

Article

A Judicial Response to the Call of National Reconstruction: Revisiting the Supreme Court of Japan's Adjudication of the Cabinet Order No. 325*

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ABSTRACT

Most states in East Asia had undergone foreign interference, invasion, or colonization under the West Powers before they finally embraced modern constitutionalism. While nowadays modern constitutionalism seems to have enjoyed universal acceptance and worldwide practice, what relatively tends to be ignored is the struggle of the recipient states to embrace, adapt, and accommodate the modern constitutionalism they inherited to their local political and social-economic context. The very issue which especially attracts legal scholars' attention is how the constitutional court, usually assigned the significant role as the guardian of constitution in modern constitutionalism, manages to safeguard constitutionalism while also attends to the needs of social-political transition.

In East Asia, Japan was the case that always appeal to the curiosity of legal scholars. History proves the astounding miracle of Japan's notable success in how it managed to seek national identity, reconstructed its society, and achieved economic prosperity after foreign occupation. Interestingly, however, as if serving as the comparison to the booming development of the post-war Japan, the Supreme Court

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of Japan has always been known as a typical of a conservative court with unequivocal deferent tendency to the Government. It makes one wonders if the Court could have had to do with the success of Japan's national reconstruction, and ever played any significant role contributing to Japan's remarkable experience.

This Article analyzes the Supreme Court of Japan's ruling upon the constitutionality of Cabinet Order No. 325 in 1952. It was a landmark case in the history of the Court, in which the status of the occupation was reviewed for the first time, with the Orders of the SACP called into question as contravene the Constitution. This Article attempts to, through a contextual analysis in light of its social-political background, revisit this case and explore the Court's contribution by rendering this decision in response to the Nation's need of national reconstruction. This Article concludes that the Court played a significant role in this adjudication. In contrast to the general assumption of the Court's conservative tendency, the Court in this case was conscious and strategic to attend to the needs of national reconstruction, including consolidating sovereignty and national identity, upholding the rule of law and human rights protection, and empowering the burgeoning civil society.

Keywords: *Constitutionalism; Legal Transplant; The Constitution of Japan; The Supreme Court of Japan; National Reconstruction*

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I. INTRODUCTION

Most states in East Asia have previously experienced foreign interference, invasion, or colonization by the Western Powers before they finally embraced modern constitutionalism.¹ Generally, constitutionalism in this region is the result of foreign influence encountering local dynamics and the efforts of autonomous momentum responding to external drive.² Modern constitutionalism is characterized by liberal democracy conceived in fundamental principles such as checks and balances, separation of power, rule of law, and the protection of human rights.³ It owes its origin to Western civilization, and later spread to other regions of the world.⁴ While modern constitutionalism seems to have enjoyed universal acceptance and worldwide practice in this day and age, what tends to be ignored is the struggle of the recipient states to embrace, adapt, and accommodate the modern constitutionalism that has been introduced to their local political and social-economic context.⁵ Particularly in a country where modern constitutionalism is introduced, if not imposed, at the critical moment when

1. See Albert H. Y. Chen, *Pathways of Western Liberal Constitutional Development In Asia: A Comparative Study of Five Major Nations*, 8 INT'L J. CONST. L. 849 (2010) (demonstrating that in this Region whether constitutionalism eventually triumphs in a particular jurisdiction is determined more by politics and the contingency of historical events, such as wars and foreign interventions).

2. A recipient state of foreign legal system may well take quite different attitudes toward legal transplant, including borrowing, rejection, or distortion; legal borrowing has never been as easy as one might assume it to be. See Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244 (2003) (arguing that legal borrowing is inevitable while at the same time extremely difficult and at times impossible).

3. Despite trivial differences, constitutional law scholars generally agree on these principles as the most fundamental elements of modern constitutionalism, probably plus a variety of additional advanced features. See, e.g., Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (M. Reimann & R. Zimmerman eds., 2006) (identifying three components of constitutionalism as a commitment to the rule of law, a reasonably independent judiciary, and regular and free and open elections with a reasonably widespread franchise). See also Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008) (defining the components of constitutionalism as to include sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law; to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation).

4. For the development of modern constitutionalism, see Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995) (identifying seven waves of constitution-making from the late eighteenth century to the present, and discussing their momentums and mechanism).

5. Though with constitutions containing similar elements, states may have adopted modern constitutionalism on varied grounds and for different purposes, depending on their particular historical and socio-political context in constitution-making. See Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Constructed*, 3(2) NAT'L TAIWAN U. L. REV., Sept. 2008, at 111. (arguing with the distinctive experiences of Japan, Korea, and Taiwan that East Asia constitution-making is neither of any mere borrowing from nor of any resistance against western constitutionalism).

drastic social and political changes are in full swing, the prospect of liberal democracy, the development of the rule of law, and social-economic prosperity depend largely on how the local community reacts to transitional challenges. The issue of particular interest to legal scholars is how the Constitutional Court, usually assigned the significant role as the guardian of constitution in modern constitutionalism, manages to safeguard constitutionalism while also attend to the needs of social-political transition.⁶

Japan is arguably the state that has experienced the fiercest struggle and made the most remarkable achievement with modern constitutionalism in East Asia. Japan was the very first state in this region to embark on the journey of modernization. Although it had consciously identified itself early on, and later successively proved itself as among the most developed states in East Asia, Japan only ended up being recognized as the notorious invader in WWII. After the war, as the defeated nation under the supervising occupation of the Supreme Commander for the Allied Powers (*hereinafter* the SCAP), for the first time in its history, Japan received seven years of overall foreign intervention, during which the SCAP purged the nation of imperial extremists and political dissidents, and imposed upon it the Peace Constitution dedicated to world peace and the protection of human rights, at the cost of eternal renunciation of military forces. After the end of the occupation, left with an imposed constitution and reshuffled domestic politics, Japan had to restart and resume its unfinished journey towards modernization. History proves Japan's astounding success in how it managed to seek national identity, reconstruct its society, and achieve economic prosperity. Interestingly, however, as if serving as a comparison to the booming development of post-war Japan, the Supreme Court of Japan has always been known as a conservative court with unequivocal deference to the government. As a result, it raises the question of the Court's contribution to the success of Japan's national reconstruction and remarkable experience.

For this purpose, the Supreme Court of Japan's ruling upon the constitutionality of Cabinet Order No. 325 in 1952 (*hereinafter* the Cabinet Order 325 Case) is a case that deserves deeper analysis.⁷ By any measure, it was a landmark case in the history of the Court, in which the status of the

6. Constitutionalism in some jurisdiction that are called upon to cope with social-economic or political transition develops features deviating from classical constitutionalism, one of which is to depend on the judiciary in resolving hyper-sensitive political disputes. Such transitional constitutionalism is marked by the emergence of unconventional constitutional adjudication, including the widespread establishment of constitutional court with the power of judicial review, and unconventional constitutional interpretations rendered by these newly established or reinstated courts. See Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism*, 4(1) NAT'L TAIWAN U. L. REV. 145 (Mar. 2009).

7. Saiko Saibansho [Sup. Ct.] July 22, 1953, 7 Saiko Saibansho keiji hanreishu [Keishu] 1562 (Japan).

occupation of Japan was reviewed for the first time, and the Orders of the SCAP was alleged to contravene the Constitution. This Article attempts to, through a contextual analysis in light of its social-political background, revisit this case and explore the Court's contribution to Japan's experience through this decision in response to the nation's need of national reconstruction. The following paragraph is divided into four parts. Part II discusses the background of this case, including the SCAP occupation and the Peace Treaty, the making of the Japanese Constitution, and the social context of the 1950s in Japan. Part III introduces the Cabinet Order 325 case, covering the controversy and the issues, the ruling of the Court and the opinions of the justices, and the effects and aftermath of the decision. Part IV explores the significance of this decision through a parallel comparison and a contextual analysis of the majority opinion, the concurring opinion, and the dissenting opinion. Part V draws the conclusion.

This Article concludes that the Court played a significant role in this adjudication. In contrast to the general assumption of the Court's conservative tendency, the Court in this case took a rather communitarian approach in resolving the dispute of transitional justice. The Court was conscious and strategic to attend to the needs of national reconstruction, including consolidating sovereignty and national identity, upholding the rule of law and human rights protection, and empowering the burgeoning civil society. Though this case study may not suffice to serve as the foundation for drawing a general conclusion on the Court's nature, it sheds some light on the Court's rarely appreciated deliberative policy and strategic style.

II. THE BACKGROUND

The significance of this case must be appreciated in light of Japan's transitional background in the early years of the Post-war era. In history Japan has always been known as a keen learner and shrewd imitator, famous for its instincts of cultural innovation and transformative adaptability. In response to the coming of the west imperial states in the late nineteenth century, which wielded unprecedented influence and threatened its national and economic independence, Japan was the very first state in East Asia to launch a national movement and embark on the road toward modernization. However, the patriotic zeal for national reform and progress soon reached its peak and finally gave way to the unbridled fanaticism of militarism; this nation turned out to be the notorious invader in the Far East during WWII. After the war the SCAP occupied and took control of Japan, during which a series of policy measures were initiated to de-militarize and democratize Japan; particularly, the Japanese Constitution was the deliberate design of the SCAP to restrain this nation. While the signing of the Peace Treaty

marked the end of the occupation, Japan was left on its own to recover from the past trace of foreign domination. Above all, the post-occupation Japan was characterized by static politics and the momentous civil society.

A. *The Occupation and the Peace Treaty*

Japan had embarked on the road toward modernization in the late nineteenth century.⁸ The arrival of Commodore Matthew Perry of the United States Navy between 1853 to 1854, also known as the *Perry Expedition*, or the *Kurofune* (black ship) Incident, rendered profound impacts upon the land, ending the two centuries of the Tokugawa rule, and opened Japan to the world for the first time. While the Meiji Restoration, with the Emperor's concentrated power and the whole nation's concerted action, entailed unprecedented progressive reforms that made Japan the first modernized country in Asia, it also led this nation to embrace aggressive militarism and launch invasions. The War came to its end in 1945 not long after the Allied Forces dropped two atomic bombs in Hiroshima and Nagasaki, and Japan admitted unconditional surrender in the ruins of the War. Given that the Japanese Empire had now dissolved, the Allied Powers occupied and took charge of Japan with U.S. General MacArthur as the Supreme Commander. During the occupation, the SCAP with the full cooperation of the Japanese Government launched a series of measures aimed to root out the remnants of the militarists, and to strengthen liberal democracy in Japan. Measures taken included the trial of war criminals in the International Military Tribunal for the Far East (known as the Tokyo Trial), the disarmament of the Japanese military complex, the purge of the right-wing bureaucrats in the government, the dissolution of militarist communities and social groups, the re-integration of the Japanese industrial and commercial tycoons, the reform of the educational system, and above all, a new Japanese Constitution.⁹

Even after the Constitution of Japan was promulgated, the SCAP continued to rule this country and carried on with its cleansing policies. The occupation of the Allied Powers in Japan did not end until 1952, when the Peace Treaty with Japan (*hereinafter* the Peace Treaty) came into force. The Peace Treaty officially ended World War II, formally renounced Japan's position as an imperial power, and allocated compensation to Allied civilians and former prisoners of war who had suffered under Japanese war crimes.¹⁰

8. For the history of Japan's modernization, *cf.* JAMES L. MCCLAIN, *JAPAN: A MODERN HISTORY* 119-397 (2002).

9. For the details of SCAP's policies of conducting cultural, political, social-economic reforms, *see* TAKEMAE EIJI, *THE ALLIED OCCUPATION OF JAPAN 199-405* (Robert Ricketts & Sebastian Swann trans., 2002).

10. Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 45 (entered into force on 28 April 1952).

Notably, in the same year, the Security Treaty was signed along with the Peace Treaty so as to create a cooperative relation between Japan and the U.S., and ensure the security of the East Asian region upon entering the bipolar politics in the Cold War. According to the Security Treaty, to make for Japan's renouncement of its own military forces in the Constitution, the U.S. armed forces were allowed to station in Japan to maintain regional security.¹¹ As a result, Japan along with neighboring states in East Asia including Korea, Taiwan, and the Philippines became the bastion on the front in the U.S.'s containment policy to prevent the spread of communism. Though officially recovering full sovereignty and resuming independence with the enforcement of the Peace Treaty, Japan was not fully exempted from the influence of the U.S. and international politics.¹²

B. *The Constitution of Japan*

Unequivocally, one of the most prominent and enduring legacies of the SCAP to this day is the Japanese Constitution of 1947. The Constitution, also known as the "Postwar Constitution" or the "Peace Constitution", was intended by the SCAP to replace Japan's previous militaristic and imperial sovereignty system with liberal democracy based on popular sovereignty, and to forever renounce the use of armed forces for eternal world peace.¹³ The Constitution of the Empire of Japan enacted in 1889, also known as the Meiji Constitution, provided for a governmental system of mixed constitutional and absolute monarchy; according to the Constitution, the Emperor of Japan was the supreme ruler of the state, and the Cabinet whose Prime Minister would be elected by a Privy Council were his followers. Though adopting a rough form of separation of power, under the Meiji Constitution substantial power was highly concentrated on the Emperor whose competence under the law was almost subject to no limitation; rule of law and human rights protection were compromised in the Meiji Constitution.¹⁴ As a result, after the war the Meiji Constitution was regarded by the SCAP as the paramount obstacle that "should be removed to [sic] the

11. Security Treaty Between the United States and Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3329 (entered into force on 28 April 1952).

12. MICHAEL SCHALLER, *ALTERED STATES: THE UNITED STATES AND JAPAN SINCE THE OCCUPATION* (1997) (providing a detailed history of LDP rule with particular emphasis on its effect on international relations).

13. The Japanese Constitutional theory is built on the proposition that pacifism, popular sovereignty and the guarantee of fundamental human rights are the foundations of the constitution. A more detailed discussion of these principles and later practices, see John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, in JAPANESE CONSTITUTIONAL LAW 39 (Percy R. Luney, Jr. & Kazayuki Takahashi eds., 1993).

14. KENSHŌ NIHONKOKU KENPŌ: RINEN TO GENJITSU [EXAMINING THE CONSTITUTION OF JAPAN: THE IDEA AND REALITY] 4-21 (Kenpō Kyōiku Kenkyūkai ed., 1998).

revival and strengthening of democratic tendencies among the Japanese people.”¹⁵

The following historical facts surrounding the adoption of the Constitution are not in dispute.¹⁶ While at the very beginning the Allied Powers had wished to encourage the Japanese Government to initiate democratic reforms on its own, the SCAP was finally at odds with the Japanese officials over the writing of a new constitution, as the Japanese Emperor and the government were reluctant to take the drastic step of replacing the Meiji Constitution with a more liberal document. In late 1945, the government finally appointed a committee to suggest revisions; however, the Commission’s recommendations were so conservative that MacArthur rejected them outright and ordered the Allied staff to draft a completely new document within only two weeks. Although the document’s authors were non-Japanese, they took into account the Meiji Constitution, the demands of Japanese lawyers, the opinions of pacifist political leaders, and the draft presented by the Constitution Research Association. In March 1946 the government publicly disclosed an outline of the pending constitution based on the MacArthur Draft, and in April elections were held in the House of Representatives of the Ninetieth Imperial Diet, which would consider the proposed constitution. Though a portion of the MacArthur Draft was changed at the insistence of the Japanese, other more important ideas embodied in the Draft were adopted by the government in its own draft proposal, including the symbolic role of the Emperor, the prominence of guarantees of civil and human rights, and the eternal renunciation of war. Finally, it was decided that in adopting the new document the Meiji Constitution would not be violated, for legal continuity must be maintained. Thus the new Constitution was adopted as an amendment to the Meiji Constitution in accordance with the procedures, and entered into force in 1947.¹⁷

15. RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 51 (2002). Paragraph 10 of the Potsdam Declaration announces that “The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.”

16. Cf. SHOICHI KOSEKI, THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION (Ray A. Moore ed. & trans., 1997); THEODORE MCNELLY, THE ORIGINS OF JAPAN’S DEMOCRATIC CONSTITUTION (2000); DALE M. HELLEGERS, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION (2002); LAWRENCE W. BEER & JOHN M. MAKI, FROM MYTH TO DEMOCRACY: JAPAN’S TWO CONSTITUTIONS 1889-2002 (2002).

17. Following the procedure of constitutional revision under the Meiji constitution, the Proposal was formally submitted to the Imperial Diet by the Emperor as the Bill for Revision of the Imperial Constitution. The old constitution required that the bill receive the support of a two-thirds majority in both houses of the Diet in order to become law. After both chambers had made some amendments the House of Peers approved the document on 6 October; it was adopted in the same form by the House of Representatives the following day, with only five members voting against, and finally became law

The new Constitution was conceived in the spirit of modern constitutionalism. It contains a manifest pronouncement of the principle of popular sovereignty in its preamble, and affirms that the emperor is merely a symbol;¹⁸ it asserts the liberal doctrine of fundamental human rights.¹⁹ Furthermore, the Constitution establishes a bicameral parliamentary system of government,²⁰ and ensures the court's competence in judicial review.²¹ Above all, Article 9 of the Constitution, probably the most distinctive constitutional provision in the world, declares to eternally renounce the sovereign competence of Japan to launch a war, and to forever give up the use of force.²² Understandably, the Constitution's foreign origin will always be the focus of controversy, and unsurprisingly revising the Constitution has since then become a disputed issue in domestic politics. Issues discussed in the debate of constitutional revision include the demand for the reinforcement of the emperor's role, and national rearmament, directly countering Article 9.²³ Yet notably, in late 1945 and 1946, when the drafting of the Constitution was occurring, there was already much public discussion on constitutional reform, through which the new Constitution had gained the ground of support.²⁴ In addition, though after 1952 the conservatives and

when it received the Emperor's assent on 3 November. Under its own terms the constitution came into effects six months later on 3 May 1947. However, scholars still quarreled over whether this new Constitution was the continuation of the imperial Constitution, or a total rupture of it. See Chaihark Hahm & Sung Ho Kim, *To Make "We the People": Constitutional Founding in Post War Japan and South Korea*, 8 INT'L J. CONST. L. 800 (2010).

18. Article 1 of the Constitution proclaims that "The Emperor shall be the symbol of the State and the unity of the People, deriving his position from the will of the people with whom resides sovereign power."

19. From Article 10 to Article 40, the Constitution stipulates the protection of a number of fundamental human rights. See *Nihonkoku Kenpō* [Kenpō] [Constitution], arts. 10-40 (Japan). In particular, Article 97 states that "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate."

20. For all the details, see *NIHONKOKU KENPŌ* [KENPŌ] [CONSTITUTION], arts. 41-64; 65-75 (Japan).

21. Article 98 provides that the Constitution takes precedence over any "law, ordinance, imperial prescript or other act of government" that offends against its provisions. Concerning the framework of judicial review in Japan, see Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 *LOY. L.A. L. REV.* 603, 607-09 (2008).

22. Article 9 stipulates that "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. (paragraph 1) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized (paragraph 2)." *NIHONKOKU KENPŌ* [KENPŌ] [CONSTITUTION], art. 9 (Japan).

23. For more discussions on these issues, see Yoōichi Higuchi, *The Constitution and the Emperor System: Is Revisionism Alive?* in *JAPANESE CONSTITUTIONAL LAW* 57-67 (Percy R. Luney, Jr. & Kazayuki Takahashi eds., 1993). See also Michael A. Panton, *Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 *ASIAN-PAC. L. & POL'Y J.* 163 (2010).

24. BEER & MAKI, *supra* note 16, at 184. Notably, the MacArthur Draft was apparently greatly

nationalists have been attempting to revise the Constitution to make it more “Japanese”, these attempts were frustrated for a number of reasons, and the non-revision of the Constitution finally became the common interest of the mainstream politics.²⁵ While the call to revise the Constitution never dissipated, in the next nearly seventy years to the present day the Constitution of Japan remains unchanged since its adoption, with no subsequent amendment ever made.²⁶

C. *The Social Bustling of the 1950s*

Following the end of the occupation, Japan entered a long term of stable politics and dedicated itself fully to economic development. The politics of the post-occupation Japan could be briefly summarized as one major party in power versus several minor parties in opposition. The outbreak of the Korean War in 1950 and the advent of the Cold War era in its wake had shifted the Allied Powers’ radar from the declining militarists to focus on the rising communists.²⁷ As a result, in the later stage of the occupation the SCAP adopted a series of policies to suppress left-wing movements; above all, the SCAP and the Japanese Government took serious measures to crack down on the Japanese Communist Party. Communists were outlawed and banned from engaging in any activities in Japan.²⁸ As a result the SCAP’s policy during the occupation had paved the way for moderate conservatives to come to power. Furthermore, due to the fierce debate between the conservatives and the liberals on issues such as ratifying the Security Treaty and revising the Constitution, Japanese politics in the 1950s witnessed a

influenced by the ideas of certain Japanese liberals, for the Draft did not attempt to impose a United States-style presidential or federal system; instead, the proposed constitution conformed to the British model of parliamentary government, which was seen by the liberals as the most viable alternative to the European absolutism of the Meiji Constitution. See Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT’L J. CONST. L. 224 (2003).

25. For the discussion of revising the Constitution in the Post-war Japanese society, see Takashi Miwa, *Sengo Shagai to Kenpokensei Mondai* [*The Post-war Society and the Issue of Constitutional Revision*], in *KŌZA KENPŌGAKU* [THE CONSTITUTIONAL LAW] 297 (Yoichi Higuchi ed., 1995). Notably, one reason was the extreme difficulty of amending it. Amendments require approval by two-thirds of the members of both houses of the National Diet before they can be presented to the people in a referendum (Article 96). Also, opposition parties, occupying more than one-third of the Diet seats, were firm supporters of the constitutional status quo. Even for members of the ruling Liberal Democratic Party (LDP), the constitution was advantageous. They had been able to fashion a policy-making process congenial to their interests within its framework. See Hahn & Kim, *supra* note 17.

26. The continuous calls for constitution revision, see MOORE & ROBINSON, *supra* note 15, at 317-38.

27. TAKEMAE, *supra* note 9, at 468-78.

28. In the eyes of the left-wing dissidents, the SCAP’s occupation served to preserve the conservative in Japan while curbing the growth of the social forces in opposition. See Ashley Smith, *The occupation of Japan*, INTERNATIONAL SOCIALIST REVIEW ISSUE 29, May-June 2003, http://isreview.org/issues/29/japan_occupation.shtml.

continual fragmentation of parties and a succession of minority governments that finally led to the re-figuration of political forces. In 1955, the conservatives formed the Liberal Democratic Party (LDP), and in response, socialist groups reunited under the Japan Socialist Party in the same year, emerging as the second most powerful political force.

Upholding the value of stable development and taking moderate position in supporting both the Security Treaty and the Peace Constitution, the LDP appealed to the general public and won the support of the mainstream. By the late 1970s, as the Socialist Party came to accept the Security Treaty and abandoned its once strict anti-military stance, the opposition camp lost its edge in political competition. As a result, Japanese politics began its long run under the “1955 System”, during which the LDP continuously held power from 1955 for several decades, only to be replaced by a new minority government finally in 1993.²⁹ In its nearly fifty years of reign, with the support of a well-organized and efficient bureaucracy, the LDP government planned economic policies that encouraged Japanese industrial development both within the country and overseas. These practices, coupled with the reliance on the United States for defense, allowed Japan’s economy to take off and grow exponentially during the Cold War. The Japanese economy began to expand in the 1950s and continued its impressive growth as a mature industrial economy until the early 1990s. The economy achieved a tenfold expansion of nominal GDP between 1965 and 1990.³⁰

Nevertheless, despite Japan’s long-term tendency of political stability and the government’s tireless efforts focusing on economic development during most of the Cold War era, the early post-occupation era was one of the rarest period in which the Japanese society was qualified to be described as the rebel era. Though the ruling LDP retained its firm control over the bureaucrats, the opposition camp took to a bottom-up strategy to promote its political agenda. Through local elections the opposition parties were able to take control of the local governments and sought further cooperation with social groups. As a result, fierce grass-root activities over various issues blossomed around the country, and large-scale social movements took place one after another. In the 1950s, the Japanese society greeted an era of social unrest and turmoil, which was rarely seen in the nation’s history; it was not until the 1970s, when the debate over the Security Treaty declined, and the mainstream consensus of retaining the Peace Constitution took shape, that the momentum of the opposition group finally died down and the stable

29. For the “1955 system” and Japanese politics during 1955-1993, see FRANCES MCCALL ROSENBLUTH & MICHAEL F. THIES, JAPAN TRANSFORMED: POLITICAL CHANGE AND ECONOMIC RECONSTRUCTING 53-71 (2010).

30. *Id.* at 72-94.

“1955 system” assumed dominance. However, the momentum of the civil society remained and became the driving forces that pushed for national development and political reforms; with the party turnover finally occurring in 1993.³¹

III. THE CASE

The Cabinet Order 325 Case involves the controversy over the validity of the SCAP’s Orders in Japan issued during the occupation. This case arose from the dispute of whether punishable acts under the Orders which were committed during the occupation ought to remain punishable, even after the occupation had come to an end. Notably, this controversy had occurred no sooner than when the Peace Treaty came into force, upon which Japan officially claimed full sovereignty and independence. The Court, despite being in a state of divided opinions, made the decision to invalidate the Order at issue and acquitted the prosecuted. This case received much attention from the general public and soon sparked a nation-wide movement that called for abolishing the SCAP Orders. It pressed the government to take legislative action in response to the issues of transitional justice.

A. *The Controversy and the Issue*

No sooner had the Allied Powers taken control of and occupied Japan following the country’s unconditional surrender in 1945, than the Imperial Ordinance No. 542 was enacted to facilitate and effectuate the implementation of the SCAP’s order. It provided that “the government may in case of special necessity stipulate for matters and enact necessary penal provisions by order for the purpose of giving effects to matters concerning requirements made by the Supreme Commander for the Allied Powers in consequence of the acceptance of the Potsdam Declaration.” Soon the supreme effects of the Ordinance were further confirmed by the Court in a decision, in which it was acknowledged that the Ordinance had legal effects beyond the Constitution.³² On the basis of the Ordinance, Cabinet Order No. 325, titled the “Order for the punishment of Acts Pre-judicial to the Occupation Objectives” (*hereinafter* the Order), was enacted in 1950 to prescribe penal provisions against a person who committed any act which

31. For the example of the impact of the Japanese Supreme Court’s decisions on the post-war society and politics, *see generally* Yen-Lun Tseng, P’och’u Fachishou Tê Missu –P’inghsi Jihpên Tsuikaofayüen “Hsik’an Hankêshan Shihshih” An P’anchüeh [*Busting the Myth of Legal Transplant-Case Note on Yukun Wakayama Jiji Case*], 36(3) Hsienchêng Shihtai [THE CONSTITUTIONAL REVIEW] 343, 343-73 (2011).

32. Saiko Saibansho [Sup. Ct.] Apr. 8, 1953, Showa 24(A) No. 685, 7 Saiko Saibansho Keiji hanreishu [Keishu] 775 (Japan).

contravened the occupation objectives. The acts the Order intended to punish was defined as broad so as to include acts which were in violation of all the directives issued by the SCAP to the Japanese Government, all the orders issued by the occupation forces to implement such directives, and all the laws and orders by the Japanese Government to implement the directives. The Order did not particularly define the substance of the punishable acts; this task was left to specific SCAP directives.

In 1952, on the same day the Peace Treaty came into effect, Law No. 81 was enacted to abolish the Ordinance and provide that all the orders or ordinances issued under the Ordinance should, unless measures for their abolition or continued existence were taken by a special legislation, remain effective as law for no more than 180 days from the day Law No. 81 was enforced. Law No. 137 was also enacted as a result to abolish the Order, while providing that “the application of the provisions to the acts done prior to the enforcement of this Law shall still follow the former rules.” In the Cabinet Order 325 Case, the accused, during the period from approximately 2nd to 25th of January in 1951, had allegedly violated the directives of the SCAP dated June 26th and July 18th of 1950, which prohibited editing, printing, distributing, transporting, or possession for the purpose of distributing the publications designated by the SCAP as the affiliate or successor of the “Akahata”.³³ The accused were therefore punished under the Order on the ground that they committed an act prejudicial to the occupation objectives in violation of the purport of these directives. The court of the first instance found that the publication at issue, “Heiwa no Koe” (voice of Peace) was the successor of the “Akahata”; the court of appeals in the second instance affirms this fact; and the case was appealed to the Supreme Court. The issue was whether the accused charged under the Order prior to its abolition should continue to be punished, or should instead be acquitted.

B. *The Ruling of the Court and the Opinions of the Justices*

The Court, with a vote of ten, ruled that the judgment of the First Instance should be quashed and the accused acquitted, on the basis that the

33. “Akahata”, meaning “Red Banner” in Japanese, was the daily newspaper of the Communist Party of Japan, published since 1928. Until World War II, Akahata was printed illegally under the title Sekky. Publication of the newspaper under this name started again in Tokyo on Oct. 20, 1945. On Dec. 5, 1945, it was renamed Akahata. On a number of occasions it suffered repression and persecution. The paper was shut down during 1950-52 on orders of the American occupation authorities. Since 1959 it has published a Sunday issue with a circulation of over one million copies. See THE FREE DICTIONARY BY FARLEX, <http://encyclopedia2.thefreedictionary.com/Akahata> (last visited Nov. 1, 2012).

penalty had been abolished after the rendition of the original judgment.³⁴ However, the opinions among the fourteen justices were highly split. The fourteen justices issued eight separate opinions in total, which could be roughly categorized into three camps, the majority, minority, and dissenting opinion. Six Justices, Justices Mano, Kotani, Shima, Fujita, Tanimura, and Irie, issued a majority opinion,³⁵ four Justices, Justices Inoue, Kuriyama, Kawamura, and Kobayashi issued a concurring opinion; and four Justices, Justices Tanaka, Shimoyama, Saito, and Motomura issued a dissenting opinion. Notably, five Justices from each group, Justice Mano, Inoue, Kobayashi (the three from the majority opinion), Kawamura (from the concurring opinion), and Saito (from the dissenting opinion), respectively issued their own personal separate opinion.

The majority opinion reasoned that the Order had simultaneously lost the effects the moment when the Treaty came into force, and that thus the illegality and the punishability of the acts condemned in the Order had naturally vanished with the termination of the occupation. At the very beginning, the majority opinion explored the background of the Order, tracing the history of how the Japanese Government and the Japanese were subject to the comprehensive control of the SCAP. It then defined the function of the directives and orders issued by the SCAP, based on the context of this post-war background, as meant exclusively to facilitate and effectuate the order of the authorities occupying Japan. Proceeding to discuss the Peace Treaty, the majority opinion affirmed that, as the occupation had ceased to exist at the moment when the Peace Treaty came into force, it must be admitted that the Order had lost its efficacy after the Peace Treaty came into effect, and the Order itself has become null and void as a matter of

34. The Court cited the provisions of Item 5 of Article 411, Item 2 of Article 337 and the provisions of Article 413 of the Code of Criminal Procedure, as the statutory basis of its judgment.

35. Interestingly, Justice Saito in his personal opinion challenge the status of the majority opinion in this case. He maintained that “The view in favor of acquittal asserted by six Justices Mano, Kotani, Shima, Fujita, Tanimura, and Irie is not agreed to by other justices; and the view in favor of acquittal expressed by four Justices Inoue, Kuriyama, Kawamura, and Kobayashi is not compatible with the similar view asserted by the above-mentioned six justices in their reasoning and not concurred in by other justices. Hence, each of the above two views in favor of acquittal is in fact two separate minority opinions.” However, Justice Inoue contended that it was indeed the majority opinion of the Court: “Although our opinion differs from that of Justice Mano and the other five justices as explained above, there is yet a common denominator underlying our line of reasoning. We concur with the opinion of the six justices in holding that it is unconstitutional to punish the accused for violation of the directive in question under No. 325; and that such a state of affair cannot be permitted to exist after our country has become independent. (The opinion of the foregoing six justices is that No. 325 has become completely inapplicable, so it goes without saying that it includes the situation of the present case and its premise). The present case corresponds to a case in which the penalty has been abolished. Thus, when both of our opinions are taken together, they constitute the majority opinion of this Court.” Accordingly, I define the opinion issued by the six Justices as the majority, another issued by the four Justices as the concurring opinion, and the other one differing from the majority of the Court by the rest four Justices as the dissenting opinion.

course. Furthermore, the Court found that Law No.81, which extended the effects of the Order for 180 days, and Law No. 137, which though abolished the Order continued the punishment of the past violation, did not prevent the Order from losing its effects. The Court ruled that these Laws were unconstitutional and thus should be null and void, because these laws constituted *ex post facto* legislation that violates Article 39 of the Constitution. As for those directives issued by the SCAP, however, since it was not the intention of the law to give force and effects to each one of the directives, there was no need to examine each one of them to determine whether they were constitutional.

While the concurring opinion reached the same conclusion, it adopted a completely different approach. At the beginning, the concurring opinion also defined the origin and intent of the Ordinance and the Order as a result of the occupation, and recognized that therefore they should be accepted as valid and necessary. In addition, it reasoned that, after Japan had regained independence upon the end of the occupation, the existence of the laws and ordinances contrary to the Constitution could no longer be allowed to stand. However, the concurring opinion pointed out that the Order did not completely lose its force and effects as Japan entered the Peace Treaty; instead, “it is imperative that these orders and directives be subjected to close scrutiny to determine whether they may be permitted to remain in force as valid laws of the nation.” The concurring opinion emphasized that “Our country is at liberty to continue the validity of the said Cabinet Order as a law of our land so far as it concerned directives having elements compatible with the Constitution, even after the Peace Treaty had come into force”, and Law No. 81 helped to preserve the effective of the Order. The concurring opinion then found that the SCAP directives covered by the Order constituted an unconstitutional total prohibition of free speech in advance under Article 21 of the Constitution, and therefore it was unconstitutional. As a result, it naturally followed that the provisions in Law No. 137 which intended to restore the validity of the unconstitutional law or ordinances was also unconstitutional under Article 98 of the Constitution, for they violated the Constitution. Since the Order had lost its effects when the Treaty entered into force for its unconstitutionality, it corresponded to the circumstances in which “the penalty has been abolished after the rendition of the judgment.”

Interestingly, though the dissenting opinion also addressed the validity of the SCAP’s order during the occupation at the very beginning, an analysis of the relevant provisions in the Code of Criminal Procedure soon followed. The dissenting opinion interpreted the clause “when the penalty has been abolished after the rendition of the original judgment” used in Article 411, Item 5 of the Code as to cover the situation where “the pre-existing right to punish has been expressly, or at least impliedly, waived by a law enacted

subsequent to the commission of the offense.” That is to say, as the dissenting opinion pointed out, “where there has been a special manifestation by the state to abolish the same [offense].” In the eyes of the dissenting opinion, a crime is punishable under a penalty already in existence at the time of the commission of the offense, even if the same penalty has been specifically cancelled or abolished and lost its effects afterwards, unless “there has been a clear manifestation of the will of the state to waive and abolish the pre-existing, consummate legal effects of the law.” As a result, the dissenting opinion ruled that, even if the Ordinance and the Order had lost their effects when the Treaty came into force, there was no manifestation of the will of the state whether explicit or implicit to nullify the effects of the punishment already taking place under the Order. Instead, Law No. 81 and No. 137 even expressed a clear will of the state to continue the effects of the penalty. The dissenting opinion further emphasized that the Order was in the nature of a “prescription law”, which were not to revive anew the penal statutes that had lost their effects, but to continue the application of the effects to the acts committed prior to the invalidation of the statutes. Finally, the dissenting opinion revisited the intent of the penalty imposed on “Akahata,” and affirmed the judgment of the court of appeals that the power to interpret the directives rest with the SCAP. Therefore, it concluded that the criminal charge against the accused should be sustained.

C. *The Effects and the Aftermath*

The Cabinet Order 325 case was not only regarded as a landmark precedent, but also celebrated as a major judicial achievement that set the tone for the independence of the Japanese constitutionalism. Before the Court decided this case, the enforcement of the Order, which subject to penalty the acts of a comprehensive scope defined by specific directives as offenses against the SCAP’s policy, had led to a series of criminal prosecutions around the country. More than half of the accused prosecuted under the Order were accused of violating the directives banning “Akahata.”³⁶ Lower courts had received a deal of litigation and dealt penalty pursuant to the Order, most of which, probably to no one’s surprise, were the criminal charges against persons allegedly spreading communist speech.³⁷

36 . The prosecution of the communist and “Akahata”, see Hoseidaigaku Daigenshagaimondaikenkyujio, *Nihon Rodo Nengan 1953* [The Labour Year Book of Japan 1953], ch. 3, <http://oohara.mt.tama.hosei.ac.jp/rn/25/rn1953-707.html>. The accused amounted to 707 in total. See Hoseidaigaku Daigenshagaimondaikenkyujio, *Nihon Rodo Nengan 1955* [The Labour Year Book of Japan 1955], ch. 4 sec. 2, <http://oohara.mt.tama.hosei.ac.jp/rn/27/rn1955-719.html>. [hereinafter *Nihon Rodo Nengan 1955*].

37. Sapporo Kōtō Saibansho [Sapporo High Ct.] Sept. 3, 1951, Showa 26(U) No. 507, 4 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1032 (Japan); Tokyo Kōtō Saibansho [Tokyo High Ct.] Sept.

Generally, in these cases, the courts demonstrated a supportive attitude toward the purpose of the Order. While upholding the Order and the directives, the courts also endeavored to make the Order and the directives not only more well-defined but also more expansive through judicial interpretation. For example, in a case decided in 1951 by Sapporo High District Court, the court interpreted the clause “acts in violation of the objective of the SCAP’s order for the Japanese Government” in Article 1 of the Order to mean “any individual act in violation of the order’s intent or purpose.”³⁸ Besides, in a case decided by Tokyo High District Court in the same year, the court defined the clause “destructive criticism” to mean “any harmful and unconstructive speech to the purpose of the occupation, not limited to those that indeed rendered real damage to the purpose of the U.N. occupation.”³⁹

Interestingly, however, the courts’ attitude soon changed after the Peace Treaty entered into force in 1952. In a case decided by Sapporo High District Court about three months after the Treaty entered into effect, the court ruled that, since the Peace Treaty had then taken its effect and the sovereignty of Japan had therefore been fully restored, the part within the Order contradicting Article 21 of the Constitution should be abolished, and the penalty imposed by the Order should lose effect.⁴⁰ In a later case in the same year decided by the same court, notably, the court ruled that the Order had contravened Article 31 of the Constitution, that Law No. 137 was unconstitutional and should lose its effects for it intended to sustain the effects of an unconstitutional penalty, and that the Order should be regarded as falling under Article 337, Section 2 of the Code of Criminal Procedure, as “the penalty abolished after the commission of the offense.”⁴¹ Approximately at the same time, the Japanese legal scholars had also begun an academic debate on the status and effects of the Order; different opinions

25, 1951, Showa 26(U) No. 2349, 4 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1793 (Japan); Fukuoka Kōtō Saibansho [Fukuoka High Ct.] Sept. 28, 1951, Showa 26(U) No. 2068, 4 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1262 (Japan); Osaka Kōtō Saibansho [Osaka High Ct.] Dec. 3, 1951, Showa 26(U) No. 1094, 4 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1508 (Japan); Tokyo Kōtō Saibansho [Tokyo High Ct.] Jan. 18, 1952, Showa 26(U) No. 4660, 5 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 112 (Japan); Sapporo Kōtō Saibansho [Sapporo High Ct.] July 12, 1952, Showa 27(U) No. 36, 5 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1329 (Japan); Sapporo Kōtō Saibansho [Sapporo High Ct.] Oct. 16, 1952, Showa 27(U) No. 278, 5 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1969 (Japan).

38. Sapporo Kōtō Saibansho [Sapporo High Ct.] Sept. 3, 1951, Showa 26(U) No. 507, 4 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1032 (Japan).

39. Tokyo Kōtō Saibansho [Tokyo High Ct.] Sept. 25, 1951, Showa 26(U) No. 2349, 4 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1793 (Japan).

40. Sapporo Kōtō Saibansho [Sapporo High Ct.] July 12, 1952, Showa 27(U) No. 36, 5 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1329 (Japan).

41. Sapporo Kōtō Saibansho [Sapporo High Ct.] Oct. 16, 1952, Showa 27(U) No. 278, 5 Kōtō Saibansho Keiji hanreishu [Kōkeishu] 1969 (Japan).

arose over whether as a matter of law the Order had lost its effects, and whether as a result the court ought to deliver an acquittal of prosecution, acquittal of conviction, or a guilty judgment.⁴² It was not until the Supreme Court of Japan delivered its ruling on the Cabinet Order 325 case that the controversy was finally settled. In conclusion, judging from the similar earlier judicial rulings by lower courts, it is safe to say that the Supreme Court was not the first court to reason that the Order had lost its effects upon the Treaty's entering into force. In other words, this leading decision was more the result of a conscious deliberation and prudent calibration drawing from the existing debate, instead of a bold pioneer made from bareness.

Notably, within the next two years following the making of this decision, the Supreme Court of Japan would continue to adjudicate a number of similar cases, most of which concerned the censorship of communist speech during the period of occupation; the Court would without exception stuck to its ruling in the Cabinet Order 325 case.⁴³ Particularly remarkable among these cases was the fact that there were two decided on the same day, not long after the Cabinet Order 325 case was made. In these two cases, the Justices of the Court again respectively withheld their same positions as in the precedent, only providing more reasons to support their positions. As a result, with these cases being the landmark cases, later cases involving the violation of the Order soon followed these precedents. Around the country, detainees accused of violating SCAP directives were released, and a great deal of litigations seeking for compensation soon followed. Moreover, following these decisions, a Movement for Abolishing the Occupation Orders was soon launched and received nation-wide concern, making reviewing occupation orders a hot spot in public debate.⁴⁴ The communist activists released following this ruling, though never becoming the mainstream in Japanese politics, later actively engaged in social movements and, above all, contributed to the discussion of revising the Japanese Constitution.⁴⁵

42. SHIAKE MASANORI ET AL., *KENPŌ 50-NEN NO TENBŌ 1* [THE PROSPECT OF THE CONSTITUTION OF FIFTY YEARS 1], 102-03 (1998).

43. Saiko Saibansho [Sup. Ct.] Dec. 16, 1953, Showa 27(A) No. 669, 7 Saiko Saibansho Keiji hanreishu [Keishu] 2457 (Japan); Saiko Saibansho [Sup. Ct.] Dec. 16, 1953, Showa 27(A) No. 2226, 7 Saiko Saibansho Keiji hanreishu [Keishu] 2520 (Japan); Saiko Saibansho [Sup. Ct.] Nov. 10, 1954, Showa 28(A) No. 4933, 8 Saiko Saibansho Keiji hanreishu [Keishu] 1816 (Japan); Saiko Saibansho [Sup. Ct.] Dec. 1, 1954, Showa 27(A) No. 1570, 8 Saiko Saibansho Keiji hanreishu [Keishu] 1911 (Japan); Saiko Saibansho [Sup. Ct.] Apr. 27, 1955, Showa 27(A) No. 2011, 9 Saiko Saibansho Keiji hanreishu [Keishu] 947 (Japan); Saiko Saibansho [Sup. Ct.] Dec. 21, 1955, Showa 27(A) No. 2011, 9 Saiko Saibansho Keiji hanreishu [Keishu] 2912 (Japan); Saiko Saibansho [Sup. Ct.] Jan. 25, 1956, Showa 29(A) No. 2122, 10 Saiko Saibansho Keiji hanreishu [Keishu] 105 (Japan); Saiko Saibansho [Sup. Ct.] Apr. 16, 1958, Showa 29(A) No. 3921, 12 Saiko Saibansho Keiji hanreishu [Keishu] 923 (Japan).

44. For the influence of this case, see *Nihon Rodo Nengan 1955*, *supra* note 36.

45. Susumu Wada, *Sengoseito Kenpo, to Kenpogaku: Nihon kyosanto no Kenporiron* [Post-war

In the eyes of the lower courts and the Japanese criminal law scholars, the three different approaches of reasoning from the Justices could be made sense of as the three separate theories in dealing with the legal effects of the Order. However, this case reveals far more than mere doctrinal discussion on criminal jurisprudence. This case, decided at the time when the occupation had just ended and Japan was to resume full sovereignty and independence, involved the status and legitimacy of the occupation orders, and the legal continuity of the Japanese constitutionalism. Above all, the Peace Treaty, the Constitution, and the Japanese Government's policy constituted the three pillars in the opinions of the justices that the Court must take into consideration. How the Court in its reasoning responded to these three pillars and defined their relation led to differing views regarding not only how the past should be reviewed, but also how the future of the Japanese Constitutionalism was to be shaped. In light of this perspective, the rest of this Article evaluates this case and explores the Court's strategy in response to the call for Japan's national reconstruction.

IV. THE IMPLICATION

In this case, three approaches of reasoning can be observed through a contextual analysis of the separate opinions of the justices. Interestingly, the majority opinion, the concurring opinion, and the dissenting opinion demonstrate different views concerning the relationship between the occupation orders and the Japanese constitutionalism resuming upon the Peace Treaty entering into force. The three approaches of reasoning respectively upheld the Treaty, the Constitution, and the will of the state as the core element in their reasoning, and above all, the deciding factor upon which the effects of the Order hinged. This case can be celebrated as one of the rarest counter-example among the Court's decisions that contradicts the Court's widely-regarded conservative tendency and collectivist style. However, underlying the apparent difference on the surface, the contextual meaning of these opinions reveals that, in reality, they still shared core consensus despite minor disagreement. The subtle consensus pointed to the Court's duty of responding to the transitional needs of national reconstruction in the post-occupation era.

A. *Consolidating Sovereignty and National Identity*

Following the end of the occupation, the controversy that has been

Political Parties, Constitution, and the Studies of the Constitution: The Expansion of the Japanese Communist Party's constitutional Theory, in KÔZA KENPÔGAKU [THE CONSTITUTIONAL LAW] 267 (Yoichi Higuchi ed., 1995).

clouding the post-war Japan until now is the Peace Constitution. Among constitutional scholars, it is widely assumed that the success of an imposed constitutionalism depends on the presence of a potent popular will during the process of constitution-making.⁴⁶ However, the experience of Japan suggests that the building of constitutionalism can genuinely begin even after the imposition of the Constitution.⁴⁷ The Japanese Constitution was unequivocally the result of imposition by the SCAP to advance liberal democracy.⁴⁸ This undisputed history did, and still does, spark the debate among the Japanese legal scholars and the general public over whether the Japanese should continue accepting this imposed Constitution, and whether a new constitution purely based on the autonomous will of the local community is more desirable.⁴⁹ However, though this debate has continued, no final conclusion ever emerged from the mainstream Japanese people on whether amendments should be made to this document.⁵⁰ The Constitution of Japan remains one of the most lasting and prosperous constitution in East Asia. What rallies mainstream support for the Constitution probably consists of more than the influence of international politics, or the Japanese legal culture conceived in group ethos.⁵¹ In fact, during the drafting of the Constitution, the SCAP officials had deliberately made efforts to accommodate significant Japanese traditional and cultural features to the Constitution, above all the Emperor, so as to minimize any potential opposition.⁵² Besides, during the constitution-making process, the Japanese

46. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005) (proposing that self-determination is indispensable to the development of constitutionalism, and that constitutionalism, subject to certain initial conditions, has a long-term tendency to serve the interests of liberty and equality). For participatory constitution-making, see Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043 (2008) (arguing that Participatory constitution making is a tool for facilitating the creation of democratic governance systems with broad citizen involvement and increasing the protection of citizens' civil and political rights).

47. Hahn & Kim, *supra* note 17. (arguing that the "constituent people" was forged in the course of a deep constitutional politics).

48. Chang, *supra* note 5, at 111. (identifying the Japanese constitution-making model as promoting democracy).

49. Japanese constitution scholars hold differing theories as to whether the sovereignty of Japan continued, or broke off, during the SCAP occupation, and whether the Constitution of Japan should be accepted as proper after Japan resumed its sovereignty. See SHIAKE ET AL., *supra* note 42, at 77-78, 99-101. Notably, one reason legal scholars raise for revising the Constitution is the argument that the Constitution is of the nature of temporal occupation administrative law, not a sovereign constitution. See TAKEHANA MITSUNORI, KENPÔGAKU YÔRON [ON CONSTITUTIONAL THEORY] 110-21 (1995).

50. Polls over the years on public opinions of whether to revise the Constitution generally show a tie between the consent and the opposition; public opinions differ on the reasons based on which the Constitution should be revised. See NIHONKOKU KENPÔ: SHIRYÔ TO HANREI [THE CONSTITUTION OF JAPAN: MATERIALS AND PRECEDENTS] 108-09 (GENDAI KENPÔ KENKYÛKAI ed., 6th ed. 2001).

51. The Japanese legal culture is pervaded by the group ethos, which is the legacy of the Tokugawa Era and the effect of Confucian ideals imported to Japan. See Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT'L LEGAL PERSP. 98 (1990).

52. John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88

public community was also allowed the chance to deliberate over the content of the document; the proposal made by the government did receive popular support to a certain extent.⁵³ As a result, though the Constitution was mainly a product of direct intervention by SCAP, it did not come under too much backlash in later years.

The above case demonstrates that the Supreme Court of Japan also contributed to rallying popular support for the Constitution. The opinions of the justices, though differing from one another on their understanding of the relationship between the Peace Treaty and the effects of the Order, similarly conducted their reasoning under the banner of recovering sovereignty and full independence in Japan. The majority opinion centered its reasoning on the Peace Treaty, and posited that the Order had lost its effects simultaneously with the entering into force of the Treaty. The concurring opinion emphasized the full and effective exercise of the Constitution after the occupation, and accordingly subjected the Order to judicial review. The dissenting opinion, though recognizing the punishability of the acts violating the Order prior to the end of occupation, in fact went even further to promote Japan's sovereignty and independence, as it upheld the will of the state as the ultimate reason. In comparison, the three opinions commonly sought to safeguard national sovereignty and identity, with the dissenting opinion being the most adamant.⁵⁴ The Court, in the making of this decision, served to lessen the connection of the SCAP legacy and the Constitution, thereby strengthening national identity toward the Constitution. Notably, the Court will have to continue making similar efforts in reconciling the political confrontation over Article 9 of the Constitution, the most controversial provision in the Constitution which always sparks debate on national sovereignty.⁵⁵

WASH. U. L. REV. 1467, 1468-70 (2011).

53. During the constitution-making process, a number of political parties ranging from the right to the left on the spectrum brought up their own constitution drafts. See KENSHŌ NIHONKOKU KENPŌ: RINEN TO GENJITSU, *supra* note 14, at 28-29. For the specific content of the drafts, see NIHONKOKU KENPŌ: SHIRYŌ TO HANREI, *supra* note 50, at 47-72.

54. It is interesting to note that the leading dissenter in this case, Chief Justice Tanaka, was famous for never hesitate to make political statements in his opinions. He was strongly anti-communist and served as Chief Justice during 1950-1960, the whole decade of the 1950s. See Satoh, *supra* note 21, at 623; HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES 258 (1989).

55. Since 1947, Japanese courts have adjudicated approximately two dozen cases involving the dispute on Art. 9 of the Constitution; the Supreme Court has decided at least seven of them on appeal. Among those cases, the Sunakawa case, concerning the constitutionality of U.S. military forces in Japan according to the U.S.-Japan Security Treaty arrangement, is the landmark case. In the Sunakawa case, the Court unanimously agreed that under Art. 9 Japan retain the fundamental right of self-defense, and that, as for national security arrangement, the Court should respect the discretion of the political branch. The Sunakawa was later reaffirmed as precedent by the Court in two subsequent cases. For the Sunakawa case, see Saiko Saibansho [Sup. Ct.] Dec. 16, 1959, Showa 34(A) no. 710, 13 Saiko Saibansho Keiji hanreishu [Keishu] 3225 (Sakata v. Japan) (Japan). For later cases that

B. *Upholding the Rule of Law and Human Rights Protection*

Rule of law and human rights protection are integral parts of modern constitutionalism. Though Japan had endeavored itself to legal reforms in the Meiji Restoration as an effort toward modernization, rule of law and human rights protection were compromised. Under foreign influences, the Constitution of 1946 is the first Constitution of Japan founded on rule of law and dedicated to the protection of human rights.⁵⁶ Unfortunately, in an ironical sense, this Constitution was mainly an imposition under foreign occupation; and what further aggravates the issue is the fact that this Constitution was secured and fostered thanks to the SCAP's efforts in adopting authoritarian rules supported by the full cooperation of the Japanese Government. Though the SCAP's strategy and the Japanese Government's concerted efforts during the constitution-making process probably served to lessen the opposition from the general public toward the Peace Constitution, however, the rule of law encompassed in the Constitution contradicted the occupation Order issued by the same authority. This issue of transitional justice in the Japanese context was more complex in that the tortfeasor was also the maker of this nation's rule of law; it would be both ironical and impossible to hunt own the SCAP officials. Besides, the Cold War international politics demanded that Japan stood by the U.S. as its anti-communist ally; it would be awkward if not embarrassing to pin the SCAP's past rule as illegal. For a country that has declared itself as transforming into modern constitutionalism, the unlawful should be corrected without compromise.⁵⁷

The Court in this case very effectively resolved this irony and upheld the rule of law. The majority opinion maintained that the Order had lost its effects simultaneously with the Peace Treaty's entering into force; this rationale placed the Order tightly into the context of the occupation, and thus the end of the occupation also marked its end. Moreover, the majority refused to review the constitutionality of the occupation orders and directives; this can be regarded as another effort to label the occupation as

confirmed the Sunakawa case, *see* Saiko Saibansho [Sup. Ct.] Aug. 28, 1996, Heisei 8 [gyo-tsu] no. 90, 50 Saiko Saibansho minji hanreishu [Minshu] 1952 (Ota v. Hashimoto) (Japan); Saiko Saibansho [Sup. Ct.] Apr. 2, 1969, Showa 44, 23 Saiko saibansho, Keiji hanreishu [Keishu] 1952 (Japan v. Sakane) (Japan).

56. The establishment of rule of law in Japan received multiple foreign influences, *see* Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, in *JAPANESE CONSTITUTIONAL LAW 1* (Percy R. Luney, Jr. & Kazayuki Takahashi eds., 1999).

57. Transitional justice is especially important for post-conflict states and emerging democracies in the late twentieth century to deal with. *See* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69 (2003) (analyzing the evolution and current direction of transitional justice under the background of post-Cold War, globalization, and security-State politics).

only belonging to the past. The concurring opinion, though recognizing that the Order had lost effects, also acknowledged the continuity of the punishment, subjected the Order to judicial review, and finally declared it unconstitutional. This rationale took a further step to confirm that rule of law was now truly in function. Finally, the dissenting opinion, though withholding the Order and in so doing appearing more conservative, in fact placed more emphasis on the action of the state. While recognizing the SCAP's past ruling as necessary in assuring the safety and order of post-war Japan, what lies behind this rationale at the same time was the urge that, since the SCAP orders and directives would not automatically lose effect, the government should take action to build up the rule of law in Japan given the full restoration of its authority. Therefore, in the end the Court in fact unanimously upheld the importance of the rule of law for post-occupation Japan, notwithstanding through different rationale. Notably, human rights would continue to be the focus in many of the Court's later adjudications,⁵⁸ with which the fundamental human rights embodied in the Constitution have brought positive changes to the Japanese society.⁵⁹

C. *Empowering the Burgeoning Civil Society*

A vibrant civil society is significant for the full development of a liberal democracy.⁶⁰ However, since the ancient period, Japan had always been a collectivist state characterized by an organized patriarchic social structure; it was not until the post-occupation era that a burgeoning modern civil society finally took its shape.⁶¹ The Meiji Restoration, though undertaking a series

58. Though usually regarded as conservative by the number of unconstitutional rulings it has made, the Supreme Court did in its rulings protect a wide variety of human rights from government over-regulation. To name some, for example, in *Aizawa v. Japan* (27 Keishu 265, [Sup. Ct.], Apr. 4, 1973) (Japan) the Court held that the heightened penalty for patricide was unconstitutional for it violated the principle of human equality before the law; in *Sumiyoshi K. K. v. Japan* (29 Minshu 572 [Sup. Ct.], Apr. 30, 1975) (Japan), the Court found it unconstitutional to restrict pharmacies from doing business close to one another; in *Kakunaga v. Sekiguchi* (59 Minshu 2807) (Japan), the Court found it unconstitutional of not to set up overseas voting system and deny Japanese citizens living abroad the right to vote.

59. Following the promulgating of the 1946 Constitution with the institution of judicial review, through several decades of constitutional adjudications, Japan has fully established its rule of law. See Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT'L J. CONST. L. 308 (2007). (examining how judicial review was institutionalized in post-war Japan). Compared to other states in this Region, Japan has performed excellently in advocating universal human rights, though interpreting them according to its own culture and traditions. See Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127 (1994).

60. JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 8-9, 14 (1996).

61. For the recent development of the Japanese society, see generally Iokibe Makoto, *Japan's Civil Society: An Historical Overview*, in DECIDING THE PUBLIC GOOD: GOVERNANCE AND CIVIL

of drastic social and political transformation, never loosened government authorities' social control. Instead, to concentrate the power of the state toward modernization, and later in full gear for total mobilization during the War, social control in Japan was further strengthened. Following the end of the war came the foreign occupation, and the Japanese society was subject to the SCAP's plans to re-shuffle and purge; thus again the Japanese lost a precious chance to develop its civil society. During the occupation, not only the right-wing militarists, but also the left-wing dissidents were suppressed and persecuted; the ensuing bi-polar politics of the Cold War following the end of the occupation only helped tilt domestic political advantages to the centre-right conservatives. However, surprisingly, despite the confrontational international politics and static domestic politics, the Japanese society in the 1950s was at its peak of dynamics and turbulence. This was due to the fact that a number of significant issues, such as revising the Constitution and ratifying the Security Treaty now surfaced, and the dissidents were freed as a result of the end of the occupation. In addition, notably, this social momentum was further exacerbated thanks to the Court's decision in the Cabinet Order 325 case.

In this case, the majority's decision of acquitting the prosecuted communist activists not only liberated the left but also empowered the ever-burgeoning civil society. Following this decision, many left-wing dissidents charged during the occupation were acquitted and released, and this momentum was fully devoted to a new round of issues beginning from the 1950s.⁶² The new politics in the 1950s finally culminated to the formation of the two confronting parties: the LDP on the right and the Socialist Party on the left. During this period, though the government was still firmly in the hand of the LDP conservative authorities, the opposition still had the chance to win national elections, or at least at times they were able to form alliances strong enough to press the LDP authorities for cross-party negotiation.⁶³ Notably, even in the 1960s when the opposition momentum finally died down and the Japanese politics resumed stability and started the "1955 system" that would last for the next thirty years, the social opposition momentum remained and transformed into grass-root movement on the local level in issues such as environmental protection, consumer protection, and anti-corruption movement.⁶⁴ Furthermore, the Court in later periods would continue to make significant decisions to empower the civil

SOCIETY IN JAPAN 51 (Yamamoto Tadashi ed., 1999); Yamamoto Tadashi, *Emergence of Japan's Civil Society and Its Future Challenges*, in *DECIDING THE PUBLIC GOOD: GOVERNANCE AND CIVIL SOCIETY IN JAPAN* 97 (Yamamoto Tadashi ed., 1999).

62. See *KENPŌ KYŌIKU KENKYŪKAI*, *supra* note 14, at 38-57.

63. Koichi Nakano, "Democratic Government" and the Left, in *THE LEFT IN THE SHAPING OF JAPANESE DEMOCRACY* 82, 82 (Rikki Kersten & David Williams eds., 2006).

64. See *KENPŌ KYŌIKU KENKYŪKAI*, *supra* note 14, at 132-39, 178-79.

society.⁶⁵ This ever-enforcing momentous civil society is not only the key for Japan's economic prosperity, but also the very reason why the LDP's corruption would be disclosed in the late 1970s and the 1980s, and its long-term dominance finally receded in the 1990s.

V. CONCLUSION

The nature and style of the Supreme Court of Japan have always been a hot spot of debate in the studies of comparative constitutional law and regional legal studies. In general, most scholars tend to agree that the Court has always been very conservative.⁶⁶ After all, the history of the Court shows that, except in a limited number of cases, most of the time the Court aligns with the government and seldom declares laws or decrees as unconstitutional.⁶⁷ The reasons given that attempt to account for the Court's deferent tendency include the law-making structure of Japan, the organization and composition of the Court, and the static politics under the long-term dominant one-party system.⁶⁸ In contrast, however, some scholars refute this general assumption of the Court's conservative nature and contend that in fact the Court has been rather conscious of avoiding political judicialization,⁶⁹ quite active in espousing the value of plural democracy,⁷⁰ and even keen in advancing social changes.⁷¹ They argue that those who wrongly believe the Court's conservative nature are misguided, because their

65. It is pointed out that the Court has contributed to empowering the civil society in the makings of quite a few rulings, especially in certain cases concerning electing rules and voting rights. See Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral System and Economic Freedoms*, 5 INT'L J. CONST. L. 296 (2007). For another specific example, see Tseng, *supra* note 31 (suggesting that the Yukawa Wakayama Jiji Case is neither a product of legal transplant nor even a step following the West, but a product of local jurisprudence reflecting the effort of the Court to break through the high pressure of political atmosphere of Japan in 1960s).

66. See, e.g., JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 90-122 (1998); Satoh, *supra* note 21; David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011); Shigenori Matsui, *Why is the Japanese Supreme Court so Conservative?*, 88 WASH. U. L. REV. 1375 (2011).

67. Since its creation in 1947, the Court has struck down only eight statutes on constitutional grounds. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009) (also pointing out that the Court could be characterize as "conservative" in the sense of being so passive or cautious that it almost never challenges the government or, in addition, in the sense that it happens to share the ideological views and preferences of Japan's long-ruling conservative party, the Liberal Democratic Party).

68. Haley, *supra* note 52, at 1468-70; Matsui, *supra* note 66.; Satoh, *supra* note 21.

69. Tokujin Matsudaira, *Judicialization of Politics and the Japanese Supreme Court*, 88 WASH. U. L. REV. 1559 (2011) (arguing that the Japanese Supreme Court is reluctant to "judicialize" politics when rights and entitlements of the citizen are not at stake).

70. Hasebe, *supra* note 24 (arguing that the Supreme Court of Japan regards its principal role as guardian of a "pluralist democracy").

71. Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493 (2011) (arguing that Japanese courts are willing to deviate from established doctrine to create social norms that they consider desirable).

studies usually ignore the legal tradition and cultural value shared by the Japanese legal community. If these subtle contextual factors could be considered together, they argue, it is fair to say that the Court is quite active, if not liberal, in a unique Japanese style.

This Article shows that the Court, at least in deciding the Cabinet Order 325 case, was not conservative but indeed quite responsive. In this case the justices, despite their different approaches of reasoning, were all conscious and strategic in meeting the transitional needs of post-occupation Japan. Beyond the common understanding of conservative versus liberal, the Court's style in adjudicating this case could be best described as communitarian;⁷² beyond the general definition of judicial active versus judicial restraint, the Court's approach could be best understood as reactive. Though the Japanese Constitution was imposed by the SCAP, the Japanese people also played important roles in withholding the constitutionalism, and the Court unequivocally played an indispensable part.⁷³ The Cabinet Order 325 case entered the Court at the critical moment when the occupation had just ended, and Japan was left on its own with the imposed Constitution to embark on post-war national reconstruction. The controversy of this case presented a complicated issue of transitional justice for the Court to resolve and tested the Court's ability to respond to the call of the time. To adjudicate the current punishability of the once-punishable acts during the occupation era, the Order at issue must also be put on trial under the fully autonomous constitutionalism. Interestingly, though the Court finally decided to acquit the accused, the opinions of the justices appeared rather divisive, with the fourteen justices adopting generally three different approaches in reasoning. The majority opinion, the concurring opinion, and the dissenting opinion respectively centered on the Peace Treaty, the Constitution, and the will of state as the pillar to adjudicate the effects of the Order.

Though differing in their rationale and conclusion, the justices in their reasoning commonly expressed their concern over the same set of crucial issues, and spared no efforts to address them. The Court's efforts in this case was dedicated to consolidating sovereignty and national identity, upholding the rule of law and human rights protection, and empowering the burgeoning civil society. In general, the Court took a cautious but reactive attitude, and adopted a progressive but moderate approach to resolve this controversy; this reflects the special features of constitutional courts in East Asia.⁷⁴

72. Haley, *supra* note 52 (arguing that judges in Japan share the prevailing communitarian orientation of their society, and relied on their collective an individual perception of community values share by peers).

73. Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3 (1996) (demonstrating how the Japanese has turned the American-inspired system of constitutional scheme into a distinctively "Japanese" constitutionalism).

74. A reactive and cautious style of judicial review is one of the features that new democracies in

Drawing from the analysis of the most remarkable case in the early years of post-war Japan, this Article not only provides evidence of the Supreme Court's substantial contribution to the progress of Japan's national reconstruction at the initial transitional period, but also concludes that the reasons provided call for reconsideration of the oft-held observation of the Court's conservative nature.

East Asian share in common. See Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 823-35 (2011) (analyzing the constitutional developments in Japan, South Korea and Taiwan after World War II).

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國家重建脈絡下的司法回應：分析 日本最高裁判所內閣令第325號案

曾 燕 倫

摘 要

在接受當代憲政主義、成為憲政主義國家之前，許多東亞國家都歷經了外來勢力干預、入侵，或是殖民。換言之，許多東亞國家的憲政主義其實是外來勢力介入所造成之法律繼受的結果。大體而言，儘管當代憲政主義如今已經被大多數國家接受且實踐，甚至被高舉為普世價值，但往往被忽略而隱藏在背後不為人知的是，繼受國家如何努力掙扎，克服在地既有之社經與政治脈絡因素，乃至能接受、調適、融入當代憲政主義。其中最令法律學者關切的議題之一，就是在憲法下作為憲政主義守護者的憲法法院，如何在鞏固憲政主義的同時，又能兼顧照料在地政治社會發展的需要。

在東亞，日本是最令法律學者感到好奇的案例。做為二次大戰中的戰敗國，在戰後經歷了長達七年的外國全面干預統治，日本在占領時期結束之後方始確立憲政主義。歷史證明，擁有一部外來憲法的日本，非但能夠成功凝聚其國家認同、重建社會，更在經濟發展上取得傲人的成績。有趣的是，相對於戰後日本在國家重建上如此積極的政治作為，日本最高法院卻一向被世人評價為保守憲法法院的典型。從而，值得探討的問題在於，究竟日本最高法院對於日本舉世聞名的國家重建成績有無任何貢獻？以及，它究竟扮演了什麼角色？

為探討此問題，本文分析著名的經典案例：日本最高法院1952年關於行政命令第325號合憲性的判決。在本件判決中，日本最高法院首次審查占領時期在憲法上的地位，並質疑盟軍司令部最高統帥（Supreme Commander for the Allied Powers, SCAP）的命令違反憲法。本文冀望藉由分析社會政治脈絡以考察並爬梳本案，探討日本最

高法院在國家重建過程中所扮演的角色。本文結論認為，法院在本案中扮演了關鍵的角色。不同於一般對於日本最高法院係趨於保守的認知，本案例中法院採取了策略性的作為，透過審查係爭命令的合憲性，法院著力於鞏固主權與國家認同、確立法治原則並重申人權保障，同時也進一步促成有活力的公民社會形成。

關鍵詞：憲政主義、法律移植、日本憲法、日本最高法院、國家重建