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ADMINISTRATIVE CONTROL OF JAPANESE JUDGES

Setsuo MIYAZAWA

1. Introduction

Japan has been known for her low civil litigation rate. Various explanations have been proposed. The most recent of these focuses on the higher predictability of court decisions and the higher probability of out-of-court settlement as its result (Ramseyer and Nakazato, 1990). There are different ways to produce highly predictable court decisions. One of them is to abolish jury trials. Ramseyer and Nakazato (1990) emphasize this point. Their premise is that professional judges are more predictable than lay people. Then, is it possible to further increase the predictability of the outcome of a court when only professional judges decide the case? This is the subject of this paper.

While the civil litigation rate is generally low in Japan, there is one area in which the rate is particularly low. Specifically, it is litigation that challenges the legality or constitutionality of governmental actions (*gyosei sosho* in Japanese). Only 1,119 such suits were filed in 1989. This figure is considered to be extremely low compared to other developed countries. One observer (Kisa, 1990a: 316) argues that the per-capita rate of such administrative litigation in former West Germany, for instance, was more than eight hundred times that of Japan. The main reason for this fact is easy to hypothesize. It has been uniformly difficult for plaintiffs to win in such cases and this fact deters litigation against governmental actions. Then, how does the Japanese judicial system maintain such uniformity among professional judges who are supposed to make independent decisions according to their own conscience, bound only by the Constitution and statutes (Article 76 (3), Japanese Constitution). This paper deals with this question.

I assume that at least in most liberal capitalist countries, appellate courts unify interpretations of law by reviewing lower-court decisions in individual cases. Lower-court judges cite supreme-court precedents and other appellate-court decisions on the basis of their own judgments. Even the supreme court must wait until the case reaches it before having a chance to express its own interpretations of the relevant law.

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The Japanese Supreme Court needs not to be so passive in its relationship with lower-court judges. It can convene a conference of judges who are presiding over the cases in which the central government has been involved as a defendant, and can express its opinions about proper interpretation of the relevant law before those cases actually reach it. Such opinions are usually favorable to the government. This and other administrative mechanisms make it possible for the Supreme Court to control or influence lower-court judges and ensure that lower-court judges do not cause problems to the government, business, and friendly foreign governments. This paper will provide an outline of such mechanisms and discuss their cultural and political backgrounds.

2. Status of Japanese Judges

Japan has approximately two thousand judges who are qualified lawyers to staff fifty district courts, fifty family courts, eight high courts, and their branches. In addition, there are approximately eight hundred summary court judges most of whom are not qualified lawyers. They hear petitions for warrants and decide cases in which the value of a plaintiff's claim is worth less than nine hundred thousand yen or which carry only a possible fine. This paper will focus on the first group of regular judges.

The occupational status of most judges in Japan is similar to that of employees of the executive branch of the government. They are virtually life-time employees of a national governmental bureaucracy called the judiciary.

Some five hundred people from among approximately twenty thousand applicants pass the bar examination in Japan each year[1]. On the average, those who pass the bar examination have spent six years since finishing undergraduate legal education and their average age is around twenty eight. Then they spend two years at the Judicial Research and Training Institute for practical training in all three branches of the legal profession, namely, the judiciary, prosecution, and private bar. After finishing this two-year training, sixty to one hundred trainees are recruited by the Supreme Court as assistant judges. The Supreme Court presents the Cabinet a list of trainees it wishes to hire and the Cabinet appoints them.

They are promoted to full judgeships after working for ten years and can be reappointed every ten years thereafter, until the mandatory retirement age of sixty-five. While the law permits the Supreme Court to appoint full judges from among private attorneys and law professors, (Article 42, Code of Courts) such appointments have been rare. Judges are appointed not to work at a specific court, but to work in the national court system.

During each ten year term, they are transferred from one court to another three times on the average. The expectation is that they spend approximately three years each at a small, a medium, and a large court. Judges are promoted in the process of such transfers. Except for branch

courts which have only one or two judges, every court is divided into sections, each of which consists of a chief judge and two or three associate judges. A judge starts his career as an associate judge at a district or a family court, moves up to a high court as an associate judge, returns to a district or a family court as a chief judge, and then goes back to a high court as a chief judge. Salary also rises according to their seniority. By the time they reach the age of mandatory retirement, approximately half of the same entering cohort has left the judiciary and become private attorneys. Many of the remaining judges can expect to become the head of a district or family court at least once before their retirement.

However, differences in the speed of promotion and the rate of salary increase among judges particularly after the second renewal of appointment, after serving for twenty years. By that time, a small number of judges are promoted to the rank of chief judge at a large court earlier than most of their cohort mates. Differences in salaries are not made public, but anyone can determine them because seating of judges at official meetings are arranged according to the applied pay scale. Many judges realize that they are ranked lower by the Supreme Court than their elite cohort mates and that there will not be much chance of promotion for them. This is a major consideration in their decision to leave the judiciary. This power to decide transfer and promotion of lower-court judges, therefore, gives considerable leverage to the Supreme Court. I will later cite some cases in which this power appears to have been used quite consciously to encourage certain judges to leave the judiciary.

A small number of judges who have been promoted faster than most of their cohort mates can expect to head more than one district or family court before reaching the age of sixty. Heads of high courts are selected from among this group. Usually, one or two judges of the same cohort can reach the rank of high court head. I will later describe what types of judges usually can get this fast-track promotion.

The Supreme Court consists of fifteen justices. The Constitution does not require them to be qualified lawyers. Associate justices are appointed by the Cabinet and the chief justice is appointed by the emperor upon nomination by the Cabinet. Usually, the chief justice recommends a specific candidate to the prime minister. There is no open hearing for the selection, nor is there any legislative confirmation. It is now an established custom to appoint five or six justices from among career judges who have moved up in their judicial careers to the rank of high court head, particularly in Tokyo or Osaka, before sixty-three or -four years of age. It is also an established pattern to appoint the chief justice from among them. (Other justices usually include five private attorneys, a prosecutor, a diplomat, a head of the Cabinet Legislative Bureau, and a law professor.) On the average, only one judge from two entering cohorts can become a Supreme Court justice. The mandatory retirement age for Supreme Court justices is seventy.

The system of ten-year term was introduced by the post-war Constitu-

tion as a guarantee of judicial independence (Article 80, Japanese Constitution). It in fact gives the Supreme Court important leverage to control lower-court judges. It is true that denial of reappointment is rare. That happened only once in 1971. This judge was an active member of an organization of lawyers called *Seihokyo* or the Young Lawyers' Association (YLA) that included private attorneys and law professors as well as judges. The suspected reason for the denial of reappointment was this membership. In saying "It was not the only reason," the Supreme Court officially admitted it. The Supreme Court also actively asked judges in this organization to leave. The message was clear and there was no need to deny another reappointment. The YLA was divided into the sections: one for practicing attorneys and academic lawyers and the other for judges. The YLA's section of judges continued to lose members and no new members were joining. The section was dissolved in 1984. I will later describe how its members have been discriminated by the Supreme Court.

The law provides that no judge shall be transferred against his own will (Article 48, Code of Courts). However, resistance to the Supreme Court's intention to transfer a judge will certainly damage his future career and thus most judges follow orders given by the Supreme Court. In this sense, lower-court judges are like employees of executive branch agencies. Moreover, the theoretical possibility of denial of reappointment makes their status much weaker than the latter.

3. General Secretariat of the Supreme Court

I have so far implied that the entire Supreme Court is involved in the administrative control of lower-court judges. Many readers must have thought that all of the fifteen justices are involved in it. That is not the case. Among justices, only the chief justice is involved in it. Daily operation of the administrative control of lower-court judges is carried out by the General Secretariat (GS) of the Supreme Court under the secretary general. The law simply provides that its function is to handle *shomu* or the general affairs of the judiciary (Article 13, Code of Courts). It sounds like a mere support function, but it is actually the most powerful part of the Japanese judiciary.

Under the secretary general and the deputy secretary general, the GS has seven bureaus of general affairs, personnel affairs, accounting, civil cases, criminal cases, administrative cases, and family cases. The bureau of personnel affairs handles recruitment, promotion, and transfer of judges, while the bureaus of civil, criminal, administrative, and family cases provide "reference services" upon request from judges in the field and convene judicial conferences in their respective areas. Since cases involving administrative agencies are special types of civil cases, the bureaus of civil and administrative cases are headed by the same chief. Approximately forty five judges are working full-time. The secretary general, the deputy secretary general, and the bureau chiefs are all judges.

While they are technically lower-court judges, judges working in the GS have supervisory power over those actually handling real cases in the field. The problem is that a small number of the same judges are repeatedly assigned to the GS and promoted faster than other judges. These judges do not decide real cases as often as other judges, but they still have a better chance to become a Supreme Court justice. In fact, all four of the most recent chief justices were formerly this type of judge.

I would like to give some examples of the career patterns of these elite judges (Shioya, 1991). Between 1983 and 1990, five judges (Katsumi, Kusaba, Onishi, Kawasaki, and Sakurai) became deputy secretary general or secretary general. All of them were old-timers of the GS. For instance, Katsumi spent only eight years outside the GS in his thirty years of his service prior to becoming deputy secretary general. Kusaba spent eighteen years of his thirty-five, Onishi spent fifteen years of his thirty-one, Kawasaki spent ten and a half of his thirty, and Sakurai spent eleven years of his thirty-one.

Except for Sakurai who is still deputy secretary general, all of them who had finished their terms as deputy secretary general became head of a district court near Tokyo and later returned to the GS as secretary general. After that, Katsumi became the head of Nagoya High Court and Kusaba and Onishi successively became the head of the Tokyo High Court. Kusaba went on to become Supreme Court justice and soon was promoted to the chief justice. One outside observer predicted in early 1991 (Shioya, 1991) that, considering the well-established promotion pattern, Onishi would also become Supreme Court justice in the near future. That happened in May of 1991.

Many of these and other judges working in the GS worked in the GS when they were still assistant judges and have repeatedly been assigned to it. By the time they have reached the position of bureau chief, they have worked together for a large part of their careers. As we have just seen, they successively occupy the same or similar positions and are virtually appointing each other to GS positions and other favored locations outside the GS. In this way, GS positions are retained by a small group of self-appointed elite judges who spend a large part of their career in administrative control of other judges.

Various justifications have been presented for strengthening the authority of the GS, for assigning same judges to positions in the GS and courts in or near Tokyo, and for assigning judges to specific courts and gradually giving different ranks to judges of the same cohort. First, the judiciary is the politically weakest branch of the government, so that it needs a full-time staff to defend its own independence and integrity. Second, GS positions need special administrative ability and political sensitivity in dealing with other governmental agencies, political parties, and other outside forces. Third, GS positions are so exhausting that its staff judges deserve preferential treatment in assignment to local courts. Fourth, there are inevitable differences in the ability in efficient disposition

of cases and propriety in legal reasoning, so that only those who can properly handle complex cases even under higher case loads should be assigned to major courts and receive faster promotion.

However, there is no plausible reason to believe that those judges who have spent a large part of their careers in administration are also better jurists in deciding real cases and should be represented in the Supreme Court with an overwhelming percentage share among those who have been appointed from among career judges. I also suspect that the specific content of decisions and outside activities of judges, rather than the efficiency of case disposition or the ability in legal reasoning, are major considerations in deciding judicial assignment. I will later present some evidence to support this suspicion.

4. Personnel Exchange between the Judiciary and the Justice Ministry

In addition to assignment to GS positions, there is another way to give judges a chance to perform administrative functions. That is to loan judges to the Justice Ministry for a limited term as a solicitor to defend the government in civil and administrative cases or to staff its bureau of civil legislation. This arrangement was introduced because prosecutors generally prefer to deal only with criminal cases as the highest position in the Justice Ministry is the prosecutor general. Now the heads of the Justice Ministry bureaus of solicitors and civil legislation and a majority of solicitors working at the Justice Ministry headquarters and local solicitor's offices are loaned judges.

These loaned judges are likely to get preferential treatment after returning to the judiciary, particularly after working in the Justice Ministry headquarters. Among the Supreme Court justices at the end of 1990, for instance, six were former lower-court judges, and two of them actually spent most of their career in the Justice Ministry (Shioya, 1991). One of them, Justice Kagawa, was an exceptional case. He joined the Justice Ministry only after working for one month as an assistant judge and stayed in the Ministry for the next twenty nine years, eventually becoming the head of the civil legislation bureau. He then returned to the judiciary, working only three and a half years as a chief judge at the Tokyo High Court and as the head of the Urawa District Court near Tokyo before becoming the head of the Tokyo High Court and, then, Supreme Court justice.

In return, the Justice Ministry loans prosecutors to the judiciary as judges. In 1989, approximately twenty judges and prosecutors are exchanged (Kisa, 1990b). Particularly noteworthy is the preferential assignment of those loaned prosecutors to major courts. From 1975 to 1989, 264 prosecutors moved to the judiciary and 67% were assigned to Tokyo and 14% were assigned to Osaka.

The GS justifies this practice of sending judges to the Justice Ministry

to defend the government, as a measure to give judges a chance to know the outside world, something that is particularly needed under the present system to recruit most judges directly from the Judicial Research and Training Institute. In addition to the Justice Ministry, the GS in fact send a small, yet increasing number of judges to other governmental agencies, law firms, and major business corporations. However, considering other measures to ensure same legal interpretations to be adopted by judges who are handling cases that involve governmental agencies and businesses, I suspect that this system of loaning judges as solicitors is also a measure to promote governmental perspectives among judges.

Indeed, this policy of loaning judges to the Justice Ministry to defend the government has been criticized because of the possibility that those judges return to the judiciary with pro-government attitudes and decide cases accordingly. This problem becomes more serious when it is combined with the practice of establishing sections specializing in administrative cases involving governmental defendants. The two sections of administrative cases at the Tokyo District Court are the most important because the central government is most likely to be sued there. In the period between 1982 and 1989, seven judges served there as chief judges. Two of them worked in both the GS and the Justice Ministry, four worked in the GS, and one worked in the Justice Ministry. Similar patterns appear for associate judges. It appears that most trusted judges are assigned to these critical positions.

The GS also appears to assign a judge with a background as Justice Ministry solicitor in order to get a desired result in a particular case at a local court. The GS can get information about important cases at local courts because judges are required to report to the GS at major junctures in the process of litigation in administrative and labor cases[2]. I would like to cite an example where the GS appears to have most effectively used this information.

In 1979, the banks of the Nagara river in Gifu prefecture was broken under heavy rain and the towns of Anpachi and Sunomata were flooded (Ode, 1987). Residents of the two towns filed separate civil suits in Gifu District Court against the government seeking damage awards as the Nagara river was classified as a major river under the management of the national government. The two cases were heard by the same section of the Gifu court, but the court reached opposing conclusions. While the court decided for the Anpachi plaintiffs 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 the administrative litigation. He was at the Tokyo High Court when ordered to move to the Gifu District Court. For a judge who had remained in the

jurisdiction of the Tokyo High Court until that time, transfer to a district court under the jurisdiction of the Nagoya High Court was an unusual move. He later returned to the Tokyo District Court in 1986, apparently having satisfied the expectations of the GS, and moved on to work at the Yokohama District Court, right next to Tokyo. In contrast, Judge Akimoto was first transferred to the Nagano District Court, and then to the Numazu branch of the Shizuoka District Court. I will later describe that assignment to a branch court often implies negative evaluation by the GS.

This case suggests both the influence of prior experience in defending the government on later judicial decisions and the relationship between judicial decisions and later treatment of judges. Japanese judges appear to need tremendous courage to decide a case in the way that is likely to displease the GS. This applies especially well to decisions that challenge Supreme Court precedents. Here is one such example.

It is prohibited for political candidates to visit households during election campaigns (Article 138, Code of Public Elections). There was a series of lower-court decisions in the fifties and sixties that held this prohibition unconstitutional in violation of the freedom of expression, but the Supreme Court held it constitutional in 1969. However, in 1979, Judge Hirayu of the Yanagawa branch of the Fukuoka District Court in western Japan, an obscure court with only himself, handed down a contrary decision (Tsukahara, 1990). He had already spent a year there by that time, but was then kept there for another five years, and was later transferred to the Ina branch of the Nagano District Court in central Japan, another minor court with only himself. He stayed there for four more years. The distance of the transfer itself is exceptional, but ten continuous years at one-judge courts should be seen nothing other than a punishment.

5. Judicial Conferences

The GS convenes conferences of judges to discuss important issues in the administration of the court system and in interpretations of law. I will focus on the latter issue, as I suspect it is a way for the GS to promote certain lines of legal interpretations without waiting for such cases to reach the Supreme Court.

The critical importance of these conferences was made clear to those outside the court system in 1987 when an attorney representing plaintiffs in a river flood case, which was filed against the government, accidentally found an internal document marked as "requiring special care." This was a thick document entitled "Materials on Handling Civil Damage Suits Against the Government Caused by Flood" and was circulated by the GS to both district and high courts in March, 1985. It contained a record of a conference of district and high court judges held at the Supreme Court in December, 1983. The topic of the discussion was the responsibility of the government in cases where floods have been caused by negligence in 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 GS tried to inform the lower-court judges of the probable content of the imminent Supreme Court decision and to encourage the attending judges to decide their cases accordingly.

The character of such judicial conferences has changed much since they started in the fifties (Kisa, 1990b). They started as forums for free discussion and judges were invited from among all of the courts. Each court sent a judge based on their own selection. Records of conferences were published and available to outsiders. Courts presenting specific opinions were identified.

They changed around 1970. Lower courts are now instructed to send a judge who is actually handling a case involving the specific issue selected for a given conference. Records are no longer available to outsiders. Participating courts are not identified even in documents for internal circulation. The GS bureau in charge of a given topic invariably presents its opinions at the end of the conference and this presentation takes the greatest amount of time. These opinions are ostensibly presented as information for lower courts that lack library, time, and staff to conduct careful analysis of these complex issues, and the lower courts are free to follow their advice. In reality, however, the GS takes these opinions seriously, and the concerned bureau presents them as their own official opinions after careful examinations among its staff, which include the bureau chief himself. 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.

A good example of such control over lower-court judges is the two conferences held in Tokyo in 1976 and 1982. The issue at both conferences was the standing of third parties to sue in administrative cases (Yukawa, 1990). Article 9 of the Code of Administrative Litigation provides that only those who have "legal interests" to do so may file a suit to nullify the governmental action. This procedure was often used in cases of environmental litigation that challenged the prefectural governor's judgement in granting permission for the reclamation to build power plants and other potentially polluting facilities. A series of cases since 1968 had granted rights to sue to local residents who did not have fishing and other interests clearly recognized by statutes. The conclusions of the conferences in 1976 and 1982 clearly denied standing to such residents and all decisions on this issue since 1976 took the same position. In one case, for instance, the district court did grant standing in 1976, but it was reversed by the high court in 1982 and the high court decision was upheld by the Supreme Court in 1985.

Some might wonder why lower-court judges assigned to the GS bureaus were able to make correct predictions of future Supreme Court decisions.

The Japanese system of Supreme Court clerks appears to be the key. Supreme Court clerks were apparently modeled after the system in use at the U.S. Supreme Court. Unlike the U.S. system, however, clerks are not young lawyers who have just finished law schools. Japanese clerks are experienced judges who have often worked in the GS or who have taught in the Judicial Research and Training Institute. Moreover, also unlike the U.S. system, clerks do not work for individual justices, but for the entire court. The office of clerks now has approximately thirty judges. They are divided into three groups under the direction of chief clerk who manages the entire office and the three senior clerks who each manages one of the respective groups. The fifteen justices are divided into three petty courts each consisting of five justices. When a case is filed, it is heard by one of these petty courts. One of the justices is assigned to the case to draft a decision, but research in relevant precedents, theories, and other materials is carried out by a clerk who is also assigned to the case. This clerk presents materials and alternative conclusions to the assigned judge and, hence, to the entire court. One former clerk in fact told me that one of their major functions was educating justices. The assigned clerk even publishes explanations of the decision and his explanations are often taken as authoritative interpretations.

I do not claim that GS judges and Supreme Court clerks actually discuss cases pending in the Supreme Court. However, since the GS selects judges to work as clerks, only the most trusted judges are likely to be sent to the office of clerks. As the Supreme Court clerks and the judges at the GS share the same perspective, Supreme Court's decisions might be at least predictable to the GS.

Returning to the impact of judicial conferences on lower-court judges, the most common justification of this influence is the lack of ability of most lower-court judges to decide complex cases. A second justification is the benefit of a court system that works like a hierarchical governmental agency. Judge Sonobe, one of the best known judges in Japan who moved from a university law faculty to the judiciary and worked as a Supreme Court clerk as a leading specialist in administrative litigation, once said that it was natural for lower-court judges to accept GS views, for GS judges are the ones who are the most resourceful (Sonobe, 1986:42). He also implied that given the way in which the court system now works, it is futile for outside administrative law scholars to try to influence local judges through their books, articles, or briefs (Sonobe, 1987:302). Any legal question of importance is decided by GS judges, Supreme Court clerks, and other elite judges and handed down to local judges. However, this practice undermines the principle of judicial independence as it applies to the relationship among judges. It also undermines the significance of having a system to settle differences in interpretations through appeals of individual cases. A footnote here is that Judge Sonobe left the judiciary, briefly returned to teaching, and was later made Supreme Court justice as the replacement for a retiring justice who was formerly a Tokyo Univer-

sity law professor. Since he was appointed with the qualification of having been a former law professor, no other academic lawyer will have a chance to become justice before his retirement in 1999.

6. Membership in Outside Organizations

The official justification for the judicial conferences I have just described is that they are occasions for judges to freely discuss matters of their interest. However, the reality is that they are carefully orchestrated by the GS as a mechanism to present its own views to judges. When judges seek forums where they can truly engage in free discussions about topics of their own selection, the GS punishes them. The GS can discriminate against such judges in terms of transfer, promotion, and salary.

The best known cases of discrimination were members of the judicial section of the YLA. This organization was established in 1954 by approximately 280 young lawyers including some ten judges (Seinen Horitsuka Kyokai, 1990). Its main purpose was the promotion of ideals expressed in the present Constitution. The YLA recruited new members from trainees at the Judicial Research and Training Institute. Eventually, a pattern emerged in which approximately one third of the new assistant judges joined the YLA every year. The total number of judges in the YLA reached 140 in 1963 and judges' section of the YLA started to publish its own periodical dealing with current legal issues from a liberal perspective.

Around 1968, a conservative political magazine published a list of judges who were allegedly members of the YLA and called them "communists." There was also a series of liberal decisions, including some handed down by the Supreme Court, particularly in the area of labor law. Conservative politicians started to pay greater attention to the judiciary and, in 1969, the justice minister said "The judiciary has been out of our control, but there are biased decisions, and we should do something about the judicial system."

Also in 1969, Judge Fukushima of the Sapporo District Court who was presiding over a case involving the constitutionality of the Self Defense Forces, exposed the fact that the head of the court had asked him to honor the government's position. Initially, the head of the court was reprimanded and called back to Tokyo. Eventually, however, conservative politicians put both of them through the impeachment procedures in the Diet. The decision was handed down in 1970. There was no impeachment of the head of the court, while the impeachment of Judge Fukushima was suspended. In other words, Fukushima's exposure was taken to be a more serious crime than the fact that the head of the court had intervened in the decision of another judge's case. Another factor for the harsher treatment of Fukushima was undoubtedly his membership in the YLA.

In 1970, the secretary general of the GS stated that "since membership in political organizations could invite public suspicion of political influences in decisions, judges should not join such organizations," and Chief Justice

Ishida stated "Extreme nationalists, militarists, and anarchists, and clear communists are morally undesirable as judges." While Ishida named various ideologies, the message was clear. The YLA was considered as a communist organization and its membership was made a most serious offense for judges. The GS asked member judges to leave the YLA. All of the assistant judges in the GS who belonged to the YLA sent a withdrawal notice to the YLA by certified mail and other judges followed them. The membership of the YLA's judicial section dwindled and, as I have already described, the section was dissolved in 1984.

Since that time, judges who have not clearly discarded their membership have received discriminatory treatment. I would like to give three examples (Tsukahara, 1990). All of them share Judge Hirayu's problem, namely, controversial decisions which were contrary to the Supreme Court's position on the issue of prohibition of house visits for political campaigns.

The first example is Judge Haruhiko Abe, a graduate of Tokyo University and formerly a leading theoretician in the judicial section of the YLA. Like Hirayu, he held the prohibition of house visits for political campaigning unconstitutional in 1968. In 1972, he was also a member of the court that held the heavier penalty proscribed by the Penal Code for homicide of a parent was unconstitutional. While the Supreme Court took the same position in 1973 for the latter issue, Judge Abe has been assigned only to family (five years) or branch courts (twelve consecutive years) ever since. In spite of his experience of more than thirty years, he has never been given a position of chief judge.

The second example is Judge Hanada. Also a graduate of Tokyo University, he was sent to the United States for study when he was an assistant judge. However, he took a similar position to that of Hirayu and Abe in a house visits case in 1969 and was also a leading theoretician of the YLA. He publicly defended the YLA and has also been assigned only to family (five years) or branch courts (twelve years). He resigned in 1987 when ordered to move to another branch court to replace a much younger judge.

The third example is Judge Kunio Ogawa. His career was unusual from the very beginning. He was first assigned to a summary court for seven years and later assigned mostly to branch courts (fifteen years, including twelve consecutive years). He held the house visits prohibition unconstitutional in 1979.

These judges are most untrustworthy from the perspective of the GS. Discrimination of most members of surviving YLA members is more subtle. There is a survey of transfer patterns of judges who joined the judiciary between 1966 and 1970 (Sakaguchi, 1988). This survey analyzed for each cohort how many judges have been twice transferred to a branch court or failed to get transfer to a major court in three consecutive transfers. Depending on the cohort, percentage of such judges varied from thiyty six to sixty percent for members and from twelve to nineteen percent for non-members. The YLA members clearly face a higher risk to get such

unfavorable assignment.

Another group that has been discriminated by the GS is members of *Saibankan Konwakai* or the Friendly Meeting of Judges (FMJ). This group was formed in the middle of the conservative attack on YLA members and, unlike the YLA, participation is limited to judges. The FMJ still holds annual meeting and publishes presented papers in a leading law journal. Academic quality of such papers is quite high. Unlike the YLA, the FMJ does not have fixed members, except some leaders who plan meetings and send out announcements. Discriminatory treatment focuses on such leaders in the same manner as that applied to YLA members.

In these cases, impacts of organizational membership and legal interpretations are difficult to distinguish as the two factors tend to coexist. It seems, however, that organizational membership has been used by the GS as the primary index to classify judges and individual decisions have worked as an aggravating factor.

7. Culture and Politics

How has this system of administrative control developed? One may try both cultural and political explanations.

A cultural explanation might focus on the legacy of the prewar structure of the Japanese judiciary and the conception of the judiciary as a governmental agency without much difference from agencies of the executive branch. Before the war, the judiciary was part of the Justice Ministry and judges and prosecutors freely changed their jobs. In spite of the American occupation that separated the judiciary from the Justice Ministry, the centralized court structure was maintained, and prewar judges remained in the judiciary and kept the prewar organizational culture with them. While the legal education under the post-World-War-II Constitution brought in more independent-minded, liberal judges into the judiciary and gave them a chance to liberalize legal interpretations in many areas, the political climate around 1968 allowed those conservative judges to regain control over the entire structure.

However, this cultural explanation itself assumes the impact of political factors that allowed the legacy of prewar organizational culture to resurface in the judiciary. I have already described the political factor which I believe was the most important, namely, the conservative attack on liberal judges around 1968. Tightening of administrative control of judges since that time can at least partially be understood as a measure to avoid a potentially more damaging intervention by conservative politicians. I should note, however, that there was also an element within the judiciary that shared the perspective of conservative politicians and actively responded to their expectations. The case in point is Justice Ishida who headed the Supreme Court from 1969 to 1973, exactly when the judiciary was under the strongest pressure from conservative politicians (Yamamoto and Okada, 1986).

In 1966, the Supreme Court handed down an epoch-making decision in a case involving the labor union of mail workers. While Article 28 of the Constitution guaranteed the right of workers to form a union and take collective actions, statutes prohibited strikes by employees of governmental agencies and public corporations and provided criminal punishments for strikes. In this decision in 1966, the Supreme Court held that unless they caused grave adverse effects to the public, no criminal punishment should be applied to strikes even carried out by employees of public corporations. The theoretical leader behind this decision was Justice Jiro Tanaka, a former Tokyo University law professor and the founding father of the modern administrative law scholarship in Japan. In the same year, the Supreme Court handed down a similar decision in a case involving teachers, namely, employees of local governments. In this way, the constitutional protection of worker's rights was extended to employees of both public corporations and governmental agencies.

These and other liberal decisions alerted conservative politicians, particularly Tokutaro Kimura. Kimura was the last justice minister right after the war prior to the separation of the judiciary and the prosecution. He took these decisions to mean a national crisis and was particularly worried about one scenario, namely, the promotion of Justice Tanaka to chief justice. The prime minister at that time was Eisaku Sato, who later received a Nobel peace prize. The incumbent chief justice was to retire in 1969 and Sato, a Tokyo University graduate, was considering the promotion of Tanaka. Realizing this possibility, Kimura met Sato in December, 1968, told his ideas, and recommended another person as chief justice. Kimura's choice was Justice Ishida. Kimura had known Ishida for nearly thirty years because Ishida was the head of the personnel department of the Justice Ministry under Kimura. Sato took Kimura's advice and Ishida became chief justice in January, 1969.

Since Tanaka and other liberal justices still remained, Ishida had to wait a few more years to overturn liberal decisions. He did so by replacing retiring liberal justices with conservative ones, including a former ambassador to the United States and a former head of the Cabinet Legislative Bureau that reviews bills proposed by the government. The Foreign Ministry and the Cabinet Legislative Bureau have kept at least one justiceship ever since. The turning point came in April, 1973. The Supreme Court decided three cases involving strikes by employees of the governmental agencies and public corporations and overturned its 1966 decisions with a eight-to-seven majority. Tanaka had been disappointed and demoralized and left the Supreme Court in March, 1973, one month before the conservative victory, leaving three years until retirement. Ishida retired with satisfaction in May, 1973, one month after his victory. Conservative justices continued to increase and, in a similar case decided in 1976, the decision was unanimous. By the way, Ishida's relationship with Kimura did not end by his retirement from the chief justiceship. In March, 1974, Kimura retired from the presidency of the Japanese Association of

Japanese Swordsmanship and Ishida succeeded him.

After Ishida, excluding two brief terms served by a former private attorney and a former prosecutor, the chief justiceship has been held by people like Ishida who accumulated their career in administrative control of other judges. Such administrators have justified the present system in terms of the need of political neutrality of the judiciary. Their conception of neutrality appears to mean simply the sharing of the perspective of the dominant political group in the legislative and administrative branches of the government. They have appointed like-minded judges to the GS and other key positions to control other judges and such elite judges have promoted each other to higher positions including the chief justiceship of the Supreme Court.

They have not only promoted conservative interpretations of law, particularly of the Constitution. They have also kept the judiciary very small in spite of tremendous economic growth of Japanese society which undoubtedly has increased potential sources of legal disputes. Per capita number of judges, including summary court judges, has constantly decreased since 1950 (Kisa, 1990b). The number of judges for one million people was twenty eight in 1950, twenty five in 1970, and twenty two in 1989. Conscious reduction of organizational size and authority by its own members is totally against an accepted wisdom of organizational sociology. Organizational sociologists particularly expect that governmental agencies always try to expand their size and authority. However, the reduction of the size and authority of the Japanese judiciary can be understood as a rational behavior from the perspective of elite judges. An expanded judiciary will make it more difficult for them to control other judges and increase chances for the public to challenge the government. Elite judges seem to find their satisfaction in their role as a rear guard of the status quo of the government.

Unlike the United States, Japan has no popular election nor legislative confirmation of judges. Unlike Germany, we do not decide judicial appointment with consideration of political identifications. Our judiciary may then appear to be more independent from political influences. However, this also means a lack of democratic control, and this alienation from democratic process allows internal elites to promote a single political perspective and deprive independence of a vast majority of judges.

I suspect that there are different ways to change the Japanese judiciary in order to give more freedom to judges and, thus, greater chances for the public to win in administrative litigation. One way may be to abolish the system of recruiting the vast majority of judges directly after they have finished their two-year practical training at the Judicial Research and Training Institute and thus drastically reduce the chances for the Supreme Court General Secretariat to influence the views of these younger judges. The Japanese Federation of Bar Associations has proposed this reform and asked the judiciary to recruit judges from among experienced practicing attorneys.

Another possibility may be to appoint judges to specific courts until their retirement and abolish the present practice to relocate them every few years. Judges could then decide more freely without the need to worry much about possible adverse effects on their future career.

Still another, more radical possibility may be to politicize the judiciary in such a way that judicial appointments, at least those at the Supreme Court, are publicly reviewed and different political perspectives are guaranteed to have representation in the judiciary. A thoroughgoing cross-national socio-legal study on Japan and West Germany (Kisa, 1990a) suggests the need for such a restructuring of the Japanese judiciary.

Given the stable control of the political process in Japan by the conservative Liberal Democratic Party, however, I am pessimistic about the possibility to implement any of these reforms in the foreseeable future.

NOTE

1. The Justice Ministry, the Supreme Court, and the Japanese Federation of Bar Associations agreed to increase admissions to approximately seven hundred by 1993. They also agreed to discuss the matter again in 1995.
2. Judges are also required to file case clearance records. Clerical staff actually prepare this report.

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