The Japanese Legal System
Professor Keisuke Abe

An introduction to the legal system of Japan. Among the general topics considered are the civil-law tradition and its Japanese reception, the sources of Japanese law, the constitutional framework and its implications for private law, and the role of law in the Japanese society. The course also examines the ongoing debate on constitutional revision, a debate that involves questions as to the appropriate role for Japan in international peacekeeping, as well as the need to expand or adjust the protection of fundamental rights and liberties to “suit the times.”

Although the course is not designed to provide detailed knowledge of procedural or substantive Japanese law, it will draw on cases and problems from constitutional law, torts, criminal law, family law, and employment law.
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* Some of the subjects listed above may not be covered in detail so that more time can be spent on discussing the topics that match the students’ interests.
# The Japanese Legal System

Santa Clara University School of Law  
Institute of International and Comparative Law  

Professor Keisuke Abe  
Seikei University Faculty of Law

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** From JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS (Curtis J. Milhaupt et al. eds., 2001).  
THE CONSTITUTION OF JAPAN, 1946*
Promulgated on November 3, 1946; Put into effect on May 3, 1947.

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

CHAPTER I. THE EMPEROR

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

Article 2. The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.

Article 3. The advice and approval of the Cabinet shall be re-

* The following is the official translation.
Article 4. The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.

Article 5. When, in accordance with the Imperial House Law, a Regency is established, the Regent shall perform his acts in matters of state in the Emperor's name. In this case, paragraph one of the preceding article will be applicable.

Article 6. The Emperor shall appoint the Prime Minister as designated by the Diet.

Article 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

(i) Pronunciation of amendments of the constitution, laws, Cabinet orders and treaties;
(ii) Convocation of the Diet;
(iii) Dissolution of the House of Representatives;
(iv) Proclamation of general election of members of the Diet;
(v) Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
(vi) Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights;
(vii) Awarding of honors;
(viii) Attestation of instruments of ratification and other diplomatic documents as provided for by law;
(ix) Receiving foreign ambassadors and ministers;
(x) Performance of ceremonial functions.

Article 8. No property can be given to, or received by, the Imperial House; nor can any gifts be made therefrom, without the authorization of the Diet.

CHAPTER II. RENUNCIATION OF WAR

Article 9. 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 a means of settling international disputes.

(2) 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.

CHAPTER III. RIGHTS AND DUTIES OF THE PEOPLE

Article 10. The conditions necessary for being a Japanese national shall be determined by law.

Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolable rights.

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin.

(2) Peers and peerage shall not be recognized.

(3) No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Article 15. The people have the inalienable right to choose their public officials and to dismiss them.

(2) All public officials are servants of the whole community and not of any group thereof.

(a) Universal adult suffrage is guaranteed with regard to the election of public officials.

(4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters, nor shall any person be in any way discriminated against for sponsoring such a petition.

Article 17. Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.

Article 18. No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

Article 19. Freedom of thought and conscience shall not be violated.
Article 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority.
   (2) No person shall be compelled to take part in any religious acts, celebration, rite or practice.
   (3) The State and its organs shall refrain from religious education or any other religious activity.

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.
   (2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 22. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.
   (2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 23. Academic freedom is guaranteed.

Article 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.
   (2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Article 25. All people shall have the right to maintain the minimum standards of wholesome and cultured living.
   (2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Article 26. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.
   (2) All people shall be obligated to have all boys and girls under their protection receive ordinary educations as provided for by law. Such compulsory education shall be free.

Article 27. All people shall have the right and the obligation to work.
   (2) Standards for wages, hours, rest and other working conditions shall be fixed by law.
   (3) Children shall not be exploited.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

Article 29. The right to own or to hold property is inviolable.
   (2) Property rights shall be defined by law, in conformity with the public welfare.
   (3) Private property may be taken for public use upon just compensation therefor.

Article 30. The people shall be liable to taxations as provided by law.

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 32. No person shall be denied the right of access to the courts.

Article 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.

Article 34. No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.
   (2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.
   (2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.
   (3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts be assigned to his use by the State.

Article 38. No person shall be compelled to testify against himself.
   (2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.
   (3) No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Article 40. Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.
CHAPTER IV. THE DIET

Article 41. The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Article 42. The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.

Article 43. Both Houses shall consist of elected members, representative of all the people.

(2) The number of the members of each House shall be fixed by law.

Article 44. The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

Article 45. The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.

Article 46. The term of office of members of the House of Councillors shall be six years, and election for half the members shall take place every three years.

Article 47. Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law.

Article 48. No person shall be permitted to be a member of both Houses simultaneously.

Article 49. Members of both Houses shall receive an appropriate annual payment from the national treasury in accordance with law.

Article 50. Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.

Article 51. Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

Article 52. An ordinary session of the Diet shall be convened once per year.

Article 53. The Cabinet may determine to convene extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.

Article 54. When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convened within thirty (30) days from the date of the election.

(2) When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convene the House of Councillors in emergency session.

(3) Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.

Article 55. Each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.

Article 56. Business cannot be transacted in either House unless one-third or more of total membership is present.

(2) All matters shall be decided, in each House, by a majority of those present, except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue.

Article 57. Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two-thirds or more of those members present passes a resolution therefor.

(2) Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy.

(3) Upon demand of one-fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes.

Article 58. Each House shall select its own president and other officials.

(2) Each House shall establish its rules pertaining to meetings, proceedings and internal discipline, and may punish members for disorderly conduct. However, in order to expel a member, a majority of two-thirds or more of those members present must pass a resolution thereon.

Article 59. A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

(2) A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

(3) The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.

(4) Failure by the House of Councillors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the
House of Representatives to constitute a rejection of the said bill by the House of Councillors.

**Article 60.** The Budget must first be submitted to the House of Representatives.

(2) Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

**Article 61.** The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.

**Article 62.** Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records.

**Article 63.** The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations.

**Article 64.** The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.

(2) Matters relating to impeachment shall be provided by law.

**CHAPTER V. THE CABINET**

**Article 65.** Executive power shall be vested in the Cabinet.

**Article 66.** The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.

(2) The Prime Minister and other Ministers of State must be civilians.

(3) The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

**Article 67.** The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

(2) If the House of Representatives and the House of Councillors disagrees and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

**Article 68.** The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet.

(2) The Prime Minister may remove the Ministers of State as he chooses.

**Article 69.** If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved with ten (10) days.

**Article 70.** When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign en masse.

**Article 71.** In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed.

**Article 72.** The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

**Article 73.** The Cabinet, in addition to other general administrative functions, shall perform the following functions:

(i) Administer the law faithfully; conduct affairs of state;

(ii) Manage foreign affairs;

(iii) Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet;

(iv) Administer the civil service, in accordance with standards established by law;

(v) Prepare the budget, and present it to the Diet;

(vi) Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law;

(vii) Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.

**Article 74.** All laws and cabinet orders shall be signed by the competent Minister of State and countersigned by the Prime Minister.

**Article 75.** The Ministers of State, during their tenure of office, shall not be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

**CHAPTER VI. JUDICIARY**

**Article 76.** The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

(2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

(3) All judges shall be independent in the exercise of their con-
science and shall be bound only by this Constitution and the laws.

Article 77. The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

2) Public procurators shall be subject to the rule-making power of the Supreme Court.

3) The Supreme Court may delegate the power to make rules for inferior courts to such courts.

Article 78. Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.

Article 79. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

4) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

4) Matters pertaining to review shall be prescribed by law.

5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 80. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

2) The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Article 82. Trials shall be conducted and judgment declared publicly.

2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein

the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

CHAPTER VII. FINANCE

Article 83. The power to administer national finances shall be exercised as the Diet shall determine.

Article 84. No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.

Article 85. No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.

Article 86. The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.

Article 87. In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorized by the Diet to be expended upon the responsibility of the Cabinet.

2) The Cabinet must get subsequent approval of the Diet for all payments from the reserve fund.

Article 88. All property of the Imperial Household shall belong to the State. All expenses of the Imperial Household shall be appropriated by the Diet in the budget.

Article 89. No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Article 90. Final accounts of the expenditures and revenues of the State shall be audited annually by a Board of Audit and submitted by the Cabinet to the Diet, together with the statement of audit, during the fiscal year immediately following the period covered.

2) The organization and competency of the Board of Audit shall be determined by law.

Article 91. At regular intervals and at least annually the Cabinet shall report to the Diet and the people on the state of national finances.

CHAPTER VIII. LOCAL SELF-GOVERNMENT

Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.
Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

CHAPTER IX. AMENDMENTS

Article 96. Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

CHAPTER X. SUPREME LAW

Article 97. 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.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

(2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Article 99. The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

CHAPTER XI. SUPPLEMENTARY PROVISIONS

Article 100. This Constitution shall be enforced as from the day when the period of six months will have elapsed counting from the day of its promulgation.

(2) The enactment of laws necessary for the enforcement of this Constitution, the election of members of the House of Councillors and the procedure for the convocation of the Diet and other preparatory procedures for the enforcement of this Constitution may be executed before the day prescribed in the preceding paragraph.

Article 101. If the House of Councillors is not constituted before the effective date of this Constitution, the House of Representatives shall function as the Diet until such time as the House of Councillors shall be constituted.

Article 102. The term of office for half the members of the House of Councillors serving in the first term under this Constitution shall be three years. Members falling under this category shall be determined in accordance with law.

Article 103. The Ministers of State, members of the House of Representatives, and judges in office on the effective date of this Constitution, and all other public officials, who occupy positions corresponding to such positions as are recognized by this Constitution shall not forfeit their positions automatically on account of the enforcement of this Constitution unless otherwise specified by law. When, however, successors are elected or appointed under the provisions of this Constitution, they shall forfeit their positions as a matter of course.
CONSTITUTION OF THE EMPIRE OF JAPAN, 1889
[Meiji Constitution]*

Promulgated on February 11, 1889; Put into effect on November 29, 1889 (based upon the 4th paragraph of the Edict); Superseded by the Constitution of Japan on May 3, 1947.

Imperial Oath Sworn in the Sanctuary in the Imperial Palace (Tsuge-bumi)

We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will hereby to give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors. That we have been so fortunate in Our reign, in keeping with the tendency of the times, as to accomplish this work, We owe to the glorious Spirits of the Imperial Founder of Our House and of Our other Imperial Ancestors.

We now reverently make Our prayer to Them and to Our Illustrious Father, and implore the help of Their Sacred Spirits, and make to Them solemn oath never at this time nor in the future to fail to be an example to Our subjects in the observance of the Laws hereby established.

May the heavenly Spirits witness this Our solemn Oath.

Imperial Rescript on the Promulgation of the Constitution

Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants.

* The following is the semi-official translation, which appeared in Count H. Itô, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Itô transl. 1889).

MEIJI CONSTITUTION

The Imperial Founder of Our House and Our other Imperial Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis, which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavours, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, and of securing forever the stability of the work bequeathed to Us by Our Imperial Ancestors.

Preamble [or Edict] (jōwa)

Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of Our Imperial Edict of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in the future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the 23rd year of Meiji and the time of its opening shall be the date, when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no other case shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.
CHAPTER I. THE EMPEROR

Article 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article 2. The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.

Article 3. The Emperor is sacred and inviolable.

Article 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.

Article 5. The Emperor exercises the legislative power with the consent of the Imperial Diet.

Article 6. The Emperor gives sanction to laws, and orders them to be promulgated and executed.

Article 7. The Emperor convokes the Imperial Diet, opens, closes, and prorogues it, and dissolves the House of Representatives.

Article 8. The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law.

(2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

Article 9. The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Article 10. The Emperor determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws, shall be in accordance with the respective provisions (bearing thereon).

Article 11. The Emperor has the supreme command of the Army and Navy.

Article 12. The Emperor determines the organization and peace standing of the Army and Navy.

Article 13. The Emperor declares war, makes peace, and concludes treaties.

Article 14. The Emperor declares a state of siege.

(2) The conditions and effects of a state of siege shall be determined by law.

Article 15. The Emperor confers titles of nobility, rank, orders and other marks of honor.

CHAPR ER II. RIGHTS AND DUTIES OF SUBJECTS

Article 16. The Emperor orders amnesty, pardon, commutation of punishments and rehabilitation.

Article 17. A Regency shall be instituted in conformity with the provisions of the Imperial House Law.

(2) The Regent shall exercise the powers appertaining to the Emperor in His name.

Article 18. The conditions necessary for being a Japanese subject shall be determined by law.

Article 19. Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any other public offices equally.

Article 20. Japanese subjects are amenable to service in the Army or Navy, according to the provisions of law.

Article 21. Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

Article 22. Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law.

Article 23. No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

Article 24. No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

Article 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

Article 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

Article 27. The right of property of every Japanese subject shall remain inviolate.

(2) Measures necessary to be taken for the public benefit shall be provided for by law.

Article 28. Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Article 29. Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.

Article 30. Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.

Article 31. The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war in cases of a national emergency.

Article 32. Each and every one of the provisions contained in the preceding Articles of the present Chapter, that are not in conflict
with the laws or the rules and discipline of the Army and Navy, shall apply to the officers and men of the Army and of the Navy.

CHAPTER III. THE IMPERIAL DIET

Article 33. The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.

Article 34. The House of Peers shall, in accordance with the Ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those who have been nominated thereto by the Emperor.

Article 35. The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election.

Article 36. No one can at one and the same time be a Member of both Houses.

Article 37. Every law requires the consent of the Imperial Diet.

Article 38. Both Houses shall vote upon projects of law submitted to it by the Government, and may respectively initiate projects of law.

Article 39. A Bill, which has been rejected by either the one or the other of the two Houses, shall not be brought in again during the same session.

Article 40. Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

Article 41. The Imperial Diet shall be convoked every year.

Article 42. A session of the Imperial Diet shall last during three months. In case of necessity, the duration of a session may be prolonged by the Imperial Order.

Article 43. When urgent necessity arises, an extraordinary session may be convoked in addition to the ordinary one.

(2) The duration of an extraordinary session shall be determined by Imperial Order.

Article 44. The opening, closing, prolongation of session and prorogation of the Imperial Diet, shall be effected simultaneously for both Houses.

(2) In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

Article 45. When the House of Representatives has been ordered to dissolve, Members shall be caused by Imperial Order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

Article 46. No debate can be opened and no vote can be taken in either House of the Imperial Diet, unless not less than one-third of the whole number of Members thereof is present.

Article 47. Votes shall be taken in both Houses by absolute majority. In the case of a tie vote, the President shall have the casting vote.

Article 48. The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.

Article 49. Both Houses of the Imperial Diet may respectively present addresses to the Emperor.

Article 50. Both Houses may receive petitions presented by subjects.

Article 51. Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

Article 52. No Member of either House shall be held responsible outside the respective Houses, for any opinion uttered or for any vote given in the House. When, however, a Member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

Article 53. The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offenses connected with a state of internal commotion or with a foreign trouble.

Article 54. The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

CHAPTER IV. THE MINISTERS OF STATE AND THE PRIVY COUNCIL

Article 55. The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

(2) All Laws, Imperial Ordinances, and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State.

Article 56. The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

CHAPTER V. THE JUDICATURE

Article 57. The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

(2) The organization of the Courts of Law shall be determined by law.
Article 58. The judges shall be appointed from among those, who possess proper qualifications according to law.
(2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.
(3) Rules for disciplinary punishment shall be determined by law.

Article 59. Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear, that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provisions of law or by the decision of the Court of Law.

Article 60. All matters, that fall within the competency of a special Court, shall be specially provided for by law.

Article 61. No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

CHAPTER VI. FINANCE

Article 62. The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.
(2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.
(3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

Article 63. The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

Article 64. The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.
(2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

Article 65. The Budget shall be first laid before the House of Representatives.

Article 66. The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

Article 67. Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

Article 68. In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.

Article 69. In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.

Article 70. When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.
(2) In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

Article 71. When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

Article 72. The final account of the expenditures and revenues of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.
(2) The organization and competency of the Board of Audit shall be determined by law separately.

CHAPTER VII. SUPPLEMENTARY RULES

Article 73. When it has become necessary in future to amend the provisions of the present Constitution, a project to the effect shall be submitted to the Imperial Diet by Imperial Order [=command].
(2) In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

Article 74. No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.
(2) No provision of the present Constitution can be modified by the Imperial House Law.

Article 75. No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

Article 76. Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.
(2) All existing contracts or orders, that entail obligations upon the Government, and that are connected with expenditure, shall come within the scope of Article 67.

A VERY BRIEF INTRODUCTION TO THE JAPANESE LANGUAGE

Japanese is a unique language. The nearest group of languages in terms of grammar includes the Korean and the Mongolian languages and those of the Siberian natives. They are very different, however, in terms of pronunciation and some other aspects of the language. Contrary to an assumption held by many in the West, the Japanese language is fundamentally different from Chinese in terms of grammar and pronunciation, although the Japanese writing system utilizes Chinese characters.

1. Letters

The Japanese use both Chinese characters (kanji) and a system of phonetic signs called kana.

(a) Kanji were introduced to Japan during the sixth and seventh centuries from China via Korea.

One of the peculiarities of the Japanese use of Chinese characters is that the same character may be pronounced in a number of different ways, which may be classified into two major groups. One retains the old Chinese pronunciation (on), the other is the new pronunciation given to the character by the Japanese (kun). Let me give an example. When they imported a Chinese character 大 (=dog), they learned that it was then pronounced as ken. They also found that it denoted a species of animals which they had called inu. Thus they pronounced this character either as ken or as inu.

The Chinese pronunciation changed historically by usage. Consequently, some Chinese characters have acquired more than one on reading. Also, a single Chinese character could have denoted several things for each of which there was a distinct word in Japanese. Thus the same kanji may now have several on and/or several kun readings.

(b) Kana are phonetic signs invented by the Japanese to adapt the kanji to Japanese, which has a complex pattern of grammatical endings not encountered in Chinese.

There are two sets of kana, hira-gana and kata-kana. One set is
[II.] THE SDF’S ROLE IN, AND RESPONSE TO, INTERNATIONAL CONTRIBUTION

Under new international conditions following the end of the Cold War, the situation is heading for one in which higher expectations are pinned on the United Nations than ever before to perform its function of maintaining peace and security of the international society. As regards U.N. peacekeeping activities, Japan has been making contributions mainly in financial terms. In order to maintain peace and prosperity of the international community into the future, however, it is indispensable for this country to make contributions not only in financial terms but also in terms of personnel. It is this country’s international obligation to make such contributions in international society, and the maintenance of peace and security of international society thus rendered by U.N. peacekeeping activities is, in return, conducive to Japan’s own security.

With the 1991 Gulf crisis as an opportunity, Japan dispatched its misenkeeping forces to the Persian Gulf, and after a cease-fire was formally enforced, Japanese misenkeepers conducted removal and disposal of the remaining mines in the Persian Gulf. This was the SDF’s first international contribution in terms of personnel, and it helped Japan to win certain understanding and appreciation, at home and abroad, for its attitude on contributions to international peace. Furthermore, Japan made statutory preparations in order to contribute more positively than before to international efforts for the cause of peace in the international community.

1. Statutory Framework for International Contribution

(i) International Peace Cooperation Law

Japan has long been cooperating with the United Nations in its peacekeeping activities, but its cooperation has chiefly been limited to the financial aspect except when it dispatched election monitors to Nicaragua in terms of cooperation by personnel.

Since the Gulf crisis, the Japanese government, with the aim of contributing more positively than before to the international community, particularly in terms of personnel, submitted to the extraordinary session of the Diet in the fall of 1991 the “Bill Concerning Cooperation for United Nations Peacekeeping Operations and Other Operations” (International Peace Cooperation Bill). The bill was designed to consolidate a domestic setup so that Japan could cooperate in United Nations peacekeeping operations and others appropriately and promptly. The bill was enacted in the ordinary session of the Diet in June 1992, and was put in force in August of the same year.

In the course of Diet deliberations, there were discussions as to whether dispatches of SDF units abroad for cooperation in U.N. peacekeeping operations might constitute “use of force,” which is prohibited by the Constitution. However, U.N. peacekeeping operations are not intended to restore peace by forcible means but to secure cease-fires through the authority and persuasion of the U.N., from a neutral and non-compulsory standpoint, in precondition that an agreement on the cease-fire has been reached among the parties to a conflict and that they have agreed on the activities of the peacekeeping operations. On the basis of this recognition, the International Peace Cooperation Law was legislated in line with the basic guidelines concerning participation in peacekeeping forces (the so-called Five Principles). The SDF’s cooperation for U.N. peacekeeping operations conducted under the Law, therefore, will never entail the possibility of the “use of force” or the “dispatch of armed forces to foreign countries for the purpose of using force” as prohibited under Article 9 of the Constitution.

Judgment

The defendants, Sakasa Shigeru, Sugano Kazuyuki, Takano Yasunobu, Eda Fumio, Tsuchiya Genichirō, and Shimizu Tokuzo are hereby found to be not guilty with respect to all charges brought against them.

Reasons

The gist of the allegations against the defendants in this case is as follows: That at about 1:50 A.M. on July 8, 1997, the Tokyo Procurement Agency, after having properly obtained the permission of the Prime Minister to use land in accordance with the Special Measures Law concerning Uses of Land to Implement the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America and the Land Expropriation Law, began a (land) survey of the private lots within the Tachikawa Airfield (located in Town of Sunakawa, District of Kitazuma, Tokyo) which was being used by the United States Air Force that from the early morning of the same day, more than one thousand people constituting the members of Sunakawa Alliance Against Base-Expansion and the members of various labor unions, student organizations and other groups who supported the Alliance, had assembled outside the fence of the northern boundary of said air field and staged a vigorous demonstration against the intended expansion of the base that some of the demonstrators had destroyed the fence at the northern tip of the runway for several tens of meters; that between approximately 10:40 A.M. and approximately 11:30 A.M. of the same day, the defendants Sakasa Shigeru, Sugano Kazuyuki, Takano Yasunobu, Eda Fumio, Tsuchiya Genichirō, and Shimizu Tokuzo, without cause, in cooperation with each other, entered 4.5 meters into the Tachikawa Airfield located in Town of Sunakawa, District of Kitazuma, Tokyo, and Airfield being an area in use by the United States Armed Forces, the entrance into which was prohibited; and that between approximately 10:30 A.M. and approximately 11:30 A.M. the defendant Shimizu Tokuzo, without due cause, entered 2.5 meters into said Airfield.

The aforesaid facts fall within the purview of Article 5 of the Special Criminal Law to Implement the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan (hereinafter referred to as the...
Article 5 of the Special Criminal Law imposes imprisonment for not more than one year or a fine of not more than 1,000 yen or a minor fine. Thus, the latter law imposes a heavier punishment than the former. This difference in weight of punishment can be viewed as a result of an intention to provide more adequate protection for the legal interest of noninterference with the facilities or areas in use by the United States Armed Forces than for the same kind of interest of the general public, based on the premise that the former legal interest is more important than the latter. If the stationing of American troops in our country is not in conflict with our Constitution, the different legal treatment between the facilities and areas occupied by the United States Armed Forces and those of the general public is hardly worth consideration, but if such stationing is impermissible under the provisions of the Constitution, Article 5 of the Special Criminal Law will be an improper imposition, without due cause, a heavier punishment upon our people than in the general case provided for in the Minor Offences Law. If such be the case, we can only declare that Article 5 of the Special Criminal Law violates the applicable provision of the Constitution and, consequently, also violates Article 31 of the Constitution which provides that no person shall be punished except according to procedures established by law. Therefore, we will proceed to examine those points below.

In Article 9, the Japanese Constitution not only renounces war and the threat or use of force forever as a means of carrying out a national policy, but also rejects the right of belligerency [kōsenkō] of the state. To give substance to these aims, it provides that land, sea and air forces, as well as other war potential, will never be maintained. Article 9 of the Constitution, although not denying the right of self-defense, is intended (saide from prohibiting wars of aggression) to prohibit using war potential for self-defense and also the maintenance of war potential for self-defense. The provision is based upon the desire of our people that "never again shall we be treated with the horrors of war through the action of government," that "[w]e, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationships (namely, the ideal of international cooperation for world peace that is the goal of the Charter of the United Nations) and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world," Japanese Const. preamble. In other words, it is based on a determination by our people that war is an offense against international peace organizations, that our security and existence will be preserved by relying on military measures taken by the international police forces of such organizations, or, at least, that, making the utmost compromise with reality, our security and existence would be preserved by relying on military security measures undertaken by the Security Council, an organ of the United Nations which has as its purpose becoming such an international peace organization. It must be said, therefore, that this provision not only performs the negative function of assuring foreign nations of our reconsideration of our past militaristic and aggressive policies, but also represents a lofty ideal and an heroic resolve that we will be the vanguard in realizing ever-lasting world peace based on justice and order. Consequently, interpretation of Article 9 should be based upon a full consideration of these Constitutional principles, and not upon the basis of a merely formalistic and conceptualistic understanding of its language. Furthermore, its interpretation should not, of course, be affected by the policy consideration that the stationing of United States troops in our country is necessary to protect our country's security and existence against a "vacuum" situation without armed forces resulting from the withdrawal of the Allied Occupation Forces after the coming into force of the Treaty of Peace, and therefore, that such stationing is necessary for purposes of our self-defense.

Now, we will examine the relationship between the stationing of the United States troops and Article 9 of the Constitution. If such stationing is based upon a recommendation or order from an organ of the United Nations with which, as mentioned above, our country has actually ensured the preservation of its security and existence, and if such stationing is for the purpose of defending our country against armed attack from without, it may not fall within the meaning of the maintenance of war potential, which is forbidden under the first sentence of Article 9(3) of the Constitution. United States Armed Forces, however, are stationed in our country as the result of a request by our country, which request was accepted by the United States of America, to the effect that America dispose its armed forces to defend against an armed attack upon our country. Such forces have the purpose of contributing to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance to put down large-scale internal riots and disturbances in Japan, caused through insurrection or intervention by an outside power or powers. Security Treaty with Japan art. I (1951). Our country provides the United States with the facilities and areas necessary to carry out such purposes. Administrative Agreement with Japan art. II (1952). Consequently, United States troops stationed in Japan might not merely be used for defense against armed attacks upon our country or for assisting in putting down internal riots and the like, but might also be ordered outside the territorial limits of Japan to contribute to the maintenance of international peace and security.
shall receive criminal punishment except according to procedure established by law.

Wherefore, such and every one of the allegations against the defendants does not constitute the alleged crime specified in the counts of the information; and this court declares said defendants to be not guilty in accordance with Article 356 of the Code of Criminal Procedure.

Sakata v. Japan (The Sunakawa Case)*

13 Keishi 3245
(Supreme Ct., Grand Bench, 1959)

Translated by Charles R. Stevens and Kazunobu Takahashi

Whereas, an appeal has been lodged by the Prosecutor against the decision in the first instance pronounced by the Tokyo District Court on March 30, 1959 in the case of the alleged violation of the Special Criminal Law Enacted in Consequence of the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America, brought against the above-mentioned defendants, therefore, this court renders its decision as follows:

Judgment

The decision below is vacated.
The case is remanded to the Tokyo District Court.

Reasons

Regarding the reasons for appeal (jikaku shi) submitted by Nomura Satake, Chief Prosecutor, Tokyo District Prosecutor's Office:
The substance of the decision below is that Article 3 of the Special Criminal Law Enacted in Consequence of the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America is null and void, as it contradicts Article 31 of the Constitution on the premise that the constitution of United States armed forces in Japan contravenes the provisions of the first part of paragraph 2, Article 9 of the Constitution and, therefore, cannot be permitted to stand.
1. The Court will first examine the meaning of the first part of paragraph 2, Article 9 of the Constitution. It may be stated at the beginning that Article 9 of the Constitution was promulgated with a sincere desire for lasting peace by the people of Japan who, in consequence of the acceptance of the Potsdam Declaration as a result of the defeat of our country and reflecting upon the errors of militaristic activities committed by the government in the past, have firmly resolved that never again shall we be visited with the horrors of war through the action of the government.

... Thus, this Article renounces the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance....

In view of this it is only natural for our country, in the exercise of powers inherent in a state, to maintain peace and security, to take whatever measures may be necessary for self-defense, and to preserve its very ex-
The next point in issue is whether the stationing of the United States armed forces in Japan is contrary to the purport of Article 9, Article 56 and the Preamble of the Constitution. Irrespective of the stationing of the United States troops in Japan is predicated upon the Security Treaty between Japan and the United States, now under consideration, determination of the constitutionality of this treaty must of necessity precede the determination of this point.

The Security Treaty was concluded on the same day as the Treaty of Peace with Japan (Treaty No. 9, 23 April 1952) and it maintains a very close and inseparable relationship with that treaty. That is to say, under the proviso contained in Article 6(a) of the Treaty of Peace, it is stated that "Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japan's territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers." Thus, recognizing the stationing of foreign troops within the territorial limits of Japan, the Security Treaty is a treaty concluded between Japan and the United States regarding stationing of the United States armed forces, the foreign armed forces recognized in the above provision of the Treaty of Peace. This provision was approved by a majority of forty countries out of sixty United Nations countries.

According to the Preamble of the Japan-United States Security Treaty, the Treaty of Peace recognizes that in consideration of the fact that Japan will not have the effective means to exercise its inherent right of self-defense at the time of coming into force of the Treaty of Peace, and since there is a necessity of coping with the danger of irresponsible militarism, that Japan, as a sovereign nation, has the right to enter into collective security arrangements. Further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense. It is clear, therefore, that the purpose of the Japan-United States Security Treaty is to provide, as a provisional arrangement, for the defense of Japan, and to stipulate matters necessary to insure the safety and defense of our country, such as granting of the right to the United States to deploy its armed forces in and about Japan to guard against armed attack upon the country.

In the formulation of the treaty, the Cabinet of the Japanese Government drew in power, negotiated with the United States on a number of occasions in accordance with the Constitutional provisions, and finally concluded the same as one of the most important national policies. It is also well-accepted public knowledge that, subsequent thereto, the question of whether the treaty was in accord with the Constitution was carefully discussed by both Houses and finally ratified by the Diet as being a legal and proper treaty. The Security Treaty, therefore, as stated before, is featured with an extremely high degree of political consideration, having bearing upon the very existence of our country as a sovereign power, and any legal determination as to whether the content of the treaty is constitutional or not is in many respects inseparably related to the high degree of political consideration or discretionary power on the part of the Cabinet which concluded the treaty and on the part of the Diet which approved it. Consequently, as a rule, there is a certain element of incompatibility in the process of judicial determination of its constitutionality by a court of law which has as its mission the exercise of the purely judicial function. Accordingly, unless the said treaty is obviously unconstitutional and void, it falls outside the purview of the power of judicial review granted to the court. It is proper to construe that the question of the determination of its constitutionality should be left primarily to the Cabinet which has the power to conclude treaties and the Diet which has the power to ratify them; and ultimately to the political consideration of the people with whom rests the sovereign power of the nation.

Accordingly, the Court in proceeding to deliberate over the Security Treaty relating to the stationing of the United States armed forces and the provisions of the Administrative Agreement based on Article 3 of the said treaty, finds that these Security Forces are foreign troops, and naturally they are not a war potential of our country. All command and supervisory authorities are vested in the United States, and furthermore, it is clear that our country has no right to command or supervise such armed forces as we do over our own armed forces. . . . It can readily be seen that the reason for permitting the stationing of these forces was none other than to supplement the lack of our own defense power, by trusting in the justice and faith of the peace loving people of the world.

If such be the case, it cannot be acknowledged that the stationing of the United States armed forces is immediately, clearly unconstitutional and void, constraining the purport of Article 9, paragraph 5 of Article 56, and the Preamble of the Constitution.

This is true, regardless of whether the provisions of paragraph 5 of Article 9 were intended to prohibit the maintenance of war potential even for self-defense.

The original decision, which adjudged that the stationing of the United States armed forces cannot be permitted as it contravenes the first part of paragraph 5, Article 9 of the Constitution, went beyond the scope of the right of judicial review, and construed an error in interpreting the Preamble of the Constitution and other constitutional provisions cited above. The original court also committed an error when it ruled that Article 5 of the Special Criminal Law was unconstitutional and void, based on the assumption that the stationing of the US troops was illegal.

**Ino v. Minister of Agriculture, Forestry and Fisheries**
(The Nagano Nuke Missile Site Case I)

712 Hanrei jibo 34
(Sapporo D. C., Sept 7, 1973)
translated by Richard Briggs and Lawrence Beur

Editorial Note

The plaintiffs challenged the government's decision to build a Nuke anti-aircraft missile site within a forest reserve near Nagano in Hokkaido, Japan's large northern island. They argued that they benefited directly from preservation of the forest reserve, and that farmers and other residents whose supply of irrigation and drinking water and protection from floods are adversely affected by the Minister of Agriculture's cancellation of forest reserve designation. They also claimed that the base is illegal because it violates quasi-Article 9 of the Constitution. The Sapporo District Court . . . held that the plaintiffs had standing to sue and that the base does indeed violate the "no war" provision of the Constitution.

The Sapporo High Court . . . agreed with the district court that the plaintiffs had legal interest in the water supply and flood control assured by the forest reserve, but held that the drive and other substitute facilities provided

adequately protected these interests and thus removed the ba-
sis for their standing to sue. Since the district court had found
the substitute measures inadequate, the high court went into
considerable civil engineering data (not translated here) to
establish their adequacy. The appellate court also differed
with the district court on whether the Private Act 9
provide a "right to peace" violated by the Self-Defense Force,
and whether the law creating the Self-Defense Force involves
a "political question" not susceptible to judicial review.

The Nagasuna plaintiffs appealed to the Supreme
Court. . . . Whether they had standing turned on interpreta-
tion of the words "a direct interest in the forest Law. The
decision in the Nagasuna case admirably display
many of the wide range of argument, strategic political
as well as constitutional and legal, which have characterized
debates on peace and war potential in Japan since 1945.
Their importance is underlined by common reference to the
document as "the Peace Constitution." . . .

Judgment

1. The official act cancelling designation of the forest
reserve cited below, which the defendant accomplished
July 9, 1965, by means of Ministry of Agri-
culture, Forestry, and Fisheries Ordinance No. 1024,
is revoked . . . .

Reasons

1. Facts Undisputed by Parties

A. Background on the Umaniyama Forest Reserve

Lying at the upper reaches of a tributary of the Yubari
River, the Umaniyama Forest Reserve forms a
boundary area between the towns of Nagasuna and
Yuni in Yubari District. . . . It is one of several forest
reserves for water conservation, that is, for regulating
the water that the trees receive and thereby ensuring
irrigation water and preventing floods. . . .

In 1949 and 1952, a portion of the reserve was re-
leased. As a result, the area of forest reserve land was
1,046 hectares [a hectare is 2.47 acres] in Nagasuna
and 420 hectares in Yuni. In June 1968, thirty-seven
hectares of the forest reserve in Nagasuna was
transferred to the jurisdiction of the Defense Agency.

The official act in question released thirty-two hect-
tares of that land and three hectares of forest under
the jurisdiction of the Forestry Agency. . . .

3. With Regard to Plaintiffs' Interest to Sue

The defendant maintains that the plaintiffs have no
interest to sue in this case. However, for reasons
stated in A(3), B(3), and C(3), the court cannot ac-
cept the defendant's arguments. For those reasons
and that in D, it must be concluded that the plaintiffs
do have a legal interest in this suit.

A(3). The forest reserve system prescribed in Chapter
3, Section 1 of the Forest Law is intended not only to
protect the individual interests of the proprietor of the
forest in question or other appropriate persons,
but also to protect the lives, property, health, and se-
curity of livelihood of the residents of the forest. . . .

This is [ ] clear from the procedures for designa-
tion or release of a forest reserve. Article 27, 1 pro-
scribes that individual(s) "with a direct interest in that
designation or cancellation of a forest reserve" have
the right to apply to the Minister to effect designation
or cancellation. . . .

What the Forest Law tries to protect by the forest
reserve system are the residents' interests of life, prop-
erty, health, and the security of livelihood. These are
not simply indirect interests, as the defendant claims,
but are interests protected by the Forest Law.

. . . [All] plaintiffs reside in Nagasuna, Yubari
district, where the Umaniyama Forest Reserve is lo-
cated. Consequently, with regard to the request to re-
scind the official act releasing the forest reserve, the
plaintiffs are "persons having a legal interest" as speci-
fied by Article 9 of the Administration Litigation
Law. . . .

C(3). From the evidence which the defendant sub-
mitted as the basic plan for the aforementioned con-
struction and the results of the same; and from evi-
dence which the plaintiffs submitted and from their
oral arguments, the following can be recognized: with
regard to the plan for construction of the Fuji'do
Number 1 Dike, insufficient data exists on the fre-
quency and amount of rainfall for a one-hundred-year
period, and considerable doubt remains about the es-
imates of the rate of flow and the comparative total
flow of flood water. As for the creation control dikes,
considerable doubt also exists about the calculations
of the quantity of soil which will be lost. Conse-
quently, even with the substitute construction, be-
cause the danger of flooding has not been completely
eliminated, the plaintiffs' interest to sue for revocation
of the official act still exists.

In addition, considering the Forest Law as located
within the constitutional order, the purpose of the
forest reserve system should not be understood as
limited to those separate purposes listed in Article 35, 1
[of the Constitution] . Rather, it is natural to see the
individual provisions as intended to safeguard the"right to live in peace" (The Preamble of the Consti-
tution) in order to realize the basic principles of the
Constitution, which are democracy, respect for fun-
damental human rights and pacifism. Accordingly, if
the right of the area residents to a peaceful existence is
infringed upon by the defendant's official act or as
long as there is a danger of such an infringement,
those residents have a legal interest in contesting the
errors of that action.

The reason for the official act cancelling designa-
tion of the reserve was, as noted in 3 above, construc-
tion of facilities for the Third Anti-Aircraft Group.
This is a Nikkei missile base, and from the testimony
of witnesses . . . this base, with its anti-aircraft facili-
ties, radar, and so forth, would be the first target of
an attack from another country at the time of an emer-
gency. Consequently, the danger exists that the plaint-
iffs' right to live in peace is being infringed upon.
Moreover, since with this kind of infringement, once
an incident occurs relief means nothing or is re-
markably difficult to obtain, the plaintiffs have a legal
interest to contest the official act and to seek its an-
nulment.

4. Order for Deciding Causes of Action

. . . The view is frequently presented that when argu-
ments maintaining a violation of the Constitution and
arguments maintaining a violation of a statute are
presented together as reasons to revoke an official act,
the court will not venture to pass on the constitu-
tional issues if it can decide the suit by considering
only the statutory questions. There is appropriate ba-
sis for this opinion . . .

However, this principle does not mean that the
courts should at all times and under all circumstances
wait to the last to judge the constitutional issues. Our
country is a constitutional state and all three branches
of government must exercise power within the con-
stitutional framework. Since only the judiciary has
the authority and obligation to ultimately pass on the
constitutionality of laws, orders, and so forth, a court
has the obligation to forsake its passive position and
to examine the constitutionality of the government's actions [a] when, in the process of investigating a
crime, the court thinks that state power exceeds that established by the constitutional framework,
that because of this situation a grave viola-
tion of constitutional principles which cannot be
overlooked is developing, and that as a result the
desires of the people are being infringed upon or there
is a danger of this; and [b] when the court feels that it
can fundamentally resolve the dispute at hand only by
considering the constitutional issue.

If even in situations such as those described above,
the court were to dispose of the case only on statutory
grounds, although this disposition would provide re-
ief for the party of that suit, this would be only a
formal, superficial relief, and would not be a real or
substantial solution. (The same issue will arise later in
a different form.) In addition, such a disposition
would invite a result showing that the court had
overlooked a situation in which State power actually
grew beyond the constitutional framework, and that
it had consequently permitted this unconstitutional situation to become larger and more serious. This
would make the exercise of judicial review, which is
provided to protect constitutionalism, increasingly
difficult and would render vacuous the judicial obli-
gation to uphold the Constitution, which Article 90
assigns to all governmental personnel, including the
courts.

In this case, in the plaintiffs' arguments concerning
a violation of Article 9 of the Constitution and a deficiency in the public welfare (grounded) as specified in Article 36. of the Forest Law, doubt appears that the SDF may violate one of the basic principles of the Constitution, that of pacifism. The possibility exists that the right of the plaintiffs to live in peace and other rights have been infringed upon, because the official act cancelling the forest reserve status was closely tied to the creation of the Air SDF base. Therefore, in such a situation, for the reasons stated above, it is impermissible for the court to avoid a constitutional judgment and the court must be positive in its exercise of judicial review.

III. The Pacifism of the Constitution and Interpretation of Article 9

A. Meaning of the Preamble

1. In a constitution, the origins, motives and purpose for the establishment of the Constitution or its basic principles are often proclaimed and made clear in a preamble, as a preface to the individual articles which comprise it. Our Constitution, in its Preamble of four paragraphs, has set down certain fundamental principles which should be called the "Constitution of the Constitution." These principles are pacifism, popular sovereignty, and respect for fundamental human rights.

2. This pacifism is not negative in nature (because) Japan was made to renounce war and not maintain armament because of its defeat in World War II and its forced acceptance of the Potsdam Declaration. Rather, it is positive in that, as stated in the Preamble, we resolve that "we shall secure for ourselves and our posterity . . . the blessings of liberty throughout this land and . . . that never again shall we be visited with the horrors of war . . . ." Specifically, on the one hand, this resolve for peace did not just derive from the feeling of abhorrence of war resulting from the calamitous experience of World War II. Rather, it is a rational determination for peace . . . 

3. This pacifism in the Preamble is inextricably linked with other two principles, popular sovereignty and respect for fundamental human rights.

(i) That the first paragraph of the Preamble ties pacifism and popular sovereignty together is clear . . . This interrelationship is one in which we try to establish a perfect peace by prescribing that government action originates from the authority of the people, thereby eliminating as a cause for war the arbitrariness of a government supported by a few. On the other hand we believe that pacifism must be established perfectly for the actual benefits of popular sovereignty for the people to exist.

(ii) . . . [The] second paragraph of the Preamble states, "All peoples of the world have the right to live in peace, free from fear and want." These words proclaim that the right to live in peace is itself a fundamental human right common to all people of the world. That people can live in peace is not an extra benefit resulting from the government's adoption of pacifism as a policy. Rather, the government itself adopted pacifism as one of its fundamental principles in order to establish the right to live in peace for our people and all peoples of the world. In other words, the only way to establish this right was to adopt pacifism.

These ideas of pacifism and fundamental human rights are pointed out in the Preamble of the United Nations Charter and in the Preamble of the "Universal Declaration of Human Rights" . . . Our Constitution conforms with these ideas and explains them more fully.

The separate fundamental rights in Chapter III of the Constitution make real each individual's rights to live in peace and to pursue happiness. Here too, the two fundamental constitutional principles of pacifism and respect for fundamental human rights are inseparably joined.

B. Interpretation of Article 9 of the Constitution

1. Each article and paragraph of the Constitution, including Article 9, simply makes concrete and separately manifests those basic principles.

(ii) "Land, sea, and air forces, as well as other war potential, will never be maintained." Land, sea and air forces can be said to mean a type of military force in the usual sense of the term, or to attempt a definition, "an organized structure of men and material which has as its purpose combat activity involving physical power against a foreign threat." For this reason, "land, sea and air forces" are separate from the police which exist for internal security. "Other war potential" is a military force other than land, sea and air forces, or an organization of men and material which has physical power comparable to and equivalent to a military even though that term may not be used, and which, when necessary, can be converted to war purposes. Facilities producing munitions exclusively for the conduct of war are included in this term. However, to interpret "other war potential" more broadly to mean all human or material capability useful for war is inappropriate, as this would include a considerable portion of the financial and industrial structures indispensable to modern society.

Thus, as long as we pledge in this paragraph not to maintain any type of "war potential," the actual conduct of wars of self-defense and wars to implement sanctions by means of a military force or other war potential becomes impossible.

(iii) The defendant maintains that "the minimum level of self-defense power necessary to prevent aggression or illegal attack by force from abroad, does not correspond to the war potential of Article 9, paragraph 2." If we agree with the position of the defendant that "self-defense power is not war potential," we are forced to the curious conclusion that because each country of the world maintains a military force and military power necessary for its own defense, none maintains war potential. In the end, regardless of whether it may be used for wars of self-defense and wars to enforce sanctions or illegal wars and wars of aggression, "war potential" must be determined by objective standards, as was done above . . .


The possession and exercise of the right of self-defense are not directly related to self-defense based on military power. First, the security of a State (this ultimately means the preservation of the life, property, and livelihood of each person) is of course related to the social, economic and political concerns of the country and to international concerns such as its international position and its diplomacy; considering these matters together, the country is able to achieve that security. Furthermore, the foundations for maintaining national security are that each individual, firmly resolving to attain peace, recognizes and understands correctly the nature of national peace; that each individual, always excluding self-righteousness and intolerance, relies on the good faith and impartiality of neighboring countries, at the same time looking beyond differences in social structure to maintain friendships that each citizen by considering the above domestic and foreign concerns judges correctly the ways to achieve security; and that the whole populace comes together and cooperates in this venture. It is obvious that the present Constitution of our country stands on this ideal.

Looking at the exercise of the rights of self-defense from this perspective, we can see that the following measures can be taken, based on the evidence, article A, number 179 and the testimony of Shigeo Tabata: reliance on peaceful diplomacy to avoid aggression; use of the police force, which is mainly for internal security, to repel aggression; mass uprisings in which the people take up arms and insist confiscation of the property held by citizens of the aggressor country, or deportation of those individuals. All these can be recognized as in exercise of the right of self-defense. We see from the testimony of Naoki Kobayashi that there are many non-military methods of resistance. In addition, we know of many instances in the history of the human race in which national or tribal peoples employed their wits and resisted those who had committed aggression. Consequently, in the future, depending on the time and situation, various methods of resistance will be found through the efforts and intelligence of the people. Moreover, we can add to these the fact that the United Nations, since its founding over twenty years ago, has taken appropriate police action several times and has thus prevented the outbreak of bilateral conflicts . . .
Minister of Agriculture, Forestry and Fisheries v. Ito
(The Naganuma Nike Missile Site Case I)
27 Gihonishi 1775
(Sapporo High Ct., Aug 5, 1976)
Translated by Theodore McNally

Judgment

The decision below is reversed.

The suit of the appellants is on all points dismissed.
The costs for both the first instance trial and this trial
shall be borne by the appellants....

[Reasons]

In view of the preceding confirmed facts, the areas
affected by a shortage of water for farming and
drinking are properly seen as limited to the areas
within the oblique line and the broken line on page.
From the standpoint of conserving water, all the
above areas must be recognized as zones directly af-
fected. Because of the close connection between the
above land and the people’s livelihood and the im-
portance of their livelihood, the interest of the farm-
ers and residents of the above sixty-four households
in conserving water for farming and drinking at the
time of designation of the forest reserve was realiz-
cally seen to be directly affected. It had to be regarded
as a concrete, particular interest deserving [protec-
tion]. Also, since those with this interest feared direct
harm from the [administrative] cancellation as issue
in this case, they should be recognized as having a le-
gal right to contest the cancellation....

With the circumstances described above, damage
resulting from the cancellation of part of the forest re-
serve to the safety of livelihood and person among
the appellants named....has been compensated for by
means of the Fujiko No. 1 Dike and other flood pre-
vention devices, so that the appellants have lost their
concrete interest for contesting the said cancellation.
Therefore, the suit of the appellants must be dismissed
as not justifiable....

The SDF Law provides that the primary duty of
the SDF is the defense of the nation, determines the
particular structure and composition of the SDF, and
stipulates that the SDF will maintain arms and use
them against aggression; in practice the SDF main-
tains armsaments based on the SDF Law and a struc-
ture and composition as determined by the law....
Therefore, it is clear that the SDF is exclusively for
self-defense within the limits of the purposes which
have been determined. The question of whether or
not the organization, composition, and equipment of
the SDF as provided in the SDF Law, or as these ex-
ist in actuality, are for the purpose of aggressive war
may not be determined solely from the above-cited
purposes; rather the question is whether or not, ob-
jectively speaking, our country’s ability to carry on
war is clearly sufficient for aggression as compared
with other countries. The comparison of the capacity
on wage war must be considered and evaluated rela-
tively from the standpoint of broad, high level, spe-
cialized technical knowledge, with attention not only
to the individual organization, composition, and ar-
amments of the countries, but also to the economic
power, geographic factors, and future prospects of
every element of other countries’ war-making capac-
ity. Because such evaluation cannot be settled upon
objectively and unequivocally in the present condition,
we cannot say that the SDF is at first sight and most
clearly aggressive.

6. Conclusion

In view of the foregoing, the problem of whether or
not the existence, and so on, of the SDF conforms to
Article 9 of the Constitution is a decision concerning
state governance, and as a political act of the Diet and
Cabinet would ultimately be entrusted to the political
judgment of the entire people. It should not be con-
templated to be a matter that courts are to determine.

Judges Yasuji Ogawa (presiding),
Takehito Ochitsu, and Hisashi Yamada
2.0

Kakanaga v. Sekiguchi
(The Shinto Groundbreaking Ceremony Case)
33 Seishin minshu 573
(Supreme C., July 13, 1977)
Translated by Frank K. Upham

Editorial Note
On the occasion of constructing a city gymnasium on January 14, 1965, the City of Mito Prefecture had a Shinto groundbreaking ceremony (shichisai) conducted by four Shinto priests. Prior to this, the city had appropriated 4,000 yen as stipends for the priests and 3,565 yen to cover other expenses of the groundbreaking. The plaintiff, a city assemblyman who attended the ceremony at the mayor's invitation, later filed suit against the mayor contending that the city, a local public entity, conducted a groundbreaking in the Shinto manner and spent public money for the ceremony. He sought the return of the funds unlawfully expended and 50,000 yen as compensation for mental suffering caused by his coerced attendance.

The Mito District Court dismissed the suit, on the grounds that the ceremony was secular and customary, not religious in substance; it might appear to be Shinto religious activity but it was not held to propagate the religion. The ceremony did not violate the Constitution; the expenditures were not for the purpose of assisting any particular religious organization. The plaintiff was not forced to attend the ceremony, so his freedom of religion was not violated.

In reversing the district court ruling, the Nagoya High Court held that Shinto is indeed a religion and that the groundbreaking ceremony was not secular or quasi-religious activity, but rather a religious act in the meaning of the Constitution. The High Court noted that with one exception, the Tsu ceremony had strictly adhered to the directives issued by the Home Ministry in 1957, in the present era of enforced unity between Shinto, the State, and modern nationalism. The judges concluded that the state or a local public entity violates the separation of religion and state when it sponsors activities of a particular religion as in the present case. Thus, the groundbreaking ceremony was unconstitutional and the spending of public funds was also unlawful.


1. The Standing of the Plaintiffs...

In the forest law (hereafter the law) the Minister of Agriculture, Forestry, and Fisheries (hereafter the Minister) can designate forests as forest reserves when necessary in order to conserve water resources or to achieve other objectives set out in each item of Article 35, paragraph 1 of the law. If a forest reserve is designated, the felling of standing timber or bamboo in that forest, damage to standing timber, grazing of domestic animals, gathering of wild grasses under the trees, fallen leaves or branches, or the excavation of rocks or removal of tree stumps, cultivation of the land, or other changes to the shape or nature of the land (therefore) is prohibited in principle, and the owners of a relevant forest are subject to various restrictions including replanting after the felling of standing trees (Article 34 and 34b of the law). The governors of the prefectures may supervise these measures (Article 35) and prescribe punishments against violators under penal provisions (Article 36). On the one hand, dispositions of designated forest reserves have a negative impact on owners of forests and other designated persons in the form of limitation of a private right. On the other hand, the implementation of the aims of each item of Article 35, paragraph 1 of the law, by a disposition designating a forest reserve, is of advantage to the neighboring residents and other unspecified majorities whose lifestyle is enhanced by continuation of the relevant forest. Further, the law in setting out to prevent natural disasters, preserve the environment, and conserve the scenic beauty of the forest area, establishes these objectives as general public interests and it must be considered that these interests justify a disposition limiting private rights inasmuch as designation of a forest reserve is made for the purpose of preserving and promoting the public interest...

In summary, the court below recognized that standing to sue is limited to people who lived in the water basin area, and that the argument that non-residents whose life style also was influenced by the threat of flood should also have standing is a mistaken interpretation of Article 9 of the Administrative Litigation Law. As explained above, the interests of non-residents are included within the general public interest and do not exist as independent, individual, guaranteed interests. The rights of these people are covered by the rights of the heads of municipal bodies in these areas who can sue representatives of the interests of residents of that area who have responsibility for asserting this public interest. Accordingly it is not possible to adopt the list "A" (a designation of appellants who were not residents within the area of the water basin) as appellants argue.

2. The Extinguishment of the Interest to Sue

Even those people who live within the limits of the water catchment area (defined above) and who qualify for standing as plaintiffs who are in list "B" (omitted) of parties appended to the judgment below, (hereinafter called the Group B appellants) may lose their standing in a situation in which the injurious state of affairs relating to their independent, practical, individual interest in the disposition, on which their standing as plaintiffs was based, is to be cancelled by a change of circumstances after the disposition cancelling the designation of the forest reserve. Accordingly,
Judgment

The judgment of the High Court is reversed.
The appeal shall bear the costs of the appeal.

Reasons ...

A. The Constitutional Principle of Separation of Religion and the State

Generally, the principle of separation of religion and the State has been understood to mean that problems of religion and belief have been considered matters of individual conscience that are to be left to the discretion of an individual, and are not to be interfered with by the State. A State shall do no more than enact and observe laws in relation to those matters. Generally, the principle of separation of religion and the State has been understood to mean that problems of religion and belief have been considered matters of individual conscience that are to be left to the discretion of an individual, and are not to be interfered with by the State. A State shall do no more than enact and observe laws in relation to those matters.

B. Religious Activity Protected by Article 30

Paragraph 3

Article 30, paragraph 3 of the Constitution provides that "The State and its organs shall refrain from religious education or any other religious activity." This language is interpreted in the light of the above discussion on the separation of religion and the State, and it is to be noted that it is not to be taken to prohibit all contact with religion, but rather that which exceeds reasonable limits and which has as its purpose some religious meaning, or the effect of which is to promote, subsidize, or, conversely, to interfere with or oppose religion. The prime example is religious education which is explicitly prohibited in Article 30, paragraph 3, as are missionary work, proselytizing, propaganda, and so forth. Other religious activities like celebrations, rites, and functions which purport to propagate or suppress any religion are also prohibited, and should be viewed from the standpoint of their purpose and effect to determine if they too are prohibited. In determining whether or not a given religious act constitutes prohibited religious activity, the external aspects of the conduct, whether the procedure is set by religion, and so on, should be the only factors considered. The conduct or action of the average person's reaction to it, the act's purpose in holding the ceremony, the existence and extent of religious significance, and the effect on the average person, are all circumstances that should be considered to reach an objective judgment based on socially accepted ideas.

Furthermore, if one thinks of the relationships between paragraphs 2 and 3 of Article 30, both are provisions for religious freedom in its broad sense, but paragraph 2 means that no one can be compelled to participate in religious activity against his will. It therefore guarantees directly freedom of religion in the narrow sense as well, i.e., against deprivation of that freedom by the majority religion. Paragraph 3, on the other hand, directly prohibits certain areas of activity by the State and establishes a system of separation while only indirectly guaranteeing freedom of religious activity exceeds reasonable bounds as determined with reference to the conduct's purpose and effects.

C. The Nature of the Groundbreaking Ceremony in This Case

From this perspective, let us determine whether the groundbreaking ceremony in this case constitutes a religious activity as proscribed in Article 30, paragraph 3 of the Constitution.

It is clear from the trial court's decision that the groundbreaking was a ceremony to pray for a stable foundation and accident-free construction. The form of the ceremony was religious. A professional Shinto priest in religious robes and following specific Shinto rituals prepared a particular place for the ceremony and used particular ceremonial equipment. Moreover, the priest who performed the service did not assume, out of religious conviction and belief. This was undoubtedly a ceremony of religious nature.

However, although it is true that a Shinto groundbreaking ceremony has its origin in a religious ceremony intended to pacify the earth god (saka no kamou), and thereby to ensure a firm foundation for the building and safe construction, there can be no doubt that this religious significance has weakened gradually over time. Even though a present-day groundbreaking ceremony might feature some prayer-like behavior,
generally these efforts have become nothing more than ritual formalities in the construction industry almost completely devoid of religious significance. Most people would evaluate the ceremony, even when conducted in accord with established religious practice, as a secularized ritual without religious meaning. The groundbreaking in the case was conducted as a Shinto religious ceremony, but for most citizens and the mayor of Taito City and others involved in sponsoring the groundbreaking, this was a secular event insufficient in many respects, whatever the role of priests, and in this respect there was no difference from the standard rituals practiced over many years.

Furthermore, it is general practice today in the construction industry for the contractors to sponsor and attend a ceremony like the one in this case; those involved in the building, moreover, regard the ritual as indispensable for safety. Taking industry custom and public consciousness into account, the motive of the contractors in holding this ceremony is merely an extension of a customary proceeding for the demands for a customary groundbreaking ceremony from these involved in the building process. It is reasonable to assume that the motive of the mayor of Taito City, the sponsor of the ceremony in question, was no different from that of those contractors who seek to ensure the safety of the building.

It is not unreasonable to say that the average Japanese has little interest in and consciousness of religion. Many people are believers in Shinto as members of the community and in Buddhism as individuals.

Their religious consciousness is somewhat jumbled, and they feel no sense of contradiction even while using different religions on different occasions. Furthermore, one of the salient characteristics of Shinto is its close attention to ceremonial form and its converse lack of interest in external activities such as the proselytizing seen in other religions. With these factors in mind, it is unlikely that a Shinto groundbreaking, even when performed by a Shinto priest, would raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of Shinto. So the State in performing such a ceremony stands in the same position as a private citizen doing so. It is absolutely incontestable that such a practice threatens to lead to the development of a special relationship between the State and Shinto, or the reestablishment of Shinto as a State religion, or to the loss of religious freedom.

Considering all the factors discussed above, we reach the following judgment. While it is incontrovertible that the groundbreaking in the present case is connected with religion, the purpose of conducting the ceremony was to ensure a stable foundation and safe construction. It was thus chiefly secular. It will not have the effect of promoting or encouraging Shinto or of oppressing or interfering with other religions. It therefore should not be considered as falling within the category of religious activities prohibited by Article 31, paragraph 3, of the Constitution.

In 1973 Yasuko Nakaya, widow of Takafumi, a deceased member of the Ground Self-Defense Force (SDF) who had died in injuries in a traffic accident while on active duty, sued to have restored his Shinto enshrinement (gojoku) at the request of the Yamaguchi Chapter of the Self-Defense Forces Friendship Association (Takayama, President, the SDF Friends). The SDF Regional Liaison Office, a State agency, gave substantive cooperation and support. In 1977, the SDF Friends had petitioned the Yamaguchi Shinto Gokoku ("guardian of the State") Shrine, a shrine for the war dead, for the "joint enshrinement" there of the spirit of the deceased couple, along with the souls of twenty-six other deceased servicemen. Mrs. Nakaya, a Christian since 1958, opposed the enshrinement, arguing that the SDF Friends, as an auxiliary of the SDF, is bound by the constitutional norm of separation of religion and the State. She demanded retraction of the original petition for joint enshrinement, and asked for one million yen from the SDF Friends and the Government of Japan in compensation for violating her personal religious rights under the Constitution.

The district court rejected Nakaya's demand for a retraction of the petition for enshrinement, but awarded her damages to be paid by the SDF Friends and the State. The SDF Friends and the Government brought a hokoky appeal against the adverse portion of the district court's judgment, as did Mrs. Nakaya in a supplementary appeal. On the constitutional question related to the enshrinement petition, the Hiroshima High Court affirmed the first instance judgment, [and held that] the SDF Friends does not qualify as a party in the case, and cannot therefore be held accountable for injury to Nakaya. The Government then brought a hokoky appeal to the Supreme Court.

Concerning the grounds for the hokoky appeal of the appellant.

1. The facts established by the original judgment are as follows:

(a) The appeals was baptized at the Yamaguchi Shan'ni Church of the United Christians Church in Japan on April 4, 1956, and has believed in Christianity ever since.

(b) The appeal and Takauna Nakaya (hereafter, Takauna), an officer of the Self-Defense Forces (SDF), were married in a ceremony involving no religious ritual on January 15, 1959, and spent their married life mainly in Moroza City. Takauna was killed in a traffic accident on January 17, 1968 while on duty in Kamaishi City, Iwate Prefecture.

(c) Mrs. Nakaya did not believe in any religion.

2. In November, 1964, the Yamaguchi Prefecture Chapter of the SDF Friendship Association, a corporate juridical entity (hereafter, the SDF Friends), sponsored a memorial service at the Gokoku (guardian of the State) Shrine of Yamaguchi.

Prefecture (hereafter Gokoku Shrine), a religious juridical person, for twelve SDF members from Yamaguchi who had died while on duty from the establishment of the SDF until March 1964. At the reception following the memorial service, some families of deceased SDF members expressed the desire to have the deceased jointly enshrined in the said shrine. Upon hearing this, President Fumoto and Vice-President Fukuda of the SDF Friends asked the chief priest of the shrine, but the enshrinement was not endorsed and months and years passed.

(b) In the summer of 1970, President Fumoto of the SDF Friends gained the impression from Chief Priest Nagoe of the said shrine that a joint enshrinement would be possible, etc.

(c) When Fukuda reported on the progress of the enshrinement matter at a social gathering of the Chugoku and Shikoku Chapters of the SDF Friends in March that year by the Commander of the Thirteenth Division of the Ground SDF, the Commander agreed and asked that the enshrinement be promoted.

(k) On March 31, 1973, the SDF Friends applied for joint enshrinement of twenty-seven persons, including Takafumi, etc. On April 30 of that year the shrine conducted the Enshrinement Ceremony (Chenjitsu Sai) of those SDF members as Enshrined Deities (Seisho), and held the related feast (Nairai-ni-Gi) and Great Memorial Service (Irie Taisai) the next day.

1. (a) On April 2, 1973, the appellee told Administrative Officer Abe of the Regional Office, who had come to get the documents necessary for the enshrinement, that she did not wish Takafumi enshrined because of his religious faith. Immediately thereafter, finding a notice sent jointly in the names of Nagoe of the Gokoku Shrine and Fukuda of the SDF Friends which announced the Enshrinement Ceremony and other affairs and inviting prayers, the appellee repeatedly told Abe by phone that she opposed the enshrinement.

(b) Although Fukuda received a communication about April 10 from Nagoe concerning the appellee's position, the application for joint enshrinement of Takafumi was not canceled.

(c) A document dated June 1, 1972 from the chief priest of the Gokoku Shrine addressed to the appellee was delivered to her on July 5 by Nagoe. It read: "Offerings for the Sacred Eternal Prayer (Eita Koryu Rei) in memory of Shinzo Dien Takafumi Nakaya are solemnly accepted. Hereafter, Memorial Services (Mainichi Sai) will continue to be held on January 23, forever."

II. Based on the above facts, the original judgment ordered compensation for damages to appellee, as follows:

1. The application, a prerequisite for the joint enshrinement by the Gokoku Shrine, was of a fundamentally religious nature: it promoted and practiced the religion of Gokoku Shrine and therefore was a religious activity.

2. The application for enshrinement was proposed and sponsored by the SDF Friends, and was initiated under its name. However, under the circumstances, the SDF Friends would not have filed the application had it not been for the cooperation of the staff of the Regional Office. The assumed reason for the active cooperation of the Regional Office staff was a strong desire for the joint enshrinement which would enhance the social status and morale of SDF members. The Regional Office and the SDF Friends planned and prepared the application together, and applied for the enshrinement under the name of the SDF Friends. The application can be considered their joint action.

3. The actions of the Regional Office staff were unlawful as a violation of public order in relation to individuals contrary to Article 30, paragraph 3 of the Constitution.

4. The joint enshrinement of Takafumi by Gokoku Shrine... infringed upon the appellee's legal interests in a peaceful religious atmosphere or her religious rights as a person.

III. However, the ruling of the court below cannot be accepted, for the following reasons:

1. The first issue is whether the application for the enshrinement should be regarded as a joint action of the Regional Office staff and the SDF Friends. Obviously, to enshrine one as a Shinto deity relates to the shrine gods which are fundamental to Shinto shrines; thus, an enshrinement is conducted at the independent decisions of the shrine....

2. Judging from these facts, the joint enshrinement of the twenty-seven dead SDF members, including Takafumi, in Gokoku Shrine was basically achieved through the efforts of the SDF Friends, acting on the requests from families of dead SDF members and negotiating with the shrine, and by the shrine's decisions for the joint enshrinement. Therefore, although it is true that the Regional Office cooperated with the SDF Friends by performing clerical work, the application under the name of the SDF Friends was filed independently in substance, and cannot be regarded as a joint action of the Regional Office staff and the SDF Friends, or as an application by that office staff. The original judgment assumed that the office intended to raise the social status and morale of SDF members; such an assumption does not affect this Court's ruling that the actual acts of staff did not go beyond those stated above.

3. Next is the issue of whether the cooperation of the Regional Office staff with the SDF Friends regarding the application constituted religious activity under Article 30, paragraph 3 of the Constitution. Religious activity under the said article should not be construed to include any acts related to religion, but to mean only those acts whose purpose has religious meaning and whose effect is to promote, aid or support religion, or to suppress or interfere with religion. As noted above, joint enshrinements are conducted by the independent decisions of the shrine; so an application is not a prerequisite. In the instant case, the original judgment found that the Gokoku Shrine had already decided in principle to enshrine the dead SDF members in the fall of 1971. Thus, though it related to religion, the application in this case, in which they notified the shrine of names of the dead SDF members, of the fact that their deaths occurred while on duty, and of their desire for the enshrinement, should not be regarded as a legal prerequisite for enshrinement. The actual actions of the Regional Office staff in cooperation with the SDF Friends till the time of application... had an indirect relationship with religion and their purpose and intention were assumed to be to raise the social status and morale of SDF members. Hence, they had little religious consciousness and their actions would not be considered by the public as having the effect of the State drawing attention to a particular religion, or sponsoring, promoting or encouraging a specific religion or suppressing or interfering with a religion. Thus, though they had a relationship to religion, the acts of the Regional Office staff cannot be considered religious activities.

Article 30, paragraph 3 of the Constitution provides for separation of religion and the State: it is known as providing a systemic guarantee, and does not guarantee religious freedom itself directly to individuals persons. Rather, it attempts indirectly to assure freedom of religion by setting forth parameters of acts in which the State and its organs may not engage,... Therefore, religious acts of the State or its organs which violate this provision should not necessarily be considered unlawful in relation to individual persons unless they directly infringe upon their religious freedom as guaranteed by the Constitution, for example, by imposing restraints on their exercise of religious freedom in violation of Article 30, paragraph 1, or by forcing individuals to engage in religious activities contrary to paragraph 3 of that article.
COMMENT

In its Judgment of August 8, 1952,\(^6\) the Supreme Court held that a newspaper reporter cannot refuse to testify in court under oath even if he is asked to reveal the source of his information. It held that this was not a "due cause" for his refusal to testify.\(^7\)

C. Obscene Publications

SUPREME COURT JUDGMENT, MARCH 13, 1957
[KOYAMA v. JAPAN—CHATTERLEY CASE]*

REFERENCE:

Penal Code, Article 175. A person who distributes or sells an obscene writing, picture or other object or who publicly displays the same, shall be punished by imprisonment with labor for a term of not more than two years or a fine of not more than 5,000 yen or a minor fine. The same applies to a person who possesses the same for the purpose of sale.

[Koyama Shoten, a publisher with a high reputation, published an unabridged translation of "Lady Chatterley's Lover" by a prominent novelist, Mr. Sei Ito. It became a best-seller (about 80,000 copies of the first volume and 70,000 copies of the second having been sold in about 10 weeks) in the spring of 1950. Then the public procurators' office brought a criminal prosecution against the president of the publishing company, Mr. Koyama, and the translator on a charge of violation of Article 175 of the Penal Code.

The court of first instance held that this book was not obscene in itself, and found the translator not guilty. However, the court found the president of the publishing company guilty on the ground that the way he advertised the book created a situation in which a great number of readers with only a prurient interest were attracted to the book, thereby conferring an obscene nature to the book. The sentence was a fine in the amount of ¥250,000.

Sec. 2] FREEDOM OF THOUGHT

Both sides appealed. The high court affirmed the judgment in relation to the president of the publishing company, but reversed in relation to the translator, and fined him ¥100,000.\(^8\)
Both the accused appealed to the Supreme Court. Affirmed.]

I. The Translation and Publication of Lady Chatterley's Lover and Article 175 of the Penal Code

Lady Chatterley's Lover is a long novel by D. H. Lawrence, who is well known in the field of English literature. It is a work of considerably high repute from the artistic standpoint. The author's artistic talents can be judged from the development of the plot, the analysis and depiction of nature, society, and the personality of the characters, and the dialogue, rich in humor and irony, which also reveals the breadth of the author's culture. In addition, this novel also treats a number of problems relating to the criticism of ideas and civilization. In respect to these the author, generally speaking, frankly reveals his own rebellious and advanced ideals respecting traditional and, especially in England, dominant concepts.

The story begins with the life in midland Rugby of the young peer Clifford, who had lost his sexual powers as a result of a wound suffered during World War I, and his wife Connie, a life both unnatural and dull for her. Before long both love and carnal relations sprang up and grew between Connie and Mellors, a woodsman, separated from his wife and living on Clifford's property as an employee. Finally, the two shook off the restraints of society and entered into a new life based on love with the dissolution by divorce of a marriage considered to be unnatural. This is a rough outline of the structure of the novel, which is fleshed with themes dealing with thought, economics, and society. The ideas criticize the atmosphere of the aristocratic class, the destruction of the beauty of nature by industrialization, the influences on the lives of the people in farming villages, the tragic circumstances of workers in the coal mines, the desolation in men's minds, and the actualities of dehumanization. In addition, the novel also suggests the author's social ideas and what he himself regards as a life with true value. The most important themes, which run through the entire novel, are the primacy of the

\(^6\) 6 Keishi 974, translated in J. Maki, COURT AND CONSTITUTION IN JAPAN at 38 (1964).
\(^7\) See Code of Criminal Procedure art. 161.
* The translation of the opinion of the court is one by Professor John M. Maki in J. Maki, supra note 6, at 3, 5-15.

\(^8\) By an Act for Temporary Measures concerning Fines (Bekkin to Rijji Sochi Ho) (1948 c. 251), the maximum amount of a fine was to be multiplied by 50 at the time of this decision. Since July 1, 1972, such amount is to be multiplied by 200 according to the above Act as amended by 1972 c. 61.
complete satisfaction of sexual desire and the philosophy of life that recognizes in love the perfection of humankind and the significance of human life.

With this philosophy of life the author denies the traditional (or what he calls puritanical) code, morality, and concept of sex that are approved not only in his own country but all others as well, and affirms the freedom of extramarital sexual relations; but at the same time he is critical of the sexual tendencies in the erratic new age. That he also affirms a new sexual code and a morality that respects the harmony and equality of the spirit and the flesh can be inferred from the content of the present work, the author's own introduction, and his other writings and correspondence cited in the original decision. That the present book, viewed thus, is a work of art different in nature from pornography is recognized in the decisions of both the court of first instance and the court of appeal. However, whether or not the sexual code and world view advocated by Lawrence should be affirmed is a question relating to the areas of morality, philosophy, religion, education, and such matters, and even though the conclusion is reached that they are antimoral and unedifying, it is impossible for that reason alone under existing law to punish the sale and distribution [of the book]. This must be recognized as relating to the area of freedom of expression and publication. The problem is whether or not there are included in the present work elements that fall within the purview of "obscene writing" in Article 175 of the Penal Code. If it is so affirmed, then the acts of distribution and sale of the present book fall under the heading of the crimes set forth in Article 175 of the Penal Code.

Even so, what is the meaning of "obscene writing" (and "picture or other object") as set forth in the provision of the Penal Code previously cited? The precedent of the Great Court of Judicature held as follows: "... It designates writings, pictures, or any other objects which stimulate or arouse sexual desire or could lead to its gratification, and, accordingly, such obscene objects necessarily are those that produce the sense of shame [or abasement] (shichi) or disgust in human beings." In addition, the present Supreme Court has held that "... obscene matter is that which wantonly stimulates or arouses sexual desire or offends the normal sense of sexual modesty of ordinary persons, and is contrary to proper ideas of sexual morality." 3

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1) E.g., Great Court of Judicature Judgment, June 10, 1918, 1443 Shim bun 22.
2) Supreme Court Judgment, May 10, 1951, 5 Keishū 1026.

Sec. 2] FREEDOM OF THOUGHT

Now, we recognize as proper the judgment below which was made in accordance with the above precedents of the Great Court of Judicature and of the Supreme Court, and we also approve these precedents.

In essence, according to the above precedents, in order for a writing to be obscene it is required that it cause the arousal and stimulation of sexual desire, or offend the sense of shame, or run counter to proper concepts of sexual morality.

As a general rule, the possession, irrespective of differences of civilization, race, clime, and history, of a sense of shame is a fundamental characteristic that sets man apart from the beasts. Shame, compassion, and reverence are the most fundamental emotions that man possesses. As man possesses the emotion of compassion for things on an equal footing with him and the emotion of reverence for things above him, so does he possess the sense of shame toward offensive things around him. These emotions constitute the foundation of universal morality.

The existence of the sense of shame is especially striking in respect to sexual desire. Sexual desire in itself is not evil; it is the instinct with which man is provided for the preservation of the species, that is, for the continuation and development of the family and of human society. That men possess this in common with other animals is a natural aspect of mankind. Consequently, the spirituality existent in man, namely, his dignity, is conscious of a feeling of revulsion toward it. This is, of course, the sense of shame. This emotion is not to be discerned in animals. There may be situations in which it is lacking or rare in certain spiritually undeveloped or ill individual human beings or in certain special societies, but it exists beyond question, if one observes humanity in general. For example, even in uncivilized societies the custom of complete exposure of the sexual organs is extremely rare and, again, there is no such thing as the public performance of the sex act. In short, the nonpublic nature of the sex act, which characterizes man alone, is a natural manifestation of the sense of shame that has its origin in human nature. This sense of shame must be respected, and any rejection of it as a form of hypocrisy runs counter to human nature. Thus, the existence of the sense of shame, in company with reason, controls the sexual life of man, which is difficult to restrain, so that it will not fall into licentiousness and, no matter how uncivilized a society may be, contributes to the maintenance of order and morality in respect to sex.

Because an obscene writing stimulates and arouses sexual desire...
and clearly makes known the existence of the animal side of man's nature, it involves the sense of shame. It paralyzes conscience in respect to matters of human sex; it ignores the restraint of reason; it comports itself wildly and without restraint; and it contains the danger of inducing a disregard for sexual morality and sexual order. Naturally, law is not burdened with the duty to maintain all morality and good customs. Such a duty pertains also to the fields of education and religion. Law incorporates into itself only "the minimum morality," namely, the morality which alone possesses a considerable significance for the maintenance of the social order it is designed to achieve. What each provision of the Penal Code mentions as a crime is, in short, something that can be recognized as a type of conduct in violation of this minimum morality. Likewise, in respect to sexual morality it is the duty of the law to provide for the maintenance of that minimum. Thus, the prohibition of the sale and distribution of obscene writing, as crimes in Article 175 of the Penal Code, arises from this idea.

Then, does Lady Chatterley's Lover, which is the problem in the present case, fall under the heading of obscene writing as in Article 175 of the Penal Code? What must be made clear here as the preliminary issue is that the judgment to be made is one involving the interpretation of law, namely, that it relates to a legal value judgment and is not a question of determination of fact.

As for the facts of the distribution and sale of the literary work in the present case, and the cooperation of the translator, and such items as the number and method of publication and the motive for distribution and sale, there was suitable testimony from witnesses in relation both to the constituent elements of the crime and the circumstances relating thereto. Also, the hearing of the opinions of expert witnesses concerning the position of the author in the world of letters and the literary value of the work in question was both valuable and necessary. However, the judgment as to whether or not the work itself falls under the purview of Article 175 of the Penal Code as an obscene writing is not a problem of the establishment of fact in relation to the work in question but is a problem of the interpretation of law. The work in question actually exists, and the court need only interpret and apply the law. This matter differs in no way from instances involving the interpretation of provisions relating to the constituent elements of individual crimes set forth in each provision of the Penal Code. For this reason the court must find to what extent this work stimulates or arouses [the sexual desire of] the average reader or awakens his sense of shame.

The standard for the court when it makes such a decision is the good sense operating generally through the society, that is, the prevailing ideas of society. These, as the original decision puts it, "are not the sum of the understanding of separate individuals and are not a mean value of such understanding; they are a collective understanding that transcends both. They cannot be rejected by separate individuals who hold to an understanding opposed to them." The judgment of what the prevailing ideas of society are is, under our present system, entrusted to judges. The fact that, as with separate individuals in society, there is no necessary unanimity of ideas among judges, either on different levels or on the same level among those who make up collegiate courts, is the same as in the other situation: the interpretation of law. This exists not only when there is a judgment as to obscenity in writing; hence, it cannot be denied that courts have the authority to determine what constitute the prevailing ideas of society. Accordingly, a judgment of whether the present book falls under the heading of obscene writing is unavoidable. Even though it may not be in accord with the opinions of some of the nation's people. The fact that the judge in this situation must decide in accordance with his conscience what the prevailing ideas of society are does not differ from all situations in which the law is interpreted. Similarly, particular problems arise when there is to be interpretation of general clauses such as "public policy or good morals" or of the comprehensive concepts that used in laws and ordinances. In these situations the courts confront concrete cases and make judgments; the accumulation of these constitutes case law.

The prevailing social ideas in respect to sex generally differ according to time and place; changes take place even in the same society. In contemporary society, for example, pictures and sculptures may be exhibited which previously were banned from public display or, again, novels which earlier were not approved for publication may appear and not be generally regarded as unusual. Also at the present time freedom is widely recognized in respect to coeducation and social intercourse between men and women. As a result, a modification of the traditional concepts relating to the two sexes have become necessary. It is a fact that eventually taboos in existence since ancient times will gradually disappear. However, notwithstanding the fact that changes in such prevailing concepts regarding sex have taken
place or are taking place, it cannot be denied that in every society it is recognized that there are limits that must not be overstepped and that there are norms that must be generally observed. One is the previously described principle of the non-public nature of the sexual act. Only in respect to this point can it be admitted that there has not been such a striking change in the prevailing social ideas that what was previously regarded as obscenity is now not generally recognized as such. To yield a point for the moment, even though the ethical sense of a substantial majority of the people were paralyzed and truly obscene matters were not recognized as obscene, the courts would have to guard society against moral degeneration in accordance with the norms of the prevailing social ideas, which are the ideas of sound men of good sense. After all, neither the courts nor the law must always and necessarily affirm social realities; they must confront evil and corruption with a critical attitude and must play a clinical role.

Now on examining the translation in the present case, the portrayal of the sexual scenes therein, amounting to some twelve as pointed out by the public prosecutor, must be recognized as possessing artistic characteristics that differ from pornography, but, nevertheless, the portrayal is fairly bold, detailed, and realistic. These scenes run counter to the principle of the non-public nature of the sex act and offend the sense of shame to the extent that one would be reluctant to read them aloud in a public meeting, to say nothing of a family gathering. Also in respect to their effect on both individuals and society, it must be recognized that they are of an order to arouse and stimulate sexual desire and to run counter to good concepts of sexual morality. In short, the portrayal of sexual scenes in the present translation must be regarded as going beyond the limits recognized by the prevailing ideas of society. Accordingly the judgment below, which held that the translation in the present case is an obscene writing as set forth in Article 175 of the Penal Code, is proper; the points of the appeal that attack the court for disregarding the prevailing ideas of society and the verdict as having been determined by an arbitrary decision of the judges are improper.

Next we consider several points relevant to the decision whether or not the present translation is obscene.

The present book as a whole is work of art and ideas and as described above it has consequently enjoyed a rather high reputation in the world of English literature. The artistic nature of the present book is apparent not only in the work as a whole, but also in those sections dealing with the depiction of sex, some twelve passages as pointed out by the public prosecutor. However, artistry and obscenity are concepts that have different dimensions; they can exist side by side. If it is said that obscene things cannot be called true art and that true art cannot be obscene, then we are faced with a question of concepts. This resembles the problem of whether we can recognize a bad law as law. As in cases where the content of positive law can be ethically evil, there are cases where what we ordinarily recognize as an artistic composition does possess the character of obscenity. The court of first instance held that because what is generally regarded as pornography is largely lacking in artistic qualities, the translation in the present case, having such qualities, cannot be recognized as pornography. However, the obscene character of the work cannot be denied on the grounds that it is an artistic composition and not pornography. The reason is that even though from the standpoint of art it is an outstanding composition, it is not impossible for it to be appraised as possessing obscenity from the legal and moral standpoint, which are of a different order. We cannot approve the principle of the supremacy of art, which emphasizes only the artistic nature of a composition and rejects criticism from the standpoint of law and morality. Even though a composition may have high artistic merit, it does not necessarily follow that its obscene nature is thereby dissipated. Though it be art, it has no right to present obscene matters publicly. The artist, too, in the pursuit of his mission must respect both the sense of shame and moral law, and he must not act contrary to the duties borne by the people at large.

Approximately the same circumstances can be recognized in regard to scientific and educational books dealing with sex as have been described above in respect to artistic matters. However, artistic creations differ from scientific works, which describe matters objectively and dispassionately; and because they appeal strongly to the senses and emotions, it cannot be said that obscenity is dissipated because they are artistic or, on the contrary, that the arousal or stimulation arising from them is not strengthened.

The existence of obscenity must be determined objectively and, in the final analysis, from the composition itself; it is not something that can be influenced by the subjective intent of the author. Counsel defines obscene writings as follows:

Writings of evil intent dealing with sex that are designed exclusively to appeal to the curiosity of only adolescents whose
spontaneous powers of judgment are undeveloped, or that are designed to deny or make one forget the human function of sex as a racial instinct, or that make real the dissolute pleasures of the flesh, or that cause injury, difficult to repair, to the minds and bodies of the adolescent... and on the grounds that the translation in the present case is possessed of sincerity, he denounces the decision. However, according to this definition, any publication whatsoever that possesses an artistic, academic, or other aim must be excluded from the category of obscene literature, no matter how extreme its obscenity, and obscene writing must be limited only to pornography. It does not follow that the sincerity of a work necessarily dissipates its obscene nature. Accordingly, we cannot accept this argument of the appeal.

Next, the counsel’s argument asserts that the translation in the present case was made “with the aim of warning the world,” denies the existence of criminal intent in the accused, and on those grounds assails the judgment below.

However, in respect to the establishment of mens rea in the crime set forth in Article 175 of the Penal Code, it is sufficient if there is a recognition of the existence of the passages in question and of their distribution and sale. Recognition that the writing containing such passages is obscene, as defined in the same article, is not necessary. For example, even though one sells a writing that one believes, subjectively, does not fall under obscene writing in Article 175 of the Penal Code, if it does objectively possess the character of obscenity, it must be said that that [subjective belief], as a legal mistake, does not rule out mens rea. Regarding obscenity, whether there was complete or only partial recognition of it, or no recognition at all, are only questions of circumstances under the provisions of Article 38, Paragraph 3 of the Penal Code and are not related to the establishment of mens rea. Consequently, the original decision, which accepts this point, is proper, and the argument cannot be accepted.

The appellant’s brief contends in respect to obscene writing that it is necessary that it appeal to the curiosity only of immature adolescents and that it cause injury, difficult to repair, to the adolescent mind and body. Because the spread of obscene literature has a bad effect on the adolescent mind and body,

k) “An ignorance of the law cannot be deemed to constitute a lack of intention to commit a crime.”

its prohibition is naturally of very great significance as far as adolescents are concerned. However, the question of what constitutes obscene writing cannot be considered only in terms of the influences brought to bear on one specific class of readers. It is necessary that its influence on general readers throughout society be considered. The argument for appeal that holds that the relevant class of readers is limited only to adolescents is arbitrary and cannot be accepted.

II. Article 175 of the Penal Code and Article 21 of the Constitution

The appellant’s brief (counsel Shōichi Tamaki) pleads as follows: The guarantee of freedom of expression in Article 21 of the Constitution is almost unrestricted; for example, even if restriction in the name of the “public welfare” is permissible, the basis for deciding permissibility must be clear before the fact. Accordingly, under the new Constitution, which prohibits a system of censorship, whether or not there may be a violation of the “public welfare” must be left to the independent judgment of each person. Thus, it is argued, because the original decision accepted an error of independent judgment in respect to the translation in the present case and held the accused guilty, it violated Article 21 of the Constitution.

However, because the basis for judging the permissibility of the translation in the present case lies in the prevailing ideas of society or in the good sense that is prevalent throughout society, it cannot be said that it was not clear before the fact. Also, whether there is an offense against the public welfare must be determined objectively; it is not something that can be entrusted to the independent judgment of each person. Consequently, it is impossible for this point to be used in the argument.

The appellant’s brief argues that because there is no explicit provision concerning the possibility of restriction upon freedom of expression in Article 21 of the Constitution as in the case of the fundamental human rights set forth in Articles 22 and 29 of the Constitution, it is absolutely unrestricted and cannot be limited even for the public welfare. However, notwithstanding the fact that each provision of the Constitution does not expressly set forth the possibility of restriction of individual fundamental human rights in the Constitution, the present court has frequently held [eight citations omitted] that the abuse of such rights is prohibited by the stipulations of Articles 12 and 13 of the Con-
stitution, that they stand under restriction for the public welfare, and that they are not absolutely unlimited. If this principle be applied to freedom of publication and other expression—a type of freedom that is extremely important—it must nevertheless be recognized that it, too, can be restricted for the public welfare. Thus, because there is no room to doubt that the protection of a sexual code and the maintenance of a minimum sexual morality are to be considered parts of the public welfare, the original decision, which held that the translation in the present case should be regarded as an obscene writing and that its publication was against the public welfare, is proper. The argument is groundless. Moreover, the argument presented from the above standpoint, that if there are situations in which Article 175 of the Penal Code is to be applied, they must, from all points of view, involve both harmful and useless matters—for example only pornography—is also groundless.

[Justices Mano and Kobayashi were of the opinion that the high court should have remanded the case for a new trial in the district court. Justice Mano also criticized the concept of obscenity adopted by the majority.]

SUPREME COURT JUDGMENT, OCTOBER 15, 1969
[ISHII v. JAPAN]
23 Keishū 1239

[One of the accused, a publisher, asked the other accused to turn in an abridged translation of the Marquis de Sade's book "Juliette" and published the translation in two volumes. They were prosecuted on a charge of publishing an obscene book. The district court found them not guilty on the ground that the book was not obscene. The high court reversed. The accused appealed to the Supreme Court alleging constitutional grounds. The Supreme Court, in an 8 to 5 decision, affirmed. The majority opinion reads as follows:]

The high court explicitly followed the precedent of our court—Supreme Court Judgment, March 13, 1957, 11 Keishū 997 (the so-called "Chaterley Case")—and held as follows: artistry and obscenity are concepts that have different dimensions; a writing of artistic or intellectual value can still be obscene in the eyes of morality or law, and its sale or circulation can therefore be punished under Article 175 of the Penal Code. In the above decision, the Supreme Court also said: "Though it be art, it has no right to present obscene matters publicly. The artist, too, in the pursuit of his mission, must respect both the sense of shame and moral law, and he must not act contrary to the duties borne by the people at large." The present court believes that this view should be sustained.

According to this view, there is no reason why we should refrain from holding a writing obscene under the Penal Code even if it has value as an artistic work or as an expression of thought. Needless to say, there may be certain cases where such artistic value would decrease or moderate the sexual stimuli normally induced by descriptions concerned with sex, thereby avoiding obscenity in the work. But otherwise, such artistic value will not negate the obscene nature of the writing. The court cannot follow the argument which suggests that any writing with artistic value cannot be punished as obscene or that the application of Article 175 of the Penal Code shall be decided by balancing the interest in protecting the public from obscene literature with the interest in having a work which is of value as an artistic work or as an expression of a certain thought.

Freedom of expression and academic freedom are of vital importance as they serve as bases of democracy. However, as the above judgment of March 13, 1957 held, they are not absolute in the sense that there may be no restriction placed upon them at all. They should not be abused. They are subject to the restrictions imposed by the public welfare [Articles 12 and 13 of the Constitution]. Inflicting punishment upon publishers, writers and so on for a writing which has been found obscene, even if it has artistic or intellectual value, preserves order and good public morals concerning sex and therefore meets the interests of the people. Thus such punishments should not be regarded as contrary to Articles 21 and 23 of the Constitution.

[Concurring opinion] by Justice Iwata held that the court must "weigh the interests which would be invaded by the obscenity of this book when published and the interests which society would receive in terms of the arts, thought, scholarship and literature." He found the former were greater than the latter.

Dissenting opinion] by Justice Okuno, though based upon the same premise, reached the opposite result on the view that the latter were greater.

\[\text{Page 744, supra.}\]
Dissenting opinion by Justice Masatoshi Yokota expressed the view that this book, looked at as a whole, was not obscene, and that its publication should be allowed under Article 21 of the Constitution in view of its value as an expression of a thought and as an artistic work, even if it were to be held obscene. The dissenting opinion by Justice Irokawa basically followed this line.

Dissenting opinion by Justice Jirō Tanaka reads as follows:

The majority still stands on the premise which has been followed by the Supreme Court for many years, namely, that freedom of speech, press and other forms of expression or academic freedom can be restrained if “public welfare” so requires. I doubt the soundness of this premise.

I am not saying that there should be no limitation upon freedom of speech, press and other forms of expression or upon academic freedom. I, therefore, do not think that Article 175 of the Penal Code is in itself unconstitutional. I, however, have a different view of the significance of Articles 21 and 23 of the Constitution which guarantee these freedoms, and consequently of the extent of the restrictions which may be constitutionally imposed upon them. Freedom of speech, press and other forms of expression guaranteed under Article 21 as well as academic freedom guaranteed under Article 23 are different in nature from various other freedoms also guaranteed in the constitution, in that they are basic to democracy. . . . Thus, these freedoms should not be restricted by policy considerations in the name of the “public welfare.” They differ from freedom to choose and change one’s residence and to choose one’s occupation which can be restricted by statutes if the public welfare so requires [Article 22 of the Constitution]. If freedom of expression, or academic freedom, or, more generally, freedom to read, hear, watch, be informed and learn, could be restrained easily by views held by the majority of the Diet or by the Government, it would be almost inevitable that the fundamental principles of democracy would be shaken from their roots, and development of culture and the search for truth would be suppressed.

This does not mean that there should be no restriction upon these freedoms. They are subject to inherent limitations. . . . What the scope of such inherent limitations is . . . cannot be answered by general and abstract standards. It is to be defined with reference to the policy underlying the constitutional guarantee of these freedoms. These freedoms, by their own nature, presuppose that those exercising such freedoms shall respect the freedoms of others . . . , that they should not be abused so as to cause present danger to society, by violating the concept of justice and morals held by the general public. Limitations necessary for guaranteeing such freedoms to each individual shall be respected as inherent in them. To defy such limitations is tantamount to abuse of such freedoms. It is only these inherent limitations, and none of those set externally by policy considerations, that can be imposed upon such freedoms. The proper scope of such inherent limitations is to be ultimately defined by the court after an analysis of each instance. . . .

Article 175 of the Penal Code providing for punishment of obscene publications can be held constitutional only if its application does not exceed the scope of such inherent limitations. If it be applied also as a means of carrying out some “external policy considerations,” such as “to preserve order and good morals concerning sex” . . . , it might exceed this constitutional limit. . . .

In view of the principle that a statutory provision must be construed so as to conform with the spirit of the Constitution, . . . the concept of “obscenity” must be construed strictly. . . .

[From this basic standpoint] I believe that . . . the concept of “obscenity” should be defined “relatively,” [i.e., taking into account the following: (i) the attitude of prospective readers, which may differ with time, place or character of such readers, (ii) the value of the writing as an artistic work or as expressing a thought, and (iii) the motive of the writer (which shall be objectively found through the writing itself) and the way in which it was sold, such as the manner of advertisement].

There is a great doubt whether this book, when read as a whole, can be labeled obscene. . . . Even if it has some element of obscenity, it is not an obscene publication in the sense of Article 175 of the Penal Code according to my views set out above. . . .

[Concurring opinion by Justice Shimomura, from the viewpoint of the majority, attempts to refute Justice Tanaka’s opinion.]

Questions:

(1) Does relying on the phrase “public welfare” necessarily mean that more limitations will be held constitutional than relying on the notion of “inherent limitation” in the sense Justice Tanaka uses that term?

(2) Does the Constitution use the phrase “public welfare” in a consistent manner? For instance, does the phrase mean that the court should take a more permissive attitude towards
restrictions imposed upon “freedom to choose and change his residence and to choose his occupation” or upon “right to own or hold property” than upon “freedom to move to a foreign country,” “freedom to divest themselves of their nationality,” or “right of workers to organize and to bargain collectively?”

D. Censorship

1. There is no prior censorship before publishing a book or other items of literature. The publication of an allegedly obscene book can be stopped only after a criminal charge is brought against its writer or its publisher.

This does not mean that groups such as publishers have not established organs to check objectionable forms of expression in certain areas.

For instance, every motion picture is submitted to a check by the Committee for the Maintenance of Ethics in Motion Pictures (commonly known as Kinrin) before it is shown at a theater. However, this system is maintained by motion picture companies without any government participation.

2. Article 21 of the Customs Tariff Act (Kansei Teitsu Hō)m) provides as follows:

(i) Any goods specified in any of the following items shall not be imported.

(ii) Books, drawings, carvings and any other articles, which are likely to injure public safety or morals.

(iii) In cases where there are any goods, with respect to which there is sufficient reason to show that item (iii) of Paragraph 1 is applicable... the “director of customs office” (zenkan-chō) shall notify the person who intends to import the said goods.

(5) Upon receipt of the complaint provided for in the preceding paragraph, the director of customs office shall make a decision concerning the complaint after referring it to the Deliberative Council on Imported Motion Pictures, Etc. (Yunyu Eiga to Shingkai), as prescribed by cabinet order and shall notify its decision in writing, to the person who filed the complaint.

Importation of a number of films has been disallowed, or

m) 1910 c. 54.

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Allowed only after the importer has deleted or “covered up”—by such methods as defocusing—portions thereof which were found objectionable.

Some attack this as “censorship by the customs office.”

3. Every textbook intended for use in a primary school or high school must receive the approval of the Ministry of Education before its publication. (This rule does not apply to supplementary readings.) The Ministry has a board which checks the drafts of textbooks. The official explanation is that the work of the board is simply to check the accuracy of the statements made, to prevent printing errors and to give advice. The Ministry of Education has tried to justify the practice on the grounds of its responsibility to maintain the quality of education. There are many who suspect that the board goes further and checks, from a particular point of view, the contents of proposed textbooks.

The problem has been most seriously felt in the field of social studies, and has given rise to causes célèbres. Textbooks on Japanese history for high schools written by Professor Saburō Ienaga of the Tokyo University of Education were found unacceptable in 1965, and conditionally acceptable (with suggestions for amendment on some 300 points) in 1964. Professor Ienaga first brought an action for damages. Then he brought another action seeking cancellation of a disposition of the Ministry of Education which held the 1967 edition of his textbook unacceptable on the grounds that there were six points which the board found objectionable.

These two cases were tried separately in two different chambers (bu) of the Tokyo District Court. Professor Ienaga won the second case (Tokyo District Court Judgment, July 17, 1970, 604 Hanrei Jihō 35). However, he lost the most important issue involved in the first case, though he won a partial victory (Tokyo District Court Judgment, July 16, 1974, 751 Hanrei Jihō 50). Both cases have been appealed to the high court.

The differences between the 1970 decision and the 1974 decision relate to:

(a) The meaning of Article 26 of the Constitution. The 1970 decision holds that this article guarantees the right of children to receive education as one aspect of their “right to maintain the standards of… wholesome and cultured living”, and that this creates a duty on the part of the state to establish and maintain a system of public education. However, the decision held that Article 26 does not give power to the state to control or supervise the content of education. The 1974 decision holds that the state
Section 4 Social Rights

A. Introduction

The rights guaranteed under Articles 25 through 28 of the Constitution are usually grouped together as ‘social rights.’ Most of them just prescribe the government’s duties. For instance, Article 25, Paragraph 2 reads as follows:

In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security and of public health.

Article 27, Paragraph 1 reads:

All people shall have the right and obligation to work.

It is clear that such provisions—commonly known as ‘program clauses’—are without legal effect until supplemented by statutes or administrative acts. (It does not seem that the provision for an ‘obligation to work’ means anything more than a statement of a philosophy.)

Not all the provisions providing for ‘social rights,’ however, are merely of the nature of program clauses. See the following cases.

B. ‘Minimum Standards of Wholesome and Cultured Living’ in Article 25

SUPREME COURT JUDGMENT, MAY 24, 1967
[ASAHI v. MINISTER OF HEALTH AND WELFARE] 21 Minshū 1043

[Mr. Shigeru Asahi was hospitalized in the National Okayama Sanatorium as a tuberculosis patient. He had neither income nor support. He therefore applied for medical assistance as provided under the Livelihood Protection Act (Seikatsu Hojo Hō), and was granted assistance covering all his medical expenses, room and board, as well as ¥600 a month as a ‘commodity expense allowance.’]

a) 1950 c. 144.
Later it was found that his elder brother was alive. He began to receive ¥1,500 monthly from this brother. In July 1962, the Director of Tsumaya Welfare Office, having been informed of this, ordered that the payment of the “commodity expense allowance” be terminated and that Mr. Asahi should pay ¥900 (the difference between the amount given by his brother and the commodity expense) to cover a portion of his medical expenses. Mr. Asahi filed his complaint asking for annulment of this order, first to the Governor of Okayama Prefecture, then, upon the denial of his complaint, to the Minister of Health and Welfare, who also upheld the order of the Director of Tsumaya Welfare Office. Mr. Asahi thereupon brought a suit to have this decision by the Minister of Health and Welfare annulled, alleging that the ¥600 a month allowed him as “commodity expenses” was so small that he could not maintain “the minimum standards of wholesome and cultured living” as provided by Article 25 of the Constitution, and that he should be allowed to keep ¥1,000 a month for such expenses.

The district court found for the plaintiff. The high court reversed, finding that reasonable “commodity expenses” for an in-patient were ¥670, but holding that, since the difference between this amount and the amount actually allowed was only about 10% of the former, the deficiency was not a sufficient ground for holding the order unlawful.

Mr. Asahi then appealed to the Supreme Court, but he died on February 14, 1964, before the decision was given. Kenji Asahi, Shigeru’s adopted son, and Kenji’s wife, Kimiko, filed a motion to succeed Shigeru as the plaintiff in this action. (Kenji was adopted by Shigeru primarily for the purpose of succeeding to his cause of action after his death.)

The Supreme Court dismissed the action, holding that Mr. & Mrs. Kenji Asahi could not succeed to the original plaintiff’s cause of action. However, the court went on further to give a long dicta on the merits.

The majority opinion reads as follows:

It must be noted here that the benefits which the person in need receives under the provisions of the Livelihood Protection Act are not merely benefits given by the State as an act of grace or as a reflex interest [i.e., by-product] of social policy. It is a legal right, which may be termed the right to receive livelihood protection. This right, however, is a personal right which appertains exclusively to the individual to be protected, and is not transferable or inheritable. Not only assistance for medical fees but also assistance for living expenses, where cash is directly paid to the protected person, is given with the aim of satisfying the need for a minimum standard of living. The money which the protected person receives should not be applied to any other purpose than the purpose contemplated by the Act. Therefore, the right to receive the payment of arrears of benefits during the lifetime of the protected person is extinguished by his death and is not inheritable. Kenji and Kimiko Asahi insist that they have a right to demand the payment of the sum which fell in arrears during Shigeru’s lifetime on the ground of unjust enrichment [by the government]. Such a right for restitution, however, can only come into existence where there is a right to receive livelihood protection. Since we hold that a right to receive livelihood protection is not transferable nor inheritable, the alleged right for restitution accordingly is not inheritable either.

Consequently, it must be concluded that this suit was terminated upon Shigeru’s death, and that it is not possible for his heirs, Kenji and Kimiko Asahi, to succeed to Shigeru’s cause of action.

We wish to take this opportunity to express our opinion, as an addendum, on the propriety of the livelihood protection standards.

1. Article 25, Paragraph 1 of the Constitution provides that “All the people shall enjoy the right to maintain minimum standards of wholesome and cultured living.” This provision merely proclaims that it is the duty of the State to set up a policy to enable all people to enjoy minimum standards of wholesome and cultured living. It did not vest in the individual person any concrete right. Concrete rights accrued to the individual only after the Livelihood Protection Act was enacted to implement the objectives prescribed in the provisions of the Constitution. The Livelihood Protection Act provides that anyone who satisfies “the requirements prescribed by this Act” is entitled to “the protection prescribed by this Act” and such protection is given according to the standards set by the Minister of Health.

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1) See Livelihood Protection Act art. 59.
2) Supreme Court Judgment, September 29, 1948, 2 Keishō 1235.
3) Livelihood Protection Act art. 2.
and Welfare. The concrete right which accrues is therefore a right to receive protection as prescribed in the standards which the Minister of Health and Welfare has found to be sufficient to maintain the minimum standard of living. Such standards should of course be set in accordance with the requirements enumerated in Article 8, Paragraph 2 of the Act and should provide for protection which is sufficient to maintain minimum standards of wholesome and cultured living as guaranteed by the Constitution. The concept of minimum standards of wholesome and cultured living is rather abstract and relative. Such standards will be improved as our culture and national economy develop. These standards can be determined only after taking into consideration all these and other variable elements. Therefore, the determination of what “minimum standards of wholesome and cultured living” actually means [under particular circumstances] is within the discretion of the Minister of Health and Welfare. His decision does not produce an issue as to the legality of the standards, although such a decision may produce an issue as to the propriety of the standards which may be discussed in terms of the political responsibility of the government in power. Only in cases where such a decision is made in excess of or by abuse of the discretionary power conferred by the law, so as to neglect [totally] the policy and objectives of the Constitution and the Livelihood Protection Act by ignoring the actual conditions of life and establishing extremely low standards, would such a decision be subject to judicial review of its legality.

2. The livelihood protection standards in question were set in July 1953. The items of expenditure, as well as quantity and cost per unit of each item, which were used as bases for determining that ¥600 a month was the appropriate sum for livelihood assistance are shown in the appendix attached to the judgment in the court of the first instance.

The minimum standards of living guaranteed by the Livelihood Protection Act should be of such a level as would make it possible to maintain standards of wholesome and cultured living, and the substance of the protection offered should be determined efficiently and properly with due consideration to the actual needs of the protected person himself and of his family. At the same time, the standard should not be more than is necessary to maintain the minimum standard of living.

In relation to an in-patient like the original appellant in this case we should also take into account the fact that there are certain qualifications which arise from his special situation such as long term hospitalization, and also from medical factors. In this instance, it cannot be denied that there is a certain co-relation between the amount of the commodity expenses provided under the Act and the effective cure of the disease; and that the shortage in the amount of assistance provided has a significant bearing upon the treatment of the patient. As a means for satisfying the minimum needs of patients and for effecting at the same time the proper operation of the protection scheme, the law prescribes the kind and scope of protection. In-patients are afforded medical assistance which includes payment for meals in addition to livelihood assistance. These two kinds of assistance differ from each other both in their nature and in their operation. There is also a system of rehabilitation aid. Therefore, it is not proper [for the appellants] to attack the standard for livelihood protection as illegal on the grounds that the bases which have been used for determining the amount of assistance do not include such expenses as are necessary to promote or effect a cure, for “filling the gaps in the present medical and nursing systems” or for assisting the situation of the patient after he has left the hospital.

The quantity of articles of daily necessities consumed by the patients, of course, depends on the degree of individual frugality and the quality of the articles. The type of articles needed also differs from patient to patient depending upon the seriousness of the illness. Among certain categories of patients, they may be used interchangeably. Consequently, whether the livelihood protection standards which are the general and abstract yardsticks used to measure the extent of the daily needs of the patients are appropriate in individual circumstances must be determined on the basis of a grasp of the whole picture, the consolidated whole, rather than by merely counting up items of expenditure as well as quantity and cost per unit of each item. Furthermore, the daily articles utilized by in-patients can be classified into those for ordinary needs and those for extraordinary needs, and it is left to the discretion of the Minister of Health and Welfare to determine whether to classify extraordinary expenditures under or-
ordinary standards, under special standards, or under a temporary assistance or loan system.

Upon a consideration of the issue with the above points in mind, the Court holds that the determination by the Minister of Health and Welfare which found that the livelihood protection standards in question were sufficient to meet the minimum daily needs of the in-patient under the set of facts found by the trial court, cannot be said to have exceeded the discretionary power granted under the law or to be an abuse of such power.

[Concurring opinion by Justice Okuno—omitted.]

The dissenting opinion of Justice Jirō Tanaka10 is as follows:

There is room for argument as to whether the cause of action in question is inheritable. The recent trend in many other countries is a common movement toward loosening the requirements for bringing administrative litigation with the aim of opening the door to judicial relief as widely as possible. There is ample reason for this trend in view of the nature of administrative litigation (especially litigation involving an attack on an administrative act by a private citizen) which has as its purpose the provision of redress to the people against [abuse by] administrative power. In our country too, we should try to render judgment on the merits so long as it is theoretically possible and to avoid a type of trial which gives an impression of turning away the caller at the door. I believe that this is the basic attitude which should be taken by the court in serving the people.

When we review this case from such an angle, it is theoretically not impossible to recognize the inheritability of this cause of action. I therefore think it is a proper attitude for the court to consider the merits of the case and to give the opinion of this court on the points alleged in the appellants' brief...

Should the decision of the Minister in the instant case be annulled, the government would be held to have unjustly suspended the monthly livelihood aid of ¥600 and to have improperly turned over the difference between the amount in the livelihood protection schedule set by the Minister and the proper amount to be set within the limit of ¥900 for Mr. Asahi's medical expenses. Of course, as will be stated hereinafter, the beneficiary Shigeru Asahi cannot be said to have the right to demand, ipso facto, protection under a proper livelihood aid schedule. Should

c) Though the court calls Justice Tanaka's opinion a dissent, he also voted for affirming the judgment of the high court, not on procedural grounds as in the majority but on substantive grounds.

d) This decision be annulled, the Minister of Health and Welfare would be bound to set a proper standard according to the aim of the provisions of the Constitution and the Livelihood Protection Act, and the government would be required to return the remaining profit to Shigeru Asahi to the extent mentioned above. That is to say, Shigeru Asahi would be allowed to claim the return of the said amount on the ground of unjust enrichment by the government. . . . The claim against the government for the return of unjust enrichment is not a claim for an award of a benefit under the livelihood aid schedule nor is it a demand for the payment of a livelihood protection allowance in arrears. It is a claim for the return of the money which Shigeru Asahi could have used of his own volition as he saw fit if he had survived. Therefore, it is my opinion that we can hardly purport to find a reasonable ground upon which to deny that such a right is transferable or inheritable.

If the claim for the return of the sum obtained by unjust enrichment in the sense mentioned above is to be admitted, the annulment of the decision which is the subject matter of this case is a prerequisite to the exercise of the appellants' claim. It is therefore reasonable to hold that Kenji and Kimiko Asahi, who succeeded to the right mentioned above, have a legal interest which they would have regained upon the annulment of the decision. . . .

On the grounds stated hereinafore, I hold that in this case, Kenji and Kimiko Asahi properly succeeded to the cause of action upon the death of Shigeru Asahi.

Since I believe that this cause of action is inheritable, I will proceed to give my opinion on the merits of the case.

Stating the conclusion first, I think this appeal should be dismissed.

I hold that it is not by the mere grace of the state nor as a reflex interest of social policy, but by a legal right . . . that those in need receive protection in sufficient amounts to maintain minimum standards of wholesome and cultured living. The epoch-making nature of the present Livelihood Protection Act lies in this fact. The question is what the legal basis of such a right is and what it contains.

Article 25, Paragraph 1 of the Constitution provides, "All people shall have the right to maintain the minimum standards of wholesome and cultured living." As stated in the precedents of this Court, however, this provision merely declares that it is a [political] duty of the government to establish as its policy the
guarantee of minimum standards of wholesome and cultured living to all people. It does not in itself grant any concrete right to an individual. 9 A concrete right came into existence only after the enactment of the Livelihood Protection Act in order to implement the policy of the above-mentioned constitutional provision. The Livelihood Protection Act states that those who satisfy "the requirements enumerated in this Act" shall be entitled to receive "the protection provided in this Act," and that the protection must be afforded according to the standards set by the Minister of Health and Welfare. 10 This means that the Act guarantees only the right to receive protection according to the standards which the Minister of Health and Welfare sets and recognizes as sufficient for maintaining the minimum standards of living. It does not presuppose the existence of minimum standards of living which could be ascertained objectively, that is, without the provisions of the Livelihood Protection Act. . .

The protection standards set by the Minister must of course be in compliance with the criteria provided in Article 8, Paragraph 2 (of the Act) and must be sufficient to maintain the minimum standards of wholesome and cultured living, as stated in Article 25, Paragraph 2 of the Constitution. However, "the minimum standards of wholesome and cultured living" is not a fixed or definite idea but is an abstract and relative concept whose substance improves constantly with the development of the culture and economy of the nation. This can be fixed only after taking many variable factors into consideration. It is hardly definable with mathematical accuracy even at a certain point of time. The Constitution should be understood as having no intention to guarantee the right to maintain minimum standards of living as something to be ascertained objectively, leaving no room for difference of opinions. . .

It is therefore to be concluded that the determination of what constitutes the minimum standards of wholesome and cultured living is primarily left to the discretion of the Minister of Health and Welfare, a discretion which he should exercise reasonably, based upon special and technical knowledge relating to the matter. His misjudgment, as a rule, may only raise a question of the political responsibility of the government. . . It does not in itself give rise to a question about the legality of his action. The standards set may be subject to judicial review only when they are set in excess of, or in abuse of, the power of discretion entrusted by the law, as, for example, where the protection to be afforded is of an extremely low quality in view of the actual conditions of life so as to deny [completely] the policy and objectives of the Constitution and the Livelihood Protection Act. The Livelihood Protection Act limits the subject matter of complaints to "the disposition concerning the decision as to whether protection should be afforded to a particular person and the decision concerning the particulars of the operation of the protective scheme." 11 It does not mention the fixing of protection standards as being among the subject matter of complaints. I believe this is based on the view I have described above.

[Justice Tanaka then examined the quality of the assistance afforded under the standards set by the Minister of Health and Welfare, and found that it was very low, but not to the extent which would justify holding that the Minister had exceeded or abused the discretionary power which had been conferred upon him by the Livelihood Protection Act. (This portion of Justice Tanaka's opinion is not very different from the dictum in the majority opinion.) He then continued:]}

As pointed out above, the standards were revised in April 1957, only eight months after the order changing the content of protection was issued. On that occasion some new items were added, quantities of some items were increased, and the cost per unit of some items was raised. However, as the protection standards are to be improved to keep pace with the development of the cultural and economic situation of the nation, it is not proper to conclude on this ground that the livelihood protection standards in questions which were set three years earlier, were established arbitrarily by the Minister of Health and Welfare.

According to the facts found in the judgment below, our national economy did not show any significant change during the period between July 1953, when the standards in question were set, and the end of 1954. It grew rapidly in the 1955 fiscal year and in the fiscal year 1956, especially in the latter half of the year, attained a high level of growth which no one had anticipated. As a result, there was a rapid increase in national revenue and an improvement in the standard of living. It also brought about a significant rise in commodity prices. In August 1956, when the order in question was issued, the substance of the assistance under the livelihood assistance standards thus seems to

8) Supreme Court Judgment, September 29, 1948, 2 Keishū 1235.
9) Livelihood Protection Act art. 2.
10) Id. art. 8(2).
11) Id. art. 65(1).
have already been unsatisfactory as a guarantee of the minimum standards of wholesome and cultured living, since social conditions had improved. The standards, therefore, had to be revised sooner or later. As the judgment below has justly confirmed, the degree of insufficiency of the protection was not so great as to frustrate the very purpose of protecting the livelihood of the in-patients. We must also take note of the fact that it takes a considerable length of time to investigate the situation and then to revise the standards. These facts reveal that the task of constantly adjusting protection standards set at a certain time to meet later changes in livelihood conditions is an extremely difficult task to fulfill. The gap between the standards and actual conditions of life must be tolerated as “an unavoidable evil” by the law so long as it does not exceed a certain limit. Since it is reasonable to set standards in operating livelihood protection programs, it follows that it is inevitable that there will be a gap between these standards and actual conditions.

As stated above, the livelihood assistance standards in question were set by utilizing a theoretical means of calculation called the “market-basket method,” and cannot be said to be unreasonable. The extent of the gap between these standards and actual living conditions is described above. We admit that the “market-basket method” should be improved. We also admit that even a small deficiency in commodity allowances may have a significant effect upon patients. Still, though a ¥600 monthly livelihood allowance may be criticized as being too low to cover daily commodity expenditures, it is a matter of propriety which can be remedied by administrative action. Consequently we cannot do other than approve the conclusion of the judgment below that there is no illegality involved in this instance which justifies the award of judicial relief. In conclusion, I find no misinterpretation of the Constitution, laws and ordinances, as alleged.

As a matter of legal argument, I have to reach the conclusion I have stated above. [As a matter of policy, however, I believe the government should try harder to [revise the standards so as to] more properly meet [the changes in] the actual conditions of life more promptly, by conducting constant research on various factors [which should be considered when fixing the livelihood assistance standards]. I also think that it is desirable to give wider discretion [to the administrators?] so that it may be easier to fill the gap between the standards and the actual conditions of life. As I said above, the livelihood protection system is not established as a matter of grace. It confers the right to such protection. However, if by calling it a right we create formalistic attitudes among the officials in their administration of this system, the achievement of its aim will become extremely difficult. The plaintiffs lose this case. The state which wins the case, however, must give deep thought to the fact that this judgment does not necessarily intend to approve the measures taken by the government as being appropriate, and that this court has only found that these measures fall short of the point where they could be held unconstitutional or illegal. I sincerely hope that the government and all those concerned in the administration of the livelihood protection system will give serious consideration to a more proper administration of the system, so that they may meet the people’s expectations.

[Justices Matsuda and Iwata also wrote an opinion, in which Justice Kusaka joined, that this cause of action was inheritable. It continues:] According to the opinion of the majority, this suit was terminated at Shigeru’s death. This in turn means that this Court does not decide the issues on the merits. Each justice may and must express his opinion until a decision is reached. Once a decision is reached, however, he must obey such a decision. We, therefore, believe . . . that we should not express our views on the merits of this case. That would in effect mean that we consider the case on the assumption that this suit has not been terminated, contrary to the above decision of this Court. Even if we venture to express our views on the merits, such an opinion would be without any legal significance . . .

Questions:

1. Do you think the court should ever declare unconstitution a statute which establishes a social security system?

2. What do you think of the majority’s expression of its views on the merits as an addendum to its opinion?

3. Justice Tanaka talked about political morality at the end of his opinion. (It is by no means rare for a Japanese judge to preach on morality.) Do you think he should have refrained from making such a statement?

COMMENT

For an earlier case on Article 25, Paragraph 1 of the Constitution, see Supreme Court Judgment, September 29, 1948, 2
B. Product Liability

J. Mark Ramseyer

II. Products Liability Law in Japan

A. Basic Products Liability

Until 1994, Japanese consumers bought products in a world governed by a general negligence regime. To sue on an accident involving a product, plaintiffs had to prove not just that the product had been defective but also that it was manufactured by a defective manufacturer. As a result, the law was relatively weak and manufacturing firms had been negligent. Effective July 1, 1994, the Japanese government changed the rule. With enormous hullabaloos, it substituted for negligence a strict liability standard for defective products. In fact, the change may have been less significant than the hullabaloos would suggest. In some spheres, Japanese courts had imposed standards close to strict liability already, and the concept of "defect" in the new law probably still incorporates a cost-benefit approach resembling the classic Hard Hand rule. . . .

B. The SG System

Unbeknownst to most Western observers for nearly two decades, many Japanese firms had already subordinated themselves—voluntarily or by a strict products liability regime. In 1973, the Diet enacted the Consumer Products Safety Act and through it established the Product Safety Council. The Act itself explicitly authorized only a small mandatory regime. It authorized the Council to establish safety standards for a few hazardous categories of products and to ban those products that did not meet the standards. Within a short time, the Council had designated eight categories of such products: motorcycle helmets, baby beds, pressure cookers, baseball helmets, roller skates, mountain climbing ropes, carbonated soft drinks, and bottles.

2. Under the system, if a product met the safety standards, the Council had to use the "S" (for Safety) label. If the product failed to meet the standards, the Council forced it off the market.

3. Simultaneously, though, the Council began coordinating a separate, privately ordered products liability regime. Although the government had organized the Council, this second system was almost entirely extralegal. The 1973 Consumer Products Safety Act did not mandate it, and private firms did not need a statute to organize it. As noted below, firms in some industries have since organized similar systems completely independent of the Council.

This voluntary regime had four components: safety standards, testing, insurance, and a distinctive legal rule. Consider initially the first three components. First, the Council set safety standards for a variety of products. By 1996, it had established standards for 103 products, ranging from baby buggies, bunk beds, disposable lighters, and bicycles to pop bottles. . . .

Second, the Council tested products submitted to it by manufacturers. If a product met the safety standards the Council had just set, the firm could attach an "SG" (for Safety Goods) label. If the product failed the test, the firm simply sold it without the label. The firms involved paid the costs of these tests.

Firms had a choice of two types of tests. Most simply, they could submit a batch of the products to the Council. The Council would then test the batch, and if it passed, the firm could apply the SG mark to all items in that particular batch. More practically for mass-produced goods, the firm could ask the Council to inspect their product design and manufacturing processes. If a firm passed the test, it could apply the label to all of the items it produced using that design and process.

Within Japan, the Council retained several specialized testing organizations (for example, the Japan Electrical Appliance Testing Institute). At the outset, importers could use only the batch-testing process. By the mid-1980s, however, the Council had established testing arrangements with foreign testing organizations (for example, the Underwriters Laboratories). Foreign firms could have their designs and manufacturing processes certified as well.

Third, the Council insured those products for which it authorized the SG seal through a private carrier. It charged premiums that averaged about 0.5% of a product's retail price. As the mandatory S-label system provided no insurance, S producers who wanted to offer products liability coverage could also certify their products under the SG system. Many did, as the prevalence of motorcycle helmets, pop bottles, pressure cookers, and roller skates (among the SG-certified products) attests.

Under the SG insurance, the Product Safety Council paid specified amounts to users injured by defective SG goods. Those firms that wanted to bundle a products-liability insurance contract with their goods could thus submit the products to the Council and pay a fee. The Council would test the products and, if they met its safety standards, compensate users injured by them. Those firms that did not want to bundle products-liability insurance with their products could sell their wares independently. The rate of coverage varied by industry.

C. A Private Legal Regime

In effect, firms used the SG system to raise the legal standard by which they would be bound. Voluntarily, they replaced the negligence requirement in tort with a rule that allowed a user to recover if or because she could show three things: (1) that the product had been defective, (2) that he or she had been injured, and (3) that the defect had caused the injuries. For that process, the firms hired the Council to serve as judge, jury, and insurer.

Unfortunately, I lack the details on some of the program's more intriguing aspects. The Council apparently did not publish regulations or records of its decisions. We, thus, have only the rough outlines and second-hand accounts of some of its practices. Cautions about the lack of good data on some matters aside, the Council seemed to follow what for anyone but a lawyer would seem to be a straightforward approach if a product broke in the course of normal use, the Council would pay damages if it performed as a consumer should expect it to perform, or if a consumer ignored ordinary precautions, the Council would not. For example, if a little girl broke her leg because the wheels fell off her roller skates in normal use, the Council presumably would pay. If she broke her leg because it was her first time skating and she tried to skate down too steep a hill, the Council presumably did not. Consumers found the lack of detail acceptable because of the Council's—and the manufacturers'—interest in preserving future business.

By design, SG justice was cheap. The Council dispensed with much of the detailed proof courts demanded, and victims, therefore, could recover with less evidence either of a product's defect or of causation. From time to time, observers complained about the SG system, but usually they complained only that more products should be covered by the system. They rarely complained that the Council interpreted concepts like causation or defect too restrictively.

SG justice was also fast. The Council paid claims quickly. Sometimes, it even paid within a month. Indeed, if a claimant could show serious personal injury, unless he or she was clearly and exclusively responsible for the injury, the Council immediately paid $600,000 as interim aid. Even if the claimant later failed to prove his or her claim, he or she could still keep the $600,000. By contrast, . . . a claimant who sued in court commonly waited five years.

The Council capped its liability for personal injury at $10 million and paid no compensation for property

damages. The amount is low, but not egregiously so. It is the minimum coverage that automobile drivers must carry, and it is less than women and some men (particularly if they were comparatively negligent—Japan has a comparative negligence regime) collect the bulk of the amounts they could collect in court. . . .

In effect, the system coupled (1) broader coverage and cheaper claim procedures with (2) caps on damage awards. Two analogies come to mind. First, the system closely resembles the voluntary nineteenth-century workers' compensation systems there too, the parties privately negotiated arrangements that combined broader coverage formulae with damage caps. Second, the system resembles many voluntary product warranties in the United States. Again, the warranties ease the process of proving claims, but in a variety of ways simultaneously limit the amounts recoverable.

Given its obvious appeal, the intriguing question may not be why Japanese manufacturers offered the SG system, as much as why American manufacturers do not—that is, why American warranties so often exclude personal injury claims. The answer probably lies (although the argument is speculative) in the hostility many American courts show toward class action and liability caps. The SG firms could probably offer the broader coverage in part because they could simultaneously limit awards. American firms can expand coverage, but cannot assume that courts will enforce any limits on awards they make pursuant to that broader coverage. Given the anticipated judicial hostility to damage caps, American firms cannot predictably broaden coverage.

. . . From 1974 to 1991, victims asserted 727 claims [under the SG system]. The Council recognized 359 complaints and paid aggregate compensation of about $56 million, or $160,000 per claim. . . . The most commonly recognized complaints involved disposable cigarette lighters. Others included baby buggies, swing sets, and step ladders.

Within a few years of the establishment of the SG system, firms in several industries outside the SG regime began similar but independent systems of their own. For instance, in 1974 the makers of large household items (for example, kitchen cabinets and integrated bathroom units) introduced the BL (Better Living) label. As of 1991, their systems covered thirty-five products and paid up to $50 million per person and $500 million per accident. Toy makers now use the ST (Safety Toy) label and pay up to $10 million per victim for injuries from defective toys. The labels cover about ninety percent of all toys sold. Fireworks manufacturers and importers began an SF (Safety Fireworks) label system in 1977 and pay up to $1000 million per accident. The fireworks trade association has apparently used its clout to make coverage universal.

III. SG Claim Levels

There is a puzzle here. In nearly two decades, the Council has granted only 359 claims. [The harder puzzle, however,] is not the number of claims paid; it is the number of claims filed. In nearly two decades, only 727 parties have asserted any claims. By contrast, in the United States (with roughly twice the population of Japan), claimants file 14,000 products liability claims per year in the federal courts alone.

Initially, three points seem relevant to this puzzle. First, the reason for the low claiming levels does not seem to lie with any dramatically restrictive policies at the Products Safety Council. True, if more potential claimants knew the Council demanded high levels of proof, then fewer people would file claims. Because only victims with the strongest claims would file, the forty-five percent success rate (359/727) would disguise how restrictive the Council has been. As noted earlier, however, in all of the controversy over the new Products Liability Act, few observers of any political stripe have claimed that the Council has been too restrictive.

Second, a few big tort disputes skew the American products liability data. Perhaps half of the recent cases have been asbestos cases. The Dalton Shield and benzene cases stretch the numbers higher still. Third, the right benchmark by which to measure claiming levels is the number of victims, and for that purpose the 14,000 federal suits are notoriously misleading. Put somewhat polemically, the right benchmark is not how many people can plausibly file claims; it is not how many can convince juries that a manufacturer ought to pay their medical bills; it is not even how many people suffer product-related injuries. The right benchmark is how many people are injured each year by defective products (granted, the phrase hides a thousand sins), and there are precious few reasons to think that the American data track that benchmark much at all.

Instead of arguing before six noses culled from department of motor vehicle records, suppose American trial lawyers had to make their cases to engineers from the Underwriters Lab. That, after all, is pretty much what happens in the SG system. Probably, most observers would conclude that plaintiffs would file dramatically fewer claims. Probably, many would also conclude that outcomes would be more accurate. Perhaps—not to put too fine a point on it—claiming levels are high in the United States because juries sympathize with accident victims and are easy to fool. They are low under the SG system because the fact-finders know what they are doing.

Even given all this, the most important reasons that the Japanese SG claim figures fall far below the American products liability figures lie elsewhere: the reasons lie in the facts that the SG system (1) covers only a small segment of the Japanese economy and (2) disproportionately covers the safer products at that. After all, a total count of Japanese products liability claims would not just include SG claims; it would include the large number of claims against products not covered by the system. And there are many such claims. Firms in the health-care and recreational products industries, for example, report over 1000 claims a year. The Japan Federation of Bar Associations' Product Liability Hotline handles over 1000 calls annually. The Citizen's Life Center—an organization heavily concerned with consumer affairs—handles nearly 1200 product-safety complaints a year. And in 1993 alone, the restaurant industry paid $1.5 million to over 4000 patrons.

Necessarily, moreover, the SG system will disproportionately cover the safer products. To see why, ask why Japanese consumers would want to pay for SG certification. They hardly want the insurance for its own sake. Japanese citizens are heavily insured: all Japanese are covered by the national health insurance system, and many carry elaborate life insurance policies in addition. Even if they wanted more insurance, why buy insurance tailored narrowly toward product-related accidents? Those Japanese consumers who want the SG certification are therefore relatively less likely to be consumers who need more insurance, than they are to be those who prefer safer products. For them, the value of insurance lies in the way it makes credible the manufacturer's assertions about safety. Effectively, by facilitating claims against the manufacturer, the SG system helps a firm "put its money where its mouth is." Effectively, it helps the manufacturers of the safer products make their promises about safety believable, and thereby gives them an advantage in the product market. And precisely because the SG system covers the safer products, it generates relatively few claims.
Liability Law shall come into force from July 1, 1995...

2. What Is Product Liability?

(i) Definition of Product Liability. Product Liability shall be defined as liability for damages in such case as follows: (a) In the case where due to a defect in the delivered product, (b) a life, a body or property of another person (including a third party not using, or consuming the product...) is injured, (c) the person who manufactured, processed, imported or put his name, etc. on the product as business is liable for damages of the injured person.

(ii) Significance of Introduction of the Product Liability Law. (a) Previously in Japan, claims for damages have usually been made based on the Civil Code [§ 709 in case the injury is caused by a defect in the product... [§ 709 employs the "fault-based liability (negligence) principle," and requires the "intention or fault" of the manufacturer, etc. as a condition for liability.

(b) The Product Liability Law takes the "defect in the product" as a condition for liability instead of the "intention or fault" of the manufacturer, etc. Therefore, after introduction of the Product Liability Law, the injured has to verify the "defect in the product" for claiming damages...

(iii) Point of the Product Liability Law... By definition, "product" means movable property manufactured or processed. Therefore, incorporeal property such as services, information, software, electricity, etc. and immovables are not the object of the Law. Moreover, agricultural, forestal, marine and mineral products which are not processed artificially are not the object of the Law...

(iv) Definition. A "defect" does not mean mere lack of quality of the product, but means lack of safety in the product which may cause the injury to life, body, or property. In the law, the term "defect" is defined as "lack of safety that the product ordinarily should provide," taking into account "the nature of the product," "the ordinarily foreseeable manner of use of the product," "the time when the manufacturer, etc. delivered the product," and other circumstances concerning the product...

Meaning of "the nature of the product": This means the circumstances of the product itself including factors such as the following, (i) representation of the product (instructions, warnings, etc. to prevent accidents); (ii) effectiveness and usefulness of the product (compared to its danger); (iii) cost vs. effect (the safety standard of products in the same price range); (iv) probability of occurrence of accidents and its extent; (v) ordinary use period and durable period of the product...

Meaning of "the ordinarily foreseeable manner of use of the product": This means the circumstances concerning use of the product, including factors such as the following, (vi) reasonably foreseeable use of the product [and (vii)] possibility of preventing danger from occurring by the product user...
on the ground that the marriage continues to subsist technically. According to the facts established by the court below, while the appellant and the appellee are husband and wife, it was not until their conjugal relations had broken down completely that the appellant manifested his intention to avoid the gift agreement entered into between them. It is, therefore, the opinion of this court that the judgment of the High Court voiding the manifested intention of the appellant’s intention is correct.

COMMENT

The draftsmen of the Civil Code gave two grounds for Article 754 [then Article 792], namely, (i) that “a wife might enter into a contract with her husband under his strong influence or a husband who doted on his wife might lose his freedom of will” and (ii) that performance of a contract between husband and wife should be based upon affection and that enforcement of such a contract through legal means might have detrimental effects upon the peaceful relationship of the family.

Later scholarly opinions have criticized the merits of this explanation and proposed the deletion of Article 754 from the Civil Code. They have pointed out that the first ground does not explain why one of the spouses cannot enforce the contract even if he or she proves that the contract was entered into by the free will of the parties, nor why Article 754 says that such a contract can be avoided only during the subsistence of marriage. They have also denied the validity of the second ground, because they believed that it does not explain why one of the spouses can avoid such a contract and sue in court for the recovery of property whose title has already been transferred under the contract to the other party of the marriage.

The court, persuaded by these scholarly opinions, tried to limit the scope of the application of this article. The leading case of the Great Court of Jurisdiction is its Judgment of October 5, 1944, 25 Minshū 579. In this case the plaintiff (husband) cohabited with another woman, and completely neglected his wife. He entered a contract with his wife to convey the title to their matrimonial home to her and he duly registered the transfer. Subsequently he avoided the contract and sued for the transfer of the title back to him. The court gave judgment for the defendant on the ground that the contract in question was entered into when the marital relationship had already broken down and

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therefore should not fall under Article 754 [then Article 792] of the Civil Code.

This brief history may also give you some idea about the role of scholarly opinions in Japan.

Questions:

(1) What, if any, are the new principles decided by the principal case of 1967 as compared with the above-mentioned precedent of the Great Court of Jurisdiction? What, if any, is the practical meaning of Article 754 of the Civil Code after this 1967 case?

(2) The decision of the Supreme Court takes the position that the term “at any time during the subsistence of marriage” as used in Article 754 of the Civil Code should be interpreted not merely as any time during which the marriage technically continues to subsist but as the time during which it continues to subsist both in form and in reality. But neither Article 754 nor any other article contain any passage indicating the availability of such an interpretation, explicitly or otherwise. Under the Civil Code, a marriage becomes effective upon registering it in accordance with the Family Registration Act (Kosshi Ho) (Civil Code art. 739(1)). In the case of a divorce, a divorce by mutual consent also becomes effective upon registering it. (Divorce by a decree of the court becomes effective at the time of the entry of judgment.) Thus, the Civil Code indicates a design to identify clearly the beginning and the termination of a marriage. According to this position, it seems natural to interpret the term “at any time during the subsistence of marriage” as the time during which a given marriage is legally effective. What, then, is the rationale of the decision of the Supreme Court quoted above?

SUPREME COURT JUDGMENT, FEBRUARY 16, 1961
[JAPAN v. UDAGAWA]
15 Minshū 244

REFERENCES:

Civil Code, Article 709. A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

c) 1947 c. 224.
Article 710. A person who is liable in damages in accordance with the provisions of the preceding Article must make compensation therefor even in respect of non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

Article 715. A person who employs another to carry out an undertaking is bound to make compensation for damage done to a third person by the employee in the course of the execution of the undertaking; Provided, however, that this shall not apply, if the employer has exercised due care in the appointment of the employee and the supervision of the undertaking or if the damage would have ensued even if due care had been exercised.

The plaintiff was hospitalized at a branch hospital of the University of Tokyo Hospital. To help her recover from physical exhaustion, she received a blood transfusion on the recommendation of Doctor B of the branch hospital. Later it was discovered that Donor A of the blood was a person suffering from syphilis, though he had no visible syphilitic symptoms at the time of the blood transfusion. As a result, the plaintiff was infected with syphilis. The plaintiff filed a suit for damages against the State, which was the employer of Doctor B, as the University of Tokyo is a national university.

The plaintiff charged Doctor B with the following instances of negligence: (1) Doctor B neglected to conduct a serum reaction test on A's blood immediately prior to the transfusion on the ground that the result of a serum reaction test on A's blood conducted 15 days before had been negative with respect to syphilis; (2) Doctor B neglected to subject A to any visual examination, palpation or oral questioning.

To this the defendant answered (1) that to ascertain the results of a serum reaction test takes more than 24 hours and that as a blood transfusion is ordinarily done in an emergency situation where time is a critical element, it is general practice among doctors to dispense with a serum reaction test when there is a reliable certificate showing negative reaction, (2) that in the present case, even if a serum reaction test had been conducted, its result would have been negative since not enough time had elapsed since A contracted syphilis, and (3) that in this case, a visual examination, palpation or oral questioning would not have discovered A's infection with syphilis.

The court of first instance gave judgment for the plaintiff, which was affirmed by the High Court. The defendant appealed to the Supreme Court. Affirmed.

The reasons given by the court are as follows:

Granting that symptoms, other than those which a medical doctor can detect from a patient he personally examines, and other matters that may prove useful for his diagnosis of the condition of the patient are inferior in their accuracy and dependability to information obtained through a serum reaction test, visual examination, palpation and auscultation, there are cases where the doctor's only recourse is to an oral questioning of the patient. Even when the blood donor produces a reliable test certificate indicating a negative reaction to a serum test, or a membership card identifying himself with a blood bank, such certificate or membership card does not necessarily justify the conclusion that transfusion of his blood carries with it no risk of infecting the recipient with syphilis. Since it is an established fact that there is no scientific method available for making a definitive diagnosis regarding the existence of latent syphilis, the doctor should have made every conceivable check through questioning the donor (who should know better than anybody else whether there had been any reason to believe that he might have been infected with syphilis) to make sure to his own satisfaction that there is no such danger, although the information thus gathered is admittedly of marginal dependability. (We wish to point out that in this case the need for a transfusion was not so critically urgent as to make it impossible to conduct such checks.) Given the facts, it must be said that it is a just and proper judgment that such a precaution is a bounden duty of the doctor in exercising good care of his patient.

The attorneys for the appellant argue that since it is an established practice of the medical profession to dispense with questioning a donor when he produces a test certificate or a membership card, as the said donor had done, Doctor B's action in dispensing with further questioning does not constitute negligence in the performance of his duty. However, the existence or non-existence of a duty of good care is something to be determined from the standpoint of law. Even if there had been an established practice, as the defense claims, the existence of such a practice merely serves at best as a factor to be considered in determining the relative gravity of a given case of negligence. There is no reason to believe that the existence of such a practice automatically relieves the doctor of his duty of care.

The appellant's brief also contends that even granting that
the doctor is obliged to question each and every donor in the manner described above, it is not to be expected, statistically, that questioning a person suspected of venereal infection who makes his living by selling his blood will pro out of him truthful answers, and that therefore the judgment below which held that the doctor was obliged to question even such a person is tantamount to imposing an unduly onerous duty of care on the doctor in utter disregard of empirical rules or reason. However, even if the donor was a professional blood seller, the court finds it difficult to agree with the appellant's contention that all such donors, without a single exception, whatever their personal background, will not give truthful answers to the questions put to them, simply because they are professional blood sellers. It is true that Donor A was a professional blood seller, but according to the decision of, and the facts established by, the court of first instance, at the time that he sold his blood to the plaintiff he did not have to rely solely on the income derived from the sale of his blood for his livelihood. Furthermore, with respect to the possibility of his having been infected with syphilis, he stated that he simply had not been asked the question. One cannot therefore assert that this form of questioning would not have produced any findings suggesting the existence of syphilitic infection in his blood, even if Doctor B had gingerly asked Donor A detailed and specific questions, wording them in such a way as to elicit truthful answers.

In this respect, the original judgment states: "On the other hand, even if the donor had been a professional blood seller, detailed and specific questioning by the doctor regarding matters pertinent to determining the existence or absence of such a danger would have induced the donor to answer the questions. Such a discussion with the donor could have provided the doctor with opportunities to observe the donor's reaction to various questions put to him, and it is conceivable that the whole series of questions would have had a psychological pressure on the donor, persuad-

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(i) Expenses incurred in connection with and during the hospitalization:

**¥41,224**

(ii) On account of the illness the plaintiff has difficulty in walking and is suffering ambylopia, with the result that she is now unable to

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ing him to open his heart and let the doctor have glimpses of the truth." In view of the facts that have been established at the trial, this judgment of the lower court shall be upheld. This court finds no error in the original judgment. This court rejects the contention of the appellant on the ground that it merely attempts to argue the case in abstract terms.

The appellant's brief further asserts that even if the doctor was obliged to question the donor, questioning in the manner referred to in the original judgment is too onerous a duty for the doctor to perform. But it must be recalled that by the very nature of the business in which the doctor is engaged, a business which deals with the life and health of the patient (i.e., the medical profession), the doctor is necessarily required to take all possible precautions in order to protect the patient from avoidable dangers.

This is not a case where Doctor B could not foresee the consequences despite the fact that he had subjected the donor to an adequate questioning of the type expected of a medical doctor; had the doctor questioned the donor effectively, he could conceivably have foreseen the possible consequences, but he elected to neglect any proper questioning. Instead, he merely asked the donor "How do you feel?" and conducted the transfusion immediately thereafter. As a result, the patient was infected with syphilis. It therefore follows that the original judgment is correct in holding the doctor liable for violating the duty of care required of members of his profession. This court finds no error in the original judgment and rejects the contention of the appellant.
conduct classes of dress-making, flower arrangement
and tea ceremony. The damages sustained due to
this illness:

$196,634.66

(ii) On account of the illness,
the plaintiff was divorced
from her husband. Damages
for mental suffering from
the divorce and other
related causes:

$860,000

Total

$1,097,658.66

$422,258.66

2. In the above-cited case, the suit was filed not against
Doctor B who actually conducted the transfusion but against
his employer, the State, pursuant to Article 715 of the Civil Code.
In the court below, the State (defendant) argued that since there
was no failure on the part of the State to exercise due care in
employing Doctor B at the branch hospital of the University of
Tokyo Hospital or in its supervision of his performance of his
duties, the State was not liable for his conduct under the proviso
to Article 715 of the Civil Code. However, the court rejected the
argument on the ground that there is no evidence positively estab-
lishing the absence of such fault in its appointment of the doctor

\[ g \) Since the plaintiff receives at the time of judgment in the form of damages the
payment of benefits which would otherwise accrue over a period of time, the interest
which would accrue from the sum during that period must be deducted. Of the vari-
ous formulae dealing with such a situation, the Hoffmann formula is widely used.
Under this formula, the amount due the plaintiff is \( \frac{A}{(1 + r)^n} \), \( A \) standing for the
amount due, \( n \) the number of years and \( r \) the annual interest rate.

In a case, for instance, where a party’s loss is assessed as the loss each month of a
net benefit worth $100,000 over a succeeding period of 20 years, the Japanese courts
used to compute \( A \) as $100,000 \times 12 \times 20 = $24,000,000. Now that the Civil Code
art. 404 sets the rate of interest in cases where there is no agreement at 5% per
annum, the damages in this case will amount to $12,000,000. But under this method,
too much is deducted in interest (i.e., even on the first $100,000 which the party
will collect the following month, interest for the entire 20 years is deducted). This
was one of the reasons why damages awarded by Japanese courts were small. In recent
years, however, Japanese courts have adopted a new method, the “new Hoffmann
formula,” whereby they apply the Hoffmann formula to the loss of net income for each
year and add up the sums thus obtained to arrive at the total amount of damages
to be awarded. Lately, however, some Japanese courts have adopted the Leibnitz
formula which is to be shown as \( \frac{A}{(1 + r)^n} \).

\( h \) Awards of consolation money under Article 710 of the Civil Code and the
computation of its amount are left to the discretion of the court. In this case, the
court awarded the plaintiff a sum of $200,000 in consolation money.

or in its supervision of his subsequent conduct. If the plaintiff
had had to bear the burden of proving positively the existence
of such fault on the part of the State, she would have stood little
chance of winning this case.

In civil suits, the question of where the burden of proof lies
is determined on the basis of the nature of the case. The court
allocates the burden to the plaintiff or to the defendant according
to its assessment of which allocation will serve to achieve a
reasonable result. However the way an article applicable thereto
is written serves as a guide in determining where the burden
of proof lies. For instance, in the case of Article 715 of the Civil
Code the burden of proof rests with the plaintiff on matters
referred to in the main sentence of the article (which ends before
the word “Provided”), while it is up to the defendant to prove
matters covered by the proviso. The employer, therefore, remains
on the safe side of the line until the injured person succeeds in
proving that the act or acts of the employee, the injuring party,
constitute a tort as prescribed in Article 709 of the Civil Code,
that there exists a master and servant relationship between
the defendant and the injuring party, and that the act or acts of
the injuring party have been committed in the course of the
execution of the employer’s undertaking. Once these allegations
have been established by the plaintiff (the injured person), the
employer must prove positively either that he exercised due care in
the appointment of the employee and in his supervision of the
employee’s performance of his duties; or that the accident
would have inevitably occurred even if he had exercised due care in his
supervision of the employee’s performance of his duties. If he
fails to establish these facts, he will lose the case.

**Questions:**

1. Do you find any “negligence” in this case in the sense
we use the term in our daily life? The court held that the
doctor was legally “negligent.” What are the grounds on which
the court has arrived at such conclusion?

2. As a matter of fact, courts seldom find that the exercise
of due care as provided in Article 715 of the Civil Code is proved.
What are the practical grounds of such reluctance by the courts
to hold it proven?

3. Article 3 of the Automotive Accident Damages
Compensation Act (motor vehicle insurance) provides:

\[ i \) 1955 c. 97.
“LEGAL PROCESS” [Chap. 2

Any person who, while operating an automotive vehicle for his own purpose, has killed or injured another person or persons in the course of such operation of an automotive vehicle, shall be liable for damages caused to others by the automotive vehicles so operated; Provided, however, that this shall not apply to cases where such person has proved that he and the person who drove the automotive vehicle did not fail to exercise due care, that there was wilful conduct or negligence on the part of a third person other than the injured or the driver, and that there was no structural or functional defect in the automotive vehicle.”

What effect has this article on the question of burden of proof?

Article 3, Paragraph 1 of the Act concerning Compensation for Radioactive Damage (Genshi-youku Songai no Baisho ni kan Bureau) provides as follows:

“In case any radioactive damage is caused to a person or persons in the course of operation of a nuclear reactor, the entrepreneur of the nuclear power business operating the nuclear reactor shall be liable for such damages; Provided, however, that this shall not apply to cases where such damage has been caused by a calamity or a social upheaval of an extraordinarily large scale.”

Which of the two principles, the principle embodied in Article 709 of the Civil Code or the principle embodied in Article 3 of the Act concerning Compensation for Radioactive Damage, is closer to the effect of Article 3 of the Automotive Accident Compensation Act?

SUPREME COURT JUDGMENT, FEBRUARY 19, 1952
[INOUE v. INOUE]
6 Minshu 110

REFERENCE:

Civil Code, Article 770. A husband or wife can bring an action for divorce only in the following cases:

(i) If the other spouse has committed an act of adultery;
(ii) If he or she has been deserted maliciously by the other spouse;
(iii) If it is unknown for three years or more whether the other spouse is alive or dead;
(iv) If the other party suffers from severe mental disease and recovery therefrom is hopeless;
(v) If there exists any other grave reason for which it is difficult for him or her to continue the marriage.

Even in cases where any or all of the grounds mentioned in items (i) to (iv), inclusive, of the preceding paragraph exist, the Court may dismiss the action for divorce, if it deems the continuance of the marriage proper in view of all the circumstances.

[A Divorce Suit: The Supreme Court affirmed the decision of the court below dismissing the petition seeking a divorce, on the following ground.]

The statement of reasons for appeal claims that the appellant is entitled to be granted a divorce under Article 770, Paragraph 1, item (v) of the Civil Code which reads “if there exists any other grave reason for which it is difficult for him or her to continue the marriage.” According to the facts found by the court below, however, the primary reason which has made it difficult for the appellant [husband] to continue the marriage with the appellee [wife] is the fact that he maintains a mistress and has neglected the appellee. If the appellant terminates his illicit relations with the mistress and restores good conjugal relations with the appellee, the marriage between the appellant and the appellee would surely be maintained harmoniously. The whole matter, therefore, is entirely up to the will of the appellant. It is preposterous to say that there exists a “grave reason for which it is difficult for him to continue the marriage.” (The appellant further alleges that the appellee did some excessive acts. But according to the facts found by the court below, the excesses of the appellee simply were acts of jealousy. It therefore follows that once the causes of the appellee’s jealousy are eliminated, excessive acts on her part will disappear in no time at all.)

The appellant may claim that his emotional attachment to the mistress has grown to a point where his reason no longer holds sway, but this is nothing more than a self-serving justification. It was the appellant himself, in the first place, who selfishly started the clandestine extra-marital relationship with the mistress. Now he says he no longer can live together with the appellee because he cannot stand her any more on account of his attachment to his mistress. If the appellant is allowed to have his own way, it is tantamount to saying that he can “give her a kick after stepping upon her” [in other words, to add insult to the injury] to use a common phrase. The law never tolerates such immoral self-indulgence. To uphold virtue and to disallow im-
morality is the most important duty of the law. All laws must be construed in this vein.

The appellant's brief talks about the necessity of paying due regard to the appellant's mistress, but it must be said that her misfortune is of her own making. If she had an affair with a man knowing that he was married and then thought of taking over the appellee's place as his wife, she was mistaken from the very beginning. Or else she might have been deceived into an illicit sexual relationship with the appellant. Even if such had been the case it does not justify protecting the mistress, who was at least negligent in causing the situation to arise, at the sacrifice of the appellee, the legal wife of the appellant. The licentiousness of sexual relationships which has become rampant since the end of the war is truly deplorable. If the court allows the interpretation that the divorce sought by the appellant in this case is legally permissible, the decision would run a grave risk of adding fuel to the already raging flame of licentiousness. . . .

The court deeply commiserates with the misfortune of the child born of the appellant and the mistress. The parents are entirely to blame for the child's sad position. They must be keenly aware of their responsibility to the child and do everything in their power to alleviate the burden of the misfortune borne by the child.

The child's position is pitiable, but the court cannot grant the petition at the sacrifice of the appellee. It is acknowledged that the provision of the said article does not require the existence of a blameworthy act on the other party, but this does not mean that such an immoral and self-serving claim should be granted. Although the judgment below uses different language, it in effect says the same thing as the present decision, and its judgment is entirely proper. So the reasons for appeal are groundless. (Generally, cases such as the present one are rather involved. Decisions must be based on the findings of a detailed investigation of the related circumstances and are not to be dealt with in general terms. The judgment of the Supreme Court, however, must be based on the facts found by the lower courts. According to such facts, there is no room for any decision other than the present decision.)

COMMENTS

1. (1) There are two ways of obtaining a divorce in Japan, divorce by consent and divorce by a decree of the court.

(2) Divorce by Consent (Article 763 of the Civil Code). If the spouses agree to a divorce, all they have to do is to fill out a form as provided by the Family Registry Act (Koseki Ho) and orders enacted under that law, and file it at the office of the city, ward, town or village where they live or where they are registered in the family registry. This form must be signed by the spouses and two witnesses, but no other form is required. Neither spouse need appear at the city or other appropriate office personally.

It occasionally happens that a form for divorce is completed by forging the signature of one of the spouses and is received by the city or other appropriate office and entered in the family registry. When the last two books of the Civil Code concerning family law were completely amended in 1947, a proposal was made to add a provision to Article 764 to the effect that a divorce by consent should take effect only after submitting a confirmation of the will of the parties to the family court. Indeed, this proposal passed the House of Councillors, but it failed to find a place in the Civil Code because the House of Representatives did not vote for it.

Divorce by consent was adopted when the original Civil Code was put into effect in 1898. Prior to that time, the husband could dissolve the marital relationship merely by expressing his intention to divorce the wife, though he was required to issue a formal letter in which he promised not to raise any objection to the re-marriage of the divorced wife. The wife had no means of seeking a divorce until 1873, when a proclamation of the Great Council of State allowed the wife to bring a suit for divorce in the court. The only way for a wife to be freed from the bond of matrimony was to flee from the husband, enter a nunnery and spend a certain number of years there as a nun. Only then was she freed from her previous bond.}

k) Civil Code arts. 766, 739.
l) It was customary to write this letter in three and a half lines. Consequently such a letter was commonly called "miyudari-hai" ("three and a half lines.

m) From the middle of the eighteenth century, this privilege of freeing the wife from the matrimonial bond was limited to a small number of temples. There were only two in the Kanari Area—within roughly a 70 mile radius from Edo (the old name of Tokyo)—the nearest to Edo being Tôkei-ji Temple in Kamakura, situated about 50 miles from Edo. The wife had to enter the compound of the temple without being captured by the husband or his men. A nice fiction developed. If the wife could throw her slipper into the compound, she was technically regarded as having physically entered it, even though as a matter of fact she had been captured before passing through the gate of the temple.

The required period of residence in the nunnery was ashikake san nen, i.e., until she greeted her second new year there, but often she could obtain a letter of divorce from her husband earlier, through negotiation.
(3) Divorce by a Decree of the Court (Article 770 of the Civil Code). Article 813 of the Civil Code as originally enacted in 1898 enumerated 10 causes for granting a decree of divorce. Each of them, except item (ix), which provided that one could sue for divorce if it had been uncertain for three years or more whether the other spouse was alive or dead, and item (x) which was based on the *jirō* (household) system, provided for grounds for divorce based upon the misconduct of the other spouse.\(^n\) The basic notion of divorce under this provision was that divorce was something to be awarded to the spouse who had not committed any material misconduct against the other spouse who was guilty of such misconduct.

The 1947 amendment to the Civil Code, however, has abandoned this “principle of fault” and adopted the “principle of incompatibility,” i.e., that a divorce should be granted when

\(^n\) A new Article 813 reads as follows:

“A husband or a wife may bring a suit for divorce only if there is one of the following causes:

(i) If the other spouse has committed bigamy;

(ii) If the wife has committed adultery;

(iii) If the husband has been found guilty of the crime of adultery [as co-defendant with another’s wife with whom he had intercourse, there being no penal statute punishing the husband’s adultery as such];

(iv) If the other spouse has been found guilty of the crime of forgery, bribery, indecency, theft, robbery, obtaining property by fraud, embezzlement, receiving property criminally obtained [by theft, embezzlement, etc. with knowledge of the fact], or of offenses specified in Articles 175 or 260 of the Penal Code or is sentenced to a ‘major imprisonment’ (*jikō-hinō*) for a term of three years or more;

(v) If the other spouse has ill-treated or grossly insulted him or her so that it has made further living together unbearable;

(vi) If the other spouse has deliberately deserted him or her;

(vii) If an ancestor of the other spouse has ill-treated or grossly insulted him or her;

(viii) If the other spouse has ill-treated or grossly insulted her or his ascendant;

(ix) If it has been uncertain for three years or more whether the other spouse is alive or dead;

(x) In the case of *nukü-shiki* (adoption of a man at the same time as marriage between him and a daughter of the adoptive father), if the adoption is dissolved, and in the case of marriage of an adopted son with a daughter of the adoptive family, if the adoption has been dissolved or annulled.”

Articles 814–818 provided for various reasons to bar a suit for divorce, such as, for example, condonation of adultery.

Some of these enumerated grounds for divorce can only be understood by bearing in mind that it was the age when the Japanese family law was based upon the notion of *jirō* (household), the lineal family. Under this notion, very high consideration was given to good relationships between a wife (or a husband) and the parents of the other spouse.

Sec. 1] “INTERPRETATION” OF STATUTES

the conjugal relations have collapsed to the point where the maintenance of the marriage has become meaningless, irrespective of who is to blame. See Paragraph 1, item (v) and Paragraph 2 of Article 770 of the Civil Code. Thus items (i) through (iv) of Paragraph 1 of Article 770 are in their nature only illustrative of “grave reason(s) for which it is difficult for him or her to continue the marriage.”

(4) A great majority of divorces in Japan are by consent. If the spouses disagree, they or one of them may bring the matter to the conciliation procedure in the family court. Only after the conciliation procedure has failed to solve the problem is an adjudicative procedure taken.

There were 108,382 divorces in Japan in 1972. (There is a trend for a greater number of divorces. This figure is 36.4% more than that in 1966.) This figure includes 11,702 divorces by consent reached through the conciliation procedure. Only in 1,572 cases were divorces effected by a decree of a court.\(^o\)

Questions:

(1) Do you think the decision of the Supreme Court cited above runs counter to this principle of incompatibility?

(2) Article 770, Paragraph 2 of the Civil Code provides that “Even in cases where any or all of the grounds mentioned in items (i) to (iv), inclusive, of the preceding paragraph exist, the Court may dismiss the action for divorce, if it deems the continuance of the marriage proper in view of all the circumstances.” It is to be noted that the above provision omits item (v) of the preceding paragraph. Doesn’t the Supreme Court decision cited above in effect mean to rephrase the provision of Paragraph 2 to read, in part, “in items (i) to (v), inclusive, of the preceding paragraph”? If so, can it be justified?

(3) There was no child of the marriage between the plaintiff and the defendant in this case. Should the existence of the illegitimate child be a sufficient ground under item (v)? Would not the need to legitimize the child be a “grave reason”?

(4) On what sort of evidence or argument did the court base its moral judgment in this case? Can you put such evidence to the court in Japan?

Family Law: Divorce

Anonymous v. Anonymous*
41 Minshū 1443
(Supreme Ct., Sept. 3, 1987)
Translated by the Supreme Court of Japan

Editorial Note: Civil Code Article 770, paragraph 1, item 5 provides that divorce may be based on "grave reasons for which it is difficult to continue the marriage." Prior to this case, however, the Supreme Court had ruled that even where a complete breakdown of the marital relationship had occurred, the responsible party could not be granted a divorce under Article 770.

Judgment

... The original judgment shall be reversed.

The case shall be remanded to the Tokyo High Court.

Reasons

... Li... According to the ... legislative history and the wording of the provisions of Article 770 of the Civil Code, it can be understood that item 5, paragraph 1 of the said Article provides that one of the spouses may seek divorce against the other through filing a suit when they have become unable to pursue cohabitation, which is the purpose of marriage, and there are no prospects of reconciliation. Also, it cannot be inferred that any divorce sought by a spouse who is responsible for having caused the ground provided [in item 4, paragraph 1] should not be granted.

On the other hand, in our country, from the standpoint of due respect for the will of the spouses concerning a divorce, in addition to the institutions of divorce through mutual agreement (Article 745 of the Civil Code), divorce through conciliation (Article 17 of the Law for Determination of Family Affairs) and divorce through determination (paragraph 1, Article 54 of the said Law), the institution of judicial divorce is available for the cases where one of the spouses does not consent to divorce. The causes for judicial divorce are stipulated by law as mentioned above, and, when such grounds are acknowledged to exist, one of the spouses may seek divorce through an action against the other. Under such system of judicial divorce, if divorces were to be always granted where the ground provided by item 5 exists, the court would be compelled to permit the spouse responsible for having caused the ground to take advantage of it and the will of the other spouse would be disregarded, and it eventually might bring about results that negate a judicial divorce system. Thus, it is needless to say that any action which may cause such results should not be permitted.

2. [Since the substance of marriage is the carrying on of communal life with serious intent for the purpose of spiritual as well as physical conjugation, when one or both of the spouses deliberately has lost the aforementioned intent as well as become devoid of the substance of communal life as husband and wife, and reached the state of no expectation whatsoever for its restoration, it should be said that the basic substance from the viewpoint of social life has been lost, and in such condition, it may be said that continuance of the marriage based merely on the family register would be unnatural. However, since divorces disrupt the social and legal order of marriage, it is proper that a claim for divorce must be a matter that does not go against the concept of justice, equity, and social ethics, and in this sense, it should be said that a claim for divorce should be matters that may be acceptable when viewed in light of the principle of good faith and trust which is the guiding doctrine in the entire Civil Code that also includes family laws.

Thus, in determining whether a claim for divorce on the ground provided by item 5 sought by the spouse solely responsible for it (hereinafter referred to as 'responsible spouse') is acceptable in terms of the principle of good faith and trust, the mode and degree of responsibility of the responsible spouse should be considered. Moreover, consideration should be given to the intents of the other spouse to continue the marriage and his or her feelings towards the plaintiff, and the mental, social, and economic situation of the other spouse as well as the situation of custody, education, and welfare of the children between the husband and wife, especially the immature children, in case the divorce is granted, and the life formed after the separation, for example, if one or both spouses have already formed a relationship of de facto marriage, the situation of his or her mate and the children...

[Even if the claim for divorce was by the responsible spouse, when the separation of the husband and wife has reached a substantially long period, in weighing their age and the period of cohabitation, and when they have no immature children, it is proper to construe that the said claim should not be denied solely because the claim was by the responsible spouse, unless there exist special factors, such as would place the other spouse into a mentally, socially, or economically harsh situation if the divorce is acknowledged, which would render the admission of the claim for divorce to be inconsistent with social justice. In such situations, the responsibility for having caused the ground provided in item 5 or the mental or social situation of the other spouse, etc., should no longer be emphasized, and the economic disadvantages the other spouse may suffer through divorce should be primarily compensated through distribution of property or recovery of consolatory money that he or she may seek at the time of or after divorce.

4. All precedents of this Court... contrary to the above mentioned edicts must be overruled.

II: The brief history of the marriage of the Appellant and the Appellee and other facts found by the lower courts are as follows: (1) The Appellant and the Appellee reported their marriage on February 1, 1927, and became husband and wife, but as a child was not born, the first daughter A. and the second daughter B. were adopted on December 8, 1948. (2) Although their marriage progressed tranquilly in the beginning, they have become estranged from each other since 1949, when the Appellant became aware of the Appellant's extramarital relationship with C. and they have lived separately since August of the same year, when the Appellant started to cohabit with C. On September 3, 1954, the Appellant recognized his paternity on D (born on August 7, 1950) and E (born on December 30, 1952), both of whom are the Appellant and C's children. (3) Suffering from a severe economic situation after the separation, the Appellee sold the house registered under the Appellant's name, which the Appellee had been entrusted for disposal by the Appellant for the sake of guaranteeing her living expenses, for two hundred and forty thousand yen in February 1950, and the amount was applied to her living expenses, but except for that the Appellee has never received any economic assistance from the Appellant. (4) Having sold the house, the Appellee rented a room in her elder brother's house, mastered doll-making techniques, etc., and made her living as an employee of a doll shop until 1952, whereas she has neither occupation nor property at present. (5) The Appellant, a president of two production and manufacturer companies, as well as a director of a real estate-leasing company, enjoys a quite stable economic life. (6) The Appellant brought an action for divorce at the Tokyo District Court in 1951, but the Court dismissed his claim for divorce on February 16, 1954, finding that he was a responsible

*Excerpted from the Supreme Court of Japan Internet site (www.ouen.go.jp) with minor stylistic modifications. Reprinted by permission. Identities of the litigants are often concealed in Japanese case reports.
spouse because his extramarital relationship with C and purposeful abandonment of the Appellee to co-habit with C caused the failure of their marriage, and the judgment became final in March 1994. (2) In December 1989, the Appellant suddenly visited the Appellee and asked her to consent to their divorce and dissolution of their marriage. The Appellee refused. In 1984, the Appellant applied in vain for divorce conciliation against the Appellee at the Tokyo Family Court where he offered the Appellee one million yen in cash and an oil painting, then he filed this suit.

III. In considering the admissibility of this claim following the rule detailed in I above and the facts summarized in II above, although the Appellant should be called a responsible spouse on the basis of item 5, paragraph 1, Article 770 of the Civil Code, the Appellant's claim should not be rejected unless there exist special factors mentioned above, because the Appellant and the Appellee lived separately for approximately thirty-six years even until the end of the lower court's oral hearing and this period itself is quite long independent of the period of their cohabitation and their ages, and they have no immature child.

Gary S. Becker

* A Treatise on the Family*

331-36 (1991)

A husband and wife would both consent to a divorce if, and only if, they both expect to be better off divorced. Although divorce might seem more difficult when mutual consent is required than when either alone can divorce at will, the frequency and incidence of divorce should be similar with these and other rules if couples contemplating divorce can easily bargain with each other. This assertion is a special case of the Coase theorem (1960) and is a natural extension of the argument . . . that persons marry each other if, and only if, they both expect to be better off compared to their best alternatives.

A risk-neutral couple would divorce with mutual consent if, and only if,

$$Z^* < Z^1 < Z^2$$

where $Z^*$ and $Z^1$ are the husband's expected commodity wealth from staying married and divorcing respectively, and $Z^2$ and $Z^3$ are defined similarly for the

wifes. If bargaining is cheap and easy, this necessary and sufficient condition can be stated more simply as

$$Z^* > Z^1 + Z^2 + Z^3$$

(10a) Obviously, if the inequality in (10a) does not hold, the inequalities in (10a) could not hold. That (10a) also implies (10a) can be shown by assuming that, say, the husband's wealth would be reduced by divorce ($Z^* - Z^1$) even though their combined wealth would be raised ($Z^2 + Z^3$). The wife could still "bribe" him to consent to a divorce by offering him a settlement that would offset his direct loss from divorce ($Z^* - Z^1$). She would also be better off as long as the settlement was less than their combined gain ($Z^2 + Z^3$).

Less obvious perhaps is that (10a), but not (10a), is still a necessary and sufficient condition for divorce when either can divorce at will or when only the husband can divorce at will, as in traditional Islamic societies. If he would gain from divorce ($Z^* > Z^1$) but their combined wealth would be reduced, she could bribe him not to seek a divorce by offering him a greater share of their married output. Conversely, if he would lose from divorce but their combined wealth would increase, she could bribe him to seek a divorce by offering him a larger settlement.

The history of divorce is filled with examples of settlements that induce reluctant spouses to consent. Only husbands could seek a divorce among Jews in the Arab world during the Middle Ages, yet "in many, if not most cases about which we have more detailed information, one gets the impression that the female partner was the initiator of the divorce proceedings, mostly, to be sure by renouncing what was due her" (her dowry and other marriage gifts) (Goetlein, 1978, p. 265; italics added). And over 90 percent of the divorces in Japan between 1948 and 1959 were by mutual consent (Reisinstein, 1973, table 5), even though either spouse alone could initiate a divorce suit.

Still, one might reasonably argue that legal rules make a difference: the anger and other emotion generated by divorce proceedings make bargaining costly and time-consuming, so a spouse might consent to a divorce only because his (or her) life is made difficult until he does (Friedman, 1969; Goetlein, 1978, pp. 265-366; Saunders and Thompson, 1979). To obtain quantitative evidence on the effects of legal rules, consider the radical change in 1970 when California became the first state to grant divorce at the request of either spouse (no-fault divorce); previously, divorce required either mutual consent or proof of "fault" in an adversary proceeding.

The average annual rates of growth of divorce rates in California and the rest of the country during the 1960s were 4.0 percent and 4.0 percent respectively. We can crudely estimate what the California rates would have been if the state had not gone to no-fault divorce by assuming that the rate of growth in divorce rates between any two years during 1969 and 1976 would have equaled the rate of growth for the rest of the country multiplied by the ratio of their average growth rates during the 1960s (0.9 = 0.056/0.060). These "predicted" rates in Figure 10.1 (omitted) are substantially below the actual rates for California in 1970 and 1971, slightly below in 1972, about equal to the actual rates in 1973 and 1974, and slightly above the actual rates in 1975 and 1976. The change to no-fault divorce does not appear to have had a lasting effect on the divorce rates in California, although divorces may have been increased for a couple of years.

Even if the change from mutual consent and fault to no-fault divorce apparently had little lasting effect on divorce rates, the distribution of the gains from divorce, $Z^* - Z^1$ in (10a), may have been significantly altered. In particular, if men have been more willing than women to divorce partly because they are not given custody of children and partly because they have many opportunities to meet other women while still married, no-fault divorce reduces their incentive to obtain their wives' consent with generous settlements. After 1970, alimony and child-support payments in California apparently did decline relative to father's income (Dixon and Weitzman, 1980, table 5).

The inequality in (10a) is a simple and easily implemented criterion for analyzing the effects of different variables on the propensity to divorce. One has only to determine whether the joint wealth of a married couple would be increased by divorce, without worrying about how the increase is divided or who has legal access to divorce. To illustrate, a negative income tax system or aid to Single children raises separation and divorce rates among eligible families in that the incomes of divorced and separated persons are raised relative to the incomes of married persons. This program, in 26 percent, provides poor women with divorce settlements that encourage divorce.

The expected wealth from remaining married would be raised if one spouse earns more than had been expected, or if any other trait of either spouse turns out to be better than expected. Nevertheless, and somewhat paradoxically, the marriage would be more likely to dissolve than if their expectations had been realized. The combined wealth of husband and wife from a divorce would be increased even more than their wealth from remaining together because they are no longer well-matched: the person with the better-than-expected traits should be matched with a "better" person than his spouse, and she should be matched with a "worse" person than he turns out to be. This implication of (10a) is also supported empirically: marriages are more likely to dissolve when
The Legal Services Industry: The Judiciary

J. Mark Ramseyer

Judicial (In)dependence in Japan

39 University of Chicago Law School Record 4 (1991)

“Your right. I wonder why,” replied Taniguchi.

“Maybe it’s because the Prime Minister has the last word in appointing chief and associate justices,” said Ebara.

Taniguchi was less sure. “Professor (and former Supreme Court justice) Dando says so too, but I wonder. I thought judges just had to obey their conscience, follow the law, and write opinions. But when I asked to [Tokyo University professor] Oda, he wouldn’t have it. You’re wrong, he said. The judges know what’s conscientious and write opinions spend all their time circulating through provincial district courts…”

Institutions

If there is a difference in the independence of Japanese and American courts, it does not derive from the constitutional text. The texts are in fact quite close. The Japanese Constitution guarantees judges independence. “All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.” And it promises them “adequate compensation which shall not be decreased during their term of office.”

Notwithstanding their nominal independence, however, Japanese judges have not been as free as their American federal peers. Like senior American politicians, LDP leaders could decide who would become a judge. Unlike American politicians, during their nearly four decades in power they also manipulated the system to reward and punish those they made judges. Their ability to do so stemmed primarily from the way they recruited and posted judges. Judges in Japan join the bench in their 30s. During their career, they then rotate through a variety of judicial posts. By controlling access to the favored posts, the men and women in the Supreme Court Secretariat (the court’s administrative offices, staffed by judges) can reward and punish judges. By controlling the Secretariat, the LDP could control the judges.

Whether Japanese judges lived well or lived poorly thus depended on their status with the LDP leaders. Most basically, Japanese judges serve ten-year terms, which the cabinet can freely decide whether to renew. If regularly renewed, they can work until age 65. Yet when they receive pay increases, where they work, and what they do are all matters that the judges at the Secretariat decide. In theory, these assignments are something the (LDP appointees to the) Supreme Court determine. In practice, the justices delegate the task to the judges in the Secretariat.

Crucial to the LDP, therefore, was the composition of the Secretariat. The LDP controlled it by appointing politically reliable justices to the Supreme Court (including at least one who knew first-hand how the Secretariat worked). These justices then staffed the Secretariat with younger politically reliable judges. The result was indirect—but substantial—LDP control over the courts.

Most Japanese judges share basic preferences about the type of appointment they want. Granted, a few judges prefer small town life and some dislike appellate work. In general, though, most Japanese judges prefer an urban post to a rural post. They prefer a family court to a branch court, a district court to a family court, and a high court to a district court. They prefer a chief-judgeship to associate judge status. And they hope for an occasional administrative position in the Secretariat or at one of the ministries. [In general], most judges can realistically hope for at least one stint as a chief judge in a district or family court. Generally, they obtain it near the end of their career. As of the judges in this class of 1991 also served at least once on a high court, they can also realistically hope for an appellate position. Although the lengths of assignment vary, judges generally work for three years in each post. Before re-assignments, they can request preferred appointments. Nominal, they can even refuse transfers they do not want. In fact, they refuse them at their peril. By 1969, Judge Shigeharu Hasegawa had worked in Hiroshima for 17 years and his wife was sick. When he declined an out-of-town transfer that year (it was a promotion to a neighboring high court), he was put in a job: the cabinet refused to reappoint him to his next ten-year term.

Political Control

The Fukushima incident. According to many observers, the LDP began to manipulate judicial careers toward political ends in the late 1960s. Before then, they argue, few judges asserted any political independence. As judges did not indulge their politics, the Secretariat could assign them to judicial posts without considering their politics.

The “crisis,” these observers claim, came when right wing ideologies began attacking judges for their liberal bias. Eager to placate their conservative constituents, the LDP launched a witchhunt. It criticized recent court decisions, and urged the cabinet to make independent judges pay for their independence. By March 1969, the Minister of Justice could declare that the time had come to “jam the cogs of the courts.” The man who took center stage in the ensuing controversy was Shigeo Fukushima, a district judge born in 1939. He had joined the judiciary in 1969, and had just begun his second ten-year term in 1969 when he found on his docket a controversy. Nearly 300 local citizens had sued the Japanese government over a planned missile base. Because Article 9 of the Constitution banned military force, they claimed, that base was unconstitutional.

Fukushima was a leader in a leftist organization of lawyers, law professors, and judges called the Young Jurists’ League. Although the LDP had been fighting to repeal Article 9, the League was explicitly dedicated to preserving the 1947 Constitution, and implicitly dedicated to fighting those repeal attempts. This potential for conflict worried local chief judge Kenta Hiraga. Last Fukushima bashed the proposed base. Hiraga wrote him a letter explaining why, we can he deducing the case, he would refuse the injunction. But to no avail. Fukushima ignored the letter and enjoined the base.

Fukushima did not keep his dispute with Hiraga quiet. Instead, he circulated copies of Hiraga’s letter to his friends in the League, and some of them circulated copies to the press. Within a few days, the letter was in the newspapers. The press and professors accused Hiraga of subverting judicial independence, and the Diet launched impeachment proceedings. Nonetheless, Hiraga emerged relatively unscathed. On October 19, 1970, the impeachment committee reprimanded him but then dismissed the charges. Additional reprimands from his District Court and the Supreme Court, he joined the Tokyo High Court.

Fukushima fared worse. He too faced impeachment proceedings, in his case for leaking the letter to the press. But where the committee dismissed Hiraga’s charges, it ruled against Fukushima. It did let Fukushima stay where he was for a while, however, and Fukushima himself remained adamantly independent. He rallied against the judicial bureaucracy in print. And notwithstanding Supreme Court decisions to the contrary, in 1977 he led the entire Japanese military unconstitutional (quickly overturned, of course). Although the Secretariat eventually brought him to the Tokyo District Court for a time, it soon
dis patched him to rural family courts. By 1969, he was 59 years old and had served without relief in provincial family courts for over 12 years. Rather than continue, he quit.

Public critics. Although the Supreme Court and Secretariat apparently did not punish judges merely for joining the Young Jurists' League, they did penalize those who directly and publicly criticized their administrative policies. Take Masamichi Hanada. Appointed in 1957, Hanada had started his career right. He had graduated from the University of Tokyo (the most selective university in the country) and begun his career at the Tokyo District Court (the prized starting assignment). He then did a judicial exist in Japan's northern-most island, and returned to Tokyo by 1965. Nonetheless, in 1971 his career began to come apart. That year, the cabin of the Supreme Court refused to reappoint (for a second 10-year term) a League judge named Yasuaki Miyamoto. To Americans, the resulting fracas sounds more like a university tenure fight than anything judicially they fired Miyamoto because of his politics, claimed his friends, they fired him because he was slow and mediocre, claimed the others. In any case, Hanada appointed himself the public spokesman on Miyamoto's behalf. He lost his fight, and Miyamoto lost his job.

For his prominence in the Miyamoto dispute, Hanada paid dearly. In 1972 the Secretariat transferred him to a branch office, in 1976 to a family court, and in 1979 back to a branch office. By 1987, he was 56 years old and had spent the last 15 years in branch offices or family courts. Like Fujisawa, he quit. His co-principal signatory on a petition to the Court over the Miyamoto affair was Minoru Takeda. In 1972, the Secretariat transferred Takeda from the Tokyo District Court to a branch office. He stayed in branch offices for the next 2 years.

To capture the severity with which the Secretariat treated those men, consider . . . what the members of Hanada's class were doing at the time he was working in family courts and branch offices. Of class members still working in 1983, 16 were high court judges, 12 were district court judges, and six held administrative posts. Only two others were ordinary judges in branch offices. By April 1972 when Hanada resigned, of the remaining 43 judges, six were chief judges, 15 were high court judges, 15 were district court judges, three were family court judges, and six held administrative posts. Only two were branch office heads and only one was an ordinary branch office judge. The person who eventually replaced Hanada in one of his branch office posts was a judge 16 years his junior.

Others who protested the Supreme Court's treatment of Miyamoto similarly suffered. Take the four judges who contributed to a 1972 book on the Miyamoto affair called Security of Status for Judges. One was Hanada. A second was Kazuhiko Moriya. The year after the book appeared, the Secretariat transferred him to the northern provincial Family Court, and as of 1990 he had spent the last 15 years on family matters, four in a branch office. A third was Tsunoo Suzuki. The year after the book appeared, the Secretariat demoted him from the Tokyo District Court to a branch office. Moriya and Suzuki were both national university graduates (on average, Japanese national universities are more selective than private universities), and both had since spent at least some time on a high court. But the fourth, Masahiro Tanaka, went to a private university and suffered worse. The year after the book appeared, the Secretariat moved him to a branch office. As of 1990, he had stayed in branch offices for the 17 years since.

The campaign cases. Although it does not do so consistently, the Secretariat can also penalize judges for writing politically incorrect opinions. It has done so most readily when the decisions threaten vital LDP positions. The various judges who hold the Japanese campaign rules unconstitutional provide a good example. The Public Offices Elections Act drastically restricts the tactics candidates can use. Because incumbent obtain media coverage through their official functions while challengers do not, these restrictions benefit incumbents. Because the LDP has had the most incumbents, they have benefited the LDP.

Section 158(a) of the Elections Act bans door-to-door canvassing. In 1950 the Supreme Court had held a similar ban unconstitutional, but by the late 1960s people had again started challenging it as a violation of their free-speech rights. In the first of these cases, a 1957 Tokyo District Court decision, the court suggested—tingly—that §158(a) might be unconstitutional.

The Supreme Court responded almost immediately: §158(a) was indeed constitutional. That did not stop judge Haruhiko Abe. A University of Tokyo graduate who started his career at the Tokyo District Court, Abe was one of the most able members of the League. He was also one of the most outspoken. In 1968, appearing temporarily in a summary court as an assistant judge with less than 5 years' experience, Abe held the canvassing ban fuzzy unconstitutional. Later there be any doubt, this was the very ban the Supreme Court had upheld against the same challenge a few months earlier. When his initial 10-year term expired in 1973, observers rumored that the Court would not reappoint him, but not so. It did reappoint him—into oblivion. The Secretariat gave him family law responsibilities for several years, and then moved him to a branch office. By 1990, 35 members of Abe's class had already served one or more terms on a High Court. Abe had been in branch offices since 1979.

Since its 1967 decision, the Supreme Court has held the canvassing ban constitutional at least another seven times. The ban's political importance is obvious and, perhaps for that very reason, some lower court judges persist in fighting it. When they do, they suffer badly. Wholly aside from politics, one would not expect the Secretariat to promote quickly judges who ignore Supreme Court precedent. But politics are not always—far from it. The Secretariat punishes harshly those judges who ignore precedent in these politically controversial cases than it does those who ignore it in more mundane disputes.

One-time League member Tetsuro So, for example, held the ban unconstitutional in 1978. As of late 1980, he was still in a branch office. He had spent three of the 15 years since the decision in family court and five in branch offices. Judge Kunio Ogawa held the ban unconstitutional in early 1979, and as of 1990 still had not left branch offices. Only former League member Shigenori Aoyama escaped branch offices for voiding the canvassing ban. He held it unconstitutional in 1980, and spent the years since handling family law cases in various northern provincial courts.

The potential punishment may be clearest with judges like Abe who show the most promise. Take Judge Masato Hirayuki, who held the ban unconstitutional in September 1979. A star University of Tokyo recruit like Abe, he too began his career in the prestigious Tokyo District Court. Although not a formal League member, he had overlapped with Miyamoto at the Tokyo District Court and participated in a study group with him. After holding the ban unconstitutional, Hirayuki stayed in a branch office until 1987. He then returned to a district court, but still with family law responsibilities. By the end of 1990, he had spent 21 of his 33 years on the bench in a branch office. [That] placed him in the last eight percent of his class. Among his University of Tokyo peers, it placed him at the very bottom.

Toward an Electoral Theory of Judicial Independence

In the United States, political leaders consider ideology in appointing judges, but leave judges once in office alone. This style of judicial independence may be a good thing—but apparently it is essential neither to economic prosperity nor to electoral democracy. Japan is rich, Japan is free, and Japan has had judges that (by many American jurisprudential standards) are not independent. Hence the predictively theoretical puzzle: why do politicians in some electoral democracies (e.g., in the U.S.) leave judges (once appointed) pretty much alone, while others (e.g., in Japan) do not?

The constitutive text does not answer the puzzle. Both the U.S. and the Japanese constitutions promise judges much the same independence—yet notwithstanding the similar texts, the two judicial systems generate radically different results. If the text were the determining factor, American politicians could do pretty much what LDP politicians did in Japan—yet notwithstanding that opportunity, they do not.
Indeed, electoral policies may suggest (executively, to be sure) the answer: for reasons Rastenbichl and I detail in our book, LDP politicians had much higher odds of staying in power than either Democratic or Republican politicians have had. Rationally expecting to stay in office long, they manipulated the courts; rationally expecting to alternate with each other in office, Republicans and Democrats implicitly agreed to leave their judges (once appointed) alone.

To see why political leaders might make these calculations, take first the LDP. By 1990, it had been in power continuously for 35 years, and could see no viable opposition party in the wings. It had stayed in power by giving Japanese voters largely what they wanted, and could rationally expect very high odds of staying in power in the future (though odds of less than 1.0, as the summer 1993 elections showed ex post). If so, the LDP had strong incentives to try to control the courts. After all, it wanted not just to enact its programs but to implement them. For that, it did not need judges who did as they pleased. It needed judges who did as they were told.

By contrast, take two political parties that alternate in power, and suppose that both are risk-averse. Although D is in power now, it expects to lose power periodically in the future. Although R is out of power, it expects to gain power periodically. In this situation, D and R may rationally adopt what amount to cooperative strategies in an indefinitely repeated game: both parties may agree not to manipulate the courts to their partisan advantage (i.e., will agree to keep courts independent) while in power.

In this world, despite the potential gains in programmatic implementation that accrue from monitoring courts, both D and R (and the voters they represent) may find it advantageous to keep courts independent. The reason derives from the way each may rationally expect the other to reciprocate. If both expect that (a) their returns while out of office from an implicit hands-off-the-courts rule (the costs in the losses they would otherwise suffer by being out of office) will have a present value greater than (b) their returns to manipulating courts while in office, then both will have an incentive to keep the courts independent. Both will sacrifice some effectiveness in how they implement their programs while in office, but both may earn larger offsetting gains by lessening their losses while out of office.

If all this is true, then judicial independence may largely be an artifact of the electoral market. Judicial independence may be relatively less likely where one political party dominates elections, and relatively more likely (though not inevitable) where two parties alternate in power. And if so, than maybe the constitution drafting the constitutional texts to maintain independent courts in the new democracies in Europe and elsewhere are approaching the issue entirely wrong. Maybe the issue does not involve constitutional texts at all. Maybe they just involve elections.

At issue is whether through cabinet appointment of career judges and Supreme Court justices, the political groups in power are not only able to but actually do effectively determine, if not the outcome of particular cases, at least the ideological directions of judge-made and interpreted legal rules. No one questions the possibility of such control. By lodging the authority to appoint judges and justices with the cabinet, as detailed below, the postwar constitution was intentionally designed to achieve a degree of political accountability. At least for the Americans who contributed to the drafting of the postwar constitution, judicial independence did not mean judicial autonomy. Although individual judges were to be bound by their "conscience" (shokunin) as well as the law in each case they adjudicated, direct political control over the appointment of Supreme Court justices and lower court career judges was intentionally provided.

Judicial Autonomy

Despite the attempts to assure a degree of political accountability, Japan's new constitutional structure has operated to ensure greater not less judicial autonomy and political insulation. At least to this extent, (occupation official Charles) Kades' fears of a judicial oligarchy have been realized, albeit without the powers that would have given them cause. Yet the political checks remain and do influence judicial administration. Those who administer the career judiciary are mindful that their autonomy depends on the trust of political leadership in their ability to maintain a corps of effective and competent judges whose decisions are within predictable and generally accepted parameters.

Individual judges also function within the shadow of potential political insulation. They cannot help but be aware that in adjudicating highly publicized, politically sensitive cases, they can be held professionally accountable for their decisions. Nevertheless, direct oversight is exercised by judges themselves. The response of the judiciary, particularly senior judges in charge of its administration, to the potential politicization of the courts in the 1990s, secured the necessary political and arguably public confidence for them to continue to claim immunity from politics. In the end, however, the judiciary, not the political branches of the Japanese government, determines the parameters of responsible judicial behavior. This conclusion is best understood through close examination of the process for appointment and promotion of career judges as well as Supreme Court justices, the career judiciary's influence on the Court, and the mechanisms for judicial socialization. These are among the principal factors that help to explain the cohesion of the judiciary and its autonomy.

Appointment and Promotion

... Despite the greater potential for at least indirect influence on the Supreme Court by political leaders and the electorate, it remains in fact one of the most autonomous highest courts in the industrial world. Appointment to the court are formally among Japan's most politically significant. The Chief Justice is nominated by the cabinet with ceremonial appointment by the emperor and is accorded the same rank and salary as the prime minister. The other fourteen justices have equal rank and salary as ministers of state and are appointed by the cabinet. The statute

The Legal Services Industry: The Judiciary

The purpose was to inform the Prime Minister of the judiciary's choice for his replacement, a choice made with the participation of the principal administrators of the judicial branch—all career judges themselves. Kaifi did not object. As an official is quoted to have said (translated into idiomatic English): "We wouldn't have the vaguest idea who anyone they might suggest was, and we wouldn't have any way of finding out whether they would be suitable. The Supreme Court people have researched this. We trust their judgments." A similar procedure has been followed in the appointment of every Chief Justice for a quarter of a century. Trust counts.

Prime Minister Kaifi's trust had context. Since 1971 the judiciary has denied promotion and reappointment as full judge to only one assistant judge. That year Assistant Judge Yamazaki Miyamoto was excluded from the list submitted to the cabinet. No reason was given, but the cause was widely acknowledged: Miyamoto's membership in the leftist Seibōkyō (Young Lawyers Association, Seinen Hibiinaka Kyōkai), which had been formed in the early 1960s. By 1971 about 350 judges had joined, many during the late 1960s at the height of radical student activity in Japan. The senior judiciary was clearly concerned and began to take a variety of steps to prevent the Seibōkyō influence. Nearly two-thirds of the Legal Training and Research Institute appointees denied appointment as assistant judges between 1970 and 1976 were Seibōkyō members. Career judges who belonged were subject to discriminatory treatment in court assignments and promotions. Still, denial of reappointment was an extreme measure, and the response to Miyamoto's denial was immediate. Nearly a third of Japan's judiciary presented in one form or another. Articles and books denouncing the case poured forth.

For many the independence of individual judges from the judiciary itself was the issue. In the words of Tohoku University law professor Toshiki Odanaka, "From the perspective of judicial democracy (minshūgakusha) . . . active associations of judges are to be welcomed, for through them democratic movements of various forms and organizations must develop within the court." And, as Odanaka noted, judges also enjoy basic civil rights and freedoms. New considerations were given to the ambiguous words of article 166, originating in the American draft of the constitution, that judges were to be "independent in the exercise of their conscience." There was no question, however, that the decisions on appointments, reappointments, and assignments were made by judges, not politicians.

We need to recall first their broader context in evaluating the importance of these events. They occurred in the midr of a decade of global radical student activity. Paris, Berkeley, and Prague no less than Tokyo witnessed student protest against those in authority. Beginning in 1966 students in Tokyo began to occupy university buildings. The general education campus at Kyōto University remained occupied for nearly a decade. Demonstrations were so violent at the University of Tokyo that in 1968, for the first and only time in its history, examination examinations were canceled. Consequently, there was no graduating class from the Tojō law faculty in 1970... . . . In Japan, the Miyamoto incident had two apparent if somewhat paradoxical consequences. First, it affirmed the trust of conservative political leadership in the judiciary's self-policing mechanism to prevent ideological shifts inward. Without belaboring the obvious, prior to 1970 senior judges in Japan, in contrast to Italy, had not been exposed to judicial promotions and the attitudes and activities of younger judges. Nor in exercising that control did the Japanese judiciary lose the confidence of either the government or the public. Instead the career judiciary in Japan strengthened its influence on Japan's highest and most political courts.

Second, however, the embarrassing outcry it produced among scholars, lawyers and, more importantly, judges themselves made it difficult for any future judicial administrators ever again to deny reappointment and promotion to assistant judges for political reasons. As a result the judiciary as an institution gained both greater political trust and more secure judicial tenure. In any event the stakes were high, particularly with respect to the character of constitutional decisions. This is best understood in terms of the career judiciary's influence on Japan's highest and most political court.

The Career Judiciary's Influence on the Court

All but four of Japan's twelve chief justices have themselves been career judges. Only one lawyer (Fujibayashi), appointed in 1976, followed the next year by the one prosecutor (Okahara), have held the office. Two University of Tokyo law professors (Kōzō Tanaka and Kikushiro Yobata) were appointed back to back as the second and third Chief Justices in 1959 and 1960. The remaining eight were all career judges, five of whom had previously held the position of Seikai jūmin shībō, the judiciary's highest administrative post.

Similarly, by convention a third of all Supreme Court justices are appointed from the career judiciary, with another third from the practicing bar and the remaining five of the fifteen justices other persons of "attainment in their profession with a knowledge of law." Thus at least five of the fifteen justices at any one time have spent their entire professional lives, usually from their mid-twenties, as judges. Between 1947 and 1992, for example, 107 persons served as justices. Excluding the first appointments in 1947, which included three former Great Court of Cassation justices and one former Councilor of the Administrative Court, of these 107, 35 held a high judicial post at the time of their appointment, and all but one of the 35 were in fact career judges. Four others had begun their professional lives as judges.

Equally significant are the careers of the justices selected from the judiciary. Of the 35 judges who have been appointed to the Supreme Court, 33 were serving as chief judge of a high court at the time of appointment. 15 from the Tokyo High Court, 10 from the Osaka High Court, 4 from the Nagoya High Court, and 9 from the Fukuoka High Court, with the most recent appointment from the Sapporo High Court. A justiceship is thus the highest rung of a career ladder that has been consistently determined first by the judge's seniority and at the finish by his or her judicial peers, new agencies, political or otherwise, outside of the courts.
The relative lack of ruling party or other political influence on Supreme Court appointments is also indicated by the non-career judge appointment. Since the appointment of the first judges in 1947, 39 judges, 9 legal scholars, 4 diplomats and only 5 administrative officials have been appointed. Of the lawyers, a third (10) were bar presidents and 3 were vice presidents at the time of their appointment. In addition, Shizuo Kobayashi, who was serving as Chief Judge of the Tokyo High Court at the time of his appointment, had spent most of his professional life as a practicing attorney, having also served as president of the Second Tokyo Bar Association. The predominance of former bar officials exemplifies the influence of the bar itself, rather than political leaders, on which attorneys are selected to become justices. One of the nine legal scholars and two of the five former administrative officials were also former judges, and one of the legal scholars was a former attorney. Moreover, all of the five former administrative officials were serving in one of Japan's most politically neutral administrative posts as head of the Cabinet Legislation Bureau or its Diet equivalent at the time of appointment. Even in the case of the four diplomats appointed to the Supreme Court, all of whom were former ambassadors who rose through the ranks of the Foreign Affairs Ministry, political considerations appear to have been secondary to a purely bureaucratic concern to reward members who have served well.

One of the most striking features of the composition of Japan's Supreme Court is the age of the justices. Since 1953 only two persons under sixty years of age have ever been appointed to the Court. Jiro Tanaka and Ken'ichi Okano, both of whom were 51. Only Justice Tanaka, who was sworn in on May 16, 1955, has ever served on Japan's highest court, and all but three of the 108 postwar justices have served less than ten years. Not until 1965 was anyone appointed who received legal education in post-war Japan.

Japan's career judges staff all of Japan's districts and high courts as well as the principal administrative offices necessary for the management of the entire judicial branch. In addition, about thirty Swiss or re-

search judges are appointed from the senior ranks of the career judiciary to assist the Supreme Court. As a result, the influence of Japan's career judges extends throughout the judicial system from the Supreme Court through the summary courts. No governmental organ in Japan enjoys such extensive autonomy or freedom from political control or influence.

Socialization of the Career Judiciary

This is not to say, however, that judges in Japan have the sort of individual autonomy common in the British and American traditions or even the French civil law tradition. To the contrary, judges in Japan are intentionally denied such independence. Many Japanese scholars, such as Seisui Miyazawa, criticize this lack. They tend to neglect, however, the benefits of both certainty and uniformity that such independence would preclude.

In order to maintain as much uniformity and certainty in the law as possible, the Japanese judiciary is structured to ensure the greatest possible cohesion and conformity. In the words of former Chief Justice Haruo, although "the Supreme Court is not allowed to order a judge to do or not do something in connection with a case before him upon the pretext of administrative supervision, it may issue general instructions to judges with regard to the disposition of judicial business as a whole." By continual rotation, collegial decision-making, seminars, and periodic conferences, particularly among judges of a single district or high court, Japan's judges seek to avoid inconsistency in all aspects of the judicial process from the initial filing of a lawsuit through the final decision on appeal.

The socialization of young assistant judges is given the highest priority. Again in the words of the late Chief Justice Haruo:

The most important task of the judiciary is the training of younger, inexperienced assistant judges. In addition to the daily training of junior members of a three-judge bench through hearing and trying cases, the training for assistant judges is roughly divided into five programs. The first is a comparatively short introductory course given to assistant judges immediately after their appointment. Its purpose is to provide them with a general idea of their future work and to aid them in preparing for judicial service. The other four training programs are seminar-type programs given in the first, third, fourth, and ninth years after their appointment.

The objective of such training, as explained by the judges in the Legal Training and Research Institute who carry it out, is to ensure the highest degree of competence. The emphasis is technical—to enable new-to-become full judges who will for the first time be able to decide cases as a single judge to resolve the cases before them appropriately. In-service training sessions for full judges tend to focus on court administration, such as how to deal with an enormous caseload in the most expeditious manner, and on new developments in the law.

Judicial training is more about case management than ideology. The caseload of Japanese judges is staggering by nearly any standard. Without any discretionary appeals, Japan's Supreme Court justices must decide over 4000 cases each year, either in banc or as a petty bench. This means that each justice is generally responsible for reviewing about 1,500 cases annually. Although procedures for summary disposition have been introduced, the number of appeals the court must decide remains a major problem that re-

duces the quality of its decisions. The caseload for lower court judges is similar. On average Japanese district court judges dispose of over 1,000 actions per judge each year, of which about 500 involve litigated lawsuits. No summary judgment procedures exist in Japan. Therefore, all lawsuits filed are either settled or pursued through trial to judgment. And all judgments must include both the judges' findings of fact and application of law. Under such circumstances, judicial management and the efficient disposition of cases are given considerable priority over other matters, including any thought over the appropriate direction of any particular legal doctrine or nationwide uniformity of judgments in like cases. Such issues, along with the social consequences of the court's interpretation of particular legal rules and principles, are of course considered by judges, but these are rarely more than minor concerns.

Uniformity is not even a stated goal. It is nevertheless a product of the process and structure for judicial training. Intended or not, the emphasis on three year rotation to a wide variety of courts nationwide for assistant judges, and their service on three-judge panels, in combination with periodic training programs prior to reappointment with promotion, aside all else represent a process of socialization through which the values, expectations, and underlying assumptions of senior judges are passed down. Younger judges learn—and are intended to absorb—the standards and expectations that will be applied to them for promotion and assignment. Judicial coherence and uniformity are the result.

Such uniformity is strengthened by the remarkable homogeneity of Japan's career judges. The vast ma-

jority are graduates of the law faculties of only four universities—two public and two private—the University of Tokyo, Kyotou University, Chit University and Waseda University. Among all graduates of the Legal Training and Research Institute appointed as assistant judges between December 1947 and April 1955, over 80 percent were graduates of the University of Tokyo, followed by Kyotou graduates (15%), and Chit graduates (15%). In fourth place were graduates of Toho University (8%), followed closely by Kyu-

shu and Waseda (7% each). Those percentages have been remarkably consistent for the entire postwar pe-
riod with only a slight decrease in the number and percentage of Tokyo graduates and corresponding in-
crease in the percentage (but not the number) of Kyotou and Chit graduates through the early 1960s.

Several conclusions can be drawn from the educational background of Japan's contemporary judiciary. First, in addition to a common socializing experience in the Legal Training and Research Institute, the majority of Japan's judges also share common under-

graduate experiences. Although they lived from childhood in various parts of Japan, more than half spent their formative years as university students in metropolitan Tokyo. They were taught and pre-

sumably influenced by a handful of elite legal scholars, who also probably graduated from the same universities. Especially in the case of University of Tokyo
graduates, their classmates and closest university friends, both radical and conservative, are most likely to have either become government officials or joined one of Japan's major financial or industrial companies, if they have not also passed the national legal examination and become either a procurator or lawyer. In other words, Japan's judges are members of the small, cohesive economic and political elite that dominates both conservative and radical politics in Japan.

The relative stability of the judiciary is another one of its predominant characteristics. Of the 77 judges appointed in 1960, for example, 45 (58.5%) were on the bench thirty years later in 1990, two serving as summary court judges after having retired. One had reached mandatory retirement age and three were deceased. Of the others who had left the bench before mandatory retirement age, three resigned within the first five years, one to join a law faculty, the other two to enter private practice. Eight resigned after serving twenty-five years as a judge, four to become notaries and four to enter practice. All of the remaining 17 resigned to enter private practice, six having served five to ten years, six, ten to twenty years, and five, twenty to twenty-five years.

The career path of Japanese judges is equally stable. Take, for example, the careers of two judges selected at random from those serving on the Tokyo High Court in 1990. One was born in Tokushima Prefecture on Shikoku in September 1937. A graduate of Chiba University, she passed the national legal examination in September 1966, entered the Legal Training and Research Institute in April 1967, and graduated with the 7th class in 1969. In April of that year she was appointed assistant judge and posted to the Osaka District Court. Three years later she was transferred to the Kanazawa Family Court. And three years later she was assigned to the Ministry of Justice, where she served for seven years (1977-1984). In April 1984 she was transferred to the Urawa Family Court and in 1985 to the Tokyo District Court. A year later she was appointed as a judge in the Osaka District Court. In April 1986 she returned to the bench as a judge of the Osaka District Court and was assigned general administrative responsibilities for that court in 1986. In April 1990 she was posted to the Tokyo High Court.

The second judge was also appointed in April 1960 to serve on the Tokyo High Court. Born in Aichi Prefecture in March 1941, he also graduated in the 17th class of the Legal Training and Research Institute and was initially posted to the Tokyo District Court as an assistant judge. Three years later in 1968 he was assigned to the Hachioke branch of the Amori District Court. In 1971 he became an instructor at the Institute and three years after that was appointed to the Naha District Court on Okinawa, becoming a full judge in 1975. He too was appointed shikioka, in 1976, and was transferred to an administrative post with the Tokyo High Court in 1977. In 1980 he was transferred to the Tokyo District Court and a year later to the Osaka District Court. In April 1984 he returned to the Tokyo District Court, first to the bench and then from 1986 until his appointment to the Tokyo High Court in general administration.

Conclusion

Evaluation of judicial independence in postwar Japan should be made within the broader comparative context of other civil law systems. To consider any aspect of Japanese law or legal structure solely from an American perspective risks the imposition of uniquely American premises and cultural values upon a system organized within a very different legal tradition. Japan's postwar jurisprudence—especially the constitutional rules and principles that define the allocation and scope of law-making and law-enforcing authority—rests on fundamental values broadly shared within the civil law tradition as well as more specific understandings held by Japan's judges regarding their role and their powers.

In Japan these values combine to produce a remarkably cohesive but cautiously conservative judiciary that permits legal change but only at a carefully managed and gradual pace in keeping with the judges' sense of community values and their felt need for a consistent corpus of judicially articulated legal rules and principles. The personal conservatism of senior judges who have dominated the administrative offices of the judiciary need not be questioned. Their particular political values are less significant, however, than the broader collective institutional concerns for freedom from outside direction and the long-term influence of the courts within Japan's governmental structure. That autonomy and influence ultimately rest on public trust.

1969 Beijing-Shanghai-Japan Industrial Exhibition v. Japan
(The COCOM Case)

560 Hanrei jih6 6
(Tokyo D. Cc. July 8, 1969)

Translated by Charles R. Stevens and Kazunobu Takahashi

Judgment

The claim of the plaintiff is dismissed. The cost of the suit shall be borne by the plaintiff.

Facts

In November 1968, the plaintiff, Association of Applied to the Minister of International Trade and Industry for approval to export about 3,000 items for display in the 1969 Japanese Industrial Exhibition to be held in Peking and Shanghai, China, from March to June 1969. Pursuant to Article 48 (1) of the Foreign Exchange and Foreign Trade Control Law and Article 1 (6) of the Export Trade Control Order, the Minister adopted a "disapproval disposition" concerning 19 items, the export of which would conflict with the COCOM Agreement.

Dissatisfied with this disposition, the plaintiff Association brought a suit in Tokyo District Court against the Minister of International Trade and Industry (MITT) to set aside the disapproval disposition on the ground that said disposition was illegal because the Minister's discretionary power exercised in this case was unwarrented under said Law and Order. Later, when the exhibition in Peking was over and the one in Shanghai was cancelled, the plaintiff modified his suit and instituted a suit against the State to demand damages of one million yen (about U.S.$ 2,800) resulting from the alleged illegal administrative disposition.

Reasons

1. Undisputed Facts Between the Parties

The following facts are not in dispute:

1. The plaintiff is an organization with the same title as the Exhibition Institute in this case and was in charge of carrying out said exhibition. In 1967, a Japanese Scientific Machinery and Tool Exhibition was held in Tianjin, China, sponsored by the Kokubosoku [the abbreviation of Kokusai Bashi Sotokai Kyokai: the International Trade Promotions Association]. Said Kokubosoku was an organization estab-
A. Disputes in Modern Japan

Steve Lohr
Tokyo Air Crash: Why Japanese Do Not Sue
New York Times, March 10, 1982

Tokyo, March 9—On the morning of Feb. 9, the skies were clear and the weather balmy when a Japan Air Lines DC-8 plunged into Tokyo Bay 300 yards short of the Haneda Airport runway, killing 24 people. A few days afterward, Yasunori Takagi, president of Japan Air Lines, embarked on a 50-journey of obligation that in Japan is the expected behavior of a top executive whose company is involved in such a tragedy. Mr. Takagi visited the families of most of the crash victims, apologizing profusely and paying homage on his knees before the Buddhist funeral altars in the homes of the bereaved.

The government is still investigating the crash, but the circumstances could scarcely have been more unusual, and all the evidence so far points to pilot error. Seiji Kasagari, the pilot, had a history of "psychosomatic disorders" and had been urged to see a psychiatrist, raising questions about whether the airline should have allowed him in the cockpit. Mr. Kasagari may face criminal charges.

Still, Japan Air Lines has not yet been sued by any relatives of the passengers who died in the crash, and it is unlikely that the company will be sued. "If this had happened in the United States," James Weatherby, a spokesman for Japan Air Lines, said, "we probably would have seen a wave of million-dollar suits. But people don't sue here."

By contrast, 11 suits have been filed thus far since an Air Florida Boeing 727 jet struck a bridge and crashed into the Potomac River on Jan. 13, seconds after taking off from National Airport in Washington, D.C., killing 78 people. "This is a nonadversarial, nonlitigious society," observed Tadashi Yamamoto, director of the Japan Center for International Exchange, a not-for-profit organization in Tokyo. "And I think that is reflected in how a misfortune like this airplane crash is handled."

The reluctance of Japanese to go to court stands in stark contrast with practices in the West, especially in the United States. International comparisons of lawsuits are imprecise. But Government figures show that in 1979 about 160,000 civil suits were filed in Japan, while the comparable total in the United States was several million. There are about half a million lawyers in the United States, compared with just over 10,000 in Japan, which has half the population of the United States.

The lack of litigiousness in Japan is often cited as an economic advantage. The Japanese, it is said, do not spend much time, money or energy suing each other but, instead, concentrate on outproducing other nations. That Japan is a relatively suit-free society is generally attributed to its cohesive culture, with its heritage of shunning open confrontation.

In his recent book, "The Litigious Society," Jethro K. Lieberman, a journalist who is a graduate of Harvard Law School, writes: "Litigiousness is not a legal but a social phenomenon. It is born of a breakdown in community, a breakdown that exacerbates and is exacerbated by the growth of law. But until there is a consensus on fundamental principles, the trust that is essential to a self-ordering community cannot be."

To a remarkable degree, the requisite consensus on fundamental principles exists in Japan. Legal practices and habits also reflect a society's values, according to Carl J. Green, a Washington lawyer and a senior re-

search fellow at the Harvard Law School specializing in the Japanese legal system. In Japan, Mr. Green says, the harmony of community is valued most and people go to court only as a last resort.

The Courtroom as a Forum

In the United States, by contrast, the rights of the individual are given priority and the courtroom is a key forum in which the conflicting claims of individuals are arbitrated. "We would be unhappy with the Japanese system," Mr. Green said.

In Japan, liability settlements are typically decided in out-of-court negotiations. For example, the previous serious accident involving a Japan Air Lines plane was on Sept. 27, 1977, when 33 people were killed in a crash in Kuala Lumpur, Malaysia. In that case no suits were filed. Instead, the airlines and families of the victims held private consultations to determine the compensation. These negotiations were handled on a case-by-case basis, with the settlements differing depending on the victim's age, salary and family responsibilities.

At present, and until April 1, there is a liability law applying to plane crashes that sets a maximum of about $60,000 for each victim. Yet Japan Air Lines has indicated that it will not necessarily limit settlements to that level, even though the accident occurred before April. "It's all negotiable," Mr. Weatherby said. "That's the way things work here." However, the negotiations could not begin until Mr. Takagi of Japan Air Lines made his rounds.

Japanese corporations are seen to bear moral as well as legal responsibility for calamities. If the top man shows this moral responsibility, then the financial negotiations are likely to be handled much more smoothly," said Shihui Naito, spokesman for Japan's Foreign Ministry. The Japanese Government owns 40 percent of Japan Air Lines.

Susan Chira
Then You in Your Day in Court, You May Wait and Wait and Wait
New York Times, September 1, 1987

Tokyo, Aug. 31—Hideo Yokochi was 48 years old when he filed suit against a Japanese company whose contaminated cooking oil gave him a liver disorder and a severe skin disease. Now he is 59. After 11 years in court—Mr. Yokochi filed suit in 1976, six years after the first plaintiff in the cooking-oil case went to court—his legal battle has finally ended, not with a decision, but with a settlement. Mr. Yokochi and 1,887 other victims of cooking oil contaminated with PCB's received payments ranging from $20,000 to $50,000, less than half the money they had originally asked for.

But Mr. Yokochi said the financial hardships of pursuing the case persuaded the plaintiffs to settle.

Many of those affected by the cooking oil were too sick to work, and some had to go on welfare. Meanwhile, the suit dragged on—at a cost of about $3,000 a month for the action covering all 1,887 plaintiffs.

The cooking-oil case is one of the longest on record, but it is not unusual in Japan for complex lawsuits to take more than 10 years to go through the courts. Japan has become known as a land where people do not sue, obeying a cultural taboo against resorting to the courts. But many here suggest that if Japanese do not sue as much as Americans, it is more because doing so is such an ordeal than out of a cultural embrace of harmony. Trials are long, court fees can be high, and judges often exert pressure to settle.
Legal System Is Bankrupt

Such a system, critics charge, can also hurt less powerful groups in Japanese society—those who do not have enough money to pay for expensive court cases or those without enough political influence to press for changes in Japan's legislature. "Japanese like this image of themselves as a harmonious, nonlitigious society, but it's more a myth than anything else," said Isaac Shapiro, a partner at Skadden, Arps, Slate, Meagher & Flom who grew up in Japan and whose practice includes Japan.

Indeed, more than twice as many lawsuits were filed last year as 10 years ago, suggesting that whatever cultural taboo on litigation that did exist is breaking down, said Nobuyuki Toshitani, a professor of law at the University of Tokyo. Professor Toshitani argued that many elements in the Japanese legal system discourage lawsuits and promote settlements. "In one word, the Japanese legal system is bankrupt," he said.

The Judges Are Busy

Professor Toshitani says he believes that the Government has a deliberate policy of encouraging conciliation—a policy that has ample historical precedent. In the Tokugawa period, from 1603 to 1868, for example, authorities severely discouraged lawsuits. In the 1930's and 1950's, when the number of lawsuits shot up, the authorities changed laws to require conciliation.

Even now the Government limits the number of lawyers and judges. Professor Toshitani said. Every year, 10,000 aspiring lawyers compete for just 300 places at a Government-run school that certifies lawyers, judges and prosecutors. Overworked judges and lawyers handle such a heavy caseload that trials are often scheduled at the rate of one session a month. "Judges are extremely busy, handling hundreds of cases at one time," said Shigero Uchida, the chief attorney for the plaintiffs in the contaminated oil case. "Sitting up dates for the sessions is always difficult. But since this case attracted wide social attention, the tempo was rather fast compared to other cases. There were two sessions in one month, and each was for a full day."

The cooking oil case took so long partly because there were so many victims and it took time for them to prove that the cooking oil caused their symptoms. But even in routine cases, lawsuits take much longer in Japan than in the United States. In 1986, it took an average of 11.4 months from the time a civil suit was filed in Japan's district courts to its final disposition; last year, the median length of time for civil suits in the entire United States Federal District Court system was seven months. Japan has 3,150 judges, according to the Supreme Court; the United States, with a population about twice as large, has 18,000 judges, according to "The American Bench," a directory of judges.

Mining Case Is Settled

A spokesman for Japan's Supreme Court said that he did not believe it was necessary to increase the number of judges, but that officials had been working to try to streamline the process. "Considering the importance of the judge's job, we need to secure people with deep knowledge of the law," the spokesman said. "So we cannot increase the number of students passing the test too drastically."

For the most part, the longer a lawsuit takes, the more willing both parties are to settle to avoid a settlement. Just last month, a settlement was reached in a 15-year-old case in which victims of Japan's worst coal mining disaster filed suit against the Minezawa Mining Company. An explosion in 1965 killed 415 people and many others suffered from carbon monoxide poisoning. The miners first tried to reach an out-of-court settlement, and then a total of 350 people filed suit against the company in 1979. Most accepted a settlement proposed by the court—of just one-eighth of their original demands....I am tired," one plaintiff told the Asahi Shimbun newspaper. "I want the case settled out of court so I can put the whole affair behind me."

Pressures to settle are built into the court system, Professor Toshitani said. Each level of the court has a special conciliation division, and in family court all disputes must be subject first to conciliation before any suits may be filed. Judges often recommend, and preside over, compromise settlements.

Minamata

Minamata is a small city in Kumamoto Prefecture on Kyushu, the southernmost of Japan's four main islands. The surrounding economy is largely dependent on fishing and agriculture, but since 1958 Minamata City itself has been the site of production facilities of the Chisso Corporation, which specializes in nitrogen-based chemical fertilizers and later in plastics. The presence of Chisso in the city was both an envied source of employment and financial support for the local citizens, and a frequent source of controversy as conflict between chemical production and commercial fishing developed. Beginning as early as 1956 local fishermen periodically demanded and received compensation for pollution damage to their fisheries, but it was not until the early 1970's that events proved pollution to be causing much more profound damage than a decline in the commercial fishing catch.

By 1963, ominous evidence appeared in Minamata. Birds seemed to be losing their sense of coordination, often falling from their perches or flying into buildings and treetops. Cats, too, were acting oddly. They walked with a strange, wailing gait, frequently stumbling over their own legs. Many suddenly went mad, running in circles and foaming at the mouth until they fell—or were thrown—into the sea and drowned. Local fishermen called the derangement "the disease of the dancing cats," and washed nervously at the animals' madness progressed.

Inevitably, the disease spread to humans. By the early 1950's, a number of Minamata fishermen and their families were experiencing the disquieting symptoms of a previously unknown physical disorder. Robust men and women who had formerly enjoyed good health suddenly found their hands trembling so violently they could no longer strike a match. They soon had difficulty thinking clearly, and it became increasingly difficult for them to operate their boats. Numbers that began in the lips and limbs was followed by disturbances in vision, movement, and speech. As the disease progressed, control over all bodily functions diminished. The victims became bedridden, then fell into unconsciousness. Wild fits of thrashing and senseless shouting comprised a later stage, during which many victims' families, to keep the afflicted from injuring themselves or others, were forced to confine them with heavy rope. About forty percent of those afflicted died.

Because the symptoms were concentrated in the relatively poor fishing villages on the outskirts of Minamata City, residents of more affluent areas assumed that they were caused by hygienic deficiencies in the afflicted households. Their general reaction was to shun the victims and their families as carriers of a contagious disease. This reaction and the victims' own shame and guilt kept the symptoms from being medically discovered until 1965, and it was another year before probable causation was attributed to the consumption of local fish. But by 1957 the sale of Minamata fish had been banned, and suspicion had begun to focus on Chisso as the likely source of the disease.

In August of 1978 the victims of mercury poisoning, certain of both the cause of their suffering and the culprit, formed the Mutual Assistance Society to negotiate with Chisso, following the pattern of the previous fishery negotiations. Chisso refuted the Society's initial efforts, but the identification in 1979 by Kumamoto University researchers of organic mercury from Chisso's effluents as the causal agent had a dramatic effect on fishing and brought the diseased patients powerful allies in the form of local fishermen. That August, members of the Minamata City Fishermen's Union demonstrated in front of Chisso's gates demanding compensation, purification of the bay, and pollution abatement. The company responded that, since causation of Minamata disease was "scientifically..."
Debate Resolution: Disputes in Modern Japan

Ambiguity," they could offer only a minor sum in the form of a solution or sympathy payment (mimashiki). The fishermen reeled by the factory's contribution, and when a subsequent meeting brought only an increase in the total offer from $3 million (approximately $8,300) to $5 million ($16,600), they stormed it again, this time taking the plant manager hostage overnight. This act apparently impressed Chisso sufficiently for it to agree to mediation by a committee consisting of Minamata City's mayor and local delegates to the Kumamoto prefectural assembly.

The mediation committee took only ten days to propose an acceptable settlement whereby Chisso agreed to pay union members a total of $15 million ($57,000) immediately and $9 million ($5,500) annually thereafter. But adjacent fishermen's unions and the disease sufferers were specifically excluded. When in October and November 1959 Chisso refused to negotiate with the other unions, riots and plant occupations ensued, causing extensive property damage. The response was a second mediation committee, this time appointed by the prefectural governor. The committee's initial charge was only to address the unions' demands, but a widely publicized sit-in at the factory gates resulted in the consideration of the patients' demand for $20 million ($64,000, or $1 million ($82,000) for each disease victim) as well.

On December 16 the committee announced its recommendation: payment of $15 million ($57,000) to the fishermen and $9 million ($50,500) to the disease victims. The unions quickly agreed, but the Mutual Assistance Society initially rejected the recommendation as greatly insufficient. Persistent pressure from the mayor and city councilmen, the Japanese tradition of clearing the slate at the end of each year, and the threatened dissolution of the mediation committee were, however, too much for the victims, most of whom were unable to work and faced steadily rising debt, and on December 30 representatives of Chisso and the Society signed the proposed agreement and social peace was declared. As in the previous agreements with the fishermen, this agreement provided for sympathy payments or mimashiki rather than compensation. The amounts—$150,000 ($500) for deaths, usual payment of $500,000 ($500) for adults and $250,000 ($250) for minors, and $250,000 ($55) for funeral expenses—were small even in the context of 1956 Minamata, but the true genius of the agreement from Chisso's point of view was its legal character.

Although the victims' reactions and the government mediation are consistent with the accepted perceptions of traditional Japanese methods of resolving disputes, the content of the agreement resembles the results of legal practice present in most societies. One searches in vain for the paternalism, communal sense of responsibility, and preference for legal ambiguity that stereotypically about Japanese law would lead one to expect. Clauses 4 and 5 clarify respective rights and duties under the agreement beyond peradventure.

**Clause 4**: In the future, if Chisso's factory effluents are determined not to be the cause of Minamata disease, the solution agreement will be dissolved immediately.

**Clause 5**: In the future, even if factory effluents are shown to be the cause of the disease, no further demands for compensation will be made.

Although it was not until 1968 that the government formally agreed that organic mercury was the causative agent, few outside of Chisso and the government disputed the role of mercury after 1959. There remained, however, the need both to demonstrate scientifically the precise process of poisoning and to trace the mercury to the Chisso plant. In fact, the government was no more in the dark than anyone else. Secret documents made public in court proceedings more than a decade later revealed that as early as July 1956, the Ministry of Health and Welfare had notified, inter alia, MITI and the Governor of Kumamoto Prefecture that research indicated that Minamata disease was caused by eating fish and shellfish contaminated by Chisso effluents.

Despite this warning from the MFW, the Chief of the Public Prosecutor's Office for Kumamoto Prefecture repeatedly refused to investigate Chisso. Even after a Kumamoto professor finally isolated organic mercury in samples of Chisso waste water and published his findings at a meeting of the Japanese Association of Hygienists in 1966, the Prosecutor's Office responded, "We cannot yet decide what to do. We have not been able to do anything so far because we did not know the precise medical cause, but when the medical researchers reach a conclusion, we will have to be very concerned with it, depending on the nature of the results." Finally, in June 1969, a court judgment was entered against Chisso [in favor of] one faction of the Minamata disease patients. By 1969 it had been sixteen years since the disease first appeared, thirteen years since its discovery as a discrete set of symptoms, eleven years since the MFW had first secretly identified Chisso as the probable cause, ten years since organic mercury's scientific identification as the causative agent, and seven years since the Kumamoto professors' conclusive demonstration of Chisso as its source. The reasons for this delay are complex: they include the socio-economic nexus of the victims, their dispersal in several separate fishing villages along the Minamata coast, the economic and political domination of the area by Chisso, lack of access to legal resources, and a distillation of the parts of the many victims to challenge authority, particularly through a lawsuit. I want to note these two obvious factors of particular importance to this inquiry.

The first is legal doctrine. Clauses 4 and 5 of the [earlier] agreement were carefully drafted to discourage legal action by potential plaintiffs and undoubtedly played a role in the delay. Not only Chisso but also the government often referred to the Minamata problem as being settled privately by this agreement. Equally important were the doctrines of tort law—or at least the actors' perceptions of those doctrines—that would cover any litigation. ... [The victims'] opponents were quick to discount the possibility of winning a tort suit on the merits because of a lack of what was referred to as "scientific" proof of causation.

A second factor in the delay was the legal nature of the settlement process. Central to the creation of the 1959 agreement and its later maintenance was the manipulation of information made possible by the informality of mediation. Both Chisso and the central and prefectural authorities regularly suppressed information whenever it suited their interests. Not only did Chisso deny information requested by researchers, but it was revealed later in the course of the civil litigation that the plant had also altered the halt of experiments conducted in 1959 by Chisso personnel who had treated Minamata disease symptoms in cats fed Chisso waste water. The suppression of vital data was greatly facilitated by the informal methods of protest and dispute settlement used by the victims. Had the fishermen and patients relied more on formal channels, the total manipulation of information would have been much more difficult.

Even after the government's formal acknowledgment of Chisso's culpability ... most victims remained reluctant [to sue] and when the Ministry of Health and Welfare offered in late 1968 to mediate demands for additional compensation, the majority of patients' families accepted. For some victims, however, the Ministry's conditions—complete discretion in the choice of mediation committee members, less role in the mediation process itself, and a prior agreement to abide by committee recommendations—and bitter memories of the 1959 agreement ruled out further reliance on the government. Of those victims, 121 individuals from 30 families filed suit on June 14, 1969. A third group, many of whom were newly discovered victims or less severely afflicted, rejected both mediation and litigation in favor of direct negotiations with Chisso officials.

The split among the patients was extremely bitter and continuous today. The litigation and direct-negotiation groups contemporaneously refer to the mediation group, who accepted in 1957 a settlement with maximum awards of $3 million (66,650) with a $75,000 ($84,000) annuity, as the "true" or "other" or "entourage" group and are in turn condemned for their "selfish" willingness to pursue their own ends without deference to the greater good of other victims and residents of the Minamata area generally. Between the two nonmediation factions, the split concerned both tactics and political affiliations. Lawyers associated with the Japan Communist Party (JCP) dominated the ten conducting the litigation, while the direct-
negotiation faction was led by unaffiliated leftist lawyers and activists. The latter were highly critical of the JCP lawyers and the JCP itself for what they saw as the manipulation and exploitation of the victims for partisan political gain. They also were critical of litigation as a tactic, arguing that the court's only remedy—money—was both inadequate to compensate for the physical harm and inappropriate to achieve a psychological and moral resolution to the tragedy. Instead they turned to direct confrontation. The JCP lawyers countered that the perceived extremism and violence of the direct-negotiation group's tactics would discredit the antipollution movement and hurt the litigation.

It seems likely that none of the plaintiffs in any of the Big Four cases sued solely for the money. Nor did they sue to vindicate legal rights; the prevailing notion at the time of suit was that the plaintiffs faced insurmountable doctrinal obstacles. Instead, the aims are better interpreted as desperate, last-ditch efforts to preserve family and community. In the words of one plaintiff: "In general the first problem we had in relation to filing suit was the feeling that 'our lives are already past—we should just endure it'. But when it began to look like the precious land left by our ancestors might be encroached upon and our grandchildren's generation affected, we could no longer endure. 'Now, we must sacrifice ourselves' became our cry. I think this trial was motivated by that attitude.' . . .

Moral indignation is not a uniquely Japanese trait, and the desire for moral justification and retribution is deeply rooted in Western tort law. What is remarkable in this situation is the plaintiffs' innocent faith in the legal system's ability to function as an instrument of moral justice, the apocalyptic and communal vision of litigation, and the total absence of the language of either legal rights or monetary compensation. The concept of a right to compensation or of the defendant's duty to pay does not appear in published discussions of the plaintiffs, and their disregard of money itself as even a secondary motivation, at least at the time of filing, seems absolutely convincing. As the litigation proceeded and the plaintiffs realized that victory was possible, the amount of the award and how it should be allocated became a divisive issue among the victims, and their motivations grew more complex. Even so, the dominant theme of the post-judgment negotiations over the amount and form of compensation remained moral retribution, and it is hard to interpret the victims' initial motivation as either individual or pecuniary.

To a large extent the lawyers involved shared these views. Although their moral outrage was secondhand and their concern with broad social issues stronger than that of their clients, the lawyers certainly saw themselves as something more than detached legal advocates. To the extent possible, they became one with the victims, sharing their pain and experiencing their humiliation and shame. That personal involvement in the victims' life was necessary because the trial was to be the forum for the baring of the victims' suffering and for the moral condemnation of the defendants. Without experiencing that suffering the lawyers could not impart it to the court, and without the public drama of that presentation the litigation would degenerate into legal formalities and fall in one of its main missions, facilitating and strengthening the antipollution movement.

The [Minamata] plaintiffs' total victory [in Ka- kumoto District Court] broke the impasse. On the same day, members of the litigation faction traveled to Tokyo to join Kawamoto's followers in pressing Chisao for compensation based upon that given by the District Court and a personal apology by [Chisao President] Shimada. The judicial award was the largest in Japanese history, with individual awards of up to $8 million (approximately $60,000), but for the patients it was not enough. With the legal victory they pressed for annuities, medical expenses, and the guarantee that all patients, whomever certified and of whatever faction, would receive equal treatment. After five hours of negotiations on March 22, Shimada pledged that all damages would be compensated in good faith. But it was not until he had knelt before the victims and apologized that they accepted his promise.

Thereafter detailed and vigorous negotiations continued until July 9, when a final agreement was reached and signed by all factions of the victims. It went well beyond the most award in providing for lifetime annuities to be adjusted biannually to the cost of living, a $500-million fund (approximately $1 million) to provide medical and economic assistance to victims, and promises by Chisao to search for and compensate unidentified victims and to cooperate with local officials in the cleanup of Minamata Bay. The agreement also went beyond the judicial settlement by including a full and public apology by Chisao.

Three days later the tens of victims outside both Chisao's Minamata plant and its Tokyo headquarters came down. After 18 months this chapter in the history of Minamata disease was over.

B. Competing Explanations

Takeoishi Kawashima

Dispute Resolution in Contemporary Japan


... There are several possible explanations of [the] relative lack of litigation [in Japan]. On the one hand, litigation takes time . . . and is expensive but this seems to be true in almost all countries having modern judicial systems and can hardly account for the specifically strong inclination of the Japanese public to avoid judicial procedures. Or one might point out that monetary compensation awarded by the courts for damage due to personal injury or death in tragic accidents is usually extremely small . . . A more decisive factor is to be found in the social-cultural background of the problem. Traditionally, the Japanese people prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants. Furthermore, judicial decisions emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solution.

This attitude is presumably related to the nature of the traditional social groups in Japan, which may be epitomized by two characteristics. First, they are hierarchical in the sense that social status is differentiated in terms of deference and authority. Not only the village community and the family, but even contractual relationships have customarily been hierarchical. From the construction contract arises a relationship in which the contractor defers to the owner as his patron; from the contract of lease a relationship in which the lessor defers to the lessee; from the contract of employment a relationship in which the servant or employee defers to the master or employer; from the contract of apprenticeship a relationship in which the apprentice defers to the master; and from the contract of sale a relationship in which the seller defers to the buyer (the former being expected in each case to yield to the direction or desire of the latter). At the same time, however, the status of the master or employer is patriarchal and not despotic in other words, it is supposed not only to dominate but also to patronize and therefore partially to consent to the requests of his servant or employee. Consequently, even though their social roles are defined in one way or other, the role definition is precarious and each man's role is contingent on that of the other. Obvi

A second class of disputes, those between a master and his debtor, lacks the very beginning a harmonious relationship comparable to that normally found between lessor and lessee or master and servant. Unions never fail to be armed not only with nonlegal means with which to enforce the factual power situation but also with means founded upon law that enable them to resort to the courts. Since the Meiji era (1868–1912), long before industrialization was under way, official statistics have shown a surprisingly large number of cases involving claims of this sort.

In short, a wide discrepancy has existed between state law and the judicial system, on the one hand, and the labor relations and behavior, on the other. Bearing in mind this, we can understand the popularity and function of mediation procedure as an extra-judicial informal means of dispute resolution in Japan.

This attitude is also reflected in the customary characteristics of contracts. Parties to a contractual agreement are not expected to become involved in any serious differences in the future. Whenever they enter such a relationship, they are expected to be friendly enough not to consider eventual disputes, much less preparation for a lawsuit. Parties do not, or at least pretend that they do not, care about an instrument or other kinds of written evidence and rather hesitate to ask for any kind of written document, fearing that such a request might impair the amicable inclination of the other party. Even when written documents are drawn up, they do not provide machinery for settling disputes. The contracting parties occasionally insert clauses providing that in case of dispute the parties "may" (instead of "must") negotiate with each other.

The contractual relationship in Japan is by nature quite precarious and cannot be sustained by legal sanctions. If the disputants seek to continue their relationship, some agreement is worked out, even if this means, in rare cases, that one party accepts the status quo imposed by the other. This rarely happens, however, because business and social custom forbid one to terminate a harmonious social tie by selflessly insisting on one's own interests. Usually it is clear that the unilaterally imposed solution is totally inadmissible when no agreement can be reached, and the wronged party is then supported by the moral opinion of the community, leaving the contract breaker in an untenable position. Thus what seems at first glance to be an absurd and serious deficiency in the contractual concept is in actuality only a reflection of the normal way of conducting business transactions.

Finally, the specific social attitudes toward disputes are reflected in the judicial process. Japanese not only hesitate to resort to a lawsuit but are also quite ready to settle an action already instituted through conciliation processes during the course of litigation. With this inclination in the background, judges also are likely to hesitate, or at least not seek, to expedites judicial decision, preferring instead to reconcile the litigant parties.

The prevailing forms of settling disputes in Japan are the extra-judicial means of reconciliation and conciliation. By reconciliation is meant the process by which parties in the dispute confer with each other and reach a point at which they can return to terms and restore or create harmonious relationships. As stated above, social groups or contractual relationships of the traditional nature presuppose situational changes depending on their members' needs and demands and on the existing power balance; the process of conferring with each other permits this adjustment. Particularly in a patriarchal relationship the superior (shunin) who has the status of a patriarch is expected to exercise his power for the best interests of his inferior (shōnin), and consequently his decision is, in principle, more or less accepted as the basis for reconciliation even though the decision might in reality be imposed on the inferior. Reconciliation is the basic form of dispute resolution in the traditional culture of Japan. Conciliation, a modified form of reconciliation, is reconciliation through a third person.
The belief that the Japanese are an exceptionally non-litigious people is remarkably pervasive. Commentators, both within and without Japan, are almost unanimous in attributing to the Japanese an unusual and deeply rooted cultural preference for informal, mediated settlement of private disputes and a corollary aversion to the formal mechanisms of judicial adjudication. As a result, they say, Japanese do not take advantage of the available mechanisms for formal dispute resolution. Those attitudes, they commonly add, are bolstered by a peculiar Japanese penchant for compromise, distrust of clear cut “all or none” solutions and distaste for both public quarrels and their public resolution. As explained by Kawashima Takeyoshi, one of Japan’s leading legal sociologists and most articulate exponents of this belief, the endurance of a traditional concern for preserving cooperative personal relationships makes unwanted any definitive delineation of rights and duties through litigation. Bringing a lawsuit has meant issuing a “public challenge and provoking a quarrel”.

A Paradigm

The threshold problem is to define “litigiousness” in some meaningful fashion. There is little question that the Japanese generally use their courts less frequently than do Americans (although the contrast may not actually be as great as some have suggested) . . . . [Relative to the number of registered motor vehicles and motor vehicle accidents resulting in deaths, Californians file twice as many suits as the Japanese in Tokyo and Osaka, jurisdictions with a combined population roughly equivalent to that of California (9 million).]

This relative lack of litigation is not, however, a uniquely Japanese phenomenon. In Austin Sarat’s and Joel B. Grossman’s study of litigation rates in a selection of ten countries (Table 3), resort to court in civil cases in Japan appears to be moderately frequent. . . . As Sarat and Grossman recognize, however, the data are too crude for an accurate index of “litigiousness” or other analytical purpose. . . . Nonetheless, to the extent their data permit a rough, impressionistic comparison, then if by “litigious” is meant simply the number of suits filed or disposed of per capita, Japan is quite litigious relative to some societies and notably not litigious compared to others.

The orthodox view of Japanese “litigiousness,” however, relates to a reluctance to litigate, not simply the amount of litigation. Even assuming such a reluctance to exist, to be meaningful in terms of evaluating the role of the judiciary it must involve more than simply a desire to avoid lawsuits. While we might conceive of an individual or community as a whole that delights in engaging the complex liturgy of trial procedure or activating the public intervention of a magistrate, if such exist, they are rare. For most persons a lawsuit is a last resort. Litigation, it is, after all, almost always a costly and cumbersome process for resolving disputes, and ordinarily an aggrieved party to a dispute will attempt to reach informal private settlement. The overwhelming majority of disputes in most societies are in fact resolved informally. . . .

The critical issue is whether the parties will settle only when neither believes he has more to gain by judicial intervention. If this is the case, a decision to settle necessarily involves an assessment of the outcomes of the potential lawsuit, and the private settlement should reflect that outcome discounted by the costs (including time) and uncertainties of litigation. . . .

Consequently, whether the Japanese are nonlitigious is in itself significant for our purposes here only if by “nonlitigious” we mean that Japanese involved in a dispute tend to reach negotiated or mediated settlements that do not reflect the litigated outcomes and one of the parties accepts a less favorable result because of an aversion to litigation in general. The frequency of litigation alone is not meaningful since the availability and successful utilization of alternative mechanisms for settlement may reduce litigation without impairing the efficacy of judicially-imposed norms. Also, a number of institutional factors can preclude litigation as a realistic option and thereby diminish substantially the influence of the courts. Indeed, resort to court would be rare to the extent that access is assured, the costs are minimal, judicial relief is effective, and the outcome is certain. . . .

The Myth Reconsidered

Is there, then, any evidence of an unusual Japanese aversion toward lawsuits that leads a party to accept a settlement less beneficial than one he anticipates he would gain by suing? The answer, I believe, is negative. What little evidence there is suggests the opposite—that most Japanese are willing to go to court in such circumstances. The recent pollution cases and the chalidomote case are illustrative.

A recently published inquiry into the decisions to litigate in the pollution cases documents a variety of cultural factors causing the litigants to hesitate to sue. These included a sense of “shame” for physical and mental deformity, constraints on individual initiative and “selfish” behavior imposed by the demands of community unity and group consciousness, and hostility against an association with what was perceived to be—correctly, I believe—a leftist, antigovernment cause reflected in the policies of the lawyers who dominated the conduct of these trials. This experience was paralleled in part in the chalidomote case, where the apparent reason for reluctance to sue was a fear of public exposure of the children’s deformities. In a society strongly prejudiced against deformity,” one of the plaintiffs’ lawyers wrote, “it took considerable courage to sue.” In such cases the plaintiffs filed suit only reluctantly and as a last resort. The reluctance, however, was based on a variety of factors related to the particular circumstances and nature of the disputes, not an unwillingness to sue in general.

The few direct surveys of Japanese attitudes that have been made provide further support for rejecting the orthodox view. For example, in the survey by Sasaki Yoshio cited by both Dan F. Henderson and Kawashima, when asked, “What would you do if a civil dispute arose and despite discussions with the opposite party you could not settle it?” 64% of the 3,098 respondents replied that they would willingly go to court. Even more provocative, however, is the pattern of litigation in Japan from 1950 to the present.

[1] Litigation has been less frequent in absolute numbers in the postwar years than the period from 1950 to the outbreak of the Sino-Japanese War in 1937. Relative to population, the contrast is even more startling. In 1954, for example, 302 new civil cases involving formal trial proceedings were initiated in courts of first instance per 100,000 persons, while in 1974 there were 135 such cases per 100,000 persons—4.1 times as many per capita in 1954 than there were in 1974. . . .

It is apparent that these patterns are inconsistent with conventional ideas about the reluctance of Japanese to litigate; moreover, they contradict the widely held belief that there has been a greater willingness to sue in the postwar period. In short, most of what is said or written about Japanese attitudes toward the
Dispute Resolution: Competing Explanations

The Reality of Institutional Incapacity

If the Japanese are not particularly averse to litigation, how then can we explain why they appear to use their courts far less frequently than do Americans and perhaps others? Why has litigation decreased since the war (and continues to do so)? Also, what accounts for the pervasive acceptance by Japanese themselves that they are unusually "nonlitigious"? And how do such explanations relate to the efficacy of the judicial model in Japan? To answer these questions, we should first reconsider the paradigm process of dispute resolution.

Typically, the parties to a dispute will move through stages—from direct negotiation, to third party mediation and finally to litigation—as a result of failure in the preceding stage to agree to an acceptable resolution. In this process, a relative lack of litigation can be explained by several factors.

One is the effectiveness of third party intervention. The availability of suitable third parties who are willing and able to perform this role reduces the need to invoke formal judicial intervention. As the outset, mediation requires the presence of persons who, because of position or personal relationships, command respect and are able to exercise some measure of authority. In other words, to be effective, the mediator must be someone who can command the parties' trust and their obedience to the settlement.

One would thus anticipate that suitable third parties are more readily available in a stable, closely integrated and hierarchical society like Japan, than in a more geographically mobile, less cohesive society like the United States in which individual autonomy and social equality are emphasized. Societal expectations and habits are equally relevant. The role of the mediator becomes increasingly legitimate for both the mediator and the parties to disputes where there is repeated reliance on third parties to settle disputes. A contrast in police attitudes in Japan and the United States pointed out by David H. Bayley is especially interesting in this respect. Japanese commonly rely on the police for assistance in settling disputes. But despite similar popular demand in the United States, what is different, says Bayley, is that American police organizations have not adapted willingly to perform this function. Another Japanese example is the mediating service some companies provide for employees involved in traffic accidents. In short, the Japanese may be more successful in avoiding litigation because of social organization and values more conducive to informal dispute resolution through mediation.

Resort to court is, however, reduced by another set of factors that do inhibit or enhance the utility of the judicial model as a vehicle for social control and development.

First, for courts to have an impact through decisions in individual cases beyond those persons immediately affected in those cases, information about the courts and these decisions must be disseminated in order that parties to similar disputes are sufficiently aware of the legal norm for it to influence informal resolution of their disputes. . . .

There must also be meaningful access to the courts. Access can be denied directly by jurisdictional barriers that prevent the courts from adjudicating certain types of disputes altogether. Bond-posting requirements that may place an intolerable burden on the parties seeking relief illustrate another form of conscious policy designed to prevent resort to courts. Limited institutional capacity also inhibits access. There must be sufficient number of courts, of judges and lawyers, to insure that the courts and delays of litigation do not preclude lawsuits as a realistic option.

A third factor is the capacity of the courts to provide adequate relief. Courts must have available a range of remedial measures and forms of relief to suit the variety of controversies that arise. An award of monetary damages or declarations of the rights and duties of the parties will not always help the aggrieved party. In addition, especially in cases where the legal norm and thus the outcome is reasonably certain, filing suit may evidence a recalcitrant party against whom coercive measures have become necessary. . . .

Assessing the effectiveness of Japanese courts in terms of these criteria, one finds first that lack of information in Japan is not a particular problem. Law is among the most popular fields of undergraduate study. The newspapers and other media cover the courts and regularly report judicial decisions. There is also in Japan an amazing abundance of legal journals and books on the law, including a plethora of layman's Handobushos for particular legal problems to advise the average person. But evidence of other institutional barriers to litigation is ample.

The courts in Japan are even more strained to capacity than the courts in the United States. Superior courts in California in 1971-72, for example, disposed of 964 cases per judge. In 1974, United States District Courts had a caseload of only 335 cases per judge. These caseloads are considered to be excessively high. Yes District Courts in Tokyo and Osaka disposed of 1,525 cases per judge in 1969 and the total Japanese caseload in 1974 was 1,708 cases per judge. This reflects a lack of judges. . . . [T]he number of judges in Japan has grown but little for the entire period from 1890 to the present. Thus as the population has grown the ratio of judges to the population has declined from one judge to 32,900 persons in 1890 to one judge to 52,800 persons in 1945 and one judge to 65,357 persons in 1969.

As a result of overcrowded courts, aggravated by the form of trials in Japan that (as in other civil law jurisdictions) involve recurring hearings typically spaced at one month intervals, delay is acute. The simplest trial can take over a year at the district court level, and the average is two years. If there are appeals, the case will take about five years, but proceedings that continue for eight to ten years are not uncommon. . . .

The limited range of remedies available to Japanese courts and the lack of contempt power to enforce their decisions are equally serious. Japanese courts in the postwar period have continued to rely on constitutional notions of judicial power that restrict available remedies to those provided by statute. In the area of civil law this has meant that the courts can order specific performance, award damages, or enter declaratory judgments affirming the legal relations of parties in the suit. In most instances, these remedies are effective because of voluntary compliance. But lacking the power of contempt, a court has no way to enforce its decrees on its own motion. Instead, it must rely on procurators to institute criminal proceedings.

The problem of inadequate relief is even more critical in the area of actions by private citizens against the government. The options open to a court in these cases are very limited. They include, for example, declaratory relief of affirming the legality or invalidity of administrative actions or decisions of the failure of officials to act or revoke of administrative acts, and decisions. The law provides the power to suspend administrative actions but includes a provision permitting the Prime Minister to object, thereby requiring the court to re-examine its order. There is no clear provision empowering the courts to order an administrative agency to take affirmative action, although there is considerable argument on this issue among scholars. There is as yet no authoritative court decision.
Employment Law: Discrimination

Managers (kabu). When queried on their future hiring plans, most firms did not expect to increase the use of female managers. In addition, when asked about what steps they had taken to adjust the working environment in order to better promote women onto the managerial staff levels, only 10.9 percent reported that they were taking any steps to do so. Overall, from the results of this 1989 survey, one gets the impression that although some firms are making an effort to make better use of the talents and skills of university-educated women, these firms are in the decided minority.

Other employer responses to the EEO Law noted by Sugeno (1987) were a change in job advertisements (fewer sex-based classifications of job offers in classified sections of the newspapers), some reduction in overt sex discrimination in employee education programs, improved eligibility for company perks like company housing and loan programs, and the abolition in many companies of sex differences in the age of mandatory retirement.

One aspect of management employment that has not yet undergone any change, the job rotation system, remains an important barrier to the advancement of women university graduates. In 1985, 40 percent of companies used job rotation systems, and of these, 14.8 percent mandated transfers that required the household to move (i.e., in these cases the new job assignment was not within commuting distance from the employee’s home). Such a requirement is quite onerous to married women. In fact, it is by emphasizing this requirement that firms have steered women into the less challenging, ippansho management track (Sugeno, 1987). Even for men, the requirement to move one’s family can be burdensome for one-third of men with families elect to leave their families behind when faced with a job rotation that requires a household move (Minami, 1993). Firms will have to take family considerations into account in an unprecedented way, by allowing family members to coordinate, postpone or even refuse moves, before many women will be willing and able to flourish in the ippansho management track.

Overall, then, although there are some signs that firms are moving to improve opportunities for university-educated women, the fact that the most evident change is the spread of the two- or multi-track system suggests that up to now, this commitment has been at best half-hearted. A 1991 MITI report on women affirms the fact that progress has been slow, saying “the gap between men and women remains wide in the context of work and promotion” (Japan Labor Bulletin, August 1991, p. 5). Furthermore, in the current recession, there is some evidence that women will have an even harder time than will men in obtaining career-track employment (Japan Labor Bulletin, October 1993).

A final indictment of the effectiveness of the EEO Law in altering firm behavior comes from Hanami (1993), who reviews the law’s primary enforcement mechanism—administrative guidance. Hanami reports on the findings of the Administration Inspection Bureau of the Management and Coordination Agency of the Japanese government in its review of the effectiveness of administrative guidance regarding the EEO Law. This agency concludes in its report that administrative activity concerning female labor was “insufficient” and needed “much improvement” and that only in one percent of the firms covered by the EEO Law had in-house “promotors” been appointed to facilitate implementation of the law, despite encouragement by the Women’s Bureau (Ministry of Labor) to do so. This finding, in Hanami’s words, indicates “a failure of administrative guidance” (p. 19), and he concludes, “it is quite obvious that the law has not been effective in abolishing the discriminatory hiring practices of Japanese companies since a substantial number of them still discriminate against women in hiring and promotion” (p. 10).

Kono v. Company X et al.

C. Sexual Harassment

Kono v. Company X et al.*

(Fukuoka Sexual Harassment Case)

607 Riihi hanrei 6

(Fukuoka D. Cit., April 16, 1992)

Translated by William Hornung and Curtis J. Milhaupt

Judgment

1. Defendant’s Kanro Hatikawa and Company X are held jointly and severally liable to the Petitioner for the amount of 8,160,000 in damages and interest thereon at an annual rate of five percent.

2. The Plaintiff’s other claims are dismissed.

B. Factual Background

1. Defendant Hatikawa joined the Company on June 30, 1985, and became Chief Editor on August 27 of the same year. [Plaintiff, a female, was hired first on a part-time, trial basis and then became a full-time employee in January 1986, at the time Plaintiff entered the company, the company’s primary business consisted of publishing Campus Fukuoka, a magazine that provided information to students. The business was carried out by three full-time employees (including Defendant Hatikawa) and approximately thirty part-time student workers, referred to as "correspondents," who were responsible for writing articles concerning events at their universities. Campus Fukuoka was sold for 1,000, but most of the firm’s revenue came from advertising fees. Company X was not profitable.

2. Because the Plaintiff had majored in English at college, Defendant Hatikawa decided to put her in charge of writing an article relating to English language study for publication in the January edition of Campus Fukuoka.

3. Thereafter, it became clear that the Plaintiff could put her prior magazine editing experience to good use both with writing and editing assignments. Gradually, she was put in charge of gathering stories, writing and editing. Because business improved, in addition to working on special-edition articles for Campus Fukuoka, beginning in April she was often put in charge of writing articles for AN, a magazine about part-time jobs that the company produced under contract from Company Y.

4. One of the full-time employees left the company in September 1986, so it became necessary for the Defendant to put considerable energy into business management. As a result, the Plaintiff assumed a greater role in editing the magazines that the company produced.

At the same time, the Plaintiff also had more opportunity to go into the field to collect stories and to attend functions hosted by clients. Some time around May, she became involved with the manager of a travel agency. This individual was a friend of the Defendant’s. The travel agency was one of the company’s advertising accounts.

5. Defendant Hatikawa is a rather introverted family man. He leads a quiet private life and holds ideas about the place of women in society and the way they should act that were once “common” among people.

6. On more than a few occasions, the Plaintiff had to take care of clients who complained that Defendant Hatikawa would arrive late to appointments. He would also leave the office... while the Plaintiff and others worked overtime.

7. The Defendant was hospitalized for over a month at the end of 1986. During the Defendant’s hospitalization, Mr. Ishimaru, a Section...
The Defendant, who once considered leaving the company because he felt alienated from the decision-making process, now had his confidence restored. Moreover, he assumed responsibility over the company's primary business (editing Campus Fukuoka) and delegated work related to the production of AN, which it subcontracted from Company Y, to the Plaintiff.

From then on, major decisions were made by Shima and Defendant Heikawa.

The company, however, was still experiencing financial difficulties in December of 1987, and it was uncertain whether it would be able to pay bonuses to employees. When the Defendant met with the Plaintiff to discuss the company's financial condition, the Plaintiff informed him that another magazine was trying to hire her away from the company. Heikawa... strongly encouraged the Plaintiff to quit.

After the meeting, the Plaintiff became aware that the Defendant wanted to force her to resign from the company, and she became sensitive to everything that he did and said.

9. From then on, the Plaintiff avoided talking to the Defendant, or for business matters.

As a result, the Defendant felt that the work environment deteriorated and that it was increasingly difficult to get work done. Defendant worried that the problem would get in the way of business, and he hoped that she would quit.

10. Since February 1988, the Defendant had been reporting to Shima about the deteriorating situation in the working environment. On March 9th, the Defendant told Shima that he believed that the Plaintiff should quit. Shima responded by pointing out that the Defendant had no authority to make decisions about personnel. Shima instead suggested that he discuss the issue thoroughly with the Plaintiff and try to work things out.

The Defendant called the Plaintiff on March 10th, and demanded that she quit. He told her that she had had a relationship with the branch manager of the travel agency, and that the travel agency decided to discontinue its advertisements because she had ended the relationship. He mentioned several specific names such as Mr. Sekido, a reporter for a sports newspaper, and Mr. Hijiki, a free-lance writer, and told the Plaintiff that he knew that she had had relationships with them as well. Heikawa also alleged that prank phone calls that the company had been receiving since September 1987 were related to the Plaintiff's relationships with men. He claimed that she was disrupting the company's business and demanded that she quit.

The Plaintiff rebuffed him and argued that there were just rumors spread by the Defendant himself, and that it did not make any sense for her to quit because of the rumors. Moreover, the Plaintiff demanded that he apologize to the affected individuals.

On March 17th, the Plaintiff even appealed to Shima, asking him to order the Defendant to apologize. Shima replied that he could not force the Defendant to apologize unless it was certain that he was the source of the rumors. Shima suggested that the only way to clear the misunderstanding would be for the two of them to discuss the issue thoroughly among themselves.

The Plaintiff also asked Mr. Onumaya, the representative director of the company, to help her. However, he simply told her not to take what had happened too seriously.

Around the same time, the Plaintiff consulted with several of the company's employees and Mr. Nakagawa, an employee at a record company. Through her conversations, the Plaintiff discovered that the Defendant had told Nakagawa at a party held sometime around the end of 1987 that the Plaintiff had an affair with a sports reporter. She also discovered that the Defendant had described the Plaintiff's private life in very negative terms to a female employee who joined the company in January 1988.

[At another point in the opinion, the court found that the Defendant had told the new employee that the Plaintiff was sexually active, led a wild private life, and was better suited to work as a bar hostess/prostitute (mitu shibai) than at the firm. The court also found that the Defendant continually criticized the Plaintiff's lifestyle, and told Shima and others that a novel she had written must be a pornographic novel based on her own experiences.

The situation deteriorated further over the next few months, and other employees complained that the hostility was interfering with their ability to work. Shima's efforts to assuage Plaintiff's anxiety failed.

13. Shima reported the above-described events to the representative director and company management during the morning of May 24, 1988. After much discussion, they concluded that Shima should meet with the Plaintiff and the Defendant and discuss the matter with each separately, if they could not work out some mutual understanding, there would be no recourse but to ask one of them to resign.

That afternoon, Shima met first with the Plaintiff and asked whether there was any room for compromise. The Plaintiff continued to demand that the Defendant apologize to all those affected by the rumors. The Plaintiff also demanded that Shima confirm her side of the story by contacting people outside of the company.

In reply, Shima told her that she would be asked to leave the firm if the talks did not progress. The Plaintiff then expressed her intent to resign, whereupon Shima ended the meeting. Next, Shima told the Defendant that she had been waiting to meet with him, that the Plaintiff had offered to resign. Shima suspended the Defendant from work for three days on the assumption that both parties were to blame. Upon later consultation with the representative director, Shima decided to punish the Defendant further by reducing his bonus.

14. Thereafter, the company paid the Plaintiff's severance fee of ¥131,750, which amounted to about one-month's salary, and a ¥10,000 bonus. . . . [The Plaintiff brought this suit.]

D. Defendant Heikawa's Liability

1. Defendant Heikawa made statements both within the office and in other places connected to work that caused Plaintiff's private life and affairs. As a result, he created a situation in which it was uncomfortable for the Petitioner to work. Moreover, if the Defendant intended to create such an atmosphere, or at least had to foresee that such an atmosphere would result, because such actions degraded the Plaintiff's character and hurt her feelings, she infringed her right to work in an environment conducive to work. Thus, we must conclude that Defendant bears tort liability under Arti
Viewing the series of actions of the Defendant described above, first, there are remarks made to people within the company that make Plaintiff's private life, especially her relationships with men, seem disorderly and that are critical of her character as a working woman. Second, identifying the names of specific men with whom the Plaintiff has had relationships (especially, if such men have a connection with the company) and spreading rumors about the Plaintiff to people with whom the company does business, are acts that degrade the reputation of the Plaintiff. Some actions made fun of the Plaintiff directly about the way she chooses to live, others relate to the Plaintiff's private life, including her relationships with men. All, however, are acts that degraded the reputation of the Plaintiff as a working woman. In addition, reporting these things to Shima, a superior, as if they were true, ultimately resulted in her quitting. It must be said that these acts were against the wishes of the Plaintiff and infringed upon her dignity and other personality rights. Moreover, relations between the Defendant and the Plaintiff became severely strained after he ordered her to quit in March 1982. The work environment became so uncomfortable as to cause part-time workers to complain to Shima. These facts make it clear that the series of acts described above caused the deterioration in the work environment for the Plaintiff. We conclude that the Defendant easily could have foreseen that his actions were likely to cause this result.

Of course, the words and actions of the Defendant are not solely responsible for the deterioration in the work environment. Conscious of her own abilities and the lack of responsibility that the Defendant felt toward his job, the Plaintiff thought of Defendant Heikawa as a rival. The fact that she hoped to be at the center of the business and inserted herself in a position where she would be able to cultivate relationships with people with whom the company did business, as well as her own attitude, behavior, and temperament . . . contributed greatly to the conflict between them. In deciding the matter before this Court, we must fully consider these additional circumstances. It is possible that damaging remarks were exchanged between the Plaintiff and Defendant Heikawa. Nevertheless, considering the position of working women in modern society, and the prevailing attitudes toward women held by men who occupy management-level positions, we must conclude in this case that it was wrongful to criticize the Plaintiff's private life, including her relationships with men, as a means to resolve their conflict and to force her out of the company.

Considering the series of acts described above, Defendant Heikawa cannot escape tort liability for his actions against the Plaintiff.

E. Defendant Corporation's Liability

1. Employer liability (respondeat superior) for the acts of defendant Heikawa. As set forth above in Section D, the series of acts directed against the Plaintiff were made by a person who stood in the position of supervisor at work, and such acts were related, in whole or in part, to the job. The series of acts involved the Plaintiff, Defendant Heikawa's supervisor, employees, and part-time workers who worked under Heikawa, and employees of the company's clients. We find that the series of acts were carried out "in connection with the execution of business." As Heikawa's employer, the Company is liable in tort under the theory of respondent superior [attributio actus].

2. Employer liability (respondeat superior) for the acts of Managing Director Shima and others. We consider below the Plaintiff's assertion that the company is liable under the theory of respondent superior because the actions of Shima and others, combined with the acts of Heikawa, give rise to joint tort liability.

(c) Employees have duties that arise out of the common social understanding of the relationship between employer and employee. An employer owes a duty of care to employees with respect to the work environment so that the lives and health of its employees are not damaged in the process of providing labor. In addition, it is also understood that there is a duty to maintain an environment conducive to work for the employees, by preventing occurrences that infringe on employees' dignity or pose a serious obstacle to the provision of labor, and by responding appropriately to such occurrences. Where a person in a supervisory position over employees neglects this duty of care, that person commits a tort against the employee, and the employer also bears tort liability under Article 715 of the Civil Code.

As we determined above, Managing Director Shima was in fact the person with ultimate responsibility within the company even though he did not have representative authority, the Defendant Representative Director is, as the name implies, a representative director. Both were in supervisory positions with respect to the Plaintiff, so it can thus be said that both have a duty to favorably regulate the work environment.

(a) The facts indicate that Shima and the Representative Director neglected their duty to regulate the work environment. Moreover, despite the fact that the Constitution and related statutes and ordinances require men and women to be treated equally in employment relations, [Shima's and the Representative Director's] attempts to adjust employment relations consisted principally of requiring the Plaintiff, who is female, to make concessions and sacrifices. We find this to be tortious conduct, and accordingly also find the company liable for these tortious acts.

F. Petitioner's Damages

1. The Plaintiff came into conflict with Defendant Heikawa in the office because he was judgmental about her private life, including her relationships with men, and spread rumors about her relationships with men. She was asked to quit, and ultimately things reached the point where she did quit. Spreading rumors and criticism regarding a working woman's private life, including her relationships with members of the opposite sex or private sexual matters, and making someone feel like an outcast in the office, causes emotional suffering, creates anxiety and reduces a person's desire to work. In the end, it invites the consequence that the person will lose their job. This case followed a similar pattern. The Plaintiff lost a job toward which she was devoted and enthusiastic. In light of the fact that this case involves personality rights such as respect for women and sexual equality, we cannot view lightly the degree of illegality [of Defendants' conduct]. We cannot imagine that the Plaintiff suffered considerable mental anguish as a result of the Defendants' actions.

On the other hand, after Defendant Heikawa ordered her to quit, the Plaintiff became angry and demanded that Heikawa and others apologize to her and to those with whom they alleged she had relationships. In addition, she maintained a defiant attitude and failed to show any willingness to discuss matters with Respondent Heikawa calmly. Moreover, she continued to question Respondent Heikawa's ability relative to her own over each and every thing that she did. She also fought hard to be put in charge of editing work at the Company and thought of Respondent Heikawa as a rival. She herself decided to network with part-time workers, clients and other people associated with the Company and created factions within the company [for strategic reasons]. On occasion, she would attack Respondent Heikawa. As such, we find that the Petitioner played a part in escalating the conflict between herself and Heikawa. Finally, the Petitioner herself disclosed some of the information regarding her relationships with members of the opposite sex.

2. Considering the circumstances, as well as the various facts recognized above, we find that ¥1,500,000 is an appropriate amount of damages to compensate the Petitioner for her emotional suffering. [The court also included ¥100,000 for attorneys' fees.]
THE HIV LITIGATION AND ITS SETTLEMENT

IN JAPAN

Awaji Takehisa

Translation by Keisuke Mark Abe

Abstract: As early as 1983, Japan's Health and Welfare Ministry had reason to know that the use of unheated blood products by hemophiliacs was infecting them with HIV, the AIDS virus. Although heated—and safe—blood products were already available from the United States, government approval in Japan was deliberately delayed for almost three years while local pharmaceutical companies developed the products. By the time the unheated blood products were all withdrawn from the market, many of Japan's hemophiliacs had contracted HIV. A number of them, or their survivors, sued the government and the pharmaceutical companies. At the end of the consolidated trials, but before handing down their opinions, the two District Courts handling the cases made proposals for settlement that were accepted by the parties. The courts' reasons for recommending settlement were that time was of the essence in order to get relief to those still suffering and that remedies unavailable via the courts were possible through settlement.

I. INTRODUCTION

(1) As is widely known, a truly tragic incident occurred in Japan when unheated concentrated blood products containing the human immunodeficiency virus (HIV) were imported from the United States and administered by transfusion to hemophiliacs. This was termed the HIV-,

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1 Translated from Awaji Takehisa, HIV sasih to wakai, 1093 JURIBUTO 52 (1996). Notes, unless otherwise indicated, are parenthetical or other information contained in the original text. Citations in the original converted to Pacific Rim Law & Policy Journal style where possible.
2 Professor of Law, St. Paul's University. The author wishes to thank Suzuki Toshihiro and other members of counsel for the plaintiffs in the Tokyo HIV litigation for providing him with the materials including their trial briefs. [Postscript in the original article.]
3 Ph.D. Candidate, Graduate School of Law and Politics, LL.B., LL.M. (University of Tokyo); LL.M. (Harvard). The translator is not related in any way to Abe Takehisa, former head of the Health and Welfare Ministry's AIDS research team. See infra note 25 and accompanying text.
4 It is also known as the AIDS virus.
5 This is the so-called third route of HIV transmission. In addition, it has turned out that there is a fourth route, that is, where contaminated blood products are administered to patients other than hemophiliacs, such as those with liver disease. [Translator's note: According to the Japanese media's terminology, the first two routes of HIV transmission are through sexual contact and prenatal infection. See, e.g., Yamazumi Hirozumi, Officials Must Account for Their Actions, DAILY YOMURI, Oct. 30, 1996, at 6.]
AIDS-contaminated blood products incident. Of Japan's approximately 5,000 hemophiliacs, about forty percent or between 1,800 and 2,000 people are said to be infected with HIV. One-third of them have already experienced AIDS symptoms. Of these, two-thirds are already dead. The HIV-, or AIDS-contaminated blood products litigation, began when some of these victims filed suit against the five pharmaceutical firms that had produced and sold the [contaminated] blood products, and against the Japanese government, which is responsible for regulating pharmaceuticals. From the companies, the plaintiffs sought compensation in contract for breach of the duty to give careful consideration to the safety of their products, and in tort under the Civil Code. From the government, the plaintiffs sought to recover damages on the basis of negligence.

The HIV litigation started in 1989. The first lawsuit was filed in May of that year, at Civil Section No. 18, Osaka District Court. The first lawsuit in Tokyo was filed in October at Civil Section No. 15, Tokyo District Court. This came about through the devoted efforts of attorneys and supporters who helped the hemophiliacs with HIV at a time when it was extremely difficult to do so because of prejudice and discrimination against people with AIDS. Subsequently, as the facts were brought to light in court and the legal issues were clarified, the plaintiffs gradually gained the support of public opinion, partly due to reports in the news media. Under these circumstances, the consolidated trial in Tokyo ended in March 1995, and the consolidated trial in Osaka, in July. On October 6, 1995, while the parties were awaiting decision, each court made an initial proposal for out-of-court settlement and issued a “Statement of Opinion on the Recommended Settlement.” On March 7, 1996, the courts presented their second proposals, suggesting ways to resolve matters not mentioned in the first proposals. On March 29, 1996, the parties accepted the courts’ proposals.

(2) Part II of this article outlines the development of the HIV litigation in Japan. Part III introduces the contents of the court proposals and Statements of Opinion and analyzes their legal significance. Part IV concludes the article with an examination of the contents of the final settlement and an assessment of this settlement as a whole.

There have been several valuable documents written by journalists regarding the course of the HIV litigation. At the present stage, however, since the facts (“the truth”) are still under investigation, led by the Diet and by the media, and since the courts did not make the findings of fact that would accompany a court opinion, there are a number of points that it is difficult to describe clearly. I hope that the determination of the facts will be advanced hereafter by the efforts of the persons concerned. In this article, I will state the facts only to the extent necessary to legal evaluation.

II. THE DEVELOPMENT OF THE [HIV] INCIDENT

(1) I will begin by reviewing how this all happened. Then, I will describe how the danger from the unheated blood products was discovered, with special emphasis on the situation in the United States at that time, and give a sketch of the measures taken—and not taken—in Japan under the

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5 The ministry in charge of this matter is the Health and Welfare Ministry.
6 35311 § 709
7 Kokka bishikō [National Compensation Act], Law No. 125 of 1947, § 1(1). In addition to this civil litigation, criminal complaints have been filed with prosecutors against the medical personnel, executives of pharmaceutical firms, and bureaucrats who were involved in this matter. It is possible that the HIV criminal litigation will soon start. [Translator's note: Between September and October 1996, prosecutors indicted Abe Takeshi, infra note 25, three former presidents of Green Cross Corp., and Matsuzuma Akihito, former director of the Biologics and Antibiotics Division (seibutsu setai kachō) of the Health and Welfare Ministry, for professional negligence resulting in death, a criminal offense punishable by up to five years in jail. See 3 Former Presidents of Green Cross Indicted, DAILY YOMURI, Oct. 10, 1996, at 2; DAILY YOMURI, supra note 5, at 6. Prosecutors claim that Matsuzuma failed to instruct doctors to stop using unheated blood products while he was director from July 1984 to June 1986, although he was aware of their potential to transmit HIV. See Matsuzuma Indictment Expected in Unheated Blood Product Scandal, DAILY YOMURI, Oct. 4, 1996, at 2. Prosecutors decided not to seek criminal charges against Gunji Amano, infra note 24, Matsuzuma’s predecessor at the Division. Id.]
8 The NHK [national public television] report was particularly outstanding.
9 Four suits had been filed at the Tokyo District Court.
10 Ten suits had been filed at the Osaka District Court.
12 This is because the lawsuits ended in settlement.
13 In addition to SAKURAI, supra note [13], and HIROKAWA, supra note [13], I also rely on Sugiyama Shinichi, HIV sosho: waki o sono go no tenbô, 498 HOKAIKA SEMINAR 4 (1996), the plaintiffs’ trial briefs, the defendant government’s trial briefs, the defendant pharmaceutical firms’ trial briefs, and articles that appeared in ASAHII SHIMBUN, YOMURI SHIMBUN, and MAIDENRI SHIMBUN. For the sake of simplicity, I will generally not cite statements concerning facts generally accepted in light of several written materials and press reports. I will, however, quote parts that I think particularly essential to the discussion. [Note 2 in the original article.]
circumstances. This should furnish the factual basis for making a judgment concerning whether the defendant pharmaceutical firms and the government were negligent or not.

(2) Hemophilia is a disease characterized by a congenital lack of a coagulation factor in blood plasma and a consequent difficulty in stopping bleeding. The disease is carried by sex-linked inheritance, and its symptoms appear in males. In the past, the only treatment for hemophilia was to transfuse whole blood, just as it was taken from donors, or to transfuse blood plasma. But following the authorization in 1967 of Blood Product I, created by the Cohn [ethanol] fractionation technique, cryoprecipitate ("cryo"), which is made by extracting Factor VIII from plasma in fresh blood, was approved in 1970 under the Pharmaceutical Affairs Act for purposes of treating type A hemophiliacs, and was put in use. Ordinarily, cryo is made from one or two donors’ blood.

Subsequently, pharmaceutical firms started producing blood products that densely concentrated these blood-clotting factors. They were approved by the Japanese government in 1972 as to Factor IX and in 1978 as to Factor VIII. Because concentrated blood products were relatively easy to use, and because the pharmaceutical companies actively promoted their sale, it became common for hemophiliacs to self-inject them at home. Further, in February 1983, the government allowed coverage under the national health insurance of such home treatment. As a result, concentrated blood products came to be used in large quantities.

However, these blood products were made from blood collected from paid [donors] in the United States. In the manufacturing process, an immense quantity of blood plasma, from as many as 2,000 to 25,000 donors, was pooled in one container. Because there were individuals infected with HIV among these numerous donors, the entire pool of plasma would become contaminated with HIV. And because these contaminated blood products were imported from the United States and used by many hemophiliacs, it led to the disaster of as many as forty percent of Japanese hemophiliacs’ contracting HIV.

(3) Between June and August of 1981, the American Centers for Disease Control (CDC) reported that Pneumocystis carinii pneumonia and Kaposi’s sarcoma, both of which had been extremely rare in the United States, were prevalent among homosexual men, and issued an epidemiological opinion suggesting that immune deficiency related to some unknown factor common to these patients might be the common underlying medical condition for these diseases. In July 1982, the CDC reported in the Morbidity and Mortality Weekly Report (MMWR) that three hemophiliacs, who had been using unheated concentrated blood products, developed Pneumocystis carinii pneumonia, and that two of them suffered from cellular immune deficiency. The report explained that, although the cause of this immune deficiency was not clear, the circumstances suggested that they had become infected through the use of blood products. This was the first time that AIDS cases were reported. In December of that year, the MMWR reported four more cases and one suspected case of AIDS in hemophiliacs, with the comment that the number of such cases was increasing and that AIDS might put hemophiliacs in serious peril.

In March 1983, the CDC warned in the MMWR that it appeared that hemophiliacs were contracting AIDS from blood or blood products, and made several recommendations along with other agencies. Among them were recommendations to avoid blood donations from members of high-risk groups, and to conduct research to develop safer products for hemophiliacs. In the same month, Travenol Ltd., which had developed a heat treatment method to cope with the threat of hepatitis transmission, was licensed to start manufacturing heated blood products. In May of that year, the Food and Drug Administration (FDA) recommended this to other pharmaceutical firms, based on the determination that it would similarly prevent HIV transmission. In June [1983], Travenol informed the director of the Biologics and Antibiotics Division ("B.A.D.") of Japan’s Health and Welfare Ministry that it had voluntarily recalled certain of its products from the American market, because one of its donors had shown symptoms indicating AIDS shortly after donating blood used for plasma. At that time,

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16 Type A hemophiliacs lack a substance known as Factor VIII, whereas type B hemophiliacs lack Factor IX.
17 At present, it is impossible to cure hemophilia.
18 Cryo is made by freezing or freeze-drying the precipitate produced when blood plasma is frozen, then slowly melted down.
20 Cryo does not contain Factor IX.
21 These products were not heat treated.
22 Among them were a number of drug addicts and homosexual men.
23 Now Baxter International Inc.
24 The report from Travenol went to Gunji Atsuki, then director of the Biologics and Antibiotics Division. The Division was in charge of matters related to blood and blood products at that time.
other products made from this same blood plasma [pool] had already been imported into Japan. Because they had not yet been supplied to the market, steps were taken to ban shipment.

(4) In Japan, immediately after the director of B.A.D. received the Travenol report that it had recalled blood products, an AIDS research team was organized within the Health and Welfare Ministry.\(^{25}\) It is said that the B.A.D. director did not inform the research team that Travenol had pulled [certain of] its blood products off the market.

In July 1983, after a hemophiliac developed AIDS symptoms and died at the Teikyō University Hospital,\(^{26}\) there was a discussion at the research team’s second meeting on whether they should recognize this as a case of AIDS, but they decided not to do so after all.\(^{27}\) Subsequently, in May 1985, two months after the first Japanese case of AIDS was officially announced,\(^{28}\) the research team officially recognized that the hemophiliac [in the 1983 case] had died of AIDS. While the circumstances surrounding the diagnosis of the first officially-recognized AIDS patient are currently in controversy,\(^{29}\) people wonder why the research team only belatedly acknowledged the hemophiliac at the Teikyō University Hospital as an AIDS patient, and suspect that they tried to conceal the existence of AIDS.

Criticism behind this suspicion is that, if they had recognized the hemophiliac as the first AIDS patient in July 1983, Japan would have started taking countermeasures to cope with AIDS from that point, and heated blood products for hemophiliacs would have been considered in a totally different light.\(^{30}\)

Is it not true that the B.A.D. director proposed at the AIDS research team’s meeting in July 1983 that heated blood products be imported on an emergency basis from the United States? Why did he suddenly change his position in a week? As to these points, huge doubts remain. In an internal document which was “discovered” at the Health and Welfare Ministry in January 1996, there are written descriptions of the B.A.D. director’s perception of the danger of, and his ideas of how to cope with, HIV transmission through unheated blood products as of July 1983. According to a document dated July 4, 1983, measures to be taken were as follows:

(i) The ministry will order the AIDS research team to recommend the use of heated blood products.

(ii) The ministry will direct Travenol Ltd., an American corporation, to file an application at once for urgent approval of its heated blood products in Japan.

(iii) The ministry will direct businesses by means of administrative guidance not to handle unheated blood products made from blood collected in the United States.

He reached a different conclusion in a document of July 11, however, stating that emergency imports of heated blood products through extralegal measures were undesirable, and that the ministry would not put a total ban on unheated blood products from the United States. People suspect that something must have happened during this [one-week] period. In the AIDS Survey Report released by a Health and Welfare Ministry survey team on March 19, 1996, this director, in response to interrogation, answered that, in his recollection, he had never considered emergency imports [of heated blood products], that the document [of July 4, 1983,] was a discussion draft created only to form a basis for the investigation, but that it did reflect the Biologics and Antibiotics Division’s atmosphere at the time quite well.

Opinions of the members of the research team at the time are divided on the issue of whether there was a proposal for emergency imports.\(^{31}\) While the facts are somewhat ambiguous, it can be inferred that the Biologics and Antibiotics Division already knew, with considerable certainty, the risk of HIV transmission from that period. As for imports of heated blood products at an early stage, it is reported that, although an official at B.A.D. again made such a proposal at the research team’s fourth meeting in October 1983, Abe Takeshi, the head of the research team, furiously objected.\(^{32}\)

At the research team’s third meeting in August 1983, there was a discussion of switching [from unheated blood products] to cryo, and

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\(^{25}\) The head of this research team was Abe Takeshi, former vice president of Teikyō University.

\(^{26}\) [Team leader] Abe was the doctor in charge.

\(^{27}\) Shortly thereafter, an American AIDS specialist came to Japan and determined that this patient had died of AIDS. Nevertheless, the research team did not rectify its conclusion at that time.

\(^{28}\) The patient was a homosexual man living in the United States who had returned to Japan for a short visit.

\(^{29}\) It is doubted that he had yet developed AIDS symptoms. YOMIURI SHIMBUN, May 26, 1996.

\(^{30}\) As a consequence, HIV transmission to hemophiliacs could likely have been minimized.

\(^{31}\) ASASHIBUN, Mar. 20, 1996.

\(^{32}\) YOMIURI SHIMBUN, Feb. 26, 1996.
conflicting opinions were expressed. In order to examine this issue, a subcommittee on blood products was set up under the research team. Switching to cryo, like emergency imports of heated blood products, would have been a way to prevent HIV transmission to hemophiliacs. The subcommittee, however, at its first meeting in September 1983, decided not to switch to cryo and submitted a report to that effect in March 1984. The AIDS research team authorized the continued use of unheated blood products until clinical tests on heated blood products were fully performed. It is suspected that Abe was influential in leading the research team to such a conclusion, and that he considered the interests of a domestic pharmaceutical firm with which he had a connection. Thereafter, the use of unheated blood products mushroomed, partly because home use had been brought within the coverage of national health insurance and partly because the companies vigorously sought to increase sales by discounting the price.

In September 1984, it was discovered that twenty-three of Abe’s patients were HIV-positive. Abe had sent blood samples of forty-eight of his patients to the United States for HIV testing. This fact was not made public, however, and the number of hemophiliacs with HIV quietly grew with the use of unheated blood products.

(5) As mentioned above, in March 1985, a homosexual man was officially recognized as the first AIDS patient in Japan, and the case of the hemophiliac who had died at the Teikyō University Hospital was subsequently recognized in May of that year. Prior to this, clinical tests of heated blood products had been conducted since February 1984. By May 1985, the domestic firms had developed the heat treatment technology, so applications for approval of heated blood products were filed, and the approvals were given for Factor VIII in July of that year. The government licensed the products of the foreign and domestic firms at exactly the same time. This was two years and four months later than the United States’ action in this matter. In December 1985, heated blood products for Factor IX were also licensed.

Pharmaceutical firms, however, did not recall [already distributed] unheated blood products promptly. Nor did the Health and Welfare Ministry direct them to do so. Consequently, even after heated blood products were introduced to the market, unheated blood products already shipped were put to use and new shipments of unheated blood products were made. With this, the disaster spread.

(6) As stated above, following these events, the HIV litigation was commenced in 1989, the trials ended in 1995, and the courts presented their proposals for settlement in October 1995 and in March 1996. I will now turn to the contents of the court proposals and examine their legal significance.


A. The Courts’ First Proposals for Settlement, “Statements of Opinion,” And Their Legal Significance

(1) On October 6, 1995, the Tokyo and Osaka District Courts each presented to the parties proposals for out-of-court settlement and “Statements of Opinion on the Recommended Settlements” (“Statements of Opinion”). The proposals were identical, and the contents of the “Statements of Opinion,” too, were about the same in principle.

In summary, the proposals were as follows:

(a) (i) The defendants shall jointly and severally pay ¥45,000,000 [approximately $360,000] per person as a lump sum settlement to compensate for the injuries of those infected with HIV to all claimants alike, including the plaintiffs in this case.

(ii) The defendant pharmaceutical firms shall pay sixty percent of the

33 It is reported that Abe vehemently opposed this proposal. YOMIGI SHIBUN, Feb. 26, 1996.
34 Kazama Mutsumi, then Associate Professor, Teikyō University, a former student of Abe, headed the unit. Of eleven members of this subcommittee, eight were hemophilia specialists. There was no, or at least there were very few, specialists in hematology or virology. See SAKURAI, supra note [13], at 40.
35 Abe performed the tests as supervising doctor for the five pharmaceutical firms involved.
36 Green Cross was the largest.
37 It is said that the domestic firms were later in developing this technology than the foreign firms.
38 Foreign firms filed their applications in April 1985; Green Cross, at the end of May.
39 It is reported that it took Green Cross two years and nine months after the approval of heated blood products in July 1985 to finish recalling all its unheated blood products. ASAHI SHIBUN, Mar. 1, 1996, (Evening ed.).
40 The statements of opinion differ in their level of detail.
41 Those who have already developed AIDS and those who have died of AIDS are included.
settlement amount, and the government shall pay forty percent.

(iii) Of the amounts that the plaintiffs have received prior to this settlement from the [Friendship and Welfare] Foundation, fifty percent of the total of the special allowances, the bereavement gifts, and the bereavement lump sums, shall be subtracted from the amounts they are to receive under this settlement.

(iv) This settlement applies to those who have filed suit, but those who have yet to prove that they became infected with HIV through the use of unheated blood products shall be subject to this settlement upon producing such proof.

(v) The parties shall continue negotiations with respect to the treatment [of the victims] who have not yet filed suit.

(vi) The parties shall also continue negotiations with respect to the defrayal of litigation costs, including attorneys’ fees and so forth.

(b) The parties shall also continue negotiations with respect to the so-called permanent measures expected to complement the lump sum settlement stated in (a) (i).

2) Next, I will look into the “Statement of Opinion” issued by the Tokyo District Court with its proposal for settlement. In brief, its contents were as follows:

(a) To begin with, the court stated that, in light of the extraordinary nature of these cases, it was highly desirable that, for the benefit of both parties and particularly for purposes of providing immediate relief to the HIV-infected plaintiffs, the parties resolve their dispute through settlement, in a speedy and comprehensive manner.

(b) Then, the court pointed out four distinctive characteristics of these cases:

(i) The plaintiffs became infected with HIV through the continuous use of unheated concentrated blood products, “pursuant to their doctors’ advice and sincerely believing the products to be an effective medical treatment.” Yet the majority of the plaintiffs had the misfortune to develop serious AIDS symptoms; further, due to the delay in notification of HIV infection, secondary infection took place as well.

(ii) Individuals with AIDS develop opportunistic infections, malignant tumors, and so forth, and ultimately die. Also, the reality is that they are subject to discrimination from society.

(iii) The number of Japanese hemophiliacs infected with HIV through concentrated blood products is said to be about 1,800 to 2,000. Over the past ten or so years following the first confirmed case of AIDS, the number of those suffering from AIDS has increased every year.

(iv) “This court believes that it is totally inexcusable from a social as well as a humanitarian perspective that the plaintiffs, born hemophiliacs through no fault of their own in the first place, have had to experience this fatal and excruciating disease, the agony of which can only be described as heartbreaking, just because they, in accordance with their physicians’ advice, and sincerely believing the products to be an effective treatment, used unheated concentrated blood products accidentally contaminated with HIV.”

(c) Furthermore, the court discussed the defendants’ responsibility as follows:

(i) Manufacturers and dealers in pharmaceutical products have a duty to supply consumers with safe products. The Pharmaceutical Affairs Act provides that one may not sell, or manufacture or import with the intent to sell, pharmaceutical products contaminated with, or possibly contaminated with, pathogenic microorganisms.42

(ii) While the Health and Welfare Minister had an official duty
to assure the safety of pharmaceutical products even under the prior Pharmaceutical Affairs Act, this duty has been fortified by new legislation. The amended Pharmaceutical Affairs Act clearly states that one of its purposes is to “ensure the safety of pharmaceutical products,” and that, when authorizing the manufacture of a pharmaceutical product, the Health and Welfare Ministry should review its “side effects.” Moreover, in order to prevent harm to the public health due to [defective] pharmaceutical products from occurring or spreading, the procedure for emergency orders has been newly established. It follows that the safety of pharmaceutical products is now one of the subjects that the Health and Welfare Minister should give utmost consideration in monitoring pharmaceutical affairs. Thus, the Health and Welfare Minister has a responsibility to exercise his or her powers to the maximum to ensure the safety of pharmaceutical products, taking steps to make sure that no products become contaminated with pathogenic microorganisms, and that no products contaminated with pathogenic microorganisms are manufactured or sold in Japan. [The Minister must] protect the lives and health of the people from the side effects of pharmaceutical products and from defective pharmaceutical products.

(iii) Because the blood products that the defendant firms were manufacturing and selling were made by refining pooled blood plasma containing a great number of people’s blood, and because the main raw material for the products was blood purchased in the United States, it was pointed out [from the beginning] that impurities such as viruses could be introduced in the process. As a matter of fact, many of those who were administered the defendant firms’ products actually became infected with hepatitis, apparently because of the hepatitis virus in the products. On the other hand, it was made clear by the [U.S.] Public Health Service (PHS) and the Centers for Disease Control (CDC) that, since around July 1982, a syndrome later referred to as AIDS had appeared in type A hemophiliacs in the United States. Thereafter, as the number of such cases increased, it was determined that it was likely that a virus, transmitted through blood or blood products, was causing the disease; further, it was hypothesized that there were many people infected with the virus who had not yet developed the symptoms. Also, it was apparent that AIDS was a disease with a high mortality rate. Since early in 1983, the United States government issued numerous recommendations about measures to protect hemophiliacs from AIDS, among which was a suggestion to reject blood donors belonging to high-risk groups.

[The court] finds that the director of the Biologics and Antibiotics Division at the Health and Welfare Ministry knew the foregoing situation in the United States, for he had started collecting information on AIDS and hemophilia around the beginning of 1983. In addition, [he knew] from Baxter’s report that, in June or July of that year, the company had voluntarily recalled products containing blood plasma from a donor suspected of suffering from AIDS. By then, the director had a strong suspicion that the cause of AIDS was a virus transmitted through blood or blood products. The AIDS research team at the Health and Welfare Ministry, too, was discussing the matter on the assumption that it was likely that AIDS was an infectious disease caused by a virus. There is some evidence of a proposal made by the director at the research team’s second meeting in July 1983 that [heated blood products] be immediately imported. Moreover, around August of that year, when the CDC specialist diagnosed the Teikyō University Hospital case as AIDS, it became clear that there had been a hemophiliac suffering from AIDS in Japan. As a purely scientific matter, the cause of AIDS had not been established at that time and the AIDS virus had yet to be identified. However, considering the results of the studies conducted by the governmental agencies of the United States and the professional opinions based on those results, the fact that AIDS was brought on by a virus transmitted through blood or blood
products was, at least with regard to AIDS in hemophiliacs, becoming common knowledge among scientists.

(iv) The defendant pharmaceutical firms, "even under such circumstances, continued to sell their unheated blood products until they were licensed to manufacture and actually started the sale of heated blood products. Even after they had begun to sell heated blood products, they did not completely recall all unheated products, so some hospitals administered the unheated blood products [to patients] as before."

Under these circumstances, it must be said that the Health and Welfare Minister "should have known that hemophiliacs in Japan were exposed to the risk of contracting AIDS due to a virus transmitted through blood products. Furthermore, since it had been demonstrated that, once an individual developed AIDS, the mortality rate was extremely high, it was desirable that the Minister would take steps to prevent HIV transmission to hemophiliacs in Japan, such as giving ample information concerning the risk to the relevant agencies, institutions, and to hemophiliacs themselves, taking emergency measures to secure alternative blood products by enhancing the domestic supply of concentrated blood products or cryo made from blood donated in Japan, or by directing imports of, or accelerating the approval of, heated blood products, and, by exercising the power to issue emergency orders, as mentioned above, suspending the sale of unheated blood products made from blood plasma collected in the United States." However, Health and Welfare officials "did not take any of these meaningful measures, and it is difficult to deny that this delay in taking action resulted in the spread of a tragic injury, HIV transmission to hemophiliacs in Japan."

(v) Such being the case, [the court] believes that the defendant pharmaceutical firms should be primarily responsible for making reparation for losses described in (b), but that the defendant government, together with the pharmaceutical firms, should also be responsible for urgently compensating plaintiffs for the terrible injuries caused by [HIV] transmission.

(d) Finally, the court emphasized the necessity by all means of resolving the dispute as soon as possible through settlement, stating that it was essential that those infected with HIV, including the plaintiffs, be quickly and comprehensively compensated for their losses through a settlement that uniformly and impartially remedied the situation of all these HIV victims.

(3) How should we evaluate the courts' first proposals for settlement and "Statements of Opinion" just described? The lawsuits actually terminated in settlement without judgments, as the courts had suggested. Accordingly, as an official matter, there are no judicial decrees demonstrating how the courts determined the liability of the corporations and the government. Even if this was the only way to work things out in these particular cases, it is necessary in such serious cases that we clarify the defendants' legal responsibility both for the benefit of the victims, who suffered grave losses, and to make sure that such events will never be repeated.

As a matter of fact, if we read between the lines, it seems reasonable to suppose that the courts' determination of the defendants' liability was made clear in the "Statements of Opinion" regarding the recommended settlement.48

First, since passages concerning the defendants' responsibility in the "Statements of Opinion" were structured in a way that is used by the courts in officially determining legal responsibility, they could be easily converted into a judicial decree if they were put into a proper format and elaborated.49

Secondly, although the pharmaceutical firms' legal responsibility was discussed only in rather terse fashion in the "Statements of Opinion" probably because it was so obvious [that they were liable for the plaintiffs' losses], their legal duty, a prerequisite for holding them liable, was specified in (c) (i), foreseeability, which is one of the elements of negligence.50

47 In light of the existence of so many victims and the severe nature of the injuries, it seems fair to say that resolving the dispute through out-of-court settlement was the only realistic solution.
48 See Iizuka Tomoyuki & Ito Toshikatsu, HIV sosh: wa kai kanka wo do miruka, [492] HOGAKU SEMINAR 17 (1995). [Note 3 is in the original article.]
49 Of course, it would be necessary that phrases like "has a responsibility to" (sekimu go aru) be replaced with [more formal language] like "has a duty to" (go aru).
50 The courts cite Yukijihō § 56(6), but in any case, it goes without saying that there is a duty of care for the safety of others under ordinary tort law. [Mino § 709.]
of unheated blood products, for which the ministry's regulatory power is a prerequisite. Further, it was possible to supply hemophiliacs with the substitutes for unheated blood products that they should have been provided, by switching to cryo or by importing heated blood products from the United States immediately. So the injuries were avoidable. It is this aspect that the "Statements of Opinion" pointed out, and it seems proper as a legal judgment as well.

Some take the phrase "transcending the dispute over the existence of legal responsibility," in the section entitled "The Proposal for Resolution through Settlement," as a basis for arguing that the "Statements of Opinion" do not presuppose the defendants' legal responsibility. It should be noted, however, that the courts did not say, "transcending legal responsibility." By definition, parties can come to a settlement only by abandoning a dispute between them. So considering the nature of the "Statements of Opinion," which recommended that the parties settle, it was instead natural that the courts used the phrase "transcending the dispute over the existence of legal responsibility."

B. The Courts' Second Proposals for Settlement and "Statements of Opinion"

(1) On March 7, 1996, the Tokyo and Osaka District Courts revealed their second proposals for settlement along with "Statements of Opinion on the Second Proposals for Settlement" ("Second Statements of Opinion"). The second proposals dealt with issues other than the lump sum settlement, namely, supplementary relief not discussed in the first proposals such as permanent measures, the treatment of those who had not yet filed suit, and so forth.

In summary, their proposals were as follows:

(a) Beneficiaries of the Settlement.

(i) This settlement shall cover the plaintiffs in the first through fourth lawsuits.

(ii) After the parties [in the first through fourth lawsuits] settle,
the courts will promptly examine the evidence concerning the fact of HIV infection through the use of unheated blood products as to the plaintiffs in the fifth through eighth lawsuits, and will expand the scope of the settlement to them.

(iii) For those infected but yet to sue, and for their survivors, the courts will await the commencement of their actions, then examine the evidence concerning the fact of HIV infection through the use of unheated blood products, and will expand the scope of the settlement to them.

(b) Health Maintenance Allowances.

(i) The defendant government shall continue to pay health maintenance costs as before to those who are infected with HIV but have not yet developed AIDS symptoms, pursuant to the “Guidelines for Implementing Research Activities for the Purpose of Contributing to Prevention of Development of AIDS in Those Who Became Infected with HIV through Blood Products,” and shall make every effort to amplify such payment.

(ii) Following the settlement, the defendant government and the pharmaceutical firms shall make monthly payments of ¥150,000 [about $1,200] per person to all those who became infected with HIV through the use of unheated concentrated blood products and have developed AIDS. The defendant government's share of such payment shall be forty percent. The defendant government shall handle this matter within the framework of the Public Finance Act.

(c) Attorneys’ Fees (omitted).

(d) Apportionment of the Defendant Pharmaceutical Firms’ Share.

[Each of the defendant pharmaceutical firms shall pay] the pro rata amount calculated on the basis of its share as of 1983 in the unheated blood products market in Japan.

(e) The Friendship and Welfare Foundation’s Relief Project.

(i) The Friendship and Welfare Foundation’s relief project for those infected with HIV shall be continued for the time being following this settlement; however, [the persons concerned] shall study terminating the project, with a goal of about the year 2001.

(ii) Following the settlement, the defendant government shall bear forty percent of the expenses of this relief project.

(iii) Amounts received by a claimant from the Friendship and Welfare Foundation after this settlement has been reached shall be subject to offsetting, so the entire amount shall be subtracted from the amount of the lump sum settlement.

(f) Other Permanent Measures.

The defendant government shall continue negotiations with those infected with HIV including the plaintiffs, hear their opinions, and diligently strive to take appropriate measures with respect to medical care for HIV victims, and related issues, such as setting up an HIV research and treatment center, making the selected key hospitals ready for AIDS patients, designating more key hospitals, making the national health insurance fully applicable to hospital charges for all types of wards, reimbursing the medical expenses of the victims of secondary and tertiary infection, and recognizing individuals with HIV as physically disabled.

For victims of secondary infection, the courts will examine the evidence concerning how each became infected.

For victims of secondary and tertiary infection, the courts will examine the evidence concerning how each became infected.

This is a provisional title.

The victims of secondary and tertiary infection are also included.

Zaiselhō [Public Finance Act], Law No. 34 of 1947.

I.e., the Health and Welfare Ministry.

[Translator’s note: The original text says “sagoku beddo no kaishō,” which literally means “to do away with beds for which extra charges apply.”]
(2) The contents of the “Second Statement of Opinion” issued by the Osaka District Court with its second proposals for settlement were as follows:

(i) To start with, the “Second Statement of Opinion” mentioned the parties’ discussions and efforts toward settlement following the courts’ first proposals. It indicated that the court was convinced that, in light of the pathetic situation of the victims and their families that the court had had a chance to observe during the negotiation process, there was no way to resolve this dispute other than through settlement, which should make early and comprehensive relief available to all those infected with HIV, regardless of which brand of product they had used or when they had become infected.

(ii) Next, the court pointed out that the settlement proposals were intended to relieve the victims within the time constraint of early relief by settling their claims in the form of damages in tort, and that, for this reason, there were limitations in terms of encompassing particular welfare measures in various areas. The court recognized that it would be impossible to solve all the problems conclusively in this settlement, especially with regard to the arrangement and reinforcement of medical care, and hoped that the government would do its best to improve the situation.

(iii) The court also emphasized that every effort must be made to eradicate societal discrimination against individuals with HIV.

(iv) Furthermore, the court stated that special consideration and sympathy were due to plaintiffs who were the survivors [of AIDS victims], but requested their special understanding of the fact that the suggested amount of the lump sum settlement was equal for each of the claimants because the living victims might also have to unavoidably share the same cruel and tragic fate in the future, and to provide comprehensive relief for all the victims without delay. The court hoped that the survivor plaintiffs would understand.

(v) Finally, the “Second Statement of Opinion” requested that the defendants, as those responsible for aiding the victims and solving this problem, reflect seriously on themselves, make a renewed resolution to ensure the safety of pharmaceutical products, and unhesitatingly accept the courts’ proposals.

(3) The second proposals for settlement presented a plan consisting of relief not mentioned in the first proposals, such as the so-called permanent measures, litigation costs, including attorneys’ fees, and the treatment of the victims yet to file suit. Among these, the contents of the permanent measures would have been difficult to order through adjudication. It was on this point that advantages of settlement existed, in addition to the speediness of the recovery. It is true that there were limitations, in that the proposals did not cover welfare measures, such as reimbursing hospital charges for all types of wards, setting up an HIV research center, and designating key hospitals, but still, it seems reasonable to say that the proposals encompassed much more substantive steps toward a complete solution than a judicial decree could have ordered.

Further, that the courts proposed that the defendants defray litigation costs including attorneys’ fees, together with an abundance of expressions implying the defendants’ legal responsibility, which can be found throughout the “Second Statements of Opinion,” may be yet more evidence showing that this settlement presupposed the defendants’ legal responsibility.

Yet it is regrettable from the victims’ point of view that, as a practical matter, only those who have already developed AIDS are eligible for the [monthly] health maintenance allowances, because adequate treatment is indispensable to retardation of the development of symptoms, and health maintenance allowances seem to be necessary in order to enable and to motivate individuals [with HIV] to seek such medical treatment.

IV. THE SETTLEMENT AND ITS OVERALL EVALUATION

(1) On March 29, 1996, the plaintiffs, the defendant government, and the five defendant pharmaceutical firms reached a settlement. This settlement was based on the “Statements of Opinion” issued with the courts’ first proposals for settlement and the “Second Statements of Opinion” issued with their second proposals for settlement.
The terms of the settlement dealt with the lump sum settlement, attorneys’ fees, filing fees and other litigation costs, methods of payment, health maintenance allowances, and plaintiffs’ renunciation of remaining claims. Basically, the terms were the same as those suggested in the courts’ first and second proposals.

(2) Upon settlement, the parties exchanged memoranda, confirming that:

(a) The Health and Welfare Minister and the pharmaceutical firms promised as outlined below:

(i) The Health and Welfare Minister and the pharmaceutical firms shall sincerely and solemnly accept the courts’ first and second “Statements of Opinion,” recognize and reflect on their grave responsibility concerning HIV transmission, and apologize to the victims from the bottoms of their hearts for having caused enormous injuries, both physically and spiritually.

(ii) The Health and Welfare Minister shall deeply reflect on the fact that, despite firm promises to do his best [to prevent future such tragedies] when settling the cases of the victims of the harmful side effects of thalidomide and chinoform, the Ministry once again let tragic injuries occur. The Health and Welfare Minister shall do his best to clarify the truth further, and shall make a definite promise afresh to exercise the various powers given to him in order to make every effort to keep such injuries from happening again.

(iii) The pharmaceutical firms shall sincerely recognize their duty to supply safe products to consumers, and shall make a definite promise to make their best and utmost efforts to keep tragic injuries due to pharmaceutical products, as in the present case, from ever happening again.

(b) The parties reached agreement concerning the parties to be compensated, the lump sum settlement, health maintenance costs, [monthly]

health maintenance allowances for those suffering from AIDS, how the five pharmaceutical firms would make payment, and the treatment of the Friendship and Welfare Foundation’s relief project. Among other matters also arranged were the following permanent measures:

(i) The Health and Welfare Minister, while listening to the opinions of the plaintiffs, shall make efforts to take appropriate measures concerning the enhancement of medical care for those infected with HIV.

(ii) The Health and Welfare Ministry shall create a forum for discussing with those infected with HIV, including the plaintiffs, medical care and related matters for those with HIV, such as setting up an HIV research and treatment center, designating key hospitals and improving the conditions thereof, reimbursing hospital charges for all types of wards, and recognizing the victims of secondary and tertiary infection as physically disabled.

(iii) The pharmaceutical firms, too, shall make efforts to enhance the quality of medical treatment for those infected with HIV.

Further, an agreement was also reached, basically following the courts’ proposals, as to the treatment of victims yet to file suit, attorneys’ fees, and filing fees and other litigation costs.

(3) Thus, the HIV litigation came to an initial conclusion. In closing, I would like to discuss, in part reorganizing what I have already stated, how we should appraise overall such dispute resolution through settlement.

First, it must be pointed out that, considering the urgent need of relief, it was, in a sense, out of necessity that this litigation ended in settlement, because, as the “Statements of Opinion” noted, the number of the victims of the HIV incident amounted to so many as 1,800 to 2,000, and it was imperative that immediate relief be given, in light of the sad reality of the disease that all these victims would develop AIDS, experience various symptoms, and die. Even if some of the victims had won a lawsuit, their
suffering would have been multiplied during the defendants’ appeals to the High Courts and then to the Supreme Court; besides, those who had yet to sue would have had to initiate suit from the beginning. Given such circumstances, it seems fair to say that a framework for a total resolution through settlement would have been needed at some stage [in any case], as evidenced, for example, by our experience in the lawsuits concerning mercury poisoning in Minamata and subacute myelo-optico-neuropathy (SMON). It was significant for purposes of providing relief to the victims that this litigation came to a close before formal judgment was rendered, even though the trials had already been finished. The courts’ efforts, in addition to those of the victims, their attorneys, and their supporters, must be especially noted.

Secondly, resolution through settlement was necessary also in terms of the contents of relief suitable for the injuries in question. As is widely known, under current [Japanese] tort law, damages compensation is to be made by means of one-time payment, and although some scholars suggest that periodic payments ought also be allowed, the courts have yet to endorse them. Moreover, in this particular case, not only cash payment such as health maintenance allowances, but also many nonpecuniary permanent measures were called for, such as setting up an HIV research and treatment center, enhancing the quality of key hospitals, reimbursing hospital charges for all types of wards, defraying medical costs of victims of secondary and tertiary infection, and recognizing those with HIV as physically disabled. These are steps that cannot be ordered by court decision under the present legal system, which may have been another reason that settlement was found necessary. Yet, although the settlement did stipulate monthly health maintenance allowances, even though insufficient, all the other measures were left to future talks. It is true that creation of a forum itself can be seen as a fruitful result of the settlement, but this is still just a starting point. It is essential that henceforth the permanent measures for remedying the victims’ situation be implemented one after another.

Thirdly, judging from the above, this settlement, looked at as a whole, can be characterized as one that aimed at a “supralegal” resolution.

66 See AwaJI Takehisa, SMON JIKEN TO HO [THE SMON INCIDENT AND THE LAW] (1981). [Note 4 in the original article.]
67 I presented a conceptual framework for disputes over pollution in AwaJI Takehisa, Kōgoi funsō no kaiketsu kōshiki to jittai, in 4 CHOSHAKU KOGAO HAIKETSU [1] (1973). In the book cited supra note [67], I used this framework as a perspective for analyzing various issues, and actually examined the SMON incident. Also, I discussed the categories of recent mass toxic tort litigation that have ended in settlement, sought, based on the [defendants’] legal responsibility indicated in the courts’ “Statements of Opinion,” relief that could not have or could only with difficulty have been obtained under current law. Whether it will have much substance or not, however, is up to the parties’ efforts and the support of public opinion in the future. In this respect, the settlement was but the first step to a [complete] solution.

V. CONCLUSION

Although there are some reservations as mentioned above, the dispute has been solved by [the defendants’ promises to pay] compensation for the victims’ losses and [to provide] other relief measures. Yet there is no genuine solution unless we make sure that tragic injuries due to pharmaceutical products, as occurred in this incident, will not be repeated. In the “written vow” that the government and the pharmaceutical firms submitted when they assented to the settlement proposals, they promised never to let such injuries happen again. But words alone are not enough. What is wrong with the current law and the legal system must be examined hereafter, but prior to that, [all] the facts of the HIV incident must be elucidated and the responsibility for this incident must be clarified. I hope that the facts will be brought to light in the Diet, in the media, and in court, when necessary.

in AwaJI Takehisa, Kōgoi, kankō Jura, 48 HOSHAKAGAKU 93 (1996), focusing on advantages of such settlements. [Note 5 in the original article.]
69 Particularly, governmental policy concerning how to improve the current system and how to construct a new system in order to accomplish the various relief measures is of fundamental importance.
70 I understand that JURISUTO plans to publish more articles on this theme.
71 [Translator’s note: See supra note 9.]
Notes


2. We have noted a number of times, euthanasia is generally prohibited in the West (outside of the Netherlands and Oregon), while withdrawal of treatment is generally permitted. It is not, of course, necessary to observe this distinction. The Japanese case that follows both accepts active euthanasia, in principle, and takes a very conservative view (by Western standards) of withdrawal of treatment.

Tokai University Hospital—Euthanasia Case.

Judgment of Yokohama District Court, March 28, 1995, 1530 Hanrei Jikó 28 (Japan v. Tokunaga), (Tokai University Hospital euthanasia case)

Translated and edited by Robert B. Leff

[Translator's note: This case was the first case in Japan in which a physician was prosecuted for an act of euthanasia. The patient, Mr. Katsumura, age 57, was terminally ill with bone marrow cancer. He was hospitalized in Tokai University Hospital at the end of 1990. His three physicians were Dr. Nozaki, Dr. Noguchi, and the defendant, Dr. Tokunaga.]

Facts

Dr. Nozaki, the original attending physician, informed the patient's son and wife that the patient, Mr. Katsumura, had untreatable bone marrow cancer. The son strongly requested that his father not be informed of the cancer diagnosis; so the patient was told there was an "insufficiency of bone marrow function."

The patient's condition worsened in late March 1991. The defendant, Dr. Tokunaga, was told by Drs. Nozaki and Noguchi about Mr. Katsumura's condition and prognosis, and about the family's request that the patient not be informed of his diagnosis. On April 5, the patient began vomiting blood, and on April 8 a plasma exchange was commenced. [There follows a day-by-day account, somewhat excerpted, of his last illness.]

April 9: The patient was scarcely conscious, and could respond only to simple commands. At 9 am his wife and son said to Dr. Noguchi: "The patient didn't sleep at all last night. He is complaining of pain from the Foley catheter. He's suffering so much we can't watch. We want the plasma exchange stopped. Take out the I.V. and the Foley catheter, and stop all treatment. The patient understands what's happening. This is an incurable illness, there's no point in treating it any more; please don't keep him suffering."

Dr. Noguchi told Dr. Tokunaga of this request by the family to cease treatment; Dr. Noguchi also presented it to the senior physician on his rounds. But the family withdrew the request later after hearing an explanation from the senior physician.

April 10: The patient could not respond when spoken to, but his condition had stabilized. At 6:30 pm the wife and son asked Dr. Noguchi again to stop treatment and to discontinue the I.V. and catheter. Despite his attempts at persuading them to continue treatment, they tenaciously refused to acquiesce. After an hour of his persuasion, though, they finally acquiesced in the continuation of treatment. But at 9 pm Mrs. Katsumura called Dr. Noguchi at home, angry that his promise that sedative drugs would not be injected had been broken. Dr. Noguchi was at a loss to respond to the family; he lost confidence in his ability to relate to them.

April 11: * * * 9 am: Dr. Noguchi told the defendant of the family's request to cease treatment, and of the angry phone conversation the previous evening. Drs. Noguchi, Nozaki and Tokunaga conferred, and decided that Dr. Noguchi would henceforth be in the background, and Dr. Tokunaga would deal with the family. They also agreed that the plasma exchange, which carried some risk, would be discontinued.

Defendant, thinking the family's attitude might be changed a little, met with the wife at 9:30, saying: "It's a critical situation. But as a physician, as long as there's any possibility [of cure], of course we'll keep treating the patient. I believe there's some hope, so I'll continue treatment. So please grit it out with me. If we stopped all treatment, you'd regret it afterward."

The son said, "When the time comes, let him face death naturally. Withdraw the I.V. and the catheter," Dr. Tokunaga responded: "Even when the patient is facing death, I believe a physician must not cease treatment. So I must refuse your request. It's the physician's job to continue treatment right up to the end." (Emphasis by the court)

But the son said, "Don't make my father suffer. When death is near, don't use meaningless treatment. I want him to be able to face death easily, without pain." Dr. Tokunaga responded, "Well anyway, we won't use CPR at the end." But Tokunaga was wondering. How much does this patient really mean to his family?

April 12: The patient's condition worsened; lung inflammation had set in. Antibiotics were started and a breathing tube put in. The patient's level of consciousness slipped further, and he had difficulty breathing.

* * *

The son and wife spent the night at the hospital. The son brought a photo of the patient's eldest daughter (his sister); the patient showed no response. The son, thinking that he had lied to his father about his disease and given him false hope of an impossible cure, was filled with regret.

* * *

April 13: The patient declined through the day. Breathing was more difficult; consciousness declined to level 6 (no reaction to pain stimuli); cyanosis of the fingers with light pressure.

The son said, "My mother and I can't take this any more. Stop all treatment; liberate him from this suffering and let him die naturally; even if death comes a little sooner, it's all right." Later that morning, the wife happened to meet Dr. Nozaki in the corridor. "I've been with him without sleeping for a week now, and I'm tired," she exclaimed. "If it's incurable, stop the treatments. I'm going to say this to Dr. Tokunaga too."

About 10 am, the son and wife said to a nurse, "You've done everything you can do. We want you to take him off the I.V. and the Foley catheter." Dr. Tokunaga, hearing this, came in about 11. The family told him: "You've done everything you can. We want you to take him off the I.V. and the catheter. We want to take him home quickly. We can't stand to see him suffer like this any more. We want you to let him be comfortable. We've thought about this and decided."
Dr. Tokunaga said, "Taking him off the I.V. means stopping nutrition and hydration, and that would shorten his life. Wouldn't that be too selfish, to let him die? I can't do that. As a doctor I'm going to fight it to the end."

Defendant on the one hand as a doctor believed he couldn't stop treatment. On the other hand, he understood the family's feeling that with death only a day or two away, advancing that death by removing the I.V. and Foley catheter that the patient seemed to dislike and permitting him to die naturally, probably wouldn't contravene the patient's own wishes. All these things filtered through the doctor's mind. [Translator's comment: The judge is exercising a good deal of creativity in setting out these facts.]

So Dr. Tokunaga finally reached the conclusion that removing the life-sustaining treatment and speeding up the patient's death would be acceptable, and he answered the family: "All right. I understand." He went back to the nurse station, and said to Head Nurse Itō, "I've been told by the family that they want all treatment stopped. I've tried over and over to persuade them otherwise, but they won't listen. So we'll stop all treatment, and remove the I.V. and Foley catheter." Hearing this, Nurse Itō said, "Let me try to talk with them." She did so, but to no avail.

At 11:20 am defendant Tokunaga told a nurse to stop all treatment, and wrote the order in the chart. About 1:30 pm, the nurse disconnected all the equipment.

The son thought that the father would die naturally as though in his sleep that night. He stayed in the hospital room with him. But the father's breathing became more labored still, weighing on the son's mind. (The wife, at the son's suggestion, had gone home in the afternoon to rest.)

About 2 pm, Dr. Nosaki came by and was surprised to find the I.V. and catheter out. Thinking that Dr. Tokunaga, whom he had turned over to the patient's care, had given in to the family's requests, he called out to Dr. Tokunaga at the nurse station. "I see you've stopped the I.V." Dr. Tokunaga responded: "I tried to persuade them, but they wouldn't listen, so I stopped it." Dr. Nosaki, acquiescing, then left for a conference in Kyoto.

About 3 pm, Dr. Tokunaga checked the patient. The breathing tube was in, and the EKG monitor was attached. The patient's level of consciousness was Level 6: no reaction to pain stimuli, no consciousness. He thought the patient probably would die that day or the next. At about 4 pm, he met Dr. Mihama of the same department and rank as he, and he told Mihama that he had stopped treatment. Mihama replied, "That ought to shut the family up."

The son, seeing his father apparently suffering with heavy breathing and wanting him to die quietly as though in his sleep, called Dr. Tokunaga to the room about 5 pm. "He's suffering. I want you to take out the breathing tube." Dr. Tokunaga replied, "I can't do that. There's a danger that his tongue will block his throat and he'll stop breathing." The son renewed the request. Dr. Tokunaga thought, it's all right with the son if his father dies. He already agreed to his request to disconnect the I.V. and catheter. So at 5:40 pm, he took out the breathing tube.

The patient's labored breathing continued. About 6 pm the son called Dr. Tokunaga to the bedside again. "I can't stand to listen to his breathing. Please let me take him home quickly." Dr. Tokunaga, thinking that at least he could quiet the father's breathing, said "I understand." He went back to the nurse station, considering what drug would suppress this labored breathing.

He decided on Horizon, an analgesic with the side effect of suppressing breathing, knowing the drug might hasten the patient's death. He had Nurse Kadogawa prepare twice the usual dose: 4 ml. At 6:15 he injected it into the patient's left arm. The son silently watched him from the bedside.

After watching for nearly an hour after this injection, the son, seeing that his father's labored breathing continued unchanged, called loudly for Dr. Tokunaga: "He's still breathing. I want to take him home quickly." Dr. Tokunaga went back to the nurse station, filled a syringe himself with double the normal dose of the drug Serenesei, and at about 7 pm injected it into the patient's left arm. (Serenesei also has the side effect of suppressing breathing.)

The son, after watching the injection, asked "How long will it take?" Dr. Tokunaga replied: "His heart's really strong. Maybe an hour or two."

After the Serenesei injection, Dr. Tokunaga, seeing to forestall any more requests from the son, called him out of the hospital room. "You're asking me to kill him with these drugs. Well, the law doesn't allow it, and as a physician I can't do it." The son just listened silently.

The son, seeing the father unchanged after the second injection, suspected Dr. Tokunaga of trying to fool him with meaningless injections. He paged Dr. Tokunaga, who was in his car to get some dinner outside the hospital. Dr. Tokunaga turned and came back without getting dinner. The son confronted him at the nurse station angrily. "What are you up to, doctor? He's still breathing! I want to take him home before this day is over."

Dr. Tokunaga felt that he could not escape from the unusually persistent demands of the son. He went into the nurse station without answering, worried about what to do. He felt as though as much as he tried to refuse the son's requests, he couldn't keep doing so forever. He was physically and mentally exhausted. Finally he decided to do the son's bidding, and make the patient die.

He decided to use a drug that would make the patient's heart stop. Looking in the drugbook at the nurse station, he saw in a drug compendium that Wasoran, used for circulatory conditions, had the side effect of transient heart stoppage. He decided to use it. But that alone might not kill the patient immediately. So he decided to add KCI (potassium chloride), which causes damage to the heart's electrical function, to the mix.

Usually potassium chloride is diluted and given patients intravenously. But Dr. Tokunaga decided to inject it undiluted. He asked Nurse Miyoko Takahashi if they had potassium chloride and Wasoran available. She said "There's some potassium chloride, but no Wasoran." But she knew about his trying the other two drugs, and she acceded to his request. She wrote up an order for Wasoran to the hospital pharmacy, and gave it to Dr. Tokunaga. He got it from the pharmacy.

Dr. Tokunaga put 5 ml of Wasoran—twice the usual dose—into a syringe. He put 20 ml of potassium chloride in another. He went to the patient's room. The patient was breathing laboriously. The son watched him silently.

Facts Constituting the Crime

The defendant, on April 13, 1991 at about 8:35 pm, in Ishara City, Kanagawa-ken, at Tokai University Affiliated Hospital, 6th floor Room 14, injected the patient first with Wasoran; upon seeing that had no effect, he injected 20 ml of undiluted potassium chloride into the patient's left arm. Nurse Kadogawa immediately noticed an abnormality on the heart monitor and shouted, "There's a ventricular narrowing." But Dr. Toku-
naga kept on with the injection. He confirmed the patient's heart stoppage on the monitor, checking for lack of a heartbeat and pulse. He said to the son “It's over.” At about 8:46 pm, the patient died of heart stoppage caused by an acute high level of potassium in the blood.

Judgment of the Court

Part I. Introduction

[The court makes general observations about medical progress, euthanasia, and how this case forces us to define the legal limits; what's important about the case; the consequences of the decision.]

Part II. Requirements for Cessation of Treatment

Death must be unavoidable; the patient must be in the last stages of an incurable disease with no prospect of recovery. The cessation of treatment originates in the patient's right of self-determination and the limit of a physician's duty in cases of medical futility. This is not to recognize the patient's right to die as such, or right to choose death. It simply recognizes a right to choose the method or process of facing death. This is to prevent us from viewing death too lightly. It is desirable that more than one physician make the judgment that recovery is impossible. Also, if the treatment in question is one that has only a small influence on the patient's continued life, it should be easier to terminate the treatment than if it lies in directly with the patient's death—in which latter case the patient should be actually facing death before the treatment is terminated.

It is necessary for the patient to have made an expression of intent that treatment cease, and that that intent [not be revoked] at the time of the cessation of treatment. It goes without saying that it is most desirable for the patient himself to have clearly expressed that intention. The expression of intention should be based on the patient's own accurate knowledge of his disease, nature of treatment, and prognosis. For this reason the importance of informing the patient of his diagnosis and of informed consent is indicated.

However, in the great majority of cases, patients will be unable to express their intention about cessation of treatment at the time the decision must be made. Most Japanese today, we expect, would want meaningless treatment stopped, and we can expect that in future, living wills will become more prevalent. But we must consider whether substituted consent [lit. “inferred intent” — suiteioku shi] should be recognized.

If there is a prior expression of will by the patient, whether written or oral, it is powerful proof—if near in time. But if remote in time, or vague, then the case should be treated like situations where no expression of will by the patient exists. Where no reliable expression of the patient's intent exists, it is best to rely on the family to state the patient's “inferred intent.” Better this, than digging into fragmentary evidence of what the patient might have said in passing. The family is likely to know the patient's character, values, and view of human existence. The family, like the patient, should be given accurate information about the patient's condition, nature of treatment, prognosis, etc. To judge the family's ability to speak for the patient, it is necessary for the physician to know about the patient's relationship to his family, how close they are, and so forth.

The treatments that may be terminated include drugs, chemical treatment, artificial respiration, blood transfusion, nutrition and hydration—for both measures for treatment of disease and life support measures. However, what treatments should be stopped, and when, are medical judgments about when the treatments are meaningless.

Part III. Requirements for Euthanasia

Conditions for active euthanasia by a physician:

a. Physical pain difficult to bear.

b. The time of unavoidable death is drawing near.

c. Methods of eliminating or easing physical pain are exhausted, and no substitute means remain.

d. There is a clear expression of intent to accept the shortening of life.

Conditions for cessation of treatment: An expression of intent by family members who can infer the patient's will, will suffice. [Moreover, cessation must be medically appropriate.]

Defendant's acts here did not meet the conditions allowing either “cessation of treatment” or “active euthanasia.”

The patient had bone marrow cancer. A doctor at Tokai University Hospital received a request from the patient's son to “put him to rest,” saying “I want to take him home quickly” [i.e., as a corpse].

A distinction must be made between physical suffering (whether existing or probable in the future), which can serve as a justification for active euthanasia, and mental suffering, which cannot. Judging mental suffering is too subjective; we could start to view death too lightly.

Active euthanasia is permitted as long as death is imminent. But if it is not, “indirect euthanasia” [kansetsu-toki annakushi], in the sense of pain relief treatment with the possibility of hastening death, can be used.

The idea of allowing euthanasia is based on the concept of patient autonomy: the patient must choose whether to undergo suffering or shorten life. So an indication of the patient's will is essential. Whether a clear indication of the patient's will is required, or whether merely an inference of the patient's intent will suffice, depends on the method of euthanasia.

[The court sets out three types of euthanasia:

Passive (shiyokukuteki): the cessation of life-prolonging treatment, a non-delegated (yusakai) act

Indirect (kanetsukeki): giving pain relief treatment with the possibility of hastening death

Active (sekkokutoku): treatment deliberately inviting death in order to free the patient from suffering]

The permissibility of euthanasia differs according to which of the three types is in question. The permissibility of passive euthanasia is to be judged merely as a matter of whether it is medically appropriate to cease treatment. Indirect euthanasia is permitted in accordance with the principle of patient autonomy. An inference of the patient's intent will
suffice; and this can be inferred from the family's expression of intent. Active euthanasia is permissible only when all means of removing or easing pain have been exhausted, and no other alternate methods exist. Then as the Nagoya High Court said in its December 22, 1962 judgment (Hanrei Jihō 32:41): "It must be performed by a physician."

Active euthanasia is based on the principles of emergency refuge [kinshi yōmin] and patients' self-determination; so it is permissible only with a clear expression of intent by the patient. Passive euthanasia is permissible only if the patient is in an incurable state, nearing death, with no prospect of recovery. Some evidence of the patient's intent is required for passive euthanasia. Clear evidence of the patient's will at the time of the decision to cease treatment is desirable. It should be based on continuing consideration and accurate information concerning prognosis, accurately understood.

However, clear evidence of the patient's will is not necessary for cessation of treatment. Passive euthanasia is also allowed based on inferences from the patient's own previous expression of will, or from the family's statement of intent. Still, to recognize that the family is properly inferring the patient's will, the family must know the patient's character and values, and must have full and accurate information on the nature of the disease, treatment, and prognosis. Moreover, the physician assessing the family's expression of will must be in a position to know both the patient's own thoughts and position concerning his disease and treatment, and the level of the patient's relationship with his family.

The conditions justifying active [or indirect] euthanasia were not met here. The fatal injection was not for the purpose of relieving physical pain, since at that time the patient was not suffering and since the patient had never been told he was suffering from cancer, there was no clear statement available as to the patient's own intent.

Part IV. Evaluation of Defendant's Specific Acts

Removal of I.V., Foley Catheter & Breathing Tube: Both Dr. Tokunaga and Dr. Nozaki judged that the patient, as of April 13, 1991, had only a day or two to live. Other physicians said the same; even with aggressive treatment, the patient could at most have survived 4-5 days. So objectively, the patient's condition was at the stage appropriate for consideration of termination of treatment.

As for the expression of the patient's will, this patient had not been informed of his diagnosis, and had not received an accurate explanation of his condition and prognosis. At the time of decision, he was incapable of expressing his will. So we must determine whether the family could properly speak for the patient. Both the wife and son had lived with the patient for many years, and knew his character, values, and outlook on life. They kept insisting on cessation of treatment over several days. We can conclude that they were capable of expressing the patient's inferred intent. However, the family were not properly informed of the patient's inability to feel pain. On April 13, when they asked that the I.V. and Foley catheter be discontinued, they were not told that he had no response to painful stimuli. So their request cannot be considered to be properly grounded, inferred expressions of the patient's intent.

This defendant had only known the family a short time—less than two weeks—at the time he became attending physician for this patient. There is doubt whether he really understood their position. He was not in a position to judge whether their decisions were a proper expression of the patient's intent. The patient's intent was neither expressed nor could be inferred from the family. Therefore the withdrawal of the I.V. etc. was not permitted by law.

Both Western and Japanese names are given family name first, to avoid inconsistency. Yen amounts are given in dollars at $1 = 110, an exchange rate typical of recent years.

LEXISNEXIS SUMMARY:

... Pervasive safety problems in medicine, scarcely noted a decade ago except among specialists, in the past few years have found a place on the health policy agenda of developed nations worldwide. ... Perhaps the supervising physician, who authorized the operation without requiring a more experienced surgeon to proctor it, might also have suffered some discipline. ... In the United States, what brought the problem of medical error to the forefront of public attention was epidemiological studies of hospital injury, drawn together in compelling fashion with insights from behavioral science in the Institute of Medicine report, To Err Is Human. ... A major difference between Japan and the United States in this respect is that medical malpractice liability premiums in Japan do not vary depending on the physician's specialty or geographical area of practice. ... Now, at least with regard to this aspect of medical malpractice litigation, if the principle of the Saitama Medical University decision is broadly applied, the tables may well have turned: Japanese law may tilt more than U.S. law toward error information disclosure in the judicial process. ... It is possible that the threat of criminal prosecution and accompanying adverse publicity may undercut sorely needed initiatives within Japanese hospitals to perform self-critical analyses, although statistics demonstrating a recent substantial increase in reporting of medical accidents to police cast some doubt on the extent of this potential patient safety problem. ...

TEXT: [*189]

I. Introduction

Pervasive safety problems in medicine, scarcely noted a decade ago except among specialists, in the past few years have found a place on the health policy agenda of developed nations worldwide. Japan is no exception. However, [*190] significant aspects of Japan's law-related responses to individual cases of medical error, and to patient safety problems in the aggregate, differ considerably from what most American readers of this Law Review might expect. This article describes some of the most noteworthy of those differences, suggests some explanations for their existence, and offers some preliminary assessments regarding the likely effectiveness of various elements of Japanese policies regarding patient safety.

The structure of the article is as follows: In Part II, we take a "first cut" at comparing American and Japanese structures and practices regarding medical error. We highlight the striking weight given in Japan to criminal prosecutions (enhanced by wide media coverage) in carrying out the critical social function of public accountability for medical mistakes—a social function performed in large part by the civil justice system in the United States. We illustrate this point with the story of a surgery gone wrong at Tokyo's Aoto Hospital in 2002. We then reflect on the differing trajectories that brought the problem of medical error to the attention of the two nations.

In Part III, we explore the civil liability systems of the United States and Japan regarding medical injury. We note significant differences between the two systems in the quantity of claims filed and in liability insurance practices. We compare the prevalence of and legal protection for self-critical analysis by hospitals, focusing on the tension inherent in disclosure practices between measures to ensure public accountability and those to promote patient safety. We also note the increasing focus on the issue, unresolved in both countries, of the proper degree of candor by medical providers towards patients, families, and the public.
In Part IV, we take up criminal liability for medical error, offering an explanation for the relative prominence of the criminal forum as an accountability mechanism in Japan, and suggesting that, in some respects, medical practitioners’ fear of criminal liability in Japan bears a functional similarity to American providers’ fear of tort. The extent to which that fear in fact deter self-critical analysis and reporting of accidents, however, seems as unclear in Japan as it is in the United States. Finally, in Part V, we describe an innovative project currently under way in Japan on error investigation and dispute resolution.

We conclude that although the institutional structures of Japanese medical and legal systems present severe obstacles to satisfactory progress toward the common safety goals that all nations share, nevertheless, Japanese initiatives and practices in some respects may usefully inform health policies and practices in the United States and elsewhere. Nationwide risk pooling of medical liability insurance, without regard to medical specialty or geographic location, may stabilize the harmful volatility of liability premiums experienced in the United States. A recently recognized civil-law duty of disclosure to patients may suggest analogues in American medical jurisprudence. An experiment in imperial expert investigation of suspected medical error cases may offer a useful method for speedier, more objective resolution of quality-of-care disputes. Finally, although the engagement of the criminal justice system as a quality control mechanism has serious drawbacks, in Japan, at least its looming presence has served the beneficial purposes of helping motivate medical leaders to undertake systemic reforms, and to deter medical providers’ widespread practice of deceiving patients and families.

II. First Cut: Public Accountability and Public Awareness - Aoto Hospital and the Roles of the Media, Civil, and Criminal Law

In American jurisprudence, it is tort law—specifically, medical malpractice law—that casts the longest shadow over controversies relating to medical injuries. Whether the topic is avoiding defensive medicine, encouraging self-critical analysis for the purpose of quality improvement, ensuring the availability of high (legal) risk medical services, or protecting the rights of the injured, all eyes turn first to torts. Malpractice law and proposed reforms thereto are at center stage in the state and federal legislatures. In Japan, by contrast, although medical malpractice litigation is increasing, in the eyes of physicians and hospital administrators, civil damage actions are not of primary concern.

In American medicine, extra-judicial oversight activities carried out by entities such as internal hospital peer review committees, state licensure and discipline boards, Medicare Quality Improvement Organizations, and quasi-public accrediting organizations such as the Joint Commission for Accreditation of Healthcare Organizations (JCAHO) and the National Committee for Quality Assurance (NCQA) constitute key quality control mechanisms.

In Japan, by contrast, the analogous entities have traditionally been weak or dysfunctional. 4 Peer review has been conventional. 4 Until recently, the nation’s disciplinary board for physicians and dentists, the Medical Ethics Council (Id shingikai), has sanctioned practitioners only after a criminal conviction (typically for reimbursement fraud, morals violations, or drug abuse). 5 Quality-of-care 5 has almost never formed the basis for administrative sanctions. The hospital accreditation entity analogous to JCAHO, the Japan Council for Quality Health Care (JQCQC, Nihon iry in ky ka kik), operates on a far smaller scale and with a lower profile than JCAHO. This is due in large part to the fact that, unlike in the United States, Japanese hospitals need not be accredited to obtain payment for services rendered; the great majority have not undergone the JQCQC accreditation process—which, in any case, focuses chiefly on structure and process criteria, not on patient safety-related outcomes. 7 Quality control has simply not been a significant aspect of the formal structure of Japanese health care.

However, there is a public accountability function that must be performed, at least in any society attentive to the rights and interests of individual citizens. Who offers assurance that the competence and the integrity of the professional class meet at least minimally acceptable standards? Who disciplines the profession’s wayward members? In Japan, that public accountability function has been carried out in considerable part by the criminal justice system—police and prosecutors—amplified by the power of the media.

Consider the following events that took place at Aoto Hospital, a facility affiliated with Jikei Medical University in Tokyo. The story occupied column-meters of newspaper space and newscast top billing for a while in 2003.

[*193]

In November 2002, three nephrology urologists at Aoto Hospital, eager to gain experience with a high-tech procedure, obtained their supervisor’s permission to perform a "keyhole" laparoscopy on a prostate cancer patient using sophisticated imaging equipment with which they were only slightly familiar. In obtaining the patient’s consent, the lead surgeon, Dr. Jun Madarama, pitched the "keyhole" technique as promoting quick healing. He neglected mentioning his lack of experience at the procedure, the possibility of serious intra-abdominal bleeding experienced by patients of the university’s other surgeons, or the existence of well-established standard alternative treatments. Neither Dr. Madarama nor his supervisor was required to clear either the consent materials or the proposed surgery itself with the medical school’s ethics committee.

Reading from the equipment manual in the operating room, the surgeons consulted with the manufacturer’s representative by phone as the operation proceeded. They persisted with the imaging equipment (giving them an indirect view of the operative field by TV monitor) despite nicking a vein, rather than falling back on standard surgical technique of opening the abdomen to afford a clearer direct view. Nine and a half hours into the surgery, the patient was bleeding heavily, but unfortunately the surgeons had also failed to procure an adequate supply of the patient’s unusual AB blood type for transfusion purposes. An emergency transfusion could have been performed with Type O blood, likely available at the hospital, but neither the surgeons nor the anesthesiologist acted on this elementary fact. The patient went into shock, suffered serious brain damage from lack of oxygen, and died a month later. Following the patient’s death, the hospital director met with the patient’s family and gave them a sanitized and misleading account of the circumstances of the operation.

Were this tragedy to have taken place in the United States, the young surgeons would have been subjected to a peer review process within the hospital, as would the anesthesiologist who failed to intercept the course of events while the patient’s blood pressure was dropping to dangerous levels. 8 Suspensions of hospital privileges might have been in order, particularly if any of the physicians had exhibited a pattern of repeated sloppiness or lack of candor. Perhaps the [*194] supervising physician, who authorized the operation without requiring a more experienced surgeon to proctor it, might also have suffered some discipline. The incident would certainly have qualified as a "sentinel event" reportable to JCAHO, although whether in fact the hospital would have reported it open to serious question. 9 There is some chance that the patient’s family might have filed a civil malpractice action—most a one-in-three chance and probably much less, if the Harvard Medical Practice Study figures are to be believed. 11 If a malpractice action were brought, the trial might merit mention in the local news.
In fact, events in Japan proceeded in a rather different fashion. The family has not, as of this writing, brought a malpractice action or even engaged an attorney. But police, who learned of the case from an anonymous whistle-blower, arrested the three surgeons for criminal negligence resulting in death, and filed papers with the prosecutor charging the supervising physician with the same crime. A dozen investigators spread out over the hospital confiscating evidence, including the video of the thirteen-hour operation. Ultimately two of the three surgeons pleaded guilty. Criminal charges were dropped against the supervising physician for lack of sufficient evidence, but his medical license was suspended (along with those of the two who pleaded guilty) \(^{13}\) by the Ministry of Health, Labor and Welfare's Medical Ethics Council—apparently the first license suspension for a failure of supervision in the Council's history. The story was national front page news when the surgeons went to court, and since then the \(^{[*195]}\) case has received steady continuing coverage by Japan's major newspapers. \(^{44}\) A leading urologist has already published a book calling attention to how the various errors committed and system flaws demonstrated in the case are manifestations of deep-seated infirmities in the structure of Japanese medicine. \(^{15}\)

Nor is the case unique. It is one of a series of recent high-profile medical mishaps to which the media have given intensive coverage: cases stunning in their quotidian banality, many of them followed by a cover-up and deception of patients and families suffering harm. \(^{16}\) Often the events come to light only because a whistle-blower within the hospital—perhaps a nurse chafing under an arrogant surgeon's abuse—contacts a journalist or the police. Among the many recent cases, three besides the Aoto Hospital case have attained representative significance: the heart and lung patients' mixup at Yokohama City University Hospital in 1994, \(^{17}\) the Tokyo Hino General Hospital fatal injection in 2000, \(^{18}\) and the Tokyo Women's Medical University heart-lung machine blunder in 2001. \(^{19}\)

\(^{*196}\)

In the United States, errant physicians and hospitals fear the malpractice lawyers. In Japan, their greater concerns are the whistleblowers, the media, and the police. \(^{20}\)

In the United States, what brought the problem of medical error to the forefront of public attention was epidemiological studies of hospital injury, \(^{21}\) drawn together in compelling fashion with insights from behavioral science in the Institute of Medicine report, To Err Is Human. \(^{22}\) Those epidemiological studies were sparked by the medical malpractice liability crises of the 1970s and 1980s, which impelled the funding of the studies. \(^{23}\) Certainly, the media have also played an important role in publicizing the patient safety issue, as well as in illustrating a few particular cases of malpractice. \(^{24}\) But in essence, the interaction of \(^{*197}\) malpractice law with liability insurance drove epidemiological science, and science has driven policy.

In Japan, by contrast, no epidemiological studies have delineated the overall extent of medical error. \(^{25}\) As will be seen in the next section, neither civil malpractice policy nor liability insurance has been a factor powerful enough to launch research programs or to move health bureaucracies to act. The salience of the topic of patient safety as a problem for national health policy must be attributed instead chiefly to the extensive media treatment given to cases such as those noted above. \(^{26}\) The widely remarked appearance of To Err Is Human not long after the failure of the patients' mixup, \(^{27}\) magnified the newsworthiness of the medical error problem, enabling the media to portray it as a matter of international rather than merely local significance.

The upsurge of public concern in Japan about patient safety must be viewed against the background of a society moving away from traditional hierarchy and secrecy, especially prevalent within the medical world, towards greater openness, transparency, and citizen participation. The Diet recently passed a national freedom of information law, \(^{28}\) following the lead of prefectures around the \(^{[*198]}\) country. Informed consent in medicine, a concept virtually unheard of until the late 1980s, has become widespread in clinical practice \(^{29}\) (albeit with a Japanese coloration and ample opportunity for abuse, as in the Aoto Hospital case). Public demand for information about hospital quality is high, as witnessed by brisk sales of popular publications purporting to rank hospitals in various fields of medicine by reputation, by volume of procedures performed, etc. \(^{30}\)

In this environment of increased public expectations for openness, traditional practices of deception and secrecy are increasingly met with stony disapproval. And malpractice actions, once rare, are on the rise.

III. Malpractice Law, Self-critical Analysis, and Policies of Candor

A. Litigation Volume, Damages, and Liability Insurance

Without question, Americans file far more medical malpractice claims, in court and out, than Japanese do. Claims incidence figures are not directly comparable, since the best available U.S. statistics count claims closed annually, while the only available Japanese statistics count claims filed annually, and do not include all claims made outside the judicial system. Nevertheless, in the face of the vast disparity between the claims figures, differences in counting methods are trivial. For example, in 1997 there were 110,754 medical malpractice claims closed in the United States, \(^{31}\) compared with a total of 1,089 claims filed in the \(^{*199}\) Japanese courts \(^{32}\) and with the Japan and Osaka Medical Associations. \(^{33}\) Given that the population of the United States is about 2.2 times that of Japan, \(^{34}\) an American in 1997 was as much as forty to fifty times more likely (as an upper-bound estimate) to have filed a medical malpractice claim than was a Japanese. \(^{35}\)

\(^{*200}\)

Damage awards to successful medical malpractice plaintiffs in Japan are more standardized and predictable than awards in the United States. Awards in Japanese malpractice cases are usually based chiefly on guidelines used by courts for injuries in traffic accident cases. \(^{36}\) Under these guidelines, for example, in death cases, pain-and-suffering awards range from 20-26 million (US$ 180,000- $ 250,000), \(^{37}\) to which would be added funeral expenses and lost earnings to the presumptive retirement age of sixty-seven discounted to present value, from which latter amount thirty to fifty percent is subtracted for presumptive living expenses not incurred. \(^{38}\) Punitive damages are never awarded in Japanese civil cases, \(^{39}\) eliminating a source of some variation in United States awards. Comparison of the magnitude of awards in Japan and the United States is difficult, because of the diversity of U.S. judicial forums and the lack of nationwide statistics; but mean and median awards in U.S. wrongful death cases, at least, seem not to diverge radically from the Japanese scale of damages. \(^{40}\)

\(^{*201}\)

Medical malpractice premiums in Japan, which could be considered a very rough- hewn proxy for liability payouts in the long term, \(^{41}\) are but a small fraction of those charged in the United States. The premium paid by a physician member of the Japan Medical Association liability insurance program in 2000 was 55,000 (US $ 500). \(^{42}\) General hospitals insured by Yasuda Fire & Marine Company paid 16,130 (US $ 150) annually per bed in 2000. \(^{43}\) By contrast, American
internists pay more than ten times as much; physicians in high-risk specialties in high-verdict locales may pay 300 times as much; and hospital premiums are far higher as well. 44 Overall levels of claims and premiums tell only part of the story, however. Trends, and perceptions of trends, are also significant. The quantity of civil malpractice cases filed in Japanese courts is accelerating, as Figure 1 illustrates, and at a rate that outstrips increases in most other categories of litigation. 45

SECURE FIGURE 1 IN ORIGINAL

[*202]
The plaintiff's malpractice bar is increasing in number and sophistication. 46 Of greatest significance is the media attention devoted to medical cases. Though the number of litigated cases is small in comparison with the United States, media coverage—e.g., of cases that would be deemed so common by major American papers as to be without news value—magnifies their impact on the public and the medical profession. With adverse publicity comes damage to reputation. 47 Civil malpractice litigation has a sentinel effect out of proportion to its quantity. 48

[*203]
In the United States, a standard component of the rhetoric of medical tort reform is that liability premiums for physicians in high-risk specialties, such as obstetricians, neurosurgeons, and orthopedists, have risen to unsustainable levels, particularly in geographic areas where large liability awards are common. However, as Mark Geistfeld and William Sage have recently observed, 49 this phenomenon is in large part an artifact of American medical liability insurers' conventional practice of basing premiums on a physician's specialty and geographic location—a practice that "is not preordained, and in fact is socially counterproductive." 50 This risk class segregation practice results in volatile risk pools composed of small numbers of physicians, justifying spikes in premiums due to a few large liability payouts in a particular specialty or locality.

A major difference between Japan in the United States in this respect is that medical malpractice liability premiums in Japan do not vary depending on the physician's specialty or geographical area of practice. 51 Essentially, the risk pool is the nation's doctors. Overall payouts should therefore be far more predictable than in the United States, and in fact premiums were stable throughout the 1990s. It is true that the Japan Medical Association indemnity insurance system has suffered substantial red ink in recent years and found it necessary to increase annual premiums from 55,000 (US $500) to 70,000 (US $640) in 2003. 52 Nevertheless, these amounts are still inexpensive by American standards. From the standpoints of efficiency, cost spreading, and stability, there is much to be said for the Japanese medical liability insurance approach.

B. Self-Critical Analysis and the Law

As pioneers in the field of medical system safety have long pointed out, 53 and as To Err Is Human stressed, 54 essential to a hospital's project of creating a "culture of safety" is self-critical analysis: the gathering and study of reliable information on preventable mistakes and the implementation of corrective measures. Since 2001, JCAHO has made the conduct of "thorough and credible root cause analyses" of all sentinel events a subject for hospitals' triennial

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Inspections. 55 Since 2003, the Department of Health and Human Services (DHHS) has required all hospitals participating in the Medicare and Medicaid programs to develop and maintain a quality assessment and performance improvement program, incorporating self-critical analyses as part of the process. 56 So thoroughly has this concept penetrated the hospital administration world, in fact, that the institution of in-hospital systems for producing self-critical analyses of accidents and near misses may be considered to have become an established standard for American health care institutions.

Many physicians and hospital administrators, cautioned by defense counsel, fear that these self-critical analyses, in the hands of plaintiffs' attorneys, will serve as weapons for infliction of legal liability and professional embarrassment. It is often claimed that this fear deters honest, thorough reviews of adverse events, hindering quality improvement efforts. 57 Whether the fear of disclosure of self-critical analyses in fact stifles efforts at error reduction is empirically unproven, 58 and in any case the fear may be considerably overblown in the light of state-law peer review privileges rendering hospital deliberations about incidents relating to the quality of care nondiscernible and inadmissible as evidence in civil trials. 59 Still, uncertainties persist about the scope of the peer review privilege. 60 [*205] which varies a bit from state to state 61 and which is not recognized in some federal courts. 62 So caution on the part of some medical providers about the legal consequences of conducting self-critical analyses is not without reason.

This concern, against the background of the heated debate over medical tort reform, 63 impelled Congress to enact the Patient Safety and Quality Improvement Act of 2005. 64 The new law, discussed more fully elsewhere in this issue, 65 creates a voluntary system for providers to report medical errors to DHHS-certified Patient Safety Organizations; it makes the reports confidential, shielding them from use in civil and criminal proceedings. Original medical information such as patient charts and incident reports will still be available to litigants as under existing state law, but evaluative information transmitted to a Patient Safety Organization will be protected. 66

Unlike U.S. hospitals, Japanese hospitals are not required to perform self-critical analyses by hospital accreditation authority 67 or by government reimbursement policy. Nevertheless, many Japanese hospitals are beginning to do self-critical analyses, spurred in part by recommendations from the National University Hospital Presidents' Conference 68 and by government from the Ministry [*206] of Health, Labor, and Welfare (MHLW) following the well-publicized medical misadventures noted above. 70 These recommendations have met resistance, not only due to institutional inertia and lack of comfort with the disruption of traditional practices. Part of the resistance is attributable to concerns by Japanese medical leaders, similar to those voiced in the United States, about the possibility that such analyses could be used to medical defendants' detriment in civil malpractice actions or in criminal proceedings. 71

Four separate sources of legal obligation are of concern to Japanese hospitals and physicians in the respect: (1) national and local Freedom of Information rules applicable to public hospitals; (2) the liberalized discovery rules under Article 220 of the civil procedure law; (3) an asserted contractual obligation, recognized in recent cases, to investigate hospital accidents and report the results to patients; and (4) the requirement for reporting to police of "unusual deaths" in Article 21 of the Physicians' Law. The first three sets of rules, relating to civil cases, are discussed in this section of the article; the fourth, violation of which is grounds for criminal prosecution, is discussed in Part IV on criminal law.
Under the national information disclosure law, enacted in 1999, records kept by public hospitals are potentially subject to disclosure unless an exception to disclosure applies, for example to protect individual patients' privacy. However, the privacy exception does not necessarily protect the names of individual physicians. For example, in response to an Asahi Shimbun journalist's request for information on an accident at a public hospital, the Cabinet's Information Disclosure Review Board, which handles administrative appeals under the law, called for the disclosure of the names of attending physicians, the minutes of internal hospital committees investigating the accident, and the contents of apology letters to patients and families. Although such disclosures are apparently uncommon, they contain the potential for considerable embarrassment to medical personnel.

The recent liberalization of the previously restrictive discovery rules of the Japanese civil procedure code has opened up the possibility that hospital incident reports and internal analyses of adverse events might become generally available to plaintiffs' attorneys. (Unlike the information disclosure law, the civil procedure law applies not only to public entities, but to any potential party in a civil case.) Article 220 of the civil procedure law now recognizes a new general principle of discoverability of specifically identified documents, but contains several exceptions. The Supreme Court in its 1999 Fuji Bank decision recognized that "documents produced solely for internal use" (nabu bunsho) are exempt from discovery, under one of these exceptions. Hospitals' internal reports arguably fall within this "internal use" exception.

The Tokyo High Court's decision applied a disclosure principle somewhat broader than that generally employed under American state-law peer review statutes, which typically call for disclosure of incident reports but protect from discovery all documents with evaluative content. This broader disclosure principle may have wide-ranging impact, due to a mandatory accident reporting requirement recently adopted by the MHLW and applied to a class of larger hospitals. This reporting requirement, under the rationale of the court's decision, may vitiate the force of the "internal use" exception to the new general discovery principle, as explained below.

Similar to the controversy over accident reporting in the United States, a major issue facing MHLW in structuring its patient safety programs has been the choice of a system to implement for the reporting and analysis of medical errors. The ministry has wobbled somewhat on the issue, MHLW initially required tokutei kin by in (an administrative category comprising about eighty-one advanced-level hospitals) to establish safety management systems incorporating systems for internal reporting to hospital patient safety committees of accidents involving injury. Fearing provider resistance, MHLW originally required neither tokutei kin by in nor general hospitals to submit any external reports, either of accidents involving injury or of "near misses" in which an error did not result in harm. The ministry encouraged all hospitals, however, to send in reports of "near misses" on a voluntary basis.

MHLW's original reporting program was not a success. The "near miss" reports, which ministry officials had hoped would contain virtually as much information useful in identifying specific problems as reports of actual accidents might contain, were entered into a rigid, unhelpful coding system that made root cause analysis difficult. Few staff were available to read and analyze the reports and give feedback; the lack of feedback in turn discouraged conscientious reporting. Vast variations appeared in the thoroughness with which tokutei kin by in conducted their internal reporting systems for accidents involving injury. The upshot was that the ministry had no reliable information on the actual extent of medically caused injury in Japan.

In 2003, acting on an advisory committee report, MHLW changed course and determined that accidents causing harm to patients, in addition to "near miss" events, would be the focus of the redesigned reporting system. Since 2004, reporting of accidents causing harm has become mandatory, rather than voluntary, for a class of 275 larger and specialized facilities, including national and university hospitals. Reports are made not to any governmental entity with enforcement powers, such as MHLW, but rather to an independent quasi-public entity whose purpose is the collection and analysis of medical accident data and the formulation and dissemination of corrective measures - a structure somewhat analogous to the air safety reporting system in the United States. Although reporting is required, no penalty is assessed for failure to report--a compromise policy aimed at simultaneously mollifying media and patients' groups' criticisms of the previous voluntary reporting system, and appeasing Japan Medical Association opposition to strictly enforced mandatory accident reporting.

The newly mandatory nature of medical accident reporting to a quasi-public outside entity, and the enforcement mechanism by the quasi-public authority, the Saitama Medical University case, may well disqualify those reports from protection under the "internal use" exemption of Article 220 of the revised civil procedure code, discussed above. It may be that the rationale of the Tokyo High Court's decision in that case (if accepted by other courts) would require hospitals subject to the mandatory reporting requirement to disclose to plaintiffs' attorneys, as a routine matter, the "objective" parts of the internal accident investigations upon which their accident reports are based.

Not long ago, Japanese civil procedure law was criticized as too restrictive in its evidence-gathering rules, to the prejudice of the quality of justice, and U.S. discovery procedures were heralded by critics of the old code as providing a freer flow of relevant information to the judicial process. Now, at least with regard to this aspect of medical malpractice litigation, if the principle of the Saitama Medical University decision is broadly applied, the tables may well have turned: Japanese law may tilt more than U.S. law toward error information disclosure in the judicial process. The possible effects on self-critical analysis in Japanese hospitals remain to be seen.

C. Policies of Candor

Legal compulsion, of course, is not the only means by which information about hospital accidents may be disclosed to affected patients, families, and the public. Some hospitals have
adopted policies of rather thoroughgoing voluntary [*211] disclosure. For example, after its nationally publicized heart and lung surgery patient mx-up 95 and other misadventures, Yokohama City University Hospital implemented a policy of public disclosure of all cases of malpractice resulting in death, serious injury, or lesser injury, where hospital safety practices are called into question. 96 The national university hospitals’ organization has also announced a similar policy calling for prompt public disclosure of individual cases of malpractice involving death or serious injury, and periodic public compilations of cases involving lesser fault and lesser harm. 97

Regardless of whether a hospital discloses its mistakes to the general public, or its self-critical analyses are made available to plaintiffs’ attorneys, in the United States a consensus has formed that errors resulting in harm to patients must be disclosed to the patient and family as a matter of medical ethics. Medical mistakes must not be covered up. This ethical duty of truth telling about error may not be universally observed—in fact, actual practice it may be disregarded as often as not 98—but the duty is made clear in the American Medical Association’s Code of Medical Ethics. 99 and the JCAHO hospital accreditation process now reinforces that ethical principle as an accreditation requirement. 100

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Neither the Japan Medical Association’s code of ethics 101 nor the hospital accreditation criteria of the Japan Council for Quality Health Care 102 contain any provisions concerning error disclosure to patients corresponding to the stances of the American Medical Association and the JCAHO. We are unaware of any studies on the extent of error disclosure to Japanese patients and families. On the one hand, the importance of sincere apology as an essential element in dispute resolution in Japan 103 suggests that candor should be at a premium. On the other hand, there are gradations of candor, and frequent is the case in which a “sincere apology” is extracted only after the harm-causer is driven into a corner by exposure of the facts. It is apparent that a great deal of the distrust in physicians that the Japanese public has come to harbor is a consequence of the medical world’s blanket of secrecy.

However, recent judicial decisions have recognized that hospitals have a legal duty to investigate the causes of medical accidents and to report the conclusions faithfully to the patient. Both the Kyoto District Court 104 and the Tokyo District Court 105 have held that this duty to investigate and report on accidents arises out of the hospital-patient contract, in which the medical provider undertakes an implied obligation to explain the nature and course of treatment and its results. Reinforcing the autonomy principle recognized in recent Japanese medical jurisprudence, 106 these decisions should help lay the groundwork for greater [*213] candor toward injured patients. The decisions also suggest avenues worth exploring in American litigation over medical accidents in which medical providers have been duplicious or evasive about adverse outcomes.

Access by medical error victims and the general public to reports of patient safety hazards through the civil justice system, administrative mechanisms, and voluntary private initiatives is not the only means by which the principle of public accountability for medical error can be vindicated. In Japan, far more than in the United States, a significant locus for the accountability function is the criminal justice system, amplified by the power of the media.

IV. Patient Safety and the Criminal Justice System

Criminal prosecutions of medical personnel for medical acts 107 resulting in harm to patients are rare in both Japan and the United States. Barriers to successful criminal prosecution are high, and properly so. Nevertheless, the criminal law is available in both nations (as it is in European legal systems) 108 as a restraint on patient-endangering acts of uncommon turpitude.

In this section of the article we compare the frequency of criminal prosecutions for medical acts in the two nations and the relative significance of the prospect of prosecution to medical personnel, finding that the criminal law casts a longer shadow in Japan. We set out the chief legal grounds for [*214] prosecuting medical acts, grounds generally unavailable to American prosecutors. We note that in the years since the spotlight has begun to shine on prosecutions of medical personnel, hospitals’ reports to police of medical accidents have increased. We describe the considerations prosecutors say they take into account in bringing medical cases in Japan, and speculate that a reason Japanese medical error victims appear more likely than their American counterparts to seek prosecutions of erring medical providers may be a greater convergence of objectives between prosecutors and victims in Japan than in the United States.

A. Prosecutions for Medical Acts in the United States

In the United States, it has been estimated that two recent decades have seen perhaps twenty-five to thirty-five cases of criminal prosecutions for medical negligence. 109 These cases were typically brought, and convictions sometimes obtained, on the basis of the defendants’ reckless disregard for patients’ safety—a standard considerably stricter than the negligence standard applied in civil cases. 110 The rarity of these prosecutions is at least partly explained by the [*215] factual complexity typical of medical cases and the need for expertise regarding matters such as causation and professional standards of care, the discretion afforded physicians in matters of medical judgment, the high burden of proof beyond a reasonable doubt, and the fact that responsibility for prosecution decisions typically falls on busy local prosecutors’ offices lacking ready access to medical expertise. These factors together make the prosecution of medical personnel a costly and difficult endeavor.

Accordingly, in comparison with the relative frequency of civil medical malpractice actions, the threat of criminal prosecution does not loom large as a concern of American physicians and hospitals. Injured patients and their families seldom seek to have a harm-causing physician indicted; the private law remedy is vastly preferred.

B. Medical Prosecutions in Japan

1. Significance to Medical Personnel

A major source of concern to Japanese hospitals and physicians is the prospect of a police investigation and criminal prosecution. 111 (This concern is not shared in the United States, though it is to an extent in some European nations.) 112 Even before the recent surge of public attention to the problem of medical error, an average of two to three prosecutions per year were brought in medical cases in Japan 113—a per capita frequency considerably higher than that reported in the American literature. 114

[*216]
More important than the absolute number of prosecutions is the level of media coverage. The front-page publicity accorded to prosecutions for recent medical disasters has set the medical profession on edge and has helped create a public expectation of sorts that police and prosecutors play a routine role in sorting out medical mishaps. This expectation is evident in the actions of medical-malpractice victims. Attorneys experienced in representing Japanese medical malpractice plaintiffs report that patients and families sufficiently indignant about medical injuries to consult an attorney frequently also seek police investigations, and want to see medical wrongdoers prosecuted. This sense of indignity is due in part, but only in part, to anger over providers' not uncommon practice of deceit about harm suffered in the hospital, and falsification of patients' medical records.

2. Legal Grounds for Criminal Prosecutions; Reporting of Medical Accidents to Police

Japanese prosecutors employ several legal weapons in medical cases that are not part of American prosecutors' usual arsenal. Most importantly, the standard charge brought against medical personnel under the Japanese Criminal Code is "professional negligence causing death or injury" - a crime not found in U.S. statute books. (As noted above, the few convictions in recent years in American medical cases almost always involve charges of recklessness or intent—a higher level of mens rea than negligence.) Additional sanctions are available in the Criminal Code for attempting to cover up medical wrongdoing by altering patients' charts, which plaintiffs' attorneys charge is a common practice, and under the Physicians' Law for failing to report "unusual deaths" (i.e., deaths) to police. Japanese prosecutors may be reluctant to bring medical crime cases for various reasons including the factual difficulties, but as these provisions demonstrate, their statutory obligation to protect the public certainly extends into medical facilities.

The crime under Article 21 of the Physicians' Law of failing to report an "unusual death," though infrequently prosecuted, is causing considerable controversy within Japanese medical circles. Disagreement exists about whether this ambiguous provision of the Physicians' Law requires only the reporting of deaths in which ordinary non-medical criminal activities might be suspected—the traditional interpretation—or whether the provision extends to cover deaths in which professional negligence might be involved.

The issue exemplifies the tension between the goals of patient safety and public accountability. Like the prospect of being named a defendant in a civil malpractice action in the United States, the possibility of criminal sanctions and adverse reputational consequences could create, in the minds of medical personnel, the incentive to cover up medical mishaps. Thus, the opportunity for analysis and correction of errors would be lost—a point that has escaped the notice of neither scholars nor medical practitioners. Accountability considerations, however, demand that circumstances raising suspicions of medical error be communicated to some competent, neutral entity outside the hospital, rather than being kept under wraps in the usual fashion. At present, there are few external entities capable of effective response to such communications, except the media (to whom whistleblowers within the hospitals have increasingly turned) and the police. So, despite the limitations of police in terms of medical expertise, it is understandable that some might favor a structure encouraging reporting to the police as a public accountability mechanism. Indeed, leaders of the medical world, attentive to shifts in public attitudes, recognize the social importance of a functioning accountability mechanism as a way of regaining the public's shaken trust in their profession.

Since the well-publicized arrest and conviction of the director of Hiroo General Hospital in Tokyo for failure to report a malpractice-related death, and the affirmance of the conviction by the Supreme Court of Japan, many physicians and hospitals have chosen to err on the side of caution and have filed "unusual death" reports whenever a patient dies in circumstances raising the possibility of professional negligence. The number of reports to police has increased six-fold since the Hiroo Hospital case became public (Figure 2).

[SEE FIGURE 2 IN ORIGINAL]

This jump in Japanese medical providers' reports to police may have implications for the debate in the United States over the proper extent of legal protection for self-critical analyses. The statistics on increased reporting indicate that the threat of legal sanction does not invariably lead medical providers to conceal evidence about adverse events. Economic incentives derived from reputational loss constitute a significant counterweight. When a hospital's coverage is revealed, public distrust of the hospital is magnified, and the hospital's patient population may drop precipitously. The prospect of avoiding that disquieting possibility has apparently reinforced hospitals' inclination to make a clean breast of hospital deaths that may be medically related.

As noted above, MHLW recently adopted a mandatory reporting system for adverse events, with reports to be submitted by a subset of hospitals to an independent entity without enforcement powers. As this new system gains traction, the accountability-based pressure for reporting to police is likely to diminish. Whether the lodging of a part of the public accountability function in the new reporting system will affect the interpretation of the ambiguity in the Physicians' Law remains to be seen.

3. Prosecutorial Considerations

According to Tokyo prosecutors experienced in medical cases, several factors are most important in decisions about whether to prosecute. Factors supporting prosecution are (1) the bringing of a complaint by the patient or family, (2) the seriousness of the harm, (3) the egregiousness of the medical personnel's acts or omissions, (4) the clarity of proof of negligence, and (5) failure by the medical personnel involved to have provided compensation and apologies to the injured. Other relevant considerations include the extent of media coverage, the current weakness of professional discipline, and perhaps, the deterrent effect of prosecution on other harm-causing behavior. Few cases meet these criteria, but those that do, when they become public, have enormous impact.

4. Why a Greater Role for Criminal Law in Japan? A Conjecture

Criminal law plays a far greater role in the public regulation of medical error in Japan than in the United States. Japanese aggrieved by perceived medical error have a greater tendency to call for police and prosecutorial involvement than Americans. The lack of other accountability mechanisms in medicine—for example, the weakness of peer review and professional discipline structures, the lack of mandatory hospital accreditation, and the relative infrequency of civil malpractice litigation—enhances the social importance of the criminal law as a way of increasing transparency in the medical world.
Various theories have been offered for the tendency of Japanese to rely on police and prosecutors in cases of medical harm. One explanation draws on a traditional predilection among Japanese to look to public authorities to resolve disputes; 
private disputes that Americans would resolve privately. Another explanation emphasizes the practical difficulties and delays in obtaining civil law remedies through malpractice actions, impelling victims to turn instead to public officials who are more accessible and may be more likely to act.

One other conjectural explanation, drawing on the work of David Johnson, focuses on a comparison between the goals of victims of medical error and the goals of prosecutors. Recent scholarship on medical error victims’ experiences and goals, and victims’ own accounts, indicate that their objectives include compensation, a sincere apology, knowledge of the truth about what happened, sometimes revenge, and the institution of measures to avoid similar injuries in the future.

Prosecutorial objectives in Japan are rather well aligned with those of medical error victims. As Johnson demonstrates, Japanese prosecutorial culture emphasizes establishing the exact facts of each case, taking victims’ wishes into account when deciding to dispose of cases, and pursuing defendants’ rehabilitation by encouraging remorse. Prosecutors’ considerations in the charging decision include whether the victim has received compensation and apology. It is reasonable to assume that Japanese prosecutorial priorities are known to the public, at least in a general way. It is not surprising, then, that Japanese medical error victims should turn to prosecutors for assistance.

By contrast, American prosecutors are typically far busier than their Japanese counterparts and generally less exacting about determining the precise facts of each case, particularly with regard to non-violent crimes. They lack the high regard for the importance of remorse and apology that forms part of Japanese prosecutorial culture. They are more remote a source of potential assistance to those suffering from medical error than are private attorneys specializing in personal injury. In short, the prosecutor is less appealing as an ally to injured patients and families in the United States than in Japan.

V. The Health Ministry “Model Project” on Investigation of Medical Accidents

Keenly aware of the criticisms of the extent of the criminal justice system’s involvement in the patient safety arena but attempting to work within existing legal and institutional structures, the Ministry of Health, Labor and Welfare launched a “model project” in the autumn of 2005 to try to move the system in a different direction. Four medical specialty societies helped launch the “model project,” viewing it in part as a possible alternative accountability mechanism that could ultimately displace some of the emphasis heretofore placed on criminal prosecutions. The project, initiated in Tokyo, Osaka, Nagoya, and Kobe, will work as follows.

When a patient dies in a hospital under circumstances indicating the possibility of medical error, an independent, third-party investigation by medical specialists can be undertaken with the agreement of both the patient’s family and the hospital. An autopsy would be conducted. Autopsies have seldom been performed in Japan, largely for cultural reasons, but pathologists and forensic medicine specialists are eager to raise their professional profile, and both the pathology and the forensic medicine specialty societies are participating in the experiment.

Specialists from the relevant medical disciplines will review the patient’s chart and interview the attending physician and other hospital personnel. An evaluation board will review the evidence and submit a report on the cause of death and on needed preventive measures both to the hospital and to the family. Then the report, with identifiers redacted, will be made public.

This third-party mechanism will have nothing to do, as a formal matter, with the question of compensation for the family. But as a practical matter, no doubt its conclusions will carry considerable weight in negotiations between the family and the hospital. Where negligence is inferable from the facts found by the investigators, given their prestige and standing, it would most likely lead quickly to apologies and formal expressions of remorse by the hospital and physicians, attention to needed preventive measures, and agreement for compensation to the family within standard amounts. The process could therefore serve as a speedy substitute for the civil malpractice action, although it would not preclude the possibility of an action. The effect of the process would probably also be to buffer providers from the draconian criminal law.

If this experiment works well and the process it envisions takes root in Japan, one of its promising aspects is that it would help bring external peer review into Japanese medicine. It would not be secret peer review; rather, the mechanism would have accountability built into it, by providing the facts and the experts’ conclusions to the family, the profession, and the general public.

The aim of the “model project” is to obtain the medical facts and conclusions in much more timely, less expensive, and perhaps more accurate, objective fashion than the civil law malpractice system currently allows. It is an experiment well worth monitoring. If it succeeds, reformers seeking to link patient safety and improvement of the American medicolegal dispute resolution system may find its conclusions instructive.

VI. Conclusion

Both Japan and the United States are coming to realize that reduction of the human toll from medical error is a social objective of the first importance. Leaders in both nations recognize that accurate information on the nature, frequency, and causes of medical errors is essential to any successful quality improvement program. Both nations are grappling with the problem that obtaining accurate information through programs of self-critical analysis in medical facilities may create serious tension between the goals of patient safety and public accountability.

Differences in the two societies’ legal structures, however, have forced efforts to resolve this tension into somewhat different trajectories. In the United States, battles over the rules of civil malpractice litigation are fierce, and tort law occupies center stage in the debate. The hospital accreditation process plays a critical role in medical quality control, and peer review is relatively well developed, so a major issue (resolved to some extent by the Patient Safety and Quality Improvement Act of 2005) has been protecting from plaintiffs’ attorneys internal hospital information developed for purposes of quality improvement and accreditation requirements. In Japan, although the volume of medical malpractice cases is increasing, malpractice premiums (stabilized by nationwide risk pooling without regard to medical specialty) do not pinch the medical profession to a comparable degree. Pressures on hospitals from civil litigation and from hospital accreditors are much less stringent, and peer review and professional discipline are weak. The debate in Japan focuses to a larger extent on the proper role of the criminal justice
system as a regulator of medical quality.

It is possible that the threat of criminal prosecution and accompanying adverse publicity may undercut sorely needed initiatives within Japanese hospitals to perform self-critical analyses, although statistics demonstrating a recent substantial increase in reporting of medical accidents to police cast some doubt on the extent of this potential patient safety problem. In any case, few would contend that police and prosecutors are ideally suited for the medical quality control role that has been thrust upon them. Nonetheless, democratic societies demand public accountability, and the relative weakness of other social structures [*225] regulating medicine in Japan has made the criminal justice system (together with the media) into an accountability mechanism of last resort.

With regard to two important points, however, the involvement of the criminal justice system in the medical error arena offers Japan unqualified benefits. First, it has helped motivate the medical profession to undertake internal system improvements [*48] and to cooperate in the health ministry's innovative "model project" for neutral expert investigation of medical accidents. Second, under the criminal law's looming presence, the entrenched practice of systematic deception of patients about medical harm cannot long endure. Whistleblowers within hospitals have uncovered these deceptions; prosecutors are not inclined to tolerate them, criminal sanctions as well as civil damage judgments have ensued, and the media are unforgiving. Thanks in part to the criminal justice system, the practice of medical dishonesty by doctors and hospitals seeking to cover up their mistakes is likely on the wane.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare Law > Business Administration & Organization > Accreditation
Torts > Malpractice & Professional Liability > Attorneys
Torts > Malpractice & Professional Liability > Healthcare Providers

FOOTNOTES:


2. See infra notes 45-48 and accompanying text, and Figure 1.


4. Campbell & Ikegami, supra note 3, at 188 (noting that "few hospitals have quality assurance programs" and that "[c]onducting peer reviews is usually technically not possible because the state of medical records is so poor that they may be incomprehensible even to the writer.").

5. Interview with officials in the Ministry of Health, Labor, and Welfare's patient safety office, Tokyo (Aug. 6, 2004) [hereinafter MHLW Aug. 2004 Interview]. These officials noted that the Medical Ethics Council, which operates under health ministry auspices, embarked on a new policy in late 2002 whereby serious malpractice and related misconduct could be the basis of an administrative sanction. However, information about incidents of malpractice is hard to come by. The ministry's patient safety office is staffed with only eight people, who have a multiplicity of other tasks besides investigating malpractice incidents. Moreover, unlike the police, health ministry officials lack subpoena power, and some hospital administrators have refused their requests for documents. Id.


7. JQHQC surveys, unlike their JCAHO counterparts, do not check whether hospitals carry out self-evaluations of adverse events. Interview with Hisashi michi, director, JQHQC, Tokyo (July 31, 2003) [hereinafter michi Interview].

8. The account given here was compiled from interviews with government sources, attorneys, and physicians, and from the following news stories: "By in ni ki na kekkai: 3 ishi taiho de inch ra ga kaiken ["Major Problems at This Hospital," Director Says of Arrest of 3 Doctors], Yomiuri Shimbun, Sept. 25, 2003; Three Urologists Held over Patient's Death; Inexperienced Doctors Readied For Operating, Japan Times, Sept. 26, 2003; Taiho no Jikei Id by in 3-ishi, Rini-I no shin tora shu jutsu [3 Jikei Medical U. Docs Arrested; Operated Without Ethics Committee OK], Yomiuri Shimbun, Sept. 26, 2003; 3-nin dake no shitt de oshiku - Jikei by in no jken [Jikei Hospital Case: Surgeons Insisted on Team of Only 3], Yomiuri Shimbun, Sept. 27, 2003; Jikei Id by in no shujutsu byo nito shu jutsu, ishi no b s kai rei e [Jikei Hospital Tums Over Surgery Video; Will It Explain Docs' Surgical Joyride?] Yomiuri Shimbun, Sept. 28, 2003; Jikei Id by in no shujutsu mtsu, 2 hikoku to moto shinsyu bchu o ch kaika [Jikei Medical U. Hospital Surgical Error: 2 Defendants and Ex-Supervisor Sacked], Yomiuri Shimbun, Dec. 26, 2003; Jikei Medical School Fines Three Doctors Standing Trial for Malpractice Death, Japan Times, Dec. 27, 2003; Moto Jikei Id byo to by in 2-ishi ni gy ru tsu shi 2- nen. Id. - shin [Medical Ethics Board Gives 2 Former Ato Hospital Docs 2-year License Suspensions], Yomiuri Shimbun, Mar. 17, 2004; Panel Floats Suspension for Surgeons, Japan Times, Mar. 18, 2004; Jikei Id byo to by in jken [Jikei Medical U. Ato Hospital Case], Yomiuri Shimbun, June 18, 2005.


11 See Paul C. Weller, Medical Malpractice on Trial 13 (1991) (summarizing HMPS finding of only one tort payment for every three potential claims involving the most serious or costly injuries); Paul C. Weller et al., Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation 70 (1993) (describing HMPS finding of one tort claim for every 7.6 negligently caused injuries). Factors suppressing the filing of malpractice actions when negligence is present include the lack of information available to injured patients and their families concerning the facts regarding patient care; potential plaintiffs' disinclination to undergo the rigors of obtaining and cooperating with legal counsel in the preparation and trial of a lawsuit; and the practical difficulties to plaintiff's attorneys of obtaining and marshaling proof of negligence and causation of injury in a cost-effective manner.

12 The hospital may have offered compensation to the family on a private, informal basis; we are unsure whether that is the case.

13 The youngest of the three urologists, who acted only as a surgical assistant, pleaded innocent. The hospital suspended him for work for ten days. As of this writing his criminal trial continues.

14 See supra note 8.


16 This phenomenon has received sporadic international attention. See, e.g., Yuriko Ono, In Japan, a Doctor Shakes Up Medicine in Malpractice Case, Wall St. J., June 10, 2002, at A1 (physician's negligence action against hospital in which her daughter died).

17 A heart patient had part of his lung removed, and a lung patient with a similar name had part of his heart valve excised. The mistake was not discovered until the evening after the operations. Three doctors and two nurses were found criminally liable for professional negligence. 1087 Hanrei Taimuru 296 (Yokohama Dist. Ct., Sept. 20, 2001). See Court Fines Medical Staff for Heart, Lung Miap, Japan Times, Sept. 21, 2001.

18 A patient died after a nurse injected her with what the nurse believed to be a heparin solution. In fact the syringe contained a disinfectant, and had been left on the cart by another nurse. The two nurses were convicted of the crime of professional negligence causing death or injury. The hospital director was convicted of forging a death certificate containing a false cause of death, and of failing to report the case to police. 1771 Hanrei Jih 156 (Tokyo Dist. Ct., Aug. 30, 2001); see also Coverup of Patient's Death Gets Director Suspended Term, Japan Times, Aug. 31, 2001; Nurses Get Suspended Sentences In Hiro Malpractice Case, Japan Dist. Ct., Dec. 28, 2000. The Supreme Court affirmed the hospital director's conviction. 58(4) Keshi 247 (Sup. Ct. April 13, 2004) (Hiroo Hospital case).

19 Improper operation of a heart-lung machine by one doctor during heart surgery led to a decreased blood flow to the brain of the twelve-year-old patient, who later died. Another doctor, who was in charge of the surgery, falsified data on the patient's chart in a coverup attempt. Two Doctors Indicted in Malpractice Death, Int'l Herald Tribune/Asahi Shimbun, June 29, 2002, at 1. The first doctor was arrested and indicted for professional negligence causing death, the second for destruction of evidence. 2 Doctors Indicted for Girl's Death, Int'l Herald Tribune/Asahi Shimbun, July 20-21, 2002, at 22. The hospital was stripped of its prestigious and remunerative status as a tokutei ikin by in (an administrative category of advanced-level hospitals). An external investigative committee later found that one of the doctors had not "acquired the basic knowledge required for heart surgery," and that three other patients had died after he had operated on them. Masahiro Unemura & Atsuko Kinosita, Hospital's System Blamed in Patient's Death of Lack of Training, Suit Over Possible Causes of Deaths, Daily Yomiuri, Apr. 8, 2005, at 3. However, he was recently acquitted on the professional negligence charge. Doctor Acquitted in Girl's Death, Int'l Herald Tribune/Asahi Shimbun, Dec. 1, 2005, at 28.

20 We base this assertion on extensive conversations with physicians (among them former hospital administrators), health ministry officials, and attorneys representing both plaintiffs and medical providers. Among the recurrent reasons offered in these conversations is the fact that reputational damage to the medical provider can often be largely or completely avoided in the case of one tort claim. On the other hand, in contrast, in the case of media reports and official acts by police and prosecutors (which become matters of public record and typically are pounced upon by the media), reputational damage is inevitable. We do not mean to minimize reputational concerns among hospitals in the United States. As patient safety specialists Robert Wachter and Kaveh Shojania have noted with regard to North America, "Fear of media exposure runs neck-and-neck with fear of lawsuits in reasons for 'failure to disclose' by caregivers and hospitals." Wachter & Shojania, supra note 9, at 266. See generally William M. Sage, Reputation, Malpractice Liability, and Medical Error, in Accountability: Patient Safety and Policy Reform 159-83 (Virginia A. Sharpe ed., 2004). Our claims are rather that civil liability occupies a relatively less prominent position in Japan than in the United States, and that criminal liability plays a more important role in the Japanese system than in the North American systems.


22 Institute of Medicine, To Err Is Human: Building a Safer Health System (2000) [hereinafter To Err Is Human].


24 Media exposes, in particular the Boston Globe's 1995 account of the death of one of its columnists at the Dana Farber Cancer Institute due to medication mistakes, drew attention to the scientific evidence of the widespread incidence of medical error and helped spark the national debate over the issue. See Michael L. Millenson, Moral Hazard vs. Real Hazard: Quality of Care Post-Arrow, 26 J. Health Pol'y, Fady & L. 1069, 1074 (2001).