates intentional actions, carried out through the exercise of judicial administration, that aim

GULAG ARCHIPELAGO, 1918-56 (Thomas P. Whitney & H.T. Willetts trans., Basic Books 1997) and DAVID REMNICK, LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE (Vintage 1993). But surely gaps between the ideals expressed in the document and the reality in fact arise in any constitutional state.

¹⁴ See *infra* at Part II.B. This article draws primarily from existing writings on the subject and leaves closer investigation of these defects for another day.

to distort a structurally neutral court proceeding towards a result determined extrinsically from the litigation process between the parties. It is a metaphorical thumb placed from above on the scale that tilts the balance of justice to favor one side over the other. And thus, by definition, it is always unfair to some party or parties in the judicial process.

Of course, not all judicial administration is instrumental judicial administration. Judicial administration is a necessary component of any judicial system¹⁵ that may accomplish distinctly laudable ends.¹⁶ There may also be instances where substantively neutral choices in judicial administration have an inadvertent but nonetheless detrimental impact on fairness.¹⁷ Circumstances where there is no intention to bias substantive results are not included in the conception of instrumental judicial administration developed here.

A number of additional clarifications may be helpful. First and most importantly, Japan's judiciary enjoys a globally recognized reputation for its institutional integrity and the integrity of the judges within it.¹⁸ With nearly thirty years of observational experience and study behind me, I emphatically agree that this exemplary reputation is deserved.¹⁹ Though some degree of criticism is inevitable and some may be fitting, this is

¹⁵ However, differences in how judicial administration systems are structured or carried out will either facilitate or impede the likelihood of instrumental judicial administration becoming a problem.

¹⁶ Thus for example, Ramseyer and Rasmusen show that Japan's judicial quality control mechanisms "illustrate[] the potential benefits to bureaucratic judiciaries In simple routine cases, [the Secretariat's ability to reassign and manipulate the promotion of judges] facilitates pressure towards enhancing quality: judges who are talented and hard-working and decide difficult cases correctly receive better jobs and greater responsibilities." J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 95 (Univ. of Chicago Press 2003) [hereinafter *MEASURING JUDICIAL INDEPENDENCE*].

¹⁷ One example may be pressures put on Japanese judges for high levels of efficiency and rapid case resolution that impede judges' capacities to optimize litigation results. See, e.g., Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 *INT'L J. SOC. L.* 303, 313 (1995) (describing a "criterion of efficiency" applied by Japanese judicial administrators); see also Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 *HARV. C.R.-C.L. L. REV.* 341 (1990).

¹⁸ Without a doubt, the most forceful English language advocate for this position is Professor John Haley. As he recently wrote, "Japanese judges are among the most honest, politically independent, and professionally competent in the world today." John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel H. Foote ed., Univ. of Tokyo Press 2007). In a sub-section of that chapter entitled "Integrity," Haley substantiates his point with data evidencing a striking absence of corruption. *Id.* at 112-14 ("Whatever the cause, by all accounts, judicial corruption is simply unheard of in Japan.").

¹⁹ Further praise can be found in *MEASURING JUDICIAL INDEPENDENCE*, *supra* note 16; see also J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993*, 154 *U. PA. L. REV.* 1879, 1880 (2006) [hereinafter *Managed Judges*] ("Through its 'managed judges,' . . . Japan maintains a system that lets people resolve their disputes by uniform and predictable legal standards.").

because no system is perfect.²⁰ This article does not seek to call into question the fundamental character of Japan's judiciary as being well-deserving of the accolades it frequently receives.

Accordingly, it is also crucial to note that instrumental judicial administration is not synonymous with corruption. While it is certainly possible that instrumental judicial administration would be motivated by corruption, motives may be benign or even well-intentioned towards the public good. In fact, instrumental judicial administration in Japan appears to be motivated by a complex and beneficent mix of aims, including protecting the overall autonomy of the judiciary from political interference,²¹ and with good moral intentions of prioritizing the achievement of consistent results across all cases and all circumstances above fairness to particular individuals in particular cases.²²

At the same time, instrumental judicial administration will ordinarily require a lack of candor and transparency with regards to its practice. Every judicial system pays lip service to procedural fairness as these values are enshrined in the world's human rights treaties and national constitutions. Thus, few judicial administrators will gladly come forward to admit an intentional disregard for fairness in civil litigation for even benign or well-

²⁰ Public opinions of the Japanese judiciary are reported to be very favorable. Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 *HŌ-SHAKAIGAKU* [SOCIOLOGY L.] 128 (2007) ("Opinion polls of the Japanese public have consistently recorded rather high levels of respect for the judiciary." *citing* Chuō Chōsasha (2004)). Nevertheless, at least one significant survey reveals more mixed results. An interview survey carried out by the Japanese government's Judicial Reform Council from a representative sample of former civil trial litigants in June 2000 determined a mean score of only 3.13 (1 = very unsatisfied, 5 = very satisfied; SD = 1.27) with regards to their evaluation of fairness of the nation's civil judicial system. Ken-ichi Ohbuchi et al., *Procedural Justice and the Assessment of Civil Justice in Japan*, 39 *L. & SOC'Y REV.* 875, 882 (2005). Of course these results were shaped by respondents' satisfaction with the outcomes they had received, but "the standardized total effect of perceived procedural fairness on the evaluation of the judicial system was larger than that of favorability of the outcome. . . . [W]hat the litigants obtained from the civil trials was not the primary influence on their evaluation of the judicial system. Instead their perception of procedural fairness of the trials was more influential in this regard." *Id.* at 887.

²¹ Again, the leading proponent of these ideas is John Haley. See Haley, *supra* note 18, at 112-14. Longtime observer Professor Yasuhei Taniguchi also believes a perceived vulnerability within the courts may lead a Chief Justice to justify instrumental judicial administration measures in order to protect the judiciary's hard-earned and highly valued autonomy. Interview with Professor Yasuhei Taniguchi, in Honolulu, Hawai'i (Oct. 28, 2009) [hereinafter Taniguchi interview]. See also Haley, *supra* note 18, at 120-27; David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *TEX. L. REV.* 1545, 1586-93 (2009); Abe, *supra* note 17, at 313-18; David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 37, 59 (Peter H. Russell & David M. O'Brien eds., Univ. of Virginia Press 2001).

²² See *MEASURING JUDICIAL INDEPENDENCE*, *supra* note 16; see also *Managed Judges*, *supra* note 19, at 1927-28. This was similarly expressed by Professor Eiji Sasada, who characterized uniformity as "the pride of Japan's Supreme Court." Interview with Professor Eiji Sasada, Professor of Constitutional Law, Hokkaido University School of Law, Sapporo, Japan (July 15, 2009) [hereinafter Sasada interview].

intentioned institutional or public purposes.²³ Institutional judicial administration will ordinarily be hidden away by those who carry it out.

Finally, instrumental judicial administration constitutes a distortion of the process regardless of whether the action ultimately accomplishes its intended result. As with the *Hiraga* memo discussed below, interfering administrators who definitively lack authority as deciders in a matter may not be guaranteed their hoped-for results. But their work should still be a matter of concern with regards to the system's fairness. Simply put, this is not the way that the system is *supposed to work*.

B. *Evidence of Instrumental Judicial Administration in Japan*

Mechanisms of instrumental judicial administration can range across a continuum between diffuse to direct measures. In Japan, the most diffuse may be administrators' *de facto* powers over judicial selection, which are used to bring in a cadre of judges reflecting certain social and political mindsets. Direct intervention is exemplified by the circumstances of the *Hiraga* memorandum, discussed in greater detail *infra*, where the chief judge of the Sapporo District Court sent "friendly advice from a senior colleague" that advised how the chief would likely decide a pending matter (that he was uninvolved with) on the constitutionality of Japan's self-defense forces.²⁴ It seems easy to suggest that direct interventions should be of the greatest concern, but both poles and what lies in between are considered in this article.²⁵

²³ This is for good reason. As Nuno Garoupa and Tom Ginsberg have demonstrated, "reputation matters." Nuno Garoupa and Tom Ginsberg, *Reputation, Information, and the Organization of the Judiciary*, John M. Olin Law & Economics Working Paper No. 503 (2d Series) 2-3 (Dec. 2009) ("First, it conveys information to the uninformed general public about the quality of the judiciary . . . as perceived by the relevant audiences. Second, reputation fosters esteem for the profession and for the individual judge . . ."). See also Nuno Garoupa and Tom Ginsberg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 455 (2009) (distinguishing "career" from "recognition" judiciaries and noting the impact this distinction will have on the incentives that motivate judges in their work).

²⁴ Although the court may have been somewhat smaller at the time, the Sapporo District Court presently includes 54 full-time judges. Courts in Japan, *An Introduction to Sapporo District Courts* (Apr. 2010), <http://www.courts.go.jp/sapporo/about/syokai/index01.html> (in Japanese). Accordingly, the "chief" is well above his juniors in the judicial hierarchy.

²⁵ This article focuses primarily on administrative influences on *lower court judges* in Japan. In that, it draws upon but differs from David Law's recent socio-legal work exploring the inner workings of Japan's Supreme Court. Law's work clearly writes the book on *how* administrative circumstances constrain Supreme Court justices who would go against the ideological and political mainstream of the courts. Law's article deserves further recognition for reconstructing the vast body of writings on the Japanese judiciary into a single compendium. While many prior writings remain foundational, Law's article should be anyone's first stop on the Japanese judiciary research highway. See David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009).

I spread the evidence out across this continuum from diffuse to direct, framing it into four distinct tiers:

- 1) Administrators' *de facto* powers over judicial selection, which are used to generate a cadre of judges reflecting certain social and political mindsets and to exclude others;
- 2) Administrators' powers over assignments, transfer, promotion, and retention, which may be employed with carrots and sticks aiming to influence the ideological and political behavior of judges²⁶ and/or to sequester noncompliant judges in less significant postings or remove them from the judiciary entirely;
- 3) Using judicial working groups and internal position papers to influence judge's decisions in specific categories of cases; and,
- 4) Direct actions by administrators to achieve results in *particular* cases. Potential mechanisms are assigning or transferring into a particular case a judge who can be expected to give the desired result²⁷ or hidden interventions taken by senior judges to steer junior judges in the exercise of their decision making authority as was exposed with regards to the *Hiraga* memorandum.

1. Tier 1: Judicial Selection to Shape the Judiciary

Formally speaking, the constitutional authority to appoint Japan's lower court judges lies with the Cabinet at the head of Japan's Executive Branch. Article 80 of the Constitution provides: "The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court."²⁸ As to the Supreme Court's authority to nominate judges expressed in that provision, the Court Act puts this in the collective hands of the Supreme Court's justices operating as a Judicial Assembly with the Chief Justice serving as its chair.²⁹

²⁶ This presumes most judges being susceptible to such carrots and sticks. There may be some (heroic or foolish, depending on one's point of view) who will not care about or will choose to disregard these considerations.

²⁷ Or removing a judge who may be perceived as likely to issue an undesired ruling while concealing this intention through the ordinary process of transferring Japanese judges around the country.

²⁸ KENPŌ, art. 80. This point is reiterated nearly verbatim in Saibanshohō [Court Act], Law No. 59 of 1947, art. 40, para. 1.

²⁹ In this delegation to the Judicial Assembly, the law is entirely explicit: "(1) The Supreme Court shall execute judicial administration affairs through deliberations of the Judicial Assembly and under the

The reality is quite different. The front line for recruiting and selecting appropriate candidates for judgeships is maintained by an elite set of judges—the instructors at the Legal Training and Research Institute (“LTRI”), the training facility that all future legal professionals in Japan must pass through. These screening agents come handpicked by the Personal Affairs Bureau of the General Secretariat of the Supreme Court,³⁰ which ultimately controls the entire process.³¹

Historically, the LTRI instructors generated reviews and reports on all trainees for the General Secretariat, which then prepared a draft list of nominees for the Judicial Assembly’s approval, and then the same was forwarded on to the Cabinet. The latter engagements of the Judicial Assembly and the Cabinet were toothless. The process in reality belonged to the judicial administrators at the General Secretariat, operating as a black box,³² with its picks nearly always finally confirmed.³³

Of course, the screening process took into account the legal expertise demonstrated by trainees at the Institute. But the assessment did not end with the legal mind. Rather a “‘systematic purge’ of ideologically unsuitable judges . . . begins with the first day of the LTRI training”³⁴ as “it falls upon the LTRI adjudication instructors to identify those who are suitable for judgeships and to dissuade those who are unsuitable from even applying for position.”³⁵

general supervision of the Chief Justice of the Supreme Court; (2) The Judicial Assembly shall consist of all Justices, and the Chief Justice of the Supreme Court shall be the chairperson.” Saibanshohō [Court Act], Law No. 59 of 1947, art. 12. *But see id.* at art. 13 (“The Supreme Court shall have a General Secretariat, which shall handle administrative affairs of the Supreme Court.”).

³⁰ *Id.*

³¹ Law, *supra* note 25, at 1553 (citing Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, ASIAN-PAC. L. & POL’Y J. (Special Issue) 89, 112 (2001)); Abe, *supra* note 17, at 306 (interview with “Judge no. 4”). For a more complete explanation of the structure and operations of the General Secretariat, see Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 KOBE U. L. REV. 45, 48-50 (1991); Abe, *supra* note 17, at 311-12. The formal responsibility for selecting LTRI instructors rests with the Supreme Court Judicial Assembly, but it is carried out by the General Secretariat. See Law, *supra* note 25, at 1553 (citing Abe, *supra* note 17, at 306).

³² Foote, *supra* note 20, at 153 (noting a view of the former system as “a complete black box, with no outside review and no opportunity for the General Secretariat to justify its determinations.”).

³³ Haley, *supra* note 18, at 103 (citing Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69 (1984)). However, Foote reports that ten candidates were denied initial appointment in the fifteen years between 1978 and 2003 (perhaps evidencing baby teeth?) but gives no further detail as to what underlie these rejections. Foote, *supra* note 20, at 135.

³⁴ Law, *supra* note 25, at 1552 (quoting Lawrence Repeta, Professor, Omiya Law School, in Tokyo, Japan (July 4, 2008)).

³⁵ “These instructors are responsible for preparing secret evaluations of all trainees and thus must observe the entire class closely from the outset.” Law, *supra* note 25, at 1554 (citing Foote, *supra* note 20, at 146 and Interview with Justice A).

The lack of transparency in the process of judicial appointments attracted criticism during recent judicial reform discussions carried out by the Judicial Reform Council.³⁶ As a result, a Lower Court Judge Designation Consultation Commission (“Commission”) was established by law as part of a reform package and began operating in 2003.³⁷ Nevertheless, critics have identified the Commission as deficient in its progress towards achieving transparency in the process³⁸ and being so opaque in its operations that no meaningful assessment can be formed on its other objectives of “objectivity in the judicial appointment process and [ensuring] that the views of the public are reflected in the process.”³⁹ As Professor Daniel Foote observed: “[w]hile a few elite outsiders are now involved in the review process, and the range of information available regarding candidates appears to have expanded somewhat, the dominant message remains: Trust us, and do not expect any concrete information about how the relevant standards are applied, much less specific candidates.”⁴⁰

To summarize, Tier 1 instrumental judicial administration takes place through the selection of judges. An elite “self-replicating clique of judges”⁴¹ in the General Secretariat has captured the judicial hiring process and employs it so as to make its best efforts in ideologically screening who will become lower court judges. Through this mechanism and over time, this clique of judges has selected a national cadre of judges who will be most

³⁶ “The Council called for re-examination of the procedures for appointing lower court judges and greater openness in that process. In the words of the Council, ‘the process by which the Supreme Court nominates candidates [for lower court appointments] is not necessarily clear, and the views of the people cannot penetrate that process . . . [F]rom the standpoint of strengthening the confidence of the people toward the judges, in order to reflect the views of the people in the [appointment] process, a body should be established . . . which, upon receiving consultations from the Supreme Court, selects the appropriate candidates and [makes recommendations] to the Supreme Court.’ The Council added, ‘[M]echanisms should be established to assure that the process is transparent, including disclosing the selection standards, procedures, schedule and other matters.’” Foote, *supra* note 20, at 143 (quoting Judicial Reform Counsel final report).

³⁷ For details on its structure and operations, see Foote, *supra* note 20, at 143-51.

³⁸ This is not to say that the Commission has been wholly impotent. Foote reports that in its first four years of operations, roughly ten percent of applicants were deemed unsuitable or had their applications withdrawn. However, he also notes that “a more cynical assessment” might conclude “that the establishment of the Commission has provided the General Secretariat with greater freedom to reject applications than it enjoyed previously.” Foote, *supra* note 20, at 152-53.

³⁹ *Id.* at 144 (“Because the third objective of transparency has hardly been achieved, there is little way of knowing for certain whether the other objectives have been achieved; one can only hope they have been.”) See also Law, *supra* note 25, at 155-56 (drawing upon Foote and his own interview with a committee source).

⁴⁰ Foote, *supra* note 20, at 151.

⁴¹ Law, *supra* note 25, at 1590. Law presents significant detail regarding the mechanisms of this “circular and self reinforcing” process. *Id.* at 1563-64.

likely to share the elite group's social and political mindsets. Consequently, this inputs into the system a constant set of background biases with regards to politically significant cases. The value choices may indirectly reflect political values and interests of Japan's elected officials or of the electorate more generally speaking,⁴² but at the bottom line, these choices are made by and mediated through judicial administrators in the General Secretariat. In short, the General Secretariat stacks the deck of cards, where the cards represent the "who" of Japan's lower courts, so as to make it most likely that its views will be reflected in future decisions.⁴³

2. Tier 2: Assignments, Transfer, Promotion, and Retention

Independence of judges in Japan is constitutionally mandated: "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws."⁴⁴ Arguably, the General Secretariat's Tier 1 control over the hiring of lower court judges should not impair the independence of individual judges in carrying out their jobs because a rigged process *ex ante* to make it likely that the judge will see eye-to-eye with the General Secretariat's values and views means that there should then be no perceived inconsistency with or interruption in the individual judge's naturally occurring deliberative processes *ex post*. But circumstances are dramatically different with regards to the powers that central judicial administrators in the Supreme Court General Secretariat have with regards to the totality of personnel decisions that affect judges in service.⁴⁵

As personnel considerations inevitably fall into the calculus that every judge makes in pursuing their careers, these powers directly implicate the independence of individual judges. Accordingly, to the extent that cases

⁴² This divide is the fault line in the analytical division between Professors Mark Ramseyer and John Haley. In a valiant effort, Professor Frank Upham has attempted to reconcile their differences or at least to flesh out how methodology, rather than the reality of the circumstances, may be underlying those differences. Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421 (2005).

⁴³ As Upham aptly notes, "the difference between Haley and Ramseyer is remarkably small" and both agree upon "the Secretariat's ideological control over the judiciary." *Id.* at 446.

⁴⁴ KENPŌ, art. 76, para. 3. I maintain that the notion of judicial independence expressed in Article 76, "the exercise of ... conscience," fits plainly with Professor Lee Epstein's conception, namely "the ability of judges to behave sincerely, that is, in line with their sincerely held preferences (whatever they may be)." Lee Epstein, *Shedding (Empirical) Light on Judicial Selection*, 74 MO. L. REV. 563, 567 n. 24 (2009); see also AHARON BARAK, *THE JUDGE IN A DEMOCRACY*, 76-80 (Princeton Univ. Press 2006). Moreover, Epstein's phrasing communicates that judges' instrumental considerations of career advancement (or survival) ought not to be embraced by the system.

⁴⁵ While Tier 1 instrumental judicial administration should not impair *judicial independence*, it can still impede *fairness* for the reasons discussed above.

arise where judges consciously or unconsciously factor into their decision-making a desire to appease their bosses, those cases will suffer from some impairment in the achievement of fairness as an element of procedural justice.

In fact, “no one disputes that the Secretariat closely monitors judges’ performance for both competence and political reliability.”⁴⁶ Beginning with anecdotal stories that have been reported even in English writings for at least twenty years⁴⁷ and through the influential empirical analysis that Mark Ramseyer and his co-authors have carried out,⁴⁸ the evidence is clear. Scholars have shown conclusively how Japan’s judicial administrators employ their powers over assignments, transfers, promotion, and retention to pursue a distinct set of ideological values in Japanese case law.⁴⁹

Again, we begin with formal structures, and within these, assignments, transfer, and promotion are handled somewhat differently from retention.

Both according to the Constitution and by statute, authority over assignment, transfer, and promotion is at first entrusted to the Supreme Court. Thus, Article 77 of the Constitution provides, “[t]he Supreme Court is vested with the rulemaking power under which it determines . . . matters relating to . . . the administration of judicial affairs.”⁵⁰ Articles 47 and 48 of the Court Act implement this more specifically, albeit with constraints on the Supreme Court designed to ensure for lower court judges a degree of status protection. After Article 47 provides “[j]udges of lower court shall be assigned to positions by the Supreme Court,” Article 48 then limits this somewhat by barring a judge from being removed, transferred, suspended from performing his job, or having his salary reduced against his or her will

⁴⁶ Upham, *supra* note 42, at 424.

⁴⁷ Early reports appear to be HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES*, 249-82 (Markus Weiner Pub. 1989); Miyazawa, *supra* note 31; Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, in *JAPANESE CONSTITUTIONAL LAW* 123 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., Univ. of Tokyo Press 1993); Abe, *supra* note 17.

⁴⁸ Just to mention the leading works in this *oeuvre*, see J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* (rev. ed., Harvard Univ. Press 1997); *MEASURING JUDICIAL INDEPENDENCE*, *supra* note 16; *Managed Judges*, *supra* note 19; J. Mark Ramseyer, *Predicting Court Outcomes through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 *DUKE L. J.* 1557 (2009).

⁴⁹ See, e.g., sources cited *supra* notes 46-48; see also Haley, *supra* note 18; Law, *supra* note 25.

⁵⁰ KENPŌ, art. 77 (“The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs. Public procurators shall be subject to the rule-making power of the Supreme Court. The Supreme Court may delegate the power to make rules for inferior courts to such courts.”).

except in certain procedurally protected situations.⁵¹ As to retention, reappointments are legally the same as new appointments, that is to say carried out by the Cabinet “from a list of persons nominated by the Supreme Court.”⁵²

For all of these activities, the “who” and “how” is more fluid. Once again, the formal authority to act in the name of the Supreme Court is given to the collective body of the fifteen justices operating as a Judicial Assembly with the Chief Justice serving as its chair.⁵³ However, while formal authority remains in their hands, they have the wherewithal to pass along the carrying out of necessary duties as they wish. The justices could, if they chose to, pass along rulemaking authority (including personnel affairs) to the lower courts.⁵⁴ Instead, the Supreme Court’s General Secretariat has received the judiciary’s portfolio over all personnel affairs.⁵⁵ Because the Judicial Assembly exercises almost no voice,⁵⁶ the General Secretariat’s power is nearly complete.

This is where the rubber hits the road. With the power to control the professional lives of every single full-time career judge apart from Supreme

⁵¹ Saibanshohō [Court Act], Law No. 59 of 1947, art. 48 (“A judge shall not be removed or be transferred, or be suspended from performing his job, or have his salary reduced, against his will, except in accordance with the provisions of law concerning public impeachment or national referendum, or unless the judge is declared mentally or physically incompetent to perform his/her duties in accordance with provisions of applicable law.”); *but see* Law, *supra* note 25, at 1557 n.63 (citing multiple sources uniformly indicating that the protection of Article 48 is a façade if an individual judge does not wish to accept a proposed transfer).

⁵² KENPŌ, art. 80; Saibanshohō [Court Act], Law No. 59 of 1947, art. 40; *see also* sources cited *supra* notes 46-48; sources cited *infra* note 63 (noting the limited change which has resulted from the new Lower Court Judge Designation Consultation Commissions); Haley, *supra* note 18; Law, *supra* note 25.

⁵³ In this delegation to the Judicial Assembly, the law is entirely explicit: “(1) The Supreme Court shall execute judicial administration affairs through deliberations of the Judicial Assembly and under the general supervision of the Chief Justice of the Supreme Court. (2) The Judicial Assembly shall consist of all Justices, and the Chief Justice of the Supreme Court shall be the chairperson.” Saibanshohō [Court Act], Law No. 59 of 1947, art. 12.

⁵⁴ KENPŌ, art. 77, para. 3 (“The Supreme Court may delegate the power to make rules for inferior courts to such courts.”). As discussed *infra*, Professor Eiji Sasada has suggested decentralizing personnel authority into the Judicial Assemblies of each of Japan’s eight High Courts and away from the General Secretariat in the Supreme Court. *See* text and sources cited *infra* note 216.

⁵⁵ And, in particular, it is the Personal Affairs Bureau of the General Secretariat that has complete control over these matters. Thus, “according to one experienced observer of the Japanese judiciary . . . the most influential official may in fact be the Director of the PAB.” Law, *supra* note 25, at 1563 (citing interview with Shinichi Nishikawa, Professor, Meiji University, in Tokyo, Japan (Aug. 20, 2008)).

⁵⁶ As one retired Supreme Court Justice has recalled, Judicial Assembly decisions are mere formalities, where proposals put forward by the General Secretariat are given rubber stamp approvals. “There is no one-by-one concrete explanation received as to personnel transfers pertaining to more than several hundred people each year. And even if we had received [separate explanations], we couldn’t make judgments on them.” EIJ SASADA, SHIHŌ NO HENYŌ TO KEMPŌ [TRANSFORMATION OF JUSTICE AND THE CONSTITUTION OF JAPAN] 42 (2008) (quoting MASAO OHNO, BENGOSHI KARA SAIBANKAN E [FROM LAWYER TO JUDGE] 102 (Yuhikaku Pub. Co. 2000)).

Court justices, the judicial administrators in the Personal Affairs Bureau have and exercise the license to incentivize judicial decision-making that conforms to their values, to punish judicial making that confronts their values,⁵⁷ and even to disempower⁵⁸ or remove entirely judges who refuse to toe the line.⁵⁹ In Professor Mark Ramseyer's words, this represents a "managed judges" system of lower court judges who lack independence. "They are free of direct control by politicians, but the Supreme Court and Secretariat control their careers."⁶⁰ Or, in Professor David Law's succinct conclusion: "the prevailing view among observers is that Japanese judges march out of ideological sync with the bureaucracy at their own peril."⁶¹

For Japanese judges, not every case has "big brother" watching over their shoulder to assess the ideological conformity of their decisions. The vast majority of cases that judges resolve have little or no political or

⁵⁷ Carrots and sticks are shaped by the range of available posts in terms of location, authority, and subject matter, which are also connected to status and pay. Japanese career judges are rotated around the entire nation every two to four years. Judges take on a variety of portfolios on the bench as well as in dispatches to executive branch agencies. The most prestigious assignments are well recognized as judicial administration posts, Tokyo and Osaka courts, and a handful of particular government posts. Nearly all judges will take on the shared burden of less desirable posts, but the salient point is that some judges' careers are mainly filled with attractive positions while others will have more, or even mostly, undesirable situations.

⁵⁸ By essentially banishing them to obscure branch court locations or less significant portfolios such as specialized panels for checks and notes or civil execution of judgments, and with the likelihood that this will inspire a voluntary departure. Levin interview with former Judge A [place concealed], [date concealed] [hereinafter Judge A interview]; see also Law, *supra* note 25, at 1561 ("... reassigning judges on a periodic basis has been effective tool for encouraging those who are too independent or too liberal to quit.").

⁵⁹ *Id.* John Haley emphatically reminds us that only one assistant judge has been denied reappointment for blatantly political reasons in the post-war history of the judiciary. Moreover, this incident involving Yasuaki Miyamoto generated a massive outcry from the practicing bar, making the judiciary "the center of a political storm." Haley, *supra* note 18, at 126. Accordingly, Haley insists that a lesson was forever learned by the Supreme Court not to employ this sanction again because it is "no longer viable." *Id.* However, his surmise is not entirely persuasive. Because the General Secretariat has a diverse collection of mechanisms, some more subtle and some more blunt, it does not need to use all of the arrows in its quiver to strike fear. Some may be most effective held in reserve, while more "conventional" options are put to use. As well, this mechanism will ordinarily be unnecessary when "[p]ay raises, transfers, promotion/demotion and other such personnel matters are likely have much greater practical significance than the ten-year reappointment reviews." Foote, *supra* note 20, at 154; accord, Judge A interview, *supra* note 58.

⁶⁰ *Managed Judges*, *supra* note 19, at 1924. Ramseyer views the system approvingly in light of its powerful capacity to create consistency in the law: "As with academic freedom for professors, judicial independence is romantic and comfortable, but not a policy destined to encourage intense effort or strict accountability." *Id.* at 1925-26; but see text *infra* at 109-113 (noting problems with instrumental judicial administration regardless of potential benefits).

⁶¹ Law, *supra* note 25, at 1562. Law also reminds readers of Professor Setsuo Miyazawa's even more strident remarks: "Japanese judges... assignments depend more upon the policy content of their decisions and their outside activities than upon their legal-reasoning skills or ability to dispose of cases efficiently." *Id.* at n.105 (citing Miyazawa, *supra* note 31, at 50-52).

ideological significance whatsoever.⁶² Moreover, judicial authorities must understand that their interventions must be both subtle and relatively scarce, as too much exposure would allow the legitimacy of the system to become subject to challenge.⁶³ But at the same time, surely Japanese lower court judges understand the game. After all, any servant is wise to understand her master's wishes.

While anecdotal reports had loosely illuminated the hot spots, Ramseyer and Rasmusen's statistical work more precisely identifies the types of cases most likely to draw the wrath of the General Secretariat if decided contrary to its values.⁶⁴ In civil litigation, they found that "judges who held either the Self-Defense Force or United States military bases unconstitutional, judges who rejected national electoral apportionment schemes advantageous to the Liberal Democratic Party, and judges who enjoined the national government in administrative law suits" all suffered in their careers.⁶⁵ On the other hand, in mundane administrative litigation involving disputes between the government and taxpayers, the system favors accurate judges rather than biased judges.

Thus, here lies instrumental judicial administration in plain form—with implications for civil and administrative cases that raise the most significant issues challenging the state. As one former judge explained to

⁶² Critical legal studies scholars might object to this characterization. See, e.g., Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) ("Law [for critical legal scholars] is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society."). For our purposes, that perspective, even if accurate, digs too deeply. Some cases which directly challenge the most significant interests of political elites will accordingly be of greater interest to them.

⁶³ The system did face a degree of public investigation through the course of the Judicial Reform Council's endeavors. As with initial judicial appointments, a limited framework of external review for reappointment was established through the Lower Court Judge Designation Consultation Commissions discussed above. However, just as with initial appointments, the Commission's effectiveness in bringing about real change seems to be quite limited in scope. In any case, "pay raises, transfers, promotion/demotion and other such personnel matters likely have much greater practical significance than the ten-year reappointment reviews. These other personnel matters lie beyond the scope of the Consultation Commission's review." Foote, *supra* note 20, at 154.

⁶⁴ Japanese judges may also be punished for activities off the bench. The most famous case in this regard is the Teranishi case, where Judge Kazushi Teranishi received a formal reprimand, when after identifying himself as an assistant judge at Sendai District Court at a symposium on the topic, he conveyed his opposition to a wiretap authorization bill pending in the national legislature. Daniel H. Foote, *Restrictions on Political Activity by Judges in Japan and the United States: The Cases of Judge Teranishi and Justice Sanders*, 8 WASH. U. GLOBAL STUD. L. REV. 285, 286-89 (2009); see also Kazushi Teranishi, *Sendai Kōsai Kaikoku Kettei Wo Ukete [On Receiving the Reprimand Decision from the Sendai District Court]* 47-53, in TOSHIKI ODANAKA ET AL., *JİYŪ NO NAI NIHON NO SAIBANKAN [JAPAN'S JUDGES WHO ARE NOT FREE]* (Nihon Hyoronsha 1998); see also DANIEL H. FOOTE, *NA MO NAI KAO MO NAI SHIHŌ: NIHON NO SAIBAN WA KAWARU NO KA [NAMELESS FACELESS JUSTICE: WILL JAPAN'S COURTS CHANGE?]* (Tamaruya Masayuki trans., NTT Pub. Co. 2007).

⁶⁵ MEASURING JUDICIAL INDEPENDENCE, *supra* note 16, at 62.

me, all judges will intimately consider their personal career implications in the event that fortune delivers to them a politically significant case. And while politically significant cases are relatively few over the course of a judge's career, it was "simply obvious" which cases would be most likely to matter to the General Secretariat.⁶⁶ In such cases, Japan's judges are of course "free" to decide as they think best. But as they weigh over the implications of their choice, taking into account how it will likely affect their careers, their lives, and their families, it seems fair to say that the scale of justice for the litigants is not poised in an even balance.

3. *Tier 3: Judicial Conferences, Study Groups, and Internal Position Papers*

With its unified administrative system, the Japanese judiciary is exceedingly capable of working from the center to proselytize particular approaches to litigation procedures or to interpretations of the law. In fact, this is precisely the intended meaning of "research" in the Japan's Legal Training and Research Institute's name.⁶⁷

This managed distribution of legal understanding to all active judges is carried out in a variety of practices. In its most formal setting, the General Secretariat, on behalf of the Supreme Court, convenes judicial conferences (*kyōgikai* / 協議会)⁶⁸ where a designated representative from each of the eight High Courts and fifty District Courts⁶⁹ will be brought in to Tokyo to discuss some particular subject matter, sometimes to assist in developing an internal position paper on that subject to be distributed by the Supreme Court to all judges.⁷⁰ Less formally and more frequently, the Legal Training and Research Institute hosts study groups (*benkyōkai* / 勉強

⁶⁶ Judge A interview, *supra* note 58.

⁶⁷ "[T]he Institute provides the advanced education for judges and assists their research programs on law and practice." SUPREME COURT OF JAPAN, JUSTICE IN JAPAN 38 (6th ed., Hōsō Kai [Lawyer's Association] 2000); *see generally* SUPREME COURT OF JAPAN, THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN (Hōsō Kai [Lawyer's Association] 2001).

⁶⁸ These should be distinguished from the judicial assemblies (*saibankan kaigi* / 裁判官会議) which are the governing bodies of each court. Saibanshōhō [Court Act], Law No. 59 of 1947, art. 12(1) (Supreme Court Judicial Assembly), art. 20(1) (High Court Judicial Assemblies), art. 29(2) (District Court Judicial Assemblies).

⁶⁹ Typically a judge with some expertise in that field. Judge A interview, *supra* note 58.

⁷⁰ *Id.* Judge A further explained to me that he participated as the representative from his court in one such conference. While opinions were gathered at the conference, it seemed to him that the views to be expressed in a position paper were predetermined by the General Secretariat administrators who had convened the conference and in fact those were what ultimately resulted.

会) of invited judges with expertise in particular subject matters to meet and discuss those issues.⁷¹

For the most part, this aspect of Japanese judicial administration attracts and deserves praise.⁷² However, these mechanisms nonetheless present a risk of being carried out in a manner that is aimed at putting bias into fair litigation results, which is to say they risk being employed as a means of instrumental judicial administration.

The danger lies in the risk that ostensibly advisory guidance on how cases should be resolved may take on a binding force in light of the General Secretariat's Tier 2 collection of carrots and sticks. Thus for example, Professor Setsuo Miyazawa tells of the public exposure of a formerly confidential internal court document that had been circulated by the General Secretariat to both district and high courts in March 1985 which:

[C]ontained a record of the conference of District and High Court judges that the Supreme Court held in December, 1983. The topic of the discussion was the responsibility of the government in cases where floods have been caused by negligence and management of rivers. Its timing was telling. The conference was held only a month before the Supreme Court decision that severely limited the governmental responsibility in such cases. It appears that the [General Secretariat] tried to inform the lower court judges of the probable contents of the imminent Supreme Court decision and to encourage the attending judges to decide their cases accordingly.⁷³

⁷¹ Some years ago, I enjoyed a private tour of the Legal Training and Research Institute, hosted by the director of its research division. During my visit, I observed two week-long study sessions in progress, each with about fifty judges participating. One was focused on issues related to medical malpractice and the other on intellectual property. Speakers included judges, lawyers, and scholars, but the audience was made up only of judges.

⁷² Professor Daniel Foote and others provide detail describing an active study session program carried out by the Tokyo District Court in the early 1960s which they attribute to helping simplify and add predictability to the resolution of traffic accident disputes. Foote presumes the acquiescence of the Supreme Court and suggests further that the General Secretariat may have suggested it in the first place. In any case, "the Supreme Court later aided the process in many ways, including convening meetings of judges to discuss relevant topics and coordinating transfers of judges in an apparent effort to spread expertise on traffic cases nationwide." Daniel H. Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 L. IN JAPAN 19, 32 (1995); see also J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts And/or the Rates in Japan*, 18 J. LEG. STUD. 263 (1989); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 L. & SOC. REV. 651 (1990).

⁷³ Miyazawa, *supra* note 31, at 52-53. Miyazawa also cites conferences held in Tokyo in 1976 and 1982 with regards to third-party standing in administrative litigation against the government. *Id.* at 53;

According to Professor Miyazawa and drawing upon work by Professor Shigeo Kisa, the nature of these conferences has “changed much since they started in the fifties.”⁷⁴ Sessions that were once informal and transparent had taken on the character of indoctrination meetings under the General Secretariat’s firm hand.⁷⁵ And the General Secretariat’s views were delivered in the context of a commonly understood but unspoken enforcement regime centered around transfers and promotions.⁷⁶

Not surprisingly, the Supreme Court’s doctrinal communications are also distributed on paper. As explained by Professor Eiji Sasada:

Even apart from the judicial councils and conferences⁷⁷ that are managed by guidance from the Supreme Court General Secretariat, there are many written materials that the Supreme Court circulates which extend its influence upon the judges of the lower courts Despite that these pertain to important matters, “memoranda” from the various bureau chiefs of the Supreme Court General Secretariat “have a nature to them suggesting that they must be followed by the lower courts.”⁷⁸

In short, reliable reports suggest that judicial position papers and conferences, while serving laudable purposes in helping carry out judicial administration, have at times crossed the line into instrumental judicial administration practices that warrant concern. When, for example, central judicial administrators who lack authority in deciding particular cases present to lower courts didactic guidance to narrowly construe standing requirements so as to bar certain plaintiff’s actions against the government, the administrators are plainly taking sides in such cases and impeding the fairness of the system.

see also RAMSEYER & ROSENBLUTH, *supra* note 48, at 176 (“the Supreme Court held a judicial conference to show judges how to decide [the state’s liability in river flooding] cases.”).

⁷⁴ *Id.* at 53 (citing Shigeo Kisa, *Professionalism and Independence of Judges*, 40 (1) HOKUDAI HOGAKU RONSHU [HOKKAIDO UNIV. L. REV.] 5-6 (1990)).

⁷⁵ *Id.*

⁷⁶ *Id.* (“Attending lower-court judges know the weight of such opinions and convey them to their colleagues after they return. Lower-court judges know what will happen to their career if they defy GS policies and many attending judges now consider these conferences as chances to ask the GS to tell them about its policies.”).

⁷⁷ The name Judicial Councils (*saibankan kaidō* /裁判官会同) has since been replaced by Judicial Conferences (*saibankan kyōgikai* /裁判官協議会). In function and practice, they essentially describe the same kind of meetings. Judge A interview, *supra* note 58.

⁷⁸ EIJI SASADA, SAIBAN SEIDŌ [THE COURT SYSTEM] 243-44 (Shinzansha Pub. Co. 1997) (quoting Nobuyoshi Asami, *Towards the Reform of the Organization and Organizational Culture of the Courts (Part I)*, 1465 HANREI JIHŌ 29, 32 (1993)).

4. Tier 4: Direct Interventions

Instrumental judicial administration via direct intervention is its most troubling form. Such cases represent clear and unambiguous meddling by judicial administrators in the “fair and balanced”⁷⁹ litigation system intended by its designers. Fortunately, direct intervention in Japan appears to be a rare occurrence.⁸⁰ Although further investigation is certainly called for to flesh out the degree to which such incidents have occurred and are occurring, it hardly seems that the system is routinely impaired in this manner.⁸¹

Accordingly, I have found only three stories that present or strongly suggest⁸² direct intervention in actual cases in Japan. The first is well-known and well-documented even in English language writings on Japanese law. It conspicuously reveals how judicial administrators dealt with the involved judges by favoring the intervener and punishing a whistle-blower. Two less familiar stories lack smoking guns, but bolster the views of those who worry about instrumental judicial administration in suspect circumstances. One is recounted by Professor Setsuo Miyazawa in a well-recognized article in the Kobe University Law Review. The other is most likely being presented for the first time here.

The first is the famous case of Sapporo District Court Judge Shigeo Fukushima, who, while presiding over one of the most significant cases of constitutional law regarding war and peace in Japan in the late 1960s (at least comparable to the U.S. Guantánamo Bay litigation in the past decade, if not even more significant for Japan then),⁸³ received a letter from the chief

⁷⁹ Cf. FOXNEWS.COM, <http://www.foxnews.com> (“Fair & Balanced” all the time).

⁸⁰ However, it needs to be pointed out that the “need” for such interventions would also likely be quite rare. To begin with, as noted above, very few cases will warrant central judicial administrators’ interest in the results. Then, whether as the result of Tier 1’s screening process that fills the courts with judges who will likely share the administrators’ views, or owing to Tier 2-type pressures on the deciding judges being sufficient to allow the administrators sufficient comfort in anticipating compliant results, or simply that the likely results in the case, resolved fairly, point in the same direction as administrators’ hope for, these dynamics further reduce the administrators’ worries. Consequently, the system already ensures that only a tiny fraction of cases will ever invite direct intervention from the central administrators.

⁸¹ Albeit a sample of n=1, Judge A neither experienced nor heard of any such interventions during his time on the bench. Judge A interview, *supra* note 58. Another possibility is that the rarity is mainly owing to the dynamics explained in note 80, *supra*. Thus even if interventions are numerically few, the odds of direct intervention may still be unacceptably high in those cases where judicial administrators would want to put it to use.

⁸² Anyone who has spent time around infants knows the “dirty diaper sniff test.” Sometimes we may assume a reliable call on what’s happened, even when we can’t see what’s inside.

⁸³ The significance of this case is demonstrated by the fact that five percent of all lawyers in Japan signed on as co-counsel for the plaintiffs. This reality corresponds to imagining 55,000 United States lawyers joining Harry Schneider and the Perkins Coie law firm in representing Salim Ahmed Hamdan *pro*

judge of the Sapporo district, Kenta Hiraga, that offered “friendly advice from a senior colleague.” The advice shared why Hiraga thought the government’s position in the case should be upheld and how the rationale could be circumspectly crafted. When Fukushima held instead for the plaintiffs, he also went public with the memo. This raised clamor from many quarters, but ultimately Chief Judge Hiraga was “reprimanded” with a promotion while Judge Fukushima was sternly admonished and then posted to various provincial cities for a period of twelve years before he ultimately resigned from the courts.⁸⁴

The second story is presented in Professor Miyazawa’s words:

In 1979, the banks of the Nagara River in Gifu Prefecture were broken under heavy rain and the towns of Anpachi and Sunomata were flooded. Residents of the two towns filed separate civil suits in Gifu District Court against the government seeking damages as the Nagara river was... under the management of the national government. The two cases were heard at different times by the same section of the Gifu court, but the court reached opposing conclusions. While the court decided for the Anpachi plaintiff in 1982, it decided against the Sunomata plaintiffs in 1984. The associate judges of the two decisions were the same, but the chief judge was different. Chief Judge Akimoto in the Anpachi decision was replaced by Chief Judge Watanabe in 1982, the same year as the Anpachi decision. Watanabe’s background is the point. He worked for five years between 1975 and 1980 as a solicitor at the Justice Ministry headquarters, finally at the rank of none other than the head of administrative litigation.⁸⁵

bono against the Bush Administration’s military commissions in Guantanamo Bay, Cuba. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁸⁴ The story is retold in many sources. For its (most likely) earliest English language retelling in print, see Yasuhei Taniguchi, *Japan*, in JUDICIAL INDEPENDENCE 205, 215-16 (S. Shetreet and J. Deschenes eds., Martinus Nijhoff 1985); ITOH, *supra* note 47, at 266-68. See also, e.g., MEASURING JUDICIAL INDEPENDENCE, *supra* note 16, at 18-22; David M. O’Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37, 48-49 (Peter H. Russell & David M. O’Brien eds., Univ. of Virginia Press 2001); Luney, *supra* note 47, at 142-43; Haley, *supra* note 18, at 123-24. In Japanese, see FUKUSHIMA SHIGEO ET AL., NAGANUMA JIKEN HIRAGA SHOKAN: 35 NEN ME NO SHŌGEN [THE NAGANUMA CASE AND THE HIRAGA MEMO: THIRTY FIVE YEARS’ OF BEARING WITNESS] (Fukushima Shigeo et al. eds., Nihon Hyoronsha 2009); see also FOOTE, *supra* note 64, at 127-30.

⁸⁵ Miyazawa, *supra* note 31, at 51-52. Miyazawa additionally notes that Judge Watanabe’s transfer to the Gifu District Court was further unusual because he had been serving at the more prestigious Tokyo High Court and that he returned to a prestigious track of postings in 1986. On the other hand, after ruling

Finally, a present-day story, based in part upon the author's personal knowledge, displays a consistent *modus operandi*.⁸⁶

*On May 15, 1998, seven plaintiffs diagnosed with terminal lung cancer filed suit for damages in the Tokyo District Court against the government of Japan and Japan Tobacco, Inc., (JT) the privatized successor to the Japan Tobacco and Salt Monopoly Public Corporation. Though Japan has no mechanism for class action, this was nonetheless an unprecedented case in Japan as the first serious challenge to the business of selling tobacco to the Japanese public which had been wholly owned by the national government until 1985 and which was still two-thirds owned by the nation through its Minister of Finance.*⁸⁷ *Given that the case concerned tobacco smoking, then prevalent among one third of all Japanese adults,*⁸⁸ *if the plaintiffs prevailed with compensatory damages for the disability and anticipated loss of lives from their diseases, the precedent would have been set for millions of similar claims against the state and JT.*

After months of pre-trial sessions, the trial continued before a panel of three career judges in ordinary piecemeal sessions over a four-year period. All of the plaintiffs testified to share stories of their smoking, their disease, and their suffering. Some passed away from their disease while the proceedings were still in progress. As well, the judges heard key officials from the government and some of JT's top executives give their direct testimony and face challenging cross-examinations. A tremendous amount of information had been prepared and conveyed by all parties in the litigation to make the judges intimately familiar with the facts and legal issues in the case. One can certainly presume the judges had formed

against the government, Judge Akimoto's career track was to less attractive posts. Miyazawa plainly states that the General Secretariat *appears to make assignments "in order to get a desired result in a particular case at a local court"* having effectively used information about important cases that lower court judges are required to submit to it. *Id.* at 51 (emphasis added). Ramseyer and co-author Frances Rosenbluth recite this story with greater detail and add a similar story from the Fukuoka High Court, hinting that the Secretariat and local senior judges may "use the personnel apparatus to fix the outcome of controversial cases" but conceding this is "harder to prove." RAMSEYER & ROSENBLUTH, *supra* note 48, at 175-78 (1993). It should also be noted that case assignments within any particular court are purportedly random, although the system is utterly opaque and not bound by any publicly available rules. Sasada interview, *supra* note 22.

⁸⁶ I was present in the courtroom in December 2002 and attended a debriefing session with plaintiffs' counsel later that afternoon. Unless specifically cited differently, additional facts in this recitation are based upon an interview with Ritsu Katayama, lead counsel for plaintiffs in the Yokohama trial. See Interview with Ritsu Katayama, in Tokyo, Japan (June 3, 2010) [hereinafter Katayama interview].

⁸⁷ Mark Levin, *Tobacco Industrial Policy and Tobacco Control Policy in Japan*, 6 ASIAN-PAC. L. & POL. J. 45, 49 (2005); see also Mark A. Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POL'Y REV. 99 (1997); Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT'L L. 743 (2006).

⁸⁸ JAPAN TOBACCO, INC., ANNUAL REPORT 104 (2005), <http://www.jti.com/documents/annualreports/annurep2005>.

*personal opinions drawn from dozens of hours of live testimony that they had heard.*⁸⁹

The case was beginning to wind down. Nearly all of the evidence had been presented to the court and the session on December 10, 2002 was set for the plaintiffs' attorneys to present a written submission translated from a United States law professor's published article on the history of tobacco business and policy in Japan,⁹⁰ to be followed by a scheduling conference for the remaining sessions of the trial. At the time, it was anticipated that the plaintiffs' and defendants' closing arguments would go through the Spring of 2003 and judgment handed down that Fall.

The parties, their legal counsel, and an audience of spectators waited in the courtroom for the session to begin. The bailiff called for those in attendance to rise and the judges entered. But there was a surprising occurrence. The presiding judge had been replaced with a new judge, Kikuo Asaka,⁹¹ who, as the day went on, seemed far less sympathetic to the plaintiffs' position. Adding to the surprise was that the change had taken place in December, asynchronous from the ordinary annual shift of many judicial personnel assignments that takes place with each new fiscal year on April 1.⁹²

Thus, for reasons unknown to the plaintiffs and their lawyers, judicial administrators in the Supreme Court's General Secretariat had chosen to replace the presiding judge with a total newcomer quite suddenly.⁹³ Later that afternoon, plaintiffs' lawyers confided to their clients that these

⁸⁹ Oral testimony was presented in twenty trial sessions over the course of four years. Yoshio Isayama, *Kesshin Chokuzen no Saibankan Kōtai no Imi Suru Mono* [The Meaning of the Judicial Transfer Just Prior to the Close of Trial Proceedings], 1 *NIHON KIN'EN GAKKAI ZASSHI* [JAPANESE J. TOBACCO CONTROL STUD.] 3 (2006).

⁹⁰ The article was Levin, *supra* note 87, translated to Japanese by the plaintiffs' legal team.

⁹¹ First appointed in April 1977, Judge Asaka was a fifteen-year veteran on the bench. He was posted to the Tokyo District Court with an elite supervisory level status in April 2002. *ZEN SAIBANKAN KEIREKI SŌRAN* [OVERVIEW OF CAREERS OF ALL JAPANESE JUDGES] 192 (Nihon Minshu Horitsuka Kyokai [Japan Democratic Lawyers' Ass'n] ed., 4 ban [4th ed.] 2004) [hereinafter *KEIREKI SŌRAN*].

⁹² Mid-year transfers in Japan are not entirely uncommon. A small number of judges exit the system throughout the year owing to illness, sudden death, or the mandatory retirement of judges designated by the Constitution article 79(5) and particularized in the Court Act Article 50, that takes effect on their birthdays. Each departure then triggers a shift of Judge B to Judge A's position, Judge C to Judge B's position, etc., and a chain reaction of multiple transfers like a set of falling dominoes. Annual April 1 transfers, at the start of each new fiscal year, represent a card shuffle. Given that judges are transferred on average every three to four years, April shuffles will inevitably include a substantial percent of the entire judiciary. Judge A interview, *supra* note 58.

⁹³ Looking back, Yoshio Isayama, lead counsel for the plaintiffs in the Tokyo litigation, notes that after forty years of losing cases, plaintiffs had just begun to win major damage awards against the tobacco industry in the United States. Such circumstances would have been known to the judges in Japan and may have given administrators pause to imagine a similar ruling being handed down in the Tokyo case. Isayama, *supra* note 89, at 3.

circumstances did not bode well for the end results, but regrettably nothing could be done.

Shortly thereafter, both of the other original judges were replaced in the regular April transfer season. And thus the case was to be decided by a panel of judges who were all new to the matter and who had heard not any of the live witness examination and cross-examinations. The “right-hand” judge⁹⁴ was even new to the bench—a very rare occasion in Japan of a mid-career appointment from the practicing bar.⁹⁵ This individual, Kuniyo Mizuno, had until then made his professional career in medical malpractice and workers’ compensation litigation. As he had become a judge just six months earlier,⁹⁶ this case was one of his first assignments.

On October 21, 2003, a defense judgment was handed down that was far-reaching in both its fact finding and holdings of law. The decision rejected nearly all of the plaintiffs’ epidemiological evidence as incapable of causally showing harm caused by tobacco smoking and severely downplayed the addictiveness of nicotine.⁹⁷

The decision was signed by all three judges, but by the commonly understood reckoning of the Japanese judicial process, the leading force in the decision would have been the presiding judge. Meanwhile, the chief draftsman of the ruling was presumably the “right-hand” judge, Judge Mizuno, the newcomer just arrived on the bench from a medical law practice.⁹⁸

We fast-forward the story. In January 2005, a new set of plaintiffs filed Japan’s second major tobacco products liability case in Yokohama District Court. Again, several years of trial proceedings were carried out with live testimony of the stricken plaintiffs and their various experts. Representatives for the defendants again faced blistering cross-examination. The plaintiffs’ lawyers had been pleased with the process in the court under

⁹⁴ By tradition even from feudal Japan, the “right-hand” judge (*mihi baiseki*) sits to the right of the presiding judge (when viewed from the presiding judge’s perspective) and is the next-most senior to the presiding judge. The junior-most judge sits on the presiding judge’s left (*hidari baiseiki*).

⁹⁵ Although there were just under 2000 career judges on the bench, “[i]n the 11 years from 1992 through 2002, only 39 judges and 10 assistant judges were appointed from among practicing lawyers.” Thus, Judge Mizuno’s attainment of a full-judicial appointment was among an average of less than four per year and his entry was obtained by less than 2.5% of all Japanese judges at the time. Foote, *supra* note 20, at 135 (statistics on mid-career appointments); Haley, *supra* note 18, at 101 (total number of judges).

⁹⁶ Traveling a rarely taken path, Judge Mizuno became a judge in June 2002 after fifteen years as a licensed attorney. KEIREKI SÖRAN, *supra* note 91, at 196.

⁹⁷ Araki et al. v. Japan Tobacco, Japan, et al., No. (WA) 10379, Tokyo District Court, unpublished final decision, Oct. 21, 2003 (copy on file with author).

⁹⁸ On June 22, 2005, the Tokyo High Court upheld the Tokyo District Court decision nearly verbatim; and after rejection of an appeal to the Supreme Court, that judgment became final on January 26, 2006.

Presiding Judge Miki, whom they understood to have a fine and fair reputation well-recognized among practicing lawyers. And yet in April 2008, just a few months before witness testimony in the trial was set to conclude, Judge Miki and both of the other judges on the panel were replaced ensemble.⁹⁹ The junior-most position went to a brand-new young member of the judiciary, Makiko Nakajima. The new “right-hand” judge was Masatoshi Miyasaka, who had spent two years seconded to the Health Policy Section of the Ministry of Health early in his career and more recently, had served an elite posting inside the Supreme Court’s research section where he had the lead responsibility for putting together the Supreme Court’s dismissal of the earlier Tokyo litigation.¹⁰⁰ Moreover, the new presiding judge was no one other than Judge Mizuno.¹⁰¹ On January 20, 2010, this panel handed down a defense verdict, as to which the plaintiffs filed for appeal on February 1.

The data set here is both small and ambiguous. Some may see this as the tip of the iceberg, hinting at a larger mass of unacceptable interventions that lies hidden beneath the surface.¹⁰² Others may see things more benignly, with the *Hiraga* memorandum being aberrational, unlikely to

⁹⁹ As Judge Miki had been appointed to the Yokohama District Court in 2003, he was ripe for transfer in April 2008. However, being from Yokohama and on his third posting there, it appears to have been his location of choice and it would have been equally feasible for him to stay longer. KEIREKI SÖRAN, *supra* note 91, at 202.

¹⁰⁰ Appointed April 1988, Judge Miyasaka’s time at the Ministry of Health was from April 1993 to April 1995. KEIREKI SÖRAN, *supra* note 91, at 246. For a reporting of Judge Miyasaka’s role at the Supreme Court, (*tantō chōsakan* / 担当調査官), see Kokumin no Kōsei na Saiban wo Ukeru Kenri wo Motomeru Moshi-ire [Demand for “the People’s Right to Access the Courts”], Kenji Mizuno et al. (Sup. Ct.; Yokohama D. Ct. April 22, 2008), www.nosmoke55.jp/action/0804yokohama_sosyou.html (in Japanese). For essential background reading, see Law, *supra* note 25, at 1579-86 (explaining the operations and jurisprudential methods of Supreme Court *chōsakan*).

¹⁰¹ Plaintiffs and their supporters bluntly expressed their frustrations in an open letter to Supreme Court Chief Justice Shimada and the Yokohama District Court Chief Judge Abe: “After these transfers, it is easy to imagine that Chief Judge Mizuno and right-hand Judge Miyasaka, drawing from their previous experiences, would have predisposed opinions with regards to tobacco illness litigation. Moreover, we, together with the general public, have come to suspect that ‘the Supreme Court, having gotten wind of the developments in the Yokohama tobacco illness litigation, intentionally devised a counter plan using judicial personnel affairs in favor of [defendants] JT and the state.’” Mizuno et al., *supra* note 100.

¹⁰² See, e.g., Miyazawa, *supra* note 31; see also ITOH, *supra* note 47, at 270 (“In view of a strict confidentiality required of judicial decision-making in a courtroom, it is not possible to verify any actual influence in a specific case. However, a potential influence can be inferred from the revelation in the *Hiraga* memorandum of the *Missile Base* case and Judge Iimori’s remarks alluding to similar practices among some judges.”). Professor Itoh does not give any citation for Judge Iimori’s remarks, but explains the story more fully. *Id.* at 267. There, Itoh explains that Judge Iimori had been Chief Judge of the Kagoshima District Court and being an outspoken hard-line conservative judge, he would have been directly opposed to Judge Fukushima’s left-leaning political views. *Id.* Nonetheless, Judge Iimori published remarks in the Liberal Democratic Party’s organizational newsletter in support of Judge Fukushima, noting that the *Hiraga* memo was “by no means without precedent in judicial decision-making.” *Id.*

be repeated in light of the public outcry that it provoked. As well, given the routine transfers of judges in Japan, some mid-year and many every April,¹⁰³ it may be that the changes in judges in both the Nagara River dam and the tobacco products liability litigation cases were strictly in the normal course of affairs and entirely unrelated to the underlying litigation circumstances. At the moment, we simply can not know for sure.

But at the very least, the above stories show that beliefs about direct intervention via instrumental judicial administration bring out skepticism regarding the fairness of the process among participants and scholarly observers.¹⁰⁴ Moreover, they reveal how the current system of centralized judicial administration in Japan, in particular the General Secretariat's black box control over judicial transfers, makes instrumental interventions easily accomplished, easily hidden, and provides few safeguards apart from an obstinate message of "Trust us."¹⁰⁵

C. *Conclusion: Instrumental Judicial Administration's Impact and Meaning*

Instrumental judicial administration in its various manifestations is alive and well in Japan, or at least it has been through the post-war years.¹⁰⁶ While there may be disagreement as to its precise manner, significance, or social costs, nearly all writers agree that it lies out there in the real world of civil litigation for social justice-related litigation.

Granted, instrumental judicial administration appears to arise in only a narrow slice of cases, namely those of social or political significance of the most interest to political elites.¹⁰⁷ Correspondingly, in "the vast majority of court cases, [which] in any modern society are mundane in the extreme," the

¹⁰³ See *supra* note 92.

¹⁰⁴ See, e.g., Mizuno et al., *supra* note 100; Miyazawa, *supra* note 31; Isayama, *supra* note 89, at 1; Taniguchi interview, *supra* note 21; Katayama interview, *supra* note 86; but see Sasada interview, *supra* note 22, discussed *infra* (noting that circumstances in Japan in this regard have greatly improved over the past decade).

¹⁰⁵ The "Trust Us" slogan is Daniel Foote's. See Foote, *supra* note 20, at 151.

¹⁰⁶ Of course, Japan is hardly alone. See, e.g., Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More than Just the Highest Ranking Judge*, 1 CONST. COMMENT. 57, 61 (1984); Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 343, 391-94 (2004) (cited in Law, *supra* note 25, at 1590 n. 272).

¹⁰⁷ Consider chemists' elemental emission spectra that show light in small sets of fixed and distinct lines, leaving most colors of visible light uninvolved. I would nominate Polonium or Actinium to graphically portray instrumental judicial administration in Japan the best, as nearly all of their lines show up on the left side of the picture. See Polonium, <http://chemistry.bd.psu.edu/jircitano/Po.gif>; Actinium, <http://chemistry.bd.psu.edu/jircitano/Ac.gif>; see generally THEODORE GRAY, *THE ELEMENTS: A VISUAL EXPLORATION OF EVERY KNOWN ATOM IN THE UNIVERSE* (Black Dog & Leventhal 2009).

judiciary seems to be doing its job fairly and appropriately.¹⁰⁸ Almost all of Japan's judges, almost all the time, do their jobs just as one would hope.

Nonetheless, I differ from those who choose to downplay the significance of instrumental judicial administration.¹⁰⁹ Neither benign¹¹⁰ or even laudable motivations or coincidental benefits¹¹¹ can entirely justify instrumental judicial administration. Unfairness seems to have been present in cases that were fundamentally important to those who brought them and important precisely when the losing party's aims may be counter-majoritarian and the courts are their principal means for seeking recourse.¹¹² If the system is supposed to be fair,¹¹³ then it is supposed to be fair, plain and simple.

And so now we turn to our next inquiry: What is the law on civil procedural justice in Japan? If instrumental judicial administration is skewing the results in a case or line of cases, what can be done?

¹⁰⁸ See *Managed Judges*, *supra* note 19, at 1928. Work remains to more carefully assess the frequency and degree that instrumental judicial administration has accomplished real effects before and after the millennial judicial reform process was accomplished.

¹⁰⁹ Most notably, *id.* My prioritization of fairness is admittedly subjective and personal, and it is with the recognition that reasonable others can value fairness without placing it above consistency, predictability, and institutional preservation in the judicial process. But this is not merely an outsider's perspective; views held by Japanese observers consonant with mine include Ohbuchi et al., *supra* note 20, at 889, Miyazawa, *supra* note 31, SASADA, *supra* note 56, at 47, and Fukunaga, *infra* note 134.

¹¹⁰ See text and sources cited *supra* note 21 (instrumental judicial administration in Japan is not so much motivated by personal ideological views of the administrators *per se*, but is motivated by, and accomplishes an essential role as guardians protecting the autonomy of the judiciary from political intrusion).

¹¹¹ Such as improving the "quality" of judicial decision making or increasing the predictability of the process. See, e.g., *Managed Judges*, *supra* note 19, at 1927. Or that it is reflective of "what the electorate wants." *Id.* at 1928. That litigation can be tied in with social movements is obvious, with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) being perhaps the most famous example. But courts may also often run ahead of the electorate in their understanding of minorities' rights. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹¹² Even when social justice causes change through a broader movement strategy, litigation will often have a key role. See, e.g., Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U.J. INT. L. & P. 419, 501-03 (2001) (Nibutani Dam litigation by Ainu people used the courts as a "cultural performance" for a broader movement strategy); ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 149 (1999) (describing a "movement away from principal reliance on narrow judicial remedies towards the additional use of the courts as forums for the development and expressions of counter-narratives and for promotion of local empowerment and community control").

¹¹³ See text and sources cited *supra* notes 6-10; see also Yamamoto, *supra* note 17, at 387 ("Litigation process is legitimized by procedures that ensure the effectuation of individual rights, that recognize the significance of dignity and individual participation in the peaceful resolution of disputes, and that foster a sense of fairness on the part of litigants and the public.").

III. STANDARDS: LEGAL PROTECTIONS CONCERNING PROCEDURAL JUSTICE AND THE LEGAL FRAMEWORK OF JUDICIAL ADMINISTRATION IN JAPAN TODAY

A. *Japan's Legal Protections for Procedural Justice Norms: Article 32 and Its Companions*

If Japanese litigants wish to state claims for fairness in the litigation process, their irreducible starting point is Article 32 of the Constitution, the “right of access to the courts.” This provision represents Japan’s closest counterpart to procedural due process in United States constitutional law.¹¹⁴

For our review, it is important to note at the outset that the standard English language phrasing of Article 32, originating from the Allied Occupation involvement in the constitutional drafting process, poorly captures the Japanese language nuance. A more accurate translation of *saiban wo ukeru kenri* might read “the right to obtain judicial hearings” or even “the right to obtain justice in the courts” as the noun “*saiban*” connotes both the event of a trial and judicial process overall and the verb “*ukeru*” includes both the passive act of receiving or being given and the active act of obtaining or getting.¹¹⁵

This article uses the standard translation, but readers are reminded that the Constitution of Japan’s true meaning solely rests in how it is understood by the people of Japan in their own language, the official language of the document.

¹¹⁴ Professor Yasuhiro Okudaira surmises that the election not to use the term “due process of law” was intentionally avoided by Allied Occupation (“SCAP”) officials in the constitutional drafting process. This was because “a majority of SCAP legal officers were New Dealers, and it is reasonable to assume that they hated the ‘substantive due process’ analysis that invalidated much early New Deal legislation.” Yasuhiro Okudaira, *The Constitution and Its Various Influences: Japanese, American, and European*, in *JAPANESE CONSTITUTIONAL LAW* 1, 13 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., Tokyo Univ. Press 1993). See also Kenzo Takayanagi, *Opinions on Some Constitutional Problems—The Rule of Law*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67* 89, 103 (Dan Fenno Henderson ed., Univ. of Wash. Press 1969) (similarly noting the SCAP authorities’ disapproval of substantive due process as an influence in their work in Japan.).

¹¹⁵ *KENKYUSHA'S NEW COLLEGE ENGLISH-JAPANESE DICTIONARY* (6th ed. 1997). As to linguistic discrepancies generally, see KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* 270 (Univ. of Chicago Press 1991) (“In retrospect, the acceptance of the new Japanese Constitution by both the Americans and the Japanese depended heavily on the ambiguities of cross linguistic and cross-cultural communication between both parties. . . . [This] made it possible for the two sides to agree on a document without agreeing on its fundamental meaning.”).

1. *The Birth of Article 32 From the Realm of Criminal Justice*

Article 32 has no counterpart in the Meiji Constitution that preceded the present-day Constitution. In fact, the Meiji Constitution explicitly *denied* Japanese citizens the right of access to judicial courts with regards “to rights alleged to have been infringed by the illegal measures of the administrative authorities.”¹¹⁶ Such matters were given to a Court of Administrative Litigation which operated solely under the authority of the executive branch.¹¹⁷ For ordinary civil matters, the Meiji Constitution established a judiciary with the power to exercise judicial functions “according to law, in the name of the Emperor”¹¹⁸ but the document had no text suggesting that access to civil justice might be framed as a right to be enjoyed by the citizenry.

Thus, when Japanese and Allied Occupation (“SCAP”)¹¹⁹ officials began their *pas-de-deux* in drafting a post-war constitution for Japan, their focus was on procedural protections for criminal charges¹²⁰ and the strengthening of the judiciary more generally.¹²¹ Non-criminal procedural rights of the citizenry in the courts were absent from Japan’s first significant engagement with post-war constitutional revision, the so-called Matsumoto draft scooped by the Mainichi newspaper on February 1, 1946,¹²² as well as from the internal discussions among SCAP’s top-secret constitutional drafting committee and from the confidential SCAP first draft presented to

¹¹⁶ MEIJI KENPŌ, art. 61. Citizens, or more precisely subjects (of the Emperor), were provided a constrained “right” to “present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.” *Id.* at art. 30. But any such petitions would be addressed to legislative or administrative authorities and not under the consideration of the courts.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at art. 57; *see also* Haley, *supra* note 18, at 115 (“This exclusive reservation of authority to act in the emperor’s name exceeded even the military’s pre-war claim that the ‘supreme command’ of the emperor precluded legislative or executive civilian control. It thereby insulated the courts from any direct political intervention in the adjudication of cases by either legislative or administrative organs.”).

¹¹⁹ Hereinafter, SCAP using the commonly-used acronym of the formal title of the Occupation’s chief authority, the Supreme Commander of the Allied Powers.

¹²⁰ *See, e.g.*, Statement of the Japanese Government Concerning Required Reforms (“Five Fundamental Reforms SCAP To Japanese Government”), October 11, 1945, *available in* THE CONSTITUTION OF JAPAN: A DOCUMENTARY HISTORY OF ITS FRAMING AND ADOPTION, 1945-47, RM041 (Ray A. Moore and Donald L. Robinson, eds., CD-ROM, 1998) [hereinafter, DOCUMENTARY HISTORY] (“4. The abolition of systems which through secret inquisition and abuse have held the people in constant fear, substituting therefore a system of justice designed to afford the people protection against despotic, arbitrary and unjust methods.”).

¹²¹ *See infra* Part III.B.2.

¹²² *The Tentative Plan of The Constitutional Problem Investigation Committee* (also known as “Matsumoto Draft” or “Mainichi scoop” version), Feb. 1, 1946, *available in* DOCUMENTARY HISTORY, *supra* note 120, RM110. For the detailed story of Chairman Matsumoto, his Committee to Study Constitutional Problems, and the “Mainichi scoop,” *see* KOSEKI SHŌICHI, THE BIRTH OF JAPAN’S POST-WAR CONSTITUTION 50-68 (Ray A. Moore trans., Westview Press 1997).

the Japanese Cabinet less than two weeks later.¹²³ The nascent emergence of the phrasing, which would ultimately become Article 32, was a provision authored by the Japanese drafters concerning *criminal* justice protections in their first official draft given to SCAP, which read: “All of the people shall not be denied the right to be tried by the judges as prescribed by law.”¹²⁴

Two days later, for reasons that are unclear from the limited records kept during a thirty-hour marathon negotiating session between SCAP and Japanese officials, a more general “right of access to the courts” emerged in the jointly developed draft language, though still set in a criminal justice provision: “No person shall be deprived of life or liberty, nor shall any criminal penalty be imposed, except according to procedure established by the Diet, *nor shall any person be denied the right of access to the courts.*”¹²⁵ Again with reasons that are not presently clear but seemingly not related to substantive purposes, that clause was detached to stand as a separate provision by the Japanese drafters in the June 20, 1946 draft constitution submitted by the Japanese Government to the House of Representatives.¹²⁶

And so the language of Article 32 was born—connected at the hip with criminal due process. Professor Yasuhiro Okudaira’s observation that the Japanese drafters of the Constitution were “utterly unfamiliar with the concept of procedural due process” in light of the significant influence of German law that was prevalent at the time, seems especially important.¹²⁷ It may be fair to say that the drafters did not even consider the possibility of

¹²³ Civil rights, first discussion of draft, Meeting of the Steering Committee with Committee on Civil Rights Feb. 8, 1946; Civil Rights: first draft SCAP: GS, undated [presumably Feb. 8, 1946]; Civil rights, second discussion of draft, Meeting of the Steering Committee with Committee on Civil Rights, Feb. 9, 1946; Civil Rights, final draft, Feb. 10, 1946; Steering Committee Review of Amended Drafts, Feb. 12, 1946; U.S. model constitution as submitted to Japanese Cabinet, Feb. 13, 1946, *available in* DOCUMENTARY HISTORY, *supra* note 120, RM 172-75, RM 187, RM189. As to the nine days of secret drafting, *see generally* KOSEKI *supra* note 122, at 68-111. For SCAP participant memoirs, *see* Charles L. Kades, *The American Role in Revising Japan’s Imperial Constitution*, 104 POL. SCI. Q. 215 (1989); BEATE SIROTA GORDON, *THE ONLY WOMAN IN THE ROOM* (Kodansha 1997); Cyrus H. Peake, *Reflections on the Occupation of Japan and the Drafting of the New Constitution*, in *STUDIA ASIATICA: ESSAYS IN ASIAN STUDIES IN FELICITATION OF THE SEVENTY-FIFTH ANNIVERSARY OF PROFESSOR CH’EN SHOU-YI* 413 (Laurence G. Thompson ed., Chinese Materials Ctr. 1975); HARRY EMERSON WILDES, *TYPHOON IN TOKYO* (MacMillan 1954).

¹²⁴ First Japanese Government draft Mar. 4, 1946, art. 27, *available in* DOCUMENTARY HISTORY, *supra* note 120, RM208 (“This is the draft which the representatives of the cabinet, including Matsumoto Jōji and Satō Tatsuo, brought to the meeting [with SCAP officials] of March 4-5, 1946.”).

¹²⁵ Second Japanese Government draft Mar. 6, 1946, art. 30, *available in* DOCUMENTARY HISTORY, *supra* note 120, RM208 (“This is the draft that emerged from the “translating marathon” of March 4-5, 1946.”) (emphasis added). On the marathon session, *see generally* KOSEKI, *supra* note 122, at 117-22.

¹²⁶ Draft revision submitted to House of Representatives June 20, 1946, art. 29, *available in* DOCUMENTARY HISTORY, *supra* note 120, RM312. *See generally* KOSEKI, *supra* note 122, at 165-92 (“The Draft Constitution in the Last Imperial Diet”).

¹²⁷ Okudaira, *supra* note 114, at 14.

the language taking on the role that it has in civil and administrative law litigation. If so, then the civil procedural justice doctrine now active in Japanese constitutional law came from nothing more than an unintended consequence of a hasty editing process.

2. *The Post-war Progression to Understanding Article 32 as a Civil Procedural Right*

Although born out of criminal procedural protections (and perhaps apart from the intentions of its drafters), Article 32 has gradually taken on constitutional law understandings as providing procedural rights in civil and administrative litigation. Interestingly, the first actors to move this forward were not scholars, but the courts, though again perhaps unintentionally.¹²⁸ Scholars followed rather slowly, so that the wide-spread recognition of such a perspective may not have been fully entrenched until as recently as 1980.

Professor Yasuhei Taniguchi lays out this doctrinal development with some degree of detail in a leading law journal's special edition on Civil Procedure Law:

Constitutional interest in the law of civil procedure in Japan is relatively new. Because the pre-war Constitution did not even give the courts constitutional review powers, that Constitution was really nothing more than a written political declaration. Therefore, even if the appropriateness of procedural law standards were reviewed from the perspective of general reason (*kyōri* / 条理), there was no possibility of seeing it the context of concrete constitutional provisions. Accordingly, as that manner of traditional pre-war civil procedure law conceptualizations underlies constitutional law considerations of the post-war Constitution, [at first], there was almost no interest in how [civil procedural] protections arise constitutionally.

Professor Katsumi Yamakaido's "procedural rights" principles put forth in 1959 was extremely forward-thinking, but it did not consider constitutional protections *per se*. And in an article I wrote in 1966 looking at the issue of multi-party litigation in the United States, I wrote as background for my

¹²⁸ Some of the Supreme Court decisions which apparently alerted Japanese law scholars to begin thinking about civil procedural justice in constitutional principles were decided on strictly statutory grounds. *Id.* at 15.

United States law scholarly investigation that the notion of due process in our country's civil procedural law scholarship was still sleeping and deserved to have some light put on it in the future.

It was instead case law that took up the initiative for discussing constitutional protections in judicial procedures. After a line of cases emerged from the Supreme Court finding unconstitutionality in third-party confiscation . . . and the constitutionality of non-contentious matters procedures (*hishōjiken tetsuzuki* / 非訟事件手続)¹²⁹ around 1960, these decisions drew deeper interest among civil procedure law scholars which included an increased interest in constitutional law linkages.

As well, we cannot ignore the influence that arose out of constitutional law discussions in German civil procedure scholarship pertaining to the right to demand legal hearings provided for in the post-war Bonn Fundamental Law (*Anspruch auf rechtliches Gehör*).

In any case, the 1966 case of the non-contentiousness of leasehold disputes served as a touchstone for the academic world. Ultimately, Professor Hideo Saito advocated a Constitutional Procedural Rights Theory in 1969, and we can say that by the time the Civil Procedure Law Scholars Association held a symposium in 1980 on "Procedural Protections and the Function of Litigation," scholarly interest in the subject was fully formed.¹³⁰

¹²⁹ Translation note: Matters such as judicial conciliation procedures in landlord and tenant disputes and marital dissolutions, which lack formal binding authority on the parties. They are governed by their own statutory framework apart from the Code of Civil Procedure. *Hishō Jiken Tetsuzukihō* [Non-Contentious Litigation Procedure Law], Law No. 14 of 1956. Accordingly, constitutional questions arose with regards to whether procedural protections ordinarily allowed for judicial matters are guaranteed in such cases. With separate constitutional footings, the distinction between what procedures are contentious and non-contentious remains a subject of debate. See, e.g., Hiroshige Takada, *Soshō to Hishō* [Contentious and Non-Contentious Litigation], in *MINJI SOSHŌ HŌ NO SŌTEN DAI 4 BAN* [ISSUES IN CIVIL PROCEDURE LAW, VOL. 4] 12-15 (Jurist Special Ed. 2009).

¹³⁰ Yasuhei Taniguchi, *Minji Soshō ni Okeru Kempōteki Hoshō* [Constitutional Guarantees in Civil Procedure] in *MINJI SOSHŌ HŌ NO SŌTEN DAI 3 BAN* [ISSUES IN CIVIL PROCEDURE LAW, VOL. 3] 8-9 (Jurist Special ed. 1998) (citations omitted; additional paragraph breaks inserted for readability in translation).

3. *The Role of Article 32 as a Civil Procedural Right Today*

Article 32 now commands a consensus understanding that it includes “the right of every person to bring suit in the courts with regards to civil and administrative matters.”¹³¹ Moreover, this right is understood to go beyond the mere notion of having unlocked courthouse doors; it plainly incorporates notions of fairness in the process.

Citing several of Japan’s foremost post-war constitutional law scholars, Professor Eiji Sasada recently presented this as follows:

[A]lbeit a rather recent arrival¹³² is the insistence that courts be “impartial” (*kōsei* / 公正). Professor Ashibe wrote “for ‘the courts,’ there must be a guarantee of appropriate procedures that are fitting to whatever kind of matter is involved.” As well, as to the right of access to the courts, Professor Urabe insisted “it does not stop with the notion simply that one can demand a trial. In order for there to be a fair trial, there must be bundled together in that a call for regular procedures and operations of the courts.” Professor Takeshita offers a more structural explanation for his opinion. He writes “Article 32 demands the construction of a judicial system that is adequate to guarantee the right of access to the courts in actual reality. That means that they must maintain a judicial system which in fact can do that and imposes on the state an obligation that the judicial system will provide judicial relief to the people.” Moreover, as to the obligation on the state for its exercise of judicial power, he proposes three distinct elements, “providing the organization and related operations of the courts,” “establishment of trial procedures,” and “the conferral of judicial authority.”¹³³

Specifically as to fairness, Professor Aritoshi Fukunaga identifies a specific “Right to Demand Fair Procedures” (*kōsei na tetsuzuki wo motomeru kenri* / 公正な手続きを求める権利) as being among the conceptual components underlying constitutional civil procedure protections

¹³¹ SASADA, *supra* note 78, at 86, (quoting TOSHIHIKO NAKANO ET AL, CONSTITUTIONAL LAW I 489 (Yuhikaku 1997)).

¹³² Translation note: Another indicator of the relative newness of fairness in the conceptualization of civil procedure in Japan is the fact that the notion did not appear in the Code of Civil Procedure until 1996. See text and sources cited *infra* notes 161-162.

¹³³ *Id.* (citations omitted).

in Japan, but he also notes its relative lack of development.¹³⁴ Drawing upon earlier work of Professor Teiichirō Nakano in connection with international human rights instruments, he writes:

In our country, one can not yet say that there has been sufficient debate concerning this right but according to Professor Nakano's studies "the right to a trial" reflects fundamental principles of equality under the law and further includes the "right to receive a fair and open trial" set out in the ICCPR. Therefore, this right is one variant of the general provisions that, like the obligation of good faith, etc., are "norms which must always be made real."¹³⁵

On the other hand, while scholars have proclaimed the existence of these constitutional rights in theory,¹³⁶ the courts have been less generous. Professor Fukunaga informs readers that Japan's Supreme Court has limited its application of Article 32 by providing substantial deference to the legislature in the determination of civil procedure laws for the courts.

[I]t has been interpreted [by the Supreme Court] that there are no violations of Article 32 with regards to various rules pertaining to jurisdiction, statutes of limitations, or appellate procedures, etc. Of course, the types of courts, their limits of authority, structure, appeals, etc., set by the provisions in the Court Act and the Code of Civil Procedure, are also not constitutionally guaranteed.¹³⁷

Accordingly, setting aside "what should be," some Japanese scholars' assessment of Article 32's protections in actual practice are rather critical. For example, Professor Taniguchi contrasts the variety of approaches taken by lower courts and Supreme Court in a leading 1989 Supreme Court decision relating to the right to notice enjoyed by a deceased biological

¹³⁴ Aritoshi Fukunaga, *Minji Soshō ni Okeru Kempō Hoshō* [Constitutional Guarantees Concerning Civil Litigation] in *MINJI SOSHŌ HŌ NO SŌTEN DAI 4 BAN* [ISSUES IN CIVIL PROCEDURE LAW, VOL. 4] 8 (Jurist Special ed. 2009).

¹³⁵ *Id.* at 11 (quoting Teiichirō Nakano, *Minji Soshō to Kempō* [Civil Procedure and the Constitution] in *KŌZA MINJI SOSHŌ* (1) [LECTURES ON CIVIL PROCEDURE LAW (1)] 9 (Koji Shindō et al. eds., Kōbundō 1984).

¹³⁶ *E.g.*, Professor Fukunaga's five-part framework for Fundamental Procedural Rights (drawing on Art. 32 as well as other constitutional provisions): 1) the right to demand a hearing, 2) the right to procedural equality, 3) the right to timely litigation process, 4) the right to demand open adversary proceedings and judgments, and 5) the right to demand fair procedures. *Id.*

¹³⁷ *Id.* at 8. Professor Fukunaga expresses support for this deference to the legislature, noting that a freestanding constitutional right should only be articulated in exceptional cases, where for some reason, fairness already built into the Code Of Civil Procedure fails to function. *Id.* at 11.

father's heirs in paternity litigation.¹³⁸ Although his phrasing is understated, the conclusion clearly criticizes the Supreme Court's approach:

If we look at the decisions as handed down by each of the courts beginning from its first consideration at the trial court, we can become acquainted with a variety of approaches to the relationship between civil procedure and constitutional protections. The first decision, by the Fukuoka District Court, found that the binding power of paternity judgments binds third parties and accordingly, there should be procedural protections in paternity litigation arising under Constitution Articles 31 and 32 for those parties who would be affected by the determination. However, the court found no constitutional issue owing to the fact that the interests of third parties related to the matter are procedurally protected in the Personal Affairs Litigation Procedures Law,¹³⁹ as it draws upon official power systems through public prosecutors as representatives of the public interest. Finally, [the court found that] the plaintiff's claims for a "right to demand a trial" are not explicit in [Japan's] constitutional text, and this was so even if there was no notice received or opportunity provided to intervene in the relevant litigation.

The second decision by the Fukuoka High Court held that "in light of the spirit of the Article 32 of the Constitution," "it was unreasonable to fix a paternity judgment while the heirs had no knowledge [of the case], in consideration of the effect upon their persons and of taking their assets. Moreover, we can not anticipate sufficient engagement by the prosecutors in the litigation and so it becomes difficult for the gathering of sufficient evidence to carry out the official power of the courts." And so the [High] Court granted the request for retrial....¹⁴⁰

¹³⁸ Professor Taniguchi explains the underlying facts as follows: "When paternity was recognized by litigation in an individual after his death, his heirs had a substantial interest relationship in the results of the case because recognition of paternity would result in their losing a portion of their inheritance. However, they were not parties to the [paternity] litigation." Taniguchi, *supra* note 130, at 9.

¹³⁹ Translation note: This is the law in Japan under which paternity actions are pursued. Jinji Soshō Tetsuzukihō [Personal Affairs Litigation Law], Law No. 109 of 2003.

¹⁴⁰ Translation note: The text continues, "... recognizing the heirs' qualification as plaintiffs in the retrial by applying Article 34 of the Administrative Case Litigation Law as being in line with the intent of the Constitution Articles 31 and 32 and drawing upon by analogy Article 420 (now, 338) (1)(3) of the Code Of Civil Procedure."

The Supreme Court, while holding that ‘obviously, an opportunity to participate would be desirable,’ overruled the reasoning described above, annulled the District Court decision that had rejected the claims, and then applied its own rationale to dismiss the case.

It is not my purpose here to go into a critique of this case per se, but comparing each of the decisions in the case illustrates various ways of thinking about constitutional protections in civil procedure. First, in the instant case, there was no issue as to whether the rights interests at stake for the heirs, as to their persons and as to their property deriving from their inheritance rights, ought to be protected. The issue was then the manner and degree to which those interests would be protected.

The District Court decision found that the involvement of the public prosecutor in the exercise of official power was sufficient. The High Court decision instead found the exercise of official power to be insufficient as an opportunity [for the heirs] to participate in the trial which determined whether or not paternity would be recognized needed to be provided. And as the Supreme Court even stated that it was desirable to provide the heirs an opportunity to participate along with the public prosecutor if the paternity litigation was still pending, it was not that they refused to recognize the interests at stake. However, given that the paternity judgment was already finalized, refusing to recognize their qualification as plaintiffs in the retrial was functionally equivalent to totally ignoring that interest. It was not expressly stated, but in finalizing the paternity judgment [the Court] prioritized its own stability [over the heirs’ interests in the litigation].

This shows that the protection of [procedural] rights is a relative matter in accordance with the circumstances.¹⁴¹

Professor Sasada has shared his views more bluntly, but also recognized room for optimism that might come out of judicial reform processes:

¹⁴¹ Taniguchi, *supra* note 130, at 9-10 (citations omitted, emphasis added).

[L]ooking broadly over Supreme Court case decisions in our country, *we have an impoverished reality in the procedural protection of human rights beginning with the right of access to the courts.* Leaving aside those judges who advocate for fairness in civil litigation, a results-based way of thinking is understood to be predominant just as much as ever. However, strengthening the consciousness of judges as to procedural protections under the Constitution is undeniably a possibility arising from judicial reform.¹⁴²

4. *Article 32 in Context: Its Constitutional, Treaty, and Statutory “Cousins” in the Protection of Civil Procedural Fairness*

Article 32 represents the center of a larger web of legal provisions that pertain to procedural fairness and systems of judicial administration in Japanese law. These will be introduced next, though it may be helpful to note at the start that their roles are significantly more aspirational in terms of how people talk about civil procedural fairness and less meaningful in terms of concrete actualities that they presently realize.

a. *Constitutional provisions*

In the Constitution, Article 32’s most numerous and closest relations are the fundamental human rights provisions pertaining to criminal procedures.¹⁴³ In contrast, Article 32’s companions for civil procedural justice includes only two provisions, Article 14’s equality under the law¹⁴⁴ and Article 82’s right to public trials.¹⁴⁵ Article 76’s command that judges “be independent in the exercise of their conscience and... bound only by this Constitution and the laws”¹⁴⁶ is notably absent here. That is because no

¹⁴² SASADA, *supra* note 56, at 47 (citations omitted, emphasis added).

¹⁴³ See, e.g., KENPŌ, arts. 31, 33-40; see generally text and sources cited *supra* notes 120-127.

¹⁴⁴ KENPŌ, art. 14 (“All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.”).

¹⁴⁵ KENPŌ, art. 82 (“Trials shall be conducted and judgment declared publicly. Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.”).

¹⁴⁶ KENPŌ, art. 76, para. 3 (“All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.”).

one presently interprets it as providing a basis for an enforceable civil right that can be claimed by ordinary citizens.¹⁴⁷

In his recent work, Professor Fukunaga articulates a “Right to Procedural Equality” (*tetsuzuki jyō no byōdō ken* / 手続上の平等権) as follows:

The Constitution’s Article 14 (1) provision for equality under the law does not only apply to substantive law, but to procedural law as well. The principle of equality in [litigation process] armaments has constitutional protection embodied in the principle of equality. *This requires that parties who oppose either the legislature or executive agencies face equal circumstances and receive equal treatment. Thus it is necessary to [textually] examine each and every provision of procedural law to determine whether it is in conformity with the principal of equality. Consideration of the principal of equality is necessary as to the interpretation and application of each of these provisions as well.*¹⁴⁸

Plainly, this theoretical rights claim is implicated in administrative cases where ordinary citizen’s suits are unevenly balanced in the government’s favor. However, notwithstanding Professor Shigenori Matsui’s contention that the Administrative Case Litigation Law may be unconstitutionally imbalanced on its face,¹⁴⁹ I found no writings describing an actual application of Article 14’s equality provision into *civil* procedural case law jurisprudence.¹⁵⁰

As to Article 82, Professor Fukunaga postulates a “Right to Demand Open Adversary Proceedings and Judgment” (*Taishin, Hanketsu no Kōkai wo Motomeru Kenri* / 対審・判決の公開を求める権利). However, he notes its relatively weaker significance in civil trials and suggests that the public’s interest in this right should be subordinate to parties’ interests in litigation:

At the outset, openness *per se* is not the purpose for the principle. Rather, it is a means that aims to preserve the trust

¹⁴⁷ Sasada interview, *supra* note 22. Professor Matsui also finds an indirect relation in Article 13’s right to “the pursuit of happiness” in light of the fact that procedural protections are necessary to preserve the right. MATSUI, *supra* note 12, at 93-97 (citing KENPŌ, art. 13).

¹⁴⁸ Fukunaga, *supra* note 134, at 10 (emphasis added).

¹⁴⁹ Professor Matsui presents this as an issue arising under Article 32, not Article 14. MATSUI, *supra* note 12, at 177, *quoted in* SASADA, *supra* note 78, at 91.

¹⁵⁰ Professor Sasada also shared with me his belief that Article 14 provides a relatively weaker footing for civil procedural justice claims in comparison with Article 32. Sasada interview, *supra* note 22.

of the people in the courts by allowing them to measure the fairness of trials through the ability of being able to observe trials. This function of observation is particularly important for criminal proceedings (and for that purpose the general provision of Article 82 is supplemented by Article 37 (1)), while its meaning in civil procedure is comparatively less. [Thus,] if sticking to the principle of open trials would infringe upon [litigants' Article 32] right of access to the courts, then the very essence of that right is undone.

b. Treaties—International Declaration of Human Rights and the ICCPR

As noted above, civil procedural justice is contained within Japan's treaty obligations under both the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR").¹⁵¹ In theory at least, these provisions should have direct applicability in the law available to parties in Japan in their articulation of their rights before the Japanese courts.¹⁵²

The UDHR addresses civil procedural justice at Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, *in the determination of his rights and obligations* and of any criminal charge against him."¹⁵³ Meanwhile, two provisions of the ICCPR pertain, Article 14 quite particularly ("All persons shall be equal before the courts and tribunals") and Article 26 more generally ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law").¹⁵⁴

Japanese courts have drawn from these documents to impose binding obligations on the executive branch in other contexts.¹⁵⁵ Nonetheless, for the time being, these provisions seem to have only hortatory weight in the

¹⁵¹ UDHR, *supra* note 9; ICCPR, *supra* note 10. Japan became a signatory to the ICCPR treaty in 1979. Shiminteki Oyobi Seijiteki Kenri ni Kan Suru Kokusai Kiyaku [International Covenant on Civil and Political Rights], Treaty No. 7 of 1979.

¹⁵² See generally YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW (Oxford Univ. Press 1998); Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan*, 28 STAN. J. INT'L. L. 139 (1991).

¹⁵³ UDHR, *supra* note 9 (emphasis added).

¹⁵⁴ ICCPR, *supra* note 10. Professor Fukunaga's writing highlights ICCPR Article 14 as being a part of Japan's constitutional guarantees of fairness and impartiality of judges and the courts. Fukunaga, *supra* note 134, at 8.

¹⁵⁵ For example, the court's analysis in the Nibutani Dam decision finding illegality in the government's construction of the dam was grounded legally in Article 13 of the Constitution and Article 14 of the ICCPR. Mark Levin, Kayano *et al.* v. Hokkaido Expropriation Committee: 'The Nibutani Dam Decision,' 38 INT'L. LEGAL MATERIALS 394 (1999), available at <http://ssrn.com/abstract=1635447> (last visited Jan. 1, 2011); see generally Levin, *supra* note 112.

context of civil procedural justice.¹⁵⁶ It remains to be seen whether a court would draw upon these in an actual case holding. Even if not there, one hopes nonetheless that judicial administrators would take the provisions to heart in their work and in developing future policies for judicial administration in Japan.

c. *Statutes—civil procedural justice in Japan’s Code of Civil Procedure*

In principle, the entirety of Japan’s Code of Civil Procedure¹⁵⁷ aims to effectuate civil procedural justice in the nation’s courts. However, while all of its provisions may be equal in this pursuit, some “are more equal than others.”¹⁵⁸

We begin at the beginning. After the opening statement and effectuation of the Code’s purpose in Article 1,¹⁵⁹ the next order of business in Article 2 is fairness, together with expeditious proceedings and an obligation of good faith upon litigation parties: “*Courts shall endeavor to ensure that civil suits are carried out fairly and expeditiously, and parties shall conduct civil suits in good faith.*”¹⁶⁰

This provision is a very recent addition to Japanese civil procedure law. The Code’s principal incarnations have been its enactment in 1890, post-war amendments in 1948, and a complete revision in 1996,¹⁶¹ which essentially represents today’s version.¹⁶² However, Article 2’s language asking courts to endeavor to carry out civil suits with fairness only first appeared in the 1996 revision.

Moreover, there is less here than might meet the eye. The language of the Code provision displays the malleable status of fairness in the minds of legislative drafters.¹⁶³ It is important to observe the dichotomy between

¹⁵⁶ Sasada interview, *supra* note 22.

¹⁵⁷ MINJI SOSHOHŌ [MINSOHŌ] [C. CIV. PRO.].

¹⁵⁸ GEORGE ORWELL, *ANIMAL FARM* (1945) (Penguin, 1996), *available at* <http://www.gutenberg.net.au/ebooks01/0100011h.html> (last visited Jan. 1, 2011).

¹⁵⁹ MINJI SOSHOHŌ [MINSOHŌ] [C. CIV. PRO.] art. 1 (“Procedures for civil suits shall be governed by the provisions of this Code, in addition to the provisions of other laws and regulations.”).

¹⁶⁰ *Id.* at art. 2 (emphasis added).

¹⁶¹ *Id.*; Law No. 29 of 1890; Law No. 149 of 1948; Law No. 109 of 1996.

¹⁶² There were minor amendments in 1999, 2001, and annually between 2003 and 2007.

¹⁶³ Professor Taniguchi similarly criticizes legislators’ lack of understanding of fairness in their enactment of revisions to the Personal Status Litigation Procedures Law. “Even in the recent amendment of the Personal Affairs Litigation Procedure Law, one sees no understanding, not even *pro forma*, that this should be motivated by the purpose of protecting the constitutional appropriateness of procedures. Ultimately, the issue was only perceived of as being at the level of the propriety of legislative policy.” Taniguchi, *supra* note 130, at 10 (citation omitted). At the same time, the Supreme Court’s General Secretariat staff must have been integrally involved in the drafting process for both statutes. Accordingly, they would have had the wherewithal to dissent influentially if they wished for stronger procedural protections in the laws.

the binding nature of the obligation of good faith imposed on litigation parties and the weaker and bifurcated aspiration expressed to Japan's judges. On careful review of the Japanese language phrasing, this is not subtle. Courts are only directed to make best efforts (*endeavor / okonawareru yō ni tsutome / 行われるように努め*)¹⁶⁴ to ensure fairness, while the phrasing as to parties, (*tsuikō shinakereba naranai / 追行しなければならぬ*) is an unambiguous command. As well, the guidance to the courts is moderated by an equally weighted instruction to ensure expeditiousness, with no advice as to how to address circumstances where the two goals may conflict.¹⁶⁵ Not surprisingly, given both its newness and its impotency, there appears to be no published case law that addresses Article 2.

Thus, the best hope for fairness in the Code must then be in its more concrete provisions and how they are applied by the courts. For example, independent provisions provide for disqualification of judges (*joseki / 除斥*)¹⁶⁶ and for direct party challenges (*kihi / 忌避*) to judges.¹⁶⁷ Both require a party to expressly petition for the action,¹⁶⁸ although a judge's *sua sponte* recusal is allowed under the Rules Of Civil Procedure providing that the judge first "obtain[s] the permission of the court that has the power of

¹⁶⁴ The direction to "endeavor" or make best efforts (*tsutome / 努め*) is not uncommon in Japanese legislation "where a gentle touch is desired." Levin, *supra* note 87, at 110 n.35 (introducing examples in Japan's Equal Employment Opportunities Law and Administrative Procedure Law).

¹⁶⁵ As to the risk that expeditiousness may detrimentally impact other fundamental values in civil procedure, *see supra* note 17.

¹⁶⁶ MINJI SOSHOHŌ [MINSHOHŌ] [C. CIV. PRO.] art. 23 ("In the following cases, a judge shall be disqualified from performing his/her duties; provided, however, that in the case set forth in item (vi), this shall not preclude a judge from performing his/her duties as a commissioned judge based on the commission from another court:

- (i) Where a judge or his/her spouse or person who was his/her spouse is a party to the case, or is related to a party in the case as a joint obligee, joint obligor or obligor for redemption.
- (ii) Where a judge is or was a party's relative by blood within the fourth degree, relative through marriage within the third degree or relative living together.
- (iii) Where a judge is, in relation to a party, a guardian, supervisor of a guardian, curator, supervisor of a curator, assistant or a supervisor of an assistant.
- (iv) Where a judge has served as a witness or expert witness in the case.
- (v) Where a judge is or was a party's agent or assistant in court in the case.
- (vi) Where a judge has participated in making an arbitral award in the case or participated in making a judicial decision in the prior instance against which an appeal is entered.")

¹⁶⁷ *Id.* at art. 24 ("If there are circumstances with regard to a judge that would prejudice the impartiality of a judicial decision, a party may challenge such judge. . . . (2) A party, if he/she, in the presence of a judge, has presented oral arguments or made statements in preparatory proceedings, may not challenge the judge; provided, however, that this shall not apply where the party did not know of the existence of any grounds for challenge or where any grounds for challenge occurred thereafter.")

¹⁶⁸ *Id.* at art. 23, para. 2 ("If any of the grounds for disqualification prescribed in the preceding paragraph exist, the court, upon petition or by its own authority, shall make a judicial decision of disqualification.")

supervision.”¹⁶⁹ These provisions directly implicate fairness and impartiality of judges in civil proceedings, but none apparently carry much weight in actual practice.

One early Supreme Court decision concerning these sections of the Code may prompt some surprise in that Court’s understanding of these provisions and the underlying principles at stake at the time. In the case, *X v. Y Forestry Partnership*,¹⁷⁰ after judgment in the High Court appeal had been entered, the losing side’s legal counsel learned that the presiding judge in the High Court proceedings had been his opposing counsel’s son-in-law.¹⁷¹ Accordingly, the losing side raised this as grounds for mandatory appeal¹⁷² raising *inter alia* a claim under Article 24 (then Article 37) that the father-in-law / son-in-law relationship between his opposing counsel and the presiding judge qualified as “circumstances...that would prejudice the impartiality of a judicial decision” and therefore asking that the High Court decision be set aside.¹⁷³

The Supreme Court disagreed. In a unanimous decision by its Second Petty Bench, the Court first noted that the presiding judge’s participation in the case was not barred by the Code’s disqualification provision (presumably because as the statute only addresses a judge’s relationship to a *party*, not to their attorneys). Accordingly, the question turned on whether the circumstances would prejudice the judge’s impartiality. In a manner that would appease former First Lady Nancy Reagan, the justices just said no—foregoing any discussion of principles of fairness or the possibility of prejudice in the underlying decision, and evidencing no sense of obligation to explain themselves.¹⁷⁴

¹⁶⁹ “A judge *may* withdraw. . .” *Minji Soshō Kisoku* [Rules Of Civil Procedure] Sup. Ct. Rule No. 10 of 2008, art. 12 (Japan) (emphasis added).

¹⁷⁰ *X v. Y Forestry Partnership*, 9 *MINSHŪ* 83 (Sup. Ct. 2nd Petty Bench, Jan. 28, 1955) (note that X and Y are translated counterparts of Japan’s John Doe and Jane Roe; the standard Japanese citation is to the published case reporter without including party names).

¹⁷¹ The son-in-law judge’s vote in the decision supported the prevailing party, his father-in-law’s client. Kiichi Nishino, *Kihi Jiyū* [*Grounds for Judicial Challenge*] in *MINJI SOSHŌHŌ HANREI HAKUSEN DAI 3 BAN* [100 LEADING CASES IN CIVIL PROCEDURE LAW, VOL. 3] 169 (BESSATSU JURIST [SPECIAL EDITION] 20 (Yuhikakū 2003)).

¹⁷² Claims that a judge heard a matter when prohibited by law constitute grounds which *must* be taken up by a court of final appeal (ordinarily the Supreme Court). *MINSOHŌ* [C. CIV. PRO.] art. 312, para. 2, sec. ii (“A [mandatory] final appeal may also be filed by reason of . . . (ii) A judge who may not participate in making the judgment under any Acts participated in making the judgment.”).

¹⁷³ *Id.*

¹⁷⁴ The Court’s ruling on this issue was expressed in a single declaratory sentence of judicial fiat: “Appellant’s argument on point number five is without reason because the fact that the judge who was the presiding judge in the trial court was the son-in-law of the lawyer for the appellee partnership is not among the provisions of Code of Civil Procedure Article 35 and furthermore, we cannot say that the circumstances

Perhaps not surprisingly, the decision has never earned even a single defender in academic commentary.¹⁷⁵ Fortunately, scholars today also believe that it remains on the books as a leading precedent primarily because no matter has risen up that would give the Supreme Court the chance to reverse itself. “Were this today, it is expected that first, a judge in the same circumstances as Judge A in this case would certainly recuse himself, and were an issue such as this to come before the Supreme Court, the likelihood that the Supreme Court would uphold this decision seems rather small.”¹⁷⁶

Since that decision, there are published reports of only seven Supreme Court cases and six High Court cases pertaining to these provisions. In all of these, only one, an appellate decision by the Takamatsu High Court in 2002, reversed a lower court decision owing to a judge’s failure to step down when disqualified or a refusal to step down on challenge.¹⁷⁷ Moreover, others still seem to reflect a narrow attitude in the courts with regards to judicial challenge, albeit nothing as remarkable as the Y Forestry Partnership case.¹⁷⁸ An optimist would hope that this reflects entirely accurate decision-making by Japan’s judges to step down in appropriate circumstances. However, in light of the apparent futility of seeking to enforce these provisions absent something so egregious as a close family relationship between the judge and a lawyer, as well as the risk of antagonizing the judge one is appearing in front of by making such a petition, it appears that these provisions still have rather limited meaning.¹⁷⁹

The Code also expressly addresses the circumstances, which arise when a judge is transferred away from the case in the course of an ongoing trial. The Code provision is self-explanatory:

clearly implicate the terms of Article 37 by [there being] a judge that would impair the fairness of the trial.” X v. Y Forestry Partnership, *supra* note 170, point II.

¹⁷⁵ Nishino, *supra* note 171, at 21.

¹⁷⁶ *Id.* Professors Sasada and Takami also expressed this view. Sasada interview, *supra* note 22; Interview with Professor Susumu Takami, Professor of Civil Procedure Law, Hokkaido University School of Law, Sapporo, Japan (July 18, 2009) [hereinafter Takami interview].

¹⁷⁷ Judge A decided the results in Trial A. The losing plaintiff then challenged that result in a subsequent suit for damages, naming Judge A as a defendant (Trial B). Being plainly covered by the Code’s Article 24 (i), Judge A’s presiding over Trial B was set aside. X v. Y, 2002 WLJPCA03070005 (Westlaw Japan) (Takamatsu High Ct., Mar. 7, 2002).

¹⁷⁸ In the most recent Supreme Court decision in this area, the Court upheld a lower court’s denial of challenge where a judge who had participated in the establishment of certain court rules at a Judicial Assembly was being called upon in the litigation to determine the validity of the same. X v. Y., 45 MINSHŪ 117 (Sup. Ct. 1st Petty Bench, Feb. 25, 1992).

¹⁷⁹ Professor Nishino asserts that the system “regrettably, does not function at all,” describing both an “abuse of petitions” by litigants and an “abuse of denials” on the part of judges when challenges are raised. Nishino, *supra* note 171, at 21. Similar views were expressed to me in several interviews. As to the state of affairs in the United States today, see Caperton, *supra* note 4.

A judgment shall be made by a judge who has participated in the oral argument on which the judgment is to be based.

(2) In the case of the replacement of a judge, the parties shall state the result of the oral argument already conducted.

(3) In the case of the replacement of a single judge or the replacement of the majority of a panel of judges, if a party has requested the additional examination of a witness who has already been examined before the replacement, the court shall examine the witness.¹⁸⁰

Here again, informants in Japan report that the stronger measures in paragraph three are rarely invoked¹⁸¹ and I was able to find no case law pertaining to this provision. What is interesting, however, is the history of paragraph three. Where paragraphs one and two derive from the first enactment of the Code of Civil Procedure in 1890,¹⁸² paragraph three emerged in the 1948 amendments,¹⁸³ apparently following guidance from Allied Occupation authorities seeking to impose their common law sensibilities with regards to the need for judges to hear witnesses' live testimony.¹⁸⁴ Brought in as a transplant, Article 249(3) has not taken root.

This more extended review of the history and development of Article 32 and related provisions in Japanese law informs us of their potential role in stating "what should be" with regards to instrumental judicial administration in Japan. If Professor Fukunaga is correct that a proper understanding of Japan's constitutional protections should incorporate a "Right to Demand Fair Procedures" in civil litigation, then it cannot be enough to simply rely upon ostensibly neutral statutory structures such as those in the Code of Civil Procedure.¹⁸⁵ As with United States employment discrimination laws, clear evidence of disparate impacts should at least give rise to meaningful concern on the part of legislators, if not also serving as a basis for remedies in the courts.

These ideas are raised again in Part IV of this article. But first, it is also essential to understand more concretely the setting for the systems of judicial administration first described in Part II above.

¹⁸⁰ MINJI SOSHOHŌ [MINSOHŌ] [C. CIV. PRO.] art. 249.

¹⁸¹ Takami interview, *supra* note 176; Katayama interview, *supra* note 86.

¹⁸² The only change being in numbering and the modernization of archaic phrasing and characters.

¹⁸³ Compare MINJI SOSHOHŌ [MINSOHŌ] [C. CIV. PRO.] with Law No. 29 of 1890 (art. 187), and Law No. 149 of 1948 (art. 187), and Law No. 109 of 1996 (art. 249).

¹⁸⁴ Takami interview, *supra* note 176.

¹⁸⁵ See, e.g., Yamamoto, *supra* note 17, at 396-98 ("Challenging Assumptions of Neutrality").

B. *The Legal Framework of Judicial Administration in Japan*

As much of the legal framework for judicial administration in Japan has been introduced in previous parts of this paper, a brief overview should be sufficient in order to put the system into a coherent view. More importantly, however, is the historical background which plays itself forward into the present circumstances.

1. *Constitutional Provisions and the Court Act*

Constitutional provisions concerning the courts are assembled into a single chapter, Chapter VI. Sections relevant for the discussion here are:

1) Article 76:

The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

3) All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

2) Article 77:

The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs

...

3) The Supreme Court may delegate the power to make rules for inferior courts to such courts.

3) Article 78:

Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.

4) Article 79:

The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law: all such judges excepting the Chief Judge shall be appointed by the Cabinet

5) Article 80:

The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

2) The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.¹⁸⁶

This presents a body of constitutional provisions which: 1) establishes a unified judiciary centered around a Supreme Court and such lower courts as will be established by the legislature (Art. 76(1) and (2)); 2) gives the Supreme Court rulemaking authority over judicial affairs while enabling it to delegate that authority to lower courts as it sees fit (Art. 77); and 3) provides the basic structures for selection and appointment of judges with a number of safeguards in place so as to guarantee the status of judges and limit the risk of interference in how they carry out their jobs (Arts. 76(3), 78, 79, 80).

The Court Act¹⁸⁷ represents the legislature's constitutionally intended¹⁸⁸ engagement in the design of Japan's judicial institutional organization. This law lays out the structure of the judiciary in terms of the hierarchy and subject matter jurisdictional boundaries of courts,¹⁸⁹ gives detail to the processes for appointment and removal of judges, and establishes subordinate organs of the court, including the General Secretariat and the Legal Training and Research Institute.

In short, governance of Japan's independent judiciary is entrusted to a hierarchy of broadly participatory Judicial Assemblies that replicates the hierarchical structure of the courts, with the top level of command given

¹⁸⁶ KENPŌ, ch. VI (articles relating to the Judiciary) (excerpted).

¹⁸⁷ Saibanshohō [Court Act], Law No. 59 of 1947.

¹⁸⁸ KENPŌ, art. 76 (" . . . as established by law").

¹⁸⁹ Geographic boundaries of lower courts are established by a separate statute. Saibanshohō [Court Act], Law No. 59 of 1947, art. 2, para. 2 (the details of establishment, abolition and jurisdictional district of lower instance courts shall be provided for by law separately.).

over to the Judicial Assembly of the Supreme Court, constituted by the Supreme Court's entire membership with the Chief Justice as its chair.¹⁹⁰

Three other sections of this law are relevant to the discussion of instrumental judicial administration in Japan. They are the establishment of the General Secretariat in Article 13,¹⁹¹ the authorization to the Supreme Court to carry out the nationwide posting of judges,¹⁹² and the guarantee that judges will not be removed or transferred against their will.¹⁹³

What is most significant here is that many of the ways that the Supreme Court structures its administrative system to enable instrumental judicial administration are neither constitutionally nor statutorily mandated. The key structures in the system, notably the unified centralized administrative structures and the heavily bureaucratic operational mechanisms, were discretionarily created by the Supreme Court. Moreover, the legislatively established Judicial Assemblies have devolved into paper tigers exerting no real power.¹⁹⁴ Accordingly, while future change could be accomplished through the heavy hand of legislation, it is equally feasible to imagine the Court redesigning its systems and practices to ameliorate current problems. Everything needed for the task is already in place.

2. *History Lying in the Roots of the Present*

Professor Sasada views the current circumstances in Japan as a pendulum swing, where the courts went from their pre-war status subordinated to the Ministry of Justice for administrative affairs, past a suitable balance point, and rose up the arc to the opposite height of the Supreme Court administrators' barely sharing their power with any judges outside of their inner-most circle.¹⁹⁵

Today's situation harkens back to the circumstances arising under the Meiji Constitution pursuant to which the judiciary lacked the power to carry

¹⁹⁰ Saibanshohō [Court Act], Law No. 59 of 1947, art. 12, para. 1 (Supreme Court Judicial Assembly); *Id.* at art. 20, para. 1 (High Court Judicial Assemblies); *Id.* at art. 29, para. 2 (District Court Judicial Assemblies).

¹⁹¹ *Id.* at art. 13 ("The Supreme Court shall have a General Secretariat, which shall handle administrative affairs of the Supreme Court.")

¹⁹² *Id.* at art. 47 ("Judges of lower courts shall be assigned to positions by the Supreme Court.")

¹⁹³ *Id.* at art. 48 ("A judge shall not be removed or be transferred, or be suspended from performing his job, or have his salary reduced, against his will, except in accordance with the provisions of law concerning public impeachment or national referendum, or unless the judge is declared mentally or physically incompetent to perform his/her duties in accordance with provisions of applicable law.")

¹⁹⁴ Similarly, the possibility in Article 77(3) of distributing administrative powers to lower courts appears lifeless.

¹⁹⁵ Sasada interview, *supra* note 22.

out its administrative affairs even as to the hiring and firing of judges. Instead, administrative power was entrusted to the executive branch and carried out by the Ministry of Justice.¹⁹⁶ Although the judiciary jealously guarded its autonomy with regards to decision-making in cases, these circumstances left the judiciary vulnerable and dependent on the executive branch.¹⁹⁷

These conditions, the judiciary's perceived vulnerability and dependency, were profoundly significant in the drafting process of the present Constitution. Allied Occupation authorities and many Japanese participants actively sought new constitutional language to strengthen and divorce the judiciary from the executive branch by giving the judiciary explicit authority over administrative litigation cases and by entrusting it with its own administrative affairs.¹⁹⁸

On the Japanese side, language accomplishing the abolition of non-reviewable administrative courts emerged independently in the Matsumoto draft, scooped by the Mainichi Shimbun on February 1, 1946, which provided: "Every lawsuit against any administrative government office for infringement on rights by illegal measures or any other lawsuits concerning administrative affairs shall fall under the jurisdiction of a judicial court."¹⁹⁹ As well, the top-secret SCAP drafting group's committee on the judiciary²⁰⁰ drew from an accurate understanding of the pre-war circumstances and worked to create constitutional language that significantly empowered the Supreme Court.²⁰¹

¹⁹⁶ Every provision in the Meiji Constitution's chapter on the judiciary included the qualifying phrase "according to law." The judiciary's claim to autonomy drew upon the provision of Article 57 which designated that they exercised their power "in the name of the Emperor." While this enabled the judiciary to hold onto a substantial degree of independence as to its decision-making authority in cases, the courts were nonetheless administratively dependent on the legislature, which in turn, handed that authority over to the Ministry of Justice. MEIJI KENPŌ, ch. V; see generally ITOH, *supra* note 47, at 250; Haley *supra* note 18, at 114-15. And, while Ministry of Justice involvement is not *inherently* harmful, it was certainly perceived as such in the constitutional drafting process. See *supra* note 120 and text *infra* at notes 198-201. For example, Germany's current system incorporates Ministry involvement in judicial administration, though not in hiring or firing judges. E-mail from Prof. Tom Ginsburg, University of Chicago, August 11, 2010 (on file with author).

¹⁹⁷ *Id.*; see also Sasada interview, *supra* note 22.

¹⁹⁸ Empowering the courts was among the top priorities in the Allied Authorities' immediate post-surrender planning for the restructuring of the Japanese government. See text *supra* note 120.

¹⁹⁹ *The Tentative Plan of the Constitutional Problem Investigation Committee* art. 61, Feb. 1, 1946, available in DOCUMENTARY HISTORY, *supra* note 120, at RM110.

²⁰⁰ Team members were Lt. Col. Milo E. Rowell, Comdr. Alfred R. Hussey, Jr., and Miss Margaret Stone. *Organization into Drafting Committees*, available in DOCUMENTARY HISTORY, *supra* note 120, at RM145.

²⁰¹ A debate soon emerged between the members of the team and Charles L. Kades, chairman of the Steering Committee for the project, who expressed concern that an over-powerful judicial oligarchy might emerge. Most likely as a result, some provisions were then modified. Meeting of the Steering

Although the chapter on the judiciary in today's Constitution very closely resembles the language that the Occupation authorities first proposed to the Japanese,²⁰² there was little substantive difference from Japanese proposals. Thus, the constitutional terms for this branch of government do not appear to have been significant in the negotiations, and Professor Sasada's assessment that Chapter VI represents a consensus understanding shared by both sides in the drafting process "to swing the pendulum" towards a stronger foundation for the courts in the nation's governance appears correct. With that momentum, the Supreme Court, under the stewardship of an initial cadre of administrators transferred in from the Ministry of Justice,²⁰³ quickly handed over to its General Secretariat the complete power over judicial administration. Since then, the elites at the center of the judiciary, drawing from powerful sentiments of historical and presently perceived vulnerability to outside interference,²⁰⁴ have not let go.²⁰⁵

IV. CONCLUSION: PRESCRIPTIONS AND REMEDIES

For all the vast body of academic writing on Japanese law that identifies instrumental judicial administration in action and explores its underlying dynamics, less attention goes to the means to change the system so as to strengthen procedural civil justice in Japan. Yet, the previous discussion of the legal regime shows that procedural civil justice is well-rooted in the text of the law while the structures that enable instrumental judicial administration are less sound. Moreover, as Professor Ohbuchi and his colleagues have demonstrated drawing upon national survey data of

Committee with Committee on the Judiciary, Feb. 7, 1946; Judiciary: Draft A, Feb. 6, 1946; Judiciary: Draft B ("Rowell"), Feb. 6, 1946; Judiciary: final draft, Feb. 9, 1946, available in DOCUMENTARY HISTORY, *supra* note 120, RM167, RM169-71.

²⁰² *U.S. Model Constitution as Submitted to the Japanese Cabinet*, Feb. 13, 1946, available in DOCUMENTARY HISTORY, *supra* note 120, at RM 189.

²⁰³ ITOH, *supra* note 47, at 254 ("[T]he initial composition of the general Secretariat consisted largely of bureaucrats of the pre-war Justice Ministry.").

²⁰⁴ See text and sources cited *supra* note 21.

²⁰⁵ Drawing on his political science background, David Law valuably points out that this degree of centralized control could just as easily become an engine to rapidly change the court's prevailing value system to liberal policies if the judicial elites come to believe that is the direction political winds are blowing. Law, *supra* note 25, at 1587-1593. Professor Sasada shares this assessment. Sasada interview, *supra* note 22. However, this would not so much represent a loosening of instrumental judicial administration's bindings, but its repurposing to different aims.

former litigants, this is not simply the hope of idealistic academics; Japanese people themselves care about fairness.²⁰⁶

Possible actors include litigation parties, the national legislature, or the courts themselves.²⁰⁷ This Part very briefly reviews some of those possibilities, laying out a skeletal map of territory that waits for more detailed exploration.

A. “We’re Not Gonna Take It”—Options for Litigation Parties

The first possibility is that an aggrieved party could raise this when seeking appellate review of an adverse lower court ruling. This presents a presumably bleak route. As evidenced by case law described above with regards to judicial challenge under Article 24, Japanese courts have hardly been sympathetic to claims that civil litigation procedures were unfair owing to judicial behavior. Moreover, the futility is supported by other factors including that the party would be seeking remediation from precisely the same institution that carried out the alleged violation of her rights in the first place, that acknowledgment of violation of procedural civil justice in the case would also present grounds for granting the relief originally sought in the case, which was precisely what the engagement of instrumental judicial administration was intended to avoid, and lastly, depending on the variant of instrumental judicial administration believed to have influenced the fairness of the litigation, proof would be exceedingly hard to establish.²⁰⁸

However, Japanese law allows a means of collateral attack on civil litigation results somewhat akin to a *habeas corpus* petition in the United States’ criminal justice system. This is a suit for damages arising under the

²⁰⁶ See Ohbuchi et al., *supra* note 20, at 889 (“[T]he present results strongly suggest that fairness is an authentic concern among litigants of civil trials even in collectivist cultures, such as Japan, and it influences their responses to the civil trial in the same fashion as among individualist cultures.”).

²⁰⁷ As to increasing external pressures on the courts for increased accountability, it seems Japan is hardly alone. See Nuno Garoupa and Tom Ginsberg, *Judicial Audiences*, *supra* note 23, at 462-63 (“We believe that there have been secular pressures on all countries that are forcing judiciaries to place greater weight on external audiences. No doubt the increasing importance of the media in democratic countries forces all government agencies to consider the public relations aspects of their work. Beyond this general trend, there has been an increasing ‘judicialization of politics’ in many countries. If judges are having a greater impact on matters of political and social importance, it is only natural that there will be greater interest in the operation of the judiciary and demands for greater judicial accountability. Unprecedented political stability after WWII has also reduced the pressure for judicial formalism that shielded the judiciary from periodical changes of political regime that characterized most of the nineteenth and early twentieth century in Europe.”) (citation omitted).

²⁰⁸ At best, mechanisms of instrumental judicial administration described in Tiers 3 and 4 above might present evidence of actions that proximately caused a distortion in the results of the case, but that seems nearly impossible with regards to the mechanisms described in Tiers 1 and 2.

National Compensation Act,²⁰⁹ which derives from Article 17 of the Constitution: “Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.”²¹⁰

I do not mean to blithely suggest that a lawsuit under the National Compensation Act would be much more fruitful than a direct challenge on appeal, but it is important to note that claims under this law put a few more tools at the parties’ disposal. First, while the party will still seek remediation from the institution that carried out the alleged violation of her rights, a prevailing case in a National Compensation Law action would only entitle the parties to some modicum of damages and should not necessarily involve undoing the legal rulings in the original action.²¹¹

More importantly, an action under the National Compensation Act would focus attention on the alleged instrumental judicial administration. Such a case invites an opportunity for investigation into the underlying circumstances in the original action. The aggrieved party could call the judges involved in the case, or administrators involved in deciding judicial transfers, to the witness stand to explore what really happened. Again, pessimism should be the order of the day, but in an egregious case, a lawsuit could set the stage for testimony where an honest judge or judicial administrator as a sworn witness would enlighten us all.

Lastly, such an action takes into account the role of courts and litigation as a cultural performance.²¹² If Japanese lawyers faced with suspect circumstances began to routinely challenge such actions in collateral claims under the National Compensation Law, media reports on these suits would begin to inform and educate the public with regards to the circumstances of instrumental judicial administration that now circulate primarily in academic circles only.

B. Change By Command—Possibilities for the Legislature

Legislative reform represents the next realm of possibility. Japan’s parliament clearly has the constitutional authority to enact laws pertaining to the courts, as it has done through the Court Act and the Code of Civil

²⁰⁹ Kokka Baishinhō [National Compensation Act], Law No. 125 of 1948; *see also* X v. Y, *supra* note 177.

²¹⁰ KENPŌ, art. 17.

²¹¹ For example, after a decision denying the unconstitutionality of some government action, a collateral ruling could give nominal damages to the plaintiffs, but the determination of constitutionality would remain on the books.

²¹² *See supra* note 112.

Procedure. At the same time, it is equally clear that the drafters of the Constitution contemplated a definite no-fly zone for the legislature with regards to judicial affairs. Thus, any potential legislative engagement would be subject to constitutional limits *and* the arbiter of those limits would be the Supreme Court acting as “the court of last resort” in constitutional review.²¹³

As noted above, Japan’s legislature has already stepped into judicial reform affairs by the establishment of the Lower Court Judge Designation Consultation Commission²¹⁴ and the qualified success of the Commission reflects what can be hoped for from the potential of legislative reform. That is to say the Commission may have brought about modest changes in reducing the possibility of instrumental judicial administration through judicial appointments and reappointment, but it does not appear to have made any dramatic changes in fact nor to have significantly changed the “Trust Us” mindset of judicial administrators.²¹⁵

Nonetheless, Professor Sasada proposes a greater role for outside oversight panels with regards to judicial administration. In his account, these could be especially important as to personnel reviews pertaining to promotions, now carried out internally, and to mind after the Personnel Affairs Bureau of the General Secretariat’s complete dominance over all assignments and transfers.²¹⁶

Another option would be decentralization of judicial administration, as appears to have been intended by Article 77(3) of the Constitution. Thus for example, Germany shares its civil law tradition with Japan,²¹⁷ but authority over assignments and transfers lies at the state level, so that lower court judges are not beholden to a single centralized body of administrators.²¹⁸ While it is generally understood that constitutional

²¹³ KENPŌ, art. 81 (“The Supreme Court is the court of last resort with the power to determine the constitutionality of any law, order, regulation or official act.”).

²¹⁴ See text and sources cited *supra* notes 37-40.

²¹⁵ Japan has had a Freedom of Information Law with regards to government operations since the early 1990s. Gyōsei Kikan no Hoyū Suru Johō ni Kan Suru Hōritsu [Act on Access to Information Held by Administrative Organs], Law No. 42 of 1999. However, as with its counterpart in the United States, the judiciary is excluded from its coverage. *Id.* at art. 2 (judiciary not listed among the government organs covered by the law).

²¹⁶ Sasada interview, *supra* note 22; see generally Nuno Garoupa & Tom Ginsberg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009).

²¹⁷ Japan’s Code of Civil Procedure is primarily derived from the German counterpart. See, e.g., *Japan: Introduction and Historical Background of Japanese Civil Procedure*, in CIVIL LITIGATION IN COMPARATIVE CONTEXT 35, 36 (Oscar G. Chase et al. eds., Foundation Press 2007).

²¹⁸ David S. Clark, *The Selection and Accountability of Judges in West Germany*, 61 S. CAL. L. REV. 1795, 1816-27 (1988); PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 71 (Carolina Academic Press 2004).

constraints would bar the transfer of judicial authority from the nation to freestanding court systems under the authority of autonomous local entities,²¹⁹ this would not preclude moving the realpolitik of judicial administration from the Supreme Court's General Secretariat to secretariat bodies in the lower courts.²²⁰

Ultimately, the stronger power enjoyed by the legislature is not in how it might enact specific laws directing particulars regarding judicial administration, but in the broader vulnerability that the judiciary already perceives as to the risk of broader legislative interference in judicial affairs. Professor Taniguchi notes the importance of the legislature's existing manner of approving budgets and judicial nominations almost unfailingly following the wishes of the court. In his assessment, judicial elites are deeply aware that nothing precludes the legislature from instead becoming stingy with budgets and more inquisitorial or adversarial with regards to judicial nominations.²²¹ Thus, the real potential for the legislature to address instrumental judicial administration in the courts in Japan appears to be not by direct action so much as by its ability to induce change drawing upon a threat of actions that need not even be openly stated.

C. *Change From Within—Internal Reform by the Courts*

In the end, the greatest possibility for change rests with the courts themselves. Whether that change is motivated by litigants' successfully changing public opinion through effective "performances" in challenging the system, by a sense of looming threat of unwanted intervention from the legislature, or simply reflecting changing values as a new generation of judges reaches the most influential levels, the fact remains that Japan's approach to judicial administration is primarily entrusted to the courts and they are in the best position to effectuate reform.

As noted above, the tools for accomplishing change are already in the Supreme Court Justices' hands.²²² The present system puts formal authority over judicial affairs in the judicial assemblies. Thus, the first step for releasing the General Secretariat's powerful grip would take nothing

²¹⁹ KENPŌ, art. 76 (placing the "whole judicial power" in the national judiciary), ch. VIII (titled "Local Self-Government"). Constitutional amendment of course opens up all sorts of possibilities, but is not considered here in light of the inherent complexities with such a route. *See id.* at ch. IX.

²²⁰ As this approach is already enabled by Article 77(3) of the Constitution and the establishment of lower courts' Judicial Assemblies and secretariat operations in the Court Act, it shifts the locus of action to internal reforms by the Courts as discussed *infra* Part IV.C.

²²¹ Taniguchi interview, *supra* note 21.

²²² And with no one more powerful to take up this opportunity than the Chief Justice. *See* Law, *supra* note 25, at 1589-93.

more than the Supreme Court Judicial Assembly taking the power that it is entitled to under the law. Similarly, the Constitution already contemplates decentralization of judicial rulemaking to the lower courts, and the Court Act establishes judicial assemblies and secretariats for all of the lower courts. Thus, it would only take an exercise of internal rulemaking by the Supreme Court Judicial Assembly to transfer to the lower courts a greater engagement with judicial administration, thereby decreasing the General Secretariat's capacity to interfere with procedural fairness in civil litigation through instrumental behavior.²²³

Drawing upon direct personal contacts and conversations, Professors Sasada already sees substantial change in the mindset of central judicial administrators. In particular, since the year 2000 and the opening of the Judicial Reform Counsel, the enormous endeavor undertaken by the judiciary, government officials, lawyers, and scholars to critically assess Japan's criminal and civil justice system and to open up discussions for accomplishing real change has had a tremendous impact. As well, political dynamics, most significantly the first fall of the Liberal Democratic Party ("LDP") in 1993 and thereafter the understanding that genuine two-party politics was possible in Japan brought judicial administrators to see their world differently. To the extent that the administrators respond to governmental political interests, a judiciary no longer obliged to appease a conservative LDP monopoly on power can steer a more centrist course for the law.²²⁴

For another close observer, Professor Taniguchi, generational change has been a significant factor. He believes that part of the perception of vulnerability among judicial elites in the early post-war years reflected a distrust of the practicing bar. In pre-war Japan, judges and lawyers had been trained on entirely separate tracks and there were little interpersonal ties or social connections between the two communities. Moreover, in those early years, with a significant portion of the practicing bar associated

²²³ The idea of the General Secretariat itself driving these changes is a hopeful possibility. Thus for example, John Haley believes that "if the [judicial elites in control] perceive a problem, they'll fix it." Interview with John Haley, Professor, Washington University School of Law, in Tokyo, Japan (June 3, 2010). Perhaps this will be true if those elites perceive sufficient external pressures, but for this author, such an optimistic scenario seems somewhat incongruent with the present institution as Law describes it. See Law, *supra* note 25. Judicial elites could also impede meaningful reform and they apparently have done just that. Professor Itoh shares a report of former Justice Shunzo Kobayashi who "complained in 1959 that the general secretariat thwarted structural reform plans which had been supported by the majority of justices." ITOH, *supra* note 47, at 251.

²²⁴ Sasada interview, *supra* note 22. Specifically, the Odakyu decision enjoining government action in the construction of a highway in central Tokyo and an increasing number of Supreme Court dissents both reflect these changes in the case law.

with the radical left, social justice litigation was often directly tied to leftist causes. This in turn fostered a perception of the bar being at the opposite political pole from Japan's ruling party, to whom the judiciary was institutionally beholden. Both of these dynamics have changed greatly in recent decades. As all of today's judges trained together with practicing lawyers at the Legal Training and Research Institute, there is a corresponding greater respect for the competence of lawyers and trust in the reasonableness of their political views. This helps ease the court's sense of political vulnerability.²²⁵

Nevertheless, neither Professor Sasada or Professor Taniguchi view the status quo as entirely satisfactory.²²⁶ Their assessments are appropriate. Most of the operating mechanisms for instrumental judicial administration remain firmly in place. While the actual practice of instrumental judicial administration may have lessened,²²⁷ genuine reform would be best accomplished by the courts' implementing structural changes to disable the system. This would improve both the perception and reality of fairness in the system and ensure a lasting step towards the achievement of civil justice in Japan.

D. *Finale*

In the end, the story told here is of the convergence of two threads—both of which appear to result from “continuities of consciousness”²²⁸ that derive from Japan's indigenous legal development in the course of modernization. The first is the enduring legacy of pre-war legal understandings, handed down through a conservative self-replicating core of judicial elites that understands criminal procedural justice as a fundamental constitutional right, but not so with civil procedural justice, which only attains less significant status as a softer statutory protection. The second is the nature of judicial administration in Japan that played forward pre-war anxieties among judicial elites as to their vulnerability to outside intrusions. Accordingly, they created, in part on constitutional design and in part through sheer fiat, a powerful self-sustaining centralized judicial

²²⁵ Taniguchi interview, *supra* note 21; Professor Taniguchi explains these dynamics more thoroughly in a recent book chapter. Yasuhei Taniguchi, *The Changing Image of Japanese Practicing Lawyers*, in EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW 223, 228-30 (Harry N. Scheiber and Laurent Mayali, eds., The Robbins Collection 2007).

²²⁶ Sasada interview, *supra* note 22; Taniguchi interview, *supra* note 21.

²²⁷ However, as the troubling circumstances in the tobacco product litigation described above are very recent, they suggest that even direct instrumental judicial administration may still be occurring.

²²⁸ Mark Levin, *Continuities of Consciousness: Professor John Haley's Writings on Twelve Hundred Years of Japanese Legal History*, 8 WASH. U. GLOBAL STUD. L. REV. 317 (2009).

administration system. In turn, this system enables instrumental judicial administration to be played out powerfully in accordance with the designs of the elites who may place their thumbs on the balance of how civil and administrative cases are decided in Japan.²²⁹ Many beneficial values are served by the present system, including highly capable judicial decision-making, predictability, and the preservation of an autonomous judiciary from direct political interference. But sometimes, in some cases, most likely cases with great social significance, the process has not been fair. That's all.

This can surely change—the recipes are in any number of writings by Japanese legal scholars; other ideas are suggested above—and perhaps things have changed somewhat already. In any case, as the reggae great Jimmy Cliff stated so plainly, “You can get it if you really want. But you must try, try and try. Try and try, you'll succeed at last.”

²²⁹ Whether the elites are choosing their own course or traveling at the direction of some other master does not matter in this discussion. The salient point is that central administrators interrupt gravity's neutral pull on the scales of Justice's balance that should be entrusted to independent judges' conscientious deliberations.