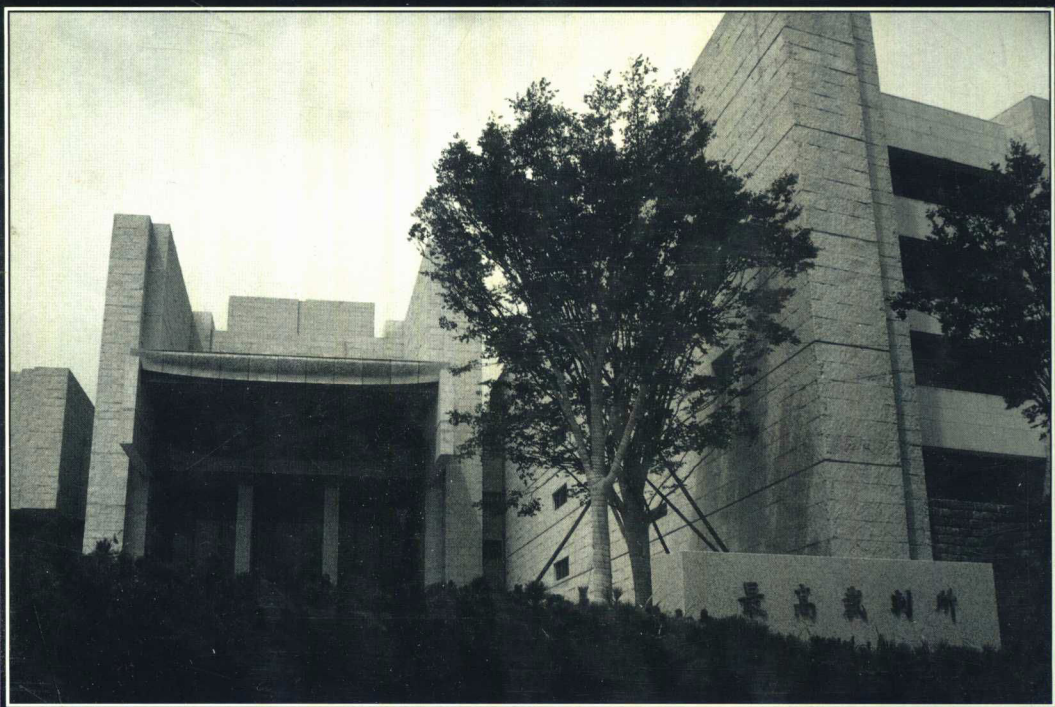


The Supreme Court and Benign Elite Democracy in Japan

HIROSHI ITOH



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ASHGATE

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Foreword

David S. Law¹

For the last two decades, Hiroshi Itoh's 1989 book *The Japanese Supreme Court: Constitutional Policies* has been the leading English-language account of the Supreme Court of Japan. In many respects, its detail and accuracy about the inner workings of the Court remain unsurpassed. It is fortunate that Professor Itoh has chosen not simply to update that book with developments of the last 20 years, but rather to write a deeper, broader and more revealing account of the Court that, like its predecessor, is likely to facilitate and influence the study of Japanese judicial politics for years to come.

The publication of *The Supreme Court and Benign Elite Democracy in Japan* is timely in more ways than one. In recent years, the political science literature on judicial politics in other countries has flourished, while legal scholars have begun to display a renewed, if not unprecedented, degree of interest in comparative constitutionalism. Comparative scholars in both fields, however, remain constrained as a practical matter by the availability of in-depth, authoritative, unvarnished accounts of how courts outside the English-speaking world operate: even in an age of globalization, linguistic barriers and geographic distance continue to render many courts inaccessible to all but area specialists. In the absence of such a literature, it is too easy for comparative scholarship to focus upon a few familiar areas, such as Canada, the UK, South Africa, the European Union, perhaps also India, and above all the United States.

Japan offers a refreshing and valuable point of comparison for reasons that go beyond its location in East Asia. At a time when leading scholars speak increasingly of the creeping judicialization of politics, Japan raises the question of why, in a democratic country, courts with the power of judicial review might be chronically unwilling or unable to exercise that power. Japan also occupies a uniquely intermediate position along both political and legal dimensions. On the one hand, it has been neither a popular democracy nor an authoritarian regime, but instead, as Professor Itoh puts it, a benign elite democracy. On the other hand, it possesses neither a pure civil law, an inquisitorial system nor a pure common law, adversarial system but instead borrows liberally from both systems. The result is

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that Japan's judicial institutions lend themselves naturally to comparison in both directions along both dimensions.

This book thus comes as a boon not only to Japan specialists, but also to the study of comparative judicial politics more generally. Those who are already familiar with Professor Itoh's earlier guide to the Japanese Supreme Court will of course welcome the long-awaited and thorough overhaul, while those with a particular interest in Japan will find this book an invaluable guide to the politics, structure and practices of the judiciary. Those seeking either an introduction to Japanese judicial politics in particular or a broader understanding of judicial politics more generally will find this book a rich resource that touches upon practically every question that a scholar interested in courts might ask. One would be hard-pressed to find a more thorough English-language introduction to the internal workings of the Japanese Supreme Court or, indeed, the highest court of any non-anglophone country. The study of judicial politics and constitutionalism alike would benefit greatly were there to exist works of this depth and caliber on constitutional courts everywhere.

Fortunately, like its 1989 precursor, *The Supreme Court and Benign Elite Democracy in Japan* is also characterized by an unusual degree of methodological pluralism that helps to ensure its usefulness to a range of audiences. It combines close attention to institutional structure, in-depth case studies and quantitative analyses of judicial voting patterns with an unusually rich trove of interview data. The level of detail in the book also captures the influence of a wide range of factors on judicial decision-making, ranging from the political, institutional and historical to the sociological and cultural. Professor Itoh wisely refrains from resorting too quickly to explanations of judicial behavior that emphasize stereotypically Japanese cultural traits. By the same token, however, it is difficult to imagine a member of the United States Supreme Court or German Constitutional Court announcing, for example, that it is 'best and safest to follow the opinion of the Chief Justice', and thereafter failing to author a single concurring or dissenting opinion.

Readers may marvel in particular at the degree of insider access to the Court that the author has been able to secure over decades of research. It is difficult to imagine that any other scholar has interviewed a wider range of justices, or that the justices have confided more in any other scholar than they have in Professor Itoh. And remarkably, the vast majority of his sources are identified by name. The resulting portrait of the individual justices and the interpersonal politics of the Court makes for lively reading. Needless to say, however, the goal of the book is not gossip-mongering, and Professor Itoh's synthesis of what the justices have to say on behalf of themselves is neither sensationalistic nor credulous but instead cautious, balanced and sophisticated. What emerges is a broad-ranging and nuanced account of the Court as, simultaneously, a highly bureaucratic institution, a political actor and a collection of unique and interesting individuals.

Acknowledgements

My field research ranges from library searches of judicial biography and autobiography to a series of interviews with Prime Ministers, judges of the Supreme Court and lower courts, private attorneys, constitutional scholars and other government officials. Justices have orally responded to a set of questions regarding their backgrounds and their activities in the courtroom.

I wish to express my deep gratitude to those justices who were gracious enough to grant me hours of one-on-one interviews about their autobiography and judicial behavior. In particular, Chapters 2 and 5 were drawn heavily from oral accounts of many retired justices. I made it a rule not to interview incumbent justices lest some information on ongoing trials should compromise the confidentiality of their judicial decisions and cause inconveniences to them. I will list each name with the date of interviews inside parentheses. I cite my interviews as sources of information used in the book. I am solely responsible for any remarks and information that I attribute to each interviewee.

Justice Tokiyasu Fujita (10 June 2008); Masao Ono (31 March 2005); Justice Buichi Amano (1 June 1982); Justice Shigemitsu Dando (11 June 1984); Justice Kiyoo Eriguchi (26 May 1982); Justice Ekizo Fujibayashi (31 May 1982); Justice Kotaro Irokawa (2 July 1982); Justice Masami Ito (5 June 1984); Justice Makoto Iwata (4 June 1982); Justice Hisaharu Kidoguchi (10 July 1981); Justice Yasuo Kishigami (10 June 1982); Justice Kazuo Kuriyama (23 June 1982); Justice Asanosuke Kusaka (17 June 1982); Justice Tsuyoshi Mano (17 June 1982); Justice Jiro Matsuda (4 June 1982); Justice Masao Matsumoto (8 June 1982); Justice Goichi Miyazaki (21 June 1982); Justice Yuzuru Motobayashi (29 June 1982); Justice Jiro Nakamura (25 June 1984); Justice Nobuo Ogawa (2 and 22 June 1984); Justice Masao Okahara (28 May 1982); Justice Ken'ichi Okuno (15 June 1982); Justice Kingo Osabe (1 June 1982); Justice Ken'ichiro Osumi (2 July 1982); Justice Kiichiro Otsuka (3 June 1982); Justice Yoshikatsu Sakamoto (27 May 1982); Justice Kosato Sekine (8 June 1982); Justice Takezo Shimoda, (10 June 1982); Justice Masami Takatsuji (3 June 1982 and 25 June 1984); Justice Shoichi Tamaki (24 June 1982); Justice Jiro Tanaka (25 July 1981); Justice Masataka Taniguchi (June 22, 1991); Justice Koichi Yaguchi (23 July 1982); Justice Sakunosuke Yamada (14 July 1982); Justice Taizo Yokoi (June 14, 1984); Justice Kisaburo Yokota (7 June 1982). Judge Kenta Hiraga (8 June 1982); Judge Toshio Yokokawa (10 June 1982); Judge Yorihiro Naito (17 July 1980); Judge Mariko Watabiki (14 June 1995); and Judge Katsumi Chiba and Judge Minoru Masuda (10 June 2008). Prime Ministers Shinsuke Kishi (9 July 1982); Zenkou Suzuki (19 July 1982); Takeo Miki (5 July 1982); Finance Minister Michio Watanabe (8

June 1981); Minister of Postal Services Masao Onishi under the Ohira Cabinet (28 June 1982); Secretary General of the Miki Cabinet Ichitaro Ide (29 June 1982); Justice Minister Osamu Inaba under the Miki Cabinet (9 July 1982); the House of Representatives member Kiseko Takahashi (9 July 1982).

Justices Itsuo Sonobe and Tokiyasu Fujita are exceptions to my rule of interviewing only retired Supreme Court justices. I wish to express my special appreciation to Justice Sonobe, who has welcomed me as academic colleague on many occasions. I was fortunate enough to know him before his appointment to the Court and enjoyed many opportunities to listen to his views on the judicial process and his judicial philosophy while he was on the bench.

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I am deeply indebted to Henry Morlock, professor emeritus, for his laborious and meticulous proofreading. I also express my sincere thanks to Nicolle Jarvis, who helped me with the time-consuming work of formatting and typing the entire manuscript with tables and figures.

List of Abbreviations

Ad. Ct.	Administrative Court
CAB	The Civil Aviation Bureau, MOT
Chukai	Annotated
Cri. Div.	Criminal Division
DC	The District Court
DPJ	The Democratic Party of Japan
DSP	The Democratic Socialist Party
EA	The Environment Agency
FTC	The Fair Trade Commission
Gairon	Outline
Genron	Principle
GHQ, SCAP	The General Headquarters, Supreme Commander for the Allied Powers
Gr. Ct. Cass.	The Great Court of Cassation
<i>Gyoroku</i>	<i>Gyosei Saibansho Hanreiroku (Records of Judgments of the Administrative Court)</i>
<i>Gyosai Reishu</i>	<i>Gyosei Jiken Saiban Reishu (Selected Records of Judgments on Administrative Affairs)</i>
<i>Hanrei Jiho</i>	<i>The Case Reporter</i> , commercial law journal published three times monthly
HC	The High Court
<i>Hogaku Kyoshitsu</i>	<i>The Law Class</i> , a commercial periodical
<i>Hogaku Semina</i>	<i>The Seminar on Legal Studies</i> , a commercial periodical
<i>Horitsu Jiho</i>	<i>The Law Reporter</i> , a commercial periodical
JCP	The Japan Communist Party
JLA	The Junior Legal Association
JNP	The Japan New Party
Jokoku	An appeal to the Supreme Court against a judgment of a high court in the first instance court, alleging unconstitutionality, violation of judicial precedents or legal construction
JRTI	The Judicial Research and Training Institute
JSDP	The Japan Social Democratic Party
JSP	The Japan Socialist Party
<i>Jurisuto</i>	<i>The Jurist</i> , commercial journal issued twice a month
<i>Kakyu Keishu</i>	<i>Kakyu saibansho keiji saibanreishu (Collection of Lower Court Decisions: Criminal Cases)</i>

Kanreki	Sixtieth anniversary of birthday
<i>Keiji</i>	<i>Saiko saibansho saibanshu; keiji</i> (Collection of Unabridged Supreme Court Decisions: Criminal Cases)
<i>Keiroku</i>	<i>Taishin'in Hanketsuroku Keiji</i> (Records of Judgments of the Great Court of Cassation: Criminal Cases)
<i>Keishu</i>	<i>Saiko saibansho hanreishu; keiji</i> (Collection of the Selected Supreme Court Decisions: Criminal Cases)
Koki	Seventieth anniversary of birthday
Koso	An appeal made against a judgment of a district, family or summary court as a first instance
Koza	Lectures
LDP	The Liberal Democratic Party
LPEL	The local public employees law
<i>Minji</i>	<i>Saiko saibansho saibanshu; minji</i> (Collection of Unabridged Supreme Court Decisions: Civil Cases)
<i>Minroku</i>	<i>Taishin'in Hanketsuroku Minji</i> (Records of Judgments of the Great Court of Cassation: Civil Cases)
<i>Minshu</i>	<i>Saiko saibansho hanreishu; minji</i> (Collection of the Selected Supreme Court Decisions: Civil Cases)
MOFA	The Ministry of Foreign Affairs
MOT	The Ministry of Transportation
MPS	The Ministry of Postal Services
NELRL	The national enterprises labor relations law
NHK	The Japan Broadcasting Corporation
NHP	The New Harbinger Party
NPAR	The National Personnel Authority Rule
NPEL	The national public employees law
PELRL	The public enterprises labor relations law
PKO	Peace-Keeping Operations
<i>Saibansho Jiho</i>	<i>The Courts News Bulletin</i> , published internally by the Supreme Court General Secretariat twice a month
SC	The Supreme Court
SCGB	The Supreme Court, Grand Bench
SCPB	The Supreme Court, Petty Bench
SDF	The Self Defense Forces
Senshu	Selected
Sosho	A Series
Taikei	Outline
Tokushu	Special collection
WECPNL	Weighted Equivalent Continuously Perceived Noise Level
YJA	The Young Jurists' Association
Zakkan	Essays
Zenshu or Zensho	Compendium

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Introduction

People are self-centered, but they also care about how they (and others) treat people, and how they (and others) participate in groups. – Even though morality is partly a game of self-promotion, people do sincerely want peace, decency, and cooperation to prevail within their groups.

Jonathan Haidt

Japan is a constitutional democracy, as it is conventionally understood. While the Constitution of 1947 formally sets forth a constitutional monarchy and is silent about democracy, it has achieved democracy in procedure if not in substance. It guarantees popular sovereignty and free elections for public offices at regular intervals and a representative form of government. It offers rather extensive civil rights and liberties including due process and the rule of law while ensuring law and order and public welfare. It prescribes the separation of powers and local autonomy within the framework of a unitary government. Thus, the Constitution of 1947 provides for important procedural components of democracy and sets the framework within which to strive for substantive democracy.

While the Japanese masses aspire to achieve a liberal democracy in which their rights and liberties are given the highest priority, her constitutional democracy is composed of and managed by the elites for the primary benefits of the elites. Japan's democracy, as it exists today, is a benign elite democracy in which a relatively small number of people in the public and private sectors, many of whom are public-minded and public-regarding, govern large numbers of people (Kuroda, 1967: 442). If the masses constructed the constitutional law of 1947 to prescribe constitutional goals, such as a liberal democracy, the benign governing elites interpreted the document as a prescription for conservative democracy. In spite of different ideologies and practices in constitutionalism, Japan, North America and many countries in Western Europe all share similar characteristics of elite democracy, and an irony of such an elite democracy is that elites make the people believe that their government is by the people, for the people and of the people (Dye and Zeigler, 2006).

The 1947 Constitution of Japan is not an end in itself, but a means to goals, such as a liberal or conservative democracy. It contains the three basic tenets of any constitutional law in a modern nation state. First, the Constitution declares itself as the supreme law, and ranks a legal hierarchy in the order of constitutional, legislative and administrative laws and local ordinances. Here the Supreme Court is in charge of safeguarding this legal hierarchy. Second, the Constitution separates the government into the national Diet, the Cabinet and the Supreme Court and gives legislative power mostly to the central government with a limited local autonomy.

Here, by invalidating unconstitutional or unlawful actions of the government, it dictates each and every branch to operate within the confines of the rule of law. Third, the Constitution guarantees popular sovereignty and fundamental human rights, and entrusts the judiciary to act as a guardian of civil rights and liberties. Its paramount objective is to avoid the concentration of governing powers in the hands of any branch or branches lest the civil rights and freedoms be jeopardized. As a major branch of the national government, the Supreme Court discharges its functions of governing the nation and its people. It settles legal disputes, sets forth judicial policies on many issues including foreign policies, and oversees the political branches with the power of judicial review.

It is precisely judicial behavior in the context of benign elite governance that this book addresses itself to. This work sets out to examine, among others, the Supreme Court's performance in each of the three constitutional functions: it will analyze the checks and balances with the political branches, i.e. the legislative Diet, the executive Cabinet and the bureaucracy in terms of judicial policies on civil liberties and judicial roles. Answers to these and other related questions would help determine the performance of the Supreme Court in the benign elite democracy of Japan.

The present work goes beyond the earlier work, *The Japanese Supreme Court: Constitutional Policies* (1989) in exploring answers to these questions. While centered on the question of how court observers think the highest court decides constitutional cases, the present work has dual objectives. First, it proposes to revisit the Court and review its constitutional litigation by incorporating, wherever applicable, information provided by justices and other key policy makers themselves. Raw data, obtained through extensive one-on-one interviews, are quite revealing of the judicial process and shed much light upon judicial decision-making. The present work presents longitudinal analyses of significant changes in the judicial process and impact during the past 60 years (1947–2008). In this context, David Law's more recent interviews (Law, 2009) find remarkably similar judicial thoughts and behavior, thereby reinforcing much of the present author's observations and conceptualization in the early 1980s. Second, this work will explore and verify the author's contention that the Supreme Court constitutes part of the ruling elites, shares much of conservative philosophy with the ruling political elites and decides constitutional issues in self-restrained and conservative ways, thereby contributing to the benign, elite democracy in Japan.

Chapter 1 examines the nature of elite governance by tracing three distinctive periods of time: the Tokugawa feudal autocracy, the Meiji oligarchy of 1868 and the present elitism after 1945. In a formal sense, 15 generations of the Tokugawa family governed the country as a regent of the Emperor, but their autocracy remained unchallenged by the royalists for over two centuries. The Meiji Restoration replaced the Tokugawa one-man rule by an oligarchy of mid-level revolutionaries who ostensibly restored Imperial rule. While the Meiji government gave a brief taste of democracy under modern constitutionalism, it retained many attributes of elitism, and it took a national defeat and foreign occupation to further

democratize Japan's political system. The chapter compares and contrasts ideas and institutions of each regime and finds influences of antecedents upon the present elite governance in Japan. It is contended that the constitutionalism of 1889 demonstrated a nascent form of democratic governance and that even the Tokugawa feudalism was not an antithesis to democracy. It would be simplistic to claim that the 1947 Constitutional system established democracy in Japan for the first time. The three systems have one thing in common in terms of elitist governance.

The second half of this chapter follows parallel evolutions of judicial functions of each regime and identifies three sub-groups or the triad of judicial elitism in the present form, and its ramifications in the context of elite governance in the political sphere. Since the present judiciary is a hybrid between the adversarial model of the American common law and the inquisitorial model of the European civil law system run by career civil service judges, this chapter compares and contrasts judicial independence, judicial review and the rule of law. Through traumatic experiences of the transition from the 1889 to 1947 constitutionalism, Japan has become an elite-dominated democracy, and the elitism of the post-1945 political and judicial systems is believed to cast a pervasive influence not only over the Supreme Court but also over lower court decisions.

Chapter 2 starts with an elitist view of the non-litigious nature of Japanese society and examines the functional division of labor between the long reign of the ruling conservative parties and judicial elitism as an institution of conflict resolution. It also compares and contrasts selected constitutional decisions between the Supreme Court and lower courts to test a widely held view that, the higher the court is, the more conservative it becomes. Then, it will shift its focus to the influence of foreign law, particularly American laws, on procedural rule-making and the substantive right of academic freedom in Japan. As Jerome Frank once pointed out, the procedural rule is just as important as the substantive law, in affecting judicial outcome. Japanese jurists busily studied and adopted American procedural rules and practices of constitutional litigation in Japanese courtrooms. A comparison of judicial rule-making and substantive rights in both countries demonstrates legislative supremacy and judicial self-restraint in spite of different sources of such rule-making authority. An in-depth analysis of the judicial decision-making in Chapter 2 reveals the impact of judicial elitism on the judicial process in constitutional litigation.

An analysis of judicial process, based on input, conversion, output and impact/feedback of the Eastonian systemic/functional model, constitutes a core of this chapter (Schubert, 1974). This paradigm perceives judicial decision-making to proceed from fact finding to tentative holdings, ending with rationalization and justification. It assumes that this process continues until a judge finalizes his holdings and expresses opinions that are satisfactory to himself and persuasive to the litigants. Then more recent analytical tools of neo-institutionalism, strategic and particularly rational decision-making, judicial role, as well as judicial attributes and judicial culture, augment the systemic/functional model and offer a

comprehensive paradigm of judicial decision-making (Melone and Karnes, 2008: 161). A neo-institutional approach analyzes institutional influences of the Supreme Court upon its decision-making. For instance, heavy workloads dictate that justices conserve their energy for small numbers of important cases and dispose of many frivolous cases rather summarily, or write fewer minority opinions. Institutional changes that reduce appeals tend to increase open hearings and opinion writings. A strategic choice approach assumes that a justice intentionally may act towards obtaining specific policy objectives at the expense of his own ideology. The small-group decision-making of five- or nine-member benches may persuade justices to reach an agreement on holdings by negotiating, bargaining and compromising on what they believe to be the most appropriate decision. Coupled with the legal and judicial culture factors, these analytical tools enabled the present writer to discern many characteristics of the multifaceted judicial process. In particular, research judges [chosakan], or the American counterpart of law clerks, occupy one of the triad of judicial elitism by assisting the justices to render conservative and restrained decisions in constitutional litigation.

Chapter 3 is a follow-up of the judicial process of input, conversion and output. No analysis is complete without adequate reference to the impact of a judicial decision and judicial or political feedback on such an impact. Since the impact/feedback analysis of judicial decisions has been very slow to develop in Japan, the present work in Chapter 3 examines in depth a full cycle of judicial processes with an emphasis on the judicial impact and feedback on one major administrative issue in the newly emerging administrative state in the 1970s. The Osaka airport noise pollution case is chosen not to explore the evolution of judicial policies on environmental issues but to explore complex cycles of impact and feedback between the judiciary, on the one hand, and political and socioeconomic actors, on the other. While the Osaka airport noise pollution case (1981) was not a constitutional case, it raised extremely important administrative issues of the government liability in one of the earliest and biggest public work projects in the 1970s and 1980s. The very fact that it took three levels of court a total of 12 years and a large amount of human resources to dispose of this case shows its magnitude and gravity. Most data in the present work derive not only from secondary sources in literature but also from first-hand information based on interviews with both national and local officials, lawyers, airlines officials and scholars as well as some victims and their litigation leaders. Furthermore, the final resolution of disputes between the government and the victims of the noise pollution at Osaka airport clearly demonstrates the conservatism and restraint at the highest level of benign political and judicial elites.

An attitudinal approach considers judicial conversion to be a human process with judges' attitudes and value judgments towards public policy at its center. Chapter 4 proves the primacy of judicial attitudes in judicial decision-making and attests to a reliable correlation between judicial attitudes on social issues on the one hand and judicial holdings on the other. A judge ascertains the facts of a case and interprets the law on the basis of his or her attitudes or value judgments and votes

to decide a legal dispute. Given a relative consistency and rationality of judicial attitude or values, the model of judicial decision-making analysis is conceptually formulated in terms of (1) the issue of a case as an independent variable; (2) the judicial attitude as an intervening variable; and (3) judicial voting as a dependent variable. The legal issues (independent variable) analyzed in this chapter are various forms of civil rights and liberties, provided for in the 30 articles in the 1947 Constitution. Judicial voting (dependent variable) manifests itself in terms of liberalism and conservatism. Then, the judicial attitudes (intervening variable) are derived from the independent and dependent variables. Statistical analyses of all divided civil liberty cases between 1950 and 1973 have confirmed the formation of judicial liberalism, conservatism and neutrality or moderation at the level of individual justices, blocs of justices and the Court as a whole.

The central theme of Chapter 4, however, is to identify specific contents of liberal and conservative ideologies. Since the Supreme Court grand bench produces many more unanimous decisions than divided ones, this chapter content-analyzes the dimension and depth of unanimous decisions of important civil liberty cases up to the 1990s. However, its content analysis of divided cases covers the entire period of 1947–2007. The attitudinal approach employed here assumes that a written judicial opinion rationalizes and justifies voting behavior and does not necessarily reflect plausible reasons for actual voting. Good judicial arguments can still persuade other judges in a spirit of intellectual integrity, and doctrinal content analyses of judicial opinions are useful and valid in probing judicial minds. Readings of both unanimous and divided decisions reveal philosophical and cultural dimensions of judicial elitism.

If Chapter 4 examines *how* justices decide, Chapter 5 addresses itself to the question of *why* justices decide the way they do. The social background approach assumes that, in spite of individual differences, justices with similar backgrounds tend to display similar thinking and behavior. The justice's age at the time of appointment to the bench, appointer, prior occupation, religion, higher education, family background and birthplace were compiled to profile Supreme Court justices, but limited data on judicial biographical and autobiographical data produced limited correlations to their liberal or conservative decisions. This chapter heavily relies on personal accounts obtained from interviews with justices, three former Prime Ministers and one Justice Minister.

The judicial role analysis in Chapter 6 is designed to explore the roles judges play in making judicial policies on public policy issues. Justices play certain expected professional roles such as observing judicial neutrality and objectivity toward litigants. Their role models also include respect for the rule of law and the doctrine of *stare decisis*. More importantly, the question of how justices perceive their roles and act accordingly in relation to the political branches is crucial in any study of judicial elitism. Some justices play an active role in shaping public policies while others play a self-restrained role in interpreting constitutional or statutory laws, or applying judicial precedents. In each instance, judicial decisions create harmony or conflict between the Supreme Court and policy-makers at the