

Restrained Judicial Constitutionalism in Japan: A Reflection of Judicial Culture Rather than Political Interests

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INTRODUCTION

Japan's postwar Constitution (*Nihon Koku Kenpô*) was supposed to revolutionise the polity into which it was imported by envisaging a new role for individuals as equal beneficiaries of the rights enshrined in the Constitution and a new role for the judiciary as the guardian of the Constitution. The imported paradigm contrasted starkly with the traditional status of individuals in Japan as the passive constituents of a social hierarchy atop of which was an authoritarian regime and with the traditional function of the judiciary, being limited to the conservative interpretation and application of laws enacted by the Diet (*Kokkai*). However, whereas individuals have more or less sought to assume their constitutional roles,¹ the judiciary has arguably shirked its own through restrained judicial constitutionalism manifested in the accordance of significant deference to relevant legislative and executive policies and the exercise of interpretive restraint in the absence thereof.

Researchers have attempted to explain the phenomenon of restrained judicial constitutionalism in Japan by reference to a number of theories, the most prominent of which suggests that judges have consciously avoided the liberal interpretation and application of constitutional provisions in consideration of a sophisticated system of skewed career incentives and disincentives ultimately directed by the Cabinet (*Naikaku*, the executive arm of the Japanese government) or by senior members of the judiciary in favour of the

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1 See J. HALEY, *The Spirit of Japanese Law* (Athens, Georgia 1998) 179–200; S. HAMANO, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, in: *University of Pennsylvania Journal of Constitutional Law* 1 (1999) 415, 447–452, 459–467.

Cabinet (hereafter, “political control theory”). By contrast, this paper asserts that the restrained judicial constitutionalism has been self-imposed, consciously or otherwise, in accordance with a strong judicial culture characterised by an intersubjective and pervasive belief in the general propriety of judicial deference and restraint: a belief influenced by traditional Japanese conceptions of democracy and the judiciary’s legitimate and proper role therein and not induced by covert political control over judges (hereafter, “judicial culture theory”).

The analysis proceeds as follows. The phenomenon of restrained judicial constitutionalism in Japan is examined with reference to the consequential dichotomy between the literal and actual scope of constitutional rights protection (I). The political control theory is then scrutinised and evaluated with respect to its capacity to explain the phenomenon (II). And finally, the judicial culture theory is proffered as an alternative, more cogent theory by which the phenomenon can be understood and explained (III).

I. RESTRAINED JUDICIAL CONSTITUTIONALISM IN JAPAN

It was expected that wholesale amendment of the Japanese Constitution following World War II would transform Japan’s civil legal system from one based on rule by law to one based on constitutionalism and the rule of law.² This was to be achieved largely through the empowerment of a judiciary able and willing to scrutinise potential violations of the Constitution. Accordingly, Article 81 conferred the hitherto foreign power of constitutional review on the Supreme Court (*Saikô Saiban-sho*), declaring it “the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.” Although the legislature paradoxically remained the “highest organ of state power”,³ the judiciary alone was granted the “whole judicial power”,⁴ including “the ultimate authority” to define the extent of its own competence and that of the legislature.⁵

However, reality has not since conformed to this ideal. Rather than adapt to constitutional change, the judiciary effectively indigenised the Constitution. As in the prewar era, the judiciary has largely left the meaning and scope of constitutional provisions for delineation by the government through legislation and executive action.⁶ Japanese con-

2 See T. HAYAKAWA, *Legal Science and Judicial Behavior*, in: *Kobe University Law Review* 2 (1962) 3, 3–5, 14; D. HENDERSON, *Law and Political Modernization in Japan*, in: Ward (ed), *Political Development in Japan* (Princeton 1968) 387.

3 Art. 41 *Nihon-koku Kenpô* [Japanese National Constitution].

4 Art. 76 *Nihon-koku Kenpô* [Japanese National Constitution].

5 Supreme Court, 8 July 1948, *Keishû* 2, 806; *Saikô Saiban-sho no ikken-sho* [Supreme Court opinion letter], in: *Hôshô Jihô* (1949) 1. See also H. TOMATSU, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, in: Higuchi (ed), *Five Decades of Constitutionalism in Japanese Society* (Tokyo 2001) 251, 253–255.

6 See, e.g., Supreme Court, 16 December 1959, *Keishû* 13, 3225; Supreme Court, 9 September 1982, *Minshû* 9, 36–39. See also J. SATOH, *Judicial Review in Japan: An Overview of*

stitutional review has thus been exceptionally conservative and cautious, such that only a handful of laws have been declared unconstitutional by the Supreme Court of Japan,⁷ whereas the Federal Constitutional Court of Germany (established two years later) has struck down over 600 laws.

The phenomenon of restrained judicial constitutionalism in Japan has been particularly apparent in the interpretation and application of Article 14 of the Constitution in relation to cases of racial discrimination. The United Nations Special Rapporteur on Racism concluded in 1996 that racial discrimination is “deep and profound”⁸ in Japan — a nation in which approximately two million foreigners reside⁹ and centuries-old myths promoting racial and ethnic homogeneity live on.¹⁰ For its failure to enact legislation prohibiting racial discrimination, the Japanese government has been the subject of serious international criticism.¹¹ The question arises as to why such legislation is necessary where Article 14 of the Constitution provides an apparently categorical prohibition against racial discrimination: “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.” The answer is that the Japanese judiciary’s restrained constitutionalism has significantly limited the scope and relevance of Article 14. The Supreme Court has held that rights enshrined in Chapter III of the Constitution, including Article 14, “apply only to the relationships between an individual and the State or a public authority,” despite Article 14 explicitly extending to economic and social relations more generally. The Court’s rationale was that “it is possible to correct the [relevant wrongs] by legislative measures.”¹² In the context of public litigation, the Supreme

the Case Law and an Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight, in: *Loyola of Los Angeles Law Review*, 41 (2008) 603, 604–605, 609; C. FORD, *The Indigenization of Constitutionalism in the Japanese Experience*, in: *Case Western Reserve Journal of International Law* 28 (1996) 3.

- 7 See, e.g., Supreme Court, 4 April 1973, *Keishû* 27, 265; Supreme Court, 30 April 1975, *Minshû* 29, 572; Supreme Court, 4 April 1976, *Minshû* 30, 223; Supreme Court, 22 April 1987, *Minshû* 41, 408; Supreme Court, 11 September 2002, *Minshû* 56, 1439.
- 8 UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Mission to Japan*: UN Doc E/CN.4/2006/16Add.2 (2006) 63–65.
- 9 IMMIGRATION BUREAU, JAPANESE MINISTRY OF JUSTICE, *Statistical Survey on Legal Migrants* (2008) <http://www.stat.go.jp/english/index/official/202.htm> accessed on 5 January 2012.
- 10 See T. WEBSTER, *Reconstituting Japanese Law: International Norms and Domestic Litigation*, in: *Michigan Journal of International Law* 30 (2008) 211, 214; E. OGUMA, *A Genealogy of “Japanese” Self-Images* (Melbourne 2002).
- 11 UNITED NATIONS HIGH COMMISSIONER ON HUMAN RIGHTS, *Concluding Observations of the Human Rights Committee, Japan*: UN Doc CCPR/C/79/Add.102 (1998) paras 11, 32.
- 12 Supreme Court, 12 December 1973, *Minshû* 27, 1536. See also Shizuoka District Court, 12 October 1999, *Hanrei Taimuzu* 1045, 216, 220; T. WEBSTER, *Bortz v. Suzuki: A Translation and Introduction*, in: *Pacific Rim Law and Policy Journal* 16 (2007) 631, 640–641.

Court has further held that Article 14 “[does] not provide absolute equality; some discriminatory treatment can be recognised as rational depending on the nature of the matter.”¹³ In making these declarations, the Court has enabled and promoted judicial deference to legislative or executive policy — to the extent that courts tend not to question the discriminatory exercise of government discretion in the absence of factual mistake or gross unreasonableness¹⁴ — and interpretive restraint in the absence thereof.

II. THE POLITICAL CONTROL THEORY

Researchers have attempted to explain the phenomenon of restrained judicial constitutionalism in Japan by reference to a number of theories, the most prominent of which is the political control theory proffered by Ramseyer and Rasmusen.¹⁵ This theory suggests that the phenomenon has arisen because the judicial institution and its constituent members have been the subject of political control which has been exercised in at least two ways.

First, the formal and substantive powers of the Cabinet over the appointment of the Chief Justice of the Supreme Court as well as the Court’s fourteen other justices¹⁶ are said to have allowed the Cabinet to shape the composition of that most influential court in the land and to thereby ensure that judges who are less likely to defer to government policy and exercise interpretive restraint in the absence thereof do not even reach the Court. The Cabinet is said to have provided for regular correction of the Court’s ideological predilections through a strategy of appointing justices close to the mandatory retirement age, with the result being a comparatively low average duration of tenure (six years) and a comparatively high turnover rate.¹⁷

13 Supreme Court, 11 June 2004, Wa 1741, 1.

14 See, e.g., Supreme Court, 4 October 1978, Minshû 32, 1223; Tokyo District Court, 12 November 2001, Hanrei Jihô 1789, 96, 102; Tokyo District Court, 9 September 1981, Hanrei Jihô 1043, 74, 97–99; Tokyo High Court, 31 January 2002, Hanrei Jihô 1773, 34, 36. See also HAMANO, *supra* note 1, 465–466. In *McLean v Minister of Justice* (Supreme Court, 4 October 1978, Minshû 32, 1223), the Supreme Court held against a plaintiff whose visa was not renewed due to participation in lawful political demonstrations on the basis that the constitutional rights of aliens are limited and aliens are permitted to reside in Japan only at the discretion of the Minister of Justice.

15 M. RAMSEYER / E. RASMUSEN, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago 2003).

16 Arts 6(2), 79(1) *Nihon-koku Kenpô* [Japanese National Constitution].

17 M. RAMSEYER, *The Puzzling (In)dependence of Courts: A Comparative Approach*, in: *Journal of Legal Studies* 23(2) (1994) 722, 725. See also D. O’BRIEN / Y. OHKOSHI, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in Russell/O’Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville 2001) 37, 53–54; D. LAW, *The Anatomy of a Conservative Court: Judicial Review in Japan*, in: *Texas Law Review* 87 (2009) 1545, 1589–1590; S. MATSUI, *Why is the Japanese Supreme Court So Conservative?* in: *Washington University Law Review* 88 (2011) 1375, 1405, 1408.

Secondly, it is said that there exists a sophisticated system of skewed career incentives and disincentives driven by decisions of the Supreme Court General Secretariat, under the influence of the Cabinet, regarding geographical rotations and hierarchical promotions of individual judges every three years. Political control theorists have inferred from statistical correlations between variables related to judicial decisions and the career progression of relevant judges that those judges who “flout the preferences of the LDP [the historically dominant Liberal Democratic Party] ... potentially pay with their careers.”¹⁸ Their suggestion is that the General Secretariat has been specifically considering the LDP’s political interests in its judicial appointments, rewarding “orthodox judges ... with prestigious postings” and sentencing “heterodox judges ... to years in obscure posts.”¹⁹ Moreover, they suggest that Japanese judges have generally heeded these signals and chosen to flout their professional and constitutional responsibilities in consideration thereof.

The cogency and legitimacy of the political control theory depends significantly on the substantiation of the purported link between judicial career progression and judicial orthodoxy as well as on the demonstration of actual political influence over judicial appointments or the performance of constitutional review. Although, as Ramseyer and Rasmusen concede, conclusive proof of political control in support of their political control theory is difficult to obtain,²⁰ that anecdotal and empirical evidence proffered by them is largely unsatisfactory.

In seeking to establish a link between judicial career progression and judicial orthodoxy, Ramseyer and Rasmusen refer to the Young Jurists League affair, in which the judiciary was partially purged of members of the leftist organisation, as an instance where the careers of certain judges are said to have stagnated due to judicial heterodoxy or activism. This affair commenced in 1973 when a League member, Judge Fukushima of the Sapporo District Court, held that the existence of Japan’s Self-Defense Forces violated Article 9 of the Constitution,²¹ which provides that “land, sea, and air forces, as well as other war potential, will never be maintained.” Political control theorists note that an “LDP-led witch hunt” closely followed this event, with the Minister of Justice announcing that judges could not be League members, the Supreme Court Chief Justice declaring that “the judiciary should exclude political extremists” and Judge Fukushima being subsequently assigned to supposedly undesirable positions in provincial family courts until his retirement.²²

18 RAMSEYER / RASMUSEN, *supra* note 15, 81.

19 RAMSEYER, *supra* note 17, 57.

20 RAMSEYER / RASMUSEN, *supra* note 15, 21.

21 Sapporo District Court, 7 September 1973, Hanrei Jihô 140.

22 M. RAMSEYER / F. ROSENBLUTH, Japan’s Political Marketplace (Cambridge, Massachusetts 1993) 162. See also RAMSEYER / RASMUSEN, *supra* note 15, 22; S. MIYAZAWA, Administrative Control of Japanese Judges, in: Lewis (ed), Law and Technology in the Pacific Community (Boulder 1994) 263, 275.

However, the conclusion that political control theorists have drawn from this affair is undermined by Ramseyer and Rasmusen's own empirical research, which showed that members of the Young Jurists League enjoyed judicial careers on par with, or better than, non-members. Their examination of more than 200 League members' careers showed that some went on to hold "exceptionally prestigious and sensitive posts" and only 50 did not fare as well as the average career judge.²³ Therefore, reference to this affair (being one of only a few cited instances of possible political control) provides very little support for the general inference of a link between judicial career progression and judicial orthodoxy.

In seeking to demonstrate actual political influence over the performance of constitutional review, Ramseyer and Rasmusen refer to the Supreme Court's decision in the *Electoral Malapportionment Provisions* case,²⁴ alleging that justices of the Court consciously adjudged the matter before them in favour of certain (but not all) LDP leaders on political grounds.²⁵ In order to do so, however, these justices must have been closely familiar with the LDP's notoriously convoluted internal politics relating to an already highly divisive political issue. While such familiarity might be remotely plausible in the United States, where political experience is a common consideration in the appointment of Supreme Court justices, this is not so in Japan where judges generally spend their careers immersed in an insular bureaucracy and avoid engaging in political activity.²⁶ In these respects, the anecdotal evidence proffered by political control theorists in support of their theory is unsatisfactory.

Beyond this anecdotal evidence, much of the perceived legitimacy of the political control theory is predicated upon Ramseyer and Rasmusen's empirical (multivariate statistical regression) analysis of data relating to the careers of 793 judges appointed between 1959 and 1968 and involving a variety of factors including judicial posts held, educational background, decisions in "politically charged" categories of cases and membership of the Young Jurists League.²⁷ However, although the methodology by which Ramseyer and Rasmusen's empirical evidence was generated is itself unsatisfactory (for a number of reasons that have been explained elsewhere),²⁸ the real issue lies with the plausibility of those inferences they draw from certain statistical correlations: namely, that there actually exists an elaborate system of judicial career (dis)incentives directed by political interests and that judges have actually responded to those (dis)incentives with restrained judicial constitutionalism.

23 RAMSEYER / RASMUSEN, *supra* note 15, 67, 70–72, 75–76.

24 Supreme Court, 14 April 1976, *Minshū* 30, 223.

25 See RAMSEYER / RASMUSEN, *supra* note 15, 68.

26 F. UPHAM, Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary, in: *Law and Social Inquiry* 30 (2005) 421, 440–441.

27 RAMSEYER / RASMUSEN, *supra* note 15, 21, 49–51.

28 See, e.g., J. CONSER, Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach, in: *North Carolina Journal of International Law and Commercial Regulation* 31 (2005) 255, 320; UPHAM, *supra* note 26, 449–453.

Ramseyer and Rasmusen's examination of the careers of judges who had found against the government in tax cases identified a remarkable anomaly: of the judges whose decisions were reversed on appeal, only those who mistakenly found for the government were 'punished'; those who mistakenly found against the government were not only spared from punishment, but actually did better than those judges whose decisions in favour of the government were affirmed on appeal.²⁹ Ramseyer and Rasmusen sought to explain this finding by suggesting that the Supreme Court General Secretariat had rewarded judges for "the talent it took ... to spot the unusual case in which the merits arguably favoured the taxpayer."³⁰ However, as Upham argues, the conclusion that quality control justifies rewarding judges who incorrectly rule in favour of taxpayers more than judges who correctly rule in favour of the government is courageous: "[a]fter all, stupid judges are likely to get the hard cases wrong at least as often as smart, diligent ones do."³¹ In reality, Ramseyer and Rasmusen's own empirical findings deny the existence of that system of judicial career (dis)incentives on which the political control theory heavily relies.

Even if one were to accept the supposed existence of a system of judicial career (dis)incentives as plausible, the suggestion that Japanese judges would almost invariably respond to the alleged (dis)incentives in the manner suggested by political control theorists remains entirely implausible. Such a view paints an alarming, almost inconceivable picture of Japanese judges as selfish careerists ready to shirk their professional and constitutional responsibilities and to flout any genuine sense of justice and ethics.

The validity of that view is highly questionable not only because it is diametrically inconsistent with the Japanese judiciary's positive reputation for honesty and freedom from (at least non-political forms of) corruption,³² but also because it overstates the strength of the alleged (dis)incentives and suggests that Japanese judges interpret them in a patently irrational manner. The threat of reassignment every three years (being a threat upon which the (dis)incentive system is said to be primarily based) is not likely to be something to which Japanese judges would generally respond because, first, even upon reassignment, a judge's relatively high salary and general working conditions remain substantially the same and, secondly, a judge could in any case simply resign to private practice as an attorney, which would likely entail a higher salary, permanent residence in a desirable location, a high status in the profession (as a former judge) and, as a political control theorist might suggest, greater professional autonomy and freedom from political interference.³³

Ultimately, lacking cogent anecdotal or empirical evidence, political control theorists fail to prove the existence of any system of judicial career (dis)incentives directed by

29 RAMSEYER / RASMUSEN, *supra* note 15, 93–94.

30 RAMSEYER / RASMUSEN, *supra* note 15, 94–95.

31 UPHAM, *supra* note 26, 431.

32 UPHAM, *supra* note 26, 434–436, 453.

33 UPHAM, *supra* note 26, 421, 434–435.

political interests and fail to cogently explain how and why rational judges would actually respond to any such system. To the contrary, the evidence suggests that there is no system of judicial career (dis)incentives directed by political interests and that, even if such a system did exist, it would be ineffective in the promotion of judicial deference and restraint. To this extent, the political control theory is itself unsatisfactory.

III. THE JUDICIAL CULTURE THEORY

This paper presents the judicial culture theory as a more plausible and cogent alternative to the political control theory. According to the judicial culture theory, the imported notion of constitutional review in Article 81 of the Constitution was, consciously or otherwise, indigenised by the Japanese judiciary to conform with the prevailing, prewar judicial culture: a culture influenced by traditional Japanese conceptions of democracy and the judiciary's legitimate and proper role therein, and thus characterised by an intersubjective and pervasive belief in the general propriety of judicial deference to government policy and interpretive restraint in the absence thereof. The suggestion is that the phenomenon of restrained judicial constitutionalism in Japan has arisen as the product of this strong and persistent (albeit gradually maturing) judicial culture.

The civil law notion that elected representatives should be left to determine policy through legislation and executive action (with judges focusing solely on the interpretation and application of authoritative statutory codes) was instilled in, and closely adhered to by Japanese judges long before the wholesale amendment of the Japanese Constitution following World War II.³⁴ In that context, the power of constitutional review conferred on the judiciary by Article 81 of the Constitution was an alien one, largely inconsistent with the prevailing judicial culture to the extent that its exercise would often entail the judicial resolution of essentially political questions.³⁵ As Hata et al. note, the "idea of judicial review [was] a bit too radical for the Japanese version of democracy."³⁶ Many at the time foresaw that Japan's civil law-trained judges would find it difficult to fulfil the responsibilities assigned to them by Article 81. Special provision was thus made to ensure that, at any given point in time, five justices on the Supreme Court would not need to be lawyers.³⁷ A former Chief Justice of the Court explained that the "introduction of non-specialists would make it possible ... to render

34 See H. HATA/G. NAKAGAWA/T. NAKAGAWA, *Japanese Constitutional Law* (The Hague 2001); H. ITOH, *The Japanese Supreme Court: Constitutional Policies* (New York 1989) 212.

35 D. HENDERSON, *The Constitution of Japan — The Fifth Decade: I. Understanding the Constitution: Comment*, in: *Law and Contemporary Problems* 53 (1990) 89, 93. See also T. MCNELLY, "Induced Revolution": *The Policy and Process of Constitutional Reform in Occupied Japan*, in: Ward / Yoshikazu (eds), *Democratizing Japan: The Allied Occupation* (Honolulu 1987) 76, 76–77.

36 HATA/NAKAGAWA/NAKAGAWA, *supra* note 34, 54.

37 Art. 41(1) *Saiban-sho kōsei hō* [Court organization law], Law No. 6/1890.

judgments which are not merely logical products reached from a narrow, technical viewpoint.”³⁸ However, rather than adapt to the constitutional change, the Supreme Court and the judiciary more generally would ultimately hold firm to the traditional values promoted by an evidently strong judicial culture.

It is remarkable that the Japanese judiciary was alone among the branches of the Japanese government to have remained intact following World War II, having not been systematically purged of opponents to the Constitution.³⁹ The generations of judges educated and trained in prewar Japan under the Meiji Constitution or in postwar Japan by instructors who themselves were educated and trained under the Meiji Constitution have thus far been disproportionately represented on the Supreme Court. As at 1995, no judge born after 1929 had ever served on the Supreme Court, and until 1990, no Justice of the Court had received his or her legal education in postwar Japan.⁴⁰ Meanwhile, the design of the judicial institution has facilitated the preservation of shared judicial values and practices through the careful, continuing and intense nurturing of judges with the Supreme Court General Secretariat and fellow judges on the bench closely involved at all stages and in almost every aspect of a judge’s career.⁴¹ The judicial culture that prevailed under the Meiji Constitution prevailed during the periods with which Ramseyer and Rasmusen’s empirical studies were concerned and largely prevails today at least partly as a consequence of the continuity and design of the judicial institution.

The phenomenon of restrained judicial constitutionalism in Japan led political control theorists to interpret the consequential affirmation of government policy and the dormancy of constitutional provisions meant to function as limits on government power as indicative of the existence of something of a conspiracy by which the restrained constitutionalism has been essentially *extorted* by the Cabinet. By contrast, the judicial culture theory suggests that a strong, intersubjective belief pervading the judiciary regarding its legitimate and proper role in the Japanese polity has led to the *self-imposed* accordance of significant deference to government policy and interpretive restraint in the absence thereof.

With public opinion polls consistently indicating that trust in the Japanese judiciary is three times greater than that in religious institutions, and more than twice that of courts in the United States, it appears that the Japanese judiciary (through its restrained constitutionalism) has been conforming to social expectations of its role in the Japanese polity.⁴² Whether or not the judiciary’s restraint has been strategic and deliberate, there

38 T. HATTORI, *The Legal Profession in Japan: Its Historical Development and Present State*, in: Mehren (ed), *Law in Japan: the Legal Order in a Changing Society* (Cambridge, Massachusetts 1963) 117, 133.

39 HAMANO, *supra* note 1, 442–443.

40 J. HALEY, *Judicial Independence in Japan Revisited*, in: *Law in Japan* 25 (1995) 1, 14.

41 J. HALEY, *Constitutional Adjudication in Japan: Context, Structures, and Values*, in: *Washington University Law Review* 88 (2011) 1467, 1485–1486.

42 See J. HALEY, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in: Foote (ed), *Law in Japan: A Turning Point* (Seattle 2006) 99, 128–129; J. HALEY,

is no doubt that judges recognise it as essential to the judiciary's legitimacy. Haley has argued that Japanese judges "cannot but ... share concern that the judiciary would suffer were the public ever to perceive that judges were freely deciding cases out of ... any extreme ideological bias."⁴³ There is also a realisation among Japanese judges that the power of constitutional review, although foreign, is an extraordinarily important one, and that the liberal use of that power may diminish its effectiveness. The power is thus likened to that of a "treasured sword ... passed from generation to generation," whose legendary power is maintained "as long as it is left unused on the mantel piece", for its "actual use is profoundly risky."⁴⁴

In reality, the postwar Constitution represented to the Japanese judiciary (and the wider polity) a far less radical break with the past than its Western authors had assumed.⁴⁵ Inoue concluded from her linguistic and cultural study of the constitutional change that the radicalism of that change depended significantly upon cultural and linguistic ambiguities and misunderstandings between the Americans (who essentially drafted the Constitution) and the Japanese; that "language and culture ... inevitably limit, or at least channel, the impact of foreign norms upon a society and its legal system."⁴⁶ For example, the potentially transformative concept of gender equality in Article 14 of the Constitution was interpreted as equivalent to the traditional Japanese idea of aristocratic honour in society, which is consistent with a hierarchical stratification of social relations and thus radically inconsistent with the original Western notion.⁴⁷ Matsui argues that the Japanese judiciary has fundamentally misunderstood the Constitution, having viewed it (in line with the positivist German constitutional philosophy which had been dominant in prewar Japan) as more of an articulation of political and moral principles than a positive, fundamental law to be enforced by the judiciary.⁴⁸ Through restrained constitutionalism and without reference to political interests or any career (dis)incentives, the Japanese judiciary effectively indigenised the imported notion of constitutional review in Article 81 of the Constitution, as it did the imported notion of gender equality.

The Japanese Supreme Court's culturally induced and self-imposed restraint in the performance of constitutional review is not so different to that of the world's arguably most independent courts and judges. For example, judges in the United States adhere

Litigation in Japan: A New Look at Old Problems, in: *Willamette Journal of International Law and Dispute Resolution* 10 (2002) 121.

43 HALEY, *The Japanese Judiciary*, *supra* note 42, 128–129.

44 LAW, *supra* note 17, 1587–1588.

45 See P. ALSTON, *Transplanting Foreign Norms: Human Rights and Other International Legal Norms in Japan*, in: *European Journal of International Law* 10 (1999) 625, 629–630.

46 K. INOUE, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of its Making* (Chicago 1991) 269–270.

47 See ALSTON, *supra* note 45, 630.

48 S. MATSUI, *Why is the Japanese Supreme Court So Conservative?* in: *Washington University Law Review* 88 (2011) 1375, 1400–1404.

closely to the principle that they should, wherever possible, avoid ruling upon a constitutional question if a case can be disposed of upon narrower grounds.⁴⁹ In the spirit of this principle, Japanese judges have relied on tort provisions in the Civil Code,⁵⁰ in place of Article 14 of the Constitution, to remedy the “mental anguish” caused by racial discrimination — recognised here as a violation of the plaintiff’s right to “dignity and honor” standing “outside of social norms.”⁵¹ In Italy, where the power of judicial review was similarly conferred on the judiciary by the constitution adopted following World War II, civil law-trained judges were said to have been unwilling or “psychologically incapable of the value-oriented, quasi-political functions involved in judicial review.”⁵² Italy responded to this restrained judicial constitutionalism with the establishment of a special constitutional court comprising a majority of politically appointed persons with diverse backgrounds beyond careers in the judiciary.⁵³ The establishment of a similar institution has been recently suggested as a possible means of promoting judicial constitutionalism in Japan.⁵⁴

CONCLUSION

Political control theorists have misinterpreted the phenomenon of restrained judicial constitutionalism in Japan. They fail to comprehend, or at least acknowledge that Japanese judges have a genuine sense of duty and justice; that judges would therefore avoid undermining the Constitution by respecting the governmental structure it is seen as having established. These theorists improperly infer from unsatisfactory anecdotal and empirical evidence the existence of an elaborate system of judicial career (dis)incentives to which, they improperly assume, rational judges selfishly and irrationally respond.

In reality, a variety of factors have enabled the preservation of a strong judicial culture in Japan dating from the nineteenth century, including the continuity and design of

49 *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 354–355; *Rescue Army v. Municipal Court* (1947) 331 U.S. 549, 568–574; *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152–153.

50 *Minpō*, Law No. 89/1896, as amended by Law No. 78/2006.

51 Shizuoka District Court, 12 October 1999, Hanrei Taimuzu 1045, 216, 231. See also WEBSTER, *supra* note 12, 666; Sapporo District Court, 11 November 2002, Hanrei Taimuzu 1150, 185, 194–195; T. WEBSTER, *Arudou v. Earth Cure Judgment of November 11, 2002 Sapporo District Court Translation*, in: *Asian-Pacific Law and Policy Journal* 9 (2008) 297, 318, 320–321; Osaka District Court, 30 January 2006, Wa No. 11926; E. JOHNSTON, *Plaintiff Gets Redress, But Not for Racial Bias*, *Japan Times* (2006) <http://search.japantimes.co.jp/cgi-bin/nn20061019a4.html> accessed on 5 January 2012.

52 M. CAPPELLETTI, *Judicial Review in Comparative Perspective*, in: *California Law Review* 58 (1970) 1017, 1047.

53 CAPPELLETTI, *supra* note 52, 1048–1050.

54 S. MATSUI, *Why is the Japanese Supreme Court So Conservative?* in: *Washington University Law Review* 88 (2011) 1375, 1418.

the judicial institution and the continued strength of traditional conceptions in the wider Japanese polity of democracy and of the judiciary's legitimate and proper role therein.

The readiness of commentators to declare the importation of the power of constitutional review in Article 81 of the Constitution a failure, due to it being supposedly hijacked by political interests,⁵⁵ is unjustified. The tendencies of Japanese judges in the performance of constitutional review inevitably reflect an inherently fluid and gradually evolving judicial culture, which will continue to evolve in line with the social and political environments in which the judiciary operates. Only the passing of adequate time would allow one to properly adjudge the impact of Article 81 in the context of a relatively immature legal system. If one compares the Japanese Supreme Court with the United States Supreme Court at the same stage of development, it would be found that the former has in fact voided more acts of the national legislature than the latter in the same number of initial years.⁵⁶ As Danelski notes: "the [Japanese Supreme] Court is coming to political maturity more quickly than many expected, even more quickly than did its American counterpart after which it was modeled."⁵⁷

The ascension of a new generation of Japanese judges, increasingly diverse and willing to use the 'treasured sword', and perhaps encouraged by the unusual attenuation of LDP dominance following the 2009 national election, appears to be accelerating the evolution of Japan's judicial culture. A few 'active' Supreme Court justices have emerged in recent years, such as Justice Takii (23 individual opinions between June 2002 and October 2006) and Justice Izumi (36 individual opinions between November 2002 and January 2009), insisting that the judiciary should proactively protect individual rights granted by the Constitution.⁵⁸ The Supreme Court's 2008 judgment in the *Case to Seek Revocation of a Written Deportation Order* paints the Court as one still highly respectful of the government's views, but nonetheless increasingly willing to liberally scrutinise and invalidate legislation where appropriate.⁵⁹ Moreover, efforts of the Judicial System Reform Council regarding the Supreme Court candidate selection process promote the expectation that future appointees will exhibit greater diversity and vitality,⁶⁰ while

55 L. TAKAYUKI, Japanese Way of Judicial Appointment and its Impact on Constitutional Review (Paper presented at the 3rd Asian Forum on Constitutional Law, Taiwan, 26 September 2009) 22–23; D. LAW, Why has Judicial Review Failed in Japan? in: Washington University Law Review 88 (2011) 1425.

56 H. BOLZ, Judicial Review in Japan, in: Hastings International and Comparative Law Review 4 (1980) 87, 133–144.

57 D. DANELSKI, The Political Impact of the Japanese Supreme Court, in: Notre Dame Law Review 49 (1974) 955, 980.

58 TAKAYUKI, *supra* note 55, 24–25.

59 Supreme Court, 4 June 2008, Minshû 62, 135. See also Y. OKUDA / H. NASU, Constitutionality of the Japanese Nationality Act: A Commentary on the Supreme Court's Decision on 4 June 2008, in: ZJapanR / J.Japan.L. 13 (2008) 101.

60 JUDICIAL SYSTEM REFORM COUNCIL, Recommendations of the Judicial System Reform Council: For a Justice System to Support Japan in the 21st Century (2001) <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> accessed on 5 January 2012.

efforts of the Lower Court Judges Nominating Consultation Commission should ensure that cultural changes diffuse through lower levels of the judiciary.⁶¹

ABSTRACT

The power of constitutional review conferred on the judiciary by Article 81 of the Japanese Constitution was supposed to revolutionise the polity into which it was imported. In reality, the Japanese judiciary has exhibited a notoriously restrained form of constitutionalism characterised by the accordance of significant deference to government policy and interpretive restraint in the absence thereof. This paper examines the phenomenon of restrained judicial constitutionalism in Japan, with reference to the consequential dichotomy between the literal and actual scope of constitutional rights protection, in order to argue that existing theories suggesting political influence over or intervention in judicial appointments and the performance of constitutional review are unsatisfactory and to proffer an alternative, more cogent theory explaining the phenomenon by reference to a culturally induced indigenisation of the power of constitutional review.

ZUSAMMENFASSUNG

Indem Art. 81 der japanischen Nachkriegsverfassung den Gerichten die Aufgabe übertragen, über die Einhaltung der Verfassung zu wachen, sollte das Gemeinwesen, in welches diese Verfassungsmäßigkeitskontrolle Eingang fand, revolutioniert werden. Demgegenüber ist die Praxis der japanischen Justiz durch eine sehr zurückhaltende Form des Konstitutionalismus gekennzeichnet; die Rechtsprechung des Obersten Gerichtshofs ist für starke richterliche Selbstbeschränkung zugunsten der Regierung und eine ausgeprägte Zurückhaltung bei der Rechtsauslegung bekannt. Der Beitrag untersucht das Phänomen des beschränkten gerichtlichen Konstitutionalismus und die daraus resultierende Diskrepanz zwischen Recht und Rechtswirklichkeit der verfassungsrechtlichen Garantien. Er vertritt die Auffassung, dass die bisherigen Versuche, dieses Phänomen mit politischer Einflussnahme auf die Richterernennungen und auf die Ausübung der Verfassungsmäßigkeitskontrolle zu erklären, unzureichend seien. Überzeugender lasse sich das Phänomen des begrenzten Konstitutionalismus als Ausdruck der Akkulturation auffassen, die das Konzept der Verfassungsmäßigkeitskontrolle in Japan erfahren habe.

(Dt. Zusammenfass. durch d. Red.)

61 See TAKAYUKI, *supra* note 55, 16–18.