

*Review Essay*

**JAPANESE INDUSTRIAL POLICY IN  
PERSPECTIVE**

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David Friedman. *The Misunderstood Miracle: Industrial Development and Political Change in Japan*. Ithaca, NY: Cornell University Press, 1988.

Chalmers Johnson. *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975*. Stanford, CA: Stanford University Press, 1982.

Richard J. Samuels. *The Business of the Japanese State: Energy Markets in Comparative and Historical Perspective*. Ithaca, NY: Cornell University Press, 1987.

Frank K. Upham. *Law and Social Change in Postwar Japan*. Cambridge, MA: Harvard University Press, 1987.

**INTRODUCTION**

Since the mid-1970s, the Japanese Ministry of International Trade and Industry (MITI) and the industrial policy under its jurisdiction have attracted public attention both in Japan and abroad as an important determinant of the economic growth in postwar Japan. At present, comments on MITI and its industrial policy are voluminous, ranging from short columns in weekly magazines to lengthy scholarly works. Well-researched studies which carefully examine the nature of industrial policy and its major instruments (such as administrative guidance) have replaced intuitive descriptions. As a result, a once flourishing image of “the notorious MITI” as an almighty director controlling every section of “Japan Inc.” has disappeared, at least in the academic world. The accumulation of serious studies in turn has caused heated controversy on the relative strengths of MITI and private industries and on the degree to which industrial policy has contributed to Japanese economic growth. While many scholars believe that MITI’s leadership and contribution to economic growth has been substantial, there are also cogent arguments that MITI has often been cap-

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tured by private industries and that its contribution to economic growth has been insignificant.

In face of the accumulation of studies and heated controversy, what contribution can sociolegal scholars make to further advancement in our knowledge of MITI and industrial policy? While I will review several books written by American scholars on MITI and industrial policy, it is not my intention to discuss the comparative merits of the observations and conclusions of these books. Rather, my objective is to reveal a shared recognition of certain features of Japanese industrial policy that lies behind the competing observations and conclusions of these books. To be concrete, I will show that the authors of these books all recognize that Japanese industrial policy is essentially informal and lacking in judicial intervention. Some authors explicitly mention these features, while others treat them only as implicit assumptions. But in either case, these features are inseparably related to the core argument of each book. Then, I will argue that both informality and the lack of judicial intervention are attributable at least in part to the self-restraint of the judiciary and hence that the passive judiciary is an indispensable component of the Japanese industrial policy system. This judicial passivity is a topic that has been not thoroughly analyzed in previous studies and is left for further sociolegal research.

#### JOHNSON, *MITI AND THE JAPANESE MIRACLE*

Chalmers Johnson's *MITI and the Japanese Miracle* must be the most widely circulated and the most often cited study on MITI and Japanese industrial policy. Most recent studies on this topic, including books I will review later in this essay, treat Johnson's book as a starting point and formulate their own theses either by further developing Johnson's argument or by criticizing it. Thus, it is proper for this essay to begin with this book.

The core of Johnson's argument is the distinction between two models of state intervention in the economy in capitalist countries, namely, "the regulatory state" and "the developmental state." According to him, "[a]ll states intervene in their economies for various reasons" (p. 17), and therefore "[t]he question is how the government intervenes and for what purposes" (p. 18). Johnson constructs these two models based on differences in the purpose and method of state intervention. In the regulatory state model, typified by the United States, the government is concerned with problems related to the forms and procedures of economic competition such as the prevention of monopolies and the protection of consumers. It intervenes in the market based on those regulatory concerns. Such substantive matters as "what industries ought to exist and what industries are no longer needed" (p. 19), however, are left to market forces. Decisions concerning the specifics of state intervention are fundamentally political and are made by a

legislative body consisting of "elected members of the professional class, who are usually lawyers" (p. 21).

The second model is the developmental state, a typical example of which is Japan. The developmental state regards the advancement of industrialization as a substantive social and economic goal and defines the role of the government as taking whatever measures necessary to attain the goal effectively. Strategic economic policies designed to further industrialization are formulated and implemented by an administrative apparatus consisting of elite bureaucrats.

According to Johnson, in countries that are late to industrialize, the state often takes on developmental functions. However, two conditions must be met for the effective fulfillment of those functions: a broad consensus concerning economic growth as a national goal that legitimizes extensive state intervention and a talented economic bureaucracy. While the very fact that a country is a late industrializer makes it possible to generate a national consensus for economic growth, additional factors reinforced the consensus in Japan. In the Meiji era when Japan began to evince interest in development, it did not have tariff autonomy, and hence the government, which could not impose protective duties on imports, had to take a direct hand in economic development in order to achieve the economic independence that most Japanese strongly desired. In addition, a deficit in the international balance of payments was recognized as one of the most serious national problems the government had to resolve. In the postwar period, the international payment deficit still continued, and the defeat in the war impoverished the whole nation and made the populace eager for economic growth.

Concerning the economic bureaucracy, two factors were especially important. First, in the early stage of the modernization of state structure during the Meiji Restoration, talented persons were recruited to the state bureaucracy and the bureaucracy in its competence gained ascendancy over politicians. Second, the Allied Powers' occupation after the war left the Japanese economic bureaucracy virtually intact; thus, the tradition of a capable bureaucracy did not disappear in the postwar period. These historically contingent factors provided Japan with exceedingly suitable conditions for the emergence of the developmental state.

Under these conditions, the Japanese developmental state came into full bloom during the period of rapid economic growth in the 1950s and 1960s. According to Johnson, after experiencing both the ineffectiveness of self-control by private industries during the prewar period and the inefficiency of state control during wartime, the Japanese government in this period developed a set of market-conforming methods of state intervention. Under these methods, the economic bureaucracy not only could manage the overall conditions of the national economy but also could allow

free enterprise and market competition to the extent that these were compatible with national developmental goals. Here, the Japanese developmental state based on a cooperative government-business relationship was established. MITI took the central role in this Japanese model as "the Economic General Staff." It is MITI and its market-conforming industrial policy that enabled the miraculous economic growth in postwar Japan.

The above is the gist of Johnson's argument. He also attaches great importance to administrative guidance, that is, administrative action to urge regulated parties to act in a way that is neither based on a specific provision of statutes nor legally enforceable. According to Johnson, administrative guidance is "[p]erhaps the most important market-conforming method of state intervention" (p. 318).

The power of administrative guidance greatly enhances the ability of Japanese economic officials to respond to new situations rapidly and with flexibility, and it gives them sufficient scope to take initiative. The Japanese have unquestionably profited from the elimination of legal middlemen and the avoidance of an adversary relationship in public-private dealings. (P. 273)

Furthermore, Johnson argues that "[a]dministrative guidance is a perfectly logical extension of the capitalist developmental state, with its emphasis on effectiveness rather than legality" (*ibid.*).

In the regulatory state, one of the major tasks of the government is formulating and enforcing rules of proper market competition in accordance with fair procedures, and both public and private actors are required to obey rules once they are formulated. In contrast, in the developmental state the requirement of legality is secondary to the establishment of national policy goals and the flexible state intervention needed to achieve them effectively. Administrative guidance is a clear manifestation of the inferior status of legality in the developmental state.

Deprecation of legality is equivalent to a preference for informality in the sense that it stresses convenience and flexibility rather than obedience to predetermined rules and respect for procedural formality. In Johnson's theoretical framework, a preference for informality is inherent in the developmental model that stresses national goals and is required for effective bureaucratic leadership to attain those goals. Informality and a strong economic bureaucracy are interacting components of the developmental state.

Most scholars endeavoring to refute Johnson's argument seem to deny a connection between informality and a strong bureaucracy. Although these critics cast doubt on the effectiveness of MITI's leadership, they, as well as Johnson, admit the informal nature of Japanese industrial policy. Richard Samuels's *The Busi-*

*ness of the Japanese State* and David Friedman's *The Misunderstood Miracle* are excellent examples of such studies.

### SAMUELS, *THE BUSINESS OF THE JAPANESE STATE*

In contrast to Johnson's perception of MITI as the Economic General Staff that consists of talented bureaucrats and manages the national economy on the basis of a cooperative relationship with the private sector, MITI in Richard J. Samuels's book is nothing more than a weak administrative body that is at the mercy of private industries and hence is forced to compromise in spite of ambitions to enhance its own power.

The central issue of Samuels's study is why the Japanese energy market has been almost completely entrusted to private ownership.

[W]hen we examine patterns of ownership in the energy markets of the industrial democracies, we find that no nation has less state ownership of electric power or coal than Japan and that only Japan and the United States rely entirely upon private firms for the refining and sale of petroleum products. Like the United States, but unlike virtually all other advanced industrial nations, Japan has no national oil champion, no national electric utility, and has not nationalized its once considerable coal industry. (P. x)

Many scholars, including Johnson, maintain that nationalization has mattered very little in Japan because the Japanese economic bureaucracy has recognized fully the inefficiency of state ownership and has had enough power to control private markets without relying on such market-displacing methods as nationalization. In short, they think that the Japanese energy market has not been nationalized largely because of the prudent and powerful bureaucracy. Samuels argues, however, that there is no evidence to support this prevailing view with regard to the Japanese energy market. Instead, the history of coal, electric power, oil, and alternative energy markets in Japan is a history of repeated frustrations of bureaucratic initiatives to attain market-displacing state intervention and the resulting development of a system of interdependence and negotiation between the government and private industries. Calling this system "the politics of reciprocal consent," Samuels argues that Japanese energy policies have been perfectly market conforming because a stable power balance among politicians, bureaucrats, and businessmen has hindered any radical departure from the status quo.

The notion of "the politics of reciprocal consent" is in striking contrast to such concepts as coercion, control, and direction. While the latter concepts imply the predominance of the state over private sectors, the former implies an interdependent give-and-take relationship between public and private actors. According to Samuels, with respect to energy policies in Japan the politics of recip-

rocal consent is an endless process of negotiation and mutual accommodation between the government and private industries regarding the territory within which authority can be exercised (jurisdiction) and the actual exercise of that authority (control). In this process, because both the government and private industries seek broader jurisdiction and more control, conflicts are inevitable and thus compromises are required. Although the permanency of the process makes it impossible to reach a final and irrevocable agreement, the basic tone of various tentative compromises is that the government obtains a far-reaching jurisdiction over the energy market in return for entrusting private industries with actual control of the market. More concretely, this separation of jurisdiction and control means that the government is mainly in charge of reducing risks by financing capital investments and guaranteeing loans, while private firms maintain control of investment, production, and price-setting decisions, limited only by general governmental supervisory authority. The accumulation of such compromises results in "the Japanese state-as-guarantor" which neither competes with nor controls private firms in spite of its permeation in the market.

Because the politics of reciprocal consent originates from the conflicting desires of the government and private industries to maximize jurisdiction and control, the outcome in some societies can be coercive state intervention, including nationalization. Samuels lists six factors that influence whether the politics of reciprocal consent leads to market-displacing state intervention: (1) market structure, (2) the degree of centralization of state power, (3) developmental timing, (4) the level of exposure to world markets and foreign investment, (5) the stability and breadth of the political ruling coalition, and (6) administrative tradition. He regards the stability and breadth of the ruling coalition as the most important determinant of the market-conforming nature of Japanese energy policies because this is the only factor that clearly distinguishes Japan from European industrial countries that have experienced market-displacing state intervention. The Japanese conservative coalition, which includes as its main constituents energy industries as well as all other segments of businesses, has been stable over time, and the fruits of the postwar economic growth under the rule of that coalition have been distributed to all social classes, including labor. As long as such a stable and inclusive ruling coalition continues, it is improbable that policies which change market structure drastically, such as the nationalization of basic industries, could gain sufficient political support to be authorized. Thus the politics of reciprocal consent is doomed to a never ending repetition of compromises that scarcely affects the status quo.

A point of great interest here is that Samuels thinks that the politics of reciprocal consent "is embedded in the notion of admin-

istrative guidance" (p. 287). According to him, administrative guidance is not a policy instrument used to compel regulated parties to obey the wishes of the government. In most cases, what the government has been doing in the name of administrative guidance is only ratifying a private ordering previously agreed on by interested parties in order to lend a public character to it and, in this sense, delegating practical control to private actors. Therefore, administrative guidance is nothing but a mechanism by which the Japanese government retains jurisdiction but entrusts private actors with control.

It is obvious that the politics of reciprocal consent which Samuels found in the processes of Japanese energy policies is somewhat contrary to the idea of legality or the rule of law. If rights and obligations of both public and private actors were clearly defined in statutes, there would be little room for negotiation. In contrast, most Japanese energy laws merely outline the broad and ambiguous jurisdiction of MITI and leave room for discretion. It is as if the drafters of the statutes had expected the politics of reciprocal consent to be operating in implementation of policies by discretionary authorities. Administrative guidance also typifies the deprecation of legality, since it is a thoroughly informal policy instrument that neither rests on any statutory provisions nor creates any legal rights and obligations. The deprecation of legality is also reflected in the informality of decisionmaking. While the idea of legality contains a demand for procedural formality, Japanese energy policies are made mainly in advisory councils that are closed to the public or in secret negotiation between MITI officials and industry representatives. There, procedural formality is never required.

In the politics of reciprocal consent described in Samuels's book, MITI is a weak governmental body quite unlike Johnson's MITI as Economic General Staff. However, Samuels and Johnson seem to agree that Japanese industrial policy is incompatible with the idea of legality or the rule of law and instead is impregnated with informality. Roughly speaking, while Johnson regards the policy as "control without law," Samuels understands it as "politics without law."

#### FRIEDMAN, *THE MISUNDERSTOOD MIRACLE*

David Friedman argues that the spectacular growth of Japanese manufacturing industries from the mid-1950s to the late 1970s resulted not from enhancing efficiency and lowering production costs but rather from constantly differentiating products through the use of flexible manufacturing strategies designed to meet special demands hidden in the mass market. Supporting his argument with a detailed case study of the machine tool industry in Japan from the 1920s to the present, Friedman strongly criticizes conven-

tional understandings which maintain that industrial development is achieved only through increases in manufacturing efficiency.

According to Friedman, there are two paths of economic development: mass production or flexible production. "Mass production is the attempt to produce a single good at the highest possible volume to reduce costs through economies of scale" (p. 15). It aims, in other words, at the enhancement of efficiency. Economic development through mass production means acquisition of a larger market share by producing more efficiently and then selling at a lower price than firms in other countries. In contrast, "[f]lexible production is the effort to make an ever changing range of goods to appeal to specialized needs and tastes with tailored designs" (*ibid.*). Its purpose is the diversification of products to meet diverse demands. Economic development through flexible production thus means cultivation of a new market by discovering latent demands that firms in other countries have overlooked and producing goods specifically tailored to meet those demands.

Friedman argues that the development of the machine tool industry in postwar Japan is one of the most successful examples of development through flexible production. In the machine tool industry, small and medium-sized manufacturers, which are much less efficient than large firms, managed to survive by cultivating unique markets and developing differentiated products overlooked by larger producers bent on efficient mass production. The success of small and medium-sized manufacturers in flexible production was the very cause of "the Japanese miracle" in this field.

Why, then, was the strategy of flexible production so widely adopted successfully in Japan? According to Friedman, whether a certain industry is dominated by mass production or by flexible production is not determined by such impersonal market forces as resource constraints. Instead, differences in the dominant form of production are the result of the accumulation of countless choices made throughout the industrial system.

Friedman calls those choices that are not reducible to market constraints "politics." While the successful diffusion of flexible production in the machine tool industry in postwar Japan is due to the survival of small and medium-sized manufactures that are relatively independent of large ones, the survival of smaller producers itself was the cumulative effect of a number of "political" events, among which the following were especially important: (1) Small and medium-sized manufacturers could recruit capable blue-collar workers despite low wages by providing unique career expectations unavailable in large firms, such as being able to set up new enterprises or to move into managerial positions after a relatively short period of blue-collar work. (2) In urban and rural industrial hamlets, small and medium-sized manufacturers successfully established cooperative relationships in order both to avoid debilitating competition and to secure independence from large



firms. (3) Public and private financial institutions for small and medium-sized enterprises were established by the initiative of conservative ruling parties, which regarded small businesses as indispensable constituencies for their continuous governance.

As the examples indicate, Friedman stresses the influence of nonmarket factors on the forms of production. Nevertheless, he argues repeatedly that MITI's industrial policy, one of the most salient nonmarket factors, has never contributed to the successful diffusion of flexible production in the machine tool industry and the resulting industrial development. On the contrary, MITI's policies for the machine tool industry have consistently aimed at enhancing efficiency through increases in the scale of production, consolidation, and other mechanisms of mass production. In the face of those policies, the industry has devised various tactics to receive subsidies offered by MITI without obeying its regulations and guidance. The success of the Japanese machine tool industry is due to the ability of small and medium-sized firms to continuously frustrate MITI's policy initiatives.

The MITI in Friedman's book is a feeble government agency at the mercy of private interests. This MITI is similar to the MITI observed by Samuels, in that it surrenders actual control to private firms in spite of its broad jurisdiction over the industry. However, in contrast to Samuels, who maintains that MITI has entrusted control to private actors through a process of reciprocal consent, Friedman argues that private actors have cunningly usurped control by hoodwinking MITI; no reciprocity can be found here. In this sense, the MITI in Friedman's book seems weaker than that in Samuels's.

Friedman attributes the MITI's feebleness to its reliance on information voluntarily submitted by the industry association and to the fact that "private firms were adept at forestalling compliance while securing material benefits" (p. 86). He argues that these conditions were caused by structural characteristics of the machine tool industry; that is, there were a large number of firms spread all over the country and only a small fraction of them were affiliated with the industry association. However, a more fundamental reason must be that MITI had few legal powers, and rarely used the ones it had. The usual method of Japanese industrial policy is not to compel private actors to submit information or force them to obey policy directives by imposing legally enforceable obligations on them, but rather to induce voluntary cooperation by planning, advising, and giving incentives. The machine tool industry is an area where the potential weaknesses of MITI's reliance on informal policy measures and voluntary cooperation were fully realized. The structural characteristics of the industry were the very factors that enabled the firms to exploit the vulnerability of informality. An implicit assumption in Friedman's argument is that Japanese industrial policy is influenced little by such notions

as legal rights and obligations, legal enforceability, and the due process of law, but instead is characterized by informality.

Informality plays a different role within the theoretical frameworks of the three authors. Johnson observes that informality is a source of MITI's strength because it enables timely and flexible intervention in the economy. For Samuels, informality is a precondition for, as well as a result of, the politics of reciprocal consent between the government and private industries. Finally, although Friedman does not explicitly refer to informality, he seems to think that informality places MITI at a disadvantage in certain situations because it makes dependence on voluntary cooperation of private actors inevitable. To be sure, the informality of Japanese industrial policy is not a main research topic for any of these authors. Yet, it is noteworthy that all of them recognize this informality.

### INFORMALITY AND JUDICIAL PASSIVITY

Informality is closely related to the lack of judicial intervention. If the idea of legality or the rule of law pervades policy processes, questions about the adequacy of policy decisions will be immediately transformed into questions of legal validity, and regulated parties' disobedience of policy directives will be regarded as violations of legal obligations. The judiciary may become the final adjudicator of "legal" problems. In contrast, in informal policy processes, questions of effectiveness, adequacy, or moral responsibility certainly emerge, but they are rarely transformed into questions of legal validity or legal responsibility. Therefore, judicial review is rarely pursued. It is inaccurate, however, to regard the lack of judicial intervention only as a result of informality. The opposite causality is also possible; active intervention by the courts will disseminate the idea of the due process of law in policy processes, redefine as legal problems what previously were treated as moral matters, and hence gradually weaken informality. The relationship between informality and the lack of judicial intervention is one of reciprocal causation.

Indeed, in the studies of Johnson, Samuels, and Friedman, with the rare exception of the famous oil cartel cases, we cannot find judicial intervention in the industrial policy process. As is the case with informality, the lack of judicial intervention is not a main theme of these studies. Johnson briefly notes that the restricted role of the judiciary is a prerequisite to the strong leadership of the economic bureaucracy in the developmental state, but no reference to this issue can be found in the arguments of the other two authors. Given the interdependence of informality and the lack of judicial intervention, however, neither the politics of reciprocal consent between the government and private industries nor the excessive reliance on informal policy measures and volun-

tary cooperation that potentially weakens MITI could be maintained if courts intervened actively in industrial policy processes. In this sense, the arguments of both Samuels and Friedman are premised on the lack of judicial intervention.

In sum, Johnson, Samuels, and Friedman seem to recognize that Japanese industrial policy is essentially informal and lacking in judicial intervention. However, they sharply disagree about the relative strengths of MITI and private industries and the degree of contribution industrial policy has made to the postwar economic growth in Japan. Their disagreement may be due to difficulty in objectively measuring MITI's power and its contribution to economic growth. Differences in the research focus may also be a factor that causes disagreement. While Johnson analyzes Japanese industrial policy in general, Samuels and Friedman focus on specific industries. It is by no means unlikely that overall success includes several partial failures. If this is the case, then, Samuels and Friedman should be criticized because of their excessive generalization from specific findings. Yet, it may be asserted that Johnson is biased by MITI's viewpoint because he relied too much on MITI's own publications. In this essay, however, I would like to focus on the points about which these authors seem to agree, that is, informality and the lack of judicial intervention. These features are the focus of Frank Upham's book, *Law and Social Change in Postwar Japan*.

#### UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN*

Upham's study does not focus exclusively on MITI and Japanese industrial policy. Rather, his purpose is to examine "the way in which elites use legal rules and institutions to manage and direct conflict and control change at a social level" (p. 1) in Japan, and thus his argument covers Japanese law and policy in general. Nevertheless, he singled out industrial policy as the object of one of his case studies, presumably because in this area the Japanese method of dispute processing and social management works smoothly. His insights enable us to attain a deeper understanding both of the informality of Japanese industrial policy and of the lack of judicial intervention in it.

At the core of Upham's argument is a Japanese model of law and social change, which he calls "bureaucratic informalism." Bureaucratic informalism consists of a combination of two elements, bureaucratic leadership and informality. In this Japanese model, the governmental bureaucracy is not on an equal footing with private interests. Rather, the bureaucracy stands above segmented private interests and deliberately manages social conflict on the basis of its belief as to the proper direction and pace of social change. The relationship between the bureaucracy and private actors is always vertical. In addition, bureaucratic management ex-

ercises discretion through consultative processes that aim toward consensus among private interests, processes that are neither confined by universal rules nor dependent on procedural formality. In most cases, judgments on when, about what, and with whom to consult are entrusted to the bureaucracy. Strong regulating and licensing powers are available when private interests are not cooperative. Therefore, an apparently soft orientation to consultation and consensus neither undermines the dominance of the bureaucracy nor produces final agreement radically different from what the bureaucracy wanted. Bureaucratic informalism means bureaucratic leadership exercised through informal processes, which Upham considers the basic characteristic of the Japanese way of dispute processing and social management.

According to Upham, bureaucratic informalism was not spontaneously generated. Instead, it is a product of "the elite's attempt to retain some measure of control over the processes of social conflict and change" (p. 17). The Japanese bureaucratic elite has been eager to discourage Western models of legality, which expect social conflict to be resolved and the direction of social change to be clarified either through legislation (the rule-centered model) or through litigation (the judge-centered model), from planting roots in Japanese soil, because those models imply the minimization of bureaucratic control. Bureaucratic informalism is a consciously developed alternative. The principal method the bureaucratic elite employs to retain control is "the manipulation of the legal framework within which social change and its harbinger, social conflict occur" (*ibid.*). The best known example is the creation of institutional mediation often presided over by governmental officials. Equally important is:

careful statutory drafting, not only to avoid the creation of private causes of action . . . but also to give bureaucrats both wide discretion to define their mission under a statute and the ability to carry it out through an administrative process that emphasizes informal consultation and compromises and avoids formal administrative acts that could trigger litigation. (P. 22)

Even in a society where bureaucratic informalism prevails, it is not impossible that conflict involving potential for social change is taken to court. Such lawsuits do exist even in Japan. They are most likely to occur when a social interest long excluded from consultation and hence not having received due care in a process of bureaucratic informalism finds its way to court. So long as the governmental elite has a strong interest in the maintenance of bureaucratic informalism, however, the role of litigation is inevitably limited. The effect of litigation is only to force the bureaucracy to admit the importance of the once-neglected interest. In response, the bureaucracy reconstructs its informal consultative process by coopting the new interest and thereby eliminates the possibility of

continuous judicial intervention in policymaking and implementation.

Upham further argues that the apparently harmonious nature of Japanese society is nothing but a product of bureaucratic informality. Since most disputes are handled through informal processes within the bureaucratic apparatus without the aid of legal professions, only a small number of disputes appear in adversarial judicial forums. What emerges is an apparently nonlitigious society. What is more important:

Without a formal and open policymaking process, government policies can appear as the inevitable and natural results of custom and consensus rather than as the conscious political choices among mutually antagonistic interests that they actually are. Because they appear natural and inevitable, policy decisions are considered socially legitimate and virtually immune to legal and political attack. (P. 208)

Both ordinary disputes and political conflicts are thus largely kept out of sight. What remains is an apparently harmonious society. Upham argues that the apparently harmonious nature of Japanese society, which has been regarded as the manifestation of deep-rooted Japanese cultural values, is but a result of successful suppression of pervasive disputes and conflicts through the creation and maintenance of bureaucratic informality.

Upham's case study of industrial policy bears out his theoretical argument. Statutes concerning industrial policy largely declare only vague policy objectives, and hence concrete policies are formulated as internal decisions of MITI through advisory councils consisting of MITI bureaucrats, interest group representatives, and a few neutral advisers and through more informal meetings of MITI officials and businessmen in regulated industries. In most cases, advisory councils merely confirm policies made at informal meetings to which anti-industry interests such as consumer and environmentalist groups are never invited. Therefore, policies are made smoothly and cooperatively. The policies are then implemented administratively in a process that aims at inducing the voluntary compliance of all regulated parties. Such a combination of informal policies and voluntary compliance keeps the whole process invisible. Therefore, it is very difficult for anti-industry groups excluded from the process to find ways not only to intervene directly in the process but also to invoke judicial intervention. According to Upham, this effect of almost eliminating the possibility of third-party intervention is a fundamental reason why MITI, along with other governmental agencies in Japan, prefers informality. By virtue of informality, MITI can maintain consensual relationships with regulated industries without fear either of getting involved in deep value conflict between pro- and anti-industry groups that is very difficult to mediate or of being scruti-

nized by the judiciary. This point is scarcely mentioned in the books I discussed earlier but is central to Upham's argument.

In sum, according to Upham, both the informality of Japanese industrial policy and the lack of judicial intervention are products of the bureaucracy's conscious and continuous efforts to retain control and, therefore, are characteristics common to all policy areas where the bureaucracy is involved. The accumulation of such bureaucratic endeavors has suppressed conflict and antagonism and resulted in an apparently harmonious society.

Upham maintains that MITI, holding regulating and licensing authorities as trump cards, exerts substantial control over regulated industries, and hence his image of MITI is consistent with Johnson's. Given that MITI has striven to maintain informality and to exclude judicial intervention, however, Upham's argument is not totally incompatible with the observations of Samuels and Friedman. Both the reciprocal consent that entrusts private industries with control in return for their approval of MITI's jurisdiction and private firms' disobedience to MITI's guidance can be regarded as costs MITI had to pay to suppress conflict and to exclude judicial intervention. The costs would not be too high if in return MITI could avoid active and continuous judicial intervention in industrial policy.

Upham's case study on industrial policy reveals one more factor that has brought informality and the lack of judicial intervention to Japanese industrial policy, that is, the reluctance of the judiciary to intervene in the industrial policy process. Upham thoroughly discusses how Japanese administrative law doctrines restrict the possibility of judicial review of MITI's decisions. "What distinguishes MITI's position from similarly situated American agencies is more the doctrinal matrix that restricts judicial review of administrative action in Japan, particularly the doctrines of justiciability, standing, and scope of discretion, than it is the lack of statutory standards" (p. 170). Because of those administrative law doctrines, many of the lawsuits brought by consumers or by environmentalists against MITI are doomed to be rejected without judgments on the merits, and hence MITI's decisions are not scrutinized by the judiciary. The result is the persistence of the bipolar and informal industrial policy process in which only MITI and regulated industries are involved.

What should be stressed here is that those doctrines are not made by MITI in order to circumvent the judiciary. Furthermore, these are not restraints imposed on the judiciary from outside at all. The Administrative Case Litigation Law (1962) (ACLL) in Japan includes only abstract provisions concerning the limits of judicial review, and it is not very difficult to interpret those provisions liberally to enable a wide range of judicial review. The administrative law doctrines that restrict judicial intervention in industrial

policy process have been established as precedents through particularly strict interpretation of provisions of the ACLL.

For instance, article 9 of the ACLL provides that only those who have a "legal interest" in an administrative disposition can challenge the disposition. This provision could be liberally interpreted as granting standing to everyone whose legitimate interest was injured by an administrative disposition. However, precedent has established that a legal interest means an interest which a statute authorizing a certain administrative disposition is specifically intended to protect. If a statute was enacted to protect general public interest, then, no one has standing to sue. In a case decided in 1989 (*Iwasaki, Kotani, & Inoue v. Japan*), the Supreme Court, following this precedent, held that commuters do not have standing to challenge the legality of a decision of a local bureau of the Ministry of Transportation to permit a railroad company to raise fares because the purpose of the Local Railroad Act (1918) is not to protect individual interests of commuters but to secure public interest. If the Court had granted standing to commuters and revoked the bureau's decision, the administrative process of permitting a rise of fares might be considerably reconstructed. In order to avoid further lawsuits, the bureau might admit representatives of commuters to participate in the process to express their interests. The process, then, might become a forum of conflict between a railroad company and commuters. As long as the judiciary maintains the precedent, however, the bureau need not worry about such a possibility. MITI is in almost the same situation.

In short, the judiciary restrains itself from intervening not only in industrial policy process but also in administrative processes in general. However, Upham provides no explanation of why the judiciary is so passive in Japan, though he does recognize that this passivity exists.

### CONCLUDING REMARKS

In spite of their disagreement on MITI's power and its contribution to the economic growth in postwar Japan, Johnson, Samuels, and Friedman all recognize that Japanese industrial policy is essentially informal and lacking in judicial intervention, whether or not they explicitly mentioned these points. As Upham notes, MITI has been eager to maintain these features. Although I suspect that Upham somewhat exaggerates the ability of the Japanese elite to manipulate social behavior and consciousness, there is no doubt that MITI's efforts to maintain informality and to exclude judicial intervention have suppressed to a considerable degree the growth of open conflict and antagonism. The last question concerns the passivity of the Japanese judiciary.

The significance of judicial passivity for the informal Japanese industrial policy cannot be exaggerated. If courts actively inter-

vened in industrial policy process by relaxing the administrative law doctrines of justiciability, standing, and scope of discretion, MITI's attempts to maintain informality and to exclude judicial intervention would be seriously obstructed. With a more active judiciary, both MITI's internal decisions and informal agreements with regulated industries could be objects of review. Lawsuits filed by interests that have neither been properly represented nor received due consideration in the industrial policy process, such as consumer groups and environmentalist groups, would increase dramatically. Those groups might even assume the role of a private attorney general, bringing lawsuits when regulated industries violate statutory requirements or MITI's policy decisions. In such a situation, MITI could no longer maintain its informal and consensual relationship with regulated industries. Various groups would be admitted into the industrial policy process, which then would be pervaded by conflict among mutually incompatible interests. In order to deal with the conflict, detailed rules covering both substantive and procedural matters would have to be enacted.

If the preceding scenario had been fully translated into reality in postwar Japan, Johnson, Samuels, and Friedman would have found something completely different from what they actually found. Japanese industrial policy is as it is today because the passive posture of the judiciary has complemented MITI's efforts to maintain informality and to exclude judicial intervention. Paradoxically, the Japanese judiciary has been an important actor in industrial policy process because of its passivity.

From what, then, is the judicial passivity derived? No answer can be found in the four books reviewed in this essay. To be sure, it is not fair to denounce these books on the ground that they lack due consideration of this matter. It is common for social-scientific studies to focus on a few specific social phenomena, excluding others from serious consideration. In the light of the boundless complexity of social reality, such a practice is understandable so long as the exclusion does not distort the whole investigation. In the four books I have reviewed, the passivity of the Japanese judiciary is just such an excluded social phenomenon. Yet, it is now undeniable that judicial passivity in Japan is an important social phenomenon in its own right which is worth studying seriously.

Several intuitive explanations are already available. The first is a popular explanation that judges pay deference to decisions made by MITI bureaucrats as policy experts. The second possible account is that judges, as well as MITI bureaucrats, are constituents of the Japanese power elite and hence defend the posture of MITI based on a certain common interests of the power elite. The third is an assertion that, under the long-term ruling by the Liberal Democratic Party (LDP), it is unthinkable that judges either designated or appointed by a LDP cabinet would actively intervene in industrial policy process in defiance of LDP's general intention



to protect MITI's free hand. This assertion is based on the assumption that the LDP has benefited from and respects MITI's discretionary economic management. The fourth argument focuses on the fact that many judges have been temporarily transferred to the Ministry of Justice as attorneys of the government. It is argued that these judges have brought both bureaucratic perspectives and values into the judiciary and thus made the whole judiciary too passive to overturn MITI's policy judgments. The final explanation is that the Japanese judiciary is bureaucratically organized under the control of the General Secretariat of the Supreme Court, which has the authority to assign judges to respective positions. Consequently, judges are passive because they are forced to obey the policy of the General Secretariat. This argument regards the passive policy as a product of the close relationship and congruence of the interests of the General Secretariat on the one hand and the LDP or the governmental bureaucracy on the other.

At present, however, none of these explanations is more than a mere hypothesis. Whether these hypotheses, as well as any other ones, are verified or not depends on further studies, which I expect will be carried out especially by sociolegal scholars. It is by no means an easy task because the Japanese judiciary is such an exclusive circle that it would be reluctant to admit outside researchers. Judges are unlikely to agree to interviews or questionnaires. Even if they agree to participate, they will refuse to answer questions about their political attitudes. However, it isn't that there is no research method at all.

First of all, retired judges are promising information sources. Because they need not worry about their future in the judiciary, they may speak frankly about their belief in judicial passivity and the influence of the LDP and the General Secretariat on judicial decisions. Second, a detailed analysis of judicial opinions in cases decided on the merits should be undertaken. By examining how much importance judges attach to both evidence and interpretation of legal rules presented by the government, the degree of deference they pay to the governmental bureaucracy can be measured. Third, articles judges have contributed to law journals can be scrutinized to discover attitudes toward the government and national policies. Judges' passivity, which can be determined from their voting records in decisions concerning the applicability of administrative law doctrines restricting judicial review, may be correlated with their deference to the bureaucracy (e.g., deference to policies and the interpretation of statutes adopted by the bureaucracy) and political attitudes (reflected, e.g., in party identification and location on a liberal-conservative scale). Fourth, a study of judicial career paths could be undertaken. If, as compared with other judges, those who had actively revoked administrative dispositions constantly received disadvantageous treatment such as be-

ing relocated to district courts in unpopulated areas, we can infer that the General Secretariat has exerted strong control over judges in order to make them obey its passive policy. Finally, we should examine whether there are any significant differences in the degree of passivity between judges who are graduates of the University of Tokyo, from which most elite bureaucrats have been recruited, and those who are not; between judges who have experience as attorneys of the government and those who do not; and between judges who have worked at the General Secretariat and those who have not.

To be sure, it is very difficult to collect sufficient data for sound statistical analyses. Yet, in view of the significance of the passive judiciary for Japanese industrial policy, elucidating the causes of the judicial passivity will make a contribution not only to the studies of judicial behavior but also to further development of our understanding of Japanese industrial policy.

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