

the scope of essential abilities will become even wider. The Reform Council recognized this, with its calls for a diverse student body, broad education bridging theory and practice, and many other features of the law schools it envisioned.

Those of us who teach in the so-called foundational fields, such as sociology of law, jurisprudence, legal history and comparative law, might feel that even from the outset most of the new law schools paid too little attention to the Reform Council's admonitions of the need for the legal profession to possess "rich humanity and sensitivity" and "insight into society and human relationships." As discussed earlier, however, in many other respects the new law schools realized significant achievements. These include a rather diverse student body, clinics and other education in practice-related skills, attention to ethics, and, at many law schools, programs in international law and various specialized fields. Yet these and other achievements either already have eroded or are under threat; and in some respects the threat extends even to undergraduate legal education and beyond.

The main source of the threat lies in the bar examination, either alone or in combination with other factors. With respect to admissions in general, the low passing rate on the bar exam, coupled with widespread reports over the difficulty even LTRI graduates face in finding jobs, would appear to be the key reasons for the dramatic decline in the number of people applying to law school. The decline in applications has been even more dramatic for the two groups that were supposed to diversify legal education and the legal profession, the *mishūsha* and *shakaijin*. For those groups, the bar exam represents an especially daunting barrier. With a pass rate for *mishūsha* that is well under 20% and dropping, it is no surprise fewer and fewer nonlaw graduates choose to attend law school. Yet with nonlaw graduates now constituting less than 20% of the student body at most Japanese law schools, the initial promise of greater diversity is quickly being lost.

Within the law schools, the bar exam is driving many aspects of the curriculum. To prevent law schools from gearing the curriculum entirely to the bar exam subjects, the accreditation standards set minimum requirements for credits in several non-bar exam fields,<sup>225</sup> as well as maximum credit hours for courses in the

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225. Using the National Institution for Academic Degrees and University Evaluation (NIAD-UE) standards as an example, students must complete at least

bar exam fields.<sup>226</sup> Even though that maximum represents approximately two-thirds of the total credit hours required for graduation, some law schools have sought to skirt the requirements, by, for example, disguising exam-oriented courses under other labels or characterizing mandatory additional study sessions conducted on weekends or during school breaks as “voluntary.” For that reason, one of the responsibilities of the accreditation bodies is to ensure that the course content actually corresponds to the course names and descriptions.

The low pass rates on the bar exam naturally affect not only the decision whether to apply to law school in the first place, but course choice and behavior patterns of students once they have entered. Students inevitably feel great pressure to devote their time to subjects that will appear on the bar exam and to avoid other courses,<sup>227</sup> not to mention extracurricular activities that might interfere with bar exam study. And while students are required to earn certain numbers of credits in specified categories other than the bar exam subjects, the level of student commitment in those courses

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four credits in foundational fields or neighboring disciplines; at least eight credits in practice-related fields, including two credits in determining the elements of causes of action and basic fact-finding for civil procedure and two credits in fact-finding for criminal procedure; at least two credits in professional responsibility; and at least twelve credits in advanced or cutting-edge fields of law. See NIAD-UE, *supra* note 110, at 5-9 (Chapter 2, Standard 2).

226. Of the 93 credit hours required for graduation, the NIAD-UE standards mandate at least 54 credit hours in the seven core bar exam fields and authorize the law schools to require up to eight more credit hours in those fields. *Id.*

227. See, e.g., Miyagawa et al., *supra* note 160, at 113. I am all too familiar with this phenomenon through personal experience. Ever since I joined the University of Tokyo faculty on a full-time basis in the year 2000, I have offered a course in International Contract Negotiation, in which teams of students from the University of Tokyo utilize Internet-based videoconference facilities, e-mail and other technologies to negotiate major contract with teams of students at the University of Washington School of Law, where I taught previously. (For a description and account of the early years of that course, see Daniel H. Foote, *International Contracting Meets Information Technology: Tales from a Transpacific Seminar*, Z. JAPAN. R./J. JAPAN. L., Vol. 10, No. 19, pp. 69-100 (2005).) For the first five years, before the law schools started, I offered it as an undergraduate seminar. All those years, it was vastly oversubscribed, with sixty to over one hundred students applying for the fifteen slots available. In the eight years since it became a law school offering, I have never had to limit enrollment. To the contrary, I have struggled to attract even a dozen students in total, and the first year I had to proceed with just six. Former students from both eras routinely tell me that, of all their classes, this class was by far the most valuable preparation for practice. Nonetheless, most law school students are chary of devoting the time the class requires, for a subject that is only tangentially related to the contents of the bar exam.

is often lower than in the exam-related subjects. The impact extends to the exam-related subjects, as well. Even at top law schools, students have voiced complaints when faculty members in those subjects spend precious class time discussing topics not likely to appear on the exam.

The impact from the bar exam is not limited to whether or not one passes. Passers receive a notice informing them of their rank order on the exam; and the judiciary, procuracy, and many law firms reportedly take the rankings into consideration in their hiring decisions. According to the student grapevine, for graduates of certain elite law schools (fortunately including the one at which I teach), law firms place considerable weight on the candidates' law school grades; but for students from nonelite law schools, many law firms base hiring decisions heavily on the candidates' rank on the bar exam, by, for example, welcoming those who ranked among the top 500 passers but avoiding those below 1,500. If these reports – variants of which naturally can be found on blogs<sup>228</sup> – are true, how students have performed in their two or three years at law school, and what they have studied there, are of little importance; what really matters is how they do on the single occasion of the bar exam. Moreover, regardless of how widespread this practice may be, the very fact students believe these reports makes them a potent influence on student behavior.

Bar exam passage rates of course are of great importance to the law schools, as well as to the students. If the *U.S. News and World Reports* law school rankings are the principal criterion by which prospective applicants rate U.S. law schools, in Japan typical applicants are most concerned with the bar passage rates. Moreover, even private law schools in Japan are heavily dependent on public funding, administered by MEXT, and the bar exam passage rate for graduates is one of the key criteria by which MEXT evaluates whether to continue to provide such funding.<sup>229</sup> The resultant

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228. See, e.g., Kuroneko no tsubuyaki (黒猫のつぶやき) [Mutterings of a Black Cat], Shinshihōshiken no “gōkakushasū fuyasebyō” ni tsuite (新司法試験の『合格者数増やせ病』について) [Regarding the “Increase the Number of Passers Disease” on the New Bar Exam], July 8, 2012, <http://blog.goo.ne.jp/9605-sak/e/e587910846f84a1f9e1aa8689e472095>.

229. See, e.g., Yureru hōkadaigakuin (揺れる法科大学院) [Trembling Law Schools], *Asahi Shinbun*, Sept. 14, 2012, at 34; MEXT, Hōkadaigakuin no soshiki minaoshi o sokushin suru tame no kōteki shien no saranaru minaoshi ni tsuite (法科大学院の組織見直しを促進するための公的支援の更なる見直しについて)

pressure affects many aspects of law school administration, including decisions on whom to admit, teaching methods, and structure of the curriculum. It comes as no surprise to hear that some law schools that had established specialized programs in fields with little connection to the bar exam, such as welfare law and international law,<sup>230</sup> have shifted resources away or have allowed positions in those fields to lapse when faculty members have retired. At many law schools with highly developed clinical programs, student enrollments in those programs have declined.<sup>231</sup> One even hears rumors that administrators at some schools have discouraged students from taking intensive clinics or other specialized offerings, evidently out of fear over impact on bar passage rates.

The impact of the bar exam extends to the undergraduate level. When the law schools were first established, many universities shifted advanced doctrinal offerings from the undergraduate law faculties to the law schools. Even at that time, though, a few universities reportedly increased the weight accorded to bar exam subjects at the undergraduate level. Recent reports suggest other universities are moving in a similar direction or reinstating advanced doctrinal courses at the law faculty level, in parallel to the law schools. One reason for these trends lies in the law school admissions process. For law school applicants to qualify for the two-year *kishūsha* course, they must pass an exam to demonstrate they have mastered the core subjects taught in the first year of law school (which largely correspond to the bar exam subjects). Most law schools administer their own exams for this purpose, as part of the admissions process. By selecting students who already have demonstrated considerable mastery of those fields, the law schools can enhance the likelihood their students will pass the bar exam following graduation. This in turn means that undergraduates in

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[Regarding the further review of public funding to promote review of law school organization], Sept. 7, 2012, available at [http://www.mext.go.jp/b\\_menu/houdou/24/09/1325669.htm](http://www.mext.go.jp/b_menu/houdou/24/09/1325669.htm).

230. Although Private International Law and Public International Law are two of the eight elective subjects on the bar exam, the percentages of candidates who take those subjects (8.3% and 1.5% of all exam takers, respectively, in 2012) lag far behind those for the most popular fields, Labor Law (31.2%) and Insolvency (23.6%). See MOJ, Heisei 24nen shihōshiken juken jōkyō (平成24年司法試験受験状況) [Circumstances of Examination Taking, 2012 Bar Examination], available at <http://www.moj.go.jp/content/000098851.pdf> (statistics for 2012).

231. See Miyagawa et al., *supra* note 160, at 113.

law who are aiming at the legal profession feel even greater pressure to master doctrine in the bar exam subjects, in order to achieve admission to law school.

The preliminary exam provides another important incentive for undergraduate law faculties to beef up their advanced doctrinal offerings. The preliminary exam was conducted for the first time in 2011. As with the old bar exam, the preliminary exam consists of three stages: multiple choice, essay, and oral exams. In 2011, 6,477 candidates sat for the exam. Of the exam takers, 1,434 were still enrolled either in undergraduate programs (1,236) or law schools (198). In total, only 116 passed, for an overall passage rate of just 1.8%.<sup>232</sup> Among the current students who took the exam, the passage rate was somewhat higher: 3.2% for undergrads and 3% for law school students. Overall, over a third of the passers, 39, were still enrolled in undergraduate programs, with six more in law schools.<sup>233</sup>

In 2012, the number taking the preliminary exam rose by about 10%, to 7,183.<sup>234</sup> The overall pass rate rose somewhat, from 1.8% to 3%; and the total number of passers nearly doubled, to 219. The number of current undergraduates taking the exam rose by an even greater proportion, 34%, to 1,657; and their success rate also increased, from 3.2% to 4.2%. For law school students, the changes were far more dramatic. The number of current law school students taking the exam nearly tripled, to 555. And the success rate for law school students also rose greatly, from 3% to 11%. Of the passers, nearly sixty percent were still enrolled either in undergraduate programs (69) or law school (61).

The statistics on the preliminary exam alone pose a concern for Japan's law schools. The rate of success achieved on the bar exam, by those who qualified through the preliminary exam, greatly

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232. See Hōmushō daijinkanbō jinjika (法務省大臣官房人事課) [Personnel Division, Minister's Secretariat, MOJ], Heisei 23nen shihōshiken yobishiken kōjutsu shiken no kekka (平成23年司法試験予備試験口述試験の結果) [Results on the Oral Examination of the 2011 Bar Examination Preliminary Examination], available at <http://www.moj.go.jp/content/000080849.pdf>.

233. See MOJ, Heisei 23nen shihōshiken yobishiken (平成23年司法試験予備試験) [2011 Bar Examination Preliminary Examination], Sankō jōhō (参考情報) [Reference information], available at <http://www.moj.go.jp/content/000080863.pdf>.

234. For statistics on the 2012 preliminary exam, see Heisei 24nen shihōshiken yobishiken (平成24年司法試験予備試験) [2012 Bar Examination Preliminary Examination], Sankō jōhō (参考情報) [Reference information], available at <http://www.moj.go.jp/content/000103364.pdf>.

increases the concern. Of the 116 who qualified by passing the 2011 preliminary exam, 85 took the bar exam in 2012. Of those, 58 passed, for a passage rate of 68%, considerably higher than even the highest rated law school that year (Hitotsubashi, at 57%). And of the 37 who were still in college or law school when they took the 2012 bar exam, 34 passed, for what, by Japanese standards, represents the extraordinary success rate of nearly 92%.<sup>235</sup> Furthermore, just as under the old bar exam system, those who passed the preliminary exam and then the full bar exam while still in college or law school reportedly have been getting the star treatment, with top law firms competing to recruit them. Thus the treatment accorded this group conveys the message that the old mindset is still intact: passing a highly competitive exam at a young age is what really counts, not experience nor law school education.

For undergraduate law faculties, at least those at a handful of elite universities, the preliminary examination route to the legal profession represents a new opportunity. Reinstating advanced doctrinal courses to the undergraduate curriculum may be seen as helping to attract students who want to pursue that route and aiding them in their studies, and at the same time ensuring they have access to a sufficiently broad array of courses to prepare adequately for their future careers.

For law schools, of course, the preliminary examination represents a grave threat. Before the preliminary exam started, law schools could hope and pray it would prove to be a very narrow path, with such difficult questions and strict grading only a handful of candidates would pass each year and the chances of success would be minimal. The results from the first two years of the preliminary exam suggest those prayers will have been in vain. Accordingly, for law schools to be able to stand up to the threat presented by the bypass, it is vitally important for them to demonstrate that they provide added value, and that law school graduates possess qualities and abilities not likely to be found among those who have qualified through the preliminary exam. In this respect, one would hope that the skills and qualities the MEXT

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235. For the statistics in this paragraph regarding the 2012 bar exam, see Shiryō 45, Heisei 24nen shihōshiken juken jōkyō (yobishiken gōkakusha) (資料45, 平成24年司法試験受験状況(予備試験合格者)) [Material 45, Test-Taking Circumstances for the 2012 Bar Examination (Preliminary Examination Passers)], in *Regarding the Bar Exam*, *supra* note 41, at 137.

committee reports have highlighted would be important to law firms and their clients – heightened commitment to learning and superior skills in communication, research, drafting, and identifying and adjusting interests, among them. One might also hope law firms would value the heightened understanding of the social mission of the legal profession and legal ethics law school graduates have been found to possess. The Reform Council's long list of desirable skills and qualities offers many other ideas for the types of values law schools might add, including abilities in persuasion and negotiation, knowledge of up-to-date legal fields and foreign law, an international vision and a firm grasp of language.

As lawyers assume a broader range of roles in companies, governmental bodies, and other organizations, still more abilities become important. These include understanding of corporate culture, strategic planning, policymaking and legislative drafting. Furthermore, as lawyers begin to enter new fields, such as intellectual property, health law, and welfare, specialized knowledge and understanding of those fields will take on greater importance. By developing their own identities and areas of emphasis, law schools could provide valuable training for a wide range of fields and roles.

Here again, however, the bar exam poses a significant barrier, and the impact of the bar exam has been heightened by the fallout over the MEXT committee's finding that some law school graduates lack "sufficient understanding of the fundamentals of core fields of law" and the JFBA's repeated harping on that point. In my view, there are numerous aspects of law schools and the overall legal training system that warrant criticism. These include elements that the organized bar is especially well-positioned to highlight, including the unevenness in legal skills training noted by the MEXT committee and the need for even greater attention to internationalization. The JFBA presumably realized that those types of criticisms have far less shock value than, for example, anecdotal accounts that an LTRI apprentice didn't even know the meaning of the presumption of innocence. Yet, by focusing its primary attack on the lack of legal knowledge, the JFBA appealed to precisely the same concern traditional legal academics have had for decades: too much to cover and too little time. Traditional academics in the core fields that appear on the bar exam dominate the policy setting process at most law schools, along with many of the relevant outside advisory committees. When presented with the complaints

over insufficient knowledge, they proved eminently willing to undertake sets of reforms that place even greater weight on mastery of doctrine in those core fields, with the consequent effect of reducing the time available for other matters.

The resulting reforms have included strengthening the requirements related to the law school entrance exam used to certify mastery of the core subjects for those seeking to enter the *kishūsha* course, and adding six extra credit hours, allocated to “mastering basic knowledge in the core legal subjects,” to the first year of the *mishūsha* course. To date, the most far-reaching of the reforms is the adoption of a proposal, contained in the 2009 report issued by the MEXT Special Committee on Law Schools, calling for the establishment of “common targets for achievement.” The “common targets” approach bears similarities to the “student learning outcomes” or “outcomes assessment” proposals in the United States.<sup>236</sup> As with outcomes assessment, the common targets, as described by the MEXT committee report, seek to “clearly identify” the “abilities that law school graduates should possess in common.”<sup>237</sup> Whereas the outcomes assessment debate has been raging for years in the United States, with no end in sight, the common targets proposal was put into effect in less than three years, in essentially top-down fashion, with MEXT guidance to the law school accreditation bodies and, in turn, their insistence that the individual law schools implement common targets.

An equally striking difference between outcomes assessment and the common targets for achievement lies in the content. The draft proposal on outcomes in the United States highlights a range of professional skills and values, as well as legal knowledge and understanding. In contrast, the common targets in Japan place almost total weight on mastery of doctrine in the seven core bar exam fields, containing a detailed list of doctrines, legal theories, and academic debates, set forth in bullet point after bullet point, in separate chapters spanning more than 200 pages.<sup>238</sup> Despite a

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236. See, e.g., American Bar Ass'n, Section of Leg. Educ. and Admissions to the Bar, Standards Rev. Comm., Student Learning Outcomes Subcomm., Draft for April 2011 Meeting, available at [http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Student%20Learning%20Outcomes%20\(redline%20to%20Standards\).pdf](http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Student%20Learning%20Outcomes%20(redline%20to%20Standards).pdf)

237. Special Committee 2009 Report, *supra* note 163, at 10.

238. For a more detailed discussion of the common targets and how they were

declaration in the introduction that the common targets are not intended to prescribe any uniform approach to those subjects, in many law schools they seem likely to have precisely that impact. One can assume those responsible for drafting the bar exam will regard any doctrine or theory contained in the common targets as fair game, so it should come as little surprise if law school students clamor for their professors to cover every item contained in all those bullet points. In sum, in seeking to defuse the criticism over lack of legal knowledge, the common targets and other reforms place the focus of law school education even more squarely on mastery of doctrine in the bar exam fields, leaving less time for the types of training in professional skills, values, and specialized fields that might truly set law school apart in the eyes of law firms and their clients, and less leeway for innovation and experimentation in fields and skills that might lead to broader roles for the legal profession.

Before turning to prospects for the future, I would like to briefly address one other matter, the plight of the *mishūsha*. When the law school system was being set up, many observers expressed skepticism over how nonlaw graduates possibly could be expected to master, in just one year, what the *kishūsha* had spent two and a half or three years learning. The standard response at the time, reflecting the stance of the Reform Council, is that all entrants naturally would need to achieve the basic minimum level needed for effective participation in the legal profession, but it was neither necessary nor desirable for all law school graduates to possess exactly the same sets of skills and abilities. To the contrary, a key objective for the new system was to develop a broad and diverse legal profession in which members from a wide range of backgrounds would possess different skill sets.

Those who administer the bar exam undoubtedly would insist that it tests only the minimum level needed for effective participation in the profession. And those who compiled the common targets for achievement undoubtedly would insist that those 200 pages of bullet points also represent the minimum all law school graduates must achieve. From the content of the exam and common targets, though, it is evident that the "minimum" level of doctrinal knowledge expected is high. Moreover, with what is in effect still a numerical cap on bar exam passers, those who have devoted more years to concentrated study of the bar exam subjects

naturally are at an advantage.

The struggles of the *mishūsha* are a serious concern for outside observers, many of whom continue to see *mishūsha* as an important source of diversity that will enrich Japan's legal profession. The struggles of the *mishūsha* are also a concern for legal academics, but it is not so clear whether the academics are equally sanguine about the *mishūsha* potential. Some academics certainly do regard the *mishūsha* as a source of diversity and vibrancy, which can enrich legal education as well as the legal profession. To other faculty members, though, the *mishūsha* must seem more like a burden, a group who slow down the progress of others and who must be "brought up to speed."

The relevant subcommittee at MEXT that is investigating the plight of the *mishūsha* appears to side with the latter view. That subcommittee is reported to be seriously considering authorizing the use of one-way lectures for teaching *mishūsha* in the first year, so they can more quickly master legal doctrine in the core (i.e., bar exam) courses. (As someone familiar with the deliberations explained, "What's the point in trying to get them to think if they don't know anything yet?") Since one-way lectures will not entail interactive class discussion, the subcommittee is also seriously considering relaxing the cap on the number of students per class for the first year of the *mishūsha* program. A third measure under serious consideration, for those who have entered through the *mishūsha* course, is relaxing the requirements that they earn certain numbers of credits in fields other than the bar exam subjects in the second and third year; relaxing those requirements would enable the *mishūsha* to devote even more time to mastering the bar exam subjects. (At the moment, these steps are only being considered with respect to *mishūsha*. If introduced at that level, though, it is likely to be only a matter of time before some law schools begin clamoring for permission to institute large, one-way lectures and reduce requirements for non-bar exam courses for *kishūsha*, as well.) The subcommittee even has suggested instituting a standardized nationwide exam after the first year of law school (focusing, one can be sure, on mastery of doctrine in the bar exam subjects), to assess whether *mishūsha* are qualified to move on to the second year.<sup>239</sup>

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239. See, e.g., Expert Advisory Council on Legal Training, Session 5, Dec. 18, 2012, Shiryō 2-1, Hōgaku mishūsha kyōiku ni kansuru genjō to kadai, jūjitsu hōsaku ni tsuite (【資料 2 - 1】法学未修者教育に関する現状と課題, 充実方策について)

Whatever impact the other steps might have on applications, it seems certain that instituting an additional nationwide exam between the first and second years of the *mishūsha* course – especially when coupled with the availability of the preliminary exam as an alternative to the entire process, would reduce the flow of *mishūsha* applicants to a mere trickle. That is one way of dealing with the *mishūsha* “problem.” For me, as one who viewed opening law school to students from a broad range of backgrounds and disciplines as the principal reason for going to all the trouble of instituting a new tier of graduate schools,<sup>240</sup> it is a profoundly depressing thought.

### VIII. Prospects for the Future

In the near term, a key determinant for the future direction for Japan’s legal training system is likely to be the conclusions set forth by the Expert Advisory Council on the Legal Training System, in its report, expected sometime in the spring of 2013, to the Ministerial Conference on the Legal Training System. The shift in political control from the Democratic Party of Japan to the Liberal Democratic Party that resulted from the general election in December 2012 adds further uncertainty. Still, in Japan’s highly top-down system for regulating legal education, the conclusions of the Expert Advisory Council are likely to hold great significance.

What the Expert Advisory Council will recommend remains unclear. In May 2012, the Forum on Legal Training, the predecessor body containing most of the same members, issued a rather comprehensive “summary of the main issues,” spanning over 40 pages. That summary identified many issues; but from the

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[Material 2-1, Regarding the current situation for and issues with education of *mishūsha*, and steps for strengthening] (explanatory material submitted by MEXT), available at <http://www.moj.go.jp/content/000105093.pdf>.

240. I have highlighted the value of diversity, not just for the legal profession but for legal education itself, in several publications and presentations in Japanese. See, e.g., Daniel H. Foote (ダニエル・H・フット), *Hōgaku kyōiku ni okeru tayōsei: sono igi to gan’i* (法学教育における多様性：その意義と含意) [Diversity in Legal Education: Its Significance and Implications], HŌRITSU JIHŌ ZŌKAN, SHIHŌ KAIKAKU 2002, at 41 (2002); Daniel H. Foote (ダニエル・H・フット), *Keiken, tayōsei, soshite hō* (経験、多様性、そして法) [Experience, Diversity, and the Law], in NOZAKI AYAKO (野崎綾子), SEIGI, KAZOKU, HŌ NO KŌZŌ TENKAN: RIBERARU FEMINIZUMU NO SAITEI (正義、家族、法の構造変換：リベラル・フェミニズムの再定位) [The Structural Transformation of Justice, the Family, and Law: A Repositioning of Liberal Feminism] (Keisō Shobō, 2003), at 227.

following quote it is evident that on the whole the Forum highly evaluated the new legal training system:

As a consequence of the introduction of a system in which legal training is treated as a process, the law schools have instituted classes emphasizing interactive discussion . . . and have led students to consider the true nature of things and the essential points on which judgments hinge; and the new system is exceedingly superior (非常に優れた) to the prior system, in which selection was based only on the single point of the bar examination.<sup>241</sup>

Notwithstanding its praise for the law school system as a whole, the Forum voiced concern that there were still problems with the educational quality at some law schools and called for investigation of additional efforts at consolidation, including further reductions in the number of students admitted and the possibility more law schools would be merged or eliminated (with specific reference to the use of cutbacks in public financial support to deficient law schools as a means of promoting consolidation).<sup>242</sup> With respect to views on demand for legal services and the size of the legal profession, in addition to the Forum's summary of main issues, one can look to the minutes of the second meeting of the Expert Advisory Council, at which that topic was discussed.<sup>243</sup> Based on these materials, there appears to be considerable support for the view that Japan continues to have many unmet needs for legal services and that the trends toward entry into new roles and new fields are likely to continue and expand. The precise implications of these views for the concrete number of bar passers are unclear; but the overall tone of the summary and discussions offers reason for hope that the Expert Advisory Council will reject calls for a substantial reduction in the current level of passers.

To synthesize relevant elements from developments to date and available information on the Expert Advisory Council's discussions: Assuming further consolidation in the number and size of law schools, the total annual number of entering students is likely to be no more than 3,000 or so, and strict grading and graduation requirements are likely to lead to considerable attrition from

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241. Forum on Legal Training, Summary of Main Points, *supra* note 25, at 10.

242. *See id.* at 20-21.

243. The minutes are available at: [http://www.moj.go.jp/housei/shihouseido/housei10\\_00006.html](http://www.moj.go.jp/housei/shihouseido/housei10_00006.html).

there.<sup>244</sup> Given these figures, if the number of passers is maintained at least at the 2012 level of 2,100, and if the preliminary exam continues to be a relatively narrow path, within a few years the pass rate for law school graduates should reach or exceed the 70% level originally envisioned by the Reform Council. Even if that happens, it does not ensure law schools will emerge from the dominant focus on doctrinal mastery of the bar exam subjects. That mindset is deeply embedded in Japan. At a minimum, however, such a change should largely free Japanese law schools and their students from bar exam-centered tunnel vision; and over time that shift should allow law schools to develop their own identities.

With respect to the long-term future of law schools, one important aspect is the composition of the faculty. In its recommendations, the Reform Council stipulated that, in the future, faculty members responsible for the core fields of law should be qualified as legal professionals. This stipulation was rooted in the belief that, to achieve education that truly bridges theory and practice, it is vital for faculty members to possess an understanding of both. Thus, the Reform Council presumably expected that most faculty members of the future not only would attend law school, pass the bar exam, and complete LTRI training, but would spend at least some time in practice. If that paradigm takes root, it should increase sensitivity to practice-related matters and might affect thinking patterns relating to the weight placed on academic theory and doctrinal mastery. It also would likely reduce the level of compartmentalization between legal fields; faculty members who have spent several years in practice presumably would have worked on many matters that span wide-ranging fields of law.

With the recent establishment of a few programs to support those seeking to make the transition from practice to academia, by providing positions or fellowships so they can devote time to research and writing, it is possible such a paradigm may yet emerge. To date, however, such a pattern has not developed. If anything, the trend is toward a system similar to that of the past, with prospective academics in the core fields completing law school (and,

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244. The Forum's summary of main issues referred, with evident approval, to statistics showing that the percentage of students completing law school within the standard number of years declined from 80.6% in the 2006 academic year to just 73.6% in the 2011 academic year. See Forum, Summary of Main Points, *supra* note 25, at 17.

in some cases, LTRI training), and then embarking on advanced research in the specific field of law they have chosen, either as research fellows or in M.A. or Ph.D. programs, without ever entering practice. In fact, the faculty certification process, mandated as part of the accreditation process, ensures the perpetuation of sharp divides between researcher-professors and practitioner-professors and the compartmentalization between legal fields, by requiring the screening of each individual faculty member for suitability to teach specifically designated courses.

Another important set of long-term trends relates to the legal profession. Law school graduates already constitute over 25% of all Japanese lawyers. At current levels, within ten years law school graduates will constitute over half the lawyers; and within a few years after that they will constitute the majority of all judges and prosecutors, too. Even if that happens, it is unlikely to put an end to the calls for limiting the size of the legal profession; self-interest is a powerful force. If law school graduates come to constitute the mainstream of the legal profession, though, law school presumably will be seen as the norm for legal training. Of course, law school graduates vary widely in their assessments of the experience.<sup>245</sup> Yet if law school becomes the accepted norm for legal training, the bar's primary focus is likely to be on how to further improve law school education, with a constructive dialogue between law schools and the bar, as was the case in the first few years of the new legal training system, before the discussion became intertwined with the campaign to limit the size of the legal profession.

Given the advent of the preliminary exam and the data from the first two years of that exam, though, the situation facing the law schools has become much more dire. Already in 2012, well over five percent of all currently enrolled law school students took the preliminary exam. In view of the statistics introduced earlier on the preliminary exam passers and their success rate on the bar exam, it seems inevitable that the number of law school students and

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245. A recent survey found generally high levels of satisfaction regarding many aspects of law school education among graduates who passed the bar exam, but even some of that cohort were highly critical. See Miyazawa Setsuo (宮澤節夫), *Shin shihō shiken gōkakusha no hōkadaigakuin sentaku riyū to kyōiku keiken* (新司法試験合格者の法科大学院選択理由と教育経験) [Reasons for Choice of Law School and Educational Experiences of Passers of the New Bar Examination], 4 AOYAMA HŌMU KENKYŪ RONSHŪ (青山法務研究論集) 73 (2011). One can easily surmise considerably lower levels of satisfaction among the nonpassers.

undergraduates taking the preliminary exam will soar in 2013. The preliminary exam passers already are receiving star treatment. If they continue to outperform the law school graduates in terms of passage rates on the bar exam itself, the impression is likely to grow even stronger that those who have entered the legal profession through the preliminary exam constitute the true elite. If that occurs, it will place even greater pressure on the law schools. A further prediction, of which I am especially confident, is that the great majority of those who take the preliminary exam will make time to attend preparatory schools, so the "double school" phenomenon is bound to reappear with a vengeance, even for law school students under a supposed duty to devote themselves exclusively to their law school studies. Moreover, as discussed earlier, the efforts to achieve a more diverse student body are foundering, and the focus on doctrinal mastery is becoming ever stronger.

Thus, the future for the law schools appears bleak. If the Expert Advisory Council agrees with the Forum's view, quoted above, that "the new system is exceedingly superior to the prior system, in which selection was based only on the single point of the bar examination," one possible measure would be limiting eligibility for the preliminary exam. Eligibility might, for example, be limited based on the factors specified by the Reform Council, financial hardship or prior experience. Another approach might simply be to disqualify those currently enrolled either in undergraduate or graduate programs. Regardless of the practical feasibility of setting such limits, there seems to be very little political feasibility for doing so. Presumably, such approaches were considered and rejected when the preliminary exam system was first set up; now that it has gone into effect, making such a change would be even more difficult.<sup>246</sup>

If that is the case, another step might be to revisit the contents of the preliminary exam and bar exam. As a possible approach to reform of those two exams, the Forum's summary of main issues

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246. If anything, political sentiment may point in the opposite direction; a 2009 Cabinet decision (albeit before the change in political administrations) stipulated that, "to ensure fairness in the competition between law school graduates and preliminary exam passers, the passing rates for both groups should be balanced and preliminary exam passers should not be treated unfavorably as compared to law school graduates." *Quoted in Forum on Legal Training, Summary of Main Issues, supra* note 25, at 36.

referred to suggestions that the fields covered and scope of those exams might be limited, so as to reduce the burden on candidates and encourage greater diversity in the legal profession. I disagree. The cap on the number of passers, coupled with the opening of the bypass, ensures that competition will continue to be intense. In my view, limiting the fields covered and scope of materials tested on the exams will not reduce the burden on candidates, nor will it increase the level of diversity in backgrounds and skills for Japan's legal profession. Rather, to survive the intense competition, they are likely to spend just as much time cramming for the exams, but devoting their efforts to mastering an even narrower set of materials.

My personal view is that the preliminary exam and bar exam should be reformed, but in the opposite direction – not reducing the scope, but expanding it. In the Japanese setting, it seems inescapable that the contents of the preliminary exam and bar exam will drive the study behavior of those seeking to enter the legal profession. In praising the new system of legal training, the MEXT Special Committee on Law Schools and the Forum on Legal Training highlighted a wide range of abilities and qualities that the new system has helped instill, including skills in communication, research, problem solving, and identifying and adjusting interests, as well as a heightened consciousness of ethical responsibilities. If the Expert Advisory Council and Ministerial Conference agree that abilities and qualities such as these are essential for the legal profession, the most effective way of ensuring candidates will develop such attributes is to include them on the exams.

Indeed, I would argue that it is even more important to include a broad range of abilities and qualities – including skills in research, drafting, and problem solving, as well as appreciation for ethics – on the *preliminary* exam. The entire aim of the preliminary exam is to ascertain whether candidates have attained the same level as those who have completed law school. The greatest achievements of the law schools are in nurturing those and other abilities that bridge theory and practice. By continuing to focus only on legal doctrine and analysis, the preliminary exam leaves out much of the essence of what it is students achieve through law school.

Truth be told, I have been advocating just such an approach ever since one of my first major interventions as a member of an advisory council on legal training, over ten years ago. At the time, I argued that the bar exam ideally should be a “qualification exam” in

the true sense of that term – an exam designed to assure that candidates had acquired the necessary qualities and skills for entering the legal profession. But I went on to argue that, since in the Japanese setting it was evident the content of the bar exam would drive much of legal education, the exam should be a comprehensive exam covering the broad spectrum of skills and knowledge students are expected to acquire. At least that way, I asserted, students (and, for that matter, law schools) would not be able to focus their efforts on cramming for a relatively limited number of subjects and mastering a limited number of test-taking skills. To that end, I argued that the bar exam should be thoroughly redesigned and expanded. As an example, I suggested a weeklong exam, with multiple choice or short answer, essay, performance type questions, and oral components, including questions focused on planning and problem-solving, questions spanning various fields of law, and questions incorporating ethical issues.<sup>247</sup>

At the time, my proposal was promptly rejected as impractical.<sup>248</sup> I have little hope such a proposal would fare any better today, with respect to either the preliminary exam or the bar exam. Yet, especially in view of the advent of the preliminary exam and its implications for the future of Japanese legal education, I remain even more convinced that a step of that sort is needed to avoid a return to the tunnel vision the reforms were designed to overcome.

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247. See Kentōkai, Jūten kamoku (重点科目) [Major Issues], Feb. 13, 2002, available at [http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai4/4iken\\_3.html](http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai4/4iken_3.html).

248. The primary objection was not to the length. Rather, the principal objection appeared to relate to the perceived inability of the bar examiners to draft appropriate exams covering those elements and to grade the answers. Of the various components, it would seem that the most difficult to incorporate would be performance type questions, but now that the Multistate Performance Test has a fifteen year track record in the United States, one would hope experience with that exam might offer useful guidance for developing a similar test in Japan.

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profession.

### [¶7-230] Definition of "legal profession" faces a crisis

In its traditional definition, the Japanese legal profession or *hōsō* has been recognized as limited to those who claim particular expertise in, and a monopoly on, courtroom work — namely attorneys, judges and prosecutors. Even though all the formal training even the most skilled attorney receives in substantive, non-procedural law takes place at the university and is training shared by well over 40,000 law faculty graduates annually, those graduates are not considered as part of the "legal profession."

The specialized training required to become a judge, prosecutor or attorney that is available only in the Legal Training and Research Institute, however, focuses solely on the development of trial skills. All these classes and training activities are designed to enable the apprentice to operate in a courtroom within the setting of a lawsuit. The apprenticeship period, moreover, is spent in the offices of judges, prosecutors and attorneys as they prepare for trial and otherwise engage in courtroom-related activities.

This specialized professional training also comports nicely with most of the professional activities of the vast majority of the graduates of the Institute. Most empirical evidence confirms that attorneys remain, for the most part, as they have been historically in Japan: professionals particularly skilled in the arts of litigation. This is the activity through which they earn the bulk of their livelihood. Outside the Tokyo and Osaka areas, attorneys earn virtually all their income and spend all their time in litigation-related activities. In Tokyo and Osaka, attorneys apparently receive some substantial amount of their income from retainer fee arrangements by which they commit themselves to advise and counsel on matters relating to the business activities of corporations. However, in fact, much of their consulting time is spent dealing with potential lawsuits and advising on litigation-related strategies. In sum, with the exception of a small handful of attorneys who consult principally on international transaction matters, the vast majority of the Japanese bar spends the bulk of its time involved in matters directly related to litigation.

However, these issues related to the practice and definition of "legal profession" are going to change significantly. First, use of alternative dispute resolution (ADR) has become more popular than before. Although Japan has a long history of dispute resolution outside the court, and although court-annexed ADR is used extensively, ADR as a legal binding alternative to litigation has not been widely recognized to date. Exceptions include commercial arbitration, but here Japan has produced a negligible number of arbitration awards annually. Currently, however, the government encourages the use of ADR and ADR is going to be one option for legal dispute resolution. The Arbitration Act (*Chōse hō*) was revised in 2003 after more than one hundred years in order to encourage active use of the arbitration forum rather than a court. Also, the Basic ADR Act (*ADR Kihonhō*) was legislated in 2004. The judicial system reform report advocates expansion of ADR so that every citizen may easily access those legal services.

This trend expands the scope of general practice of attorneys and, at the same time, challenges the traditional definition of the legal profession. The revised Judicial Scrivener Act or *Shihō shoshi hō* (1950, Law No. 197) allowed judicial scriveners (*shihō shoshi*) to represent clients in small claims courts, and settle and mediate a case seeking damages less than 1,400,000 yen. The purpose of this revision was to provide citizens enough access to justice. Currently, more than half the attorneys are concentrated in Tokyo or Osaka, and 101 out of 203 jurisdictional districts have only three law firms in that jurisdiction. Sixteen districts have no law firm at all. Therefore, the government concluded that it was practically impossible to improve access to justice with only attorneys and decided to utilize 17,000 judicial scriveners for improvement of ADR and access to justice all over Japan. Those judicial scriveners who complete special training and are approved by the Minister of Justice can exercise this new function.

Furthermore, the justice system reform allowed several license holders to join in practice areas which had been monopolized by attorneys. In addition to judicial scriveners, patent attorneys (*benrishi*) are allowed to represent clients in infringement actions relating to intellectual property so long as patent attorneys pass the special examination and clients retain another attorney for the same case (the Patent Attorney Act or *Benrishi hō* (2000, Law No. 49) Article 6-2, revised in

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2002). Also, administrative scriveners (*gyōsei shoshi*) are allowed to represent clients when they draft administrative forms or contracts (the Administrative Scrivener Act or *Gyōsei shoshi hō* (1951, Law No. 4) Article 1-2, revised in 2002). Historically, Article 72 of the Attorney Act prohibits unauthorized practice of law and representation or settlement of disputes and even legal consulting both in and outside courtrooms other than by attorneys. However, these new legislative amendments, based on judicial system reform, loosen exclusive legal practice by attorneys and introduce competition among several license holders.

Thus it becomes difficult to draw a line around the legal profession based on courtroom practice. Many attorneys will engage in the practice of law outside courtrooms, and other license holders are currently allowed to appear in courts. The traditional concept of the legal profession is, and will be, challenged severely from this point onward.

### Size and nature of “the legal profession” in Japan

#### [¶7-250] A common misconception

A commonly articulated misconception about Japan is that Japan is a country with far fewer legal professionals than the United States and western European countries. Although it is true that the number of people who are allowed to appear in courtrooms in Japan is much smaller than the number in the United States, many observers, looking at the small number of attorneys or *bengoshi* in Japan, have uncritically assumed functional equivalency between *bengoshi* and American lawyers, and consequently asserted that the number of people engaged in legal work in Japan is extraordinarily smaller than in the United States, Europe, Australia, Canada or most of the rest of the industrialized world.

#### [¶7-260] Legal tasks performed by law graduates not called attorneys

The number of Japanese attorneys or *bengoshi* is small, only slightly over 20,000 in a country with just less than half the population of the United States (126,930,000 in 2000). Attorneys, however, represent only a very small part of the legal profession. Indeed, every year Japan produces more graduates trained in law (approximately 40,000) than are graduated by all the U.S. law schools combined. And by most accounts, these students are, as a group, the very best Japan has to offer. At least at most universities, the law faculty is always one of the two most difficult faculties for aspiring students to enter.

As of 2003, 89% of Japanese companies whose stock is listed on the stock exchange do not employ an attorney as a full time employee. On the other hand, 99.3 % of those companies retain attorneys as corporate advisors. (The Japan Federation of Bar Association, White Paper on Attorneys (2003)). These statistics show that most companies do not use attorneys for daily legal matters.

Actually, many graduates of Japanese law faculties enter jobs where they perform functions that law school graduates would generally perform in the United States. Most of them enter corporations. Some of those law graduates are placed within the company’s legal department, where they give advice and counsel that all acknowledge as “legal” in form and content. This conduct is not considered unauthorized practice of law under Article 72 of the Practicing Attorney Law as long as they act “for themselves (i.e., for their own company).” Of course, by any standards, despite the recent growth of such departments, especially on the international side, those departments remain relatively small. Members of these departments, moreover, are assigned a far narrower range of tasks than their U.S. counterparts. Indeed, the words used traditionally to describe legal departments in many companies, *bunshoka* or records department, for example, suggest just how narrow a vision most companies have of the job. Legal matters in these departments are relatively strictly and narrowly defined, often involving little more than determining technical compliance with various regulations and procedural necessities. The legal department often reviews forms to make sure they are filled out correctly and otherwise keeps track of the company’s obligation to file forms, submit documents and keep completed records and forms for official review and inspection. Sometimes the department will actually be called upon to instruct company officials in their official duties, but again this generally involves advice about how to comply with the technical requirements of the law in the event, for example, of a

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meeting with shareholders or the Board of Directors. It is still important to remember, however, that these members of the legal department are performing tasks generally assigned to lawyers in the United States.

The rapid re-regulation of Japan since 2000, however, has seen the establishment of compliance departments in many large corporations that have taken over and extended regulatory compliance tasks. The static nature of work in corporate legal departments, too has changed in recent years in the wake of the 1997 financial crisis and the concomitant unwinding of transactions or bankruptcy of many corporations. At the same time, a surge in shareholder suits against large corporations since 2000 has given stronger impetus to both pre-emptive self regulation and post-filing legal responses.

Equally importantly, many of the additional tasks actually performed by legal department personnel in the United States are undertaken in Japan by people trained in law, but not as members of the legal department. Several departments in Japanese companies routinely call upon their members to give advice and undertake activities that Americans would consider legal because they involve questions of interpretation and application of legal rules and regulations. Other tasks generally assigned to lawyers in the United States are also commonly undertaken by Japanese company officials, many, if not most, of whom are trained in law. Company officials negotiate with government officials over the application of various government-imposed rules and regulations. They also often work closely with bureaucrats and occasionally even legislators in the development of regulatory schemes applicable to their company or industry. They negotiate extensively over the interpretation of various rules and even participate directly in the application and execution of various rules and regulations.

These observations highlight the critical reality that many tasks which Americans consider decidedly legal are assigned in Japan to people with legal backgrounds and training, but who may not be denominated lawyers or legal professionals in any sense of those words. Many of the law graduates in Japan use that substantive legal training about as much as American lawyers do and in order to perform tasks similar to those commonly assigned to lawyers in the U.S. Even this simple functional comparison obviously changes dramatically the perception of the ratio of "lawyers" in Japan to lawyers in the United States.

### **[¶7-270] Other occupations where legal training is relevant**

In addition to the private sector, Japanese graduates trained in law often find their way into other positions where their legal knowledge is relevant. As government bureaucrats and even legislators, for example, they will often be required to draft, interpret, analyse and apply legal rules and regulations. They might also undertake jobs where the legal content of their tasks is more explicitly recognized. They might become, for example, judicial or administrative scriveners (*shihō shoshi* or *gyōsei shoshi*), tax or patent attorneys (*zeirishi* or *benrishi*), certified public accountants (*kōnin kaikeshi*), certified social insurance labor consultants (*shakai rōmu fukushishi*), notaries (*kōshōnin*) or even real estate agents or brokers, all professions that require frequent analysis and application of legal rules and participation in legal processes. Sometimes these individuals have not studied law at the university, but they are performing decidedly legal tasks, whatever their background.

These occupations are rarely included when foreign and Japanese observers count up and compare members of the "legal profession," yet they clearly involve performance of legal tasks. These tasks, moreover, are commonly assigned to lawyers in the United States and elsewhere. Somewhere between 60 and 80 percent of all U.S. state and federal legislators, for example, are licensed attorneys. Many bureaucrats, especially at the higher policy-making levels, have law degrees. And while real estate brokers in the United States generally are not attorneys, in many real estate transactions in the United States the parties consult an attorney to give advice and execute documents that in Japan would be given and executed by the real estate broker himself. The nomenclature of the individuals performing these tasks is different, but similar tasks are being performed by individuals with similar substantive training.

By most estimates, only a relatively small percentage of the American bar — probably no more than 15 to 20 percent at the very highest — ever enters a courtroom. Rather, the vast majority of lawyers are engaged in a general business practice, small-scale real estate practice, or the like.

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Indeed, were American attorneys to read the above description of the activities of at least some company officials in Japan, they would recognize the description as a relatively accurate recital of how they spend their working days.

### Impact of justice system reform

#### **[¶7-300] Significant changes in number and quality of legal service providers**

The above discussion shows that in Japan many people other than attorneys engage in legal services which would be provided by attorneys in the United States. In the future, however, the situation of legal practice in Japan will be more complex for the following reasons:

First, the number of attorneys will increase dramatically. Until 1990, the number of applicants allowed to pass the national legal examination was fixed at 500. Accordingly, the rate of increase in the number of attorneys was relatively small — 16,853 attorneys in 1998, compared to 5,992 attorneys in 1948. However, currently the government plans to increase the number of applicants who can pass the examination to 3,000 by 2010. Also, it expects that the population of actual practicing attorneys will be 50,000 by 2018. Within the next ten years, the number of attorneys in Japan will double.

Second, the increased number of attorneys influences their practice. Although their practice is currently litigation matters for most attorneys, their areas of practice will be diversified. Many corporations will retain attorneys in their legal departments. Some may start ADR services, as many attorneys in the United States and elsewhere make their living as mediators. Moreover, most attorneys will be trained at law schools in the future. Education in law schools will also be an important influence on attorneys' practice in the future.

Furthermore, the justice system reform removed attorneys' monopolization in some practice areas. For small claims actions, judicial scriveners can compete with attorneys. For intellectual property infringement cases, patent attorneys may represent clients instead of attorneys. Administrative scriveners can also provide some legal counseling to citizens. Therefore, at least statistically, the increased number of attorneys and range of other legal service providers will compete in various fields.

### Legal service providers in Japan

#### **[¶7-500] Introduction**

The following paragraphs contain a brief introduction to each of the different professionals in Japan who offer assistance in legal affairs or whom one might encounter when engaged in a legal transaction. As already discussed, it is impossible to list and describe all people who engage in certain legal practice in Japan. Thus, the following description deal with only major license holders.

#### **[¶7-510] Attorneys ( bengoshi )**

Upon completing their time at the Legal Training and Research Institute, described above, all attorneys must register in a local bar association and in the Japan Federation of Bar Associations. Once enrolled, the attorney must maintain his office within the jurisdiction of that local bar association and obey its and the Federation's rules. Violations of local or Federation rules can result in discipline by the organization concerned. Disciplinary decisions of local bar associations can be appealed to the Federation and from there to the Tokyo High Court. The bar associations and the Federation also engage in a variety of law reform activities and other community related services, in addition to traditional activities of bar associations, such as providing free legal counseling or arbitration services.

Attorneys in Japan are not readily accessible to the average person. As mentioned in the previous section more than fifty percent of attorneys are registered in Tokyo or Osaka. Those areas where

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people cannot obtain access to justice because of extremely small numbers of attorneys are called "*shihō kasochiku*" (areas with a lack of justice). Although the Federation currently tackles this problem by financially assisting an attorney who volunteers to open an office in those areas (throughout *Himawari* foundation), one fourth of jurisdictional districts still have only one, or no, attorney.

Attorneys generally practice either alone or with a small number of other attorneys. Newly registered attorneys often enter the offices of more experienced attorneys and leave when they have gained enough experience and a client base to support themselves. The younger attorneys often remain on good terms with their more senior mentors and receive overflow work from them. The traditional structure of practice has been and largely remains a shared office in which profits are not shared.

In 2001, the Attorney Act revised and legislated provisions about the Legal Profession Corporation (*bengoshi hōjin*) which authorized attorneys to establish legal entities for their business. This legislation made it easier to practice with a larger number of other attorneys. As of March 2006, 217 legal profession corporations are registered.

An increasing number of Japanese attorneys have begun to specialize in transactional litigation and transaction work. These attorneys, many of whom have studied at American law schools and worked for American law firms, often practice with other like-minded attorneys in firms large by Japanese standards, as large as 30 or 35 in a few cases, but more commonly between 8 and 15. These firms occasionally affiliate with law offices in other countries. In other cases the firms maintain less direct but tangible "correspondence" relationships with foreign firms. Recent merger activity in the Japanese legal profession has resulted in the emergence of five clear market leaders by size: Nagashima, Ohno & Tsunematsu (217 attorneys in 2006 including licensed foreign lawyers); Mori Hamada Matsumoto (214 attorneys in 2006 including licensed foreign lawyers); Nishimura Tokiwa (210 attorneys in 2006 including licensed foreign lawyers); Anderson, Mori & Tomotsune (190 attorneys in 2006 including licensed foreign lawyers); and Asahi Koma (156 attorneys including licensed foreign lawyers). Other merger discussions between Japanese law firms and foreign law firms are also in process.

In 2004, the Japan Federation of Bar Associations (JFBA) adopted a new ethics code, called *Bengoshi shokumu kihon kitei* (Basic Regulations on Attorney's Practice). The old Code, adopted in 1990, was adopted as a "declaration," not a rule of the JFBA and therefore, violation of the Code did not directly constitute a ground for discipline. Although the new code was significantly influenced by the ABA Model Code of Professional Responsibility in the United States, there is a significant difference from the ethics codes in the United States which clearly state that they are intended to create standards for discipline; the new ethics code does not state that a violation of the code constitutes professional discipline. Even under the new ethics code, attorneys are disciplined based on the Attorney Act which provides the following grounds for discipline: (1) when an attorney violates the articles of the local bar association or the Federation; (2) when an attorney violates the Law; and (3) when an attorney is guilty of misconduct of a disgraceful nature, whether in the course of or outside his or her professional duties (Article 56). Some attorneys suggest that a violation of the new ethics code may constitute a ground for discipline because the code was adopted as a JFBA regulation, and the Articles of the JFBA clearly provides that all attorneys have a duty to comply with JFBA regulations.

### **[¶7-530] Judges ( saibankan )**

With the exception of a few judges, Japanese jurists are career judges, choosing (and being chosen for) this option upon graduation from the Institute and remaining in this career path until retirement. Immediately upon graduation, aspiring judges are appointed assistant judges. While in this position they can serve on district court panels and exercise limited judicial powers, but cannot try cases alone. They must serve at least ten years as an assistant judge before elevation to a full judgeship. Full judges are appointed by the Cabinet from a list drawn up by the Supreme Court. Full judges must graduate from the Institute and have at least ten years experience as an assistant judge, public prosecutor, attorney or law professor. They are appointed for a term of ten years which can be, and almost invariably is, renewed until they reach 70 when they must retire.

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The career path of a judge is determined largely by the Secretariat of the Supreme Court, which assigns judges among the various family courts, district courts and high courts. It also assigns judges to serve in various administrative positions in the lower courts and the Supreme Court and its Secretariat. Approximately 30 to 35 judges also serve as research associates or *chōsakan* to the Supreme Court justices themselves. These judges, usually with considerable experience and a distinguished record, are assigned to various divisions to deal with cases that fall under particular substantive headings, such as civil, criminal and administrative, and assist the judges in their research and drafting of Supreme Court opinions.

For promotion of the unification of the bar (*hōsō ichigen*), some attorneys have been appointed to judges since 1991. Every year, two to nine new, experienced attorneys sit on the bench. However, the number is still very small comparing to the fact that about 90 graduates of the Institute directly go to the bench annually as career judges.

The selection process for the 15 Supreme Court justices differs from that of lower court judges. The Chief Justice is technically appointed by the Emperor, but in fact is appointed by him only on the recommendation of the Cabinet. The remaining justices are appointed by the Cabinet alone. The law also requires that at least two thirds or 10 of the 15 justices must have been judges, public prosecutors, attorneys or law professors for at least 20 years. The remaining five must be learned and have some knowledge of the law, but need not be qualified or experienced members of any of the three branches of the profession. Only a small handful of justices have been appointed from outside the three branches of the profession (and the university). Over time, a practice has evolved whereby the Cabinet selects approximately equal numbers from each of the three main branches of the profession, though law professors often fill one or two of the five seats generally allotted to the public prosecutors.

Article 79 of the Constitution requires that all justices elevated to the Supreme Court be submitted to the general electorate for approval in the first general election after their nomination and be again submitted every ten years thereafter. A justice rejected by a majority of the voters is immediately dismissed. No justice has ever been so removed since justices must retire at age 70 and are generally appointed while in their sixties, moreover, few justices are ever subject to a second round of voter approval.

### **[¶7-550] Public prosecutors ( kensatsukan )**

Junior public prosecutors or public prosecutors of the second rank are selected from among the graduates of the Legal Training and Research Institute. The vast majority of senior public prosecutors or public prosecutors of the first rank are then chosen from among the ranks of the juniors who have served at least eight years. Assistant or full judges, judges of summary courts and attorneys are also eligible for appointment after having served in their respective professions for an equal amount of time. Currently about 70 graduates of the Institute become public prosecutors annually.

All prosecutorial activities come under the direction and control of the Public Prosecutor-General (*kenji sōcho*). Prosecutors must obey his and their superiors' orders in matters of general policy and even in particular cases. They must also, unlike judges, accept new postings when assigned. Prosecutors are immune from salary reductions or removal from office, however, except upon a hearing and suitable findings of the Public Prosecutor's Suitability Inquiry Board.

In order to enhance the independence of the prosecutors' offices, the Ministry of Justice cannot, at least since the end of the War, issue direct orders regarding specific cases except through the office of the Public Prosecutor-General. The Ministry retains the authority, however, to supervise prosecutorial activities in a general way. This is designed to insulate those offices from undue political influence, while allowing general control and oversight of prosecutorial activities to remain in those duly appointed administrative agencies that are at least indirectly responsible to the political process and democratic control.

The end of World War II also saw the enactment of reforms designed to make prosecutors' offices a more integral part of an equally balanced adversarial system. As mentioned above, the most important of these reforms separated administrative control of the prosecutors' offices from that of the judiciary. Thus, prosecutors were no longer controlled by, responsible to, or, in too

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frequent practice, in charge of the same administrative organs that controlled the courts and judges. Prosecutors' and judges' offices were moved to separate buildings and the prosecutor is now required to sit not on the dais with the judge, but on a level equal with the defense attorney near the front of the courtroom.

Post-war laws also increased the degree to which, and the mechanisms by which, public prosecutors are accountable to the public. Upon request by injured parties, for example, a committee of citizens, picked by lot under the direction of a court, can review a prosecutor's refusal to prosecute and make recommendations to the chief district public prosecutor. These recommendations are non-binding, but generally result in a review of that prosecutor's decision and, on rare occasions, an order to the public prosecutor to proceed. On certain occasions, after compliance with various formalities of review, a judge can even appoint a special prosecutor to undertake a prosecution the public prosecutor is unwilling to commence. This power has also been exercised, though with only minimal frequency, during the post-war period.

### Foreign legal specialists in Japan

#### **[¶7-600] The categories of foreign specialists**

Foreign legal specialists in Japan generally fall into three broad categories, each of which will be discussed in turn.

#### **[¶7-610] Quasi-members of the Japanese bar**

Until the legislation of 1986, *Gaikoku bengoshi niyoru hōritsu jimu no toriatsukai ni kansuru hōritsu*, or the Law Providing Special Measures for the Treatment of the Performance of Legal Business by Licensed Foreign Lawyers (1986, Law No. 66), a few foreign legal professionals were permitted to register with local bar associations, though they did not pass the national bar examination or complete training at the Legal Training and Research Institute. These attorneys registered under Article 98 of the Rules of the Japanese Federation of Bar Associations, which was, in turn, predicated on (now repealed) Article 7 of the Practicing Attorney Law of 1949 (repealed in 1955) and the Law for Special Measures Resulting from Reversion of Okinawa (1971, Law No. 129). These articles allowed foreign attorneys to register as quasi-members (*jun kalin*) or Okinawa special members (*okinawa tokubetsu kalin*) of the Japanese bar under either of the two provisions.

The first provision, repealing Article 7, appeared to require foreign attorneys to demonstrate to the satisfaction of the Japanese Supreme Court an adequate knowledge of Japanese law. Upon such a demonstration, they presumably would be permitted to engage in the full range of litigation activities generally reserved to Japanese *bengoshi*.

A second provision of repealed Article 7 permitted foreign attorneys, without any examination, to join the bar association and engage in attorney-type activities with respect to foreign persons or matters of foreign law. About 50 foreign attorneys chose to remain in Japan after the Occupation ended or commenced their activities in Japan prior to 1955 and took advantage of this second provision. A few foreign attorneys who had been engaging in similar activities in Okinawa were given similar status in the Japanese bar when Okinawa reverted back to Japanese control in 1972.

While the foreigners who have practiced in Japan under the special provisions in existence prior to 1955 are quasi-members of their respective Japanese bar associations and call themselves *bengoshi*, they have functioned not as litigators, but as business lawyers, giving legal advice to multinational corporations making investments in Japan. Their activities thus have not been the traditional ones of the Japanese attorney.

The provisions of the Practicing Attorney Law permitting foreigners to practice without examination were the object of much uneasiness on the part of the Japanese bar, and were repealed in 1955. Foreign lawyers already admitted were permitted to continue practicing and a handful, 18 as of 2004, still practice in Tokyo.

#### **Licensed foreign lawyers ( gaikokuhō jimu bengoshi )**

### **[¶7-620] Entry of foreign lawyers into Japan**

From the 1970s onward, there was an increased number of foreign attorneys engaging in some sort of legal practice in Japan. Several U.S. law firms opened offices in Tokyo in the 1970s. Some predicated their activities on the reciprocity provision of Art. 8(2) of the October 1953, United States-Japan Treaty of Commerce, Navigation and Friendship; others on Article 8(1) of that Treaty, which permits companies of either signatory country to engage technical experts to give advice exclusively for such companies; and still others on the general lack of regulation of the giving of legal advice and counsel and interpretations of prohibited legal activities in Article 72 of the Practicing Attorney Law.

### **[¶7-630] The struggle for recognition**

Apart from the quasi-members of the bar remaining after World War II, however, no foreign attorney was eligible for full practice rights in Japan without first taking (and passing) the national bar examination. The foreign lawyers, especially Americans, continued to press their case. Some argued that they did not intend to give advice on Japanese law. A few went further and continued to claim that even if they gave advice on Japanese law, their activities would not encroach on the very limited monopoly of the "practice of law" granted by the statutes that regulate the Japanese bar. Some also contended that the increasing internationalization of the Japanese economy and the development of Tokyo as a world financial center would spawn an increasing demand for the type of legal and consulting services provided by the non-litigating business lawyer, including the structuring of financial transactions and the documentation of such transactions. These services, they argued, required knowledge of international business practices and skills in English-language draftsmanship. Training in these areas, they continued, has not traditionally been part of Japanese attorneys' education or experience. The total number of foreign attorneys was small, they also pointed out. Some also pointed to increased interest on the part of American business enterprises in securing the services of professionals in Japan who could help them surmount the myriad public and private regulatory schemes and maneuver through the complexities of Japan's business environment.

However, some Japanese attorneys questioned the right of Americans to provide legal services in Japan without undergoing the rigorous screening process required of Japanese nationals. Others expressed more traditional concerns, particularly over the ability of the Japanese government to ensure high quality legal services and competence within the legal profession. To these attorneys, the various existing screening processes and self-policing mechanisms under which the Japan Federation of Bar Associations can file a complaint with the prosecutor's office about any allegations of "unauthorized practice of law" were, at best, uncertain checks on foreign legal professionals.

Other attorneys stood on national prerogative, claiming that few countries permit foreign attorneys any role in their indigenous legal system and that, in any event, the regulation of the legal profession is a purely internal matter and Japan should not bow to foreign pressure. Americans, they argued, had no claim for special relief. Some also worried about how their own countrymen might manipulate a law allowing foreign lawyers to practice in Japan. Japanese might qualify as U.S. attorneys, for example, and then work in the Japanese offices of U.S. law firms, where they might be mistaken for (or perhaps even hold themselves out as) Japanese attorneys who handle international commercial transactions. As a practical matter this latter prediction was accurate, with many Japanese now studying law outside Japan and qualifying for practice in foreign jurisdictions and thus becoming eligible for "foreign attorney" practice rights in Japan in many cases.

### **[¶7-640] Inter-government negotiations**

The various interests in the debate about the entry of foreign lawyers sparred publicly and privately to little apparent effect until March 1982, when the U.S. government included prohibition on entry into Japan by foreign law firms on the list of non-tariff barriers that it wished Japan to remove. The Japanese government responded in May of that same year that the prohibition was largely the result of differing legal systems and that regulation of the bar was largely the province of the profession itself. The Japanese government promised, however, to

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assist in expediting talks between the Japan Federation of Bar Associations and the American Bar Association, an association the government apparently assumed was the nearest equivalent of the Federation.

A series of meetings between the Federation and the ABA thereafter ensued, along with a number of Federation "study missions" established in 1981, commissioned to examine the experiences of a variety of countries in controlling and regulating foreign attorneys within their borders. As a result, the Federation held an extraordinary general meeting in December 1985, and approved "Basic Policy of Foreign Lawyer System for Smooth and Appropriate Management of International Legal Business."

Thereafter, various proposals and counterproposals, some by the Federation, some by the United States Trade Representative and finally even some by the Japanese government, were circulated. Negotiations and consultations followed the issuing of various proposals, counterproposals and drafts of possible legislation. Finally, in 1986, the Diet passed legislation which permits foreign attorneys to register and provide legal advice in Japan for the first time since 1955 (*Gaikoku bengoshi niyoru hōritsu jimu no toriatsumai ni kansuru hōritsu* or the Law Providing Special Measures for the Treatment of the Performance of Legal Business by Licensed foreign lawyers (1986, Law No. 66)).

### Japanese law permitting registration of foreign attorneys

#### [¶7-650] Scope of the legislation

The Act Providing Special Measures for the Treatment of the Performance of Legal Business by Licensed Foreign Lawyers (1986, Law No. 66) also translated as the Foreign Office Lawyer Act became effective on April 1, 1987. It governs the scope of practice of licensed foreign lawyers in Japan, the requirements for qualification, the rights and responsibilities and the registration and control of licensed foreign lawyers in Japan.

#### [¶7-660] Meaning of title

"*Gaikokuhō jimu bengoshi*" is the name licensed foreign lawyers are called under the new system. Early drafts of the law used the title "*gaikokuhō sōdanshi*" (or "foreign law consultant") but the suggestion, borne out by analogy to the treatment under the Practicing Attorney Law of other Japanese non-*bengoshi* (such as tax agents and judicial scriveners), was that if foreign lawyers are designated by any title other than "*bengoshi*" they would not be under the jurisdiction of the JFBA, brought the compromise "*jimu bengoshi*", roughly equivalent to the word "solicitor", although usually translated as "office lawyer" or "licensed (foreign) attorney".

#### [¶7-670] Prohibitions

Until 2003, the Foreign Office Lawyer Law was revised seven times and it has been progressively deregulated. However, there are still many restrictions that licensed foreign lawyers have to follow.

The Law allows licensed foreign lawyers to engage in the practice of law in Japan, but there are six specific categories of prohibitions on such practice (Article 3). A qualified licensed foreign lawyer, for example, may not represent clients in connection with proceedings in Japanese domestic courts, cases concerning criminal affairs, lawsuits or administrative proceedings to be conducted by a foreign court or administrative agency, the drawing up or commissioning of a "notarial deed", or cases mainly dealing with the rights to real property located in Japan. The most significant prohibition is that a licensed foreign lawyer may not give legal advice with respect to the interpretation or application of any laws other than the laws of the "country" in which he or she originally qualified as a lawyer. The foreign lawyer may apply to the Ministry of Justice for a special designation with respect to a specified foreign law. If the person can prove that he or she has the same expertise as a lawyer engaged in practicing such law, or enjoys the status of lawyer or its equivalent with respect to such law, the designation may be granted.

However, according to the request for deregulation from economic organizations, the United

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States government and European Commission, a new provision was inserted in 1998 (Article 5-2). This provision allows a licensed foreign lawyer to practice law other than the laws of the applicant's country with the written advice of a qualified person, such as an attorney in the country of which the licensed foreign lawyer would like to practice law.

Even with respect to matters which are not expressly prohibited, the law requires that, in connection with certain activities, the licensed foreign lawyer must collaborate with or receive advice from a Japanese attorney (Article 3(2)). For example, a Japanese attorney must be involved in connection with the representation of a person with respect to domestic relations where a Japanese citizen is one of the parties, or the representation of a person with respect to the drafting of a will or donation coming into effect at the time of death of a Japanese citizen.

### **[17-680] Qualifications**

Persons who wish to practice in Japan under the Foreign Office Lawyer Law must measure up to certain prescribed standards. The applicant, in addition to being a lawyer or its equivalent, must have actually practiced for more than three years (originally five years and revised in 1998) "in the country where the qualification [of a lawyer] was given." This controversial requirement brought numerous complaints by American lawyers who had spent significant amounts of time practicing in Japan as employee "trainees" of Japanese attorneys. In 1998, the provision was modified and the working experience outside the country where the qualification of a lawyer was given may also be counted toward the three years.

Another controversial requirement in the original Law involved the treatment of Japanese attorneys under the law of the applicant's country. Originally, an applicant could be denied admission under the original Law, even if he or she was otherwise qualified, unless the country in which the applicant was a lawyer granted "substantially equal treatment as afforded under [the law] to [Japanese] attorneys" (Article 10 (3)). However, a 1994 revision provided that even if the above situation is applicable, the Minister of Justice can approve the application if such denial prevents good faith performance of treaties or international agreements (Article 10 (3)-2).

Several other requirements exist for the protection of the bar and the clients of licensed foreign lawyers. An application will be rejected if the applicant has been sentenced to prison, disbarred, subjected to disciplinary action by the bar of original status, or has been judged an incompetent, quasi-incompetent or bankrupt (Article 10 (1)). A person must pledge to practice in good faith and must offer proof of financial backing and the capability of indemnifying clients injured in connection with the licensed foreign lawyer's performance of duties. The applicant must also provide suitable references.

### **[17-690] Responsibilities**

The law designates responsibilities for licensed foreign lawyers. The successful applicant must use the name "licensed foreign lawyer" and prominently display the name of the country in which he or she was originally qualified (Article 44). Any special designations should also be displayed and used. A licensed foreign lawyer may establish one, and only one, office in Japan in the area in which the local bar association of choice is located. The name of the office shall designate some or all of the individual licensed foreign lawyers and, if a licensed foreign lawyer is a member of a foreign law firm, the name of the firm may also be used. The law also provides that the licensed foreign lawyer must remain in Japan for 180 days out of every year. (Article 48)

### **[17-700] Relationship between attorneys and licensed foreign lawyers**

The 2003 revision significantly changed the relationship between licensed foreign lawyers and attorneys. Previously, licensed foreign lawyers were prohibited from employing Japanese attorneys, whereas Japanese attorneys may hire them. Even establishing joint office with Japanese attorneys has been strictly regulated. However, revisions in 2003, which took effect on April 1, 2004, enabled licensed foreign lawyers to establish a joint office with Japanese attorneys freely. Furthermore, they are now allowed to hire Japanese attorneys (Article 49).

Even under the new provision, however, licensed foreign lawyers may not direct Japanese

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attorneys about the practice of law relating to jurisdictions in which they themselves are not allowed to practice.

The law requires to report to the JFBA if a licensed foreign lawyer employs Japanese attorneys. As of March 2006, there are seven law firms managed by licensed foreign lawyers that employ Japanese attorneys.

### **[¶7-710] Professional associations**

A licensed foreign lawyer under the law is subject to the Japan Federation of Bar Associations and the local bar association which he or she joins. A person who is qualified as a licensed foreign lawyer registers his or her name, date of birth, nationality, name of the jurisdiction where he or she qualified as a lawyer, home country address, office, bar association and other matters, in the licensed foreign lawyer's name register. The name register is administered by the Federation, but application is made through the local bar association which the candidate intends to join. The law provides that the Federation establish a registration screening committee to review the applications. The screening committee consists of eight attorneys, one judge, one prosecutor, and one legal scholar. If the screening committee determines that an application should be denied, the committee is required to give advance written notice to the applicant of the negative ruling and allow the applicant to make a statement and present evidence in support of the application.

A successful applicant must become a member of the Federation and a local bar association and as a member will be subject to discipline under the rules of such organizations. As with Japanese attorneys, the law provides four classes of disciplinary measures: reprimand, suspension of business for not more than two years, an order of compulsory withdrawal from the bar association and disbarment. An action can be brought by any person through the bar association to the Federation. The bar association may form a disciplinary maintenance committee for the purpose of investigating any disciplinary matters. This committee is composed of lawyers, a judge, a prosecutor, a legal scholar, and a person of learning and experience. If a determination is made that discipline is appropriate, the committee may make a recommendation to the Federation. A disciplinary committee formed by the Federation, composed likewise of lawyers, a judge, a prosecutor, a scholar, and a person of learning and experience, can take disciplinary action. As of March 2006, there are 241 licensed foreign lawyers who register with the JFBA.

### **[¶7-720] Present and future prospects**

**Both international and domestic politics have removed many regulations** which were originally imposed upon licensed foreign lawyers. Since 1994, licensed foreign lawyers may use the name of law firm to which they belong, making it easier to gain the trust of clients. Also, licensed foreign lawyers have been able to represent clients in international arbitration since 1996. Their required work experience is currently three years whereas it was originally five years. Finally, today they can hire attorneys or establish joint law firms freely.

On the other hand, in addition to the law itself, a licensed foreign lawyer is subject to various regulations and edicts promulgated by the Ministry of Justice, the Federation, and the bar association. Under guidelines issued by the Federation, for example, brochures concerning the firm's activities may not contain the name of any current or past client, whether in connection with a transaction or not. In addition, brochures and firm résumés and the like cannot be distributed by direct mail.

It is unclear how far the deregulation of the law governing foreign lawyers will go in the future. However, the impact of their existence in Japanese legal practice will be more significant in the future. Promotion of cooperation between licensed foreign lawyers and attorneys will strongly influence legal practice, and at the same time, it may impact the practice of foreign lawyers too.

### **Other foreign legal personnel**

### **[¶7-750] Foreign trainees**

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Firms of Japanese attorneys and quasi-members of the Japanese bar also occasionally hire young foreign lawyers, mostly recent graduates of American law schools, to work for varying periods of time, usually two to four years. These young lawyers are generally called legal trainees and do a variety of work, ranging from improving the linguistic quality of English language documents to research, writing and drafting on matters related to foreign law and international transactions. The 1987 Law for Licensed Foreign Lawyers does not appear to affect the status of these trainees, assuming they do not qualify to register as licensed foreign lawyers, and firms of Japanese attorneys and quasi-members of the Japanese bar apparently will be permitted to continue this hiring practice.

### Other legal service providers in Japan

#### **[¶7-800] Judicial scriveners ( shihō shoshi )**

Judicial scriveners (sometimes translated as "solicitors") provide a variety of legal services, including drafting documents which are filed in court or other legal proceedings and assisting in preparing the documents necessary to complete various relatively routine legal transactions, such as registrations of land transfers in local registration bureaus and making deposits in public deposit offices. Individuals and small companies sometimes make use of their services as a substitute for an attorney when an attorney is relatively inaccessible. Attorneys can perform all the work judicial scriveners perform, but the latter are generally less expensive and more inclined to the routine and repetitive work that attorneys prefer to avoid.

The judicial system reform expanded the scope of judicial scriveners' practice. As mentioned in preceding sections, they are currently allowed to appear in a small claims court with the approval of the Minister of Justice. They can also represent clients to settle, negotiate, or mediate legal disputes where the claimed amount is below 1,400,000 yen (about USD 13,000).

Like attorneys, the revised Judicial Scrivener Law also allows judicial scriveners to form a legal entity.

Approximately 18,900 people were registered (as of 2007) in local judicial scrivener associations, which associations in turn belong to a national federation of scriveners' associations. To be eligible for registration, an individual must pass an examination or have served at least ten years as a clerk of court or an administrator in the courts, public prosecutors' offices. The law also grants permission to sit for the examination by the Minister of Justice to someone who has learning and ability equivalent to that obtained in the jobs described. Judicial scriveners fall generally under the regulatory and licensing authority of the Ministry of Justice.

#### **[¶7-820] Administrative scriveners ( gyōsei shoshi )**

Administrative scriveners perform some of the same functions as their judicial counterparts, except on the administrative side. They can prepare for submission to government and public offices documents not specifically reserved by law solely to some other professional province. They cannot, however, appear in court on behalf of clients. The judicial system reform expanded the scope of the administrative scriveners' practice, too. They are currently allowed to draft contracts for individuals, represent clients to draft and submit administrative forms, and provide legal advice relating to their practice (Article 1-2, 1-3).

Certain individuals may register as scriveners without examination. These include attorneys, patent and tax agents, certified public accountants and employees of national or local government who have dealt with administrative matters for at least twenty years and have a high school education or at least eight years without a high school degree. Others may qualify by taking an examination administered on the prefectural level. Scriveners must register with the local prefectural administrative scriveners association. Within the guidelines of the Administrative Scrivener Law, the prefectural governor, in cooperation with the Ministry of Local Autonomy, regulates the activities of judicial scriveners within his prefecture. There are about 40,000 administrative scriveners in Japan (as of 2007).

#### **[¶7-840] Patent Attorneys ( benrishi )**

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Patent attorneys (also translated as patent attorney) handle much of the legal work related to registering and otherwise properly securing entitlement to various forms of intellectual or industrial property, such as patents, trademarks, designs and "utility models" (*jitsuyō shin an*), a type of intellectual property that receives protection in Japan but does not rise to the level of patentability. Patent attorneys are governed by *Benrishi hō* or the Patent Attorneys Law (2000, Law No. 49) and related regulations, which provide that attorneys and individuals who have served as examiners (*shinsakan*) or referees (*shinpankan*) in the Patent Office for at least seven years may register as patent attorneys. Also, attorneys can register as patent attorneys without examination. Others may qualify by examination.

The judicial system reform granted patent attorneys the rights to represent clients at infringement actions relating to intellectual property. When clients retain another individual attorney, a patent attorney who passed the designated exam can appear in court (Article 6-2). Patent attorneys register with the Patent Attorneys' Association, an organization regulated by the Ministry of Economy, Trade and Industry. The Minister of Economy, Trade and Industry has authority to discipline patent attorneys. There are only about 6,000 patent attorneys in Japan (as of 2007). However, according to the recommendation of the judicial system reform report, the government is going to increase the number of patent attorneys in order to promote use of intellectual property.

### **[¶7-860] Tax agents ( *zeirishi* )**

Tax agents (also translated as "tax attorneys") may advise, draft and file documents, and represent clients throughout the complaint process within the Tax Office, with respect to matters of tax (*Seirishi hō* or the Tax Agent Law (1951, Law No. 237) Article 2). Attorneys and certified public accountants are already authorized to handle tax matters. Others who wish to do so in the capacity of tax agent must take an examination. Qualified agents, many of whom are former government officials with long service in the tax office, register with the government and join the Tax Agents Association in the locality in which they intend to practice. Their activities are regulated and supervised by the National Tax Agency of the Ministry of Finance.

Since the introduction of a voluntary assessment and compliance system in 1948, tax agents have come to occupy a major place in preparing tax returns. Over two-thirds of the corporate returns and more than 20 per cent of the individual returns are prepared by tax agents. The Tax Agent Law (1951, Law No. 237), in addition to providing the basis for regulating tax agents, also specifically acknowledges tax agents' status by requiring the government to notify the tax agent as well as the client when investigating tax returns (Article 33).

### **[¶7-880] Certified public accountants ( *kōnin kaikeishi* )**

Following World War II, Japan began to develop the profession of certified public accountant to augment the long extant profession of accountant (*keirishi*). The profession, with its sense of uniform accounting standards, certification of competence and professional responsibility and independence, developed close on the heels of the post-war Securities Transaction Law, which required corporations listed on one of the Stock Exchanges to obtain certification from certified public accountants for certain legally specified accounting reports. Qualification is by a three-stage examination, and entitles successful applicants to engage in all the work of certified public accountants and the work of tax agents and administrative scriveners. Applicants join local chapters of the Japan Institute of Certified Public Accountants and are governed by pertinent rules and regulations.

Unlike the entitlement which attorneys enjoy with respect to the work of judicial and administrative scriveners and tax agents, attorneys are not automatically entitled to engage in the work of certified public accountants simply by virtue of their membership in the bar.

### **[¶7-900] Certified social insurance labor consultants ( *shakai hoken rōmushi* )**

Certified social insurance labor consultants deal with specific laws concerning employment and insurance (*Shakai hoken rōmushi ho* or Certified Social Insurance Labor Consultant Law (1968,

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Law No. 89) Article 2). They draft applications concerning labor law which should be submitted to administrative agents by companies. They can also represent clients for legal business relating to labor law, or labor disputes at dispute management committees under prefectural labor departments. They can consult about labor management in an enterprise and other matters concerning labor. The government passed the Law in 1968 in order to produce professionals who can meet the needs of enterprises with enough knowledge of labor and insurance law and lead them to appropriate labor management and labor social insurance.

In order to become a certified social insurance labor consultant, one has to pass an examination and have at least two years working experience in the labor or insurance field. However, attorneys can register as a certified social insurance labor consultant without passing the exam and working experience (Article 3). As of 2007, there are about 28,000 certified social insurance labor consultants. The Minister of Health, Labor and Welfare has authority to regulate and discipline them.

### [¶7-920] Notaries ( *kōshonin* )

Notaries certify and notarize deeds, and attest to articles of incorporation and a variety of other private documents of legal effect. The function of Japanese notaries differs almost completely from that of their American namesakes. It would be preferable to translate this term otherwise, but given the long history of translating *kōshōnin*, and its French analogue, as notary, it seems best to continue that practice here.

The process of attesting requires the notary to verify the parties' seals and then retain copies of the notarized documents for 30 years. The advantage of notarization is that it establishes documentary and substantive authenticity for most judicial purposes. Thus, for example, a properly drafted and notarized expression of a money obligation is taken as virtually conclusive in court and the holder of such a document moves directly to the enforcement stage of the proceedings.

Notaries are designated, assigned to specific locales, and supervised by the Ministry of Justice. The Ministry of Justice limits the number of notaries, most of whom are retired judicial or prosecutorial officers. As of 2004, there are only about 550 notaries throughout Japan. The Ministry also establishes a fixed fee schedule. The important role of the notaries in the judicial system and the strong control of the Ministry of Justice make them quasi-public officials.

## JAPANESE LAW IN ACTION

### Introduction

#### [¶8-020] Japanese law in action

It goes without saying that in Japan, as elsewhere, law and legal institutions are shaped by political, economic and social institutions. It should not surprise us that, for example, while the form of language in most Japanese laws is easily recognized by legal specialists from the countries from which those laws were first adopted, particularly Germany and the United States, the legislative rules actually operate quite differently when grafted onto the legal system of Japan.

Legal, political, economic and social institutions are formal or informal arrangements that shape human behavior by determining "the rules of the game." In the case of Japan, until recently social institutions have been intensively studied and have been one of the dominant frameworks for explaining the particular ways in which legal rules are invoked, interpreted and impact society and the ways in which legal institutions do and do not operate. Examples of social institutions in Japan regarded until recently as being distinctive and strongly influencing the shape and operation of law include: the household (or *ie* structure); lifetime employment at large corporations; an emphasis on educational achievement and merit-based advancement; a highly-educated, stable bureaucracy; and relative ethnic, linguistic and class homogeneity.

Yet the past decade and a half has been a period of intense economic, political and social change

## The Changing Image of Japanese Practicing Lawyers (*Bengoshi*): Reflections and a Personal Memoir

Yasubei Taniguchi<sup>1</sup>

It is quite appropriate to address my topic in the framework of this conference because the rising concept of rights in Japan can be rightly attributable to a rising image of practicing lawyers in Japan. The rising concept of rights, if any, is, in my view, a product of the increasingly active role of Japanese lawyers and of its social and political recognition and acceptance which has brought about a real change in the lawyers' social image. Presently, there appears to be already a benign circle between the lawyers' role and their image. This has happened recently for the first time in the long history of Japan. I am glad to belong myself to the generation of those fortunate Japanese who have personally experienced such a historical change during their own lifetime.

This essay will consist of a series of personal experiences I have had at various moments of my 70 years of life. So, please bear with me. I finished my undergraduate legal education in 1957, when Japanese society was still in the process of reconstruction from the devastation by the war. Japan was ostensibly dressed with the new Americanized ideal of a democratic legal system, under which the practicing lawyers (*bengoshi*) were accorded only a lowly status in the spectrum of social ranks. It is well known that there was no such thing as the legal practice officially allowed during the Tokugawa regime, which had lasted for more than 250 years until 1868. *De facto* existence of the legal practice by the suitors' inn keepers was frowned upon and avoided by good citizens although inn keeping was a legitimate, if not prosperous, business. Full legitimization of legal practice under the new Meiji regime in the 1870s, however, did not change the social image of the practice of law. With no entry examination instituted, at least in the beginning years, any person could become a lawyer. The name given to the new profession, *daigen'inin*, was a term of disgrace, synonymous with *shyster*.

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When I took the already very competitive National Legal Examination (NLE or *shihō-shiken*) and became a legal trainee (*shihō-shushu-sei*) of the Legal Training and Research Institute (LTRI or *shihō-kenshū-jō*) in 1957, I did not have any intention of becoming a practitioner. I wanted to become a judge. The LTRI was created after the war in order to train the candidates for three branches of legal professions—namely, judges, prosecutors, and practitioners—in the same program for two years. It was a great innovation because, in the pre-war period, training of practitioners was conducted separately by the organized bar and not regarded as of a high standard. Therefore, the integration of future *bengoshi* in the training program for judges and prosecutors was considered necessary to elevate the standard of legal practice in the newly democratized society. Only ten years had passed since the new system had been instituted when I entered the LTRI. The social image of *bengoshi* had not yet changed at all since the war. I found, as I expected, that the young cohort of promising trainees in the LTRI were naturally expected to become a judge or prosecutor. Many trainees were older than I was because they took many more years before passing the NLE. These older people were expected to become practitioners. After two years of training, my classmates mostly chose their respective professions as I anticipated. There were, of course, many exceptions, especially since some promising young men in fact became practitioners because their fathers were successful practitioners or because of their leftist political zeal.

I was invited to join the law faculty of Kyoto University, so I abandoned my wish to become a judge. When I was a young academic there, a senior professor of law told me what he kept saying to his son who was a young promising trainee at the LTRI after graduating from the University of Tokyo, an elitist school. He said to me, "Every time he comes home, I tell him not to take, by any chance, such a humble and miserable profession as *bengoshi*." I was not shocked to hear this honest remark; it was just what I expected. He was later happy because his son became a judge. But he had reason to worry. In the late 1970s and mostly in the 1980s, the LTRI was undergoing a change. In the 1970s, those promising young trainees started choosing a career in legal practice, and in the 1980s the judiciary and the prosecuting office had great difficulty in filling vacancies with eligible young recruits. In the career system of Japan's Civil Law type judiciary and prosecuting office, it was essential to recruit eligible young people successively to the system.

The number of trainees admitted to the LTRI was increased several times, reputedly to cope with this new trend. The LTRI started in 1947 with just 146 trainees, of whom only 18 went into practice. It was taken for granted that all trainees were paid a decent salary (a little better than the starting salary of a university graduate in a public office). When I was there, from 1957–59, we were 300. It had

just been increased to this number from 250. The number was gradually increased to reach 500 in 1964 and stayed at that level until 1991. After it reached 600 in 1992, the pace of increase was rapid: 700 in 1994, 800 in 1999, 1000 in 2002 and 1200 in 2004. The increasing number of trainees who chose to become practitioners during this period is remarkable because the recruitment to the judiciary and the prosecuting office has been more or less constant since the 1960s (80–100 judges except for the "crisis period" of the 1980s when number dropped to 50–60 for judiciary). The same level of salary has been paid to all trainees regardless of their future career. In the beginning years of the LTRI, those who became judges and prosecutors together outnumbered those who chose to practice. The judge-prosecutor/*bengoshi* ratio among 904 graduates of LTRI from 1949–1952 was 1:0.53, and that of 893 from 1953–1956 was still 1:0.89. The ratio jumped to 1:2.48 in the period from 1973–74.

In the mid-1970s, the Minister of Justice expressed the view that future practitioners and future judge-prosecutors should be trained separately because public funds should not be used for training nongovernmental employees. This remark gave rise to a big controversy. As one of the few LTRI graduate academics, I was asked to contribute an article to the monthly journal of the Japan Federation of Bar Associations (*Nichibenren*) about the problems of LTRI. I pointed out that the real issue was not just the increasing number but also the changing quality of those who wanted to become *bengoshi*. I argued that the very nature of the LTRI had been transformed.

The same trend was further strengthened thereafter. The number of those who chose to become judge, prosecutor, and *bengoshi* in selected years have been as follows: 64, 49, and 350 in 1977; 58, 50, and 325 in 1982; 58, 51, and 360 in 1987; 104, 75, and 406 in 1992; 97, 72, and 549 in 1997; and 101, 75, and 822 in 2002. These figures, of course, do not show the quality of those who chose to go to practice. But everyone knows—although they will not say it publicly—that in the 1980s the LTRI started pouring many of most brilliant and ambitious young people into the bar.

What brought about this fundamental change? What has been brought about by this? I shall discuss the first question first. I think there were at least two or three major reasons for this new trend. First, there were the activities of leftist lawyers in anti-pollution and other consumer- or citizen-related litigation which attracted much public attention in the 1960s. The 1960s were a time when Japan's industry and economy started an upward move with the government policy slogan "doubling people's income." A dark side of this was devastating industrial pollution in various areas of the country. The best known was the Minamata mercury poisoning case. A lawyers group called "Free Lawyers League" (*Jiyū-hōsō-dan*) was an organization of Marxist-oriented practitioners. The political landscape at that period was char-

acterized by a political polarization, with a solid conservative Liberal Democratic Party established since 1955 (the so-called 55 setup) and several leftist opposition parties such as the Communist Party and the Socialist Party, which were supported by labor unions and students groups. The Free Lawyers League was closely associated with the Communist Party and used court litigation as a strategy to publicize the vices of the industrial policy of the dominant government party. Hundreds of lawyers cooperated to litigate a number of large cases against companies causing environmental pollution and also against the government. Actions against the government were not successful, however, because of restrictive procedural and substantive law applicable to administrative litigation. But civil actions based on tort theories eventually gained victory in many important cases. These litigation cases were widely publicized by media along with the activities by *benigoshis*.

I think this was very instrumental for changing the public image of *benigoshis*. Traditionally, people tended to think about the *benigoshis* as helping money lenders to collect or landlords to evict. It was inconceivable that lawyers would fight against big corporations for the cause of people's safety while the government was neglecting to control them properly. Although people of the older generation tended to dismiss such activities as a politically motivated propaganda, it was enough to arouse the enthusiasm of ambitious young people who had been already politically leftist-oriented. I now recall that I was surprised by the decision of some young promising classmates in my LTRI class of 1959 to go into practice rather than to become judges or prosecutors as had been anticipated. Interestingly, through the years, the monopoly of "public interest" litigation by the leftist lawyers has become blurred. I recall my surprise when I learned that one of my classmates at the LTRI, who was known as a "rightist" lawyer specializing in the representation of management in labor cases, was working eagerly on a case against a large pharmaceutical company on behalf of Thalidomide victims.<sup>2</sup>

Another development came up a little later when the Japanese economy started booming internationally. Some law firms grew larger mainly by dealing with international business matters and started hiring promising young lawyers at high pay. Those who would have gone into the judiciary were attracted to the practice not only because of an allure of good salaries, but also because of the challenging career of an international lawyer. The opportunity for young associates to study at an American law school was certainly an added attraction. Even domestically, the business for lawyers in general shifted from work for individual clients to work for corporations, thus bringing more income to the practitioners. This was the second

reason why private legal practice became more popular among the trainees in the LTRI. It was said jokingly that the international law firms were natural enemy of the judiciary.

There was another factor however, which coincided with these others in this period and was likely to make the judiciary less attractive for young trainees. This possible third reason was a change within the judiciary: namely, the tighter discipline imposed on judges by the Supreme Court, which exercised under the new Constitution of 1946 the administrative power within the judiciary, including the power of placement and promotion of judges. The Japanese judiciary was traditionally proud of a relatively free atmosphere. Judges enjoyed a freedom similar to that enjoyed by academics. The judiciary was perceived by many as a different kind of organization from ordinary public offices or private firms. Because of the judicial independence guaranteed by the Constitution, even young judges would not be directed by senior judges how to decide a case. This feature was an attraction not available in most other prestigious workplaces. Prosecutors did not have a comparable independence, and the judges' work conditions were very different from normal administrative public offices.

In such a free atmosphere, affiliation of young judges with a leftist-oriented association (Youth Lawyers' Association or *Seinen-horitsuka-kyoikai*) was tolerated until the 1960s. However, when a political polarization intensified in the 1970s, and politicians in the conservative government party started paying close attention to the outcome of politically-involved litigation where the plaintiffs were organized and assisted by leftist activist lawyers, several incidents occurred which led observers to notice a changed atmosphere within the judiciary. For example, a LTRI trainee who was a member of Youth Lawyers' Association was refused judicial appointment (*Sakaguchi* trainee incident). A young judge who was a member of the same association was refused a renewal of the term when his first 10-year term expired. This was the first case of refusal to renew a term since the term-employment system was introduced during the American occupation. A presiding judge in Sapporo District Court was moved to Tokyo and assigned exclusively to civil litigation involving checks and notes shortly after his court decided that the controversial self-defense force was unconstitutional. Commentators talked about a bifurcation of judges between the elitist and the non-elitist. If a judge decided in favor of labor or other leftist causes or against government, he was risking his career. A study by the legal sociologists Miyazawa and Kashimura appeared to prove such a tendency statistically.<sup>3</sup>

2. See Masaru Ino, et al., "Diary of a Plaintiff's Attorneys' Team in the Thalidomide Litigation," *Law in Japan* 8 (1975):136-87.

3. See the well-known article in English by Setsuo Miyazawa, "Administrative Control of Japanese Judges," in *Law and Technology in the Pacific Community*, ed. Philip S. C. Lewis (Boulder, Colo., 2001).

Since a political shuffle in 1993, Japanese politics has undergone great changes. The Socialist Party changed its name to the Social Democratic Party, but is now almost defunct. The Communist Party has shrunk a great deal. The organization rate of labor unions has dropped dramatically. The former tension between the ruling political party and the judiciary has disappeared. The above-mentioned tight discipline of judges appears much loosened today. But, of course, the trend that promising young trainees keep going into practice continues and it will continue in the future. Therefore, the third reason I have given may not have been a decisive one.

Let me now turn to my second question: What has been brought about by the change in the flow of the LTRI graduates since the 1970s? In my view, it is a changed relationship between the judiciary and the organized bar and between judges and *bengoshis* in the courtroom or outside. From the beginning of the establishment of the modern legal system in Japan in the late nineteenth century, the judiciary and judges were above legal practitioners and their organization. Under the old regime before the war, activities of the *bengoshis* were under the strict control of the government. Judges looked down on *bengoshis*. *Bengoshis* had to take a humble posture before judges. The post-war democratization changed this completely in the face of law. The new Lawyers Law of 1949 defined *bengoshis* as the protectors of human rights and social justice. It lifted all governmental control over them and made their organization (integrated bar association, or *bengoshikai*) a totally independent and autonomous body. For example, the discipline of member *bengoshis* became the sole responsibility of the bar association.

Such a sudden legal status change without change of social status created a peculiarly twisted situation. Judges continued to look down as before on *bengoshis*, perhaps rightly because most of them were inferior in their ability and training as lawyers. *Bengoshis*, now armed with new freedom and independence, became openly critical of the judiciary. As an organization, they took a strong leftist stance, which was called "progressive." The monthly journal of *Nichibenren* looked almost like a publication of the Communist Party. They presented small and large demands to the judiciary, but their demands were invariably rejected as political and unconstructive. On the other hand, all requests or proposals by the judiciary or by a local court to the practitioners in general or to the organized bar as a body were flatly refused as oppressive and authoritarian. In short, there was no conversation between the judiciary and the bar. Behind such mutual mistrust and antagonism, there was an arrogance and the traditional sense of superiority on the part of the judges, and a proud and complex attitude on the part of *bengoshis*.

This relationship between the judges and the practitioners started to improve in the 1980s in connection with a movement to reform the practice of civil litigation. As in many other countries, a delay in civil cases had been a problem. Since the initial enactment of a modern Code of Civil Procedure in 1890, the history of Japanese civil procedure had been one of failed reforms. Procedural reform cannot be achieved by the mere amendment of a law's language. Without an accompanying change in the mindset and behavior of the judge and the counsel, it is bound to fail. The judiciary's view was that the uncooperativeness of the *bengoshis* caused delays. But their proposal for consultation with the bar had met rejection for the reasons stated above. In the 1980s, younger lawyers in Tokyo and Osaka formed a study group for improvement of civil procedures, and they made proposals to the courts. Then, judges and members of the bar formed a joint study group. They started experiments of pre-hearing preparatory conferences and concentrated hearings to examine several witnesses on the same day. The members of these groups, judges and *bengoshis*, published numerous articles about the management of civil cases in professional law journals.

This kind of development was unheard of before that time. Such a cooperative atmosphere became possible, in my view, only because of the changed "quality" of the *bengoshis*. Understandably, the attitude of judges toward these lawyers who did just as well or even better than themselves in the LTRI had to change. Constructive conversation and consultation also became possible between the local court and the local bar, as well as between the judiciary as the whole *vis-à-vis* the organized bar (*Nichibenren*) because the leading positions within the organized bar were now occupied by these elitist practitioners. It was only in the 1990s when this equilibrium was really achieved.

A symbolic event took place in 1991. When the Consultative Commission for consideration of a large-scale reform of the Code of Civil Procedure was formed within the Ministry of Justice, a couple of eminent *bengoshis* were included as its official members. Surprisingly from the today's point of view, no practitioner had been included previously in such governmental commissions for legislation. These commissions had typically consisted of academics from famous state universities (one of them as chairman), judges, and also prosecutors depending on the subject matter. I recall my surprise and wonder when I learned as a young academic, perhaps in the 1970s, that there were many practitioners in the Advisory Committee for Federal Rules of Civil Procedure. It was simply inconceivable for that kind of thing to happen in Japan prior to that time. Presently, the inclusion of *bengoshis* in these commissions is quite common.

Following the successful legislation of the new Code of Civil Procedure, a movement for a large justice system reform arose. The Prime Minister organized the Justice System Reform Commission in 1999. The Commission consisted of 13 members, of whom the number of lawyers was kept to less than a half in order to have opinions of users of the system better reflected. Among these, a famous activist *bengoshi* was included along with professors, judges, and prosecutors. The Commission returned a report in 2001 and immediately a special team was set up within the Prime Minister's Office and many consultative committees were formed for various subject matters on which the Commission recommended reform legislation. In these committees, *bengoshis* were always included and played an important role. Within two years, some 20 new laws were enacted, such as the law establishing a criminal court consisting of three professional judges and six lay judges. The organized bar had long been demanding adoption of a common law type jury in Japanese criminal process, but it had never become a real issue. The new legislation was a result of compromise between the judiciary-prosecution and the organized bar. It is certainly significant that such a compromise ever became possible at all. It would have been inconceivable 20 years ago. There had been a similar Judicial System Reform Commission in the 1960s which made various recommendations for the justice reform, but nothing happened at all at that time. Neither the judiciary nor the organized bar then had any willingness to cooperate for a fundamental reform.

\* \* \*

I have described what has happened for these 60 years in the relationship between the judges and the *bengoshis*, and what was brought about as a result of a changing relationship between these professions which are so fundamental to the maintenance of a good justice system. All this has changed the social image of the *bengoshi*. Active practitioners and a responsive judiciary are essential for protecting people's rights. If there is a rising concept of rights in the Japanese society today, it is certainly thanks to the raised standard of legal practice by *bengoshis*, the judges who are willing to listen to *bengoshis*, and the citizens who respect and trust *bengoshis*. With the new law school system already started in 2004, the landscape of the Japanese legal profession will undergo another fundamental change in the near future. The number of *bengoshis* will be radically increased in years to come. Some seriously question whether Japanese society can properly accommodate such a great number of *bengoshis*. Whatever may happen as a result of the new law school education, the social image of the *bengoshi* now established is not likely to be affected easily.

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## Articles

**\*255 THE BRAVE NEW WORLD OF LAWYERS IN JAPAN REVISITED: PROCEEDINGS OF A PANEL DISCUSSION ON THE JAPANESE LEGAL PROFESSION AFTER THE 2008 FINANCIAL CRISIS AND THE 2011 TOH OKU EARTHQUAKE**

Bruce E. Aronson [FNd1]

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Abstract: In the United States, the 2008 financial crisis had a serious impact on a legal profession that had been growing strongly for three decades, highlighting fundamental issues concerning the business and educational models of both law firms and law schools. This raises the interesting question of how Japan, with its much shorter history of large law firms and professional law schools, has been affected by the 2008 financial crisis and the 2011 Tohoku earthquake, tsunami, and nuclear reactor crisis.

At a recent conference sponsored by the University of Washington School of Law and the law firm of Perkins Coie, a distinguished group of legal practitioners from the leading Japanese and foreign law firms in Tokyo engaged in a panel discussion on the current state of Japan's legal profession. The panelists saw both the 2008 financial crisis and the Tohoku earthquake as "one-time" events that will not have a significant long-term impact. The 2008 financial crisis, although it had a lesser economic impact in Japan, raised fundamental issues similar to those in the United States concerning the appropriate models for large law firms and law schools. Despite a number of current problems, the panelists supported the goals and direction of recent Japanese reforms, which have overhauled the system of legal education and increased the number of lawyers, and they explicitly embraced a new model for the legal profession: rather than the traditional small elite with a narrow societal role, the Japanese bar would be significantly expanded and compete to fill a wide range of law-related roles in society.

## I. Introduction

During the period from 2000 to 2007 observers of the Japanese legal profession grew accustomed to a new world in which lawyers and law firms played an increasingly important role in Japan. The changes during this time included 1) the rise of large corporate law firms, 2) an increase in both the demand for corporate legal services and the supply of lawyers, 3) an expansion in the range of work activities of big firm lawyers and their increasing influence with Japanese businesses and government, 4) mergers \*256 among both domestic and international law firms, and 5) a greater presence by foreign law firms in Tokyo. [FN1]

These changes in the legal profession contradicted a long-standing image of Japan as a place where law and lawyers were of little importance. In addition, this period saw the introduction of even more ambitious legal reform. Following a broad plan adopted in 2001 (see *infra* Appendix D), [FN2] a new graduate law school system was introduced in 2004; [FN3] plans were made for

the continuing expansion of the supply of lawyers, with a corresponding expansion of their role as “doctors for the people's social lives”; [FN4] a new jury (or “lay judge”) system was instituted for serious criminal cases; [FN5] foreign law firms were allowed to form partnerships with Japanese firms and hire \*257 Japanese attorneys; [FN6] and numerous other measures were undertaken to implement this vision (see *infra* Appendix E).

In the United States, the 2008 financial crisis had a serious impact on a legal profession that had been growing strongly for three decades. For the first time large firms laid off attorneys for clearly stated economic reasons rather than due to performance, and their long-standing business models were called into question. [FN7] American law schools, which had also enjoyed decades of continuous growth, faced their own challenge to their business and educational models. [FN8] With increasing student loan burdens and a tough job market, the question frequently arose whether law school was now a “bad deal” for law students. [FN9]

This raised the interesting question of how Japan, with its much shorter history of large law firms and professional law schools, has been affected by the 2008 financial crisis, or “Lehman shock.” [FN10] Has the demand for legal services dried up? Have Japanese law firms also had layoffs? Is the number of lawyers still expanding? Have attitudes toward the activities of foreign law firms changed? Are recent reforms in the legal profession and legal education over the past decade continuing, or is there retrenchment due to poor economic conditions? In addition, what is the effect of the 2011 Tohoku earthquake and nuclear reactor crisis?

The theme of a recent panel discussion by prominent attorneys from Japan was that the Japanese legal profession demonstrated considerable resiliency in the face of these challenges. The panelists shared a basic optimism that Japan's legal profession still has a bright future, and will adjust to the current short-term issues as necessary. However, as in the \*258 United States, the 2008 financial crisis sparked widespread discussion of fundamental issues concerning the relationships among the legal profession, the legal education system, and society.

The panel discussion covered three principal areas: the fall in demand for legal services following the 2008 financial crisis and law firms' responses to it; legal education and the supply of lawyers; and the effect of the 2011 Tohoku earthquake and its aftermath. The panelists viewed both the 2008 financial crisis and the Tohoku earthquake as “one-time” events that would not affect the long-term health of the legal profession in Japan.

The 2008 financial crisis affected the demand for legal services in Japan, but to a lesser extent than in the United States and the United Kingdom. Large Japanese corporate law firms continued to grow (see *infra* Appendix A). One panelist from a large firm estimated that his firm's annual rate of revenue growth slowed from twenty percent prior to the financial crisis to five percent following it, but did not turn negative as was the case for many U.S. and U.K. firms.

The suggested reasons for this difference in impact included the smaller size of Japanese law firms; the prior, ongoing restructuring efforts of Japanese corporations in the face of an extended period of low economic growth; and continuing trends related to the growing importance of lawyers in Japanese society. Within Japan, smaller law firms were even less affected than large firms due to their size and relative insulation from the downturn in cross-border transactions that occurred as foreign investors reduced their activities in Japan.

The panelists noted that even with a lesser financial impact than that suffered by U.S. and U.K. firms, large Japanese law firms nevertheless had a temporary surplus of lawyers that neces-

sitated more active management. Unlike in the United States and the United Kingdom, there were no announced layoffs or direct firing of attorneys in Japan. [FN11] Large Japanese **\*259** law firms instead undertook closer monitoring of associates' performance and assumed a larger role in career counseling in light of the diminished opportunities for advancement within firms.

There was some disagreement among the panelists as to whether this truly represented a “kinder, gentler” approach to managing associates that was significantly different from the methods commonly used by U.S. and U.K. firms. Representatives of large Japanese firms viewed their efforts as a form of career guidance and counseling, but the Tokyo head of a prominent English firm did not see a substantial difference in result between Japanese practices and outright layoffs. He noted that the small lateral attorney market in Tokyo was flooded with young Japanese lawyers who had been pressured to leave large firms and that the end result was similar to the more direct layoffs generally associated with personnel practices at English and American firms.

Panelists' comments also raised the issue whether big firm practices that resulted from the 2008 financial crisis, such as more aggressive management of associates, could become permanent features of corporate law firms. It is argued in the United States that the financial crisis and other factors may have changed the business model of big law firms, [FN12] and Japanese firms also face new concerns about cost control and lawyer quality.

The most controversial topic in the Japanese legal profession [FN13] today is the question of legal education and the supply of lawyers. The far-reaching reform program formulated in 2001 called for a significant increase in the number of newly admitted attorneys each year and a doubling of the lawyer population by 2018. [FN14] The program was intended to simultaneously improve the quality of new attorneys through a new system of graduate-level professional law schools [FN15] (accompanied by a new bar exam) that would go far beyond the traditional undergraduate law departments in providing both a broader-based and more professional legal education.

**\*260** Over the past decade, there have been substantial increases in the number of new lawyers per year (from roughly 1,000 to 2,100) and in the total number of lawyers (from approximately 17,000 to 29,000), although both measures remain well below the ambitious reform goals of 3,000 new lawyers per year and a total of 50,000 lawyers in 2018 (see *infra* Appendix E). There are now many stories, supported by data, about new lawyers who are unable to find jobs.

The new law schools also encountered problems. The original idea was to attract a broader range of law school students, in particular those with no previous study of law, by raising the number of new attorneys each year and achieving a significantly higher bar passage rate (originally envisioned to be in the range of 70%, in contrast to 2 to 3% under the old system). However, due to a large number of law schools and law students the bar passage rate has been much lower than anticipated (27.6% in 2009; see *infra* Appendix C). [FN16] This has discouraged potential law students with non-legal backgrounds from applying to law school, and has encouraged law school students to focus their studies narrowly on bar exam courses and topics rather than pursuing a broad-based legal education. [FN17] The Japanese bar, as represented by the Japan Federation of Bar Associations [Nihon Bengoshi Rengokai] (“Nichibenren” or “JFBA”), which initially supported both the increase in the supply of lawyers and the new law school system, has suffered internal turmoil over these issues [FN18] and has recently called for a **\*261** reduction in the annual number of new attorneys [FN19] and reform of the law school system. [FN20]

The panelists, while recognizing shortcomings in the recent reforms, were surprisingly uniform in their support for the goals of reform and the necessity of continuing to progress toward those goals. They largely attributed the problems of the new law schools to design flaws and political compromises in the original plan for law schools and to continuing bureaucratic infighting among the government agencies responsible for education and for the legal profession. There was also a consensus that the rate of growth in the number of lawyers should not be diminished but rather should continue to increase. [FN21]

Rather than debating the appropriate number of new lawyers, the panelists regarded the real issue as one of expanding the role of lawyers to address the actual and potential demand for legal services by corporations \*262 and government on the one hand, and by consumers on the other. [FN22] In particular, one panelist noted that it was important to remove sources of competition faced by lawyers: 1) the large numbers of undergraduate law majors who go to work for business and government directly upon graduation, and 2) a variety of quasi-lawyers who undertake examinations and receive separate licenses in areas such as tax law and intellectual property law that would be serviced by lawyers in the United States. [FN23] In addition, a panelist noted that demand for legal services remained weak among Japanese consumers. [FN24]

This led to a discussion of perhaps the most fundamental issue underlying legal reform--the philosophy behind legal education and the bar exam. The contrast between the American system and the traditional view of the bar in Japan is striking. In the United States, the premise of the bar exam is to confirm that lawyers have the minimum knowledge necessary to be competent attorneys and to compete broadly, allowing them to fulfill a wide range of social roles without regulating their numbers; the former system in Japan was intended to pick a small, elite group of highly capable lawyers for a narrow range of jobs through very difficult testing and direct regulation of their numbers. The question arose as to which model, if either, \*263 accurately describes Japan's newly emerging system, and which model is preferable for the legal profession.

One panelist noted that the planners of the new law school system favored a new philosophy that is broadly similar to that prevailing in the United States. However, this approach represents a significant departure from past practice and was neither broadly discussed nor universally accepted when the reform program was formulated.

The panelists, all of whom are highly successful lawyers, embraced the new broader, competitive approach that underlies the law school system. Several panelists expressly accepted the notion that a law license should be like a "driver's license," that is, it should result in competition among qualified license-holders to fill a wide variety of society's law-related needs rather than creating a small elite with a narrow focus. However, a panelist also expressed the concern that the low bar passage rate under the current law school system, combined with uncertain job prospects, might reduce the attractiveness of the legal profession and thereby lower the overall quality of lawyers.

Reflecting this viewpoint, another panelist characterized the law schools' recent struggles as a new system experiencing birth pains and growing pains. All the panelists accepted the notion that, despite the current difficulties there could be no return to the former "elite" system, even if the result was that legal jobs could no longer be "guaranteed" for newly minted attorneys.

The final topic was the effect of the 2011 Tohoku earthquake and its aftermath on the Japanese legal profession. [FN25] A panelist from an American law firm described the considerations behind his firm's decision to announce the temporary closing of its Tokyo office shortly after the

earthquake. Although this decision was questioned by some in Japan, public announcements and actions of the U.S. embassy in Tokyo and other institutions encouraged voluntary evacuation from Japan. [FN26] The actual \*264 decision on evacuation was left to individual attorneys, however, many of whom remained and continued to work in Tokyo. The impact of the earthquake on the activities of foreign law firms in Tokyo was expected to be temporary. [FN27]

Another panelist noted that the biggest uncertainty was the continuing concerns over nuclear reactors in Fukushima. [FN28] This had an impact on law firm activities, but was not expected to have a long-term effect. The same panelist expressed the belief that reconstruction efforts in the Tohoku region could help stimulate the Japanese economy and the hope that recent events might also create a more “can-do,” positive mindset both domestically and with respect to trade and investment throughout Asia.

Finally, panelists noted the criticism within Japan of the government's regulation of the nuclear power industry and the vulnerable position of the Tokyo Electric Power Company (“Tepco”), the operator of the affected nuclear reactors. Questions remain about lawsuits and potential liability, criteria for the operations of other nuclear plants and of any new plants, and, more generally, about public information and discussion concerning the safety and operations of nuclear plants. [FN29]

All of these topics--both short-term impacts and long-term fundamental issues--were covered as the panelists discussed the Japanese \*265 legal profession following the 2008 financial crisis and the Tohoku earthquake.

## II. Proceedings of the Panel, May 9, 2011 Moderator:

Bruce Aronson

Panelists:

Hisashi Hara, Chairman, Nagashima Ohno & Tsunematsu

Toru Ishiguro, Partner, Mori Hamada Matsumoto

Akira Kosugi, Partner, Nishimura & Asahi

John Roebuck, Partner, Tokyo Office, Jones Day

Shinichi Sugiyama, Harago & Partners

Toshiro Ueyanagi, Tokyo Surugadai Law Offices

Akihiro Wani, Managing Partner, Tokyo Office, Linklaters

### A. Fall in Demand for Legal Services and Law Firms' Responses

#### 1. Fall in Demand for Legal Services

Professor Aronson: Following the 2008 financial crisis, external shocks and the poor economy must have affected the demand for legal services. How would you generally describe the effect?

Mr. Hara: As a general matter, before 1995 the role of Japanese lawyers was largely limited to cross-border transactions and litigation. Japanese companies did not use lawyers for domestic transactions. Starting around 1995, Japanese companies started using lawyers for their domestic transactions, and that changed the demand for lawyers very drastically. From 1995 until the Lehman shock, the major Japanese law firms probably recorded more than a twenty percent increase in their revenue every year. As a result of the Lehman shock, U.S. and U.K. law firms suffered a decrease in revenues and they initiated very substantial cost reductions, including layoffs of lawyers and staff members, to maintain their profit per partner. The affected lawyers sometimes included partners. But that was not the situation in Japan.

We were also strongly affected by the Lehman shock; however, we could still maintain an increase in revenue at a lower level. At my firm, in 2009, we only had around a five percent increase in revenue compared to the \*266 twenty percent increase before the Lehman shock. So the situation was not terribly bad compared to U.S. or U.K. law firms, partially because we do not have as many lawyers. So we still enjoy a good balance from the viewpoint of lawyers' supply and demand. Another factor is that the Japanese economy suffered badly in the early 1990s after the economic bubble burst. Japanese companies had adjusted and were relatively prepared to overcome the situation at the time of the Lehman shock. As a result, demand in the Japanese legal market decreased, but not to the same extent as in the U.S. and UK.

Professor Aronson: What areas of your practice have been affected the most, and what areas have been affected the least? Is there any difference between manufacturing and financial services? Has there been an increase in countercyclical work such as litigation and bankruptcy since the financial crisis?

Mr. Hara: There are many differences among practice areas. For example, the capital markets practice was almost dead after the Lehman shock. Among transactions, the U.S. and U.K. markets suffered in the [mergers and acquisitions ("M&A")] area, and Japan did as well. Inbound cross-border M&A transactions, mainly from major U.S. funds coming to Japan to acquire Japanese companies, was very slow or dead. But on the other hand, Japanese companies engaged in strategic M&A transactions so that volume was maintained. Also, the insolvency practice performed better.

Mr. Ishiguro: The areas which were adversely affected at our law firm include structured finance, or the securitization field, and also private equity and other fund-related activities. M&A remained relatively healthy due to the strategic M&A activities of domestic companies, although financial M&A activities were very slow.

Litigation remained largely unaffected by the financial crisis. The general situation in the capital markets was not good, but due to the crisis many large Japanese financial institutions and corporations felt the need to strengthen their balance sheets and entered into large fund-raising transactions including global offerings of equities. The overall number of transactions in the capital markets field decreased drastically, but the total size of the offerings increased dramatically. The field of insolvency was better off. This is a general overview of our firm after the financial crisis in 2008.

\*267 Professor Aronson: What about the effect of the 2008 financial crisis on foreign law firms in Japan?

Mr. Wani: The Lehman shock seriously affected international firms which have global opera-

tions, and our firm is mainly focused on cross-border work. As Mr. Hara mentioned, domestic M&A was stable, but the motivation for non-Japanese companies to make investments in Japan was severely affected and that market was almost dead. On the other hand, the motivation of Japanese corporations to engage in overseas M&A activities strengthened. Outbound M&A transactions sound like good deals for lawyers in Tokyo, but in reality such lawyers just play the role of intermediaries and send the cases to law firms overseas. So the situation in Japan continues to be difficult with regard to international transactions. Japanese still have a great amount of money to invest, but people favor simple products. Because of that tendency, transactions continue but they require less advice from lawyers. Japan has special problems with the recent earthquake and nuclear reactor crisis, but even after taking such facts into consideration, Japan is still a bit behind in the demand for legal services compared to other economies. However, I think that we may catch up sometime in the latter half of this year.

Professor Aronson: Is there any difference in impact between the large corporate firms and smaller law firms?

Mr. Ueyanagi: The impact was less because our firm is smaller than those of other panelists. However, I think smaller firms also suffered from a decrease in the number of matters, especially those related to real estate transactions, since the value of real estate is decreasing. I am trying to think of new practice areas. For example, some Japanese consumers and small enterprises are suffering losses in transactions involving derivative financial products with major banks. Another potential field is employment law. Due to M&A transactions and the restructuring of Japanese small and medium-sized enterprises, more people are losing their jobs and so the number of employment cases is also increasing. However, these cases are somewhat time-consuming and less profitable.

Professor Aronson: Have clients become more concerned with the costs of using lawyers? Is there any greater competition among law firms for clients?

**\*268** Mr. Kosugi: The expansion of Japanese corporate law firms was caused by social changes in Japan over the past two decades. The Western-style legal system permeates Japanese society, and Western-style lawyering was adopted by Japanese law firms starting in the late 1990s. At that time, foreign investors were interested in bargain deals in Japan because of the economic crisis. Such complex deals require more corporate lawyers to conduct legal due diligence and to handle those transactions.

These trends contributed to our firm growing very fast. When I became managing partner fifteen years ago, the number of lawyers at our firm was around forty. Now we have almost five hundred lawyers. As a result, events in 2008 outside of Japan in the United States or Europe, such as the Lehman shock, affected us as well.

Returning to your question on cost consciousness, it is an issue because many of our clients are foreign financial institutions and also some are top-tier Japanese business institutions that are competing globally. Therefore, if something happens to lawyers in the United States or Europe, it will also likely have some effect on us. Now even the top-tier U.S. firms or [the five top-earning U.K.] "Magic Circle" firms are not immune from pressure from their clients to discount rates. That would have been inconceivable ten years ago. It is not unusual that many foreign investors are more cost conscious and that as a result, Japanese financial institutions also learned how to deal with lawyers. Some clients are now quite cost conscious, although it is not as direct for Japanese law firms as for foreign law firms. We are no longer neglecting the demand for cost con-

trol from clients. We must demonstrate that our services are of a quality that warrants our fees. In that sense, I think that the cost element has changed and it will never return to the old days.

Professor Aronson: So you have lost your immunity from cost considerations. Have smaller firms been able to steal some of these sophisticated clients away from larger firms?

Mr. Sugiyama: I am a partner in a smaller firm with twenty lawyers. From the late 1990s, there were many cases of securitized loans and invested assets in which the investors were mostly foreign investors from the U.S.A., U.K., or other countries. And this trend still continued even after the Lehman shock, but it is slowing down. Some investor deals went away, but other investors came into the market and the total number of matters is almost the same after the crisis. Cost consciousness is also almost the same. We always had a modest fee since we have a smaller number of lawyers and \*269 staff and a smaller office than other firms, and our practice is not as expensive to maintain. Dealing with assets in Japan does not require a large number of lawyers and staff, so cost performance is very important for clients. After the Lehman, shock I heard that some larger firms tried to get involved in litigation over assets in Japan, but it seems not to have worked because they do not have our breadth of experience in this area and the cost is higher than for smaller law firms.

Professor Aronson: Do you view the fall in demand as something that is cyclical and will recover over time, or is there a danger of a permanent loss of demand for legal services?

Mr. Roebuck: It is a big question so I will give a big answer. I view this decrease in demand, if any, as what might be called transitory rather than permanent. It is not cyclical because I thought Lehman was a one-off event and certainly one hopes that the events of March [the Tohoku earthquake and its aftermath] were also a one-off event. I take a rather bullish view of the prospects for continued demand for corporate work in Japan for a number of reasons. I think the drivers of legal demand are fundamentally economic growth, corporate investment and profitability, complexity of the legal environment, and, of course, how corporations use lawyers. And I think all of those trends are still pointing in a largely positive direction. Although there are some caveats, as we have already heard, such as a greater cost consciousness, I do expect that what we will see will not be a collapse in demand or net reduction in demand, but rather a change in the composition of demand.

My speculation is that because of a heightened perception of risk in Japan there may be less inbound acquisitions and foreign direct investment [("FDI")], perhaps counterbalanced by more alliances and joint ventures as foreign investors continue to seek greater access into Japan. There may also be more strategic outbound FDI and acquisitions, principally by smaller Japanese corporations that have not already successfully moved offshore, as they realize and respond to a heightened perception of Japan risk by Japanese corporations. I think there may be some knock-on increase in demand from the reactions of various corporate players to a heightened perception of Tokyo risk due to over-concentration in Tokyo. So I think this process will be more a change in demand rather than a gross deflation of it.

We have been through this before, after Lehman. We have already heard from other panelists that there was less real estate, less securitizations, and less capital market activities, balanced by more bankruptcy and \*270 insolvency disputes, investigations, anti-trust, and some M&A. We heard that at least through 2010, the law firms continued to grow, and that was true in our case as well. We grew from forty to about sixty lawyers from 2007 to 2010. And I should also add that even though we are a foreign firm, we are largely Japanese in our makeup. When I joined sixteen

years ago, we had two lawyers in Tokyo, and we now have sixty. So I am, in conclusion, an optimist concerning a continuing robust increase in demand, at least in the short to medium term. In the long run, one has to wonder how the various structural issues that are present in Japan may play out, but I will leave that to later generations.

## 2. Law Firms' Response to the Financial Crisis

Professor Aronson: In the United States many large law firms fired attorneys for economic reasons following the financial crisis of 2008. Despite the continuing overall growth of the largest Japanese law firms [see *infra* Appendix A], there presumably were also more attorneys than needed at large firms in Japan. However, our image of Japan suggests that there would be reluctance to fire attorneys. Were there any firings? How did you deal with that situation?

Mr. Ishiguro: Since the effect of the 2008 financial crisis was not as great in Japan as in the United States, the U.K., or Europe, management of the number of lawyers in large law firms such as ours was also not as affected by the crisis as in other areas. Nevertheless, we felt the need to manage the size of the firm and the number of associates because, as Professor Aronson noted, of the rapid growth in the size of the firm throughout the last decade. There was no direct firing of associates or partners in our firm. But we felt it was necessary to monitor and evaluate associates all through the year to gauge their motivation, performance, and ability. And we are engaged in continuing discussions with them about prospects for the future, and that will naturally result in encouraging those who do not have good future prospects that can be shared with our firm to think about alternative professional careers. Fortunately, in Japan, these alternative careers are developing gradually, if slowly. I think it is an interesting situation in our firm, since although there is no direct firing there is managing of the number of associates as a whole.

Professor Aronson: How have foreign firms been affected? Despite the continuing overall growth of foreign law firms in Tokyo [see *infra* Appendix \*271 B], foreign firms also presumably had a surplus of attorneys and staff. Did you follow more of a “Japanese-style” response or an “American-” or “English-style” response in dealing with your attorney and staff population following the financial crisis?

Mr. Wani: We had a redundancy plan. But the problem with the international firms in Tokyo is that we are just part of global organizations. Once our global management decides to reduce the number of lawyers we must also reduce from the viewpoint of fair treatment, even if it results in a loss of substantial prior investment. In Tokyo at that time, we had three kinds of lawyers: English solicitors, U.S. lawyers, and bengoshi [Japanese lawyers]. Based on discussions with my friends at New York law firms, British firms seem to be quite transparent and strict on such matters, and some of my English, American, and Japanese colleagues had to leave. With regard to Japanese lawyers in our Tokyo office, we were told that we should reduce the number of bengoshi, too, and we entered into discussions of so-called voluntary retirement, which means that we need to provide greater severance pay than usual.

We had to talk with our weaker performance people and finally they agreed to step down. It is great news that although we expected many of them to have difficulty in finding new positions, they all found new positions within two months after their departure, despite the fact that all law firms were retrenching and there was a very weak lateral market at that time. Mr. Ishiguro noted that the Japanese firms did not do any direct firing. But in fact, there are many people in the lateral market who are looking for new positions because of insecurity with their current firm and some of them say they were encouraged to leave by their current employer. So the situation seems

to be quite similar to what took place in the U.S. or in the U.K.

Professor Aronson: Have views changed on the long-term strategy, positioning, or ideal size for law firms in Japan as a result of the financial crisis?

I note that at a prior panel discussion four years ago, Nishimura & Asahi was in the midst of a big merger. There was a statement by a panelist from Nishimura & Asahi at that time that this represented the first merger in Japan that was not undertaken to acquire a specialty practice like capital markets, but rather to grow bigger and to add more breadth and depth to handle large matters for clients. Has this strategy been affected at all due to recent events?

**\*272** Mr. Kosugi: I note that I just resigned as managing partner this January and so my successor will have a free hand to take measures for coping with the new situation, including human resource issues. I think the basic issue is how we deliver value to our clients, and that would be the main driving factor of our strategy.

At the time of the merger in 2007, we retained our so-called Nishimura system, but this style may need to be adjusted in the near future depending upon the circumstances surrounding us. At that time there was surplus demand for our work and we needed human resources, not only from new graduates but also from lawyers who already had enough experience to create value for our clients. That was a major reason that our merger sought primarily to enlarge our pool of talent. And specialty practice areas are being enhanced by that as well. It is not only a matter of quantity, but it also relates to the quality of our legal services.

But the current situation is that we have an increasing number of new law school graduates, some four times more than twenty years ago. So we have changed the style of our recruiting by making decisions on the hiring of new graduates two years before they enter the market. In 2008 to 2009, we recruited more than fifty new graduates each year. But the quality of those new graduates is still a big question. Many say that under the old difficult bar examination, with a passage rate of something like two percent, we were somewhat guaranteed to get good lawyers. Under the new bar examination system, there was supposed to be a passage rate of more than seventy percent in the original plan. But even at the current passage rate of around thirty percent, we have a division of opinion amongst our partners whether our new hires are the same quality as those we had ten years ago. If you have partners or senior associates who are well trained, you can deliver enough value to clients. You can persuade clients that our services are the best services that can be obtained in Japan. But it may now sometimes be difficult to say that about the services of junior associates, and this relates to how you form a team to handle cases. It would be more effective to simply take an energetic partner and some talented senior associates who can handle big matters quickly and efficiently, and create value for our clients. But to continue as an institution, we need to educate and train young associates on the ground. To do that, we must involve young associates in teams with partners and senior associates.

But under the current circumstances, there are some cases where we have difficulty in forming such teams since clients demand more efficient services from us. That means there might be some redundancy of those junior associates and we must deal with this. One way is to reduce the **\*273** number of new recruits, but we are not sure of their quality until we work together with them. That may take several years, so we have been trying to develop some kind of career exit system for our associates. If we are not satisfied with an associate, in Japan we cannot say "you are fired." But keeping young attorneys who do not fit well in our firm it is not good for the associate or for us. So I think that we need to show such associates that there may be a better way for them

to pursue their career. We also are reducing the number of new recruits to some extent. Through this combination we must keep a balance among the entire composition of attorneys within the firm. This is not particularly related to the global financial crisis, but rather related to the increasing number of lawyers coming into the market and also to the needs of our clients and how we deliver value to our clients.

## B. Legal Education and the Supply of Lawyers

Professor Aronson: That presents a perfect lead-in for the next topic, which is legal education and the supply of lawyers. Appendix D shows how Japan has been engaged in a very broad and far-reaching set of legal reforms over the past decade. Our focus today, which is also the area of greatest emphasis in Japan, is Pillar Two--and in particular, the expansion of the supply or population of lawyers and the introduction of a new legal educational system. Appendix E shows some of the ambitious goals set in 2001: an increase in the number of new bar passers every year from around 1,000 in 2001 to 3,000 by 2010, and an increase in the total number of lawyers from roughly 17,000 in 2001 to 50,000 by 2018. There have been significant increases in the number of lawyers over the past decade, but the numbers still fall far short of the announced goals. At the same time, we hear stories about new lawyers who cannot find work. Was the plan to increase the number of new lawyers too ambitious and mistaken, or is this just a temporary problem due to the financial crisis?

Mr. Ueyanagi: I should point out that last year we had 1,800 new lawyers. As of December 2010, 214 of them did not register with the Japan Federation of Bar Associations [("JFBA")]. In other words, these 200-plus people could not find a legal job as of last December. One might therefore say there are too many lawyers, or at least too many new lawyers. However, yesterday the JFBA announced that as of April 25, [2011,] sixty-four people had not registered. In other words, 150 people have registered with the bar in the past four or five months. They presumably found law firm jobs or \*274 chose to establish their own solo practices. On the other hand, in the Sendai area, where they were greatly affected by the earthquake and tsunami, there are almost 300 lawyers in the Sendai City Bar Association. All of the Sendai bar members are offering free legal consultation to the affected victims. To provide free legal consultation once a week, they drive one or two hours to the seashore. Even in Iwate, they have eighty lawyers and all of the lawyers are volunteering to drive three or four hours to provide legal consultation. So it is my observation that Japan needs more lawyers, at least in such rural areas.

Professor Aronson: New graduate-level professional law schools were created in Japan in 2004. The original idea was to attract a broad range of students with different backgrounds and to introduce both U.S.-style professional legal education with small classes using the Socratic method and a broad-based legal education, not focused on the bar exam, that would include new areas such as intellectual property. Many people seem to feel that the law schools have not achieved their goal. What happened?

Mr. Hara: It is a very difficult question. The Japanese law school system was introduced without careful consideration. It moved very quickly, and one of the basic issues was that the government announced that under the new law school system, the bar examination passage rate would be seventy percent. And also under the law school system, law students with an undergraduate law background have a two-year program, while those without a law background must attend a three-year program. Many people who work at companies might think that if the passage rate is seventy percent, it may be worth the challenge. In the first and second year of the new law schools' opera-

tion, many “salarymen” [corporate managers] without a legal background entered law school. But in fact, the first-year passing rate was not that high and the actual result was discouraging [see *infra* Appendix C]. As a result, people who work at companies lost interest in going to law school and the quality level of students went down. The plan for the law schools was created by the Ministry of Justice and the Supreme Court, but actual law school administration is conducted by the Ministry of Education[, Culture, Sports, Science and Technology]. The Ministry of Education permitted the opening of many law schools, and even at the initial stage there were a large total number of enrolled students, with only a fixed number who could pass the bar. As a result, the bar passage rate was not near seventy percent. So it was poor administration or a lack of coordination that led to a bad result.

**\*275** This created many problems. Some law schools have only one or two students who pass the bar examination. And those law schools cannot recruit good students and may not survive. Two years ago the government realized that the total number of law school students was too large. And in my view, good law schools like the University of Tokyo should have maintained their current number of students and the worst performing law schools should disappear. However, the Ministry of Education announced that throughout Japan all law schools should decrease the number of law students by ten percent or twenty percent. The problem is that the Ministry of Education is not an expert about the legal profession but it nevertheless controls law school administration, and it sometimes makes serious mistakes. So except for the few excellent law schools, almost all law schools are very focused on how many of their students can pass the bar. However, they have a low bar passage rate and have trouble attracting excellent new students, which creates a vicious circle. It is also difficult now to create creative and challenging classes that are unrelated to the bar examination. So at regional universities it is not easy for a young college student to enter law school.

Professor Aronson: What should be done to fix the law school system?

Mr. Sugiyama: As Mr. Hara described, the law schools in Japan are controlled or operated by the Ministry of Education, not by the Supreme Court or by the Ministry of Justice. On the other hand, the bar examination is controlled by an independent committee for the bar examination which is actually controlled by the Ministry of Justice. So there are conflicts between the government agencies. We left too many matters undecided when we actually launched the law school system in Japan.

The basic issue that we first need to revisit is whether we need to change the image or the conception of lawyers in Japan. The traditional image of the *bengoshi* is that they are the elite with the most difficult examination among a number of law-related qualifications in Japan. Should we change this or not? If the answer is yes, we must do many things, including not only the establishment of law schools, but also seriously giving consideration to abolishing universities' undergraduate law departments. Since we continue to have undergraduate law departments in addition to law schools, it is a double system. Many smart students choose to seek employment at a Japanese corporation after they complete their undergraduate education. So demand from companies is mostly satisfied by the graduates from the undergraduate law departments, not by graduates **\*276** from law schools. That is a problem. And secondly, we must seriously discuss whether to have unified qualifications for all law-related professions. For example, in Japan we have *benrishi* [intellectual property law professionals], *zeirishi* [tax law professionals] and other categories that would all be lawyers in the United States. But in Japan each category has its own different qualifications and is controlled by a different administrative agency. So we need to seriously discuss abolishing or combining these categories. Unless we can achieve that, the law school system will

not work.

Professor Aronson: So we need to attack the issue more broadly. In the United States, law schools have faced serious issues over the past few years, as the number of students has increased and they have assumed student loans and higher debt levels to attend law school, but the job prospects are substantially diminished. This has caused some people to argue that “going to law school doesn't pay” and bright young people should pursue other goals. What is the situation in Japan? Have law schools been losing popularity over the past few years?

Mr. Kosugi: The general motivation for those who would like to enter law school has been weakened by events over the past several years. The passage rate is not what was promised by the government. If this happened in the United States, there would be a large class action suit against the government. That is not the case in Japan. The design of the law schools may be too idealistic to some extent, but I do not think that we can go back to the old system, so we need to live with the current situation. And the problem is the level of demand for legal services that exists today. I think that the quickest fix might be to create more plaintiffs' lawyers so that there is more litigation in Japan. But judges are not lenient or generous in granting large damage awards, and that is a hurdle to the plaintiffs' lawyers in Japan. As Mr. Sugiyama said, once attorneys in Japan were an elite profession, but I do not think that will be the case any longer. So as an increasing number of lawyers enter the market, the easiest thing is to grant a permit to anyone who can pass the minimum qualifications--like a driver's license.

The other problem is that the clientele in Japan who were under-served were low-income individuals and corporations. Corporate clients need sophisticated legal services and low-income individuals need day-to-day care, but for the latter legal aid is not well-established in Japan. That is a problem since more than ninety percent of Japanese lawyers are either solo practitioners or in very small firms of less than ten lawyers. In fact, the \*277 major firms like those of some of the panelists are an extreme minority in the bar.

So how we can deal with this situation? There is no easy, reasonable solution. Businesses are trying to recruit law school graduates to some extent. But they have their own problems, due to a company career system that is focused on internal training within their organizations rather than on professional qualifications. That is another hurdle we need to overcome. Probably businesses expect us, the large corporate law firms, to educate and train some of the new law school graduates, so that after four or five years of experience they are better suited for providing legal services within corporate organizations. Our hope is that the number of lawyers within companies will increase, but that depends on the mindset of business management with regard to risk and how to cope with it in doing business.

Professor Aronson: Mr. Kosugi and Mr. Sugiyama have both touched upon a very fundamental issue, the philosophy behind the bar exam and the legal education system, and I would like to address it more directly. In the United States, the basic purpose of the bar exam and legal education is to certify that people who are going to be lawyers have the minimal level of knowledge required to be competent attorneys. We do not attempt to directly regulate or limit their numbers, as they will all presumably compete to fill a variety of roles in society. The comment was made that in Japan, lawyers do not fill as many roles. The traditional approach in Japan has been quite the opposite, with a strong focus on limiting the number of lawyers to produce a very small elite. And there are other people with legal training, as Mr. Sugiyama mentioned, such as undergraduate law majors who will fill other roles that might be filled by lawyers in the United States. With the new law school system and the increase in the supply of lawyers in Japan, it seems that to some degree

Japan is moving away from its traditional model. But are you prepared to embrace something like the U.S. model, where the number of lawyers is no longer regulated and the system simply certifies minimal competence, or are you still reluctant to do that? How would you describe the Japanese system today, and what kind of system do you think it should be in the future?

Mr. Ishiguro: It is a very good, but difficult, question. I think the publicly announced idea was to secure the minimum competence of lawyers and let them meet a variety of societal demands. However, I am afraid that when we introduced the new law school system in Japan, there really was no commonly shared philosophy among lawyers or society as a whole. \*278 Following the introduction of the new system, the passage rate increased compared to the old system, even if it was not as much as initially promised. We have many more new entrants into the profession. But Japanese citizens still do not consult lawyers in their daily lives as U.S. citizens do, and they do not care much about the legal system. I think the quality level for new attorneys is about the same as under the old system, at least for the top ten percent of law school graduates. But I am fearful that the profession itself will lose attractiveness, as the motivation for talented young people to select the legal profession as their career will decrease. This would create a major problem for Japanese society. It is not practically and realistically possible for us to return to the old system, so I think we should consider how to make the law school system, as well as the lawyering system, attractive to young people in Japan.

Mr. Wani: The new Japanese system is quite strict in that if you fail the bar exam three times, you cannot take it again unless you re-enter law school--a so-called "three strikes and you're out" system. To our surprise, at the law school where I lecture, we saw graduates who failed the bar three times and wish to re-enter law school. Also, the number of academicians has fallen because the Ministry of Education recommended a strange rule that to be a law professor, you must graduate from law school and then enter a separate graduate program for law. Quite recently, the University of Tokyo relaxed this regulation. In the past, excellent law professors entered into academic life right after university graduation in their early twenties. But nowadays they must wait until the age of twenty-five. This situation should be improved.

I agree with Mr. Kosugi's idea that lawyer certification should be like a driver's license. In the past, I was told by those who passed the bar exam, "our life is now like retirement, our future is guaranteed, and there is no need to work hard." This is no longer the case. I think that the increase of lawyers is necessary, but it is also important to monitor for malpractice and to try to keep the quality of professional practice as close to the current level as possible. Although lawyers are professionals, we do not stick to the old image of the legal profession. I think that the American style of lawyers could work in Japanese society. When we introduced the new system, we thought that after graduation and the bar exam, there is no need for additional training under the control of the Supreme Court at the Legal Research and Training Institute. But the Supreme Court insisted on keeping such training, so the current system is duplicative. The question is what \*279 should we do to make legal training efficient and make the market more competitive?

Mr. Roebuck: Japan may not be unique, but it is certainly among a very small number of countries that have effectuated such a deep and dramatic reform to legal education and licensing in recent years. I think it is almost unprecedented and revolutionary. I have been practicing as a lawyer in the United States for thirty-six years now, and frankly not much has changed there in these areas. In fact, compared with Japan, the number of lawyers produced annually has not changed very much in the United States. When I graduated from law school in 1975, there were some thirty thousand lawyers being created annually. It is now forty to fifty thousand. It has not been such a large increase in percentage terms. Back then, Harvard Law School already had

classes of over five hundred students. We have grown a bit, but that is pretty much where we are today.

The U.S. legal profession has enjoyed an incredible run of prosperity over that period of time. The reason is that it was actually the U.S. that was limiting the number of lawyers, although not through any legal control. If you look at the results, you will see that in the U.S. the economy grew faster than the number of lawyers and certainly corporations and their profitability grew faster than the number of lawyers. There is also globalization and other new sources of demand. I like to poke fun at some of my colleagues in law offices in Japan, because I think there is a perception that, in Japan, lawyers are a very scarce commodity and in the United States they are a dime a dozen. But the reality is that over the last thirty years, at least highly-qualified, corporate U.S. lawyers have been very scarce, and it has been a very favorable market for them. That has been true in Japan until now, of course. And Japan has accomplished, to its credit, a thoroughgoing, deep reform of legal education and licensing. I think it was necessary for a number of reasons that have been mentioned, and it cannot be reversed. However, because it was so deep, and because, at least as articulated originally by those who designed it, it was philosophically different than what had come before, we are now witnessing significant birth pains and growing pains. I personally think that in the midst of this chaos, the law schools have done a reasonably good job. It is not the law schools that are failing or falling down, it is those who designed the system and those who administer the system. They continue to fail. If there is fault, I believe that is where the fault lies.

**\*280 C. Effects of the 2011 Tohoku Earthquake and its Aftermath**

Professor Aronson: In the immediate aftermath of the Tohoku earthquake, a number of foreign law firms evacuated their personnel out of Tokyo, including Jones Day. What was the reasoning behind this action? Was there a greater threat perception in law firms' head offices outside of Japan than in Tokyo?

Mr. Roebuck: As you know, that was a difficult moment in the lives of many people and, of course, it was a difficult situation for our law firm. We are the Tokyo office of a global law firm. Although our attorney population is largely Japanese and our staff is nearly entirely Japanese, we have a fairly large component of foreign attorneys who are not Japanese nationals. Therefore, all of those interest groups have to be taken into account as the law firm is managed. What happened is that a decision was made jointly by firm management in the United States and local management of the Tokyo office that the office should be closed temporarily in light of a perception of risk, both actual and potential, to the health and safety of Tokyo office personnel. It was done in a way that protected everyone, and everyone was given the option to relocate to the Kansai area. Many people in the office did relocate, but also many people did not. Although the office was closed temporarily, about half of the people actually stayed in Tokyo and worked in the office during this time, and throughout we kept the office going on a kind of virtual basis. That period of temporary closure lasted about seven or eight days.

One may question that decision in retrospect, and there has been some criticism in Japan about the behavior of some foreigners and foreign firms. I think that the decision our firm made was based on information that was obtainable at the time through the media and also on announcements by some governments. Some of you may know, for example, that the United States embassy offered to evacuate all embassy families, although not the employees themselves. A very large percentage of those people did evacuate, and my information is that a large number of them

remain outside of Japan to this day. I was told a couple of weeks ago, for example, that the enrollment in the American elementary school was down about thirty percent. Some of you may know that the U.S. embassy has a website providing information about the events, and recommendations and suggestions about what to do. In the early days, that website contained a statement that U.S. nationals should consider relocating out of Japan. Some \*281 of you may be aware that some European countries advised all of their nationals, wherever they were located, to leave Japan.

One may question the wisdom or the properness of some of those statements, but the fact is they happened. Our management in the United States, which needs to consider among other things, the health and safety of personnel, took those statements into account in making its decision. Although there will inevitably be a range of reactions and individual circumstances and opinions about such matters, that was the decision that this law firm made. But it was done in a balanced and structured way to provide equality of treatment and support to all employees--not just foreign employees or the attorneys, but to all employees-- and in a way that protected client interests. And I think it was generally appreciated by the attorneys and the staff, but I will acknowledge that we did receive some questions from our clients.

Professor Aronson: As some of you may know, the running joke in Tokyo was that the Japanese word for foreigner is "gaijin" and that the foreigners who fled from danger were "flyjin."

How were Japanese law firms affected? Do you think that this will have a short-term impact that will not affect your long-term operations?

Mr. Hara: We must distinguish the nuclear radiation problem from the earthquake and tsunami problem. At this moment, attention is focused on the radiation problem rather than on the earthquake and tsunami. After the earthquake, many deals that were near closing were suspended or postponed, but not cancelled. Foreign investors wanted to watch the situation of the Japanese market. Japanese lawyers were operating in Tokyo. They were not worried about radiation as it is sufficiently far away. We have suffered from a shortage in the electricity supply. In terms of operations, Japanese law firms are fine, and none of them moved to Osaka. However, in terms of practice, foreign investment may have suffered, and that may continue until some solution or some direction becomes clear for resolving the nuclear problem. I do not think it will be very long, perhaps one year or so.

In Japan, consumer prices have not changed during the last twenty years--except for legal fees--and that means that domestic demand never changed. But in order to reconstruct the affected areas we will need to create five or six new cities, and that reconstruction effort will greatly stimulate the Japanese domestic market. So in the long run, that may have a positive effect on the Japanese economy. It may also result in a positive mindset, not only in the domestic market, but also in terms of more \*282 aggressive investment in Asian countries. This disaster has been a tragedy, however it will also lead to a positive change in the Japanese people's mindset over the mid- or long-term. For that reason, it may also have a beneficial effect on legal practice.

Professor Aronson: One issue is the regulatory side. Just yesterday there was a front-page article in the New York Times about how the U.S. Nuclear Regulatory Commission is not really capable of effectively regulating the nuclear industry. Is there a similar discussion in Japan concerning regulation of the nuclear industry?

Mr. Sugiyama: Yes, we have similar discussions, and some argue that the close relationship among electric and oil companies and the ministries is a problem. But in addition to this, it is also

discussed that the anti-nuclear power movement and local communities' objections to nuclear plants have had the adverse effect of concentrating nuclear reactors and making plants more crowded. Another adverse effect is that the companies and ministries avoided serious discussion of, and concrete plans for dealing with, the worst case scenario, and instead merely propagated a myth of safety. All told, it is a failure of Japanese society.

Professor Aronson: The operator of the nuclear plants, the Tokyo Electric Power Company, or Tepco, has also come under severe criticism. If a client asked you about the lessons to be learned from Tepco's response to the crisis, what would you say?

Mr. Kosugi: Again, I think that if this were in the United States, the situation would be different. But we already have received a number of questions about the legal analysis of this event, particularly in light of a Japanese special law on nuclear plant damages which calls for strict liability and unlimited liability. There are a number of issues which have not been tried before in court; there is only one similar court case about ten years ago, which was on a small scale. The amount of damages in this case would be huge. The government is required to provide necessary support to Tepco under that law. But the details of such support must be determined by a resolution of the National Diet. In that sense, I do not know if it is more of a political problem, although I believe that there are quite a few legal issues. We are forming a team to address any questions by clients relating to this incident. The big difference compared to [British Petroleum's 2010 Deepwater Horizon] oil spill situation is that in Japan, a natural disaster \*283 caused the damage. Another issue to be considered is how to prepare for the safety and security of nuclear plants, but there is no reliable legal guidance for that problem. As lawyers we would be interested in being involved in any litigation that is brought to court. But many of our clients are probably on the defendants' side, so unless a very aggressive plaintiffs' lawyer appears, there is unlikely to be litigation. There is some demand for legal services related to this incident, but we are waiting for the development of events.

Professor Aronson: Let us ask an aggressive plaintiffs' lawyer what he thinks should be done.

Mr. Ueyanagi: Some of my clients are non-profit organizations and they are asking me about the possibility of filing shareholder litigation against Tepco and also an injunction against the Fukushima City government to protect children while they are playing on the playground. Tepco has had shareholder litigation, and some groups have been warning about the danger of tsunamis. I think Japanese corporations should have heard--and should make greater efforts to hear--such minority voices. On the other hand, such minority groups should rethink their own organization and strategies, since so far they have unfortunately been largely unsuccessful in getting attention from the general public or in effecting any change in politics or government policy.

### III. Conclusion

Japanese society and, in particular, its legal profession, are coping with the aftermath of both the 2008 financial crisis and the March 2011 Tohoku earthquake and related events. Among the panelists, both are seen as "one-time" events that have temporarily reduced the demand for legal services in Japan, but will not have a significant long-term impact.

Despite a lesser economic impact on the legal profession in Japan than in the United States or the United Kingdom, the financial crisis of 2008 nevertheless acted as a catalyst to raise fundamental issues for both Japanese law firms and the new Japanese law schools--issues similar to those being debated in the United States. The period from 2000 to 2007 of high growth in the de-

mand for legal services, law firm expansion, and confidence in undertaking ambitious, broad-ranging reforms of the legal profession has given way to a new period characterized by economic headwinds, rethinking, and adjustment.

**\*284** The panelists' discussion of the reaction of the Japanese legal profession to recent events contained a number of highly significant points for all three of the principal topics: the fall in demand for legal services following the 2008 financial crisis and law firms' response, legal education and the supply of lawyers, and the effect of the 2011 Tohoku earthquake and its aftermath.

With respect to big law firms' reaction to a period of lower growth, it is perhaps unsurprising that Japanese firms would “manage” associates more carefully rather than engage in direct firing. Large firms will continue to hire new classes of lawyers who will be actively monitored and managed.

Whereas the panel discussion four years ago highlighted changes in law firm practices under which it would no longer be possible for the majority of associates to make partner, this panel discussion suggested that new associates would be weeded out and might not be able to remain as associates. It sparked disagreement among the panelists over the question of whether big law firm practices in managing associates following the 2008 financial crisis were, in fact, significantly different from firings and layoffs experienced in the United States and the United Kingdom. This may also represent the permanent adoption of more aggressive management practices normally associated with U.S. and U.K. firms, as Japanese firms respond to clients' concerns about costs and their own concerns about lawyer quality under the new law school system.

Perhaps the most striking and potentially significant topic was the new system of legal education and the increasing number of lawyers. The panelists explicitly embraced a new and different vision of the role of lawyers in Japan. Rather than the traditional small elite with a narrow societal role, perhaps analogous to barristers in England, the new model for the Japanese bar would be much closer to practices associated with the United States: a bar exam system that certifies minimal competence for attorneys and permits the admission of large numbers of them, followed by competition among lawyers to fill a wide range of law-related roles in society.

The adoption of this new model of the legal profession is hindered by a number of compromises included in the current Japanese system, especially the continuation of the role of powerful competitors for law-related jobs such as licensed tax and intellectual property law specialists. However, the panelists were unanimous in their view that the basic course has been set, and that despite “growing pains,” there could be no turning back to the prior system.

**\*285** Panelists' views on the recent events surrounding the Tohoku earthquake were necessarily more speculative. They did not see a long-term impact on the legal profession. Rather, the most significant issues appear to involve the intersection between law and broader policy issues. Specifically, under what conditions can Japan, a country with virtually no natural resources, continue its emphasis on nuclear power in the face of safety, disclosure, and liability issues?

As noted in the panel discussion four years ago, the Japanese legal profession has emerged from its insularity and limited social role. This panel discussion confirms that reform efforts in the direction of a larger number of lawyers and a greater social role for attorneys are likely to continue, despite recent challenging circumstances that might prompt some to long for the “good old days” when lawyers in Japan were a small elite and passage of the bar exam assured a comfortable life. If anything, recent events have prompted even stronger “American-style” practices at large

law firms and have highlighted some of the costs to lawyers and law firms of adopting a broader model for the legal profession. However, by all indications the system is in place, the course has been set, and the voyage across uncharted waters will continue.

**\*286** Appendix A

Largest Law Firms in Japan [FNA1]

1985	1998	2001	2005	2009	
	Nishimura & Partners		Nagashima Ohno & Tsunematsu		Mori Hamada Matsumoto
26		63		149	198
	Nagashima & Ohno		Nishimura & Partners		Nagashima Ohno & Tsunematsu
25		62		112	197
	Mori Sogo		Mori Sogo		Nishimura & Partners
23		62		94	183
	Anderson Mori		Anderson Mori		Anderson Mori & Tomotsune
20		50		91	179
	Asahi		Asahi		Asahi Koma
20		48		79	140
	Mitsui Yasuda		Mitsui Yasuda		TMI
20		36		65	87
					Tokyo Aoyama Aoki Koma
					113

	TMI	Tokyo Aoyama Aoki	Tokyo Aoyama Aoki	City Yuwa	
17		33	58	68	102
	Matsuo Sogo	TMI	Ohebas hi	Ohebas hi	
17		29	54	64	90
	Iwata Godo	Hamada Matsumoto	City Yuwa		
16		28	41	64	
	Ohebas hi	Ohebas hi			
16		27	40		

\*287 Note 1: Numbers indicate number of Japanese lawyers (bengoshi) in each firm.

Note 2: No names of firms are available for 1985.

**\*288 Appendix B**

Foreign Law Firms and Lawyers in Japan: Affiliation by Joint Enterprise [FNa2]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

	2001	2002	2003	2005	2006	2007	2008	2009
Foreign Lawyers	83	95	95	99	109	116	116	124
							81 oper- ate joint en- terprises	
							43 em- ployed by others	
Japanes e lawyers	338	403	446	312	536	688	755	839

							175 op- erate joint enterprises	
							664 em- ployed by others	
Joint Enterprises	23	25	27	19	23	28	30	30

**\*289** Note 1: No data are available for 2004.

Note 2: “Joint Enterprises” through 2003 include only “specified joint enterprises” (those operating under statutory practice restrictions that were lifted in 2003); starting in 2005, numbers include unrestricted “foreign law joint enterprises.”

Note 3: “Japanese Lawyers” are those operating joint enterprises and those employed by Japanese lawyers or foreign lawyers operating joint enterprises.

Note 4: “Foreign Lawyers” are registered foreign lawyers who operate joint enterprises or who are employed by Japanese lawyers or foreign lawyers operating joint enterprises.

**\*290** Appendix C

Bar Passage Rates Under the Law School System [FNa3]

	2006	2007	2007	2009 Students with Law Background
Number Taking Bar Exam	2091	2641	3002	3274
Number Passing Bar Exam	1009	1215	1331	1266
Passage Rate	48.25%	46.01%	44.34%	38.67%
Students Without Law Background				
Number Taking Bar Exam	0	1966	3259	4118

Number Passed	0	636	734	777
Passage Rate	0.00%	32.35%	22.52%	18.87%
Overall Bar Passage Rate	48.30%	40.20%	33.00%	27.60%

**\*291** Note 1: “Students with Law Background” refers to law school students/graduates with a background in law from their undergraduate studies (whether or not they were law majors) who qualify for a shortened two-year course in law school (kishusha).

Note 2: “Students Without Law Background” refers to law school students/graduates without a qualifying law background who take the regular three-year law school course (mishusha).

### **\*292** Appendix D

#### Outline of Legal Reform in Japan: The “Three Pillars” of Legal Reform

##### Pillar One:

##### The Justice System - “Responding to Public Expectations”

###### Reform of the Civil Justice System

- Comprehensive Response to Intellectual Property Cases
- Establishment of “patent court” divisions in Tokyo and Osaka
- Reforms regarding expert witnesses
- Improving Access to Justice
- Reducing costs
- Making courts more accessible
- \* Geographical distribution of courts
- \* Introduction of information technology during various phases of a court's work
- Strengthening the Civil Legal Aid system
- Considering implementation of a plaintiff class action system

Reform of the Criminal Justice System

- Establishing a Public Defense System for Defendants

Accommodating Internationalization

Pillar Two:

The Legal Profession - "Supporting the Justice System"

Expand the Population of Lawyers

- Increase Supply of Lawyers
- Secure Lawyers from Diverse Backgrounds

Reform the Legal Education System

- Introduction of Law Schools
- New Bar Exam Reflecting New Legal Education System

Reforming the Role of Lawyers

- Social Responsibility of Lawyers: "Doctors for the People's Social Lives"
- Expanding Access to Lawyers
- Make information about fees, past performance, expertise, etc. readily available
- Expanding the Expertise of Lawyers
- Continuing education
- Promote cooperation with foreign firms

**\*293** Pillar Three:

The People - "Popular Participation in the Legal System"

#### Increased Participation

- Introduction of the “Lay Judge” (Jury) System
- Securing Conciliators from Diverse Backgrounds
- Consideration of Public Opinion in Judicial Appointments and Nominations

#### Making the Legal System More Readily Understandable to the General Public

#### Improving Education of the General Public Regarding the Justice System

### \*294 Appendix E

#### Chronology of Legal Reform in Japan

1999	Training period at the Legal Research and Training Institute (“LRTI”) shortened from two years to eighteen months.
1999	Number of successful bar examinees reaches 1,000 for the first time.
Jul.1999	Justice System Reform Council established to examine the justice system.
2000	Population of registered Japanese lawyers is 17,126
2001	990 (2.5%) examinees pass the bar exam.
Jun. 2001	<p>The Justice System Reform Council releases its recommendations for reforms to the justice system.</p> <ul style="list-style-type: none"><li>• Graduates of new law schools are intended to have a 70-80% bar passage rate.</li><li>• Goal of at least 1,500 successful bar examinees annually by 2004 under the old bar examination.</li><li>• Goal of at least 3,000 successful bar examinees annually by 2010 under the new bar examination (with the goal of having phased out the old bar examination).</li></ul>

- Goal of 50,000 practicing lawyers by 2018.

Apr. 2004	Sixty-eight American-style law schools begin operation. Of 72,800 applicants, 2,792 are admitted.
May 2004	The Diet passes the law instating the Saiban-in (lay judge) system.
2005	Amendments to the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers come in to effect, permitting partnerships between Japanese and foreign lawyers and allowing foreign firms to hire Japanese lawyers.
2006	The new bar exam is offered for the first time. In total, 1,009 (48.3%) examinees pass the new bar exam. The old bar exam continues to be offered.
2006	Training period at the LRTI further shortened to one year.
Apr. 2006	There are now seventy-four law schools in operation.
May 2009	The Saiban-in system is implemented. The first trial is held in August 2009.
2010	2,074 (25.4%) examinees pass the new bar exam.
Dec. 2010	Population of registered Japanese lawyers is 28,868.
2011	Population of Japanese lawyers exceeded 30,000.
2011	The old bar exam is scheduled to be phased out after this year's examination.

[FNd1]. Senior Fulbright Researcher and Visiting Research Scholar, Waseda University; Professor of Law, Creighton University School of Law; Affiliate Professor of Law, University of Washington School of Law.

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the research assistance of Michael Swick. The panel proceedings have been edited for length and clarity.

[FN1]. The extent and significance of these changes were explored in a prior panel discussion of Japanese lawyers held in 2007. See Bruce E. Aronson, *The Brave New World of Lawyers in Japan: Proceedings of a Panel Discussion on the Growth of Corporate Law Firms and the Role of Lawyers in Japan*, 21 *Colum. J. Asian L.* 45 (2007). That article concluded that the positive aspects of an increasingly important role and new opportunities for Japanese lawyers were achieved at the cost of new competitive pressures and tradeoffs that are familiar to American lawyers, and that the prior insular and secure “beautiful world” of Japanese lawyers cited by one panelist might be giving way to a competitive “brave new world” for lawyers in Japan. *Id.* at 82.

[FN2]. The Japanese Cabinet created a special legal reform council in 1999, which issued its final report in 2001. For an English translation of the final report, see Justice System Reform Council, *Recommendations* (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>. Among the report's many recommendations were a series of targets for increasing both bar passage rates and increasing the overall number of lawyers. For an overview of the legal reform process, see, for example, Kahei Rokumoto, *Overhauling the Judicial System: Japan's Response to the Globalizing World*, 20 *J. Japan. L.* 7 (2005).

[FN3]. See generally Setsuo Miyazawa, *Education and Training of Lawyers in Japan - A Critical Analysis*, 43 *S. Tex. L. Rev.* 491, 493-95 (2002); James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 *Pac. Rim L. & Pol'y J.* 303, 313 (2004). See also Koichiro Fujikura, *Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission*, 75 *Tul. L. Rev.* 941, 945 (2001) (emphasizing the shortcomings of Japan's new law schools); Mark D. West, *Making Lawyers (and Gangsters) in Japan*, 60 *Vand. L. Rev.* 439 (2007).

[FN4]. This is the goal quoted in the reform council's report. See Justice System Reform Council, *supra* note 2, ch. III, pt. 1-1.

[FN5]. *Saiban'in no sanku suru keiji Saiban ni kansuru horitsu* [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004, translated in Kent Anderson & Emma Saint, *Japan's Quasi Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 *Asian-Pac. L. & Pol'y J.* 9, 9 (2005). Under the lay-judge system, mixed tribunals of professional judges and members of the public are called to render verdicts and determine sentences in serious criminal cases. There are varying conceptions of the role of the lay-judge system in Japanese society; some view it as an important step towards reforming a criminal justice system that is substantially unfair to criminal defendants, others as a means of educating the public about the legal system and of promoting civic engagement. For general discussion of the lay-judge system, see, for example, Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 *Fordham Int'l L.J.* 487 (2010). For a comparison of the lay-judge system and the American jury system, see Daniel Senger, *The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation*, 2011 *U. Ill. L. Rev.* 741 (2011).

[FN6]. See *Gaikoku bengoshi ni yoru horitsu jimmu no toriatsukai ni kan suru tokubetsu sochi ho* [Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers], Law

No. 66 of 1986. Subsequent major amendments became effective on January 1, 1995 and April 1, 2005. The number of registered foreign law attorneys has grown dramatically from 87 in April of 1998 to 344 in April of 2010. Japan Federation Fed'n of Bar Ass'ns, White Paper on Attorneys 11 (2010), available at <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2010> [hereinafter 2010 White Paper]. As of April 1, 2010, 34 foreign law joint enterprises, employing a total of 627 Japanese attorneys and 55 foreign law attorneys, have submitted notifications to the Japan Federation of Bar Associations(as required by the 2005 amendment). *Id.* at 13. For additional data, see *infra* Appendix B.

[FN7]. See William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J., July 2011, at 40 (arguing that a “massive structural shift” of the balance of power in the provision of legal services from traditional law firms to clients and new “tech-savvy” legal service providers began prior to, and was significantly exacerbated by, the 2008 financial crisis, and that the business model of big law firms has permanently changed); A Less Gilded Future, *Economist*, May 7, 2011, at 74.

[FN8]. See, e.g., Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 *J. Legal Educ.* 598 (2010).

[FN9]. See, e.g., David Segal, *Is Law School a Losing Game?*, *N.Y. Times*, Jan. 8, 2011.

[FN10]. Outside the U.S., the 2008 financial crisis is commonly referred to by this name. The Lehman Shock, *Newsweek*, Sept. 13, 2009, available at <http://www.thedailybeast.com/newsweek/2009/09/14/the-lehman-shock.html>.

[FN11]. There was, however, a significant reduction in hiring over time. For example, Nishimura & Asahi hired 46 new associates in January of 2010 and 32 new associates in January of 2011. Topics: News Details: 46 new associates join Nishimura & Asahi on January 6, Nishimura & Asahi, [http://www.jurists.co.jp/en/topics/others\\_8248.html](http://www.jurists.co.jp/en/topics/others_8248.html) (last visited Feb. 15, 2012); Topics: News Details: 32 new associates join Nishimura & Asahi on January 6, Nishimura & Asahi, [http://www.jurists.co.jp/en/topics/others\\_9828.html](http://www.jurists.co.jp/en/topics/others_9828.html) (last visited Feb. 15, 2012). This number continued to decline to 17 in 2012. Topics: News Details: 17 new associates join Nishimura & Asahi on January 6, Nishimura & Asahi, [http://www.jurists.co.jp/en/topics/others\\_11564.html](http://www.jurists.co.jp/en/topics/others_11564.html) (last visited Feb. 15, 2012). This is counter to an earlier trend of larger incoming classes established in the years prior to the Financial Crisis of 2008 in which a typical incoming class of new attorneys at a major corporate law firm was somewhere in the twenties or thirties. See, e.g., Bruce E. Aronson, *Changes in the Role of Lawyers and Corporate Governance in Japan - How Do We Measure Whether Legal Reform Leads to Real Change?*, 8 *Wash. U. Global Stud. L. Rev.* 223, 230 (2009); *Zadankai: Daikibo horitsu jimusho no gendai to shorai* [Roundtable: The Present and Future of Large-Scale Law Firms] 57 *Jiyu to seigi* 12, 39 (May 2006) (remarks of Akira Kosugi).

[FN12]. See Henderson & Zahorsky, *supra* note 7.

[FN13]. Although it was beyond the scope of the panel discussion, it should be noted that Korea has undertaken a similar fundamental reform of its legal educational system following legislation enacted in 2007. See, e.g., Yeong-Cheol K. Jeong, *Korean Legal Education for the Age of Professionalism: Suggestions for More Concerted Curricula* (working paper, July 2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=young\\_cheol\\_jeong&sei-redir=1#search=Korealegaleducationreform](http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=young_cheol_jeong&sei-redir=1#search=Korealegaleducationreform). For background on the parallel reform processes in Japan and Korea, see Tom Ginsburg, *Transforming Legal Education in Japan and*

Korea, 22 Penn. St. Int'l L. Rev. 433 (2004).

[FN14]. See Justice System Reform Council, *supra* note 2.

[FN15]. See *supra* note 3.

[FN16]. The actual bar passage rate for the first law school graduating class under the new system in 2006 was 48.3% and, as noted in the text, this percentage has fallen to 27.6% in 2009. See *infra* Appendix C. The percentage is expected to stabilize in the area of 24%. See Setsuo Miyazawa & Tatsuya Yonetani, Nyugaku teiin no ichiritsu 3 wari sakugen to 3,000 nin gokaku no doji katsu sassokuna jisshi wo--shimureshon ni yoru kinkyu teigen [For the Simultaneous and Rapid Implementation of an Across-the Board 30% Reduction in the Number of Entering Students and 3,000 Bar Passers--an Emergency Recommendation According to Our Simulation], 628 Hogaku semina 60 (Apr. 2007). The declining pass rate is a result primarily of law school students being divided into two groups with a two-year law school course for undergraduates with law majors and a three-year course for non-law undergraduates. *Id.* As the non-law undergraduate majors completed the three-year law school course and began taking the bar, there was an increase in the total number of bar exam takers.

[FN17]. Prior to the implementation of graduate law schools, fierce competition resulting from extremely low bar passage rates created a phenomenon known as daigakubanare, "the tendency to ignore university classes and focus only on preparatory schools." Justice System Reform Council, *supra* note 2, at ch. III, pt. 2-1. Reformers believed that because conventional legal education was "not ... sufficient in terms of...specialized legal education," and because curriculum at preparatory schools was solely focused on the bar, the quality of attorneys was seriously impacted." *Id.* While graduate law schools were seen as a means of facilitating more broad-based and practical training for attorneys, falling bar passage rates have encouraged, if not forced, law schools to assume the role once filled by preparatory schools.

[FN18]. In March of 2010, for the first time in the history of the Japan Federation of Bar Associations ("JFBA"), an outside insurgent, Kenji Utsunomiya, was elected president over the incumbent Vice President, Takeji Yamamoto. The key issue that attracted support for the challenger was reportedly a pledge to work for a more drastic reduction in the annual number of new lawyers (to 1,500) than promised by the incumbent vice president. See Setsuko Kamiya, Reformist Bar Head Works to Raise Way Lawyers Serve, Japan Times, July 24, 2010. For a recent critical look at the postwar history of the JFBA, see generally Masahiro Kobayashi, Konna Nichibenren ni dare ga shita? [Who Made It This Kind of JFBA?] (2010).

[FN19]. The JFBA maintains that questions about the efficacy of the graduate law school system and increases in the number of unemployed lawyers indicate that the growth of the population of lawyers was too drastic and sudden. To address these "institutional distortions" it urges that the "number of successful bar examination candidates [be reduced] to a significant extent from the current level." Japan Fed'n of Bar Ass'ns, Housou jinkou seisaku ni kansuru kinkyuteigen [Urgent Recommendations on Policies for the Number of Legal Professionals] (Mar. 27, 2011), available at <http://www.nichibenren.or.jp/activity/document/opinion/year/2011/110327.html>, translated at [http://www.nichibenren.or.jp/en/document/opinionpapers/20110327\\_2.html](http://www.nichibenren.or.jp/en/document/opinionpapers/20110327_2.html) (last visited Jan. 27, 2012).

[FN20]. The JFBA made a number of recommendations to address failings of the legal education system, including re-examining the preliminary exam so that it does not undermine the philosoph-

ical basis for the law school system; temporarily increasing the number of times a student can take the bar exam from three to five times; and reducing the number of law school students by abolishing or merging schools. Japan Fed'n of Bar Ass'ns, *Hosoyosei teido no kaigen hosaku ni kansuru kinkyuteigen [Urgent Recommendations on Improvement of the Professional Legal Training and Education System]* (Mar. 27, 2011), available at [http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327\\_3.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_3.pdf) (summary available in English at [http://www.nichibenren.or.jp/en/document/opinionpapers/20110327\\_1.html](http://www.nichibenren.or.jp/en/document/opinionpapers/20110327_1.html) (last visited Jan. 27, 2012)).

The impact on bar passage rates of allowing students to take the bar exam five times is not discussed, but it stands to reason that the increased pool of applicants would lead to a further decline in passage rates. If this measure were to be implemented alongside the recommendation to lower the numerical limit on candidates passing the bar, see *supra* note 19, the resulting low bar passage rate could potentially undermine the graduate law school system.

[FN21]. How to best achieve these goals remains contentious. The most recent controversy centers on retaining a system for a limited number of law undergraduates to “bypass” graduate law schools and take the bar exam upon completion of their undergraduate legal education. A new form of bypass, the *yobi* examination, was offered for the first time in 2011. The *yobi* examination draws attention to the many shortcomings of the graduate law school system and has provided a vehicle for renewed debate about the direction of legal education reform. See Takayasu Okushima, *Ri'nen ni tachimodori hoso wo fuyase [Return to Ideals, Increase the Number of Lawyers]*, *Asahi Shinbun*, May 31, 2011, at 15; Junji Annen, *Shihoshiken no juken shikaku ni suruna [Don't Make Law School a Requirement for Sitting for the Bar Exam]*, *Asahi Shinbun*, May 31, 2011, at 15.

[FN22]. By one measure, the total number of in-house lawyers increased from 64 in 2001 to 242 in 2007. Aronson, *Changes*, *supra* note 11, at 231. This number continued to grow to 412 in 2009. *Nihon Soshikinai Bengoshi Kyokai [Japan In-House Lawyers Association]*, *Kigyonai bengoshi no ninzu to shozoku kigyo ni kan suru chosa 2009 nen shimohanki [Second Half 2009 Report on the Number and Corporate Affiliation of In-House Lawyers]* (2009). For the central government, the number of in-house government lawyers increased from 40 in 2004 to 69 in 2006. Aronson, *supra* note 11, at 231.

[FN23]. The number of lawyers in Japan, as of March of 2010 was 28,789. See 2010 White Paper, *supra* note 6, at 1. The number of licensed legal specialists (that is, not including undergraduate law majors) is far larger than the number of licensed lawyers. *Id.* at 22 (showing that the total number of licensed “other legal professionals” was 241,171 in 2010, of which 28,789 were attorneys). For a comparative discussion of the various categories of legal professionals in Japan, see, for example, Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 *BYU L. Rev.* 627. For a recent analysis of how legal reforms in Japan have affected the various groups of legal service providers, see Kyoko Ishida, *Ethics and Regulations of Legal Service Providers in Japan: Deregulation or Re-Regulation? Remaining Problems After the Justice System Reform 25-46* (2011).

[FN24]. The broad plan adopted in 2001 envisioned greater consumer access to legal services due to increases in both supply and demand, with the first pillar of reform containing planks for improving legal aid for civil cases and public defenders for criminal cases. See sources cited *supra* note 2; *infra* Appendix D. However, a panelist noted that the bulk of reform efforts have focused on increasing the supply of legal services. The Japanese Diet did pass a Comprehensive Legal Support Law. See *Sogo horitsu shienho [Comprehensive Legal Support Law]*, Law No. 74 of

2004. This law created a new Japan Legal Support Center, which engages in five areas of activities in order to support access to legal services. See Rokumoto, *supra* note 2, at 33-35; Implementation of Comprehensive Legal Support by the Japan Legal Support Center, Ministry of Justice, <http://www.moj.go.jp/ENGLISH/issues/issues02.html> (last visited Aug. 1, 2011). However, legal aid efforts trail those of other industrialized countries and consumers' use of lawyers in Japan remains quite limited.

[FN25]. Japan was hit by a magnitude 9.0 earthquake on March 11, 2011. USGS Updates Magnitude of Japan's 2011 Tohoku Earthquake to 9.0, U.S. Geological Survey (Mar. 14, 2011) [http://www.usgs.gov/newsroom/article.asp?ID=2727&from=rss\\_home](http://www.usgs.gov/newsroom/article.asp?ID=2727&from=rss_home) (last visited Feb. 6, 2012). The earthquake, and the enormous tidal waves it triggered, devastated northern Japan, killing hundreds and doing untold amounts of property damage. Martin Fackler, *Powerful Quake and Tsunami Devastate Northern Japan*, N.Y. Times, Mar. 12, 2011, at A1. Recovery in the Tohoku region, most severely affected by the quake, has been faster than expected, and some feel that the act of rebuilding has given Japan a new sense of direction. Japan's Post-Quake Economy: Casting About for a Future, *Economist*, May 19, 2011, available at <http://www.economist.com/node/18713566>.

[FN26]. Beginning on March 13, 2011, the United States embassy in Tokyo began issuing a series of travel alerts. On March 16, the embassy announced authorization for the voluntary evacuation of family members of U.S. government personnel and stated that such persons should “consider departing” from Japan. See Embassy of the United States, Tokyo, Japan, Travel Warning - Japan (Mar. 19, 2012), available at <http://japan.usembassy.gov/e/acs/tacs-20110319-travel-warning.html>.

[FN27]. For a survey of a number of large law firms in Tokyo by Japan's leading business daily, see Homu juyo, gaishikei jimusho ni ankeeto--“shinsai de gensho” wa ichijiteki--chuchoki de wa kakudai kitai no koe [Demand for Legal Services, A Survey of Foreign Law Firms--“Reduction Due to Earthquake” Is Temporary--A Voice for Anticipation of Expansion for the Medium-Long Term], *Nihon Keizai Shinbun*, June 20, 2011.

[FN28]. The 2011 Tohoku earthquake and related tidal waves badly damaged a number of nuclear reactors in Fukushima. In order to protect public health, the areas around the reactors were evacuated, and produce from the region was banned. Efforts to bring the reactors under control and to mitigate the effects of the radiation released by the damaged reactors have been ongoing. See generally, Japan's Catastrophes: Nature Strikes Back, *Economist*, Mar.17, 2011, available at [http://www.economist.com/node/18398748?story\\_id=18398748](http://www.economist.com/node/18398748?story_id=18398748); Hiroko Tabuchi, *Japan Sees Signs of 2 More Meltdowns*, N.Y. Times, May 25, 2011, at A10.

[FN29]. As a result of the Fukushima nuclear disaster, there has been a move for stricter oversight of nuclear power. Within a few months, representatives from around thirty countries met in Paris to discuss the future of nuclear power. Matthew Saltmarsh, *Wide Support for Stricter Nuclear Oversight*, N.Y. Times, June 8, 2011, at B3. As a result of what are sure to be enormous damages (some estimates place the number at approximately five to ten trillion yen), Tepco's future is uncertain, though nationalization is seen as one possibility. Taiga Uranaka, *TSE head recommends court-led Tepco restructuring, stock dives*, Reuters (June 6, 2011), <http://www.reuters.com/article/2011/06/07/us-tecpo-idUSTRE75509I20110607>; Hiroko Tabuchi, *After Nuclear Crisis, Japan's Biggest Utility Faces Insolvency Risk*, N.Y. Times, June 10, 2011, at B3. However, the Diet is currently considering a bill that would shift some of the burden of compensation to the Japanese government in an attempt to prevent the company from collapsing. Hideyuki

Ioka & Chiaki Toyoda, Compensation Bill Aims to Help TEPCO Pay Victims, Daily Yomiuri Online (June 16, 2011), <http://www.yomiuri.co.jp/dy/national/T110615005625.htm> (last visited Feb. 6, 2012).

[FNa1]. 39 Jiyu to seigi, No. 13, at 61 (Supp. 1988); Shoichiro Niwayama & Kazuhiko Yamagishi, Nihon ni okeru kyodai horitsu jimusho no kanosei [The Possibility of Large-scale Law Offices in Japan] 49 Jiyu to seigi 34, 35 (Nov. 1998); ILS Publications, Inc., International Lawyers 2002, 246-47 (2002); Nihon Keizai Shinbun, Feb. 25, 2005, at 1; Japan Fed'n of Bar Ass'ns, 2009 White Paper on Attorneys 16 (2009), available at <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2009.pdf>.

[FNa2]. Foreign Lawyer System Study Group, Report attach. 8 (Dec. 24, 2009), available at <http://www.moj.go.jp/content/000051408.pdf>.

[FNa3]. Hosō yosei seido ni kan suru kento waakingu chiimu [Investigation Working Team for the Training System for Legal Professionals], Hosō yosei seido ni kan suru kento waakingu chiimu ni okeru kento kekka (torimatome) [shiryō] [Investigation Result of the Investigation Working Team for the Training System for Legal Professionals (summary) [appendices], Appendix 11 (heisei 22 nen 7 gatsu 6 nichi) [July 6, 2010].

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DISPUTE RESOLUTION IN CONTEMPORARY JAPAN

Takeyoshi Kawashima

THERE is probably no society in which litigation is the normal means of resolving disputes. Rarely will both parties press their claims so far as to require resort to a court; instead, one of the disputants will probably offer a satisfactory settlement or propose the use of some extrajudicial, informal procedure. Although direct evidence of this tendency is difficult to obtain, the phenomena described below offer indirect support for the existence of these attitudes among the Japanese people.

FORMAL MEANS OF DISPUTE RESOLUTION: LAWSUITS

During the last years of World War I, when the housing shortage became critical, active speculation in real estate existed and there arose a large number of disputes regarding land and leases, both residential and farm. Because of the patriarchal nature of the traditional lease in Japan, tenants had not previously dared to dispute the terms or meaning of a lease. Thus when tenants began to press these disagreements, the choice of a method for resolution was influenced almost entirely by the advantages and disadvantages of the alternatives. Although the increase of litigation regarding these contracts threatened the government so seriously that the institution of *chōtei* (mediation) was hastily legalized,<sup>1</sup> in the following years the volume of litigation was relatively small when we take into account the seriousness of the housing shortage and the social unrest caused by it. This suggests that only a small portion of the disputes were brought to the courts (see Table 1 at the end of this essay). Furthermore, if we compare the number of mediation cases regarding leases and farm tenancies after mediation was legalized with the lawsuits of the same type, we note that the latter figure is considerably smaller, showing the extent to which mediation was preferred to litigation (Table 1).

Similarly, a comparison of the number of lawsuits and mediation cases

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<sup>1</sup> By the Leased Land and Leased House Mediation Law, Law No. 41 of 1922.

the area of economic regulation. That is one of the reasons why in Japan there is so little litigation. The judiciary is utilized regarding only a fraction of the overall economic activity. Many Japanese corporate executives seriously believe that the Japanese economy is carried out more efficiently than the United States' because of the absence of litigation and intervention of lawyers in business in Japan.

However, when it comes to justice under the law, there is something to be desired in Japan, I have to admit. Against the supremacy of the executive branch and the legislative branch is the judicial branch; the concept of rule of law in Japanese society could be promoted more to strike a healthy balance. Accordingly, the legal profession in Japan has a very important role to play in today's Japanese society, a society which needs to open itself more to the outer world. The journalism and legal professions have been providing limited sources of criticism within Japanese society. Therefore, it is important to preserve the public image and quality of the legal profession in Japan. Also, in dealing with international issues, trade or otherwise, the capability of the legal profession to discuss these issues in a logical fashion and to negotiate in a cool manner is much in demand.

This means that it is critical, not only for Japanese society and its legal profession, but also for U.S. society and its legal profession, to promote a balanced role of the judiciary and the healthy growth of the Japanese international bar. In doing so it is important for foreign lawyers to pay respect to the traditional concept of *bengoshi* in Japan as officers of the court. Under the new Japanese foreign lawyers' law, foreign lawyers are now made members of the Japanese bar. I would like to remind you that a view has been voiced that the introduction of foreign lawyers could have been a mistake, because such introduction seems to support the proposal to increase the younger generations of lawyers who will most probably end up joining large (by Japanese standards) law firms dealing with international matters and/or serving big corporations. It is all the more important that foreign lawyers in Japan behave as good members of the Japanese bar so that friendly and fruitful understanding and association between Japan, the United States, and other countries may be further promoted and the international legal community can mutually contribute to the expansion of a peaceful and prosperous world community.

regarding leases during the years immediately after the Japanese surrender in 1945, when the complete destruction of housing by air raids in most of the cities had produced a serious housing shortage, suggests that litigation was resorted to in only a relatively small number of cases. Mediation was vastly preferred (see Table 2).

It is also indicative in this connection that during the years of economic depression after the panic of 1927—in Japan the depression started two years earlier than in the United States—the statistics do not show any significant increase in the number of lawsuits, although a large number of debtors became insolvent (Table 3). The judicial statistics of the same period of some states in the United States, on the other hand, show a remarkable increase in the number of lawsuits (Table 4). The fairly small number of lawyers in Japan relative to the population and the degree of industrialization suggests that people do not go to court so frequently as in Western countries and that the demand for lawyers' services is not great.<sup>2</sup>

Finally, it is of significance that, according to a survey conducted by this writer, extremely few claims arising from traffic accidents involving railroads and taxis were brought to court, and almost all of the cases were settled by extrajudicial agreements (Table 5). A railroad was involved in a total of 145 traffic accidents which caused physical injury during the period from April 1960 to September 1960; but not a single case was brought to court, and only two cases were handled by attorneys. Of all the accidents of the same company which caused physical injury during the past seven years, only three cases were brought to court, and all three were settled during the course of the litigation. Of the total of 372 accidents which caused physical injury and involved another railroad in 1960, not a single case was brought to court, and only one case was handled by an attorney.

The volume of litigation arising in 1960 from traffic accidents caused by taxis is as follows.<sup>3</sup>

Company	Personal injury	Property damage	Total	Litigation
A	221	2,041	2,262	1
B	10	195	205	1
C	4	154	158	0
D	0	appr. 42	appr. 42	0

<sup>2</sup> See Takaaki Hattori, "The Legal Profession in Japan: Its Historical Development and Present State," in this volume.

<sup>3</sup> The following figures from a study by M. A. Franklin, R. G. Chanin, and I. Mark (Columbia University Project for Effective Justice) suggest the significance of these Japanese figures. "Each year in New York City some 193,000 accident victims seek to recover damages for injuries ascribed to someone else's fault. For about 174,000 of these claimants the first step is retaining an attorney, while 39,000 proceed without aid of counsel. Theoretically, a claim is but the first step on the road to the courthouse, but in fact very few of the 193,000 claims ever get that far. Approximately 116,000 are closed without suit, leaving 77,000 that are actually sued. Almost all claimants who have been unable to recover without suit, and who wish to continue, retain an attorney." *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 *COLUM. L. REV.* 2, at 10 (1961).

There are several possible explanations of this relative lack of litigation. On the one hand, litigation takes time (see Table 6) 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 traffic accidents is usually extremely small. In a large number of cases, the damages awarded by the courts for a death caused by a traffic accident were said to be less than 300,000 yen (approximately 833 dollars); thus the Automobile Damage Compensation Security Law<sup>4</sup> when originally enacted provided that the compulsory insurance for a death need cover only 300,000 yen.<sup>5</sup> 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 lessee defers to the lessor; 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, he 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

<sup>4</sup> Law No. 97 of 1955.

<sup>5</sup> Automobile Damage Compensation Security Law, art. 13; Automobile Damage Compensation Security Law Enforcement Order, Cabinet Order No. 86 of 1955, art. 2. An amendment to the Enforcement Order by Cabinet Order No. 217 of 1960 subsequently increased the amount to 500,000 yen. For a full discussion, see Ichiro Kam, "The Treatment of Motor-Vehicle Accidents: A Study of the Impact of Technological Change on Legal Relations," in this volume.

of the other. Obviously this characteristic is incompatible with judicial decisions based on fixed universalistic standards.<sup>6</sup>

Second, in traditional social groups relationships between people of equal status have also been to a great extent "particularistic" and at the same time "functionally diffuse." For instance, the relationship between members of the same village community who are equal in social status is supposed to be "intimate"; their social roles are defined in general and very flexible terms so that they can be modified whenever circumstances dictate. In direct proportion with the degree to which they are dependent on or intimate with each other, the role definition of each is contingent upon that of the other. Once again, role definition with fixed universalistic standards does not fit such a relationship.<sup>7</sup>

In short, this definition of social roles can be, and commonly is, characterized by the term "harmony." There is a strong expectation that a dispute should not and will not arise; even when one does occur, it is to be solved by mutual understanding. Thus there is no *raison d'être* for the majority rule that is so widespread in other modern societies; instead the principle of rule by consensus prevails.<sup>8</sup>

It is obvious that a judicial decision does not fit and even endangers relationships. When people are socially organized in small groups and when subordination of individual desires in favor of group agreement is idealized, the group's stability and the security of individual members are threatened by attempts to regulate conduct by universalistic standards. The impact is greater when such an effort is reinforced by an organized political power. Furthermore, the litigious process, in which both parties seek to justify their position by objective standards, and the emergence of a judicial decision based thereon tend to convert situational interests into firmly consolidated

<sup>6</sup>The terms "universalistic," "particularistic," and "functionally diffuse" are used here in the sense of the "pattern variables" scheme of PARSONS, *THE SOCIAL SYSTEM* 62-65 (1951); PARSONS & SHILS, *Categories of the Orientation and Organization of Action*, in *TOWARD A GENERAL THEORY OF ACTION* 82-84 (1952).

<sup>7</sup>One of the clues to understanding the social-cultural background of divorce by agreement, which is so characteristic of Japanese culture, is found in this point. Whenever a conflict or a dispute arises between husband and wife, it is most appropriate to attempt to reach agreement through mutual understanding in the context of the complicated and subtle circumstances of the families of both husband and wife, instead of resorting to court for a decision in accordance with universalistic standards.

<sup>8</sup>This principle is still observed today in village communities with regard to a "right of common" in land. To bring about any alteration of rights respecting "common," the mores require unanimous consent of the villagers, and majority rule is not admitted. This traditional principle is recognized as customary law by art. 2 of the Law for the Application of Laws, Law No. 10 of 1898. On this unanimity rule for the "right of common," see KAOBU, *Meiji Shonen no Iriaiken* (The Right of Common in the Early Years of Meiji), in NAKATA, HOSHI SHI RONBU (Collected Essays on the History of the Legal System) 686-87, 719 (1938). Legal recognition of the unanimity rule makes it extremely difficult for villagers to introduce innovations in the use of common, so that vast areas of common lands are left uncultivated despite a serious shortage of agricultural land.

and independent ones. Because of the resulting disorganization of traditional social groups, resort to litigation has been condemned as morally wrong, subversive, and rebellious.<sup>9</sup>

On the other hand, there were, even in the traditional culture, disputes in which no such social relationship was involved. First, disputes arising outside of harmonious social groups, namely *between* such social groups,<sup>10</sup> have a completely different background. Such disputes arise, so to speak, in a social vacuum. Since amicable behavior from the other party is not to be expected in such a context, both parties to the dispute tend to become emotionally involved to a great extent, and the traditional culture contains no fixed rules of behavior to indicate the acceptable course of action. Yet, even in the absence of a specific tradition of harmony and in spite of strong emotional antagonism, disputes of this type are often settled by reconciliation. If one disputant apologizes, it is postulated by traditional culture that the other party must be lenient enough to forgive him, and, as a matter of fact, emotional involvement is usually quite easily released by the apology of an enemy. Occasionally disputes, usually antagonisms of long standing, are settled because the disadvantage of continuing disagreement outweighs the price of concession. These agreements are usually achieved through the mediation of third parties and are similar in nature to peace treaties. Until and unless such a peaceful settlement is made, sheer antagonism and the rule of power, very often of violence, prevail. Disputes of this kind are also settled when one party can impose a fait accompli by force. In other words, superiority in power establishes a new social order. The only way in which the weaker party can escape from this rule of power is through the lawsuit. For this reason, a large number of suits relating to the "right of common" (*iriaiiken*) in land recorded in the law reports of the prewar period were disputes between village communities.<sup>11</sup>

A second class of disputes, those between a usurer and his debtor, lacks from the very beginning a harmonious relationship comparable to that normally found between lessor and lessee or master and servant. Usurers 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 (1867-1912), long before industrialization was under way, official statistics have shown a surprisingly large number of cases involving claims of this sort (see Table 7).

<sup>9</sup> The writer personally knows a farmer in a village near Tokyo whose whole family has been socially ostracized by all the villagers because his deceased father had sued another farmer in a dispute about the boundaries of his farm.

<sup>10</sup> E.g., disputes concerning irrigation rights among various villages, disputes between a village community alleging the existence of customary rights of common or of collective use of land, on the one hand, and an electric-power company denying such rights, on the other.

<sup>11</sup> Horumi, *Iriaiiken ni Kan-naru Senjo Henrei no Kenid* (An Examination of Postwar Court Decisions Relating to the Right of Common), 31 Hôritsu Jûdô (Law Journal) 1346 (1959).

In short, a wide discrepancy has existed between state law and the judicial system, on the one hand, and operative social behavior, on the other. Bearing this in mind, we can understand the popularity and function of mediation procedure as an extrajudicial 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 supposed 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.<sup>13</sup> The contracting parties occasionally insert clauses providing that in case of dispute the parties "may" (instead of "must") negotiate with each other.

Typical examples of the precarious nature of traditional contracts are the following clauses in construction contracts between the government and general contractors before World War II: "If due to act of God [literally "calamity from heaven"] or other appropriate cause it becomes difficult to complete the work within the time in article 2, B [the contractor] may within this time set out a detailed written account of such cause and request an extension from A [the government]. In this case A, if it recognizes the request to be proper, may approve it and exempt the damages for delay in article 13."<sup>14</sup> Further, if the government has canceled the contract, "it may pay the contractor damages in an amount which the government considers adequate."<sup>15</sup> After World War II, these clauses making the legal duties and rights of the contractor dependent on the will of the government were changed into more "democratic" ones (as they are actually called) by which the legal duties and rights of the parties are subject to *ad hoc* agreements between them:

- (1) A [the person placing the order], in case it is necessary to do so, may alter the content of the work, or either suspend or discontinue the work. In this case, if it is necessary to alter the fees for the independent work or the time of completion, A and B [the contractor] are to confer and settle these matters in writing.
- (2) In the case of the prior paragraph, if B has sustained damage, A shall

<sup>13</sup> Von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1494 (1958), points out "there are still very large areas of Japanese life in which it is difficult to predict whether a dispute will be settled by reference to legal standards (applied either in court or in an out-of-court settlement) or in terms of quite different conceptions. It is often impossible to know in advance whether a party will seek to enforce his legal rights."

<sup>14</sup> Naimu-shō Kōvaku-shō (Ministry of Home Affairs Contract Form), art. II in KAWA-SHIMA & WATANABE, *DOKEN UKIJOI KEIYAKU RON* (A Treatise on Civil Engineering Construction Contracts) 187 (1950). Emphasis added.

<sup>15</sup> *Ibid.*, art. 21. Emphasis added.

compensate him for this damage. The amount of compensation is to be determined by *conferral* between A and B.<sup>15</sup>

(1) If due to act of God or other force majeure damage has arisen concerning the portion of the work already finished or construction materials taken into the work site, the inspection of which has been completed, B, upon the occurrence of this fact, shall, without delay, notify A of the present situation.

(2) In regard to that damage of the prior paragraph which can be recognized as grave, if it can be perceived that B has exercised the care of a good manager, A is to bear the amount of damage. In this case, if casualty insurance or some other form of coverage is present, such amounts are to be deducted from the amount of the damage.

(3) The amount of the damage of the prior paragraph is to be determined by *conferral* between A and B.<sup>16</sup>

These clauses do not assure a solution and lawyers may ask with good reason what would result if the disputing parties could not reach an agreement after negotiation. In practice some agreement is normally reached, though occasionally it is not. 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 forbids one to terminate a harmonious social tie by selfishly 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.<sup>17</sup> A similar reliance on custom may be seen in the American practice of buying and selling corporate stock through verbal orders.

This emphasis on compromise has produced its own abuses. A special profession, the *jidan-ya* or makers of compromises, has arisen, particularly in the large cities. Hired by people having difficulty collecting debts, these bill collectors compel payment by intimidation, frequently by violence. This is of course a criminal offense,<sup>18</sup> and prosecution of the *jidan-ya* is reported

<sup>15</sup> *Kensetsu Kōji Hyōjun Ukeoi Keiyaku Yakkan* (Standard Stipulated Terms for Contracts for Work in Construction Projects), Feb. 21, 1950. Ruling of the Third Meeting of the Central Construction Industry Council, as amended through the Oct. 3, 1956. Ruling of the Twenty-First Meeting, Second Session of the Central Construction Industry Council, art. 16. Emphasis added.

<sup>16</sup> *Ibid.*, art. 21. Emphasis added. Also see KAWASHIMA & WATANABE, *NOTE* 13, at 57-70, 140-43.

<sup>17</sup> It seems that here we have another clue to an understanding of the social-cultural background of divorce by agreement.

<sup>18</sup> PENAL CODE ART. 249-50.

from time to time in the newspapers.<sup>19</sup> But their occupation is apparently flourishing. Furthermore, public opinion seems to be favorable or at least neutral concerning this practice; even intimidated debtors thus compelled to pay seem to acquiesce easily and do not indicate strong opposition. This attitude is doubtlessly due to some extent to the delay and expense of litigation, but at the same time the traditional frame of mind regarding extrajudicial means of dispute resolution undoubtedly has had some influence on public opinion toward the *jidan-ya*. The common use of the term *jidan-ya* seems to suggest that extrajudicial coercion and compromise are not distinctly differentiated in the minds of people.

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 conciliatory processes during the course of litigation. With this inclination in the background, judges also are likely to hesitate, or at least not seek, to expedite judicial decision, preferring instead to reconcile the litigant parties—as is revealed in Table 8 which shows the number of lawsuits actually settled by reconciliation. Complaint about delay in reaching judicial decisions is almost universal, particularly in recent years, and the reasons for the delay are diverse. But one reason may be this judicial hesitancy to attribute clear-cut victory and defeat to the respective parties.<sup>20</sup> It is, though, interesting to note that the percentage of judicial decisions has tended to rise since 1952, while the percentage of judicial proceedings terminated by compromise and successful mediation has tended to fall. It would be incautious to conclude hastily that these figures indicate a popular shift from the traditional attitude to a more individualistic one, but the beginning of such a tendency may be suggested.

Furthermore, it seems that judges are rather commonly inclined to attach importance to the status quo or to a *fait accompli*. The legal adage, *perest mundus, fiat justitia*, is apparently alien to the Japanese public as a whole and to Japanese lawyers in particular. Once a certain situation is set, especially when it has been in existence for some time, people are inclined

<sup>19</sup> See, e.g., *Asahi Shimbun*, Jan. 12, 1962, p. 11, col. 1 (southern Tokyo morning ed.); this item does not appear in the bound *ASAHI SHIMBUN SHUKUMATSU HAN* for Jan. 1962. Moreover, note the remarks in Nakagawa, *Jidan-ya no Mondai* (The *Jidan-ya* Problem), *HOGAKU SEMINAR* (Legal Seminar) no. 75, at 1 (1962).

<sup>20</sup> In this connection another aspect of this judicial attitude should be pointed out: because of the inclination to avoid attributing to one party clear-cut victory or defeat, judges are apt to attribute some fault to both parties. For instance, in case of a suit for damages based on tort in which a truck driver, ignoring the right of way of another car, crossed a street and collided with the latter, the court declared that the victim was also negligent in not slowing down his speed, and reduced the amount of damages for personal injury and property damage to 30,000 yen (approximately \$3 dollars), *Yamaki v. Yūgen Kaisha Kubota Shōji* (Kubota Commercial Limited Liability Co.), Tokyo District Court, March 24, 1959, 10 *KAKYŪ SAIBANSHO MINJI SAIBAN REIKŪ* (A Collection of Civil Cases in the Inferior Courts) 545.

to accept it even if it is not legally permissible. The courts reflect this attitude of the people and then attempt to rationalize the result. Such a tendency also seems to be related to the traditional popular conception of social relationships, which sees them not as something controlled by objective fixed standards but as something precarious depending on and changing with actual situations. An extreme example is the *Kochi Railway* case decided by the Great Court of Judicature on October 26, 1938. In 1929, the Kochi Railway began to lay track across land owned by the plaintiff. The plaintiff obtained a provisional disposition order<sup>21</sup> prohibiting the Kochi Railway from continuing construction, but the order was later withdrawn and the plaintiff was held to be entitled to sue the railroad at any time to compel removal of the railroad facilities from the land if the defendant's construction proved to be a trespass. The plaintiff filed a subsequent suit against the defendant with the District Court which rejected his claim on the ground that the railway served the welfare of the public in that specific locality and, if the railroad facilities in question should be removed, the public would suffer tremendous inconvenience. In such circumstances, the claim of the plaintiff was thought to be an "abuse of property rights." The supreme court sustained the decision of the inferior court.<sup>22</sup>

It is also widely known that the courts are reluctant to admit the existence of unfair labor practices; they prefer to accept the fait accompli and try to reconcile the litigants through extrajudicial negotiations.<sup>23</sup>

Considering these facts, parties in dispute usually find that resort to a lawsuit is less profitable than resort to other means of settlement. A lawsuit takes more time and more expense,<sup>24</sup> terminates the harmonious relationship between the parties, and gives the plaintiff just as little as, or quite often less than, what he would obtain through extrajudicial means. Who would resort to a lawsuit in view of these disadvantages except pugnacious, litigious fellows?

Jerome Frank has noted that an overwhelmingly large number of lawsuits in the United States are not appealed to a higher court and that nearly 95 percent of the cases come to an end in the trial court.<sup>25</sup> Such finality is in

<sup>21</sup> A remedy similar to the Anglo-American temporary injunction; *einstweilige Verfügung* in German.

<sup>22</sup> *Arimitu v. Kochi Tenrudo Kabushiki Kaisha* (Kochi Railway Co.), Great Court of Judicature, IV Civil Department, Oct. 26, 1938, 17 *DAI SHUN IN MINJI HANREI SHU* (A Collection of Civil Great Court of Judicature Cases) [hereafter cited as *DAI-HAN MINREI*] 2057, 18 *HANREI MINJI HÔ* (Civil Case Law) 475 (note Kaino).

<sup>23</sup> See Kichisemon Ishikawa, "The Regulation of the Employer-Employee Relationship: Japanese Labor-Relations Law," in this volume.

<sup>24</sup> As Thomas Blakemore observed at the conference, in addition to lawyer's expenses, court costs, particularly filing fees which are graduated by the size of recovery claimed, are high. These are recoverable by the winning party, but the necessity of hazarding new capital on the chance of winning the suit is a serious deterrent. The deterrent factor varies directly with the degree of uncertainty as to liability and the amount of probable damage.

<sup>25</sup> FRANK, *COURTS ON TRIAL* 33 (1950).

striking contrast to the comparatively large number of cases appealed to a higher court in Japan (see Table 9). Presumably this reflects the reluctance of litigants to accept a court decision rendered and imposed upon them without being convinced of the righteousness of its content; in the traditional ways of settling a dispute the solution was, in principle, reached through agreement by both parties. The notion that a justice measured by universal standards can exist independent of the wills of the disputants is apparently alien to the traditional habit of the Japanese people. Consequently, distrust of judges and a lack of respect for the authority of judicial decisions is widespread throughout the nation.

INFORMAL MEANS OF DISPUTE RESOLUTION:  
RECONCILEMENT AND CONCILIATION

The prevailing forms of settling disputes in Japan are the extrajudicial means of reconcilement and conciliation. By *reconcilement* is meant the process by which parties in the dispute confer with each other and reach a point at which they can come 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 (*oyabun*) who has the status of a patriarch is expected to exercise his power for the best interests of his inferior (*kobun*), and consequently his decision is, in principle, more or less accepted as the basis for reconcilement even though the decision might in reality be imposed on the inferior. Reconcilement is the basic form of dispute resolution in the traditional culture of Japan. *Conciliation*, a modified form of reconcilement, is reconcilement through a third person.

In the legal systems of Western countries as well as of Japan, dispute resolution through a third person as intermediary includes two categories: mediation and arbitration. In mediation a third party offers his good offices to help the others reach an agreement; the mediator offers suggestions which have no binding force. In contrast, a third party acting as arbitrator renders a decision on the merits of the dispute. In the traditional culture of Japan, however, mediation and arbitration have not been differentiated; in principle, the third person who intervenes to settle a dispute, the go-between, is supposed to be a man of higher status than the disputants. When such a person suggests conditions for reconcilement, his prestige and authority ordinarily are sufficient to persuade the two parties to accept the settlement. Consequently, in the case of mediation also, the conditions for reconcilement which he suggests are in a sense imposed, and the difference between mediation and arbitration is nothing but a question of the degree of the go-between's power. Generally speaking, the higher the prestige and

the authority of the go-between, the stronger is the actual influence on the parties in dispute, and in the same proportion conciliation takes on the coloration of arbitration or of mediation. The settlement of a dispute aims to maintain, restore, or create a harmonious "particularistic" relationship, and for that purpose not only mediation but also arbitration must avoid the principles implicit in a judicial settlement: the go-between should not make any clear-cut decision on who is right or wrong or inquire into the existence and scope of the rights of the parties. Consequently the principle of *kenka ryō-saibai* (both disputants are to be punished) is applied in both mediation and arbitration.

If a dispute is very likely to arise and the parties thereto are more or less equal in their status (in other words, the power balance is not sufficient to settle an eventual dispute), they normally agree in advance on a third person as mediator or arbitrator. For example, when marriage takes place, it is a common custom in Japan to have a go-between (sometimes each of the marrying families appoints its respective go-between) witness the marriage and play the role of mediator or arbitrator if serious troubles arise later. Or, when a man is employed (not only as a domestic servant or apprentice of a carpenter, painter, or merchant, but also as a clerk in such business enterprises as steel mills, chemical plants, and banks), it is still common practice for the employer to demand from the employee an instrument of surety signed by a *mimoto hikiukenin* or *mimoto hoshōnin* (literally translated, a person who ensures the antecedents of the employee). Originally this man had to undertake the role of mediator or arbitrator in case of sickness, breach of trust of the employee, or other eventual troubles; in recent years he simply undertakes the obligation as a surety.<sup>23</sup> The reason that a very small portion of disputes are brought to court is to be found,

<sup>23</sup> Though the liability of a *mimoto hikiukenin* was limitless in the traditional contract, in practice it was normal that if the employer sustained damage caused by the employee the scope of liability was defined through an *ad hoc* agreement between the employer and the *mimoto hikiukenin*. Therefore, if the employer sued the *mimoto hikiukenin* in court on grounds of the limitless liability expressed in the language of the contract, it meant that the employer went far beyond the contemplation of the parties to the contract at the time, and consequently, a court would feel the need of making adjustments. The court attempted to mitigate the liability of the *mimoto hikiukenin* under various circumstances—Tanaka v. Kabushiki Kaisha Ōzaki Kyōritsu Ginkō (Ōzaki Joint Bank Co.), Great Court of Judicature, I Civil Department, July 4, 1927, 6 DAI-NAN MINSU 436, 7 HANAN MINGI Hō 328 (note Egawa); Kurihara v. Dai Ichi Kasai Kaijō Hoken Kabushiki Kaisha (First Fire and Marine Insurance Co.), Great Court of Judicature, III Civil Department, May 24, 1933, 22 DAI-NAN MINSU 1923, 23 HANAN MINGI Hō 346 (note Kanno)—and based on these court practices a law was enacted in 1933 which aimed at mitigating the liability of *mimoto hikiukenin* (Personal Surety Law, Law No. 42 of 1933). Particularly interesting in this connection is the provision of art. 5 which reads as follows: "In determining the liability of a *mimoto kashōnin* [i.e., a *mimoto hikiukenin*] and the monetary amount thereof, the court shall take into consideration whether there was negligence in the supervision of the employee by the employer, the facts attendant upon the giving of the surety, the degree of care exercised in giving the surety, changes in the duties or status of the employee, and any other circumstances."

as stated above, in the fact that most of the disputes are settled through these informal means.

### *Kankai*

Very soon after the Meiji Restoration, the government was forced to make concessions to this centuries-old practice<sup>25</sup> and accordingly legalized conciliation; in 1876 the government initiated *kankai* (literally, invitation to reconciliation) as a legal court procedure and provided for its preferred usage prior to a regular judicial proceeding.<sup>27</sup> In 1883 the Ministry of Justice issued a directive that *kankai* should be a compulsory procedure prior to regular judicial process in all except commercial cases.<sup>28</sup>

*Kankai*—the Japanese word gives the impression that it is a recommendation favoring reconciliation—was actually the imposition of a settlement under authority of the court with the litigants often being in no position to refuse the proposal. A scene of a famous Kabuki drama, *Suitengū Megumi no Fukagawa* (first performance in 1885), by Mokuami presents a very realistic description of the image of *kankai* then held by the people.<sup>29</sup> The usurer Kimbei comes, accompanied by Yasuzo, a pettyfogger, to the home of his debtor Kobei, an indigent former samurai. In front of the debtor's home Yasuzo says to his client: "If the debtor is not likely to pay the debt, let's intimidate him by saying that we will resort to *kankai* in case he does not deliver a pledge." They enter the house and demand that Kobei deliver them pledges as a substitute for the payment of his debt: "If you are delayed in delivering them, I will bring the case to *kankai*, have them arrest you and let you enjoy a cool breeze."

Table 10 shows how frequently *kankai* was resorted to and what an important function it had. Probably this was due to the fact that, in the social chaos of the early Meiji era, the traditional extrajudicial means such as reconciliation and conciliation were insufficient for settling disputes. In 1890 the institution of *kankai* was abolished by the Code of Civil Procedure. This was but one of the codes promulgated during the 1890s as preparatory measures to bring to an end the privileges of extraterritoriality for alien residents in Japan; and it was with this aim in mind that the government strove to follow the pattern of Western nations in its recognition of judicial institutions. The reactions to the reform can be inferred from the comments on it given thirty years later by members of the House of Representatives when the reinstatement of mediation was under debate.

<sup>25</sup> See Henderson, *Some Aspects of Tokugawa Law*, 27 *WASH. L. REV.* 85, 96-100 (1952)—a discussion of the pre-Meiji practice.

<sup>26</sup> Ministry of Justice Pronouncement A (K3) No. 17 of 1876.

<sup>27</sup> Ministry of Justice Directive of Oct. 23, 1883 in response to an inquiry from Ibaragi Prefecture.

<sup>28</sup> Mokuami Kawatake is known as a dramatist whose plays give a very realistic description of the Japanese society of his time (the late Tokugawa and early Meiji periods).

Shotoku Taishi, who drafted the "Constitution of Japan," wrote in article 17 that harmony is to be honored. Japan, unlike other countries where rights and duties prevail, must strive to solve interpersonal cases by harmony and compromise. Since Japan does not settle everything by law as in the West but rather must determine matters, for the most part, in accordance with morality and human sentiment (*ninjō*), the doctrine of mediation is a doctrine indigenous to Japan . . . The great three hundred year peace of the Tokugawa was preserved because disputes between citizens were resolved harmoniously through their own autonomous administration, avoiding, so far as possible, resort to court procedure . . . However, later the justice bureaucrats, assuming upon the appearance of the Code of Civil Procedure that the bureaucracy should attempt to settle all problems in dispute, extremely perverted the thought of the people.<sup>30</sup>

Even after 1945, a leading lawyer, Yoshikata Mizoguchi, now Chief Judge of the Tokyo Family Court, declared in the preface to *Chōtei Tokuhon*, (Mediation Reader; published by the Japanese Federation of Mediation Associations in 1954): "Needless to say, the basic idea of *chōtei* [mediation] is harmony and since, as Crown Prince Shotoku revealed to us in article 1 of his Constitution of Seventeen Articles enacted 1,350 years ago which stated that 'harmony is to be honored,' respect for harmony is a national trait, the development of the *chōtei* institution in our country seems natural." We can imagine, then, the popular reaction which followed the abolition of *kankai*.

#### *Chōtei*

During World War I the industrialization and urbanization of Japan developed rapidly and upset the traditional social structure. In such a time of social unrest, the trust in those traditionally in positions of authority, such as employers or landlords, was weakened; and those who had been in an inferior position began to assert their legal rights. The traditional authority and prestige of superiors was no longer effective to prevent, much less to solve, disputes with inferiors. Lawsuits by landlords or lessors against their tenants or lessees, which had been quite rare in the past, were becoming frequent, thus sharpening the antagonism between parties who were supposed to be friendly toward each other. What the government attempted, facing this dissolution of the social structure upon which the political regime had been based since the Meiji Restoration, is interesting from our point of view. Instead of coordinating the conflicting vested interests by legislation,<sup>31</sup> the government reconstituted *chōtei*, with which the disputes them-

<sup>30</sup> Dai 31 Kai Teikoku Gikai Shūgi In Ienkai Sokkōroku (Stenographic Record of House of Representatives' Committee in the 31st Session of the Imperial Diet), category 3, no. 18, 3rd session, at 2 (1926).

<sup>31</sup> The only exceptions were the Leased Land Law, Law No. 49 of 1921, translated into English in 2 EHS LAW BULLETIN SERIES FR 1 (Nakane ed. and transl., 1959); and the Leased House Law, Law No. 50 of 1921, translated into English in 2 EHS LAW BULLETIN SERIES FS 1 (Nakane ed. and transl., 1959). These statutes were probably necessitated by the

selves were to be "washed away" (*mizu ni nagasu*) by reconciliation; the emerging individualistic interests of lessees, tenants, and employees were to be kept from being converted into firmly established vested interests independent of the will of their superiors.

A member of the House of Representatives urged, when the Leased Land and Leased House Mediation Law was under debate: "By endeavoring to be sympathetic and by expressing harmony, we amicably reap rights which are not actually rights in themselves."<sup>32</sup> Another member argued:

Handling this matter as merely a determination of the problem of the rights of a lessee of land or a tenant of a house so that the owner may assert his own rights even to the point of rapacity, in a period such as that of today when a shift in society in the harmony of supply and demand brings only shortages, with anyone being able to assert his own rights exclusively, makes it quite difficult, in the final analysis, to obtain true stability of rights. Therefore, the establishment of the Mediation Law is not so that someone by sticking to the law can determine the relationship of rights among the parties. That is, the relationship between a tenant and a house owner, a land lessee and a landowner differs from that between complete strangers. Therein is the personal expression of sympathy; therein is morality. And in the sense that it attempts to base settlement on these things exists the *raison d'être* of mediation.<sup>33</sup>

The institution of *chôtei* was to replace the informal mediators of the past who had been mostly men of "face" — for instance, village elders and sometimes even policemen — by mediation committees (consisting of laymen and a judge) and to have parties reach agreement under the psychological pressure derived from the "halo" of a state court. This attempt was quite successful. A large number of disputes arising out of leases were brought to *chôtei* procedure and not to regular judicial proceedings (see Tables I and II).<sup>34</sup>

fact that the traditional contractual relationships between lessors and lessees had been already dissolved, and even in smaller ones it was rather common to resort to a lawsuit to solve disputes arising from these relationships. Table II indicates that in the course of small local ones the number of lawsuits exceeds the number of mediation cases.

<sup>32</sup> Dai 45 Kai Teikoku Gikai Shūgi In Jinkai Sokkoku (Stenographic Record of House of Representatives' Committee in the 45th Session of the Imperial Diet), category 5, no. 5, 2nd session, at 4 (1922).

<sup>33</sup> *Ibid.*, 3rd session, at 1 (1922).

<sup>34</sup> In this connection the surveys made by Professor Yoshio Sasaki in Shimane Prefecture are extremely interesting. To his question, "Is it essential in civil mediation to consider whether the contentions of the parties are legally correct or not?" only 28 percent of people listed on the panel of mediation-committee members answered, "It is always essential." To his question asking them "which qualifications they thought most important for a mediation-committee member," only one respondent rated "correct knowledge of the law" as the first qualification, whereas the largest number (approximately 30 percent) of respondents rated it as the last. See Sasaki, *Chôtei ni okeru Minji Chôtei* (Civil Mediation in Rural Areas), 32 Hōritsu Jōhō 1051, 1054 (1960); Sasaki, *Minji Chôtei ni okeru Hōteki Mondan zo Jikan no Kaimai* (Legal Reasoning and Clarification of the Case in Civil Mediation), 7 Minji Sochi Hō Zasshi (Journal of Civil Procedure Law) 154-57 (1961).

The number of mediation cases concerning land and house leases, farm tenancies, pecuniary debts, and domestic relations increased surprisingly after the institution of mediation,<sup>32</sup> but, remarkably enough, the number of regular judicial cases underwent no significant decrease. In other words, a large number of disputes which had been solved outside of the court or left unsolved were now brought to *chôtei*, which meant that (1) *chôtei* was much preferred to regular judicial proceedings, (2) traditional informal means of dispute resolution already had lost their function in this sector of personal relations, and (3) society needed control by a governmental agency of some kind during a period of social disorganization.

The tendency to settle disputes by compromise is also illustrated by the number of suits withdrawn or formally compromised and the number of mediation cases withdrawn (see Table 12). Such a termination takes place when the need for a judicial decision or *chôtei* disappears; in most such instances, this occurs because the parties have settled the dispute themselves. As the table indicates, the court takes an active role in encouraging settlement at stages short of a final decision. In Summary Courts the number of cases settled by judicial compromise entered in the official record is approximately equal to the number settled without the formal aid of the court and withdrawn. In District Courts, the ratio is lower, but the number of judicial compromises is only a little less than half that of the cases settled privately. Practicing attorneys report that, in a large number of cases, the judge urges the parties to compromise at least once during the course of the trial. Both the tendency of parties to settle and the court's practice of encouraging compromise reflect the general attitude of the people.

In addition to *chôtei*, there is a long tradition of police intervention in disputes between citizens. Officers act as mediators on the basis of their authority,<sup>33</sup> particularly when another man with sufficient prestige and authority is not available. *Chôtei*, as legalized by the series of mediation statutes, may in a sense be a modified, perhaps rationalized, form of the type of mediation performed by police officers. But even after *chôtei* was legalized, mediation by the police did not lessen. With their authority and psychological dominance, particularly under the authoritarian regime of the old Constitution, police mediators were by and large effective and efficient. The total number of cases brought to police officers for mediation is presumed to be still very great, though the exact figures are kept secret. Table 13 shows the considerable quantity of cases brought to the Tokyo police for consultation and the large percentage of them solved through this informal procedure. A certain portion of the cases in which solutions were not reported presum-

<sup>32</sup> That is under the following statutes: Leased Land and Leased House Mediation Law, Law No. 41 of 1922; Tenant Farming Mediation Law, Law No. 18 of 1924; Monetary Obligation Temporary Mediation Law, Law No. 26 of 1932; Personal Affairs Mediation Law, Law No. 11 of 1939.

<sup>33</sup> HIRONAKA, *HÔ TO SAIBAN* (Law and Trial) 108 (1961).

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ably were resolved by party agreement based on the recommendations made. If these are taken into account, the number of cases solved by the police is indeed quite sizable. In my own investigations, I have found that a rather large number of cases in the Family Courts were first brought to police officers for mediation and came to court only after mediation proved futile. Presumably the same may be true for *chôtei* cases in other courts.

#### *Arbitration*

It is characteristic of Japanese culture that arbitration has been a kind of reconciliation. For this very reason, arbitration in the sense of contemporary Western law is alien to Japan. Despite the fact that the Code of Civil Procedure contains provisions for an arbitration procedure, it is seldom used. Clauses specifying that a dispute arising out of a contract shall be settled through arbitration are normally not employed except in agreements with foreign business firms.

The Construction Industry Law<sup>37</sup> provides both arbitration and mediation procedures for disputes arising out of construction contracts, in order to promote the legal disposition of these disputes instead of leaving their resolution to traditional extrajudicial reconciliation. Nevertheless, very few cases of arbitration have been initiated since these provisions came into effect, only two applications for arbitration having been filed with the Ministry of Construction during the period between October 1956 and April 1961, as compared with fourteen applications for mediation. Although the Ministry of Construction is encouraging the use of an arbitration clause in construction contracts (the standard contract stipulations drafted and recommended by the ministry contain a clause of this type), few contracts have made use of it. Contractors and owners have told me that they feel insecure under the provision, since arbitrators might render unfair decisions. Presumably the underlying basis for this feeling of insecurity is not that arbitrators are in fact unfair, but rather that they might make decisions in accordance with universalistic standards; the contractors and owners prefer to settle disputes in accordance with the prevalent psychological climate and the subtle power balance existing between the two parties.

Statistics of labor disputes present an even more interesting picture. Compared to the mediation cases, the number of arbitration cases is surprisingly low (Table 14). Furthermore, it is worthy of note that, out of five arbitration cases filed with the Central Labor Relations Commission, three were withdrawn because the disputes had been settled outside of the administrative proceeding. This again shows that even in the process of arbitration parties are ready, and prefer, to enter into informal reconciliation.

At the same time, however, collective-bargaining agreements, in contrast to construction contracts, apparently tend to familiarize the disputants with

<sup>37</sup> Law No. 100 of 1949, arts. 25-25 to 25-20.

arbitration as a means of dispute resolution. According to an investigation by the Ministry of Labor in 1958, 57 labor agreements from a sample of 532 contained arbitration clauses.<sup>38</sup> In 1961 the Central Labor Relations Commission conducted an investigation of collective labor agreements, and its interim report shows that, from a sample of 280 collective agreements, approximately 20 percent contained arbitration clauses.<sup>39</sup> The sampling methods employed in these surveys were not identical, but indications are that the number of collective agreements containing arbitration clauses nearly doubled over the three years. This figure is indeed impressive, especially in comparison with the extremely few construction contracts or contracts of sale between Japanese citizens containing arbitration clauses (though no supporting statistical figures are currently available). This striking difference is probably due to the fact that the relationship between employer and employee is, unlike most other contractual relationships, more individualistic, each party insisting upon his own interests.

These figures should be compared with those of the international commercial arbitrations administered by the Japan Commercial Arbitration Association. In 1960 there were filed with the association 78 cases of mediation and 93 cases of arbitration. The ratio of arbitration cases to mediation cases is thus 1.19; the ratio of arbitration cases in the Ministry of Construction for the three and a half years between October 1956 and April 1960 is only 0.09, and that in the Central Labor Relations Commission for the entire period from 1946 to 1960 only 0.0027.

#### RECENT CHANGES

I have tried to show the main features of various forms of dispute resolution, with particular emphasis on their specifically Japanese aspects. However, there are indications of gradual change. Some of these have been touched on above. Since the Meiji Restoration, Japan has been in the process of rapid transition from a premodern, collectivistic, and nonindustrial society. The traditional forms of dispute resolution were appropriate to the old society, whereas judicial decision and arbitration as contemplated in the provisions of the Code of Civil Procedure are alien to it.<sup>40</sup> But all modern societies, including Japanese society, are characterized by citizens with equal status and, consequently, by a kind of check and balance of individual power. It is against this background that traditional relationships serving to make a proposed settlement acceptable have been disrupted and that the need for decisions in accordance with universalistic standards has arisen.

Furthermore, there is another aspect specific to the modern industrialized

<sup>38</sup> RŌDŌ-ANŌ (Ministry of Labor), RŌDŌ KYŌYAKU JISŌ (Actual State of Collective Labor Agreements) (RŌDŌ KYŌYAKU SHIRYŌ (Collective Labor Agreement Materials) No. 51, 1958).

<sup>39</sup> CHŪŌ RŌDŌ IINKAI (Central Labor Relations Commission), RŌDŌ KYŌYAKU CHŪA (An Investigation of Collective Labor Agreements) 95 (1962).

<sup>40</sup> E.g., CODE OF CIVIL PROCEDURE arts. 786-805.

society: the economic value of calculability (*Berechenbarkeit*, as Max Weber calls it) or foreseeability of rights and duties, without which the rational operation of capital enterprise would be seriously endangered.<sup>41</sup> As industrialization proceeds, the need for perfection of the judicial system and of legal precepts becomes both more extensive and more intensive; and the traditional informal means of dispute resolution are found to be disruptive to capital enterprises. In the latter years of World War I, the outward signs of this change were the increase in collective transactions, the growing number of lawsuits involving immovable property, and the development of a new form of labor relations. Though further changes were not apparent under the strong control of the totalitarian regime during the thirties and forties, the large-scale industrialization necessitated by the war in China and later with the Allied powers undoubtedly accelerated the transition. During the whole period of the war, Japanese family life was gradually disorganized, accompanied by dissolution of the social controls exercised by the family. The result was a large number of serious conflicts within families and kinship groups which the traditional means of social control (patriarchal power and the family council) could no longer effectively resolve. The traditional family system being the very basis of the official ideology (*shūshin*) and the power structure of the state, the government adopted *chōtei* to settle disputes arising from the disorganization of the family. Rather than adjustment through a system of legal rights, disputes were to be "washed away" in order that the family might be strengthened and preserved.

With the collapse of government through the Emperor, the authority of the traditional social institutions as a vehicle of social control was lost or at least greatly weakened. Although various "superiors" still survive to some degree, they are no longer so influential as to be able to solve all controversies arising out of their relationships with their "inferiors." The most conspicuous of these changes is in the area of family disputes. Today neither the authority of the head of the family, the family council, nor the marriage go-between is capable of settling all family disputes. The large number of such disputes brought to the Family Courts in the postwar era suggests this fact.

In 1950 the Ministry of Labor made a very interesting nationwide survey of social attitudes.<sup>42</sup> Among questions on family solidarity, parental authority, selection of a marriage partner, primogeniture, equality of the sexes, and the like, there was this one: "If you checked the weight of rationed sugar [in

<sup>41</sup> A prerequisite for such operations is "full calculability in the functioning of the administrative system and the legal order and dependable strictly formal guarantees of all agreements by the political authority (*formal rationale Verwaltung und formal rationales Recht*)." 3 WASSER, GRUNDRISS DER SOZIALÖKONOMIK (III. Abteilung Wirtschaft und Gesellschaft) 94 (3rd ed., 1947).

<sup>42</sup> FUJIN SHŌNEN KYŌKU (Women and Juvenile Bureau), RŌDŌ-CHO (Ministry of Labor), HŌKENZAI NI TSUITE NO CHŌDAI (A Survey Regarding Feudal Characteristics) 22 (Fujin Kankai Shiryō Series (Materials Relating to Women Series) No. 7, 1951).

those days sugar was tightly rationed] and found a shortage, would you notify the merchant or not?" This question was designed allegedly to determine the extent to which people would uphold their rights. From a sample of 2808 (randomly selected), 90 percent of the men and 82 percent of the women replied "I would notify him," 9 percent of the men and 16 percent of the women replied "I would not," and 1 percent of the men and 2 percent of the women replied "I don't know." Perhaps this particular question was not entirely appropriate to probe the attitude sought because a deficit in the weight of rationed sugar was of vital importance to everyone in those days of food shortages; thus, while important, one should not overgeneralize from this response. In 1952, the National Public Opinion Institute conducted a nationwide survey, a part of which bears upon our problem.<sup>43</sup> The institute investigated the reaction to the following question: "There is a saying, 'yield to a superior force' [*nagai mono ni wa makarerō*: literally, allow oneself to be enveloped by a long object]. Have you ever heard of this?" Those who replied affirmatively were then asked: "Do you think that the attitude expressed in that saying should be approved and that nothing else can be done?" Purportedly these questions were designed to measure the extent to which people yield to authority or power. Out of 3000 random samples, 51 percent of the men and 30 percent of the women replied that such an attitude should not be approved. Of course, this question simply pertained to the attitude toward authority and did not cover the exact problem under consideration, but it indirectly reveals the attitude of people toward informal means of dispute resolution in which the authority of the go-between plays a significant role.

Probably of greater significance is a change which seems to be taking place in *chōtei* cases, particularly in the Family Courts of large cities such as Tokyo or Osaka; it is not at all rare for parties to be aware of their legal rights and to insist upon them so strongly that reconciliation becomes at times quite difficult. Parties to *chōtei* cases have frequently complained that lay mediators did not pay sufficient attention to their rights under the law. From time to time various political leaders complain of the people's awareness of their rights and of the decay of harmony-minded traditions. Whatever their feelings about this may be, the legal institution of *chōtei* no longer functions to maintain the precarious nature of the interests involved in the traditional social and contractual relationships. The transition is irretrievably in process, and the outcome is clear.

<sup>43</sup> *KOKURITSU SEIWA CHISAYO* (National Public Opinion Research Institute), *SHAKAI KYŌIKU NI TSUITE NO YORON CHŪKA* (A Public Opinion Survey Regarding Social Education) (1953).

THE LEGAL SYSTEM AND THE LAW'S PROGRESS

TABLE I. Number of Land and House Lease Cases and Farm Tenancy Cases

Prefecture	I. Land and House												
	1910	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	
Tokyo	325	172	115	123	120	118	155	141	293	478	877		
DC Land Lease	73	73	137	147	261	363	505	394	300	409	383		
House Lease	170	259	312	43	41	58	83	87	104	277	477		
I.C. Land Lease	1,005	1,338	1,603	1,680	1,570	2,115	2,313	2,178	1,837	2,108	3,038		
House Lease							97	5,239	8,603	4,908	4,923		
Mediation*								4,850,400	3,985,700	4,486,558	4,848,500		
Population	2,800,400	2,918,000	2,310,100	2,437,000	2,600,428	2,812,600	2,931,200	2,850,400	2,985,700	3,086,558	3,167,600		
Yokohama													
DC Land Lease	8	16	12	70	18	21	9	0	39	42	53		
House Lease	6	6	7	16	36	23	31	3	10	11	13		
I.C. Land Lease	63	30	31	13	13	13	36	3	88	93	134		
House Lease	203	306	270	302	208	389	400	30	183	271	381		
Mediation*							11	24	508	682	702		
Population	1,176,200	1,189,400	1,246,700	1,268,100	1,323,300	1,342,100	1,361,500	1,370,000	1,397,000	1,416,792	1,436,200		
Osaka													
DC Land Lease	64	84	38	45	61	67	72	102	137	143	163		
House Lease	36	26	41	86	100	118	128	114	134	139	179		
I.C. Land Lease	72	65	65	58	47	43	48	98	76	113	186		
House Lease	604	801	1,120	1,206	1,292	1,201	1,277	1,798	2,034	2,332	2,138		
Mediation*							23	252	623	802	1,361		
Population	3,322,700	3,376,000	2,508,000	2,643,500	2,587,847	2,683,400	2,768,000	2,889,700	2,998,500	3,038,600	3,167,600		
Tochigi*													
DC Land Lease	0	0	18	1	4	4	9	8	9	8	9		
House Lease	1	1	0	0	3	2	6	8	8	4	4		
I.C. Land Lease	20	20	30	17	21	20	17	20	23	21	17		
House Lease	69	60	77	44	62	61	70	75	60	133	68		
Population	1,070,400	1,054,700	1,031,800	1,067,100	1,016,479	1,060,800	1,075,200	1,089,500	1,100,200	1,080,428	1,090,600		
Aomori													
DC Land Lease	0	0	2	7	5	4	3	5	15	14	10		
House Lease	0	0	3	2	6	4	1	4	13	7	8		
I.C. Land Lease	28	14	28	26	20	22	20	27	10	34	32		
House Lease	45	45	41	38	31	21	31	32	32	64	33		
Population	777,600	788,400	786,400	791,400	780,456	781,800	773,200	781,600	791,000	812,977	824,700		

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TABLE 1 (continued)

Prefecture	II. Tenant Farming										
	1919	1917	1916	1919	1920	1921	1922	1923	1924	1925	1926
Iiyogo	25	20	19	29	28	26	44	61	48	64	71
I.C.	80	20	41	20	30	0	12	39	26	20	27
Mediations*	—	—	—	—	—	—	—	—	3	35	35
Chifu	0	1	1	3	11	10	18	31	30	18	31
I.C.	53	40	103	65	00	34	28	62	44	16	70
Mediations*	—	—	—	—	—	—	—	—	0	3	30
Akchi	6	12	21	31	21	23	35	44	68	75	61
I.C.	32	07	85	102	111	72	56	61	60	43	61
Mediations*	—	—	—	—	—	—	—	—	0	28	21
Annohd	0	1	3	9	6	6	3	3	17	11	12
I.C.	22	22	41	53	23	26	22	24	12	18	15
Mediations*	—	—	—	—	—	—	—	—	0	0	0
Shimane	0	0	0	0	0	1	1	0	1	2	1
I.C.	16	22	17	18	23	11	5	6	13	24	30
Mediations*	—	—	—	—	—	—	—	—	0	12	48

\* District Court.

† Local Court.

\* The mediation system began in 1922.

\* The Leased Land and Leased House Mediation Law was not in effect in Tsuchigi and Annohd Prefectures during these years.

\* The mediation system began in 1921.

Source: NIHOH, TEIKOKU SHIMU-SHO (Japanese Imperial Ministry of Justice), DAI 42-52 MINJI TOKAI NEWSHO (42nd-52nd Annual Reports of Civil Statistics) (1910-1920).

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TABLE 2. Number of Postwar Judicial and Mediation Cases Involving Leased Land and Leased Houses

Year	Judicial cases		Mediation cases	
	District Courts	Summary Courts	District Courts	Summary Courts
1950	7,816	1,151	360	23,945
1951	7,433	3,854	591	29,658
1952	8,695	2,979	1,208	23,909
1953	10,449	2,228	1,473	24,411
1954	9,158	4,244	1,474	23,008
1955	8,377	5,891	1,926	25,700
1956	8,955	6,155	1,947	24,811
1957	7,902	7,316	1,888	23,633
1958	7,978	7,635	1,771	23,600
1959	7,313	7,821	1,639	19,597

Source: SAIKŌ SAIBANSHO JINJI-SŌKYOKU (General Secretariat of the Supreme Court), SHŌWA 25-34 NEN SHIRŌ TŌKEI NEMPŌ (1950-1959 Annual Reports of Judicial Statistics), 1 MINJI HEN (Civil Affairs Book).

Table 3. Number of Civil Cases Filed in Japanese Courts

Year	District Courts	Local Courts
1925	61,178	237,731
1926	42,941	260,974
1927	43,306	276,236
1928	43,944	272,631
1929	42,409	268,831
1930	39,756	285,380
1931	38,107	301,774
1932	37,047	333,782
1933	34,027	261,445
1934	32,312	231,705

Source: NIHON TEIKOKU SHIRŌ-SHŌ (Japanese Imperial Ministry of Justice), DAI 51-60 MINJI TŌKEI NEMPŌ (51st-60th Annual Reports of Civil Statistics).

TABLE 4. Number of Civil Cases Filed in Superior Courts in Connecticut

Year	Cases
1927-28	7,822
1928-29	8,387
1929-30	9,523
1930-31	9,535
1931-32	10,503
1932-33	10,396
1933-34	10,711
1934-35	11,194
1935-36	9,824
1936-37	9,461
1937-38	8,957
1938-39	8,158

Source: FIFTEENTH REPORT OF THE JUDICIAL COUNCIL OF CONNECTICUT 16 (1956).

TABLE 5. Extent of Litigation for Traffic Accidents Involving the Japanese National Railways

Litigation and accidents	1953	1954	1955	1956	1957	1958	1959	1960
Number of lawsuits	20	20	22	20	19	18	24	15
Number of victims of physical injury including death	4,645	5,158	5,169	5,451	5,818	6,044	6,317	—

Source: Based upon unpublished materials furnished by the Legal Affairs Section, Japanese National Railways.

TABLE 6. Amount of Time Required for Judicial Decisions

Period required for judicial decisions in the District Courts in 1916 and 1920											
	Under 10 days	Under 1 mo.	Under 2 mos.	Under 3 mos.	Under 6 mos.	Under 1 yr.	Under 2 yrs.	Over 2 yrs.	Total		
1916	106	1,231	2,047	1,283	1,723	1,142	494	181	8,189		
1920	143	1,868	3,646	2,390	2,982	2,023	986	253	14,263		
Period required for judicial decisions in 1938 and 1939											
Summary Courts											
	Under 15 days	Under 1 mo.	Under 2 mos.	Under 3 mos.	Under 6 mos.	Under 1 yr.	Under 2 yrs.	Under 3 yrs.	Under 5 yrs.	Over 5 yrs.	Total
1938	578	4,389	11,203	3,791	8,530	2,923	1,528	429	213	17	32,604
1939	434	4,369	10,830	8,668	8,277	2,931	1,853	830	291	30	32,163
District Courts											
1938	29	582	4,435	3,312	5,136	4,393	4,171	878	1,362	403	25,925
1939	23	499	4,620	3,593	5,091	4,380	4,643	2,094	1,986	545	27,059
High Courts											
1938	8	21	47	140	458	952	1,091	367	220	36	3,360
1939	14	19	82	167	572	991	1,242	824	247	57	3,915
Supreme Court											
	Under 3 mos.	Under 6 mos.	Under 1 yr.	Under 2 yrs.	Under 3 yrs.	Under 4 yrs.	Under 5 yrs.	Under 6 yrs.	Under 7 yrs.	Under 10 yrs.	Total
1938	14	77	96	430	130	22	7	3	3	1	793
1939	4	21	99	239	159	59	—	4	2	5	642

Source: NIKON TEIKOKU SHIRO-SHO (Japanese Imperial Ministry of Justice), DAI 42, 46 MINJI TOKAI NEMO (42nd, 46th Annual Reports of Civil Statistics) (1916, 1920); SAIKO SALBANSHO JIRO-SOKYOKU (General Secretariat of the Supreme Court), SHOWA 33-34 NEN SHIRO TOKAI NEMO (1938-1939 Annual Reports of Judicial Statistics), 1 MINJI HEN (Civil Affairs Book).

TABLE 7. Lawsuits Concerning Loans of Money and Grain in First-Instance Courts

Year	Hypothecs and pledges of land	Hypothecs and pledges of buildings	Loans of money (Interest- bearing)	Loans of money (Interest discounted)*
1878	2,174	233	100,499	9,859
1888	21	1	6,059	481
1905	72	1	4,140	435
1925	43	18	6,843	556
1930	45	13	4,944	—

TABLE 7 (continued)

Year	Loans of grain (Interest-bearing)	Loans of grain (Interest discounted)*	Pledges of movable property (Interest-bearing)	Hypothecs of movable property (Interest-bearing)
1878	1,908	1,216	12	254
1888	27	30	0	17
1905	32	20	6	0
1925	23	6	6	0
1930	0	2	11	0

Year	Hypothecs of movable property (Interest discounted)*	Total of lawsuits mentioned above (A)	Total of all lawsuits (B)	A/B × 100
1878	1,301	117,523	148,811	80.71
1888	111	8,112	12,098	67.05
1905	50	8,782	22,363	39.18
1925	—	7,567	53,812	14.06
1930	—	5,086	31,082	16.38

\*These categories are obscure even to scholars of Japanese legal history, but it is presumed that they pertain to loans made with interest discounted in advance.

Source: NIKON TEIKOKU SHINBO-SHO (Japanese Imperial Ministry of Justice), DAI 4, 14, 38, 51 MINJI TOKAI NENPO (4th, 14th, 38th, 51st Annual Reports of Civil Statistics) (1878, 1888, 1905, 1925).

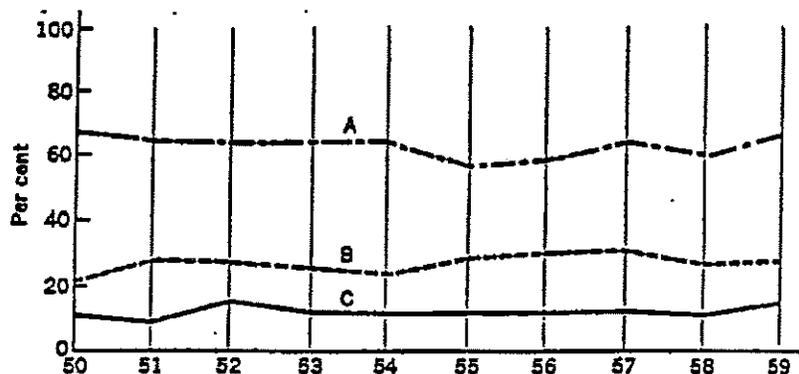
TABLE 8. Number of Prewar Lawsuits and Judicial Compromises

Dispute settlement	1920	1925	1930	1935
District Court				
Lawsuits	32,360	53,812	66,411	50,178
Judicial compromise	1,691	3,805	4,822	3,344
Withdrawal of suit	9,293	13,324	14,741	10,322
Total	10,984	17,129	19,263	13,866
Local Court				
Lawsuits	134,391	228,677	692,496	521,258
Judicial compromise	13,324	29,076	45,789	38,956
Withdrawal of suit	34,094	52,002	78,375	61,245
Total	47,418	81,078	124,174	100,201

Source: NIKON TEIKOKU SHINBO-SHO (Japanese Imperial Ministry of Justice), DAI 46, 51, 56, 61 MINJI TOKAI NENPO (46th, 51st, 56th, 61st Annual Reports of Civil Statistics) (1920, 1925, 1930, 1935).

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TABLE 9. Percentage of Appeals



A shows the percentage of appeals of administrative cases in District Courts to High Courts; B the same for ordinary civil cases in District Courts to High Courts; and C the same for all the civil cases in Summary Courts to District Courts.

Source: SAIKŌ SAIBANSHO JINKU-SŌKYOKU (General Secretariat of the Supreme Court), SHŌWA 34 NEN SHIHŌ TŌKEI NEMPŌ (1959 Annual Report of Judicial Statistics), I MINJI HEN (Civil Affairs Book), chart 2.

TABLE 10. Number of Kankai and Lawsuits

Year	Kankai filed	Lawsuits filed
1879	651,604	135,009
1880	675,216	131,813
1881	732,217	130,426
1882	908,932	181,639
1883	1,084,216	238,071
1884	760,106*	138,250
1885	592,311	51,573
1886	509,915	49,920
1887	388,215	51,008
1888	327,600	50,707

\*The reason for this abrupt decrease is not clear.

Source: SHIHŌ-SHŌ (Ministry of Justice), DAI 5-14 MINJI TŌKEI NEMPŌ (5th-14th Annual Reports of Civil Statistics) (1879-1888).

TABLE 11. Lawsuits and Mediation Cases Involving House and Land Leases

Year	Tokyo	Yoko- hama	Yoko- suka	Kyoto	Osaka	Sakai	Kihi- wada	
1925								
Mediation	3,050	707	12	251	930	34	9	
Lawsuits (DC) <sup>a</sup>	939	85	—	32	273	—	—	
Lawsuits (LC) <sup>b</sup>	2,445	309	38	520	2,178	90	29	
1930								
Mediation	9,290	1,444	16	2,375	8,487	59	24	
Lawsuits (DC)	818	165	—	37	490	—	—	
Lawsuits (LC)	3,782	852	118	901	7,183	235	78	
Year	Kobé	Itami	Akashi	Himeji	Toyo- oka	Nagoya	Ichino- miya	Okazaki
1925								
Mediation	99	2	5	10	2	226	1	1
Lawsuits (DC)	97	—	—	11	2	124	—	17
Lawsuits (LC)	1,418	72	11	65	8	523	23	19
1930								
Mediation	756	44	11	16	2	1,285	7	23
Lawsuits (DC)	72	—	—	13	1	103	—	10
Lawsuits (LC)	3,200	240	66	127	23	1,799	58	37

<sup>a</sup> District Courts.

<sup>b</sup> Local Courts.

Source: NIBON TEIKOKU SHIHÔ-SHÔ (Japanese Imperial Ministry of Justice), DAI 51 MINJI TÔKEI NEMPÔ (51st Annual Report of Civil Statistics) 338-39, 34-61, 166-237 (1925); NIBON TEIKOKU SHIHÔ-SHÔ, DAI 56 MINJI TÔKEI NEMPÔ (56th Annual Report of Civil Statistics) 38-63, 306-77, 530-31 (1930).

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TABLE 12. Postwar Court Mediation and Litigation

I. Mediation cases			
<i>District Courts</i>			
Year	Filed (A)	Withdrawn (B)	(B/A) 100 (percent)
1952	6,369	483	7.58
1953	8,173	769	9.41
1954	9,629	964	10.01
1955	9,199	1,003	10.90
1956	9,653	1,083	11.22
1957	9,190	999	10.87
1958	9,297	988	10.63
1959	8,644	898	10.39
<i>Summary Courts</i>			
Year	Filed (A)	Withdrawn (B)	(B/A) 100 (percent)
1950	49,209	11,647	23.67
1951	35,501	12,575	35.42
1952	54,160	11,291	20.85
1953	57,414	11,074	19.29
1954	65,650	12,133	18.48
1955	69,587	13,160	18.91
1956	68,923	12,562	18.77
1957	64,613	11,575	17.91
1958	67,062	11,923	17.78
1959	62,095	11,267	18.14
<i>Family Courts</i>			
Year	Filed (A)	Withdrawn (B)	(B/A) 100 (percent)
1950	41,412	13,346	32.23
1951	37,920	12,655	33.37
1952	38,187	12,071	31.61
1953	38,351	12,403	32.34
1954	40,023	12,703	31.74
1955	43,109	14,181	32.90
1956	42,711	14,115	33.05
1957	43,358	14,064	32.44
1958	45,906	14,906	32.47

TABLE 12 (continued)

II. Litigation				
District Courts				
Year	Filed (A)	Withdrawn (B)	Judicial compromise (C)	[(B + C)/A] 100 (percent)
1952	69,815	18,721	10,806	49.36
1953	72,533	22,804	12,368	48.47
1954	74,442	25,583	12,798	51.53
1955	60,360	22,364	10,428	54.33
1956	61,778	24,091	10,661	58.25
1957	63,145	23,375	10,382	53.46
1958	67,232	24,561	11,249	53.26
1959	65,648	24,153	11,474	54.27
Summary Courts				
Year	Filed (A)	Withdrawn (B)	Judicial compromise (C)	[(B + C)/A] 100 (percent)
1952	28,493	8,264	8,223	62.23
1953	27,164	8,005	8,374	63.61
1954	58,041	12,848	14,216	50.08
1955	92,675	22,197	23,575	55.36
1956	83,351	25,464	24,206	59.61
1957	87,239	26,207	23,903	57.44
1958	94,633	27,597	26,364	57.02
1959	90,718	28,237	25,765	59.58

Source: Mediation and litigation in the District and Summary Courts: SAIKŌ SAIBANSHO JEMU-SŌKYOKU (General Secretariat of the Supreme Court), SHŌWA 25-34 NEN SHIHŌ TŌKEI NEMPŌ (1950-1959 Annual Reports of Judicial Statistics), 1 MINJI HEN (Civil Affairs Book): 1950, at 114-15; 1951, at 141, 143; 1952, at 63-65, 136-37, 173, 175, 200-01; 1953, at 63, 65, 144-45, 181, 183, 212-13; 1954, at 84, 87, 198-99, 247, 249, 298-89; 1955, at 89, 91, 208-09, 250, 261, 300-01; 1956, at 115, 117, 232-33, 283, 285, 325, 329; 1957, at 141, 143, 310, 315, 363, 365, 408, 411; 1958, at 135, 137, 320, 323, 375, 377, 425, 427; 1959, at 135, 137, 322, 325, 381, 383, 433. Mediation cases in the Family Courts: SAIKŌ SAIBANSHO JEMU-SŌKYOKU, SHŌWA 34 NEN SHIHŌ TŌKEI NEMPŌ (1959 Annual Report of Judicial Statistics), 3 KAJI HEN (Family Affairs Book) 21-25, 34.

TABLE 13. Disposition of Family-Affairs Cases Through Consultation with the Tokyo Police

I. Family-affairs consultation, 1952 and 1953												
	Number handled		Satisfactorily solved (%)		Recommendations (%)		Consultation terminated (%)		Transferred to other agencies (%)		Consultation continued (%)	
	1952	1953	1952	1953	1952	1953	1952	1953	1952	1953	1952	1953
Marriage and adoption	231	182	33.3	19.2	50.7	52.7	4.3	12.1	—	—	0.4	—
Divorce and termination of adoptive relationships	2,274	1,833	20.3	27.0	56.0	60.3	12.1	10.1	0.9	0.7	0.3	0.9
De facto (non-legal) marriages	745	677	34.3	33.8	47.8	51.7	14.6	12.3	0.5	1.2	0.8	1.0
Inheritance	202	204	14.4	10.3	31.7	36.3	3.5	3.4	0.5	0.7	—	—
Support and illegitimacy matters	347	308	40.3	32.1	50.1	49.7	7.8	7.2	1.6	0.7	0.3	0.3
Family registration matters	197	135	24.4	17.0	72.6	77.8	2.5	4.4	0.5	0.7	—	—
Welfare matters	745	818	24.0	22.2	47.3	46.4	3.4	2.1	2.6	1.9	0.5	0.4
Employment matters	228	123	17.1	20.3	79.8	84.2	2.8	2.4	—	4.1	0.4	—
Miscellaneous	3,629	3,073	34.8	33.1	55.1	57.0	7.1	8.0	1.5	1.4	0.3	0.5
Total	8,618	7,041	32.0	30.1	47.8	50.8	8.4	8.4	1.2	1.2	0.6	0.6
Consultation for Prevention of Criminal Actions, 1952 and 1953												
Eviction from buildings	3,003	3,442	31.7	30.6	53.5	57.0	11.6	10.6	0.4	0.3	0.9	1.4
House lease	2,448	2,623	32.6	33.2	54.7	56.1	9.2	9.4	0.3	0.4	0.6	1.0
Land matters	1,337	1,342	27.9	25.3	59.4	62.3	19.6	10.9	0.7	0.3	1.2	1.2
Monetary loans	3,144	2,832	43.7	40.8	37.2	41.2	13.9	14.0	2.4	1.3	2.9	2.8
Matters relating to valuable (negotiable) securities	327	448	41.8	37.7	33.8	36.3	12.5	22.4	3.1	1.0	6.1	1.4
Nonpayment of wages	848	843	46.1	50.6	38.2	34.1	10.4	10.1	1.4	3.5	0.8	1.7
Borrowed goods	468	448	45.2	53.1	37.6	31.0	13.9	11.4	2.8	1.8	0.9	0.7
Nonperformance of contract	3,071	3,487	46.8	43.8	33.1	38.9	14.9	14.5	1.7	1.5	3.7	3.3
Miscellaneous	3,629	3,073	34.8	33.1	55.1	57.0	7.1	8.0	1.5	1.4	0.5	0.5
Total	8,618	7,041	32.0	30.1	47.8	50.8	8.4	8.4	1.2	1.2	0.6	0.6

TABLE 13 (continued)

II. Family-affairs consultation, 1958 and 1959												
	Number handled		Satisfactorily solved (%)		Recommendations (%)		Consultation terminated (%)		Transferred to other agencies (%)		Consultation continued (%)	
	1958	1959	1958	1959	1958	1959	1958	1959	1958	1959	1958	1959
Marriage and adoption	152	168	34.3	34.7	64.5	67.5	10.5	8.4	0.7	2.6	—	—
Divorce and termination of adoptive relationships	1,657	1,558	32.6	31.1	66.3	72.0	8.4	8.1	1.4	1.2	0.2	0.7
De facto (nonim) marriages	907	1,013	34.9	34.4	52.9	53.0	10.4	8.0	3.0	2.4	0.6	0.3
Inheritance	269	254	2.2	8.7	62.8	64.8	2.2	2.8	1.8	—	—	—
Support and illegitimacy matters	263	180	34.4	30.6	67.2	70.8	4.4	8.0	2.8	3.9	0.5	—
Personal problems	2,724	2,900	28.4	28.4	48.7	50.4	6.8	8.7	3.8	4.2	0.4	0.3
Welfare matters	432	405	32.4	38.3	47.2	48.9	7.1	2.3	15.4	13.1	—	0.7
Employment matters	166	154	45.2	43.5	47.0	48.5	3.6	1.5	4.2	4.5	—	—
Miscellaneous	2,400	2,484	34.9	40.9	54.0	51.3	7.6	4.7	3.3	3.0	0.2	0.1
Total	9,043	9,178	32.3	34.3	56.2	58.3	7.1	8.7	4.1	3.4	0.3	0.3
Consultation for Prevention of Criminal Actions, 1958 and 1959												
Ejection from buildings	2,501	2,399	32.2	31.2	55.8	59.2	10.6	7.0	0.8	0.5	0.7	0.3
House lease	2,633	2,584	32.9	32.6	58.3	59.3	9.2	8.0	1.3	1.5	0.3	0.6
Land matters	2,010	2,177	22.9	22.8	63.4	67.3	9.5	8.3	1.1	1.2	1.0	0.7
Monetary loans	2,827	2,737	42.4	38.0	43.7	47.7	11.6	9.8	2.3	2.7	1.3	1.8
Matters relating to valuable (negotiable) securities	573	514	32.0	31.5	41.6	46.5	18.3	15.8	5.1	4.7	1.7	1.8
Nonpayment of wages	890	920	51.6	51.1	32.7	32.2	10.3	11.2	4.6	4.7	0.8	0.9
Borrowed goods	348	341	52.3	51.4	31.3	33.5	12.7	10.3	4.5	4.4	0.3	0.3
Non performance of contract	2,485	2,293	41.7	43.5	31.7	33.5	14.4	14.7	3.2	3.8	1.4	2.4
Miscellaneous	6,375	6,890	41.8	39.2	43.8	43.6	8.3	8.4	3.2	3.2	0.6	0.7
Total	21,829	21,824	38.6	38.3	47.1	49.8	10.8	9.7	2.8	2.8	0.9	1.1

Source: HIRONAKA, note 38 in text, at 106-09, 118-19.

TABLE 14. Arbitration and Mediation Cases

Year	Arbitration			Mediation
	C <sup>a</sup>	L <sup>b</sup>	Total	
1946	0	0	0	176
1947	0	2	2	823
1948	0	6	6	1,406
1949	0	4	4	1,296
1950	0	0	0	1,114
1951	0	2	2	1,033
1952	0	1	1	1,051
1953	1	2	3	1,068
1954	1	1	2	1,021
1955	1	1	2	1,123
1956	1	2	3	1,027
1957	0	2	2	1,339
1958	1	3	4	1,174
1959	0	3	3	1,297
1960	0	7	7	1,194
Total	5	30	41	16,141

<sup>a</sup> Central Labor Relations Commission.

<sup>b</sup> Local Labor Relations Commission.

Source: Based upon unpublished materials furnished by the Ministry of Labor.

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\*31 THE UNRELUCTANT LITIGANT? AN EMPIRICAL ANALYSIS OF JAPAN'S TURN TO LITIGATION

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**ABSTRACT**

This paper analyzes the rapid increase in civil litigation in Japan during the 1990s in light of existing theories of Japanese litigiousness. Using a unique set of prefecture-level data, it demonstrates that the 1990s increase in litigation is best attributed to two factors: the expansion in institutional capacity for litigation traced to procedural reforms and an expansion in the bar, and structural changes in the Japanese economy related to the postbubble slowdown in growth. The paper contributes to three literatures. First, it builds on earlier institutionally oriented research on civil litigation in Japan by John Haley and Mark Ramseyer by providing new data and detail about the institutional barriers to litigation. Second, it contributes to the literature on the relationship between economic change and litigation more generally. Finally, it contributes to the empirical and comparative literature on litigation rates by providing evidence about the determinants of litigation in one country.

**1. INTRODUCTION**

It is a commonplace in comparative law that, when compared to Americans, Japanese do not litigate much (see Wollschlager 1997). This fact has been seized on by American critics of lawyers and the litigation system (Bok 1983), by Japanese who argue that it demonstrates the superiority of the Japanese political and social system, and by reformers who argue for an expanded role for law and litigation in Japan.

\*32 While there is little dispute about the lower levels of litigation, the question of why Japanese litigate less is the subject of great dispute. A traditional explanation, offered by many Japanese academics, was that Japanese had a basic cultural preference for consensus and harmony (Kawashima 1963; Noda 1976, pp. 165-66). In a classic article, John Haley (1978) argued that cultural accounts were overblown and that institutional factors, such as the relative dearth of judges and lawyers in Japan, explained the alleged difference in propensities to litigate. Later, Mark Ramseyer (1988; Ramseyer and Nakazato 1989) used economic analysis to develop a different institutional account of the sources of litigation, focusing less on institutional barriers and more on institutional quality.

This paper returns to this classic debate in the light of the changes experienced by Japan's legal system in the last decade. Litigation in Japan has increased significantly since 1990, when most of the theorizing was complete. This increase has been accompanied by an expansion in the size of the bar, the reform of substantive law in a number of areas, and significant procedural changes to make litigation more attractive. These dramatic reforms of the legal system, as well as economic disruptions experienced by Japan in the 1990s, provide an opportunity to test the various assertions in the debate over litigation in Japan and to refine theory accordingly.

We use a unique set of prefectural-level data for the 1990s to evaluate the various theories of Japanese litigation behavior. Our approach is longitudinal. Rather than enter the thicket of cross-national comparisons, which typically involve apples and oranges, we compare litigation in Japan over time to allow us to isolate which factors have the greatest impact in encouraging litigation (see Haley 2002, p. 125).

This examination contributes to a number of literatures. First, it furthers institutionally oriented research on civil litigation in Japan, building on earlier work by Haley and Ramseyer, among others. It also touches on broader questions of the role of law in economic growth and the reciprocal relationship between growth and litigation. Finally, it contributes<sup>33</sup> to the empirical and comparative literature on litigation rates by providing evidence about the determinants of litigation in one country.

Any study of litigation rates is limited by the problem of baselines. The law and society literature has identified this as the issue of "naming, blaming, and claiming" (Felstiner, Abel, and Sarat 1980; see also Trubek et al. 1983). Before any dispute gets to court, the aggrieved party must first feel that it has suffered a wrong and must identify a responsible party. Only then will a dispute be potentially available for litigation. Without knowing the underlying baseline level of potential disputes, it is difficult, even in one society, to determine whether a level of litigation is "high" or "low" or even to evaluate how substantial an increase has occurred. We are not asserting that Japanese have now become litigious in some absolute sense but rather are seeking to unpack what factors may influence change in litigation patterns.

The paper proceeds as follows. Section 2 reviews the 4-decade-old theoretical debate on litigation in Japan. Section 3 describes the increase in litigation during the 1990s along with other reforms of the legal system that might be thought to contribute to this phenomenon. Section 4 presents the model and empirical analysis. Section 5 analyzes the implications of the analysis for the theoretical debate. Section 6 concludes.

## 2. THEORIES OF LITIGATION IN JAPAN

It is customary in any discussion of Japanese litigation to begin with the idea that Japanese are simply nonlitigious as a result of a cultural preference. The fact that Japanese litigate less frequently than citizens of other advanced industrial societies has been explained as cultural in origin. Unlike conflict-laden Western societies, we were told, culturally homogenous Japan valued peace, harmony, and getting along over rights and litigation.

The most sophisticated variant of this argument was offered by Takeyoshi Kawashima (1963). In keeping with the dominant paradigm of his time, Kawashima saw Japan as a society whose modernization was incomplete. Invoking Japanese history going back to Shōtoku Taishi (573-622 C.E.), he asserted that Japanese held a cultural preference for informal mechanisms of dispute resolution. This preference was rooted, in his view, in a comfort with particularistic, hierarchically defined roles and relationships and was incompatible with judicial decisions based on<sup>34</sup> universal standards of behavior. Kawashima also noted that Japanese society was changing and becoming more modern. The implication was that as modernization proceeded, Japanese would become more litigious.

This culturalist argument was attacked in a classic article by John Haley (1978; see also Upham 1998). Haley first observed that litigation in most countries is an expensive and time-consuming process. [FN1] An assertion that Japanese have a cultural preference for alternative dispute resolution implies that Japanese would be willing to pay rather than to go to court, that is, accept an outcome that is less favorable than would be reached in court. [FN2] He noted that at certain times in Japanese history, such as the interwar period, litigation rates had been high, which suggests that there was more to the story than a unidirectional modernization process or a permanent cultural aversion to litigation. A better explanation for the observed low litigation rates, argued Haley, was the lack of institutional capacity in the legal system. Compared with the United States, Japan had relatively few lawyers per capita. [FN3] It also had few judges, with correspondingly high caseloads and delays. Furthermore, Japanese courts had inadequate remedies available, with no contempt power. [FN4] Thus, there was little incentive to bring cases to court.

Another answer to the puzzle of low litigation rates was provided by Mark Ramseyer in a pair of articles revisiting Haley's thesis (Ramseyer 1988; Ramseyer and Nakazato 1989). Ramseyer argued that it was not the weakness of the Japanese legal system that accounted for low litigation rates, but rather its strength. Litigation occurs only when parties either cannot or do not predict what the court will do. If courts are predictable and the result can be accurately

determined in advance, rational parties will settle. Greater predictability makes it more likely that the estimated outcomes of the parties will converge, thus making it easier to reach agreement. There are many features of the Japanese court system \*35 that render it more predictable than America's court system. For example, Japanese judges all receive common training and socialization at the Judicial Training and Research Institute, reducing variance among judicial decisions compared with the diverse United States, where judges are appointed later in life in an explicitly political process. In addition, Japan has no juries to add unpredictability. Japan's legal system provides a public formula to standardize judicial decisions on damages, further leading to uniformity. Finally, Ramseyer noted that the trial structure involved discontinuous proceedings, giving judges many chances to signal their views to the parties and the parties more opportunities to settle. He provided data from traffic accidents to show that out-of-court settlements closely approximate the amount litigants would gain in court, providing little incentive to litigate. He argued for the superiority of the predictability theory, noting that if cost was the only factor, litigants should be willing to settle for lesser amounts.

Takao Tanase's (1990; see also Tanase 2001) contribution to the debate sought to combine institutional and cultural accounts with a perspective he called "management." Tanase argued that the Japanese elite had an interest in low levels of litigation, to insulate government policies from challenge. But they also needed to provide alternative fora in which disputes could be resolved away from the courts. This account echoed that of Upham (1986), who had argued that the bureaucracy encouraged informality. Tanase (1990, pp. 658-59) also focused on availability of lawyers as the key barrier to pursuing justice in courts. But the management perspective, besides having political overtones, is distinctive for emphasizing the availability of alternatives to litigation.

We thus have at least four differing explanations for the observed low litigation rates: one cultural (Kawashima), two institutional (Haley and Ramseyer), and one that combines the two in a perspective that might be called political (Tanase). Each of these theories has a prediction about what might be necessary to observe a greater level of litigation among the Japanese. Kawashima might expect such an increase as a result of socioeconomic modernization. Haley and Ramseyer would look to institutional changes in the costs and benefits of litigation, with Ramseyer focusing on the issue of predictability and Haley on the issue of capacity. Tanase would not expect much increase in litigation without a breakdown in the systems of elite management of disputes and the substitution of alternative dispute fora.

One should not overstate the degree to which these various theories are mutually exclusive. It is perfectly possible and in fact likely that the \*36 function explaining litigation would include elements of culture, institutional barriers, predictability, and alternatives. Nevertheless, the theories do have different empirical implications. This provides us with an opportunity to use recent data to try to sort out the various explanatory strands.

### 3. THE JAPANESE TURN TO LITIGATION

Around 1990, Japan's great economic bubble began to pop. As the economy bounced in and out of recession for the next decade, pressure began to build for legal change. A wave of reforms to fundamental legislation and legal institutions followed, including, *inter alia*, reforms of civil procedure and corporate law; an overhaul of financial law; passage for the first time of an administrative procedures act, a law on information disclosure, and a products liability law; and, most recently, efforts to overhaul the system of legal education and professional training. Because of the range and scale of these reforms, some have compared the current period with the systemic transformations of the late 19th century and the U.S. Occupation era (Rokumoto 2001), and the reformers themselves have invoked the parallels (Justice System Reform Council 1999).

As legal reform was proceeding, Japanese began to litigate more frequently. Table 1 provides an indicator of the number of suits filed in district courts since 1986. During this period, there was a stark increase in litigation beginning in 1992 and steadier increases from 1993 onward, along with a slight decline in the last 2 years. [FN5]

This section considers three recent institutional reforms and their potential impact on civil litigation, along with other factors that might conceivably lead to greater litigation rates. The three reforms that we focus on are expansion of the bar, changes to the civil procedural code, and substantive legal reform that gives expanded opportunities to litigate. We also consider the role of judges and of economic change. We do not, in this section, consider the availability of alternatives, the factor focused on by Tanase in his analysis, but we return to that issue in Section 5. For each set of reforms, we consider the predictions of the various theories.

\*37 Table 1. New Common Actions in District Courts per Year

Year	New Common Actions	New Common Actions per 1,000 Persons
1986	111,937	.9200
1987	113,804	.9309
1988	112,557	.9168
1989	104,469	.8478
1990	100,212	.8107
1991	105,161	.8474
1992	122,670	.9848
1993	136,326	1.0912
1994	139,130	1.1107
1995	136,806	1.0895
1996	135,455	1.0762
1997	139,652	1.1070
1998	144,809	1.1450
1999	142,272	1.1232
2000	147,759	1.1641
2001	146,113	1.1479

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20  
21  
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2002

143,859

1.1289

### 3.1. Expansion of the Bar

Japan is famous, or infamous, for having a small number of lawyers, leading prominent observers such as Derek Bok (1983) to call for the United States to become more like Japan in encouraging smart students to go into engineering rather than law. Legal education developed out of a continental model and saw as its goal the training of generalist state officials (Levin 2000). Bar passage was seen as a separate goal, reserved for an elite group. Some early observers, such as Kawashima, attributed the small number of lawyers to a lack of demand for legal services from the Japanese public, ignoring the role of regulation in determining the availability of legal services.

Successful entrants into the legal profession have completed a university education in law, passed a very competitive exam (*shihō shiken*) to pass the bar, and then undertaken an 18-month training course at the Legal Training and Research Institute (LTRI). Exam passage was traditionally limited to 500 persons annually (out of some 20,000 applicants in a typical year), nominally because of limitations on the capacity of the LTRI building. The exam to enter the LTRI was overseen by a committee consisting of a Justice Ministry official, secretary general of the Supreme Court, and a practicing attorney recommended by the Federation of Bar Associations (Nichibenren). This "iron triangle" acted as the exclusive set of policymakers when it came to regulation of the legal profession for most of the postwar period (Rokumoto 2001, p. 553).

In 1991, an agreement among the three main actors led to a revision of the National Bar Examination Act and a gradual expansion in the size of the bar passage group, combined with a reduction in the term needed to complete the LTRI course. The exam control committee adopted a quota that reserves 30 percent of passage "slots" for those who take the exam three times or fewer, beginning in 1996. By 1999, the period of training was shortened from 2 years to 18 months, and the LTRI graduated 1,000 persons in 2000, a 100 percent increase over the 500 graduates in 1991. This expansion will continue, according to the final report of the Justice System Reform Council, released on June 12, 2001. The report calls for expanding the bar to an expected number of 50,000 lawyers by 2018, roughly tripling in 18 years. The goal is stated in terms of expected number of graduates of the LTRI and thus continues the tradition of managing the growth of the profession rather than setting a standard and relying on market processes to control entry. Nevertheless, the expected substantial increase in lawyers is an important step.

Other things being equal, greater availability of lawyers should make litigation cheaper and more accessible, and hence we would expect litigation rates to increase. This is consistent with all of the theories, save that of Kawashima, who would say that both litigation rates and lawyers were caused by the shared independent factor of socioeconomic modernization.

One of the articulated rationales for expanding the bar was to increase the availability of lawyers in rural prefectures. Lawyers are unequally distributed around Japan, with most concentrated in urban centers and some prefectures having only a handful of attorneys (Yonemoto 1995). We obtained prefecture-level data on the number of attorneys and learned that the increase in lawyers has not been uniform around the country. Figure 1 presents a map showing which prefectures had increases or decreases in the number of lawyers per capita. Prefectures shown in white lost lawyers, while prefectures shown in gray gained. The intensity of the gray scale captures the extent of the increase. Note that growth is very uneven. Most of the increase in the number of lawyers occurred in the urban prefectures, where lawyers had been previously concentrated. Urban prefectures uniformly added above-average percentages of lawyers, and of course in absolute terms the effect is even stronger because of high base rates there. Tokyo, for example, added 3,039 lawyers during the period, a 51 percent absolute increase. This represented 53 percent of the increase for all of Japan.

\*39 Figure 1. Increase in lawyers per 100,000 persons, 1986-2002

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

### 3.2. Procedural Reform

After long discussions, the Civil Procedure Code was amended in 1996, effective January 1, 1998, to make litigation more attractive (Ota 2001). \*40 A major factor behind the reform was perceived disincentive for business to use the courts. [FN6] Taniguchi (forthcoming; see also Taniguchi 1997) traces three forces behind the civil procedure reforms. First was German influence, specifically the reform of German civil procedure in the 1970s. Second was the support of some elements of the bar, in the context of more cooperative relations between the bar and the judiciary. Third was pressure by Keidanren and Keizai Doyukai, the leading business associations in Japan, which became interested for the first time in facilitating litigation. Against these interests stood certain elements of the bar that preferred slower procedures: a concentrated trial, while easier on the judge, requires more preparation by the lawyer. Furthermore, some lawyers had been charging by the appearance, creating a disincentive to shift to a concentrated trial. But the bar ultimately was unable to resist reforms.

There were several major reforms, two of which are most relevant to our analysis. First, there was a shift toward more concentrated trial procedure and new techniques of case management to reduce delay. Second, discovery procedures were expanded, including the introduction of a general duty to produce documents, judicial power to order production, and the use of interrogatories for the first time. Discovery should encourage filings by making proof easier to obtain, raising the expected benefit of litigating certain types of cases. [FN7]

What empirical predictions would be associated with the concentrated trial procedure? The issue is complicated. To the extent that the concentrated trial procedure and case management tools reduce disposition times, we would expect that filings might increase following the introduction of reforms. However, the increased workload from new filings would put new pressure on disposition times, so it is hard to say whether disposition times would actually improve. Barring an increase in the size of the judiciary, streamlined procedures could actually lead to longer backlogs, as filings increase to fill "unused" judicial capacity. In our analyses that follow, we code for an effect to see if there was any increase in filings associated with the civil procedure reforms effective January 1, 1998, although we do not consider disposition times directly.

Ramseyer and Nakazato (1989) have argued that discontinuous trial \*41 procedures might actually discourage judicial resolution because the various gaps in the procedure allow time for settlement discussions between hearings. Of course, the effect this would have on filings would be different than it would on cases ultimately resolved. Ramseyer and Nakazato's theory implies that settlement rates would be higher under discontinuous procedures than under continuous procedures because of iterated periods of negotiation during which the judge could signal information to the parties about his ultimate decision. This implies that the ratio of filings to completed cases might decrease with streamlining procedural reforms.

To be certain, even after the reforms, institutional barriers to litigation are many. Compared with the United States, the unavailability of punitive damages for many kinds of civil disputes means that attorneys have no positive incentive to seek out plaintiffs. Furthermore, plaintiffs have relatively less incentive to litigate when at best they will be made whole, without the "tort lottery" that allows them to get a share of punitive damages. Certain other features of the American system, such as contingency-fee arrangements, have analogues in Japan, but it is not clear whether they are frequently utilized. A related expense is the need to purchase revenue stamps (*inshi*) as a portion of the amount claimed. [FN8] Finally, the weaker sanctions available to judges in the Japanese discovery process discourages fishing expeditions whereby lawyers can pursue low-probability claims in the hope that the discovery process will produce some information that would increase the probability of a victory. All of these factors mean that there are still procedural and institutional barriers to litigation, at least as compared with the United States.

### 3.3. Legal Reforms

Another factor that may give rise to changes in litigation behavior is substantive legal change that makes suits easier or more difficult. For example, effectively lowering the fees of shareholders' derivative actions in 1993 no doubt encouraged such filings (West 1994). Corporate law reforms were staggered throughout the period, and a 1993 products liability law led to more lawsuits in that area, albeit from a low base (Nottage 2004). Legislative changes in the financial sector associated with the "Big Bang" were no doubt a factor too. For example, Zaloom \*42 and Nagashima (forthcoming) note that as foreign "vulture funds" took over the nonperforming loan portfolios of certain Japanese banks, they became more aggressive in collecting on the loans than did the Japanese banks.

Overall, however, there was little legal change likely to affect Japanese litigation broadly. While substantive change may have affected the litigation incentives of particular groups, there was no major legal change akin to the waves of massive structural reform that Japan experienced in the Meiji and Occupation eras. The Civil Code remained stable. There were no new causes of action introduced. Thus, the effect of legal change is likely to be small.

### 3.4. Judges

Judicial capacity formed a significant constraint on litigation in Haley's analysis. He notes that the number of judges in Japan has historically been very small, and the size of the judiciary remained relatively constant during the 1990s. Data from the Japanese Supreme Court indicate that there were 3,050 judges nationwide at the end of 2003. The comparable figure from 1994 was 2,808.

We also have no reason to think that judicial quality declined during the period under review. The training mechanism remained constant, albeit with a shortening of the formal training period by 6 months. The mechanisms of hierarchical control and supervision, so well documented by Ramseyer and Rasmusen (2002), remained intact. And there is no reason to think that judges were able to exercise more independence at the end of the period than at the beginning, as there were no major political shifts in the period. In any case, it is arguable that the cases we analyze, civil disputes, are those wherein the ruling Liberal Democratic Party (LDP) would have little interest, as opposed to tax cases and suits against the government.

### 3.5. Structural Changes in the Economy

*Governmental Deregulation,*

A final variable that we will consider is the effect of secular economic change on litigation behavior. It is something of an axiom in sociological studies that litigation breaks relationships. Hence, one is less likely to litigate when one is engaged in long-term commercial relationships with suppliers, partners, or consumers. This factor was noted by Kawashima to explain why Japanese litigiousness could be expected to increase with modernization.

Other things equal, sustained economic downturns are likely to lead \*43 to the breaking of at least some long-term relationships. While "forgiving" behavior and economic adjustment to the temporarily strained circumstances of a partner might be acceptable when the pie is expanding, firms and individuals have less capacity to make such adjustments when the pie is no longer growing or is even shrinking. We thus predict that economic circumstances will have an inverse relationship with litigation behavior, other things constant.

## 4. EMPIRICAL INVESTIGATION

### 4.1. Data and Variables

To investigate which of the predicted factors had an effect on the amount of litigation, we analyze litigation in

each of Japan's 47 prefectures from the period 1986-2001. [FN9] Our dependent variable is the amount of litigation per capita. We obtained information on the number and type of litigation in each year in each prefecture from the *Shiho tokai nenpo* (Annual report of judicial statistics) published by the Supreme Court of Japan. We counted litigation at the level of the district courts, which handle the first instance of most types of civil cases. [FN10] Following Haley (1978), we focused on new common civil actions (*tsujo sosho jiken*), calculating the number of actions per capita. This category includes many types of "ordinary" civil cases, such as tort suits, loan collections, and commercial cases.

Turning to our explanatory variables, we obtained annual data on the number of lawyers in each prefecture from the Japan Federation of Bar Associations (Nihon Bengoshi Rengokai, or Nichibenren). The federation, in conjunction with the local bar associations, is an autonomous body for the regulation of attorneys, independent of the Diet, the courts, and government agencies. All attorneys in Japan become members of the federation upon obtaining membership in their local bar association, and the federation tracks attorneys per judicial district.

There are 50 district courts in Japan having territorial jurisdiction \*44 over their particular judicial districts, and 478 summary courts within these districts. [FN11] Except in Hokkaido, which is divided into four judicial districts, the area of each judicial district is identical with that of each prefecture. (We treat the four Hokkaido districts as a single unit for purpose of our analysis, since economic and demographic data are available only at the level of the entire prefecture.) There is a local bar association for each district, with the exception of Tokyo, which has three local bar associations, mainly for historical and political reasons. To obtain the number of lawyers in Tokyo, we summed the total number of reported attorneys in all three bar associations.

Data on the number of judges at the district court level in each prefecture came from the *Zen Saibankan Keireki Soran* (Biographical guide to judges), which was published in 1987, 1990, and 1998. We used those data points to interpolate values for the other years. The resulting estimates of growth in the judiciary are consistent with the statistics on all judges provided by the Japanese Supreme Court.

We captured the effects of the 1998 civil procedure reforms in two alternative ways. On the assumption that their full effect was felt immediately, we generated a dummy variable set to one in years during which the reforms were in effect (1998 and later). To allow for the possibility that their effect was more gradual, we generated a variable measuring the number of years in which the reforms had been in effect. [FN12]

We also gathered annual demographic and economic data for each prefecture from the *Kenmin keizai kisan nenpo* (Annual report on prefectural accounts), compiled by the Japanese government's Economic and Social Research Institute. In order to investigate the effect of economic conditions on litigation rates, we included both prefectural income and annual change in prefectural income. The former captures absolute wealth, while the latter indicates growth or decline, which will allow us to assess the degree to which economic growth or downturn influences litigation rates. [FN13] Finally, to allow for the possibility that litigation is \*45 more common in urban settings, where interpersonal relationships may be less strong on average, we generated a dummy variable set to one for the most urban prefectures. We hypothesize that urbanization is associated with the modernization variable emphasized by Kawashima and the culturalists. In the reported results, we defined the most urban prefecture as the specially designated *fu* (urban prefectures) and *to* (metropolis): Kyoto-fu, Osaka-fu, and Tokyo-to. In robustness checks, we used several other definitions, by including prefectures containing three, four, five, or six of Japan's four largest cities as of 2000.

Table 2 provides descriptive statistics and correlations for our data. Two measures provide no evidence of problematic multicollinearity. The maximum variance inflation factor is 2.32, and the mean variance inflation factor is 1.48, both well below the critical value of 10. The condition number of the model is 13.79, well short of the critical value of 30.

#### 4.2. Model

Our data are a balanced panel with 16 annual observations for each of the 47 prefectures. If we performed ordinary least squares without controlling for the panel nature of our data, we would risk obtaining inflated standard errors. Therefore, we estimate a random-effects model that accounts for potential heterogeneity across prefectures and yields accurate standard errors (Hsiao 2003). [FN14]

In addition, we need to address the possibility that the numbers of lawyers and judges are endogenous to the amount of litigation in a prefecture, in particular, that all three quantities may be simultaneously determined. In the presence of endogeneity, our coefficient estimate would be biased and inconsistent. Indeed, Davidson and McKinnon's (1993, pp. 236-42) augmented regression test strongly rejects the hypothesis that the numbers of judges and lawyers are exogenous ( $p = .0132$ ). Therefore, we also estimate a generalized two-stage least squares model to control for both endogeneity and the panel nature of our data, providing consistent coefficient estimates (Balestra and Varadharajan-Krishnakumar 1987).

After performing a generalized least squares transformation on the variables to control for their panel nature, the first stage of this method generates instrumented values of the endogenous variables, number of lawyers and number of judges, by regressing each against all of the exogenous variables in the system. The results of this stage are used in the second stage, in which litigation is estimated using the predicted value of each instrumented variable in place of its actual value. This removes the impact of endogeneity by purging the endogenous variables of their correlation with the error term in the litigation equation (Woolridge 2003, p. 500).

\*46 Table 2. Descriptive Statistics and Product-Moment Correlations

[Note: The following table/form is too wide to be printed on a single page. For meaningful review of its contents the table must be assembled with part numbers in ascending order from left to right. Row numbers, which are not part of the original data, have been added in the margins and can be used to align rows across the parts.]

\*\*\*\*\*  
 \*\*\*\*\* This is piece: 1  
 \*\*\*\*\*

1		Mean	SD	Min	Max	(1)	(2)	(3)	(4)
2	1. New common actions per capita	.0008 40	.0003 43	.0003 93	.0028 83	1.00			
3	2. Judges per capita	.0000 15	.0000 06	.0000 05	.0000 32	.32	1.00		
4	3. Lawyers per capita	.0000 69	.0000 86	.0000 22	.0007 40	.82	.29	1.00	
5	4. Post-civil pro-	.2500 00	.4333 01	.0000 00	1.000 000	.12	.01	.05	1.00

	cedure re- form										
6	5. Per capita in- come (10 million yen)	96	.0002 94	.0001	.0000 62	.0014 27		-.06	-.13	-.03	.05
7	6. Annu al change in per capita in- come (10 million yen)	05	.0000 81	.0000	-.001 041	.0010 18		-.03	-.00	.00	-.14
8	7. Large st urban prefec- tures	30	.0638 12	.2446	.0000 00	1.000 000		.72	.25	.74	-.00
9	8. <i>Shiho</i> <i>shoshi</i> (legal scriven- ers) per capita	52	.0001 41	.0000	.0000 56	.0002 69		.05	.46	-.02	-.09

\*\*\*\*\*  
\*\*\*\*\* This is piece: 2  
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1	(5)	(6)	(7)	(8)
2				
3				
4				
5				
6	1.00			
7	.19	1.00		
8	.00	.00	1.00	

9	-.06	.03	-.02	1.00
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\*47 To perform this estimation, we require variables that are correlated with the endogenous variables but not with the error term in our main equation. We use the high court district for each prefecture (a set of seven dummy variables) and the number of *shihō shoshi* (legal scriveners) in the prefecture as identifying variables. While attorneys and judges may have preferences regarding the high court district in which they want to practice, we expect that few potential litigants will be aware of what high court district they are in, much less be aware of the implications of those districts for litigation they might pursue. *Shihō shoshi* should not affect the amount of litigation, as litigation is limited to *bengoshi*. However, since the services of *shihō shoshi* and *bengoshi* overlap somewhat (for example, legal advice), the presence of *shihō shoshi* would influence the economic attractiveness of a prefecture to an attorney.

Estimation indicates that our instruments fulfill both requirements for use in a two-stage least squares model. First, they exhibit sufficient correlation with the endogenous variables ( $p < .01$  for each). Second, Hausman's (1978) overidentification test indicates that they are valid; that is, we cannot reject the hypothesis that they are uncorrelated with the error term of the litigation equation ( $p > .10$ ).

#### 4.3 Findings

First, we note that the increase in litigation in Japan, like the increase in the number of lawyers, has not been uniform during the period under review. A total of 36 prefectures experienced gains in per capita litigation, while 11 prefectures experienced losses (see Figure 2). Urban prefectures tended to gain. Rural prefectures were more varied.

Table 3 presents the results of our regression with the number of new ordinary civil cases per capita as the dependent variable. The data cover 1986-2001. Column 1 presents the initial random-effects model, and column 2 the results of the generalized two-stage least squares model. The models are substantively similar in terms of the direction and significance of results, although the magnitude of the coefficients varies across models. The latter model yields consistent estimates despite the endogeneity of the number of lawyers and judges, albeit at the cost of less efficient estimates than the random-effects model.

\*48 Figure 2. Percentage change in litigation per capita, 1986-2000

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As indicated by an  $R^2$  value of .6, our model fits fairly well. Each of our theoretical variables, with the exception of urban prefectures, is statistically significant at the .10 level or better. Our results are consistent with the view that institutional constraints explain the relatively low rate of litigation in Japan. We turn now to the results for each of the three primary institutional constraints: a shortage of lawyers, a shortage of judges, and procedural barriers.

\*49 Table 3. Regression Results: New Common Actions per Capita

	Random-Effects Regression (1)	Generalized Two-Stage Least Squares Random-Effects Regression (2)
Lawyers per capita	4.15813 <sup>FN [FNaal]</sup>	2.13934 <sup>FN [FNa1]</sup>
	(.000)	(.014)

Judges per capita	10.76755 <sup>FN [FNaa1]</sup>	21.19843 <sup>FN [FNaa1]</sup>
	(.000)	(.002)
Post-civil procedure reform	.00005 <sup>FN [FNaa1]</sup>	.00007 <sup>FN [FNaa1]</sup>
	(.000)	(.000)
Per capita income (10 million yen)	.06235 <sup>FN [FNf1]</sup>	.06362 <sup>FN [FNf1]</sup>
	(.063)	(.069)
Annual change in per capita income (10 million yen)	-.10174 <sup>FN [FNaa1]</sup>	-.08870 <sup>FN [FNf1]</sup>
	(.035)	(.079)
Largest urban prefectures	-.00015	.00031
	(.206)	(.189)
Constant	.00037 <sup>FN [FNaa1]</sup>	.00033 <sup>FN [FNaa1]</sup>
	(.000)	(.000)
<i>R</i> <sup>2</sup> :		
Within	.383	.323
Between	.706	.698
Overall	.661	.649

Note. Values in parentheses are *p*-values. Number of observations = 752; number of prefectures = 47.

FNf1. Significant at 10%.

FNaa1. Significant at 5%.

FNaa1. Significant at 1%.

We find that an increase in the number of attorneys per capita does lead to an increase in the amount of litigation per capita. However, the increase per attorney is fairly small, just over two additional cases per year. [FN15] However, it does add up. Focusing on the period affected by the \*50 1991 revision of the National Bar Examination Act and related measures to expand the bar, we see that Japan added 4,030 lawyers between 1986 and 2001. On the basis of the 2001 Japanese population, these lawyers were responsible for approximately 8,622 more new common actions in 2001 (out of a total of 146,113 new common actions that year) than would have occurred if the number of

lawyers had stayed at the 1986 figure. The prefectures where it made the largest difference were of course the ones that gained the most lawyers.

Turning to judges, we find that the addition of a judge has a larger effect than the addition of an additional attorney, with each additional judge in a prefecture increasing the number of new common cases by slightly over 20 a year. However, since the expansion of the judiciary was less than the expansion of the bar during the 1990s, the total effect of judicial expansion was smaller. As Japan added approximately 124 judges at the district court level between 1986 and 2001, this translates to 2,604 additional cases in 2001.

The 1998 civil procedure reforms also had a significant impact. We estimate that it led to approximately 8,910 more new common actions nationwide in 2001 than would have occurred without the reform. [FN16] In other words, the procedural reforms have had approximately the same effect of all the lawyers that have entered the field since 1986. [FN17]

In sum, therefore, Japan's institutional reforms appear to be having the desired effect of encouraging greater use of the legal system. Taken together, civil procedure reform and the expansion of the bar and judiciary account for over 20,000 additional cases per year, an almost 20 percent increase over the number of cases that would otherwise have been predicted. Each aspect of the reforms has played an important role in the increase. [FN18]

\*51 The noninstitutional results are also interesting. The impact of the economy on litigation is twofold. As one would expect, where there is more economic activity in absolute terms, there is also more litigation per capita. More economic activity means more transactions, and hence one would expect more litigation even if the rate of litigation per transaction remained constant. However, we also find that change in economic activity over time affects litigation. During downturns in which the prefectural income has declined since the previous year, litigation increases. [FN19] This is consistent with the literature that finds that litigation is countercyclical, as bad times mean more broken contracts and a willingness to break relationships. [FN20]

Finally, we note that, controlling for population, economic activity and the availability of lawyers, there is no evidence that urban prefectures (Tokyo-to, Osaka-fu, and Kyoto-fu) are more litigious than non-urban prefectures. [FN21] The coefficient is far from significant ( $p > .2$ ). Cultural \*52 and sociological theories of litigation often assume that urbanization increases litigation in and of itself. [FN22] Our results provide no evidence in support of this explanation while establishing that institutional and economic factors play an important role. Of course, it is possible that urbanization is simply a poor proxy for cultural variables within Japan.

## 5. DISCUSSION

These results allow us to reflect on the theoretical debate on the sources of litigation in Japan. To recap, Haley's theory focused on the lack of institutional capacity in the legal system, in particular, the difficulty of finding judges and lawyers and the lack of enforcement power of the court. Of these three factors, the one that has seen the greatest change has been the number of lawyers, which saw an early expansion that was significant in percentage terms. The number of judges has remained more or less constant in the period in question, increasing by less than 10 percent while overall number of cases increased by almost 30 percent. Our empirical analysis supports Haley's arguments about capacity. Judicial capacity appears to be a bigger constraint than the number of lawyers, as each additional judge accounts for a greater amount of litigation than does an additional lawyer. Another factor identified by Haley, the use of discontinuous trials through 1998, also appears to have had a major effect in discouraging litigation.

Ramseyer's theory focuses on predictability. Japanese sue less than Americans because their courts are more predictable and stable. This theory, however, does not directly predict a change in litigation behavior within Japan. Japan's legal system remained fairly stable in the period under review. There were no major changes in the way judges were selected or trained and no influx of new judges who might apply the law less predictably than their forebears.

Nor were there dramatic changes to the core statutes interpreted by judges, such as the Civil Code. \*53 While there were some changes in Japanese substantive law in the 1990s, these were concentrated in the financial and securities area and hardly fundamental to the types of cases that might be litigated in Aomori. [FN23] Predictability, then, remained relatively constant, but there was still a dramatic increase in litigation.

Another theory of Japanese nonlitigiousness, articulated by Tanase and Upham, is that litigation rates are low because of elite management of dispute resolution. The availability of alternative dispute resolution, it is argued, channels conflict resolution away from courts in a manner that does not threaten elite rule. The paradigm case was the interwar land tenancy mediation system, which scholars have argued was designed to extend government control but also to reduce pressure for widespread social challenge (Vanoverbeke 2003). The suggestion, then, is that informal alternatives are a substitute for, rather than a complement to, formal litigation in the courts. Following this theory, one might expect that the shift toward litigation was produced by or related to a corresponding move away from the informal alternatives. That is, one might expect that the increase in litigation resulted from a decline in either the availability or quality of informal alternatives, reflecting a loss of political control by elites.

We reject the hypothesis that the availability of alternatives is the key factor suppressing litigation in contemporary Japan, as argued by Tanase and Upham. Japan does have a distinctive set of nonjudicial alternatives to litigation, to be sure. We list the major institutions in Table 4, along with the number of cases handled by each. We use a generous definition of "case" here, summing what are categorized as resulting in referrals, mediation, and arbitration, although a referral can simply consist of a suggestion to go elsewhere. Most of these centers have experienced increasing demand over time. Thus, it does not seem likely that disputes are being channeled away from informal alternatives to the formal court system. The only dispute resolution center with decreasing usage was the pollution dispute resolution center, which even at its most active heard a small number of disputes. The total number of all cases handled by these centers, taking into account their historic high numbers of cases, is less than 10 percent of the overall civil litigation rate.

The increases in alternative dispute resolution (ADR) use and litigation are themselves highly correlated. Table 5 traces the number of traffic accident cases filed in summary courts from 1989 to 2002 as compared with the total number of cases handled by the Traffic Accident Dispute Resolution Center and two similar centers operated by the Japanese bar. [FN24] All centers report cases as referrals, mediation, and arbitration, and these figures are combined in Table 5. The annual numbers are correlated at a rate of .91. (Note that it is hardly surprising that the absolute number of cases handled by the informal alternative is greater, given the cost and time involved in formal litigation.)

\*54 Table 4. Alternative Dispute Resolution Institutions in Japan (Includes Referrals, Conciliation, and Arbitration)

	Years Data Available	Low Number of Cases	High Number of Cases
Japan Real Estate Dispute Resolution Center	1995-98	2,646	5,086
Product Liability Dispute Resolution Center	1995-2000	223	1,083
Pollution Dispute Resolution Center	1980-2003	1	48
Tokyo Consumer Dispute	1995-98	28,618	31,987

Resolution Center

Construction Industry Centers	1981-2003	206	302
Equal Employment Opportunity Disputes	1999-2003	22,885	37,346
Auto accident centers total	1989-2003	22,359	40,218
<b>Total</b>			<b>116,070</b>

The positive correlation between ADR and litigation is consistent with what we know from Japanese history. During the previous high-litigation era in Japan, the 1920s and 1930, use of ADR mechanisms also increased. [FN25] The elite management theory, whatever its explanatory power into the reasons ADR systems are established, does not provide insight into the changing demand for formal litigation. Japan's elite iron triangle of bureaucracy, business, and LDP has remained largely intact, despite a decade of economic stagnation. With the elite a constant, other factors must explain the increase in litigation.

\*55 Table 5. Traffic Accident Dispute Resolution (ADR), 1989-2002

Year	ADR Total	Litigation Total	Ratio
1989	22,359	4,260	5.25
1990	22,939	4,056	5.66
1991	23,532	3,970	5.93
1992	26,443	4,224	6.26
1993	28,552	4,416	6.47
1994	27,530	4,400	6.26
1995	28,439	4,408	6.45
1996	30,469	4,795	6.35
1997	33,067	4,484	7.37
1998	33,150	4,719	7.02

1999	35,236	5,549	6.35
2000	36,860	6,090	6.05
2001	38,571	6,249	6.17
2002	40,218	6,712	5.99

Kawashima's culturalist theory has been widely criticized by most of the authors under consideration. Our results on urbanization are consistent with these criticisms, since we find that, controlling for levels of economic activity and population, urban residents are not statistically more likely to sue. It is of course conceivable, though not in our view likely, that the urban/rural distinction is a poor proxy for cultural differences within Japan.

We also hypothesized that economic decline might be associated with increased litigation. The data suggest that absolute levels of wealth increase litigation, but economic decline also increases it. More transactions should mean more litigation, but relative growth or decline is also an important factor in the decision by firms to go to court. This result also suggests something about the earlier debate. Ramseyer, Haley, and others focused on the cross-national comparison with the United States and offered explanations for relatively low Japanese litigation rates. Our results suggest that another unexplored factor during the classical period may have been the rapid growth of the economy. Within Japan, we suggest, litigation is countercyclical. Thus, the bursting of the bubble, by breaking social and economic relationships, might have encouraged litigation in the 1990s. Figure 3 presents the data on growth and litigation, showing that they had an inverse relationship in the period under study.

\*56 Figure 3. Growth and litigation

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

This result suggests that the core insights of sociolegal literature on litigation apply to Japan, just as to other societies. We thus expect, in Japan as elsewhere, that economic stress breaks relationships, leading to more disputes that become salient enough to resolve through courts. Expanded access to lawyers and a friendlier civil procedure had predicted effects, with the former having a larger influence. In short, Japanese appear to respond to incentives to litigate just as do citizens of other advanced industrial democracies.

## 6. CONCLUSION

This paper has explored Japan's turn to litigation in the 1990s. From 1986 to 2001, the Japanese civil litigation rate increased by 29 percent. Most of this increase was concentrated in urban prefectures but can be explained as primarily resulting from economic decline, the expansion in the bar, and the streamlining of civil procedure. We find no support for the hypothesis that cultural factors play a major role. Among legal reforms, the expansion of the bar and civil procedure reform had the \*57 largest cumulative impact. The slight increase in the judiciary also accounted for increased litigation, as each additional judge increased litigation by more than each additional lawyer.

While our results are limited to Japan, they have implications for the comparative study of law and legal institutions. Litigation rates provide a notoriously difficult field for cross-national study because institutional environments vary so widely (but see Wollschlager 1997). Within a single legal system, however, we can try to isolate the factors that lead to more or less litigation and the impact of particular reforms. Our analysis suggests that both procedural incentives to litigate and attorney availability matter, and matter a good deal, relative to other institutional factors. Per-

haps more important, however, are underexplored relationships between the economy and litigation.

## REFERENCES

Balestra, P., and J. Varadharajan-Krishnakumar. 1987. Full-Information Estimations of a System of Simultaneous Equation with Error Component Structure. *Econometric Theory* 3:223-46.

Bok, Derek C. 1983. A Flawed System of Law Practice and Training. *Journal of Legal Education* 33:570-85.

Davidson, Russell, and James G. McKinnon. 1993. *Estimation and Inference in Econometrics*. New York: Oxford University Press.

Felstiner, William L. F., Richard L. Abel, and Austin Sarat. 1980. The Emergence and Transformation of Disputes: Naming, Blaming and Claiming. *Law and Society Review* 15:631-54.

Field, Norma. 1991. *In the Realm of a Dying Emperor*. New York: Pantheon Books.

Haley, John Owen. 1978. The Myth of the Reluctant Litigant. *Journal of Japanese Studies* 4:359-90.

\_\_\_\_\_. 1991. *Authority without Power: Law and the Japanese Paradox*. New York: Oxford University Press.

\_\_\_\_\_. 2002. Litigation in Japan: A New Look at Old Problems. *Willamette Journal of International Law and Dispute Resolution* 10:121-42.

Hausman, Jerry A. 1978. Specification Tests in Econometrics. *Econometrica* 46: 1251-71.

Henderson, Dan Fenno. 1997. The Role of Lawyers in Japan. Pp. 1-59 in *Japan: Economic Success and Legal System*, edited by Harald Baum. Berlin: de Gruyter.

Hsiao, Cheng. 2003. *Analysis of Panel Data*. 2d ed. New York: Cambridge University Press.

\*58 Justice System Reform Council. 1999. The Points at Issue in the Justice Reform. December 21. English translation at [http://www.kantei.co.jp/foreign/policy/sihou/singikai/991221\\_e.html](http://www.kantei.co.jp/foreign/policy/sihou/singikai/991221_e.html).

\_\_\_\_\_. 2001. Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century. June 12. English translation at <http://www.kantei.co.jp/foreign/judiciary/2001/0612report.html>.

Kawashima, Takeyoshi. 1963. Dispute Resolution in Contemporary Japan. Pp. 41-72 in *Law in Japan: The Legal Order in a Changing Society*, edited by Arthur von Mehren. Cambridge, Mass.: Harvard University Press.

Levin, Mark. 2000. Legal Education for the Next Generation: Ideas from America. *Asian-Pacific Law and Policy Journal* 1:3-19.

Noda, Yosiyuki. 1976. *An Introduction to Japanese Law*, translated by Anthony Angelo. Tokyo: University of Tokyo Press.

Nottage, Luke. 2000. The Present and Future of Product Liability Dispute Resolution in Japan. *William Mitchell Law Review* 27:215-35.

\_\_\_\_\_. 2004. *Product Safety and Liability Law in Japan*. New York: Routledge.

Nottage, Luke, and Christian Wollschlager. 1996. What Do Courts Do? *New Zealand Law Journal*, pp. 369-73.

Ota, Shozo. 2001. Reform of Civil Procedure in Japan. *American Journal of Comparative Law* 49:561-83.

Ramseyer, J. Mark. 1988. Reluctant Litigant Revisited: Rationality and Disputes in Japan. *Journal of Japanese Studies* 14:111-23.

Ramseyer, J. Mark, and Minoru Nakazato. 1989. The Rational Litigant: Settlement Amounts and Verdict Rates in Japan. *Journal of Legal Studies* 18: 263-90.

\_\_\_\_\_. 1999. *Japanese Law: An Economic Approach*. Chicago: University of Chicago Press.

Ramseyer, J. Mark, and Eric B. Rasmusen. 2002. *Measuring Judicial Independence*. Chicago: University of Chicago Press.

Rokumoto, Kahei. 1978. Higaisha-gawa tojisha no hokodo (The legal process from the perspective of the victim as a party). Pp. 33-82 in *Jidosha Jiko o meguru funso shori to ho* (Law and resolution of automobile accident disputes), edited by Takeyoshi Kawashima and Ryuichi Hirano. Tokyo: Iwanami Shoten.

\_\_\_\_\_. 2001. Law and Culture in Transition. *American Journal of Comparative Law* 49:545-60.

Tanase, Takao. 1990. The Management of Disputes: Automobile Accident Compensation in Japan. *Law and Society Review* 24:651-86.

\_\_\_\_\_. 2001. Soshō riyō to kindaikahan-setsu (Theory of litigation as a reflection of modernization). Pp. 289-311 in *Shindo Kōji sensei koki shūkuga: Minji soshō ho riron no arata na kochiku* (Essays in honor of the 70th birthday of Professor Kōji Shindo: New constructions in civil procedure law theory, Vol. 1). Tokyo: Yuhikaku.

\*59 Taniguchi, Yasuhei. 1997. The 1996 Code of Civil Procedure in Japan—a Procedure for the Coming Century? *American Journal of Comparative Law* 45: 767-91.

\_\_\_\_\_. Forthcoming. Civil Procedure Reform. In *Law in Japan: A Turning Point?* edited by Dan Foote and Veronica Taylor. Seattle: University of Washington Press.

Trubek, David, William Felstiner, Joel Grossman, Herbert Kritzer, and Austin Sarat. 1983. Civil Litigation Research Project Final Report. Madison: University of Wisconsin Law School.

Upham, Frank K. 1986. *Law and Social Change in Postwar Japan*. Cambridge, Mass.: Harvard University Press.

\_\_\_\_\_. 1998. Weak Legal Consciousness as Invented Tradition. Pp. 48-64 in *Mirror of Modernity: Invented Traditions of Modern Japan*, edited by Stephen Vlastos. Berkeley: University of California Press.

Vanoverbeke, Dimitri. 2003. *Community and State in the Japanese Farm Village, Farm Tenancy Conciliation (1924-1938)*. Leuven: Leuven University Press.

Weiner, Myron. 1966. *Modernization: The Dynamics of Growth*. New York: Basic Books.

West, Mark A. 1994. The Pricing of Shareholder Derivative Actions in Japan and the United States. *Northwestern University Law Review* 88:1436-1507.

Wollschläger, Christian. 1997. Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics. Pp. 89-134 in *Japan: Economic Success and Legal System*, edited by Harald Baum. Berlin: Walter de Gruyter.

Woolridge, Jeffrey M. 2003. *Introductory Econometrics: A Modern Approach*. 2d ed. Cincinnati: South-Western

College Publishers.

Yonemoto, Kazuhiro. 1995. The Shimane Bar Association: All Twenty-One Members Strong (translated by Daniel H. Foote). *Law in Japan* 25:115-30.

Zaloom, Anthony, and Yasuharu Nagashima. Forthcoming. The Rise of the Large Japanese Business Law Firm and Its Prospects for the Future. In *Law in Japan: A Turning Point?* edited by Dan Foote and Veronica Taylor. Seattle: University of Washington Press.

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[FN1]. Indeed, Haley noted that Japanese litigation rates are not particularly low when compared with those of other industrial democracies; they appear low only in a binary comparison with the United States. *Germany?*

[FN2]. Haley (2002, p. 127) provides survey data from the Justice System Reform Council that shows that Japanese, by and large, seek to advance interests in court. See also Rokumoto (1978).

[FN3]. In contrast, Kawashima had attributed the lack of lawyers to the low demand for litigation. See Kawashima (1963, p. 42): "The fairly small number of lawyers in Japan relative to the population and the degree of industrialization suggests that people do not go to court so frequently as in Western countries and that the demand for lawyers' services is not great."

[FN4]. This is the theme of Haley's book *Authority without Power* (1991). Ramseyer and Nakazato (1999, pp. 147-50) rebut this claim.

[FN5]. We offer no specific theory here for the decline over 1989-1990, but we note that it corresponded with the peak of the real estate bubble and the illness and death of Emperor Hirohito. See Field (1991).

[FN6]. Ota (2001, p. 565). The reforms do not include sanctions on violators, apparently because practicing attorneys in the Diet resisted them. Ota (2001, p. 564) notes that this is consistent with the lack of contempt power of Japanese judges.

[FN7]. Of course, discovery might lead the parties' expectations on the ultimate outcome to converge, encouraging settlement before a final decision.

[FN8]. West (1994, pp. 1464-65) notes that in 1993, the Tokyo high court held that derivative suits ought to be subject to a procedural rule that allowed set fees in cases claiming indeterminate amounts, significantly reducing this expense.

[FN9]. We selected the 1986 date because of the availability of data on lawyers per prefecture, one of our independent variables.

[FN10]. We chose to focus on district courts rather than summary courts in part because of our independent variables. Our data on the number of judges are at the district court level. Further, Tanase (2001) has argued that the role of lawyers is different at the district level than the summary level, where pro se arguments are common. Therefore, we believe it more appropriate to model cases at the district level, where additional lawyers may more plausibly have an impact.

[FN11]. Henderson (1997, p. 59) reports that 50 summary court districts do not have a single lawyer's office.

[FN12]. As explained in note 16, these alternative specifications generated substantially similar results.

[FN13]. One might use an alternative indicator, such as the number of bankruptcies in a prefecture, to capture economic stress at the firm level. We use the change-of-income measure for two reasons. First, it allows us to measure the level and change of economic activity in the same units, allowing us to calculate the net impact of changes over time. Second, we are concerned in our setting that the decision to declare bankruptcy may be influenced by the legal cost and difficulty of doing so, introducing problems of endogeneity.

[FN14]. We also estimated a fixed-effects regression, which does not allow us to include time-invariant variables. Thus, we could not model the effect of being a large urban prefecture. The remaining estimates were, however, substantively unchanged from those we report based on the random-effects model.

[FN15]. Since both the number of attorneys and the number of new cases are in per capita terms, the coefficient represents the number of new cases associated with each additional attorney in a prefecture. We use the consistent estimates from column 2 in our numerical calculations.

[FN16]. Using the alternative measure for effect of civil procedure reform, the number of years since the reforms took effect, yields substantively identical results.

[FN17]. An additional .00007 cases per capita times the 2001 Japanese population of 127,290,000.

[FN18]. Indeed, there may be a synergistic impact of the civil procedure reform and increase in the bar or judiciary that we do not capture. For example, without the easier access to the courts provided by the civil procedure reform, it is possible that each additional attorney would have been less able to bring new cases, reducing their impact. In the context of a two-stage least squares model, we cannot test this possibility simply by interacting the dummy for civil procedure reform and number of lawyers. The inclusion of the civil procedure reform variable among those used in the first stage to generate instrumented values for the number of lawyers means that the standard error for the interaction between civil procedure reform and the (instrumented) number of lawyers in the second-stage estimation would be biased. Recognizing the potential bias due to endogeneity, we note that the interaction between number of lawyers and civil procedure reform in a simple random-effects model is far from significant ( $p = .76$ ).

[FN19]. While we did not gather data on the types of disputes involved at the district court level, we do have disaggregated data on types of cases litigated at the summary court level within prefectures. Loan cases at the summary level went from 60,111 in 1986 to 135,265 in 1998. Over the same time period, they went from being 28.5 percent of all cases to 44.2 percent. Other types of litigation also increased, going from 150,558 cases in 1986 to 170,904 in 1998. Our findings are consistent with Tanase's (2001) assertion that loan and debt collection constitutes the bulk of the increase in litigation in Japan.

[FN20]. Nottage and Wollschlager (1996) have a similar finding. As the magnitude of the coefficient for changes in per capita income is larger than the coefficient for per capita income, a decrease in per capita income from year  $t$  to  $t + 1$  will mean a temporary increase in per capita litigation, as the impact of economic stress overwhelms the decrease caused by reduced economic activity. Assuming no further change in income, litigation in years  $t + 2$  and after will be lower than that in year  $t$ , which reflects the smaller base of economic activity. Conversely, an increase in income

from year  $t$  to  $t + 1$  will result in a temporary decrease in litigation due to the benefits of an "expanding pie." Thereafter, however, the rate of litigation will be higher, reflecting greater economic activity.

[FN21]. We conducted a variety of robustness checks, two related to model specification and two to the definition of "urban prefecture." We first used a fixed-effects model to control for the panel nature of our data rather than the random-effects model used in the reported model. It is impossible to estimate via fixed effects the impact of variables that do not change over time, meaning that we cannot estimate the effect of being an urban prefecture. The estimates of the other coefficients change very little. Next, we control for the possibility of autocorrelation, that is, the error terms for each prefecture being correlated across time. The estimates of the institutional variables remain significant and of approximately the same relative magnitude, although their absolute magnitude is slightly reduced. However, both the absolute income and change-of-income variables lose significance. We also estimate models redefining urban prefectures as those containing Japan's three, four, five, or six largest cities. The impact of being an urban prefecture is actually negative and significant under several definitions. A continuous measure of urbanization, the percentage of economic activity generated by tertiary industries (Tanase 2001), yielded a positive coefficient that approached conventional levels of significance, with  $p$ -values of .133 and .099 in the random-effects and generalized two-stage least squares regressions, respectively. Estimates of the other variables remain substantively unchanged under all definitions. In summary, our findings for the effects of institutions (judges, attorneys, and civil procedure reform) are extremely robust. Our findings for the impact of economic factors are generally robust, although they lose significance under one specification.

[FN22]. While Kawashima (1963) does not discuss urbanization per se, other modernization theorists have associated urbanization with cultural change. See generally Weiner (1966).

[FN23]. Note that we do observe the increase in loan collection litigation, but there is no indication that there was legal change facilitating this so much as the indirect factor of allowing foreigners to enter the market. See Zaloom and Nagashima (forthcoming) and Tanase (2001).

[FN24]. Nichibenron Kotsu Jiko Soodan Senta and the Tokyo Begoshikai Jiko Soodan Senta. These two were merged in April 2004.

[FN25]. See Nottage and Wollschlager (1996, pp. 369-73). We are not asserting that there is some fixed number of disputants who must choose between one or the other type of dispute resolution system. One possible explanation for the observed correlation is that structural changes in the legal system send a signal to the public about the appropriateness of pursuing claims in general, so all types of claiming increase.

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#### 4 The Development of an Adversary System in Japanese Civil Procedure

YASUHEI TANIGUCHI

##### I. INTRODUCTION

When the late Judge Kohji Tanabe wrote his much-acclaimed article, "The Processes of Litigation: An Experiment with the Adversary System," which was published in 1965 in the original volume of *Law in Japan: The Legal Order in a Changing Society*, Japanese civil procedure was still in the course of recovery from the shock of postwar reform and looking for a way to settle in. As Judge Tanabe described, the postwar legal reform posed a nearly impossible task for judges and practitioners, let alone parties who had to represent themselves pro se.

The postwar reform in civil procedure was embodied in only a couple of changes to the Code of Civil Procedure as amended in 1948. Probably the most significant postwar provision was the new Article 264, which required examination of witnesses to be conducted first by the parties and only secondarily by the judge. Another change was the repeal of Article 261, which had allowed the judge to examine ex officio any evidence at almost any time he deemed it necessary.

These two changes in the code expressed the legislative intention to shift the driving force of proceedings from the judge to the parties. The repeal of Article 261 signified to judges that it was not only unnecessary but also prohibited to assist parties whose presentation of evidence was insufficient to support their case. The philosophy underlying these changes led judges to ignore the still-existing Article 127, which allowed them to address questions to the parties and to make suggestions for the parties to adduce further evi-

dence. This power of the judge, called "the power of clarification" (*shakumaku*) was considered in prewar time so fundamental that the justice system could not have been accomplished without it. In fact, it was not just a right but also rather a heavy duty of the judge, in accordance with its original German concept of *Ausfragemacht* meaning the duty of clarification. The prewar highest court, the Grand Court of Judicature (*Daiten'in*), firmly held that a failure to exercise the clarification power constituted reversible error, despite the fact that the 1926 amendment to the code changed the relevant word from *duty* to *power*.

The postwar Supreme Court under the amended code was ready to lend itself to the new procedural philosophy. It held that clarification was a power and not a duty and therefore a failure to exercise it was no longer reversible error. Judge Tanabe explained how much confusion and dissatisfaction resulted from the new practice and how the Supreme Court rather quickly (several years later) changed its view back to the prewar interpretation that the judge was obliged to exercise the clarification power in appropriate cases.

The later development of case law up until today has been a history of the strengthening of the same position. Today, as it was before the war, clarification is firmly established not just as a power but also as an important duty of the judge. Emphasis on the clarification duty has much mitigated the importance of the repeal of Article 261, abolition of ex officio evidence taking, because the judge can and must invite a party to produce needed evidence and such an invitation is normally accepted readily. But how much did this change limit the adversary system introduced by the postwar reform?

What happened, for example, to another aspect of the adversary procedure also introduced in 1948, namely the examination of witnesses by the parties? Judge Tanabe did not give any definite answer about its fate, because it was not yet clear how things would develop thereafter. But he concluded his article by saying, "[T]he gravitation from an exaggerated and extreme version of the adversary concept to what I have labeled a midway position probably suggests the pattern of the future in the District Courts. . . . The midway position is in a real sense a fusion of the Continental and the Anglo-American philosophies."<sup>2</sup>

The period of some forty years that has followed since Judge Tanabe wrote his article has seen a development culminating in the new Code of Civil Procedure of 1996 (enforced from January 1 of 1998) and the practice under it, which seems to have given us certain answers to the questions that Judge Tanabe would have liked to ask. Even now, what Judge Tanabe described as the "midway" position can still be seen. This essay will explicate the events

that have occurred during these intervening forty years. From the author's point of view, several key factors have led Japanese civil procedure to its present state. Some factors have remained relatively unchanged throughout not only these forty years, but in fact have not changed even since the inception of the modern Japanese civil procedure system in 1890. Other factors were added at some point of the development with impacts of varying degrees of importance.

## II. OVERVIEW OF THE BASIC SCHEME OF JAPANESE CIVIL PROCEDURE

Let me first underscore an unchanged feature of the Japanese civil procedure. It is often asserted from the Common Law camp that the continental European civil procedure is characterized by the so-called inquisitorial system. The Civil Law camp rebuts this by saying that the Civil Law civil procedure adopts the so-called principle of party control and not an inquisitorial system at all. Without going too much into the details of this discussion, the German and therefore Japanese civil procedure can be said to have been "adversary" in the sense that it is the parties that lay a binding framework within which the court is allowed to make a decision.<sup>2</sup>

The principle of party control was introduced to Japanese civil procedure from Germany with a German-styled Code of Civil Procedure in 1890 and has since remained unchanged in principle until today. The principle of party control is that presentations made by the parties will have a binding effect on the court. Thus, this principle binds the judge's power within the scope of (a) a claim (cause of action and quantum) proposed by the plaintiff and (b) the factual allegation of the parties in support of such a claim.

For example, where a plaintiff asks for a judgment for payment of damages of five million yen for breach of a contract, the court is not allowed to grant a judgment for specific performance nor damages of ten million yen, because the underlying cause of action is different or the granted quantum exceeds the prayed-for relief. The plaintiff must always state a prayer for a specific relief in the complaint. So-called general relief is not permitted. This is an application of the so-called principle of free disposition, a branch of the principle of party control. (The principle of free disposition, *dispositionsmaxime*, expresses itself also in the freedom to withdraw an action, freedom to settle an action, etc.)

Next, the plaintiff must substantiate his or her claim by factual allegations. The same applies to a defense raised by the defendant. An important impli-

cation of this is that the factual allegation cannot be replaced by presentation of evidence. For example, in an action for loan collection, the defendant who did not allege payment of the debt must lose even if the evidence has clearly shown a payment. Thus, the unfolding of a civil case totally depends on the parties' initiative. If a party fails to present a factual allegation, the court is not allowed to find such a fact because no issue of fact has been formed about such fact. Thus, the "burden of pleading" is borne by the plaintiff for factual substantiation of a claim and by the defendant for a defense. This branch of the principle of party control is called the "principle of argumentation" (*Verhandlungsmaxime*). Some Japanese commentators seem to think that, by adopting such a principle of autonomy of the parties, the Japanese civil procedure adopted some sort of adversary system. As discussed later, this understanding is not accurate in my view when applied to the stage of proof.

The principle of argumentation, and accordingly the burden of pleading, were not enforced in their pure form from the beginning but were attenuated by the judge's "power of clarification." We distinguish two types of power of clarification: The first type simply enables the judge to understand more fully a party's assertion. When exercised properly, this does not add anything to the principle of argumentation. It only assures that a party's assertion is fully understood by the court. When we discuss the clarification power, however, we usually think of something more. It is the second function of the clarification power that really changes the nature of the principle of argumentation and lessens the party's burden of pleading. The court cannot supply a missing factual allegation, but it can suggest what is missing. Upon such suggestion, the party who bears the burden of assertion will most likely supply such a factual allegation. Thus, the Japanese version of "adversary system," if it is such, is not enforced in a pure form because, as said before, the exercise of the power is considered to be a duty of the judge.

## III. ADVERSARINESS IN PROOF

Let us now turn to the phase of proof and see how adversarial it was in the original form of the code and how it was changed after the war. In my view, one of the basic differences between the German-styled party presentation and the Common Law adversary system can be found in the approach to the party's role in proving the disputed facts. In order to clarify the difference, it is convenient to distinguish between two meanings of "evidence." Evidence may mean a piece of paper or a witness that is examined. Evidence can also mean the information contained in the piece of paper in the form of meaningful

letters or the statement (testimony) made by the witness in the form of spoken language.

The evidence in the former meaning can be better called the "evidential medium" because it carries with it certain information yet to be elicited. In the latter meaning, it can be called the "evidential information" which may or may not be useful for deciding a case. When certain evidential information is useful, it can be called "effective evidential information." Under the original Japanese Code of Civil Procedure borrowed from Germany, there was a degree of party control over the proof as far as evidential media were concerned. It was primarily the role of the parties to propose evidential media to the court, which had discretion to decide which evidential medium to adopt for examination.<sup>3</sup> In addition, however, the court could decide to examine "supplemental evidence" whenever the court considered that the case before it was "not yet ripe for a final decision."<sup>4</sup> The 1926 amendment not only continued to adopt the same scheme but also made the judge's initiative more explicit than before.<sup>5</sup>

The new Article 261 of 1926 now provided, "The court may examine any evidence *ex officio* when it is not convinced by the evidence submitted by the parties or when it otherwise deems it necessary." In practice, however, the court's power to adopt an evidential medium not proposed by a party was exercised sparingly. When necessary, the court rather resorted to the power of clarification to suggest to a party to propose a new evidential medium, and the party most likely presented such new medium whenever possible. Thus, the degree of a party's control over an evidential medium was almost as high as, or as low as, that over the factual allegation because the party's control over the factual allegations might be similarly attenuated by exercise of the court's clarification power as explained before. We can say, therefore, that the party's control over the evidential medium was, at least as a matter of principle, well preserved.

However, when we observe the level of evidential information, a party's control was much more restricted or almost nil as to certain evidential media, such as witnesses and experts. In the case of documentary evidence, evidential media and evidential information are inseparably combined because the medium is itself the information it conveys. In other words, the production of a document (medium) is also a presentation of the information it conveys. However, in the case of testimonial evidence, different versions of evidential information may be elicited from an identical evidential medium, a particular witness.

In this respect, the pre-1948 code recognized little control by the parties.

When a witness was adopted, it was the presiding judge who was primarily supposed to question the witness and to decide how to question (by way of a continuous narrative or by question and answer). Even the associate judges had to obtain from the presiding judge permission to ask questions. The law expressly stated, "The parties cannot ask questions of a witness. However, a party may apply for permission of the presiding judge to ask in order to clarify the statement of a witness." Therefore, the scope of a party's questioning was limited to that already laid down by the presiding judge. In practice, the party's questioning was not active at all. Moreover, as a matter of legal ethics, as common in all Civil Law jurisdictions, the party and the attorney were not supposed to have contact with a prospective witness in advance. Under such circumstances, it was difficult for a party (attorney) to ask intelligent questions even when allowed to do so.

The postwar reform tried to change this situation as described earlier. In other words, greater party control over evidential information was introduced by changing the main actor of witness questioning from the presiding judge to the party who proposed the witness and by then giving an opportunity to the adversary to cross-examine.<sup>6</sup> The presiding judge had to wait until both parties had finished their questioning. The respective roles of the presiding judge and the parties were completely reversed. In order to make the parties' questioning as effective as possible, the new rules promulgated by the Supreme Court now officially encouraged the parties to interview prospective witnesses.<sup>7</sup>

Thus, a party in Japanese civil litigation was given, at least in theory, complete control over the making of a case, from the presentation of a claim, to factual allegations, and through the elicitation of relevant evidential information from adopted witnesses. This last point is particularly significant in Japan in view of the predominant importance of testimonial evidence in civil litigation there. Precise documentation of commercial or noncommercial transactions is not legally required as in some other Civil Law systems and often such documentation may not even exist. When a dispute arises, therefore, firm documentary evidence is usually scarce and the court must rely heavily on testimonial evidence.

#### IV. INSTITUTIONAL BACKGROUND

Judge Tanabe pointed out how Japanese courts reacted to elements of an adversary system introduced by the postwar procedural reform. As far as the clarification power was concerned, the court was rather quick to return to the prewar solution. I believe that it was inevitable for a conscientious judge

clary to do so in view of the two conditions prevailing in the 1950s—first, a large percentage of pro se representation even at the district court level and, second, a bar that had not changed radically from its prewar character. In addition, of course, there was also the strong willingness of judges to give a just solution to each case irrespective of the parties' or their lawyers' performance.

The Japanese Code of Civil Procedure of 1890 was borrowed from the German code of 1877 but the two codes differ on some important points. Chief among these is the fact that the Japanese version did not adopt a system of compulsory representation by a lawyer (*Anwaltszwang*) even at the district court level and above, though this was an integral part of the German code of the time. When a lawyer was retained in Japan, no special license was required for appearing before a higher court including the then-highest court, the Great Court of Judicature (*Daijishin'in*). This is the situation still prevailing today in Japan. Litigation involving at least one party without a lawyer, usually the defendant, or even two parties without lawyers was common and can still be seen today. In these circumstances, a conscientious judge would feel compelled to intervene to clarify the factual and legal situation of the dispute in order to determine a just solution. The need to do so would be intense even when only one of the parties was without legal representation.

Even where both parties were represented, judges wanted to intervene and were expected to do so whenever a lawyer's performance was not satisfactory in their eyes. Before the war, judges and lawyers were trained separately and differently. Generally speaking, the qualification and the training of the lawyers were inferior to those of judges. A judge often looked on lawyers with a paternalistic bias.

The postwar professional education reform unified the training of the three branches of legal professions, the judge, prosecutor, and lawyer, and elevated the educational background of all three professions to the same standard. However, as of the 1950s, the lawyers who received the postwar unified training were still young and did not yet form the mainstream of the practicing bar. The judges at the time did not see any necessity to change their attitude toward these practitioners. This condition has completely changed now. As of 2000, all of the practicing lawyers and judges are the product of the postwar professional training at the Legal Training and Research Institute, and, more importantly, a significant change has taken place in which the judges have come to see the lawyers as on a par with themselves.

One element, however, did not change. The number of lawyers and the rate of pro se lawsuits without any lawyer at all, or with a lawyer on one side only, remained constant. Now, the number of lawyers has increased consid-

TABLE 4.1. Representation in Japanese District Court Cases

Year	Location of district courts	Number of cases with no lawyer at all	Number of cases with only plaintiff represented	Total number of cases
1960	All of Japan	17,867	17,476	65,157
	Tokyo	1,083	3,209	12,001
1998	Miyazaki	460	150	820
	All of Japan	32,634	54,312	156,683
2000	Tokyo	5,176	13,950	36,263
	Miyazaki	307	405	1,090
	All of Japan	33,988	52,162	158,779

NOTE: All writing so data were available by cases for the year 2000.

erably. More than eight hundred new lawyers per year have been appearing recently and the total number of lawyers has exceeded twenty thousand. But these are mostly in the Tokyo and Osaka areas. There are still many civil cases conducted without the help of a lawyer. Table 4.1 shows statistics comparing the situation in 1960 with that of the late 1990s in all district courts, the first instance court of general jurisdiction.

V. WHAT HAS HAPPENED SINCE 1960?

It is in these conditions—some changing, others unchanging—that Japanese civil procedure has developed since the early 1960s when Judge Tanabe's article was written. Several significant events during the intervening period have directly or indirectly affected the way Japanese civil procedure was conducted and eventually provided some stimulus for legislative change. At this point, it must be emphasized that procedural reform cannot be achieved only by changes in the language of law. Procedure must be supported by a massive infrastructure, both tangible and intangible. The failure of the postwar reform can perhaps best be explained from this point of view.

While the basic theoretical structure of the Japanese civil procedure has not changed at all, there have been several important events since the 1960s, each of which has had and is still having a considerable influence on the way Japanese civil procedure operates today. First, there was a reform in Germany in the 1970s, the so-called Stuttgart Model, and ensuing reform by the Simplification Act (*Vereinfachungsgesetz*), which, considering the German origin

of modern Japanese civil procedure, had a considerable impact in Japan. Second, the relative position of the judiciary and the bar began to change in the 1970s. The bar gained more confidence and power and, perhaps with a motivation of its own, became more cooperative with the judiciary's effort to streamline and expedite proceedings. Third, public dissatisfaction with the state of civil litigation mounted and, especially in the 1990s after the demise of the bubble economy, politically influential business groups, such as the *Keizaihyōron* and *Keizairon*, became interested, perhaps for the first time in Japanese modern history, in the function of civil justice.

All these factors worked to motivate the successful legislation of the new Code of Civil Procedure of 1996. This political driving force continued to give rise to a larger wave that touched all aspects of the basic justice system. Most scholars understand the creation by the Cabinet of the Justice System Reform Council in 1999 in this context also. I shall deal with the first two factors first and then proceed to the litigation practice that has appeared under the new Code of Civil Procedure enforced since 1998.

#### VI. IMPACT OF THE STUTTGART MODEL

There was a movement in Stuttgart, Germany, to make civil procedure more efficient. Under the initiative of Judge Rolf Bender of the Stuttgart District Court, an innovative method was developed from the 1960s and became widely known as the *Stuttgarter Modell*. It was eventually adopted by legislation in 1977 (*Verzinsfahrgesamstelle*). Because of its traditional affinity with German law, Japan showed much interest in the new development in Germany. Scholars studied the model, and the judiciary sent some young judges to Germany. A considerable amount of publications followed.

The main feature of the Stuttgart Model was that the judge took initiative in the early stage of litigation to narrow the issues of the case by holding a conference involving not only the attorneys but also the parties in person. In Japan, the preparatory procedure preliminary to a plenary hearing has long been a central subject of the discussion of how best to achieve the expeditious disposition of civil cases. In fact, the Japanese legislative history has been marked by various—but not fruitful—efforts to introduce a more effective preparatory procedure since the 1926 amendment of the Code of Civil Procedure.

In an attempt to make the procedure more regimented and expeditious, the 1926 law made preparatory procedure mandatory and required all possible allegations and evidence to be presented at this stage.<sup>8</sup> All allegations and evidence not mentioned in the record of preparatory procedure were to

be permanently excluded unless a good reason was proven.<sup>9</sup> The effort was a total failure. Parties were not ready to present all available allegations and evidence, and the courts were reluctant to strictly enforce the rule of exclusion. The postwar reform changed this slightly. It made the preparatory procedure elective at the discretion of the court but retained the exclusionary rule when the procedure was adopted.<sup>10</sup> The result was the virtual nonuse of preparatory procedure.

We can see in this development the enduring dilemma in Japanese civil procedure: the legislature clearly intended to encourage and expedite the parties to participate actively in the process by presenting necessary allegations and evidence on time. Inactive and unprepared parties, often without professional assistance, were not able to live up to the legislative expectation. Judges who wished to do justice under the construction of the principle of party presentation had to risk a long duration of the process in favor of a substantively just resolution of the dispute. Thus, the so-called *May rain type* (*samurai-shiki*) proceedings became the norm, in which a long series of short hearings took place over the span of an extended period.

Typically, the first several sessions served a preparatory purpose with exchanges of briefs and the judge's exercise of the clarification power. Thereafter witnesses were heard only once by one in each session of the oral proceedings. Very often, the cross-examination would occur not immediately after the examination in chief, but in the next session a couple of months later. Yet the process of "preparation" would never end. When a new fact arose from testimony, a party was allowed to amend the complaint or raise a new defense. In a sense, as Professor Dan Ferraro Henderson once remarked, the first half of the whole process, often taking as long as a couple of years, could still be described as the "discovery" stage. Problems inherent in this type of procedure are evident. The process tends to take a long time. Moreover, judges were not able to make decisions based on a fresh impression of testimony. Also, the presiding judge would often change because of a regular transfer or retirement, and a new judge would have to decide the case solely on the basis of the written record.

Dissatisfaction with this system was widespread, but achieving a remedy was difficult. The experiment in Stuttgart attracted much attention in Japan because it seemed to succeed in radically expediting the process of litigation in Germany, which was also suffering from a similar procedural malaise, though in a much lesser degree. Willing Japanese judges started their own experiments. They tried to create a kind of preparatory procedure that allowed them to determine the real issues at an early stage of the process and sched-

rule concentrated sessions to take testimonies while avoiding the type of preparatory procedure found in the code. What they created was called "Ber-*ronkenwaki*," literally meaning "pleading (*beron*) and settlement (*waki*)" at the same time. Judges held an informal session with the parties (with their attorneys present) to find out which issues the court must decide and if it was possible to achieve a settlement. Sometimes, the judge would place emphasis on achieving a settlement and at other times, on joining the issues. In all cases, an informal session was held, not in the courtroom, but in a closed room reserved for settlement negotiation or preparatory procedure.

The presumed hybrid nature of the device was controversial. If it was a pure settlement negotiation, there was no problem in conducting it in a closed room; but if it was a session for "Beron," the Constitution mandated that it be held in open court. Complaints were voiced from the bar that the judges risked the danger of "shaping" a case too prematurely. This reaction is understandable because lawyers were accustomed to wait for a "natural ripening" of a case through the *May rain* type procedure. The new practice required the lawyers to be better prepared at an early stage of litigation.

Despite lack of authorization in the code, this practice became considerably widespread in urban district courts and proved effective for expeditious disposition of cases. The practice was effective not only for bringing complicated cases to a stage where they were ready for witness examination in a relatively short period of preparation, but it was also very useful in inducing an early settlement and thereby relieving the court's heavy caseload.

#### VII. CONCENTRATION OF WITNESS EXAMINATION

The next step was how to realize a concentrated and efficient witness examination. This was a more difficult task. Here the German model was not as useful because in Germany the judges examine witnesses, while in Japan the parties must do so, and this takes more time. In large cities, each judge was simultaneously in charge of a few hundred cases. Each case would progress only slowly by way of the *May rain* method. If some cases were given priority and accorded a greater amount of time than the rest of the cases, other cases would be delayed. Some courts reacted to this problem by creating new teams of judges who would specialize in experimentation with more concentrated treatment of cases.

More importantly, cooperation by participating lawyers was essential for successful concentration of witness examination, but most lawyers were reluctant to cooperate because of the preparation time required, though it was

still not so onerous as for an American type of trial. Responding to the court's initiative, however, the organized bar made constructive proposals and conferences, and consultations were held between the court and the bar. Meanwhile, increasing numbers of lawyers became willing to cooperate with the venture. This process was a phenomenon that may have been inconceivable to Judge Tanabe when he wrote his article in the early 1960s.

#### VIII. CHANGING ATTITUDE OF THE BAR

For a long time after the end of the war, the Japanese organized bar took a strong antiestablishment posture. The mainstream of the bar allied itself with the opposition parties (Socialist Party and Communist Party) and was mostly opposed to proposals by the judiciary collectively or by judges individually. This antagonistic relationship prevented both the judiciary and the bar from making constructive proposals for improvement in the practice of civil litigation.

The situation began to change in the 1980s. In my view, there are several factors behind this change. First, those lawyers who had been trained at the postwar Legal Training and Research Institute came to occupy a majority of the leading positions within the organized bar. Second, starting in the 1960s, the bar increasingly attracted eligible young jurists who would previously have gone to the judiciary. This fostered a mutual respect and spirit of cooperation between the judiciary and the bar. Third, the political environment radically changed in 1993 when the so-called 1955 setup collapsed, and the Liberal Democratic Party lost the hegemony. The political polarization that had spawned mutual mistrust between the judiciary and the bar loosened considerably if it did not disappear altogether.

Study groups formed within major bar associations and many made public proposals for the rationalization of the litigation process. The court welcomed these constructive proposals and criticisms. It was in such an optimistic atmosphere that various experimental practices were adopted by all-in-judges and lawyers in large district courts in Tokyo and Osaka, and finally the Law Revision Commission of the Ministry of Justice started consideration of a total revision of the Code of Civil Procedure in 1989.

#### IX. INNOVATIONS WITHIN COURTHOUSES

It is also worth noting that there have been some changes in the infrastructure of the court system. Active participation of the court clerks in case management is noteworthy as a strong support for the new mode of case

processing. Court clerks long remained in a subordinate and obscure position, responsible only for preparing the court record. The task of case management was considered to be the judge's responsibility. The postwar establishment of the Training Institute for Court Clerks and a rigorous employment policy raised the standard of court clerks considerably.

However, the relationship between the judges and the clerks was not a friendly one, partly because of the strong unionization of the latter. In the wake of this reform movement in civil litigation, some innovative judges started giving greater responsibility to clerks, within the limit of the law. Willing court clerks responded to this new challenge with enthusiasm. For the smooth progress of the litigation process, good coordination among the parties and the judge is essential and a great deal of labor and time is needed to achieve successful preparatory work and concentrated witness examination. Clerks were redefined as "court managers" and became instrumental to successful experiments for innovation.

Another interesting aspect of reform is found in the physical environment of the courtroom. When the new practice of "pleading-settlement" sessions in a closed room was criticized, a real courtroom that was still suitable for an informal session became necessary. The so-called roundtable courtroom was created and implemented in several large courthouses in the late 1980s. These rooms have a large roundtable around which the judge, the clerk, the lawyers, and witnesses all sit at the same level, side-by-side. The spectators' section is in the other half of the room, separated by a bar. This type of courtroom is convenient not only for generating a cooperative atmosphere among the participants, but also to circulate documents easily among them. Such roundtable courtrooms have increased in number considerably since then.

#### X. THE NEW CODE OF CIVIL PROCEDURE OF 1996

Work for revision of the Code of Civil Procedure was started under the strong leadership of Akira Mikazuki, professor emeritus of the University of Tokyo and the leading figure in the field of civil procedure scholarship. After an unprecedentedly short period of deliberation and drafting, the new code passed the Diet in June 1996 and was enforced beginning January 1, 1998. It is noteworthy that the Division for Civil Procedure of the Law Revision Commission of the Ministry of Justice included for the first time a few eminent lawyers as official members from the very beginning of deliberations. This practice has become widespread today in the legislative process in general. An overview of the new code is presented in my article in the *American*

*Journal of Comparative Law*.<sup>14</sup> I will try not to repeat what I have already written there. I would rather limit myself to the aspects of the new code and the practice under it that relate to the theme of an adversary system in Japanese civil procedure.

The practice of the pleading-settlement was not adopted by the new code. Instead, it created three kinds of preparatory procedure. The first type is the preparatory plenary hearing. As mentioned earlier, under the so-called May rain type of procedure, the first several sessions had to function as a preparatory stage for the next testimony-taking stage. The new code formalized this as one type of preparatory procedure.

The second type is the proceeding preparatory to plenary hearing. This is a direct descendant of the former preparatory proceeding and revamped form of the pleading-settlement session. An important change was that it became possible to introduce and officially examine documentary evidence at that stage. Another change was a loosening of the exclusionary effect on allegations and evidence not presented in the preparatory stage. This change was made in light of the past failure to enforce strict exclusion.

The third type is a preparation by documents only, which is designed to accommodate parties in remote places. Practice has proved that the second method is most preferred. This is understandable because the second type was derived from the successful experiment of the pleading-settlement practice.

The new code does not provide much about the concentration of witness examination. It contains a new provision that the examination of witnesses and the parties in person must be held in a concentrated manner "after conclusion of the arrangement of points at issue and evidence."<sup>15</sup> When witness examination begins, documentary exhibits have already been presented and examined by the court, and all parties know the evidential information contained therein.

Another important change brought about by the new code was a reconsideration of the regime for the examination of witnesses that was introduced by the postwar reform. As mentioned before, the postwar code mandated that the party who presents a witness must conduct the initial examination of that witness, and this must be followed by an opportunity for cross-examination by the adversary. As a rule, the judge can ask questions only after both parties have finished. A famous remark by Professor Tōichirō Kiyama, an eminent proceduralist, criticized this as "the worst error in postwar legal reform."<sup>16</sup> The unsatisfactory result of this procedure is well known. The new code made it possible for the judge to change the order of examination. It is now possible for the judge to start the questioning, with the agreement of the parties.<sup>14</sup>

As I have pointed out, however, even before the amendment, when faced with parties who were not represented by a lawyer, a judge would often question a witness first by relying on the provision that allowed the judge to "ask a question at any time when necessary."<sup>5</sup> It does not seem, however, that judges exercise this initiative under the new code in ordinary cases where both parties are represented by a lawyer. All Japanese lawyers who have trained or practiced in the past fifty years are now more or less accustomed to the art of examining witnesses.

### XI. PRACTICE UNDER THE NEW CODE

Now we must ask how much has actually been achieved with this statutory framework during the time since the enforcement of the new code in 1996. As I emphasized in my previous article on the new code, litigation practice is always difficult to change. The history of modern Japanese civil procedure is full of examples of failures to attain an intended objective. The failure of the preparatory procedure of the 1926 amendment, the unsuccessful abolishment of clarification power, and the imposition of the heavy task of witness examination on untrained parties are all examples.

But these mistakes can teach us lessons about how difficult procedural reform is in practice unless both judges and lawyers accept the change. Innovative movements before and during the drafting of the 1996 code gave hope to many that the new code would be successfully enforced as planned. When I wrote my article in 1997 before the actual enforcement of the new code, however, I was not very optimistic. I noted that there was a sort of enthusiasm for reform, but I was apprehensive about how long the enthusiasm could last and whether it would fade away before establishing a new standard. I am glad to report that my experience of these past four years has been encouraging.

Judge Takahisa Fukuda of the Tokyo District Court recently reported on the changes taking place in his court.<sup>16</sup> He served as one of the presiding civil judges of this large court from a year before the enforcement of the code and for four years thereafter. He describes the change as "dramatic," and he notes that the present practice looks as if it were "practice in a foreign country" when compared with the situation before. According to Judge Fukuda, litigation in Tokyo is "becoming among the fastest in the world." The greatest factor accounting for this change, he says, is the changing attitude of the practicing lawyers. They are now better prepared for and more responsive to the need for speedy disposition of cases. A questionnaire survey within the Tokyo District Court in June 2000 showed that concentrated witness exam-

2007 8.5  
2002 8.3  
2003 8.2  
2004 8.2  
2005 8.2  
2006 8.2  
2007 8.2  
2008 8.2  
2009 8.2  
2010 8.2  
2011 8.2  
2012 8.2  
2013 8.2  
2014 8.2  
2015 8.2  
2016 8.2  
2017 8.2  
2018 8.2  
2019 8.2  
2020 8.2

TABLE 4.2. Average Duration, in Months, of Case Litigation in Nationwide District Courts 1991-2000

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Months	12.2	10.9	10.1	9.8	10.1	10.2	10.0	9.3	9.2	8.5

ination (at least two witnesses examined on the same day) was practiced in virtually all cases.<sup>17</sup> Remember that examination of only one witness per day was the previous norm. This requires a great amount of preparation on the part of lawyers, but it also greatly reduces the duration of litigation.

Judge Fukuda does not mention the situation in many other courts than in Tokyo, but a similar report was made about the situation in the Osaka District Court after only one year of enforcement of the new code.<sup>18</sup> Table 4.2 presents national statistics showing the considerable shortening of the duration of first-instance litigation in district courts nationwide.

Supposedly, local courts are slower to change because of the traditional attitudes of those in the bar (more aged lawyers), the smaller caseload of the court (less pressure to expedite), and the greater percentage of lawyerless litigation (general inefficiency).

Active participation by the parties in an early stage of litigation becomes possible when the parties have advance access to likely evidence (evidential media). In the previous May rain type of procedure, a long time was spent for the unintended purpose of discovery. Viewed that way, it was not entirely meaningless for a judge to wait until a case had matured, under the principle of party presentation, before giving a just decision.

When the whole process is expedited and witness examination is concentrated, there emerges a variance between the provided evidential information and factual allegation based on specific legal theory developed by pleadings. Under the previous May rain practice, such variance could be readily corrected by an amendment of pleading because the proceedings were supposed to be continuing anyway. How and whether this problem is solved under the typical present practice in Tokyo as just described is an interesting question.

### XII. ACCESS TO EVIDENCE

One of the major points emphasized in the legislation of the new code was improvement in the methods of collecting evidence. As a result, the availability of document production orders was expanded, but this is still a far cry from American discovery. In short, what was limited to only three specific categories

of document has now been enlarged to include all kinds of documents, with some specific exceptions.<sup>29</sup> Some of these exceptions and their interpretations by the courts are very controversial. But it is a widely accepted view among Japanese lawyers today that the document production order has become much more available under the new code than it was before. In practice, the party holding a document will normally comply with a judge's informal request during the preparatory procedure. This is because the parties know that the judge is ready and able to issue a production order if necessary.

It has also become a common practice to produce statements for all prospective witnesses in advance. When a lawyer is retained, the lawyer normally interviews and assists witnesses for the purpose of drafting such a statement. Lawyers are encouraged to do this at the stage of preparatory procedure in order to agree on the issues and witnesses to be examined. Both the judge and the parties will know of all available documentary evidential media, including those produced by force of a production order, by the close of preparatory procedure. This is because documents may be officially produced and examined by the court during preparatory procedure. Thus, if both parties (i.e., their attorneys) are diligent, the concentrated witness examination that follows will not create much variance.

### XIII. CLARIFICATION AND DISCUSSION

An expedited and yet substantively just solution of disputes depends on a successful preparatory procedure. Therefore, the preparatory stage may take longer than before, and the judge's role in this stage will become more important. The judge's power of clarification should be efficiently exercised and a serious and lively discussion should be held between the judge and lawyers on the legal theories and the facts to be proved. This procedure has long been considered ideal in order to reach a just result. In order to expedite the process, a judge's exercise of the clarification power can be made by fax at any time. Previously, this power could be exercised only at a formal meeting.

In the past, when a judge exercised his clarification power, he would be criticized as too authoritarian and imposing. Unprepared and less competent lawyers often voiced this criticism. If well prepared and competent, a lawyer will engage in a debate with the judge in order to correct any misunderstandings on the part of the judge. It is still worth asking how best to realize this ideal situation in the Tokyo District Court today.

I am still not too optimistic. But from what has been written and spoken, I think that the new code has made a good start. In my view, this is the first

time in the history of Japanese civil procedure that an elevated general standard of the Japanese bar has played a crucial role in putting the legislative objective into practice. We should also remember that representative members of the bar were included in the drafting of the new code and that their opinions were incorporated here and there in the new code.

### XIV. CONCLUSION

The main theme of Judge Tanabe's article forty years ago was how to evaluate the development of the adversary system in Japan. Judge Tanabe suggested that the best direction for the Japanese civil procedure would be a "middle way" between Common Law procedure and Civil Law procedure. I would like to conclude this short essay by saying that his ideal is being realized, at least in part. In order to spread the practices currently found in large cities throughout the entire country, we need more lawyers and more judges. Unless we can minimize pro se litigation, if we allow it to exist at all, the innovation occurring typically in Tokyo will not become the Japanese standard.

A large-scale reform of the justice system is being planned and has already been realized in part along the lines of proposals made by the Justice System Reform Council in June 2001. The future of the Japanese civil procedure can now be considered only in the context of the reforms yet to come.<sup>30</sup>

### NOTES

1. Kohji Tanabe, "The Processes of Litigation: An Experiment with the Adversary System," in Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society* (Cambridge, MA: Harvard University Press, 1963), 110.
2. For a comparison of these systems, see Yasuhai Taniguchi, "Between Verhandlungssysteme and Adversary System—in Search for Place of Japanese Civil Procedure," in Peter Gonnwald and Hans Prütting, eds., *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (München: Beck, 1990), 457–501.
3. Minji soshōhō [Code of Civil Procedure (before the 1926 amendment)], art. 274.
4. Minji soshōhō (before the 1926 amendment), art. 285.
5. Minji soshōhō (before 1996), arts. 258, 259; Minji soshōhō (before 1948), art. 261.
6. Minji soshōhō (after 1948), art. 294, ¶¶ 1, 2.
7. Rules for Continuous Hearing in Minji soshōhō (of 1950), art. 2.
8. Minji soshōhō (of 1926), art. 249.

9. *Minji soshohō* (of 1926), art. 255.
10. *Minji soshohō* (after 1948), arts. 249, 255.
11. Yasuhiko Taniguchi, "The 1996 Code of Civil Procedure of Japan—a Procedure for the Coming Century?" *American Journal of Comparative Law* 45 (1997): 7-57.
12. *Minji soshohō* [New Code of Civil Procedure], art. 182.
13. Tōchirō Kigawa, "Sengo saikai no erō—Kōgo jinman no dōryū" [Adoption of Cross-Examination System: The Greatest Post-War Error], *Hanrei tazunazu* 400 (1986): 96.
14. *Minji soshohō* (new code), art. 202, ¶ 2.
15. *Minji soshohō* (before 1996), art. 204, ¶ 3.
16. Takahisa Fukuda, "Minji soshō no aratashi jissun" [New Practice of Civil Litigation], *Hanrei tazunazu* 1077 (2002): 26.
17. *Hanrei jūhū* 1735 (2001): 28.
18. Takahisa Fukuda, "Shūpōjūmu shūminji soshō no ichinen o furikaeru" [Symposium: Looking Back on One Year of the New Code of Civil Procedure], *Hanrei tazunazu* 1007 (1998): 37, 49, 52.
19. *Minji soshohō* (new code), art. 200.
20. For developments after 2001, see Yasuhiko Taniguchi, "Development of Civil Procedure in Japan: An Experiment to Fuse Civil Law and Common Law" in *Studies in Honored Nanzai Jinas* (Budapest, Hungary: ELTE, 2009), 833-54; and Taniguchi, "Japan's Recent Civil Procedure Reform: Its Seemingly Successful and Left Problems," in Nicolo Trocker and Vincenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Turin, Italy: Giappichelli Editore, 2005), 91-113.

## 5 The Japanese Judiciary *Maintaining Integrity, Autonomy, and the Public Trust*

JOHN O. HALEY

Japanese judges are among the most honest, politically independent, and professionally competent in the world today. Organized as an autonomous national bureaucracy, the judiciary comprises a small, largely self-regulating cadre of elite legal professionals who enjoy with reason an extraordinarily high level of public trust. The vast majority of judges begin their careers in their mid-to-late twenties upon graduation from the court-administered Legal Training and Research Institute (LTRI). Most spend a professional life of thirty to forty years within the nationwide structure of courts that they themselves administer. Assignments and promotions are determined by a central personnel office staffed by peers. (This feature of the judiciary is shared by nearly all public and private organizations of appreciable size in Japan, including all major business enterprises as well as the national ministries and the procuracy.) Coupled with a jurisprudential approach that favors certainty and consistency, the Japanese judiciary is by nearly all accounts cautiously conservative. Yet paradoxically, judges play an activist role in the development of legal norms, filling lacunae left by legislative and administrative inaction.<sup>2</sup> With less irony than may appear at first glance, they have also become a target of criticism for failure to participate more fully in Japanese governance through progressive judicial policy making.

My aim in this chapter is first to describe the judiciary and its exemplary features. I begin with the structure and organization of the courts and the career paths of regular judges. An examination of the Supreme Court for

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### ADR IN JAPAN: DOES THE NEW LAW LIBERALIZE ADR FROM HISTORICAL SHACKLES OR LEGALIZE IT?

*Aya Yamada\**

#### ABSTRACT

*Japanese society has been famous for frequent use of Alternative Dispute Resolution [hereinafter ADR] for civil disputes, rather than court proceedings. The recent tide of justice system reform in Japan includes the development and enrichment of ADR in general. In the "Recommendation of the Justice System Reform" issued in 2001, ADR is regarded as an integral factor of the justice system, aiming to provide people with various and attractive means of dispute resolution, in addition to litigation at Courts. In 2004, the Law on Promotion of the Use of Alternative Dispute Resolution was enacted (Act No. 151 of 2004). This law provides the fundamental ADR policy in general and establishes a certification scheme for conciliation/mediation services delivered by private ADR organizations. Two years have passed since its coming into force in 2007, it is the author's intention to analyze this law's impact on private ADR organizations, as well as other ADR practitioners including Courts and administrative agencies. We are able to observe the tension between the gravities of legalization or standardization of ADR on one hand and of liberalization or de-*

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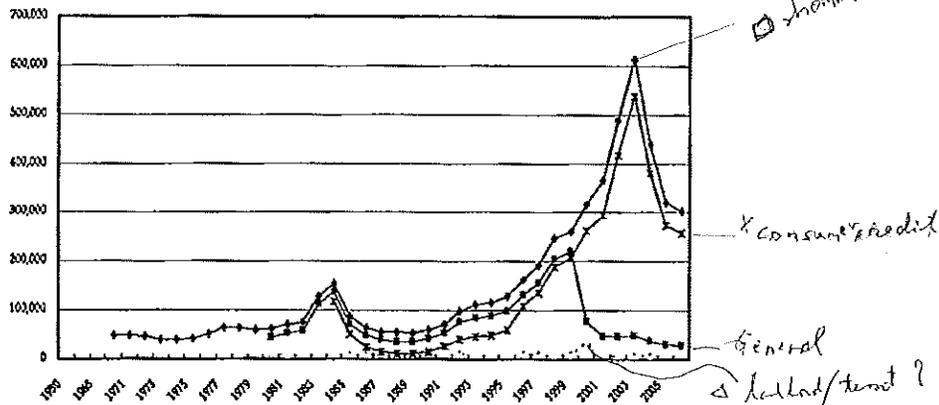
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*legalization of ADR on the other by following the steps of this article.*

**KEYWORDS:** *Alternative Dispute Resolution, ADR, conciliation, mediation, arbitration, unauthorized practice of law, rule of law, justice system reform.*

## I. INTRODUCTION

Japanese society has been famous for frequent use of Alternative Dispute Resolution [hereinafter ADR] for civil disputes in lieu of court proceedings. It is difficult to evaluate if this is true from the numerical perspective. In 2007, the caseload of Court-Annexed Conciliation for civil disputes [*Minji Chotei*] was around 255,000, while those cases filed for trial numbered almost 658,000 including cases filed in both District and Summary Courts.<sup>1</sup> Indeed, if you add the dockets of small claims and *Tokusoku* cases (summary proceedings for debt collection) to the latter, the total number of cases filed for judge's adjudication (in forms of a judgment or a decision on legal merits) would be over 1 million (1,044,701). In this context, we cannot assume that Japanese society prefers ADR to trial proceedings.



On the other hand, the trend of Conciliation cases can be misleading. The graph above shows the trend of the caseload of civil Court-Annexed Conciliation. The x (x) denotes consumer credit/debt cases and the triangle (▲) shows landlord/tenant cases (mandatory conciliation). They are special Conciliation proceedings under two different laws. The square (■) indicates the caseload of general Conciliation proceedings under the Civil Conciliation Law [*Minji Chotei Ho*], and the rhombus (◆) shows the total caseload of all Civil Conciliation proceedings.

You can observe the caseload has fluctuated from more than 600,000 cases in 2003 to 254,000 cases in 2007. It does not mean that Japan has come

<sup>1</sup> The judicial statistics in Japanese can be found at Courts in Japan, <http://www.courts.go.jp> (last visited May 30, 2009). For a summarized version in English, see Supreme Court of Japan: Statistical Tables, [http://www.courts.go.jp/english/info/statistical\\_table.html](http://www.courts.go.jp/english/info/statistical_table.html) (last visited May 30, 2009).

to be litigious; rather, we should view the situation around the year 2003 as exceptional. During the Heisei recession, the *Tokutei* Conciliation proceedings had been playing a special role to provide remedies to the debtors in danger of insolvency. This was established by a special law (Law on Promotion of Adjustment of Specified Debts, Act no. 158 of 1991), as one of the special Conciliation proceedings. The proceedings start when the Court (Summary Court) accepts the debtor's application to mediate over his/her unpaid debts with creditors.<sup>2</sup> During the proceedings, the Court re-calculates the total amount of the payment and allots them to the payment of the principle, not to the interest, even when it has not been agreed upon. Then, it proposes to the parties (the debtor and the creditors) an installment plan for the rest of the debt (if any). However, the Supreme Court judgments rule the multiple debts in general and restrict the interest rates of creditors, so that these *Tokutei* Conciliation cases have decreased dramatically.

The third factor which makes the discussion complicated is that many lawyers in Japan, academic or those in practice, have thought that when the legal consciousness among Japanese people develops, litigation would be preferred to Court-Annexed Conciliation and other ADR proceedings. A world-famous essay written by Takeyoshi Kawashima in 1963 theorized this notion, explaining that the non-litigiousness was a reflection of Japanese culture and a symptom of a lack of modernization.<sup>3</sup> Under this powerful theory, a considerable proportion of lawyers including attorneys tend to evaluate ADR as a vehicle of second class justice. Up to, at the earliest, the 1980's, Court-Annexed Conciliation had been seen as such, although it was virtually the last resort for ordinary disputes, because of the delay and inefficiencies of court trial proceedings and the relatively high price of attorneys' fees. Later, the evaluation of Court-Annexed Conciliation has changed "from negative to contingently positive";<sup>4</sup> however, the other private ADR proceedings including arbitration have not been trusted by disputing parties or by lawyers.

The recent tide of justice system reform in Japan includes the development and enrichment of ADR in general. In the "Recommendation of Justice System Reform" issued in 2001, ADR is regarded as an integral factor of the justice system, which should provide people with various and attractive means of dispute resolution, in addition to litigation in the Courts.

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<sup>2</sup> The *Tokutei* Conciliation has been functioning as an informal financial rehabilitation proceeding, while in 2001, the amendment of Civil Rehabilitation Act starting to offer rehabilitation proceedings to person with multi-debts.

<sup>3</sup> See generally Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 41-72 (Arthur Taylor von Mehren ed., 1963).

<sup>4</sup> Koji Shindo, *Nihon Ni Okeru Chotei Seldo No Hyoka* [Evaluation of Conciliation/Mediation in Japan], in MINJISOSHOU HOGAKU NO KISO [THE FOUNDATION OF CIVIL PROCEDURE THEORY] 309, 322 (1998) (based on his speech at Association of Comparative Law first published held in Taipei in 1986).

In 2004, as a result of difficult discussion, the Law on Promotion of Use of Alternative Dispute Resolution [hereinafter ADR Law] was enacted (Act No. 151 of 2004). It provides the fundamental ADR policy in general and establishes a certification scheme for conciliation/mediation services delivered by private ADR organizations. Two years have passed since its coming into force in 2007, I would like to analyze this Law's impact on private ADR organizations, as well as other ADR practitioners including Courts and administrative agencies. We can see the tension between the gravities of legalization or standardization of ADR on one side and of liberalization or de-legalization of ADR on the other.

## II. OUTLINE OF MODERN ADR IN JAPAN

### A. Court-Based ADR: Some History

1. *Genesis of Court-Annexed Conciliation.* — The first Court-Annexed Conciliation [*Chotei*] system was established by the Landlord-Tenant Conciliation Law of 1922.<sup>3</sup> Even before this enactment, the Court had discretion to recommend settlements to the parties during the trial proceedings. The new Conciliation system was designed to mediate the dispute from the outset of the proceeding.

When the Law was enacted, the booming economy after the World War I and the concentration of population in large cities caused a housing shortage and gave rise to many landlord-tenant disputes. It was the policy of the government to channel these disputes into an amicable settlement by Court-Annexed Conciliation, because such proceedings would bring about a better solution for the parties than adversarial litigation would. At the same time, however, the government wanted to minimize the increase in judicial budget due to increasing trial caseloads. In addition, at that time, the traditional mechanism of settling disputes within each local community had been weakened. This may be the other possible reason for creating public institution to mediate civil disputes.

This Conciliation system did not enjoy popularity at the beginning, but in the year following enactment, an earthquake disaster hit Tokyo and brought about a rapid increase of landlord-tenant disputes. Parties then found the utility of Conciliation, which was more accessible, speedier and equitable than formal court litigation. Because of the success of this first Conciliation system, some special proceedings were successively created: Agricultural tenancy Conciliation in 1924, Commercial Conciliation in 1926, and Monetary Debt Arrangement Conciliation in 1932.

<sup>3</sup> This Law of 1922 was repealed by the Civil Conciliation Law of 1951.

Here we have some statistics of Court-Annexed Conciliation in comparison with litigation. In 1928, when the first three special proceedings were ready to function, the total number of Conciliation petitions was 15,224 nation-wide. But it increased in 1935 to 113,270, including petitions for the Money Debt Arrangement Conciliation proceedings. The number of filings of law suits in the same years in the District Courts nation-wide was 22,041 in 1928 and 20,150 in 1935, and in the Ward Courts (lowest courts before the WWII) 180,843 and 171,613 respectively. From these figures, the conclusion could be drawn that the Court-Annexed Conciliation system had become a popular method of dispute resolution among the Japanese people.

2. *Court-Annexed Conciliation Modernized.* — After the World War II, the various *Chotei* systems were integrated in 1951 under the single Civil Conciliation Law [*Minji Chotei Ho*] with special provisions for differential treatments of various kinds of disputes. When traffic accident disputes increased and various kinds of public nuisance (air/water pollution, noise, etc.) started causing social conflicts, new provisions for the traffic *Chotei* and public nuisance *Chotei* were added to the Law in 1974. When the Landlord-Tenant Law was amended in 1991 to add a provision which required a *Chotei* before filing a case for the increase of rent, the Civil Conciliation Law was amended to respond to it. More recently, in 1999, when the troubles arising from consumer financings (e.g., consumer loan, credit card loan, credit sale) increased dramatically, the Law of Conciliation for Specific Cases [*Tokutei Chotei Ho*] was enacted to deal with the proper arrangement of multiple debts. Under this scheme, the debtor (not the creditor) applies to this Specific Cases *Chotei* to have his/her multiple debts reorganized. One of the most important features is that once a *Chotei* is filed, the creditor is prohibited from starting judicial execution while *Chotei* is going on. During the sessions, the conciliator panel [*Chotei* committee] orders creditors to hand out the contract papers, recalculates the debts based on the Interest Restriction Law, makes a payment plan for all creditors, and persuades creditors and debtors to agree on the plan. The current legislative anomaly of a double standard in interest control is being corrected through the Consumer-Debt Conciliation on the basis of an agreement of the parties concerned, an individual and a money lender.<sup>6</sup>

<sup>6</sup> The anomaly consists in that the Interest Restriction Law limits the interest to maximum 20% per annum but makes a payment of interest in excess valid if paid voluntarily. On the other hand, the Capital Advance Law makes it punishable that a business money lender charges an interest higher than 29.2% per annum. Therefore, most consumer loan companies charged an interest between 20% and 29% and most customers paid the interest "voluntarily". When a debtor becomes insolvent and resort to *Chotei*, assuming that the payment was not on the debtor's clear intent, the debt is recalculated on the basis of the 20% interest and an agreement is reached or a decision *au lieu de* agreement is entered. However, *Chotei* is not a panacea for the debtors who have less expectations of income to pay for the reduced debts in a few years.

At last, in January 2006, each Bench of the Supreme Court rendered judgments not to admit the voluntariness of payment of interest beyond the Interest Restriction Law. See 60-41 MINSHO [Supreme

### ***B. Administration-Based ADR: Consultation, Mediation and Arbitration***

1. *General.* — Many administrative agencies have their own ADR to deal with the disputes arising in the areas of their respective administrative authorities. For example, the Ministry of Health and Labor oversees the pharmaceutical industry and has a general interest in establishing an ADR system of its own to solve disputes arising therefrom. Most of these administrative ADR programs offer consultation, mediation, and adjudication/arbitration services.

However, their ultimate objectives vary. Some appear to be with more emphasis on information gathering. When an administrative ADR openly aims at consumer protection, certain procedural settings which would raise the success rate are strongly desired. In fact, some such ADRs are provided by law and given powers of inspection, publication of name of the company whose behavior is being complained about and/or the contents of the terms of mediation which was proposed but rejected, monitoring of the performance the agreed terms, and so on. Certain administrative ADRs are given by the law a power of administrative adjudication [*Gyosei-Shimpan*] without any arbitration agreement. This appears similar to administrative tribunals in other countries. They can be called “quasi judicial organization”. The stronger the power of an administrative ADR is, of course, the greater independence must be guaranteed to the ADR organization from the administrative agency concerned.

The examples of these administrative ADR include the Environmental Dispute Coordination Commission,<sup>7</sup> the Labor Relations Commissions,<sup>8</sup> the

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*Court Civil Reporter*] 1 (2d Bench of the Sup. Ct., Jan. 13, 2006); 1926 HANREI JIMU 23 (1st Bench of the Sup. Ct., Jan. 19, 2006); and, 60-1 MINSHO 319 (3d Bench of the Sup. Ct., Jan. 24, 2006)). These judgments have triggered the amendment of these Laws in the end of the same year.

<sup>7</sup> It is an external agency of the Ministry of Internal Affairs and Communications. The Environmental Disputes Settlement Law was enacted in 1970, following the Basic Law for Pollution Control of 1967, to establish an efficient system to solve pollution and public nuisance disputes outside the court. Two years later, this system and another dispute resolution system for land-use were consolidated into the Environmental Dispute Coordination Commission system as it is today. This system has two tiers: (1) one Central Commission in Tokyo which deals with large and/or inter-prefectural cases, and, (2) the local Commissions which are located in each prefectural government and deal with smaller cases. The former has settled 736 out of 743 cases received from 1970 (before consolidation) to 2001. The latter altogether disposed 1,122 out of 1169 cases, which consists of conciliation (1,152), arbitration (4) and recommendation to perform the duty (13). The settlement rate seems over 90%. For more details, see Gateway to Determination of Environmental Disputes, <http://www.soumu.go.jp/kouchou/english/index.html> (last visited May 30, 2009).

<sup>8</sup> The local Labor Relations Commissions, located in each prefecture, and the Central Labor Relations Commission (receiving appeals from local LRCs) in Tokyo, give decisions on a claim of unfair labor practice under the Labor Union Law and settle labor disputes by conciliation, mediation and arbitration. This system was established in 1946 after the American model. The Commissions are external agencies of the Ministry of Health, Labor and Welfare.

Construction Dispute Committees,<sup>9</sup> consumer affairs centers of local governments,<sup>10</sup> and so on. The first two are “strong” ones that have power of adjudication.

2. *Short History of Administrative ADR.* — Many administrative organizations, either local or national, have developed ADR and consultation systems for the disputes which occur between the business under their regulation and the consumer or other affected persons. The disputes dealt with vary and increase in variety as new laws promulgate new rights or legal relationships.<sup>11</sup> The administrative agencies have played a big role in regulation of the economy, through legally authorized regulation and administrative guidance which is not authorized by law. In this context, ADR run by administrative agencies could make the most of their power as resources to run ADR systems effectively.

The development of administration-based ADR started in late 1940's, immediately after the World War II. Under the influence of US law, to provide ADR for unfair labor practices and other labor disputes, the Labor Committee system was established by Labor Union Law in 1946. Three years later, ADR for construction disputes and a remedial system for human rights were promulgated by the Construction Business Law and the Law of Committee Members for the Protection of Human Rights respectively. The first two are independent, tribunal-type administrative committees, and the purpose of these three is to protect the newly established rights of workers,

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<sup>9</sup> Local Committees are administered in each prefecture and the Central Committee which deals with larger cases is located in Tokyo. This administrative ADR system was established by the Construction Business Law of 1949 to settle construction disputes rapidly with expert mediator's intervention, and is administered by the Ministry of Land, Infrastructure and Transport. It has mainly entertained business to business disputes, but reflecting an increase of defective housing claims, consumer to business disputes have also been increasing. The caseload of this system, summing up the local and the Central Committees, is as follows; in 2007, 216 new cases were received, consist of 34 for *Assen* [passive conciliation], 146 for *Chotei* [advisory conciliation], and 36 for arbitration.

The number of arbitration cases may appear very few. In Japan, however, this number is exceptionally large as domestic arbitration. The background is as follows. The model construction contract, which Ministry of Land, Infrastructure and Transportation “recommends” to the construction companies to use, includes an arbitration clause for arbitration with the Committee. Validity of an arbitration agreement based on such an unnegotiated clause was questioned but the Supreme Court upheld its validity in 979 HANREI JIHŌ 53, (1st Bench of the Sup. Ct., June 26, 1980). Following this decision, the model contract form was modified, although it was legally unnecessary. At present the arbitration clause is printed on a separate page of the contract and must be signed separately. Thus, the Construction Dispute Committees have dealt with certain number of true arbitration cases, an interesting difference from other ADR organizations in Japan.

<sup>10</sup> There are hundreds of consumer affairs centers instituted by local governments and they network with each other. The National Consumer Affairs Center of Japan [NCAC] is functioning as the core of this network by gathering risk information from local centers, examining product safety, and announcing the result of information analysis, in addition to the regular business of dispute resolution. It was established in 1971 and the government agency concerned is the Cabinet Office.

<sup>11</sup> For example, in 2000, for dealing with disputes over public nursing care service, an ADR system, *Un'ei Tekisei-Ka Inka* [Committee for Reasonable Administration] was institutionalized.

subcontractors, and human rights, rather than mediating the disputes between parties.

In the 1960's, social problems such as public nuisance, environmental damage and consumer disputes have increased and administrative agencies in charge of these problems thought that ADR offered victims more accessible and speedier remedies in comparison to court proceedings.

In 1972, the Prime Minister's Office integrated some administrative ADR organizations dealing with disputes arising from specific nuisance into a Committee for Arrangement of Public Nuisance at national level and a similar dispute resolution organization at local level. This system, especially the Committee at national level is authorized to exercise rendering adjudication without the parties' consent, in addition to mediating between the parties.<sup>12</sup>

Regarding consumer problems, the Economic Planning Agency (at that time) established the National Consumer Life Center in 1970. At the outset, its business focused on information gathering and research of events related to consumer life. The founding law was amended in 2008 and it provides the Center with the power of mediation with authority to order to produce evidence relevant to the proceedings and also provides for arbitration of important consumer disputes, the resolution of which has a great effect in consumer life in general.

On the other hand, in 1965, a local government, Hyogo prefecture, started the first Consumer Life Center. Other local governments, whether at the level of prefecture, city or town, have established such consumer ADR Centers or divisions, following the Hyogo model<sup>13</sup> These are located basically within the administrative organization, and the personnel in charge provide consumers with information on legal and factual matters and advice for negotiation with the business with whom they have issue in the consultation phase. Further, it is not unusual that the personnel directly negotiate with the business, on behalf of the consumer. The next phase is called *Asen* [passive conciliation], but, the line between the negotiation by the personnel and mediation presided by the personnel is blurred. This means that the neutrality of the personnel is not clear, and it is not clear to the complainant which process he/she is using.

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<sup>12</sup> Articles 42-2 *et seq.* of the Law of Resolution of Public Nuisance Disputes allows the Committee to render adjudication on responsibilities and on causes of public nuisance. The former judges the amount of damage, if any, and if one or both parties file a case into court within certain period, the adjudication will be regarded as a settlement. The latter evaluates the causation between the damage and the action of the opposite side and it does not decide the existence and the extent of legal rights directly.

<sup>13</sup> This Hyogo Center became a model for following local governments, and, as of the year of 2007, 532 Centers exist in Japan as whole. However, in this decade, the budget of local government has been tight, so that there appears a tendency to downsize this section.

Although negotiation per procuracion of clients and mediation between parties can be regarded as a practice of law and entrusted only to licensed lawyers (Article 72 of *Bengoshi Ho [Attorney Act]*) these personnel are interpreted as an exception to Article 72, because their practice is not business-based and the personnel have expertise as certificated consumer-life counselors or advisors.

3. *Features of Administration-Based ADR.* — One of the advantages of the administrative ADRs is that they can utilize administrative influence, formally or informally, to make the ADR process efficient. For example, the respondent party (company) will appear at the ADR session and negotiate with the claimant (consumer) faithfully, because it wishes to avoid the risk of negative evaluation by the administrative agency. Under the umbrella of the administrative agency whose influence over the companies is strong, ADR may give the claimant better remedies than those he/she would be awarded in court. It is also expected that the agency monitors the implementation of the promised remedies. For the consumers, the administrative ADR can be more effective than court proceedings. For the company, because of the confidentiality of the process, administrative ADR is more desirable than court proceedings.

At the same time, administrative ADR can be beneficial to the relevant administrative agency itself because a "dispute" is full of useful and specific information about the companies which the agency must regulate. It alerts the administrative agency to the necessity of regulation not only of the accused company but also the industry as a whole. In addition, due to the recent reforms in the Japanese governmental style, the administrative agencies are expected to refrain from exercising too much precautionary regulations so that administrative controls would not deter free economic activities. In this context, the administrative ADRs come to be a good means for the agencies to find out where a problem is and to regulate the respondent company properly.

Let me point out the features of administrative ADR, in terms of cost effectiveness and public interest.

First of all, the service is free or much cheaper than court proceedings.<sup>14</sup> However, in fact, generally speaking the major monetary cost is the attorney's fees. It is a common feature among ADR processes that they do not adopt an adversarial system, but rather a non-adversarial system, more precisely, the *Verhandlungsmaxime* originated from German Law. This principle governs civil procedure and allocates the parties the responsibility of presentation of facts and evidence. In theory, then, the ADR provider or

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<sup>14</sup> For example, suppose you have an environmental problem whose amount at risk is 10 million dollars, you need only 73 dollars to pay to use conciliation service at Committee of Arrangement for Public Nuisance, which is much cheaper than 250 dollars for Court-Annexed Conciliation and 500 dollars for filing a case for litigation.

the neutral party can actively inquire, regardless of the party's presentation. If it works well, the party does not need attorneys. Although many ADR providers do not have such personnel to make inquiries as to the facts and evidence on behalf of the parties, administrative ADR has some advantage in that it may have adjunct research institutions, personnel with expertise, or an administrative network which can assist the neutral party to collect adequate information or evidence. Of course, this kind of inquiry is at the discretion of the ADR provider or the neutral party, so, hiring an outside attorney is a safer and better way for the party. However, administrative ADR is widely regarded as independent and trustworthy, and saving on the attorney's fee is tremendously attractive to the complainants, who, if they were to take the matter to court, need to pay the fee regardless of the result and would not win much money in comparison with punitive damage in the U.S.

### C. Private ADR

1. *Private ADR as a Late Starter.* — The oldest private ADR in Japan is an arbitration organization for maritime disputes, which was established in 1926 and was reorganized as the Japan Shipping Exchange in 1933. It remains the only ADR method for maritime disputes in Japan, and recently it added mediation to its ADR method. In 1950, for commercial disputes where at least one foreign party is involved, an international arbitration organization was created by the Japan Chamber of Commerce and Industry.<sup>15</sup> The other private ADR organizations started to develop on a full scale in the 1990's, with the exception of ADR for car accidents which was established in 1978. E.P.

There may be some reasons why the private ADR started later than court-based or administration-based ADR. One reason is the necessity. Those publicly supported ADR have wide jurisdiction and have plenty of resources such as personnel, public trust, administrative power, budget, legal expertise, and so on. The fees for their service are nominal, if any, and the process is quicker than court litigation. The result of the process could be more equitable than court judgment. The second reason is the general perception of authority accompanying to the decision made by public organizations. A tendency could be observed that not only individuals but also businesses respect public organizations as authoritative, rather than private ordering through negotiation and settlement by the parties. This tendency may relate to the strict perception of neutrality. The private organizations need funding from someone, and then automatically people doubt their neutrality, even when the mediator or arbitrator is institutionally insulated from such funding.

<sup>15</sup> It became Japan Commercial Arbitration Association, which deals with domestic commercial disputes as well and started mediation service for commercial disputes in general.

The third one relates to ADR generally, the easiness of foreseeing the judgment. For some decades, the judicial precedent and positive law have been stabilized in Japan. In this context, the incentives for parties to negotiate outside of the court are not high; if a party wants to foresee the judgment, the Court-Annexed Conciliation is the shortest way.

2. *Bar Association-Based ADR.* — The situation has been changing, though slowly. The important actors in promoting private ADR are attorneys [*Bengoshi*] and their national association, the Japan Federation of Bar Associations. The first big change occurred in 1978 when the JFBA decided to cooperate to run private ADR, the Center for Resolution of Traffic Accident Disputes, funded by an alliance of various insurance companies. At that time, many attorneys defined their mission as to pursue legal rights in court, through judgment, without compromise. On the other hand, at that time, all lawyers including judges had serious concerns in common that appropriate remedy should be given to each victim as soon as possible.

After the standardization of the amount of compensation was completed tentatively by the court, the Center could contribute to the efficient remedy. For this purpose, the Center adopted unique procedural features. Firstly, the insurance company which is allied and complained by the accident victim cannot deny participation in the mediation process (it keeps veto on the settlement of the case, though). Secondly, such insurance company has to accept the adjudication given by the Adjudication Committee. When the mediation fails and the claimant wants, the case is brought to the adjudication phase, where Adjudication Committee deals with the case as if arbitration agreement exists. The adjudication, different from arbitration award, does not deprive the claimant of his/her right of day in court. On the other hand, the insurance company has to accept it as far as the claimant accepts it. This system is called "one-side arbitration [*Henmen Chusai*]" in Japan, a kind of conditional arbitration.

We can see this event as a turning point; it took another ten years for the local Bar Association to create an ADR, dealing with all civil disputes. In 1990, the Tokyo Second Bar Association set up the first Bar Association based ADR, "Arbitration Center", offering mediation and arbitration for all cases where the parties have right to consent. In respect of the scope of disputes, it could be regarded as a privatization of Court-Annexed Conciliation. However, the quality of the process should be better and quicker than other ADRs because they are led by experienced attorneys, and, it should be cheaper than court litigation with representation by attorneys. In fact, the parties at Arbitration Center have to pay higher fee than Court-Annexed Conciliation<sup>16</sup> and the Court-Annexed Conciliation system's

<sup>16</sup> In many cases, it is impossible for parties to cover all amount of the fee which the attorney would have gained if he/she worked for ordinary clients. Most local Bar Associations compensate the fee of attorney, who is in charge of a mediator or an arbitrator.

resources are such that it is difficult for the Center to compete; however, the Center has been fighting bravely. The movement of creating such ADR has been spreading over the local Bar Associations nationwide. Now 25 local Bar Associations have this kind of ADR.<sup>17</sup>

3. *Business Association-Based ADR.* — An ADR which deals with disputes between a business and a consumer, and is funded by a business association in which the business involved in the dispute belongs to is classified as Business Association based ADR.

The typical Business Association based ADR is called "PL Center", which was institutionalized in accordance with the Diet's supplementary resolutions passed when the Product Liability Law was enacted in 1994. There are many ADR organizations of this type, each dealing with a category of products, such as automobiles, household appliances, cosmetics, chemical goods, and so on. Its scheme of dispute resolution is guided by the Ministry of Economy, Trade and Industry [METI] but its operation is not governmental.

Here again we see the Japanese preference for mediation over a lawsuit when coping with new social issues. These centers deal with product liability disputes (damages arising from deficient products), excluding consumer contract disputes. Generally, they have three procedural stages; the consultation, mediation, and adjudication by a neutral party which usually binds only the industry party. Each PL center receives more than one thousand consultations a year but cases reaching mediation or adjudication are often less than 10 per year. Such a gap is a common feature among ADR outside of court. It is said that the person in charge of consultation often mediates the parties *de facto* before referring a case to a neutral mediator or adjudicator.<sup>18</sup> If so, the real settlement ratio is higher than the published data which is only a fraction of 10% of the cases actually referred to mediation or adjudication.<sup>19</sup>

<sup>17</sup> The name of ADR varies; especially the newly developed ADR organizations name themselves "Dispute Resolution Center", avoiding the use of "arbitration".

<sup>18</sup> Those who are in charge of consultation are usually sent from a manufacturer of the relevant industry because they need expertise about the products. Naturally they cannot be totally neutral, while the mediator and adjudicator must be. The neutrals are mostly lawyers. When *de facto* mediation is conducted by such "partisan" receptionists, a conflict of roles is well suspected.

<sup>19</sup> For example, the Automobile PL Consultation Center received 3,098 consultations in 2007. 63.8% of them were contract-concerned, claiming defects in function or quality of automobiles, and 29.8% were technical inquiry from consumer affairs centers described in *supra* note 10, or inquiry of troubles with dealers' repair shops, and only 6.4% (198 cases) were related to product liability. Although most consultations were not within its jurisdiction, the Center dealt with all of them.

The outcome of consultation was as follows; 22.5% were mediated *de facto* by the person in charge of consultation and 81.6% were disposed of without active intervention of the Center. For the latter category of cases, the person in charge gave the claimant technical information and/or advice which would help the claimant to negotiate with the company *pro se* or to understand that the claimant's complaint was groundless. In the same year, 22 cases out of those 2,555 cases were not disposed of and proceeded to the "formal" mediation process, which is presided by an advisory attorney of the

### III. ADR LAW AND ITS IMPACT

#### A. *ADR and the Rule of Law*

The justice system in Japan has been small, in respect of budgets of the court system and markets of legal services. This situation simultaneously exists with the shortage in the number of lawyers, accessibility to legal system, and public perception of the usefulness and efficiency of court proceedings.

In 2001, the Prime Minister Koizumi started reform of the justice system, and for the purpose of completing the first ever radical reform since Meiji government has built the new, westernized justice system. He assigned variety of key figures as members of the Justice System Reform Council, which was established in the Cabinet in 1999. The Council issued "Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century" in 2001. Following this Recommendation, a lot of changes have been discussed and realized.

In the Recommendation, ADR is taken up as a topic in "Chapter II: Justice System Responding to Public Expectations". Some points are excerpted below:<sup>20</sup>

In addition to making special efforts to improve the function of adjudication, which constitutes the core of the justice system, efforts to reinforce and vitalize ADR should be made so that it will become an equally attractive option to adjudication for the people.

From the standpoint of establishing a comprehensive institutional base for ADR, necessary measures should be studied, including the possible enactment of a law (such as "ADR Basic Law") that prescribes a basic framework to promote the use of

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Center. In this phase, 14 out of 22 cases were settled (success rate was 63.6%). Only 1 case was newly applied to the Adjudication Committee whose members are independent from the Center or the member companies in 2007. The case was settled before the adjudication was rendered. If rendered, the adjudication would bind parties only when the consumer side accepts it (conditionally binding arbitration). See Automobile PL Consultation Center, Katsudo Jokyō Hokoku 2007 [Activity Report for 2007] 19, 25-27.

<sup>20</sup> SHIHO-SEIDO KAIKAKU SHINGOKAI [JUDICIAL SYSTEM REFORM COUNCIL], SHIHO SEIDO KAIKAKU SHINGOKAI IKENSHO: 21 SEIKI NO NIHON WO SASAERU SHIHO SEIDO [RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL - FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY] 35-38, (June 12, 2001), English version available at <http://www.kantel.go.jp/foreign/judiciary/2001/0612report.html> (last visited May 30, 2009) (It is on the website and is not paged. The text is excerpted from: "Chapter II. Justice System Responding to Public Expectations - Part 1. Reform of the Civil Justice System - 8. Reinforcement and Vitalization of Alternative Dispute Resolution (ADR)").

ADR and to strengthen coordination with trial procedures. In doing so, the following measures specifically should be studied: coordination of conditions for giving the effect of interruption (suspension) of the statute of limitations; granting execution power; including ADR as an object of the legal aid system; and coordination of procedures for using trial procedures for the whole or a part of an ADR proceeding, and vice versa.

As a result, the "ADR Basic Law" suggested in the Recommendation became Chapter I of the ADR Law. It does not provide legal rights and duties, but demonstrates the general policy of ADR promotion as a means of appropriate realization of rights and interests of the people (Article 1), and provides basic principles and definitions of ADR (Article 2 and Article 3(1)). It also contains the duty of ADR organization to cooperate with each other, as well as the responsibilities of the state and local government to promote ADR by providing relevant information or by other appropriate means (Article 3(2) and Article 4).

Some basic procedural rules such as "confidentiality" failed to be incorporated, which the "ADR Basic Law" might implicitly adopt.<sup>21</sup> Instead, a certification scheme focusing private ADR was established by the Law. This was not included in the Recommendation. When the certification scheme appeared as a topic of the Law, a heated argument occurred within the ADR Study Committee (which was established to consider and to propose the way of realization of the Recommendation) as to whether legal regulation of ADR was consistent with the nature of ADR. To conclude, the Study Committee stated that if there was no legal guarantee of the quality of private ADR, public trust in private ADR would be extremely difficult to gain. A Certification scheme is regarded as one of the ways of quality control of private ADR.

The other argument was whether ADR promotion was consistent with the "rule of law", which was the ultimate goal of the Justice System Reform. Suppose you see ADR as an informalized trial, then, ADR would not contribute to the rule of law as far as the result of ADR process differs from foreseen judgment at court.

I propose, on the other hand, that ADR should be analyzed from the negotiation side. It should play an important role to ratify the negotiation process through equalization of parties, making parties informed, and

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<sup>21</sup> Firstly, the UNCITRAL Model Law on International Commercial Conciliation was thought to be adopted, as if the UNCITRAL Model Law on International Commercial Arbitration was adopted by new Japanese Arbitration Law. However, it failed, because adoption of procedural rules on mediation/conciliation was thought to be too early. The more substantial reason would be that for Court-Annexed Conciliation, already the laws (Civil Conciliation Law and Act on Adjudication of Domestic Relations) have existed, and such procedural rule was thought to restrict the power of conciliators too much.

facilitating negotiation between the parties. As for the civil matters, private ordering by the parties through making contracts, especially settlement contracts, is the principle. However, in many cases parties are not informed well or do not know how to negotiate with others, and the settlement agreement may not be that which is best suited to the dispute. ADR can assist such parties by agreement-based dispute resolution methods, such as mediation/conciliation or arbitration. In this context, the rule of law and promotion of ADR do not necessarily conflict each other.

### *B. Outline of the ADR Law*

1. *Principles of ADR: Chapter I of the Law.* — Chapter I governs all kinds of ADR, private or public, mediation or arbitration, certified or not. Article 3, which provides for the basic principles of ADR, reads: "Alternative dispute resolution procedures shall, as procedures for settling disputes legally, be executed in a fair and appropriate manner while respecting the voluntary efforts of the parties to the dispute resolution, and be aimed at achieving prompt dispute resolution based on specialized expertise and in accordance with the actual facts of the dispute." It is highly demanding, but at the same time, it shows variety of expectations towards ADR.

It should be noted that ADR is provided "as procedures for settling disputes legally." This "legally" does not mean the result of ADR procedure shall be the result of strict application of law and precedents at court. It should be interpreted more liberally, allowing creative options of settlement and producing individual justice. Needless to say, the Law aims not to admit illegal or legally invalid procedure or results of procedure. The word "legally" should be interpreted in this context.

2. *Certification Scheme of Private ADR: Chapter II of the Law.* — The Ministry of Justice [MOJ] has the authority of certification of mediation/conciliation services provided through private ADR<sup>22</sup>. As a result of the long discussion mentioned above, this scheme is not licensing, but certifying certain quality in ADR service providers. Under this scheme, anyone can establish and manage a private ADR organization (or individually provide ADR services) and offer ADR service to the society without this MOJ certification. The only but serious concern is that ADR service is generally regarded as practice of law, which is prohibited and criminalized by Article 72 of the Attorney Act. The exceptions to the application of this provision is that (i) when the service is not offered on a business basis; (ii) when the service is interpreted as a legitimate act; or (iii)

<sup>22</sup> As for the arbitration services, the Arbitration Law is to regulate. However, some scholars say that arbitration should be regulated more strictly than mediation/conciliation because the arbitration award become binding without party agreement.

when other law provides differently. The certification based on ADR Law comes under the (iii) exception.<sup>23</sup>

This is better understood if taking the policy of utilizing non-lawyer professionals, such as those from fields adjoining law (quasi-legal professionals) into consideration. The Recommendation of 2001 suggests clarifying the requirements of Article 72, considering the changes of the services which non-lawyer professionals provide.<sup>24</sup> It can be seen as a liberalization of legal service.

However, again, the situation is complicated. The MOJ scheme requires ADR organizations to guarantee an attorney is available for consultation when specialized knowledge on the interpretation and application of laws and regulations is required in the process of providing private dispute resolution (Article 6(v)). It not only excludes illegal settlement, but also guarantees the parties decide when they are fully informed from the viewpoint of law. Benefits of ADR which are sacrificed in favor of additional legal input will be non-legal creativity, non-legal mutuality and casual negotiation between parties, because parties tend to focus on the virtual judgment of their disputes offered by the consulting lawyer.

Let me introduce the other legal effects of the MOJ certification scheme. They are provided by the Articles 25 to 27 of the Law.

First, Article 25 provides that where the MOJ certified ADR procedure is terminated without reaching settlement, and a party brings a suit within one month from the date of being notified of the termination, prescription shall be nullified as if the suit had been brought on the date on which the "claim" was presented during the certified ADR procedure. Different from the complaint submitted to court, at the outset of ADR procedure, the "claim" does not need to identify the legal right whose limitation may be at risk, or, precisely, such legal claim itself need not to be included.

Secondly, when a lawsuit is pending, and the parties agree to use certified mediation/conciliation procedures or such a procedure is already being carried out, the court may make a decision that the legal proceedings shall be suspended for a period of not more than four months (Article 26). The court has the authority to forward the pending case to Court-Annexed Conciliation, suspending the legal proceedings with no restriction of period. It's within the discretion of the court, so, no party agreement is required

<sup>23</sup> In fact, potential private ADR organizations without MOJ certification still withhold their full-scale activities because they may be criminally charged with unauthorized practice of law.

<sup>24</sup> The Recommendation reads: "study must be given to each such profession individually, taking into account each profession's actual situation, and the status of such non-legal professionals should be legally defined as part of the revision of Article 72 of the Attorney Act. That article should at least clarify the contents of restrictions in an appropriate way, including the relationship with persons engaged in corporate legal work, from the standpoint of responding to changes in the contents of services provided by professionals in fields adjoining law and the diversification of company forms, in order to ensure the predictability of the scope and modes of activities that are subject to restrictions."

(Article 20 of Civil Conciliation Law). In comparison with this authority, this treatment of private ADR is understated.

The third legal effect is to substitute certified ADR for mandatory Court-Annexed Conciliation. For example, divorcing parties need to apply for Family Court-Annexed Conciliation first, and if it fails, either party can file a case into the Family Court.<sup>25</sup> Article 27 of the Law provides that if such parties try to mediate their dispute using a MOJ certified ADR service, and if it is terminated without reaching settlement, either party is permitted to bring the suit into the Family Court. This substitution is applicable to disputes related to the appropriate amount of rent fee of land or house (Article 24-2(1) of Civil Conciliation Law).

3. *Certification Standards.* — Article 6 provides the standards for certification according to sixteen criteria, as well as one more request in its main clause that the ADR organization shall have the “financial base” to carry out its service. Article 7 provides the reasons for disqualification on the basis of 12 criteria. Many of them are common with international standards such as the UNCITRAL Model Law on International Commercial Conciliation, the ISO 10003 for External Dispute Resolution, and the Unified Mediation Act of the US. They include, for example, (a) a mediator whose expertise and competence should be suitable to the individual dispute (Article 6(i)); (b) fairness and impartiality of mediator and ADR organization (Article 6(ii)); (c) adequate and certain notice of process (Article 6(vi)); (d) standard operation process from the commencement to the termination, including clear grounds for termination of ADR procedure and operation of notice (Article 6(vii), (xii)); (e) secure management of submitted materials and range of confidentiality (Article 6(x), (xiv)); (f) appropriate handling system for complaints arising from ADR procedure (Article 6(xvii)).

On the other hand, at least two considerations are unique to Japanese society. One is that the request for the availability of a consultation attorney (Article 6(v)). The other is that Article 7 provides a number of disqualification reasons many of which aim to exclude Japanese mafia [*Yakuza*] from becoming ADR providers.<sup>26</sup>

As you will see, most standards are related to procedural matters. The exception is the third one, ensuring the availability of legal advice, which was (and is still) the most controversial standard, provided by the Article 6(v) of the Law. If the scope of necessary consultation is broadened, the ADR

<sup>25</sup> See Article 18 of *Kaji Shiropan Ho* [Act on Adjudication of Domestic Relations], Act No. 152 (1947). As for its real functioning and potential problems, see Aya Yamada, *Divorce Mediation in Japan: Legalization, Privatization, and Unification* (presented at Sho Sato Conference at University of California Berkeley on Japanese Family Law in 2008) (forthcoming 2009).

<sup>26</sup> Article 7 includes disqualification reasons such as: a person who was declared bankrupt and has yet to have his/her rights restored; a person who was sentenced to a fine for violating the provision of this Law or the Lawyers Law; a person who is a member of mafia; a corporation whose director or an employee comes under the disqualification reasons.

procedure becomes more law-like and adversarial, the procedure tends to focus only on legal issues, rather than to develop the settlement options or try to understand each other's perception of the dispute. On the other hand, needless to say, illegal settlements or those with serious deficiencies in terms of legal characteristics shall be prohibited, and, the parties should be fully informed when they decide to agree on a settlement and dispose of their rights to sue.

This standard is a result of compromise between these two values. At this moment, when the availability of an attorney's consultation outside of the ADR procedure is not easy, in terms of economical and psychological barriers, and when the ADR itself has not yet been trusted by public, this kind of institutional safety-net is necessary. However, the practical problems remain: how and when the legal advice should be disclosed to the parties; should it be in the joint session or in caucus settings; what if the potential problem is not noticed by the mediator so that the settlement is reached without legal consultation; how deeply the attorney should be involved in the procedure, and so on.

It is quite difficult to give comprehensive answers to these questions. Here I just put some theoretical cues to think about the detailed interpretation for the actual cases. First of all, legal advice should be taken as a tool for parties to reach a better self-determination, not as the final decision rendered by the other person. In fact, many legal advices would encompass some latitude depending on the probabilities of proof, foreseen judgment on fault, and estimation of damages (especially the amount of psychological compensation). They restrict excessive claims and offer a basic framework of negotiation. In this sense, such legal advices can be delivered in the joint session. If parties understand that the legal consequence shall not be the only and the best fitting resolution for their dispute, the mediator can continue to facilitate the negotiation between the parties to develop a mutually beneficial resolution, considering values other than law, such as continuing business relationship, prevention of future wrongdoing, psychological satisfaction, confidentiality of the disputes, and so on.

Secondly, however, we should take care of the third party's interest and the public values of protection of social disadvantaged persons from exploitation or being defrauded. If the dispute encompasses such interest or values, the mediator should intervene actively into the mediation process.

Thirdly, the role of attorneys who represent his/her client at mediation has not been theorized yet. Some do more careless work at mediation, while some do adversarial arguments the same as in litigation. The attorneys should assist their client to reach a better self-determination and a better settlement agreement. Before and during the mediation proceedings, the attorney should check if the client's needs and preference are well communicated to the mediator and the other party, assist the mediator to offer proposals or options

to reach mutually beneficial settlement, and to calculate the timing to quit the process if necessary. The ultimate purpose of the representation at mediation is to reach a resolution, not to fight over legal rights.

### C. Impact of Enactment of ADR Law

1. *Increasing Certified ADR.* — Since its effective date of April 1st of 2007, the number of applications from private ADR organizations for MOJ certification has been increasing. As of the end of January 2009, 26 providers have been certified.

The problem is that the caseloads have not increased dramatically. The causal relationship between certification of an ADR organization and the strengthened motivation to use it cannot be observed, so far. The concept of ADR has not yet spread in society,<sup>27</sup> and even among the professionals who run their own ADR, e.g., attorneys, judicial scriveners, land and house investigators [*Tochi Kaoku Chosa-Shi*], ADR is generally less trusted than courts and administration-based ADR.

However, some positive effects can be seen in repeat players. When a consumer bring a claim into the certified ADR organization, the first stage is a consultation where personnel gives advice to the claimant and exchanges the positions of both sides (consumer and business). Recently, in this stage, not few businesses have come to compromise for settlement more readily than before. This happens *prior* to the certified mediation/conciliation procedure, because they would like to avoid all "formal" procedures which interestingly include certified mediation/conciliation. This is an important effect of ADR Law because it equalizes the parties and leads them to a fair negotiation and an appropriate resolution.

2. *Widening the Varieties of Jurisdiction.* — As the certification scheme gets known not only to the active ADR organizations but also latent ones, the subject matter jurisdiction of certification applicants has been varied. The inspired organizations include ones such as Japan Industrial Counselors Association which has applied for and was certified by the MOJ for offering mediation for labor disputes and relationships of couples, married or not. It utilizes a facilitative method, based on the industrial counselor's expertise, not relying on the virtual judgment over the dispute.

In addition, administrative agencies other than the MOJ have become interested in the ADR certification scheme, instead of establishing their own administration-based ADR, which costs more. For example, in 2008, METI proposed the amendment of an Act on Special Measures for Industrial

<sup>27</sup> The public notice of ADR has been slightly better, the reasons of which including that now the MOJ advertises it on its costs, that newspapers sometimes introduce ADR, that legal aid center (Ho-Terrace) will start introducing ADR to the customers, and that some law schools had started to teach ADR in their formal curricula.

Revitalization, which established an additional certification scheme to MOJ certification. A provider dealing with voluntary revitalization planning of businesses can apply to METI for a Specifically Certified ADR Provider, if it has been certified by the MOJ scheme.

There are different kinds of legal revitalization procedures, but this scheme promotes the quality of revitalization processes outside of courts and urges businesses to utilize such processes to turn themselves around as early as possible. Most businesses in deterioration would postpone using revitalization procedures in court, because of their reputation in the market and the acceleration effect on debts. On the other hand, revitalization outside of courts has not been fair enough because it needs all creditors' agreement on the turnout plan without any institutional and professional support. METI's aim is to streamline the turnout process by private ADR provider with expertise and efficiency.

3. *Pursuing Transparency of Disputing Process.* — Many certified ADR providers are administrated by non-lawyer personnel. Before their preparation for certification, the processes of consultation, mediation and conditional arbitration were confused partly from the perspective of procedural fairness. For example, at the business association based ADR organizations, the de-facto distinction between consultation and mediation has been blurred. At the consultation stage, advisor tended to mediate between the claimant and the business, even when the advisor had already listened to and given advice to the claimant. The duty of confidentiality of unbeneficial information of the claimant was not secured. The possible conflict between the partisan role of advisors (on the consumer/claimant side) and neutrality as a mediator was not considered seriously.

Under the certification scheme, this kind of conflict is not allowed, and the administration office now fully understands such risks. It tries to pursue the transparency of processes.

4. *Promoting Competition and Networking Within Dispute Resolution Services.* — From the viewpoint of caseload, the Gulliver of ADR is still the Court-Annexed Conciliation for civil disputes. In respect of legal effects of settlement agreements, which allows the parties to start execution of the agreement, the fee, and the public trust in Courts generally, the Court-Annexed Conciliation has an apparent advantage.

Nevertheless, some Court-Annexed conciliators started to think that competitors have appeared with new perspectives and techniques of mediation. Many conciliators have joined the training or study sessions organized by private ADR organizations. Courts started to promote the quality of Conciliation, considering the situation in justice systems in other countries.

At the same time, networking among private ADR providers has begun. For example, the Osaka Bar Association tries to network its ADR with those

run by other profession's associations. ADR Networking is essentially important, because the subject matter jurisdiction of ADR is narrower than Courts. It could ensure to develop the effective collaboration of training for mediator/conciliators, to offer multiple expertise for dispute resolution, and to invite more customers. It can be a fertile soil to breed comprehensive ADR.

#### IV. CONCLUSION

The ADR Law was enacted to promote quality and the use of ADR by liberalization of dispute resolution services. So far the liberalization proceeds smoothly, inspiring private and administration-based ADR providers. On the other hand, the certification standard has established a set of institutional requirements which ADR should satisfy, including ensuring the availability of a consulting lawyer. It may drive ADR to legalization and deprives ADR of incentives to develop facilitative or dialogue-centered mediation methods.

As a civil law country, the traditional image of "rule of law" is to spread the authoritative legal interpretation (in many cases, in the shape of estimation of court judgment) in every corner of the country. Then, the role of ADR is a vehicle of such interpretation.

On the other hand, when the importance of private ordering through mutual agreement is stressed, the "rule of law" is understood to ensure the quality of the private ordering and liberty of agreement. The wider the accessibility to litigation is, the fairer the settlement outside of court must be. The role of legal advice in certified ADR should be limited to this function of "rule of law", as far as the third party interest or the public interest is not concerned. This may be more influenced by the image of ADR in common law countries.

Some additional years are necessary to determine the effect of the new ADR Law. The worst scenario is that ten years later, certified ADR terminate their services because of the running cost of qualified ADR, including fees for consulting lawyers. Right now a business model for private ADR is not developed in Japan and there seems no chance to get monetary support from local or state government.

The better scenario is that various ADR services ranging from legal to non-legal are offered by mediators with various backgrounds, and they offer wide accessibility to ordinary people and businesses. Disputing parties appreciate that the way of dispute resolution and the resulted private ordering can vary, depending on the individual situation and priorities, and that the private ordering by the disputants themselves empowers them and brings better tailor-made results for them. This scenario may require the integration of the images of mediation and rule of law in Japan and in the common law countries.

## REFERENCES

Articles/Shorter Works in Collection

Kawashima, Takeyoshi (1963), *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* (Arthur Taylor von Mehren ed.).

Shindo, Koji (1998), *Nihon Ni Okeru Chotei Seido No Hyoka [Evaluation of Conciliation/Mediation in Japan]*, in *Minjisosho Hogaku No Kiso [THE FOUNDATION OF CIVIL PROCEDURE THEORY]* 309.

Cases

1926 HANREI JIHŌ 23 (1st Bench of the Sup. Ct., January 19, 2006).

60-41 MINSHŪ 1 (2d Bench of the Sup. Ct., January 13, 2006).

60-1 MINSHŪ 319 (3d Bench of the Sup. Ct., January 24, 2006).

979 HANREI JIHŌ 53, (1st Bench of the Sup. Ct., June 26, 1980).

Statute

Kaji Shimpan Ho [Act on Adjudication of Domestic Relations], Act No. 152 (1947).

Internet and Other Sources

Automobile PL Consultation Center, *Katsudo Jokyo Hokoku 2007 [Activity Report for 2007]*.

Courts in Japan, <http://www.courts.go.jp>.

Gateway to determination of environmental disputes,  
<http://www.soumu.go.jp/kouchoi/english/index.html>

SHIHO-SEIDO KAIKAKU SHINGIKAI [JUDICIAL SYSTEM REFORM COUNCIL], SHIHO SEIDO KAIKAKU SHINGIKAI IKENSHO: 21 SEIKI NO NIHON WO SASAERU SHIHO SEIDO [RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL – FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY] (June 12, 2001), English version available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

Supreme Court of Japan: Statistical Tables, [http://www.courts.go.jp/english/info/statistical\\_table.html](http://www.courts.go.jp/english/info/statistical_table.html).

Yamada, Aya (forthcoming 2009), *Divorce Mediation in Japan: Legalization, Privatization, and Unification* (presented at Sho Sato Conference at University of California Berkeley on Japanese Family Law in 2008).

## WHY HAS JUDICIAL REVIEW FAILED IN JAPAN?

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## I. INTRODUCTION

Judicial review in Japan can be characterized as a failure in more than one sense. On the one hand, the *Saikō saibansho*, or Supreme Court of Japan (SCJ), strikes down government actions so rarely that the judicial enforcement of constitutional limits on government power exists more in theory than in practice. On the other hand, even on those rare occasions that the SCJ does exercise the power of judicial review, its practical ability to secure government compliance in all but the most trivial of cases is open to question. Over the course of its entire existence—a period spanning over six decades—the SCJ has struck down only eight laws on constitutional grounds<sup>1</sup> and thus cemented its reputation as “the most conservative and cautious in the world” with respect to the exercise of judicial review.<sup>2</sup> By contrast, the German *Bundesverfassungsgericht*, a slightly younger court, has already struck down over six hundred laws,<sup>3</sup> while the United States Supreme Court, with a docket similar in size to that of its Japanese counterpart,<sup>4</sup> has struck down roughly nine hundred laws over the same time frame.<sup>5</sup> Worse still, in the one area where the SCJ has struck down legislation of any political or ideological significance<sup>6</sup>—

1. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1547 (2009); Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375, 1388–92 (2011). Nor has the SCJ made a habit of invalidating executive or administrative action on constitutional grounds. See *id.* at 1392–95.

2. DAVID BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 121 (1995).

3. See *Germany's Constitutional Court: Judgment Days*, ECONOMIST, Mar. 28, 2009, at 59 (reporting that, since its creation in 1951, the German *Bundesverfassungsgericht* has struck down 611 laws).

4. See Law, *supra* note 1, at 1577 & nn.191–92 (noting that both the United States Supreme Court and Japanese Supreme Court typically face a docket of roughly ten thousand cases per year).

5. From the 1953 through 2009 terms, the United States Supreme Court struck down on constitutional grounds a total of 262 acts of Congress, 566 state laws, and 68 local ordinances. See Harold Spaeth et al., *2010 Release 02*, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/data.php?s=2> (Aug. 26, 2010) (comprising a variable, “UNCON,” that measures declarations of unconstitutionality). At an individual level, a number of Justices vote to strike down over half of the statutes that they confront. See Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1774–76 & tbls.1, 2 (2007) (summarizing the voting records of the members of the Burger and Rehnquist Courts in cases involving the invalidation of statutes).

6. See Law, *supra* note 1, at 1547 (summarizing “the rare and often obscure legislative provisions that the Court has struck down”); Matsui, *supra* note 1, at 1388–92 (describing each case in

namely, the electoral apportionment of the House of Representatives<sup>7</sup>—the government has failed for decades to comply with the Court’s rulings.<sup>8</sup>

This Article surveys and critically evaluates a wide range of historical, cultural, political, and institutional explanations for the effective failure of judicial review in Japan. Some accounts depict the judiciary as an

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which the SCJ has struck down a law, and noting that it has been “rare” for the Court’s holdings of unconstitutionality to have “significant political implications”). In his contribution to this Symposium, Professor Haley reaches a different conclusion. He argues, *inter alia*, that the SCJ cannot accurately be characterized as more deferential to other government actors than its American or European counterparts, and that the SCJ has in fact “reached decisions that are considerably more ‘liberal’ or ‘libertarian’” than those rendered by the U.S. Supreme Court. John O. Haley, *Constitutional Adjudication in Japan: History and Social Context, Legislative Structures, and Judicial Values*, 88 WASH. U. L. REV. 1467, 1470 (2011). In support of his argument that the SCJ has on occasion shown a “considerably more ‘liberal’ or ‘libertarian’” streak than its American counterpart, he cites a case in which the SCJ struck down a law that prevented pharmacies from operating within a certain distance from one another, and another in which the SCJ invalidated limits on the postal service’s liability for losing registered mail. *See id.* Had the SCJ consciously set itself the goal of performing judicial review in a manner that bothers the government as little as possible, however, it would have been hard pressed to find a pair of more obscure or less important laws to invalidate. Nor do these cases begin to establish that the SCJ is anything other than conservative: the only sense in which the pharmacy case might be characterized as “liberal” or “libertarian” is in the sense epitomized by the *Lochner* Court and its reactionary favoritism toward economic liberty. *See Lochner v. New York*, 198 U.S. 45 (1905) (striking down restrictions upon bakery working hours as an unconstitutional infringement upon freedom of contract).

7. *See, e.g.*, Saikō Saibansho [Sup. Ct.] July 17, 1985, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1100 (*Kanao v. Hiroshima Election Mgmt. Comm’n*); Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223 (*Kurokawa v. Chiba Prefecture Election Control Comm’n*).

8. In response to the Japanese Diet’s ongoing failure to keep malapportionment of the House of Representatives within the limits set forth in *Kurokawa*, the Court has reiterated in a string of cases that the apportionment scheme remains unconstitutional, but it has consistently declined to order a remedy. *See, e.g.*, William Somers Bailey, *Reducing Malapportionment in Japan’s Electoral Districts: The Supreme Court Must Act*, 6 PAC. RIM L. & POL’Y J. 169, 178–81, 184 (1997) (discussing both the Court’s malapportionment decisions subsequent to *Kurokawa*, and the ongoing inadequacy of the Diet’s response); Law, *supra* note 1, at 1547–48 & n.11; Shigenori Matsui, *The Reapportionment Cases in Japan: Constitutional Law, Politics, and the Japanese Supreme Court*, 33 OSAKA U. L. REV. 17, 30–36, 40–42 (1986) (noting the “deep frustration” of many judges and commentators at the “continued failure of the Diet” to comply with the Court’s legislative apportionment rulings); *Court Contradictory on Vote Disparity*, JAPAN TIMES, Nov. 18, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20101118a1.html> (describing a pair of conflicting Tokyo High Court rulings on the constitutionality of the apportionment of the Diet’s upper chamber, and noting that vote-value disparities have actually increased since the last election in 2007). Nor is electoral apportionment the only context in which the government has proven uncooperative with judicial rulings of unconstitutionality. *See Law, supra* note 1, at 1587 & n.257 (noting that it took nearly two decades for the Diet to comply with the Court’s decision in the *Parricide* Case, Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265, by repealing the provision that had been held unconstitutional); Craig Martin, *Rule of Law Comes Under Fire: Government Response to High Court Ruling on SDF Operations in Iraq*, JAPAN TIMES, May 3, 2008, available at <http://search.japantimes.co.jp/print/ea20080503a1.html> (describing the government’s public vow to ignore a Nagoya High Court ruling that deemed Japan’s air support operations in Iraq to be a violation of Article 9 but denied relief to the plaintiffs on standing grounds).

ideological ally or servant of a long-ruling conservative government.<sup>9</sup> Other explanations portray the judiciary's behavior as the product of extreme deference to the wishes of the government, or the public, or both.<sup>10</sup> Still other accounts posit that, for reasons that are easily overlooked, the judiciary simply has not been confronted with many laws that are constitutionally suspect.<sup>11</sup> Some of these arguments feature prominently in the existing scholarly literature on Japanese constitutional adjudication; others are not widely discussed and surfaced instead in the course of discussions with academics and off-the-record interviews with judges and other officials in Tokyo.<sup>12</sup> This Article concludes by arguing that the SCJ is unlikely to discharge its responsibility for performing judicial review with greater vigor absent institutional reforms that reduce its dependence upon the bureaucracy for personnel and resources, and it discusses a number of reforms that might have such a liberating effect on the Court.

## II. CULTURAL EXPLANATIONS

### A. *The Culture of the Kan*

Some have suggested that government officials, or *kan*, share a characteristic outlook, and that judges, as *saibankan* or "court officials," are no exception.<sup>13</sup> This shared outlook can be distinguished, moreover, from mere partisanship or conventional left-right ideology. A number of the judges I interviewed were relatively quick to express distaste for the party that has ruled Japan for most of its postwar history, the Liberal Democratic Party (LDP), which they view as corrupt, if not also increasingly incompetent. At the same time, however, they feel a sense of

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9. See *infra* Parts IV.A–IV.B.

10. See *infra* Parts IV.A & IV.C.

11. See *infra* Part V.A (discussing the argument that pre-enactment review of proposed legislation by Japan's Cabinet Legislation Bureau obviates judicial review).

12. The confidential interviews conducted by the author encompassed seven current and former members of the Japanese Supreme Court; two supreme court clerks, or *chōsakan*, who might be more accurately called research judges, see Masako Kamiya, "Chōsakan": *Research Judges Toiling at the Stone Fortress*, 88 WASH. U. L. REV. 1601 (2011); and four current or former lower-court judges, including Yasuaki Miyamoto and Haruhiko Abe, both of whom ran afoul very publicly of the judicial bureaucracy; see Law, *supra* note 1, at 1557 n.63, 1559, and have consented to be identified by name. Because the *Washington University Law Review* cannot verify the contents of the confidential interviews, the author takes sole responsibility for the accuracy of his citations to those interviews.

13. See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99, 126–27 (Daniel H. Foote ed., 2007); Interview with Shinichi Nishikawa, Professor, Meiji University, in Tokyo, Japan (Aug. 20, 2008).

obligation to help maintain stability and have, at least in the past, experienced a reluctance to interfere with the government and bureaucracy that delivered the economic miracle of postwar Japan. Scholars, too, have argued that Japanese judges are imbued by their positions with a sense of both responsibility and restraint.<sup>14</sup>

It may be true that many Japanese judges think this way, but the argument proves too much. The SCJ has not always toed the line. For example, under the leadership of Chief Justice Masatoshi Yokota, the Court rendered pro-labor decisions in the late 1960s that aroused the ire of conservatives and frustrated the government's efforts to prevent the public employee unions from striking.<sup>15</sup> The LDP was, at the time, locked in a fierce political struggle with organized labor, which was a bastion of support for the Communists and Socialists. The Court did not change course until the subsequent appointment of the conservative Chief Justice Kazuto Ishida and several other like-minded justices.<sup>16</sup> Its initial willingness to defy the LDP in a high-stakes struggle over the direction of postwar Japan demonstrates that not all judges possess an outlook that renders them unwilling to defy the government.

### *B. Mainstream Japanese Political Culture*

One might argue that, to the extent that the SCJ approaches judicial review in a conservative manner, it does so simply because Japanese society is conservative, and the Justices who make up the Court are members of that society and share that sensibility. A number of judges suggested that the SCJ's behavior merely embodies the views and values of mainstream Japanese society. Notwithstanding a steady drumbeat of criticism from Japanese constitutional scholars—who tend to be politically progressive—it is plausible that the SCJ may actually be “somewhat in line” with public opinion.<sup>17</sup>

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14. See, e.g., HIROSHI ITOH, *THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN* 280 (2010); Haley, *supra* note 13, at 127–28.

15. See Law, *supra* note 1, at 1592–93; Matsui, *supra* note 1, at 1400–04; Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 *KOBE U. L. REV.* 45, 58 (1991); Lawrence Repeta, *Reserved Seats on Japan's Supreme Court*, 88 *WASH. U. L. REV.* 1713, 1728–29 (2011).

16. See Law, *supra* note 1, at 1592–93; Matsui, *supra* note 1, at 1400–04; Miyazawa, *supra* note 15, at 57–58; Repeta, *supra* note 15, at 1735–39.

17. Interview with Takao Tanase, Professor, Chuo Law Sch., in Tokyo, Japan (June 26, 2008); see also, e.g., Haley, *supra* note 6, at 1471 (citing the LDP's dominance of postwar politics as evidence that “the Japanese people overwhelmingly favor center-right political policies”).

There can be no doubt that many judges sincerely believe that their actions merely reflect the views of mainstream Japanese society. And it is both difficult and unrealistic to deny that judges behave in ways that reflect the values of the society to which they belong. Nevertheless, it seems unlikely that the conservatism of the SCJ can be so easily explained. Several interviewees expressed the seemingly contradictory view that Japan's judges are, as one Justice put it, "aloof from daily and political life" and "out of touch with regular people."<sup>18</sup> It is difficult to see how the behavior of judges who are "aloof" and "out of touch" can be explained as the product of affinity with mainstream opinion. Likewise, it is hard to believe that Japanese political culture is so conservative as to entail the rejection of nearly every constitutional claim that comes before the SCJ. As in other countries, some constitutional plaintiffs happen to be highly sympathetic figures, such as the Christian widow who fought in vain to prevent a government-supported veterans' group from enshrining the spirit of her husband in a Shinto shrine.<sup>19</sup> Finally, even if it is true that Japanese judges merely behave in sync with the political mainstream, that begs the question of why their role as guardians of the constitution almost never leads them to defy mainstream sentiment, as judges in other countries more often do.

### C. Cultural Aversion to Open Conflict

A frequently offered explanation for the SCJ's reluctance to strike down laws is the concept of *wa*, which defies precise translation but refers roughly to a Japanese ideal of harmonious coexistence.<sup>20</sup> On this account, one way in which the Japanese avoid conflict is by declining to take language literally, and judges behave in precisely such a manner when faced with seemingly unequivocal constitutional language. One Justice described the SCJ's failure to enforce the letter of Article 9, the pacifist

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18. Interview with Justice E, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

19. Saikō Saibansho [Sup. Ct.] June 1, 1988, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (*SDF Joint Enshrinement Case*); see DAVID M. O'BRIEN WITH YASUO OHKOSHI, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* 142–78 (1996).

20. See, e.g., Hideo Chikusa, *Japanese Supreme Court—Its Institution and Background*, 52 SMU L. REV. 1719, 1724 (1999) (arguing that the overcrowded character of Japanese society fosters a desire to avoid conflict and open disagreement, and attributing the preference for conciliation and settlement over litigation to this mindset); Shigenori Matsui, *A Comment Upon the Role of the Judiciary in Japan*, 35 OSAKA U. L. REV. 17, 26 (1988) (describing, and rejecting, the argument that the "Buddhist notion of 'ichimiwagou' (everyone in harmony), an insistence on harmony by dedication of self to the society," renders "Western notions of right and individual" "alien" to Japanese society).

provision of the postwar constitution,<sup>21</sup> as the product of a characteristically Japanese way of dealing with legal principles and their application: the Japanese “do believe in the power of words, but not in the literal meaning of words expressed.”<sup>22</sup> Another Justice offered evidence that such attitudes are deliberately inculcated in the judiciary. This Justice explained that, during his time as an instructor at the Legal Research and Training Institute (LRTI)—which provides mandatory training to everyone who passes the bar, including judges, lawyers, and prosecutors alike<sup>23</sup>—he sought to train would-be judges to value harmony and reconciliation over candor. In his words: “Communication with other people is most important. What is true comes second.”<sup>24</sup>

There are a number of reasons to view *wa*-based explanations for the near-absence of judicial review with suspicion. First, invoking cultural norms is a way for judges to shift responsibility for their own behavior to the culture at large. A judge’s choice to uphold the status quo and avoid rocking the boat at the expense of vindicating constitutional rights is precisely that—a choice. And it is a choice that cannot be reduced to a matter of compliance with cultural norms. Culture does not dictate such choices; Japanese judges are no more slaves to cultural mores than American judges are. Instead, conservatives can be expected to invoke the concept of *wa* precisely because the status quo is already to one’s liking. As one Japanese legal scholar put it, elites invoke the notion of *wa* to discourage others from disagreeing openly with them.<sup>25</sup> To insist upon *wa* is tantamount to rejecting disagreement, and thus to enshrining the status quo. It is therefore convenient and self-serving for conservatives to respond to disagreement by appealing to the notion of *wa*, simply because they are in power; conversely, it is unlikely that the Communists would ever do so as long as they remain out of power.

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21. Nihonkoku Kenpō [CONSTITUTION] art. 9; see *infra* notes 92–96 and accompanying text.

22. Interview with Justice E, *supra* note 18. It has been argued that this aversion to literalistic interpretation is rooted not simply in Japanese culture, but in the language itself. Because Japanese characters have multiple meanings and “spoken words change meaning depending on context,” suggests Professor O’Brien, “the Japanese expect less precision.” O’Brien, *supra* note 19, at 29. Moreover, as a matter of culture, “indirection, vagueness, and ambiguity are regarded as polite and respectful.” *Id.* at 30. The result, he argues, is that the Japanese are “tolerant of ambiguity, elasticity, and discretionary applications of legal documents.” *Id.*

23. See Law, *supra* note 1, at 1552.

24. Interview with Justice A, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

25. Interview with Masako Kamiya, Professor, Gakushuin Univ. Law Sch., in Tokyo, Japan (June 27, 2008).

Second, broad-brush cultural explanations of the *wa* variety run the risk of relying upon inaccurate or outdated stereotypes. As scholars have repeatedly observed, it is simply not the case that Japanese political life is characterized by an absence of conflict or a penchant for harmony, as illustrated vividly by the breadth and intensity of the conflict that occurred in the 1960s over Japanese labor relations and security arrangements with the United States,<sup>26</sup> or by the years of armed resistance mounted by local farmers to the construction of Tokyo's Narita Airport.<sup>27</sup> Cultural explanations that essentially rest upon stereotypes about "the Japanese" must be taken with a grain of salt, lest we exoticize behavior in lieu of explaining it.

Third, resort to cultural explanations risks circularity and raises more questions than it answers. Culture is as much a consequence as a cause of behavior: if anything, it is not culture that explains behavior, but rather behavior that defines culture. To say that a cultural norm or consensus drives behavior merely begs the question of why people uphold the norm or consensus instead of destabilizing or subverting it. The patterns of behavior that come over time to be understood as cultural are themselves malleable and contingent. At the turn of the twentieth century, for example, it was possible for Japanese employers to criticize their workers as lazy, spendthrift, and disloyal when compared to American workers.<sup>28</sup> It

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26. See J. PATRICK BOYD & RICHARD J. SAMUELS, *NINE LIVES?: THE POLITICS OF CONSTITUTIONAL REFORM IN JAPAN* 23–25 (2005) (discussing the uproar over the 1960 revision of Japan's mutual security treaty with the United States, which generated "the largest mass protests in Japan's postwar history" and eventually forced Prime Minister Kishi's resignation); MASUMI JUNNOSUKE, *CONTEMPORARY POLITICS IN JAPAN* 361–66 (Lonny E. Carlile trans., 1995) (discussing the Mitsui Miike coal mine strike in March 1960, the biggest labor dispute in Japanese postwar history); John O. Haley, *Waging War: Japan's Constitutional Constraints*, 14 CONST. F. 18, 23–28 (2005) (describing the protracted litigation and power struggles within the judiciary over the constitutionality of Japan's security arrangements); *supra* notes 15–16 and accompanying text (discussing the Court's shifting stance on the politically charged question of the ability of public employees to engage in mass strikes). *Keidanren*, the umbrella organization of Japanese big businesses, collaborated with the management of the mine, while workers from around the country made the pilgrimage to join a picket line that was twenty thousand strong. No less than ten thousand police and fifteen thousand union members faced each other down when Mitsui sought to reopen the mine two months into the strike. See JUNNOSUKE, *supra*, at 365.

27. See DAVID E. APTER & NAGAYO SAWA, *AGAINST THE STATE: POLITICS AND SOCIAL PROTEST IN JAPAN* 79–109 (1984) (describing, *inter alia*, the construction of fortified tunnels, barricades, and moats filled with human feces, and the armed takeover of the airport's control tower, by farmers and militants opposed to the appropriation of land for the airport).

28. Gerald Curtis tells the apt story of Sakutaro Kobayishi, the founder of a company called Tokyo Shibaura Denki, now known as Toshiba. Visiting the United States in 1908, Kobayishi was deeply impressed by the work ethic and company loyalty of American workers as compared to the stubborn, disloyal, inflexible workers with whom he was accustomed to dealing in his native Japan. Comparing them to their American counterparts, a frustrated Kobayishi said of his Japanese workers: "Teaching them anything is like trying to teach a cat to chant the nembutsu [Buddhist prayers]."

is doubtful that anyone would speak of Japanese cultural traits in the same manner now.

*D. The Non-Axial Character of Japanese Society*

It could also be argued that Japanese culture lacks the religious or philosophical foundation necessary for judges to stake out absolute or strongly principled positions on constitutional questions. In this vein, Japan might be characterized as a non-axial society, meaning that the normative regulation of behavior does not rest upon binding moral axioms or claims of higher or transcendental truth.<sup>29</sup> Japanese society is not Christian; nor is it Kantian, or otherwise inclined toward moral absolutism. As a practical matter, the guides to correct action in Japanese society are consensus and relationships of status, not higher truth of the type that one might glean from an authoritative text—be it biblical or constitutional.<sup>30</sup>

The existence of social conditions radically different from those that spawned political liberalism, as well as a legacy of Confucianism, lend support to this account of the character of Japanese social and political reasoning. Western liberal political thought reflects the costly lessons of centuries of religious conflict between Catholics and Protestants. In response, a set of political and legal institutions and mechanisms for the peaceful coexistence of people with irreconcilable beliefs developed under the intellectual umbrella of liberalism.<sup>31</sup> A political system founded on the impossibility of religious consensus does not contemplate consensus as a basis for political decision making. However, in the absence of sizeable and powerful religious, ethnic, or linguistic minorities, it is not surprising

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GERALD L. CURTIS, *THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE* 12 (1999). Kobayishi also praised Americans for saving their earnings, unlike his fellow countrymen. *See id.* As Curtis observes, “Americans now have the lowest savings rate of any industrialized country and Japanese are criticized for saving too much.” *Id.*

29. I am originally indebted to Stephen Givens for this insight. John Haley makes a similar point in his contribution to this Symposium. *See Haley, supra* note 6, at 1471 (identifying a “relative lack of a widely shared belief among the Japanese in universally applicable moral imperatives” and observing that “East Asian legal traditions never developed a notion of “natural law” or a notional nexus between law and morality”).

30. *See id.* at 1471 (arguing that “[c]ommunity norms, not transcendental norms, are what matters”).

31. *See, e.g.,* RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 1 (1999) (noting that “political liberalism was partly invented in response to religious claims that some ways of believing should be suppressed”).

that consensus might both prove more attainable and assume greater weight in Japanese society than in most other liberal democracies.<sup>32</sup>

The absence of a sense of higher truth, combined with the corresponding importance of hierarchy and consensus, has political and legal implications. On the one hand, Japanese courts have little moral or intellectual heritage upon which to draw if they wish to resist the wishes of the majority or the government. The absence of religiosity and moral absolutism—and, with it, the absence of the notion of binding commandment or scripture—gives judges little basis to resist a strongly positivistic civil law tradition.<sup>33</sup> On the other hand, that same positivistic civil law tradition, with its narrow conception of the role of judges, firmly places the courts in a hierarchically inferior position to the Diet and the Cabinet when it comes to the creation of legal norms.<sup>34</sup>

Consistent with this line of argument, one Justice did suggest that the SCJ's approach to the interpretation of constitutional principles may in fact be influenced in a deep way by Japan's religious and moral heritage.<sup>35</sup> In explaining why the SCJ has repeatedly allowed the government so much leeway in the area of legislative apportionment, this Justice opined that "equality," in the context of voting rights and elsewhere, is for the Japanese a "relative, not absolute" concept, whereas Christians and Buddhists subscribe to a "more absolute concept of equality" that may make them less inclined to tolerate disparities.<sup>36</sup>

Even if cultural traditions at such a high level of abstraction are relevant to judicial behavior, it is implausible that such traditions can fully account for the SCJ's reluctance to exercise the power of judicial review.

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32. This is not to suggest that Japanese society is wholly homogeneous; Japan certainly has its share of minorities who experience varying degrees of discrimination, such as the historically outcast *burakumin*, indigenous peoples such as the Ainu and native Okinawans, and those of Chinese or Korean descent. Thus far, however, such groups have not proven capable of generating and sustaining large-scale social conflict.

33. See Saïd Amir Arjomand, *Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions*, 33 ARCHIVES EUROPÉENES DE SOCIOLOGIE 39, 43–44 (1992) (suggesting that the notion of inviolable individual rights presumes the "transcendence of justice introduced by Christianity" and foundation of natural law furnished by Christian theology); *id.* at 53 (observing that, as a historical matter, the absence of the "sacred law of a world religion" from the traditional Japanese normative order has resulted in an absence of "tension between man-made and transcendent law").

34. See *supra* note 69 and accompanying text (noting that the civil law tradition does not contemplate a lawmaking role for judges but tends instead to "diminish the judge and glorify the legislator").

35. Interview with Justice D, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

36. *Id.*

The growing global consensus in favor of judicial review<sup>37</sup> and the ubiquity of “rights talk” in legal and political discourse everywhere<sup>38</sup> make it increasingly difficult to argue that judicial review has failed in Japan for lack of an adequate normative foundation. If the Justices of the Japanese Supreme Court have failed to embrace their role as enforcers of the constitution with the same enthusiasm as courts elsewhere, that is because they have chosen not to embrace it, not because the non-axial character of Japanese society prevents them from doing so. The manner in which cultural traditions influence judicial behavior reflects the exercise of “choice by those with the power to make and implement such choices about which traditions to maintain and which to discard and then how to maintain or foster those chosen.”<sup>39</sup> To rely upon a cultural explanation of Japanese judicial behavior is both to excise the role of individual choice from judicial policymaking and to absolve Japanese judges of responsibility for their decisions.

### III. HISTORICAL EXPLANATIONS

#### A. *The Postwar Legacy of the Meiji Era*

A number of judges attributed the present-day conservatism of the Japanese judiciary in part to the legacy of the Meiji era.<sup>40</sup> Under the Meiji Constitution, Japan’s judges were under the direction and control of the *Hōmushō*, or Ministry of Justice, and behaved in a correspondingly cautious, conservative, and bureaucratic way. The postwar constitution freed the judiciary from this outside control and ordained various American-style guarantees of judicial independence.<sup>41</sup> However, unlike officials in other branches of the government, the judges of the ancien

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37. See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. (forthcoming 2011) (documenting the growing global popularity of judicial review).

38. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 11–12 (1991) (“In the years since the end of World War II, ‘rights’ have entered importantly into the cultural schemes of meaning of peoples everywhere. . . . All over the world, political discourse is increasingly imbued with the language of rights, universal, inalienable, inviolable.”).

39. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 221 (1987).

40. E.g., Interview with Justice B, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed) (observing that the Court has failed to make a “clean break” with the “conservative” prewar system); Interview with Haruhiko Abe, Attorney & Retired Judge, in Tokyo, Japan (July 16, 2008); accord Interview with Yoshitomo Ode, Professor of Law, Tokyo Keizai University, in Tokyo, Japan (Aug. 6, 2008).

41. See Haley, *supra* note 13, at 117–19.

régime were not purged following the war.<sup>42</sup> Instead, the liberation of the judiciary from the Ministry of Justice created a power vacuum that these conservative holdover judges were ultimately able to fill. According to one critically minded judge, the “old guard” temporarily lost sway but soon reasserted itself by gaining control over the LRTI and thus over the training and hiring of new judges.<sup>43</sup> A variation on this story is that the judiciary behaves conservatively in order to preserve its hard-won institutional autonomy: on this account, the judges who run the judiciary prize their autonomy so highly that they are careful not to allow anything to happen that might antagonize the government and invite political interference within their fiefdom.<sup>44</sup>

Even on its face, this explanation for the SCJ’s aversion to judicial review does not tell the whole story. The problem lies in the fact that conservatives did, for a brief period, lose their dominance of the judiciary. In order to say that the Court’s current behavior reflects the legacy of the Meiji era, one must first explain how that legacy was restored after it had been disrupted. If conservatives regained control of the judiciary only with the help of political intervention, as Setsuo Miyazawa has suggested,<sup>45</sup> then it is the political intervention, not the shadow of the Meiji era, that truly explains the Court’s behavior. Alternatively, if a fear of jeopardizing the judiciary’s precious independence is what leads the Court to restrain itself, then it must be asked what prompted the Court to rediscover that fear after a liberal interlude—or, indeed, why the Court ever overcame that fear in the first place.

### *B. Judges as “Second-Class Bureaucrats”*

A related explanation for the failure of judicial review is that Japan’s judges have historically been “second-class bureaucrats” who have lacked either the will or the ability to stand up to the executive or legislature. In

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42. See Miyazawa, *supra* note 15, at 57; sources cited *supra* note 40.

43. Interview with Haruhiko Abe, *supra* note 40; see Miyazawa, *supra* note 15, at 57 (observing that postwar changes to Japanese legal education “brought in more independent-minded, liberal judges into the judiciary,” but subsequent changes in “the political climate around 1968 . . . allowed conservative judges to regain control”).

44. See Interview with Hidenori Tomatsu, Professor, Gakushuin Univ. Law Sch., in Tokyo, Japan (July 17, 2008).

45. See Miyazawa, *supra* note 15, at 57–59 (observing that the argument that the current “system of administrative control” reflects “the legacy of prewar organizational culture” “assumes the impact of political factors that allowed [this] legacy . . . to resurface,” and attributing the judiciary’s rightward shift to the appointment of Kazuto Ishida as Chief Justice, following “pressure from conservative politicians” to correct the Court’s liberal trajectory).

the words of one Justice, the judiciary was historically a second-class member of the Japanese bureaucracy: “The cream reached the top, but by and large, judges were second-class bureaucrats.”<sup>46</sup> As startling as it may be to hear a Japanese Supreme Court Justice deride the competence and courage of the Japanese judiciary, these views merely echo those of another prominent jurist, former Chief Justice Kouichi Yaguchi. Yaguchi, who is often credited with raising the quality and prestige of the judiciary, offered these sentiments shortly before his death in 2006:

You folks look at the post-war judiciary, and you say the Japanese judiciary should use its authority and power to declare laws unconstitutional more often. But how can a second-class bureaucracy perform that kind of responsibility, even if given that responsibility by the Constitution? Maybe now the judiciary is in a more spirited position to state its views. There is no future for the Japanese judiciary if it doesn't do that.<sup>47</sup>

When asked specifically whether he agreed that Japanese judges are timid because they are “second-class bureaucrats,” one justice deemed it “kind of true”;<sup>48</sup> another, who had spent his entire working life as a judge, called it “half true.”<sup>49</sup> A number of interviewees opined that the prestige and attractiveness of a career in the judiciary has increased over the last few decades. All agreed, however, that as a historical matter, the top graduates of Japan's top universities have not always favored a career in the judiciary.<sup>50</sup> For several decades, the best and brightest sought jobs either in other government ministries or in top corporations. In the private sector, they favored such companies as Nippon Steel, Tokio Marine, and Mitsubishi Bank. On the government side, high-prestige ministries included Finance, Foreign Affairs, and subsequently MITI (now METI), International Trade, and, after the war, Agriculture as well, while the “residue” went to the judiciary.<sup>51</sup> The prewar domination of the judiciary

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46. Interview with Justice D, *supra* note 35; see also ITOH, *supra* note 14, at 31 (citing Louis Favoreu's argument that career judges in civil law countries such as France, Germany, and Japan “often lack the power and skill” to challenge legislative or executive officials).

47. SHINGO MIYAKE, SHUO TO HO [MARKETS AND LAW] 282 (Nippon Keizai Shimbun, 2007) (quoting Chief Justice Yaguchi). The English version of the quotation given here is a transcription of the oral translation provided by a former Justice.

48. Interview with Justice B, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

49. Interview with Justice G, *supra* note 35.

50. Interview with Justice A, *supra* note 24; Interview with Justice B, *supra* note 48; Interview with Justice D, *supra* note 35.

51. Interview with Justice D, *supra* note 35.

by the Ministry of Justice certainly did not help to enhance the prestige of the judiciary. The net result has been, supposedly, a corps of judges who have been unable or unwilling to challenge legislation devised by elite bureaucrats in other agencies and rubber-stamped by the legislature.

The notion that Japanese judges are “second-class bureaucrats” seems inconsistent with the portrait of the judiciary that some scholars have painted, and in particular with the emphasis that has sometimes been placed upon the educationally elitist character of the judiciary.<sup>52</sup> As many have noted, the judiciary has historically been well stocked with graduates of prestigious universities.<sup>53</sup> Yet relevant differences exist even among the most elite schools. Although the University of Tokyo (“Todai”) and Kyoto University (“Kyodai”) are both highly prestigious universities that produce substantial numbers of judges. Todai’s prestige exceeds that of Kyodai.<sup>54</sup> However, Kyodai’s representation in the judiciary has been disproportionately greater than that of Todai.<sup>55</sup> Notwithstanding Kyodai’s own prestige, its graduates may have perceived themselves to be at a disadvantage relative to Todai graduates in the competition for government employment. This feeling of being “a little lower,” suggested one former judge, may have led them to seek positions in the judiciary, where they may have felt at less of a disadvantage owing to its somewhat less prestigious position in the government hierarchy.<sup>56</sup> Such self-selection has the potential to become self-reinforcing, as old-boy networks facilitate the entry and advancement of future Kyodai graduates (although, as Professor Ramseyer’s contribution to this Symposium demonstrates, school ties may ultimately be no substitute for actual productivity).<sup>57</sup> Meanwhile, certain universities widely considered to be at least as prestigious as Kyodai—in particular, Keio and Waseda—have never placed a graduate on the SCJ, a fact that more than one interviewee found both noteworthy and aberrational.

A number of interviewees, both judicial and academic, opined that the prestige and attractiveness of a career in the judiciary has increased since

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52. Haley, *supra* note 13, at 109, 115.

53. *Id.* at 108; Setsuo Miyazawa, *Legal Education and the Reproduction of the Elite in Japan*, 1 ASIAN-PAC. L. & POL’Y J. 1, 22–24 (2000).

54. See Miyazawa, *supra* note 53, at 23; J. Mark Ramseyer, *Do School Cliques Dominate Japanese Bureaucracies?: Evidence from Supreme Court Appointments*, 88 WASH. U. L. REV. 1681, 1683 (2011) (describing the University of Tokyo as traditionally “preeminent . . . in nearly all academic departments,” with Kyoto University ranking second).

55. Miyazawa, *supra* note 53, at 23.

56. Interview with Haruhiko Abe, *supra* note 40.

57. See Ramseyer, *supra* note 57, at 1682 (finding only “weak” statistical evidence of favoritism toward Kyodai graduates in the judiciary).

the war and, in particular, under Chief Justice Yaguchi's tenure. Yaguchi's views regarding the inferiority of judges, suggested one Justice, rang true for members of Yaguchi's own generation but reflected an "old way of thinking."<sup>58</sup> It is also true that, partly to compensate for its legacy as a second-class bureaucracy, postwar reforms made judges the best paid of all government employees.<sup>59</sup> By all accounts, however, the bench is chronically understaffed, and the recruitment of qualified new judges poses a severe challenge. Indeed, those interviewees with experience in judicial personnel matters uniformly identified recruitment as the most pressing challenge that they faced, and they bemoaned in particular the extent to which increasingly lucrative opportunities in the private sector have made it increasingly difficult to recruit capable new judges. A number of academic interviewees, meanwhile, speculated that, given the range of attractive opportunities available to the elite few capable of passing the bar, those who self-select into a lifelong judicial career are likely to be highly conservative and risk averse in character.

The difficulty of recruiting talented, dynamic judges is only aggravated by the fact that, like most civil law countries, Japan has a career judiciary.<sup>60</sup> The vast majority of its judges join the bench immediately after completing their LRTI training, without an opportunity to first reap the financial benefits of the private sector. The seniority-based career advancement path of Japanese judges, combined with a mandatory retirement age of sixty-five for regular judges (seventy for members of the SCJ), makes it essential for those who wish to reach the highest echelons of the judiciary to embark upon their careers at a young age.<sup>61</sup> As a result, would-be judges face an even starker choice between financial comfort and a judicial career in Japan than they do in the United States or other common law jurisdictions, where judges are often individuals who have already established themselves financially.

Career judges are at more than just a financial disadvantage relative to their common law counterparts. In common law countries, a typical judge has already enjoyed a successful career in private practice or public service (or both) prior to joining the bench and thus possesses a considerable measure of confidence, experience, and personal reputation.

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58. Interview with Justice A, *supra* note 24.

59. See Miyazawa, *supra* note 53, at 22.

60. See Law, *supra* note 1, at 1551–59 (describing the career path for Japanese judges, from their initial training and recruitment to the prospect of promotion to the Supreme Court); David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 798 & n.69 (2011) (citing Japan, Chile, France, and Italy as examples of countries with career judiciaries).

61. See Law, *supra* note 1, at 1552 n.26.

Having embarked upon their judicial careers fresh out of school, by contrast, Japanese judges are unlikely to possess such qualities in abundance. One Justice who had himself been a career judge alluded to this fact in explaining why Japanese judges might feel reluctant to substitute their own judgment for that of the government. As he put it, a young judge who has literally just graduated from judge school must ask himself: why should anyone—especially smart, experienced people in other branches of government—listen to me?<sup>62</sup> Even if a particular young judge wants to “change the world,” he added, the judge in question will be “trained to require strong evidence before acting on his wishes.”<sup>63</sup>

### *C. The Alien Character of Judicial Review*

It has suggested that the SCJ has historically exercised the power of judicial review with extreme restraint because judicial review was, from the perspective of the typical Japanese judge, an “alien transplant.”<sup>64</sup> Notwithstanding the efforts of the American occupation authorities to instill a sense of judicial supremacy by way of the postwar constitution, Japanese judges simply were not accustomed to striking down laws on constitutional grounds. One Justice expressed the view that the notions of judicial review and judicial supremacy have, after some time, finally taken hold among the people and the judges alike, and that we should therefore expect to see the SCJ behave in a more active fashion in years to come.<sup>65</sup>

Even on its face, this explanation is not especially persuasive. Other countries have introduced judicial review more recently than Japan did and have reaped much more dramatic results within a much shorter period of time. Canada, for example, did not patriate its Constitution until 1982. Prior to that time, parliamentary sovereignty was the rule in both theory and practice, and there was no precedent for judicial review in the British legal tradition that Canada inherited.<sup>66</sup> Almost immediately, however, the

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62. Interview with Justice G, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

63. *Id.*

64. Interview with Justice A, *supra* note 24; see also Matsui, *supra* note 1, at 1400 (describing the unfamiliarity of the SCJ’s initial membership with judicial review as the “root cause” of its current “passivism” and observing that the “German positivist jurisprudence” in which the first members of the Court were steeped contained “no tradition” of constitutional review).

65. See Interview with Justice A, *supra* note 24.

66. See JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 79 (2010) (noting that Canada still retains the principle of parliamentary sovereignty to some extent, in the form of a constitutional provision that allows for legislative override of most rights found in the Canadian Charter of Rights and Freedoms).

Supreme Court of Canada began to strike down important laws at a rate that far outstrips that of its Japanese counterpart.<sup>67</sup> Even more striking is the example of France, which adopted a limited form of judicial review over a decade later than Japan against a backdrop of widespread and longstanding hostility to the idea of *le gouvernement des juges*, or a government of judges.<sup>68</sup> Like Japan, France combines a civil law tradition that minimizes the lawmaking role of judges<sup>69</sup> with pre-enactment review of proposed legislation by an elite administrative agency that might, at least in theory, be expected to reduce the need for further review of a judicial variety.<sup>70</sup> Nevertheless, the French *Conseil Constitutionnel* has historically found constitutional defects in over one-third of the laws that it has reviewed.<sup>71</sup>

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67. See F.L. MORTON & RAINER KNOPFF, *THE CHARTER REVOLUTION & THE COURT PARTY* 30 (2000).

68. See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 23 (1992) (characterizing hostility to judicial review in France as “a dominant ideological dogma of political life”); *id.* at 39–40 (describing the “incredible impact” of Edouard Lambert’s condemnation of American-style judicial review as *le gouvernement des juges*). Until very recently, there was no judicial mechanism in France by which individuals could challenge the constitutionality of a statute: such challenges could be brought only by certain categories of government officials, and only before actual promulgation of the statute in question. See Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 *NYU J. INT’L L. & POL.* 15, 15–22 (2010) (describing the original limits upon the jurisdiction of the *Conseil Constitutionnel* and the implementation in 2010 of a “preliminary reference procedure” that enables it to decide constitutional questions raised by ordinary litigants).

69. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 56 (3d ed. 2007) (observing that the defining characteristics of the civil law tradition—such as “[l]egislative positivism,” a dogmatic approach to the separation of powers, and “the ideology of codification”—“all tend to diminish the judge and glorify the legislator”).

70. See *infra* Part V.A (comparing the Japanese *Naikaku Hōsei Kyoku*, or Cabinet Legislation Bureau, with the French *Conseil d’État*).

71. See STONE, *supra* note 68, at 121 tbl.5.1 (reporting that, from 1974 to 1987, the *Conseil Constitutionnel* annulled or amputated 49 out of the 92 laws that it reviewed); Raphaël Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006*, 25 *J.L. ECON. & ORG.* 262, 265 (2008) (indicating that, from 1959 to 2006, the *Conseil Constitutionnel* found 124 of the 317 laws and treaties that it reviewed to be unconstitutional). When left-leaning governments are in power, the *Conseil Constitutionnel* becomes even more active. See *id.* at 265–67 (noting that the *Conseil Constitutionnel* invalidated 97 out of the 209 laws and treaties that it reviewed during periods of left-wing rule). Between January and May of 1981 alone, the *Conseil Constitutionnel* rejected five of the ten major reforms enacted by the newly elected Socialist government. See F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 *AM. J. COMP. L.* 89, 94–95 (1988).

#### *D. The Impact of the Cold War*

Another historical explanation that deserves attention is the impact of the Cold War. With its written guarantees of a minimum standard of living and public education,<sup>72</sup> the right of workers to organize and bargain collectively,<sup>73</sup> and an explicit commitment to pacifism,<sup>74</sup> the postwar *Nihonkoku Kenpō* might be considered a last monument to New Deal liberalism before the weight of the Cold War settled upon civil liberties in Japan and the United States alike. It is no doubt true, as a number of interviewees argued, that many government elites in Japan felt the suppression of communism to be a matter of national survival, and that many judges, in particular, may have considered it necessary to sacrifice rigorous enforcement of constitutional rights to that end. The United States Supreme Court is often said to have capitulated in the face of McCarthyism and the Red Scare.<sup>75</sup> Yet the threat of communism was, if anything, more palpable in Japan, which found itself in the perilous situation of having the Soviet Union, China, and North Korea for neighbors.

The concern that many senior judges shared with other elite government officials, emphasized one Justice, was the spread of communism. Domestically, the Communist Party had strong ties to an active and powerful labor movement.<sup>76</sup> Beyond Japan's borders, the region was increasingly unfriendly terrain for capitalist democracy. China and North Korea fell under communist control; South Korea and Taiwan were democratic more in name than in practice; Thailand was subject to constant coups. Meanwhile, well into the 1980s, Japanese elites were convinced that they faced a powerful Soviet Union bent on infiltrating and subverting Japan's pro-American government.<sup>77</sup> Through the Cold War, the Japanese judiciary was not ideologically monolithic; it contained both defenders of pacifism and members of the Socialist Party. These judges did not, however, prevail in the judiciary's internal power struggles.<sup>78</sup>

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72. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 25, para. 1 ("All people shall have the right to maintain the minimum standards of wholesome and cultured living.").

73. *Id.* art. 28, para. 1 ("The right of workers to organize and to bargain and act collectively is guaranteed.").

74. *Id.* art. 9.

75. *See, e.g.,* *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

76. *See* Interview with Justice D, *supra* note 35.

77. *See id.*

78. *See id.*

The impact of the Cold War on Japanese constitutional jurisprudence may have been greatest in the areas of voting rights and freedom of expression. In the face of massive migration from the countryside to the cities, the Japanese Diet became increasingly malapportioned, and this malapportionment favored rural areas over urban ones. Rural constituencies were largely conservative and formed the electoral power base of the LDP; urban areas, by comparison, were strongholds of the left and prone to unrest.<sup>79</sup> In the name of political “stability,” suggested one Justice, the LDP was “permitted by the people” to benefit from electoral malapportionment that kept it in power at the expense of voting rights.<sup>80</sup> Labor rights and freedom of expression cases, meanwhile, were high-profile battlegrounds between the left and the right. An influential administrative law judge who participated in high-profile cases in the SCJ in his capacity as a senior *chōsakan* admitted that he could not bring himself to sympathize with the plaintiffs in the freedom of expression and political pamphleteering cases that came before him because they were all Communists.<sup>81</sup>

Like the “second-class bureaucracy” explanation, the Cold War geopolitical explanation for the conservatism of the SCJ is an interesting one that most likely contains at least a grain of truth but, at the same time, clearly fails to tell the whole story. Even if it is true that the Cold War helps to explain a substantial portion of the SCJ’s constitutional jurisprudence, the Cold War has by now been over for some time. Nothing could more dramatically underscore the demise of Cold War politics in Japan than the fact that, in 1993, the LDP engineered a coalition government with the head of the Socialist Party as Prime Minister.<sup>82</sup> The

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79. See GERALD L. CURTIS, *THE JAPANESE WAY OF POLITICS* 19–20 (1988) (noting that, “by the end of the 1960s,” Japan was home to “an impressive array of urban protest movements and of local government leaders backed by the opposition parties”); ETHAN SCHEINER, *DEMOCRACY WITHOUT COMPETITION IN JAPAN: OPPOSITION FAILURE IN A ONE-PARTY DOMINANT STATE* 57–58, 162–63 (2006) (discussing the LDP’s reliance on rural and agricultural support, and observing that electoral malapportionment in favor of rural areas “probably even allowed the LDP to win a majority of seats in years when a correctly apportioned system would not have”); Yoshio Sugimoto, *Quantitative Characteristics of Popular Disturbances in Post-Occupation Japan (1952–1960)*, 37 *J. ASIAN STUD.* 273, 278, 281 (1978) (showing statistically that “labor union members were the spearhead of popular disturbances,” which tended to be concentrated in “highly populated prefectures in the ‘industrial belt’ along the Pacific Coast”).

80. Interview with Justice D, *supra* note 35.

81. Interview with Anonymous Source, in Tokyo, Japan (June 27, 2008) (describing a confidential conversation with the judge in question).

82. See CURTIS, *supra* note 28, at 21–22, 195–96 (describing the political machinations by which Tomiichi Murayama, chairman of the Socialist Party, became Prime Minister in coalition with the LDP).

United States Supreme Court discovered a more liberal footing in the aftermath of the McCarthy era; there is no obvious reason why the SCJ could not have done so as well once any plausible threat of communism had passed.

Another problem with the Cold War argument—and, indeed, with all historical explanations of judicial conservatism in Japan—is, quite simply, that the judiciary has not always behaved conservatively. In 1947, when the SCJ was first established, the Socialist Prime Minister Tetsu Katayama and his cabinet appointed the first fifteen justices to serve on the Court, and in its first three years under Chief Justice Mibuchi, the SCJ struck a somewhat liberal tone.<sup>83</sup> Subsequently, under the leadership of Chief Justice Masatoshi Yokota in the late 1960s, the SCJ rendered landmark labor decisions that shielded public employees from prosecution for participating in strikes and greatly bolstered the power of the Socialist-influenced public employee unions, to the outrage of conservatives.<sup>84</sup> Neither the pressures of the Cold War nor the judiciary's supposed status as a “second-class bureaucracy” can explain these liberal interludes; nor, for that matter, can they explain how quickly and dramatically these interludes came to an end.

There is also, it must be said, reason to be leery of historical and cultural explanations in general. To explain individual behavior as the product of collective norms or collective history is to overlook both the importance of individual choice and the extent to which group behavior is itself the product of individual choice writ large.<sup>85</sup> Japanese judges, in particular, are not unthinking automatons, or helpless pawns in a social or historical narrative that they are powerless to resist. They are, on the contrary, rational and sophisticated to a fault. Precisely because they are, like other highly intelligent human beings, capable of critically examining past practice and old ways of thinking, there have been many judges and even members of the SCJ who have been willing to adopt a more progressive stance. The question is why these intrepid souls have not prevailed. History and culture may suggest ways in which the deck has been stacked against them. But history is not destiny, and culture is as much a consequence as a cause of political behavior.

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83. See Interview with Haruhiko Abe, *supra* note 40; Shigenori Matsui, The History of the Japanese Supreme Court 6–8 (June 14, 2008) (unpublished manuscript) (on file with the author) (discussing the Court's decisions under the leadership of Chief Justice Mabuchi, including the *Placard* case).

84. See *supra* notes 15, 26 and accompanying text.

85. See *supra* notes 28, 37–39 and accompanying text.

#### IV. POLITICAL EXPLANATIONS

##### *A. Political Constraints upon Judicial Review: External or Self-Imposed?*

No one of even modest sophistication and candor can deny that constitutional adjudication by the SCJ is, in some sense, political. It takes no deep understanding of the relationship between judicial politics and electoral politics to realize that a court that has coexisted for decades with a conservative ruling party is likely to behave at least somewhat conservatively. Even from a normative perspective, it is reasonable, if not healthy, for a court to show a degree of respect for political processes and electoral outcomes when interpreting constitutional provisions written in highly abstract language that have potentially profound implications for national policy. The question, therefore, is not whether politics have constrained the exercise of judicial review in Japan, but in what ways.

Specifically, there are two questions to be asked. First, to the extent that the constraint is imposed by other political actors, who imposes that constraint? Second, to the extent that the constraint is self-imposed, what are the reasons for which the Court restrains itself? The distinction between imposed and self-imposed political constraints is, admittedly, an artificial one. A court may choose to restrain itself only because it knows that it will otherwise be constrained by others. Indeed, from a political actor's perspective, there may be no better way to control a court than to induce the court to control itself: in this manner, control is achieved without a formal sacrifice of judicial independence. Nevertheless, the distinction is a useful device for structuring discussion of an otherwise unruly topic.

With respect to the question of who constrains the Court, there are essentially two candidates—the government and the people themselves. Does the Court answer to the wishes of the government, to those of the people, or to some combination of the two? As Frank Upham has astutely observed of the long-running debate between Mark Ramseyer and Eric Rasmusen, on the one side, and John Haley, on the other, both sides actually agree that “conservative political values” dominate Japanese judicial behavior.<sup>86</sup> Where they disagree, instead, is on “who the ultimate master is.”<sup>87</sup> In Haley's view, the judiciary shares the values of the general

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86. Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 447 (2005).

87. *Id.* at 446.

public<sup>88</sup> and protects itself from the partisan whims of the government by maintaining the trust of the people,<sup>89</sup> who in turn “overwhelmingly favor center-right political policies.”<sup>90</sup> It is therefore the mood of the public that ultimately drives the conservatism of the courts. In Ramseyer and Rasmusen’s view, by contrast, conservative politicians have for decades employed the potent instrument of judicial appointments to keep the SCJ in line.<sup>91</sup>

One might object that this particular disagreement is academic, in the pejorative sense of the word, because the politicians are themselves elected by the people, with the result that obedience to one is obedience to the other. The problem, however, is that the two masters can and do conflict with one another: the actions of an elected government do not necessarily reflect the wishes of a popular majority. With respect to the meaning of the pacifist provisions found in Article 9 of the Japanese Constitution,<sup>92</sup> for example, one Justice explained that the SCJ is very aware that it is caught between public opinion, on the one hand, and the views of the government and diplomatic pressure from a key ally, on the other hand.<sup>93</sup> A substantial majority of the public currently opposes any amendment of Article 9.<sup>94</sup> Dilution of Article 9 has, however, been a central plank of the LDP platform since the party’s inception and has now become part of the Democratic Party of Japan (DPJ)’s platform as well, at the same time as the United States has pushed Japan to assume greater responsibility for its own security as well as that of the region.<sup>95</sup> It is precisely because the SCJ is aware of the forces arrayed on both sides, this Justice suggested, that the Court has not merely hesitated to wade into the treacherous waters of Article 9, but has also barred the lower courts from doing so.<sup>96</sup> In other words, the Court’s response has been neither to

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88. See Haley, *supra* note 6, at 1485.

89. See Haley, *supra* note 13, at 127–28; Upham, *supra* note 86, at 446.

90. See Haley, *supra* note 6, at 1471.

91. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 333 (2001); Upham, *supra* note 86, at 446.

92. NIHONKOKU KENPŌ [CONSTITUTION] art. 9 (renouncing “the threat or use of force as means of settling international disputes,” and stipulating, *inter alia*, that “land, sea, and air forces, as well as other war potential, will never be maintained.”).

93. See Interview with Justice E, *supra* note 18.

94. See Editorial, *The Constitution Today*, ASAHI SHIMBUN & INT’L HERALD TRIBUNE (Tokyo), May 5, 2008 (reporting the results of a poll conducted by the Asahi Shimbun in which 66% of respondents expressed opposition to amending Article 9).

95. See BOYD & SAMUELS, *supra* note 26, at 17–19, 21 (describing the history of the pro-amendment faction of the LDP and the subsequent exertion of American pressure on Japan to rearm).

96. See Haley, *supra* note 26, at 24–27 (describing the SCJ’s use of the political question doctrine to render cases involving Article 9 justiciable only in theory).

mediate between the two opposing forces or to chart a middle course between them, but instead to avoid taking a position altogether, with the net result that the government has enjoyed a free hand to pursue its preferred policies. The Court's actions also suggest that there may be merit to both sides of the debate, in the sense that the Court appears reluctant to defy *either* the public *or* the government.

With respect to the second question, it is clear that the SCJ exercises a large measure of self-restraint in the area of judicial review, and especially so where politically sensitive issues are involved,<sup>97</sup> but its reasons for doing so are much less clear. Does it restrain itself out of fear that antagonizing the public or the government will jeopardize its institutional autonomy? Is it afraid that the result of vigorous judicial review will be an embarrassing episode of noncompliance by the government? Or is its reluctance to strike down laws motivated by a sincere, normatively grounded respect for democratic processes? Unfortunately, as any social scientist will attest, motivation can be difficult to ascertain; it is not an empirical phenomenon that can be directly observed, and different motivations can often be inferred from the same behavior.

Consider, for example, one Justice's observation that the Court views constitutional adjudication as "political" in the sense that the Justices feel pressure to decide cases in ways that are consistent with "national sentiment."<sup>98</sup> That observation leaves open the question of why the Court responds to "national sentiment." Do they heed "national sentiment" because they believe, as a normative or ideological matter, that it is the right thing to do? Do they fear that the interests of the Court or judiciary as an institution are threatened by defiance of public opinion? Or do they simply prefer to avoid the disapproval of their friends and neighbors? Simply to observe that the Court follows public opinion begs the crucial question of what its underlying motivation happens to be.

Part IV.B explores the possibility of external constraint and, in particular, the argument that judicial review is rare because the government has used the power of appointment to subdue the Court. Part

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97. See, e.g., Hidenori Tomatsu, Kenpō Soshō [Constitutional Litigation] 429 (2d ed. 2008) (observing that the SCJ tries not to get involved in "politically sensitive cases," such as those involving Article 9); Interview with Justice E, *supra* note 18 (indicating that the SCJ's avoidance of Article 9 cases reflects a "political judgment," and that Japanese judges are generally "apolitical" but have little choice in light of national sentiment on certain constitutional issues but to make "very political decisions" on constitutional issues); *supra* notes 92–96 and accompanying text (discussing the controversy surrounding Article 9).

98. Interview with Justice E, *supra* note 18.

IV.C focuses on the question of self-restraint or, more specifically, whether the Court's self-restraint is principled or strategic in character.

*B. External Constraint: Government Influence Via the Appointments Process*

A straightforward political explanation of the SCJ's failure to strike down laws is simply that, for decades, conservative governments have appointed conservative Justices. In Japan, as elsewhere, one way in which a government can ensure that a court does not challenge its desired policies is by appointing ideologically like-minded judges. "The reason Japanese Supreme Court justices uphold LDP positions," Mark Ramseyer and Eric Rasmusen argue, "is straightforward: For most of the postwar period they have been recent LDP appointees."<sup>99</sup>

In response, John Haley has vigorously disputed the notion that the government plays any meaningful role in the selection of Justices, much less that it screens nominees on the basis of their ideological views.<sup>100</sup> Haley argues that the role of the Prime Minister in selecting Justices is, like that of the Emperor, a largely formal one,<sup>101</sup> and that in practice, the Prime Minister simply gives pro forma approval to the recommendations given to him by the Chief Justice, who is in turn guided by a cadre of senior judges in the General Secretariat, the administrative arm of the Supreme Court, in identifying and vetting potential candidates. Haley emphasizes, in particular, that there is no known case in living memory of a Prime Minister rejecting a Chief Justice's recommendation as to who should fill a vacancy.<sup>102</sup> As he depicts it, the Japanese judiciary is a bureaucracy that enjoys virtually complete autonomy from the government

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99. Ramseyer & Rasmusen, *supra* note 91, at 331; see also J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 126 (2003) (arguing that LDP leaders "appointed only loyal LDP partisans to the Supreme Court"); J. MARK RAMSEYER & FRANCIS MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 178 (1993) (arguing that "Japanese judges are agents of LDP principals").

100. See Haley, *supra* note 13, at 109 (lauding the "absence of partisan or other political influence on Supreme Court appointments" in Japan); see also David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37, 59 (Peter H. Russell & David M. O'Brien eds., 2001) ("[J]udicial appointments are made largely on the recommendation of the chief justice and the General Secretariat. Lower court judges are more the agents of the chief justice and the General Secretariat than they are of the LDP or other political parties.").

101. As a formal matter, the KENPŌ provides that the Emperor appoints the Chief Justice "as designated by the Cabinet," NIHONKOKU KENPŌ, art. 6, para. 2, while the power to appoint the other members of the court is vested directly in the Cabinet, *id.* art. 79, para. 1.

102. See Haley, *supra* note 13, at 106-07.

and is trusted to manage its own affairs under the direction of a cadre of “cautious and conservative” senior judges.<sup>103</sup>

The SCJ is indeed part of a conservative bureaucracy,<sup>104</sup> but it is by no means immune from political manipulation via the appointments process. There are several mechanisms by which the government shapes the composition of the Court. One, but only one, of these mechanisms is the Prime Minister’s power to reject the Chief Justice’s recommendations, which casts a long shadow over the selection process regardless of whether it is actually exercised. Unless the Chief Justice relishes the thought of having his recommendations publicly rejected by the Prime Minister, or even jeopardizing his informal power of recommendation altogether, he will take care not to suggest ideologically unacceptable candidates in the first place.<sup>105</sup> Knowing this, the Prime Minister can therefore “safely rubber-stamp” the Chief Justice’s nominees.<sup>106</sup> It becomes especially unnecessary for the government to scrutinize the judiciary’s chosen candidates, moreover, if the leadership of the judiciary already shares the government’s ideology. Once an ideologically reliable leadership is in place, the judiciary’s rigorous internal controls can be relied upon to ensure ideological consistency over time without the need for overt government intervention.<sup>107</sup>

In practice, however, the threat that the Prime Minister may exercise his veto power is rendered moot by the fact that the government has the opportunity to reject candidates long before the Chief Justice submits their names to the Prime Minister for approval. Indeed, in some cases, the government, not the judiciary, is responsible for the initial selection of candidates. This responsibility is in accordance with the longstanding practice of allocating seats on the Court to different constituencies.<sup>108</sup> The

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103. *Id.* at 125; *see id.* at 114 (opining that Japanese judges “enjoy a greater degree of independence from political intrusion than in any other industrial democracy, both with respect to individual cases as well as the composition of the judiciary”); *id.* at 126 (dubbing the Japanese judiciary an “autonomously governed bureaucracy for which there are few if any parallels in the world”).

104. *See* Interview with Justice E, *supra* note 18 (observing ruefully that the SCJ is “just another bureaucratic organization”).

105. *See* RAMSEYER & RASMUSEN, *supra* note 99, at 63 (arguing that the judges responsible for selecting supreme court nominees have in practice “only nominated people they knew the prime minister would approve”).

106. Ramseyer & Rasmusen, *supra* note 91, at 333.

107. *See* Law, *supra* note 60, at 804–05 (arguing that the Japanese judiciary is characterized by “policy stability,” or consistency and predictability over time, “thanks to a combination of lifelong processes of screening and professionalization and fearsome internal disciplinary mechanisms”).

108. *See* Law, *supra* note 1, at 1564–72 (describing the current allocation of seats); Repeta, *supra* note 15, at 1716–39 (describing the evolution and manipulation of the SCJ’s “reserved seats” system).

Chief Justice and General Secretariat select candidates to fill the six seats on the Court that are allocated to the career judiciary, as well as a seventh seat that is typically held by a legal academic,<sup>109</sup> but they are not involved in the initial selection of candidates for the remaining eight seats. Instead, two of these seats are ordinarily filled by the Ministry of Justice,<sup>110</sup> while two more are filled by the Cabinet itself.<sup>111</sup>

Last but not least, the heavy reliance of the selection process upon behind-the-scenes consultation and consensus building—a typically Japanese style of decision making known as *nemawashi*<sup>112</sup>—ensures in a subtle but effective way that the Chief Justice nominates only candidates who are palatable to the government.<sup>113</sup> As a Justice with experience in personnel matters revealed, the Chief Justice’s recommendations to the Prime Minister

are merely the last stage of a process in which potential nominees have already been vetted by the Prime Minister’s office before the Chief Justice makes his recommendations. . . . [T]he Cabinet Secretary, or *Kanbōchōkan*, engages in “negotiations” over potential candidates with the Secretary General, or *Jimusochō*, who is appointed by and works closely with the Chief Justice. . . . Only after these key aides to the Prime Minister and Chief Justice have already arrived at a mutually satisfactory conclusion does the Chief Justice convey his (pre-approved) recommendations to the Prime Minister.<sup>114</sup>

Thus, it is simply wrong to infer from the Prime Minister’s routine acceptance of the Chief Justice’s recommendations that the appointment of Supreme Court Justices is free of political control. The Prime Minister’s power to reject candidates who have already been vetted by his office is

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109. See *Law*, *supra* note 1, at 1556–64, 1572–74.

110. See *id.* at 1565.

111. See *id.* at 1571–72; *infra* Part V.A (describing the Cabinet Legislation Bureau). Japan’s bar associations nominate private attorneys to fill the four remaining seats. See *Law*, *supra* note 1, at 1566–69; Repeta, *supra* note 15, at 1737–39.

112. See Seki, *infra* note 130, at 185–86 (describing the Cabinet Legislation Bureau’s use of *nemawashi* to vet proposed legislation).

113. See *Law*, *supra* note 1, at 1550–51.

114. *Id.* at 1550–51. A Justice with experience in the General Secretariat elaborated that, prior to the negotiations between the Cabinet Secretary and the Secretary General, substantive discussions take place between the assistant to the Cabinet Secretary and the Director of the General Secretariat’s Personnel Division—all of which, in turn, is a prelude to the Chief Justice’s ritual presentation of a final, preapproved list of names to the Prime Minister. See *id.* at 1551; Interview with Justice G, *supra* note 62.

never exercised because it is completely redundant—not to mention more conspicuous and embarrassing than discreet negotiation.

*C. Self-Restraint: Normative or Strategic?*

A number of Justices with whom I spoke attributed the extreme rarity of judicial review to a normative obligation on the part of the judiciary to defer to the wishes of the Cabinet and Diet. This type of argument is certainly familiar to American readers from the endlessly rehashed debate over the so-called “counter-majoritarian dilemma” of judicial review.<sup>115</sup> The theoretical basis of such arguments is not nearly as strong with respect to the SCJ, however, as it is with respect to the United States Supreme Court. It is often argued that American federal judges should defer to the elected branches because they are unelected and lack democratic legitimacy. By contrast, Japanese Supreme Court Justices are constitutionally required to face retention elections after their initial appointment and at ten-year intervals thereafter,<sup>116</sup> and the Court, in turn, enjoys a remarkable degree of control over the rest of the judiciary. Thus, at least in theory, the members of the SCJ enjoy a degree of direct electoral legitimacy that their American counterparts do not, even if the retention elections have little effect in practice.<sup>117</sup>

The argument that respect for democracy leads the SCJ to abstain from striking down laws is perhaps only to be expected, as it casts the timid Japanese approach to judicial review in a highly principled light. But it is also a fact that the SCJ has powerful practical and strategic reasons to refrain from challenging the government. As Takao Tanase aptly puts it, the proposition that judges must defer to the government may be a “normative statement,” but it also happens to be “inseparably linked with

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115. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–22 (2d ed. 1986); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEO. L.J.* 723, 727–30 (2009) (noting the centrality of the countermajoritarian dilemma to contemporary constitutional theory, and describing the growing scholarly attacks upon the empirical premise that judicial review is countermajoritarian).

116. *NIHONKOKU KENPŌ* [KENPŌ] [CONSTITUTION], art. 79, para. 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.”). As a practical matter, however, the retention elections that are supposed to be held at ten-year intervals are rendered moot by the fact that most justices are first appointed at an age well within ten years of mandatory retirement. See O’Brien & Ohkoshi, *supra* note 100, at 53–54.

117. See Tokuji Izumi, *Concerning the Japanese Public’s Evaluation of Supreme Court Justices*, 88 *WASH. U. L. REV.* 1769 (2011) (questioning the value and efficacy of the retention elections in light of how little the public knows about the Court).

their strategic options.”<sup>118</sup> Like every court, the SCJ must contend with the fact that it lacks the power of either the purse or the sword, which limits its strategic options.<sup>119</sup> Yet Japanese courts possess even fewer means of coercion and are thus in an even more precarious position than their American counterparts: they lack contempt powers, have relatively little ability to order discovery or compel disclosure, and do not exercise the kind of continuing jurisdiction over parties that would enable them to ensure long-term compliance with their rulings.<sup>120</sup>

Not only is the SCJ mindful that it has no obvious way of imposing its will upon the Cabinet or the Diet, but its impotence has also been on display for some time. When the Court struck down a statutory provision punishing parricide more severely than other forms of homicide, the conservative Diet registered its unhappiness by refusing for decades either to respond to the decision or to amend the law.<sup>121</sup> The Court has insisted for decades that electoral malapportionment has reached unconstitutional levels, yet the LDP has yet to introduce an apportionment scheme that satisfies the standards set forth by the Court.<sup>122</sup> When asked what means the SCJ possesses of forcing or even encouraging legislators and bureaucrats to comply with its decisions, one Justice responded simply: “We don’t have any.”<sup>123</sup> Another Justice likened the Court’s power of judicial review to a *denka no hōtō*, or revered ceremonial sword: one leaves the sword on the mantle and refrains from actually using it for fear of revealing to the world that the sword is in fact dull, thus destroying whatever value the sword may have had in the first place.<sup>124</sup> Not all insiders agree, however, that the SCJ restrains itself for fear of highlighting its impotence. One Justice observed that, although the SCJ is sometimes “disappointed” by Diet inaction in response to its rulings, its

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118. Interview with Takao Tanase, *supra* note 17.

119. THE FEDERALIST No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

120. See Haley, *supra* note 6, at 1484 (contrasting the ability of common law judges to “exercise continuing jurisdiction to ensure compliance with their decrees” and “coercive powers through contempt” with the more circumscribed authority of European and Japanese judges); Matsui, *supra* note 1, at 1413–16 (noting specifically the Japanese judiciary’s lack of contempt powers); Interview with Matt Wilson, Professor, Temple Univ., in Tokyo, Japan (June 20, 2008) (highlighting the limited discovery powers of Japanese courts).

121. See ITOH, *supra* note 14, at 148–49; *supra* note 8 and accompanying text.

122. See *supra* notes 6–8 and accompanying text.

123. Interview with Justice D, *supra* note 35.

124. Interview with Justice E, *supra* note 18.

conservatism ultimately has much more to do with the composition of the Court itself than any strategic calculations regarding the likely reactions of the other branches.<sup>125</sup>

To the extent that judicial self-restraint is responsible for choking off judicial review, there is reason to suspect that the strategic variety is more to blame than the principled variety. A telltale sign is the inconsistency in the judiciary's approach to different types of cases that Frank Upham highlights in his contribution to this Symposium.<sup>126</sup> On the one hand, argues Upham, Japanese courts have played an "activist role" by boldly misusing the general clauses of the Civil Code to regulate private employers and rewrite the law of divorce in ways that were more protective of women and workers than the government might have liked.<sup>127</sup> This "lack of deference to the legislative branch" is difficult to reconcile with the notion that Japanese judges refrain from striking down laws out of principled respect for democratic lawmaking processes.<sup>128</sup> On the other hand, as Professor Upham acknowledges, the courts clearly cannot be accused of "judicial activism" when it comes to exercising the power of judicial review.<sup>129</sup> If one accepts that the judiciary acts strategically out of self-preservation, however, there is no mystery at all to this inconsistency. It is less confrontational, and thus less hazardous for the judiciary as an institution, to regulate private conduct in ways that the government can override, than to impose limits on the government's power to make policy. Adopting policies that target faceless corporations and philandering

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125. Interview with Justice B, *supra* note 48.

126. See Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493 (2011).

127. *Id.* at 1493–94; see *id.* at 1499–1500 (discussing the SCJ's cavalier approach to the language of the Labor Standards Act in the *Sumitomo Cement* line of cases); *id.* at 1502 (observing that the general clauses were intended only to enable courts "to reach justice in cases when the strict application of the legal rules will lead to a result inconsistent with the purpose of the [statute]" and were not intended "to give the courts the power to supplant, even temporarily, the legislature as the institution responsible for establishing fundamental norms").

128. *Id.* at 1498. Nevertheless, it can be argued that Japanese courts evince a form of respect for democratic processes that American courts do not. On Upham's view, the greater willingness of Japanese courts to "change norms openly" is balanced—perhaps favorably—by their greater "willingness to allow the political process to operate after judicial announcement of the law." *Id.* at 1504. To put his argument in colloquial terms, the American brand of judicial activism allows the legislature to have the first word but not the last word, whereas the Japanese brand gives the legislature the last word but not necessarily the first word. Although Upham himself does not say so, the Japanese version of judicial activism might be said to evince greater respect for democratic lawmaking by giving the legislature an opportunity to ratify or reject the judiciary's approach, then leaving the judiciary's response undisturbed.

129. *Id.* at 1494.

husbands, for the benefit of a majority of the public, is one thing; attempting to tie the hands of the Japanese state is another thing entirely.

## V. INSTITUTIONAL EXPLANATIONS

### A. *Pre-Enactment Review by the Cabinet Legislation Bureau*

Another possible explanation for the failure of judicial review in Japan is that some institution other than the judiciary has taken responsibility for evaluating the constitutionality of government action. Some observers have pointed in particular to the existence of the Cabinet Legislation Bureau (CLB), or *Naikaku Hōsei Kyoku*, as an important reason for why the SCJ has so rarely struck down legislation. Modeled after France's elite *Conseil d'État*, the CLB has responsibility for drafting and reviewing prospective Cabinet legislation.<sup>130</sup> By all accounts a prestigious and influential institution, its eighty or so members are elite senior bureaucrats on temporary assignment from other agencies; most possess significant expertise in legal matters.<sup>131</sup> At any given time, approximately ten percent of CLB personnel are judges and lawyers.<sup>132</sup> Former CLB officials, in turn, are often appointed to the SCJ, including many who themselves had never been judges. Assignment to the CLB, for what is typically a three-year term, is strongly indicative of an elite career trajectory that can culminate in appointment to the SCJ, even for those with no prior judicial experience.<sup>133</sup>

Some scholars and judges argue that the CLB reviews government legislation so carefully and expertly prior to enactment that the SCJ is highly unlikely to find constitutional flaws in the final product.<sup>134</sup> The fact that many current and former CLB members are themselves judges, moreover, can only enhance the CLB's ability to anticipate what the courts will find acceptable. Indeed, given the nature of the ties between the CLB

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130. See SHINICHI NISHIKAWA, *RIPPO NO CHUSU SHIRAREIZADU KANCHO: NAIKOKU HŌSEIKYU* [THE MYSTERIOUS CABINET LEGISLATION BUREAU] (2000); Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT'L J. CONST. L. 296, 298–99 (2007); Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 L. IN JAPAN 168 (Daniel H. Foote trans., 1986); Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?* (Japan Policy Research Inst. Working Paper No. 99, 2004), available at <http://www.jpri.org/publications/workingpapers/wp99.html>.

131. See NISHIKAWA, *supra* note 130.

132. See *id.*

133. See *id.* A former CLB official who is not also a career judge will usually assume one of the two seats on the SCJ that are informally allocated to former prosecutors, as discussed below.

134. See, e.g., *id.*; Hideo Chikusa, *Japanese Supreme Court—Its Institution and Background*, 52 SMUL. REV. 1719, 1725–26 (1999); Hasebe, *supra* note 130, at 298.

and the judiciary, members of the SCJ have no doubt found themselves on occasion in the position of deciding upon the constitutionality of legislation that they had previously reviewed and approved as members of the CLB.

It is unduly optimistic to think that pre-enactment review by the CLB has been so thorough and effective that the SCJ is left with practically nothing to do. Comparison of the CLB and the French *Conseil d'État* is instructive. No less than its Japanese equivalent, the *Conseil d'État* is a highly elite, capable, and well-respected institution that performs pre-enactment review and gives influential advice on the constitutionality of legislation.<sup>135</sup> Notwithstanding the longtime presence and formidable reputation of the *Conseil d'État*, however, France's *Conseil Constitutionnel* has struck down much more important laws, and with much greater frequency, than the SCJ has done over a longer span of time.<sup>136</sup> There is no reason to believe that the CLB is vastly more skilled at screening proposed legislation for constitutional defects than the *Conseil d'État*.

It is also doubtful whether the CLB's views carry much weight, if any, with the SCJ. Given that the CLB reviews approximately eighty percent of all legislation before it is enacted,<sup>137</sup> it is certainly possible that preventive work by the CLB may play a role in reducing the number of "bad laws" that are enacted. What the CLB does not appear to enjoy, however, is judicial deference. One Justice deemed it "too extreme" to suggest that the SCJ hesitates to strike down laws simply because they have been reviewed by the CLB,<sup>138</sup> another Justice stated more bluntly that the CLB's views carry "no influence" with the Court.<sup>139</sup> Likewise, the Court's influential *chōsakan*, or law clerks, appear to pay the CLB little heed: those whom I interviewed consistently took the position that they and their fellow clerks

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135. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 14–24 (5th ed. 1998).

136. See *supra* notes 68–71 and accompanying text (discussing the history of the *Conseil Constitutionnel*, the rate at which it has invalidated legislation, and the importance of the legislation that it has invalidated). An example of *Conseil Constitutionnel* jurisprudence that the SCJ has never rivaled in terms of policy impact was the invalidation in 1981 of Socialist President François Mitterrand's centerpiece economic policy of nationalizing the industrial and financial sectors. See STONE, *supra* note 68, at 158–62.

137. See Interview with Shinichi Nishikawa, *supra* note 13. The CLB is not responsible for reviewing bills introduced by individual members of the Diet, or so-called private member's bills.

138. Interview with Justice B, *supra* note 48.

139. Interview with Justice C, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

place little or no weight upon what the CLB or, indeed, any other government agency has to say.

Nevertheless, even if the notion that judicial review can be rendered largely superfluous by expert bureaucrats who prevent unconstitutional laws from being enacted warrants a degree of skepticism, the CLB is undoubtedly an important part of the political ecosystem within which the SCJ operates and is likely relevant to a complete understanding of the SCJ's behavior. In particular, there is reason to think that CLB has enabled the SCJ to avoid potential difficulties surrounding the interpretation and enforcement of Article 9 by bearing the brunt of political conflict that might otherwise have befallen the SCJ. The CLB has in recent years come under pressure from the LDP for its efforts to adhere to an interpretation of Article 9 that leaves the government less leeway than it might like.<sup>140</sup> The fact that the CLB has staked out a position on Article 9 and, in doing so, served as a lightning rod for past efforts to expand Japan's military capabilities, has perhaps alleviated potential pressure on the SCJ to confront the issue itself.

*B. The Influence of Personnel Exchanges Between the Judiciary and the Ministry of Justice*

Yet another explanation for the failure of judicial review concerns the close relationship between Japanese judges and prosecutors. Even more so than the CLB, the Ministry of Justice regularly exchanges personnel with the judiciary. Under the practice known as *hanken-kōryū*, approximately twenty percent of Japanese judges work at the *Hōmushō* in some capacity during their careers.<sup>141</sup> Participation in the *hanken-kōryū* bodes well for a judge's future career prospects upon returning to the judiciary.<sup>142</sup> Prosecutors on loan to the judiciary, meanwhile, can expect favorable treatment in the form of assignment to major courts in desirable locations.<sup>143</sup> Prosecutors also enjoy the benefit of an informal quota of seats on the SCJ: there are usually two of them on the Court at any given time,<sup>144</sup> a figure that does not include career judges who have prosecutorial experience on account of having spent time in the Ministry of Justice.

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140. See Samuels, *supra* note 130; see also NISHIKAWA, *supra* note 130 (noting that the CLB has encountered difficulty "managing" its interpretation of Article 9 in the face of political pressure).

141. See Miyazawa, *supra* note 15, at 50–51.

142. See *id.* at 50.

143. See *id.*

144. "Prosecutor" is what lawyers in the Ministry of Justice are typically called in English, but it is perhaps a poor translation of the corresponding Japanese term, *kenji* or *shomu-kenji*. In practice,

There are two reasons why the Court's ties to the Ministry of Justice might help to foster an extremely conservative approach to judicial review. The first has to do with the fact that the Ministry of Justice has responsibility for drafting both the Civil Code and the Criminal Code, which amount to a significant portion of the statutory law that the courts are called upon to interpret and apply. It would not be surprising if judges were to exhibit a tendency to uphold legislation drafted by their former colleagues at the Ministry of Justice—or perhaps, indeed, by the judges themselves during their temporary tenure as government attorneys.<sup>145</sup> The second reason is that prosecutorial experience may have the effect of making judges more conservative and sympathetic to the government. The practice of loaning judges to the *Hōmushō* has been criticized on the ground that the judges in question acquire “pro-government attitudes” that influence their behavior upon their return to the bench.<sup>146</sup>

Even if it is true that prosecutorial experience makes judges more conservative, however, it is unclear that the judiciary's close relationship with the Ministry of Justice does much to explain the conservatism of the SCJ in particular. To be sure, the prosecutors who have served on the SCJ have enjoyed a reputation for conservatism, but the fact remains that they make up only a small fraction of the Court's membership. Of the SCJ's current fifteen members, only two are former prosecutors, and only one of the six career judges currently on the Court appears to have spent any time at the Ministry of Justice.<sup>147</sup>

### C. *The Bureaucratic Structure and Internal Discipline of the Judiciary*

A number of scholars have voiced a simple yet powerful explanation for the conservatism of Japan's lower court judges: the judiciary is a tightly controlled bureaucracy, the judges at the top are conservative, and these top bureaucrats favor like-minded conservatives while consigning

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Japanese prosecutors might be better described as general-purpose government attorneys. Like lawyers in the U.S. Department of Justice, they represent the government in all public litigation matters; unlike their American counterparts, however, they also do a significant amount of legislative drafting.

145. See Hasebe, *supra* note 130, at 298–300.

146. Miyazawa, *supra* note 15, at 51. This type of outlook, in turn, appears to be valued and rewarded by the judicial bureaucracy: as Setsuo Miyazawa observes, there is reason to suspect that the General Secretariat has deliberately assigned judges with prosecutorial experience to handle sensitive cases that it wishes to have decided in favor of the government. See *id.* at 51–52.

147. See *Justices of the Supreme Court*, SUPREME COURT OF JAPAN, <http://www.courts.go.jp/english/justices/index.html> (last visited May 13, 2011). As of this writing, the most recent appointee is Itsuro Terada, who also happens to be the only career judge on the SCJ with experience at the Ministry of Justice. See *id.*

those who are liberal or otherwise heterodox to professional oblivion.<sup>148</sup> Professors Ramseyer and Rasmusen, in particular, have amassed statistical evidence that career judges who belong to a left-of-center political group or rule against the government on politically sensitive constitutional questions suffer systematically over the course of their careers: even if one controls for such factors as educational background and productivity, such judges are likely to spend more time at less prestigious courts in less desirable locations and to advance up the pay scale more slowly.<sup>149</sup>

The argument that lower court judges are at the mercy of a conservative bureaucracy is a highly plausible explanation for their reluctance to wield the power of judicial review against a conservative government. But it does little to explain why the Supreme Court fails to exercise that power either.<sup>150</sup> The logic of reward and punishment that applies so forcefully to other Japanese judges simply does not apply to Supreme Court Justices. Having already reached the pinnacle of the judiciary, the Justices of the SCJ are immune to the prospect of promotion or punishment by the General Secretariat; indeed, at least in theory, they are responsible for supervising and directing the General Secretariat. The only career goal that a sitting Justice might conceivably have left to pursue is elevation to the position of Chief Justice.<sup>151</sup> That incentive, in turn, is unlikely to exert much influence over any meaningful number of Justices for any meaningful period of time. In practice, only those who have been career judges are considered for appointment to the position of Chief Justice,<sup>152</sup> and of the five or so justices who meet that requirement at any given time, some will already be too close to mandatory retirement age to be considered viable candidates.<sup>153</sup>

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148. See RAMSEYER & RASMUSEN, *supra* note 99, at 17–25; Law, *supra* note 1, at 1551–64 (describing judicial hiring and promotion practices in Japan); Miyazawa, *supra* note 15, at 57–59; Ramseyer & Rasmusen, *supra* note 99, at 333–34; Upham, *supra* note 86, at 453 (opining that “even readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system”).

149. See RAMSEYER & RASMUSEN, *supra* note 99, at 26–43; Ramseyer & Rasmusen, *supra* note 99, at 338–41.

150. See O’Brien & Ohkoshi, *supra* note 100, at 39 (faulting Ramseyer and his coauthors for “focus[ing] only on the lower courts and, rather oddly, pay[ing] no attention to the operation of the Supreme Court”).

151. See Law, *supra* note 1, at 1550–51, 1589–92 (describing the unique administrative powers that render the Chief Justice more than merely “first among equals”).

152. See *id.* at 1522–23 n.25. The current Chief Justice, Hironobu Takesaki, is a rare exception to the general rule that Chief Justices are selected from among sitting members of the Court. See *id.* at 1569 n.148.

153. The career judges who are appointed to the Court serve an average of approximately seven years before reaching mandatory retirement age. See Law, *supra* note 1, at 1575. In recent decades, the Chief Justice has almost invariably been a career judge who is elevated to the position after having

In order to account for the SCJ's behavior, Ramseyer and Rasmusen emphasize instead the LDP's ultimate control over the appointment of Supreme Court Justices. They argue that the SCJ is conservative for the "straightforward" reason that "almost all the justices have been recent LDP appointees."<sup>154</sup> A mildly puzzling aspect of this account, however, is that it depicts the conservative tendencies of the SCJ and the conservative tendencies of the lower courts as essentially separate phenomena that call for different explanations<sup>155</sup> when, in fact, the two phenomena are deeply intertwined. Ramseyer and Rasmusen's own statistical evidence suggests, for example, that conservative judges are more likely to receive influential administrative postings in the General Secretariat.<sup>156</sup> They further observe that this same cadre of judges in the General Secretariat is also largely responsible for vetting and nominating Supreme Court candidates. It is safe to assume that conservative judges are inclined to place fellow conservatives throughout the upper reaches of the judiciary, including the SCJ: to advance the career of a fellow judge who shares one's own policy preferences is to advance one's own policy preferences. Thus, the fact that the judges who select SCJ candidates are themselves conservative should tend to ensure that the SCJ will also be conservative. Ramseyer and Rasmusen do not draw this connection explicitly, however, but instead attribute the conservatism of the SCJ to the long shadow cast by the Prime Minister's rarely exercised power to veto ideologically unpalatable nominees.

Other scholars have, by contrast, emphasized how institutional factors link the ideological tendencies of the SCJ with those of the judicial bureaucracy: the bureaucracy, they observe, favors the career advancement

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already served on the Court for two or three years, which places him even closer to mandatory retirement than the average justice. *See id.* at 1522–23 & n.25. The current Chief Justice, Hironobu Takesaki, was appointed to the position at the unusually young age of sixty-four, which will allow him to serve for nearly six years before he faces mandatory retirement. *See Justices of the Supreme Court: Takesaki, Hironobu*, SUPREME COURT OF JAPAN, <http://www.courts.go.jp/english/justices/takesaki.html> (last visited May 30, 2011). More typical was Takesaki's immediate predecessor, Niro Shimada, who was promoted to Chief Justice shortly before his sixty-eighth birthday and consequently served in that position for barely two years before reaching mandatory retirement age. Likewise, Shimada's own predecessor, Akira Machida, faced mandatory retirement within four years of his promotion to Chief Justice.

154. RAMSEYER & RASMUSEN, *supra* note 99, at 63.

155. *See* RAMSEYER & RASMUSEN, *supra* note 99, at 63 (opining that "[t]he real puzzle is not the Supreme Court's conservatism but that of the lower courts," as if to suggest that the two phenomena are distinct).

156. *See* Ramseyer & Rasmusen, *supra* note 99, at 339 (finding statistically that judges who found constitutional violations in Article 9 or electoral malapportionment cases received fewer assignments to the General Secretariat).

of conservative judges who find themselves, as a result, in a position to promote the selection of like-minded Supreme Court nominees.<sup>157</sup> My own view, which is broadly consistent with that of Professors Miyazawa, O'Brien, and others, is that the behavior of the Supreme Court is the product of interaction between the internal organization of the judiciary and the political environment in which the Court operates.<sup>158</sup> The composition of the Court and the resources and incentives surrounding its members are shaped both directly and indirectly by an institutional structure that equips a cadre of judges in administrative positions with a highly effective array of tools for securing conformity and suppressing deviance. The influence of the General Secretariat, nominally an arm of the Supreme Court, extends to the Supreme Court as well: not only is it responsible for grooming and selecting career judges to fill six of the fifteen seats on the Court,<sup>159</sup> but it also exercises complete control over the *chōsakan* upon whom the Court must rely heavily in order to cope with an overwhelming and largely mandatory docket of over ten thousand cases per year.<sup>160</sup> In other words, the Supreme Court commands the General Secretariat, but the General Secretariat pulls the strings.

This centralization of power over both administrative and personnel matters in the General Secretariat, under the leadership of the Chief Justice, has important implications for the ability of a newly elected government to alter the ideological direction of the Court. It suggests, in particular, that in order to make the Court more liberal, the current DPJ government might need to do little more than replace the existing Chief

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157. See, e.g., Miyazawa, *supra* note 15, at 59 (arguing that administrators in the General Secretariat share “the perspective of the dominant political group in the legislative and administrative branches,” “appoint like-minded judges to the [General Secretariat] and other key positions to control other judges,” and “promote[] each other to higher positions”); O'Brien & Ohkoshi, *supra* note 100, at 44–48 (arguing that the Chief Justice and General Secretariat exercise their considerable power over personnel matters and appointments to the Court in a manner that disadvantages judges who are “too independent or too liberal”).

158. See Law, *supra* note 1, at 1587; Miyazawa, *supra* note 15, at 59; O'Brien & Ohkoshi, *supra* note 100, at 59 (“[T]he politics of the judicial bureaucracy, electoral outcomes, and the governmental infrastructure matter a great deal more for establishing judicial independence—both institutional independence and judicial independence on the bench—and for the exercise of constitutional review than the parchment guarantees of Japan's 1947 Constitution.”).

159. See Law, *supra* note 1, at 1557–64 (describing the General Secretariat's control over the judicial career path to a seat on the Court). Moreover, the General Secretariat's influence over the composition of the SCJ has only grown over time, thanks to the allocation of an increased number of seats to the career judiciary at the expense of the private bar. See Repeta, *supra* note 15, at 1735–39 (suggesting that this reallocation of seats had the effect, if not also the intent, of steering the Court to the right); Interview with Justice B, *supra* note 48 (indicating that the reallocation of seats was in fact intended to consolidate conservative control over the Court).

160. See Law, *supra* note 1, at 1577.

Justice and wait a few years. The fact that the Chief Justice is typically appointed to that position when he is already in his mid to late sixties and is subject to a mandatory retirement age of seventy normally ensures that the government will have the chance to replace this key figure within the space of four to five years, at most.<sup>161</sup> Conversely, however, if the DPJ is for some reason unable to replace the Chief Justice, its ability to influence the Court, via the appointments mechanism or otherwise, would presumably be blunted.

The problem for the DPJ is that the LDP appears to have anticipated these possibilities. It is a time-honored strategy for a government that anticipates electoral defeat to seek to entrench itself by appointing friendly judges who cannot easily be removed by the incoming government.<sup>162</sup> In Japan, given the unusual degree of power concentrated in the hands of the Chief Justice, a highly effective way to pursue a judicial entrenchment strategy of this type is to appoint an ideologically reliable Chief Justice who is young enough to outlast the opposition's turn in power. It may be no coincidence that, in the face of imminent and resounding electoral defeat, the outgoing LDP government appointed Hironobu Takesaki to the position of Chief Justice at an uncharacteristically young age.<sup>163</sup> The average length of time that Justices serve before reaching retirement age is only five-and-a-half years,<sup>164</sup> and because the Chief Justice in particular is nearly always selected from among the former career judges who are already on the Court, he is unlikely to serve for more than two to four

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161. See *supra* note 153 and accompanying text.

162. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 22–30 (2003) (offering the “political insurance” thesis that governments facing a future loss of power can and do insure themselves against that prospect by empowering and staffing judicial institutions capable of thwarting and resisting the wishes of a future, hostile government); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11–16 (2004) (offering the “hegemonic preservation thesis” that ruling elites faced with an imminent loss of power seek to preserve their own hegemony by empowering judicial institutions that will share their outlook); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 418–20 (2009) (describing how the Federalists reacted to the massive electoral rout of 1800 by creating new judicial positions and appointing a large number of so-called “midnight judges”); Ramseyer & Rasmusen, *supra* note 91, at 333 (noting that it is optimal strategy for the party in power to appoint Justices close to retirement age in order to minimize the problem of ideological drift by sitting Justices, but the calculus shifts in favor of selecting younger Justices, who may be less predictable over the long run but will also remain in office longer, if the ruling party anticipates that it will soon be out of office).

163. At the time that the LDP broke with convention to select Hironobu Takesaki as Chief Justice in 2008, it was already clear that the party was heading for catastrophic electoral defeat on a scale that it had never before experienced in over fifty years of nearly uninterrupted rule. See *Japan's Crashing Economy: Cold Medicine*, ECONOMIST, Feb. 19, 2009, at 44 (reporting that, with a general election imminent, the LDP government enjoyed approval ratings of less than 10%).

164. See Law, *supra* note 1, at 1574.

years before facing mandatory retirement.<sup>165</sup> At the time of his appointment, however, Takesaki had not previously served as an associate Justice and was nearly six years from mandatory retirement age.<sup>166</sup> Assuming that Takesaki exercises the degree of influence over appointments that Chief Justices are generally thought to enjoy, the result of Takesaki's appointment may be to blunt any efforts that the current government might make to modify the composition and behavior of the Court, at least in the short to medium term.

#### VI. CONCLUSION: BREAKING THE GRIP OF THE BUREAUCRACY

The fact that the Supreme Court of Japan has approached judicial review so conservatively for so long is ultimately unsurprising. Unless one believes that courts can be hermetically sealed from their political environment, it is unrealistic to think that the decades-long dominance of Japanese politics by the right-of-center LDP would not profoundly shape the behavior of the SCJ. Moreover, even though the government has, for the time being, taken a very slight turn to the left, it is unclear how quickly the judiciary will follow its lead. In the long run, the Court is bound to succumb eventually to the effects of an enduring political shift to the left. In the short term, however, the tendency of the judiciary to cling to its old ways should not be underestimated. As previously noted, a temporary but nonetheless serious obstacle to any immediate effort to reshape the Court is the fact that, on its way out of office, the LDP happened to stumble upon the simple but effective entrenchment strategy of appointing a Chief Justice who is young enough to potentially outlast the opposition's time in office.<sup>167</sup>

A more enduring, structural reason why the SCJ seems unlikely to develop a sudden mania for judicial review, however, is its heavy dependence upon a hierarchical bureaucracy for both personnel and resources. As a bureaucratic organization, the Japanese judiciary is ill suited not simply by temperament, but by design, to challenge the government on matters of policy. Form and function, as Mirjan Damaška observes, are symbiotic: the fact that a judiciary is organized in a particular way renders it better suited to performing certain functions than

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165. *See supra* note 153 and accompanying text.

166. *See supra* notes 152–53 and accompanying text.

167. *See supra* notes 162–65 and accompanying text (discussing the political circumstances surrounding the appointment of Hironobu Takesaki as Chief Justice and the ways in which Takesaki was an atypical candidate).

others.<sup>168</sup> The Japanese judiciary, in particular, is what Damaška would call a “hierarchically” organized judiciary that is more suited to “policy-implementing” than to “conflict-solving.”<sup>169</sup> The fact that tremendous power is concentrated in the hands of its leadership, in the form of an abundance of internal mechanisms for securing conformity and punishing deviance, renders the judiciary a stable and predictable mechanism for the transmission and implementation of government policy.

What an organization with such characteristics cannot be expected to cultivate or even tolerate, by contrast, is a penchant for defying authority or exercising independent judgment on matters of policy. Yet it is precisely these qualities that a court must possess if it is to discharge the responsibility of judicial review. An organizational form that inculcates conformity to the wishes of judicial bureaucrats who epitomize conventional thinking is simply not conducive to judicial review, which entails scrutinizing and overturning rather than implementing the wishes of those in power.

The fact that the Supreme Court is nominally in charge of the bureaucracy does not mean that it is independent of the bureaucracy. Instead, to a substantial degree, it is the bureaucracy that literally makes the Court. To turn the Japanese judiciary into something other than a policy-implementing arm of the state—one characterized by consistency, discipline, and fidelity to the sensibilities of those who wield power—will require more radical surgery than the American constitutional interventions of 1946, which may have formally emancipated the judiciary from the Ministry of Justice but did little to alter its fundamental character.

There is more than one way to liberate the exercise of judicial review from the control of a conservative, self-replicating bureaucracy that prizes conformity and orthodoxy over constitutional principle. Some scholars have suggested that the power of judicial review be vested in a specialized constitutional court that is distinct from the regular judiciary,<sup>170</sup> an approach that has been adopted by many other civil law countries and, indeed, is more popular on a global basis than the American-style approach of relying upon courts of general jurisdiction.<sup>171</sup> It is neither

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168. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 182–201 (1986).

169. *Id.* at 11–12, 94–96.

170. See Matsui, *supra* note 1, at 1416–19 (discussing proposals that have circulated in Japan for the creation of a separate constitutional court).

171. See Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMP. POL.* 217, 223–24 & tbl.9.1 (Daniele Caramani ed., 2008) (reporting that countries that have adopted the “European model”

necessary nor sufficient, however, to create a separate court in order to guarantee the vigorous exercise of judicial review. Regardless of whether one creates a separate court with formal autonomy from the regular judiciary, a successful reform strategy must also aim to deprive the bureaucracy of its power over the personnel and resources needed to perform judicial review.

The stifling influence of the bureaucracy could, in theory, be lifted by reforming the existing Supreme Court instead of creating a specialized constitutional court. The first problem to be addressed is that of the bureaucracy's control over the resources available to the Court. As explained previously, the Justices are heavily dependent upon law clerks who are both obsessed with adherence to precedent and beholden to the General Secretariat. Justice Izumi's proposal to assign *chōsakan* to individual Justices would obviously ameliorate this problem by providing the justices with the resources that they need to question and challenge the legal orthodoxy that the bureaucracy fights so hard to maintain.<sup>172</sup> Indeed, one might go further by eliminating the General Secretariat's role in the selection of law clerks altogether and enabling the Justices to select clerks who are not necessarily career judges. Such a reform would give the Justices the opportunity to select law clerks who reflect their own values and priorities, as opposed to those of the bureaucracy.

The second problem to be addressed is that of the membership of the Court. As Justice Izumi observes, the appointment of at least three constitutional law or public law scholars to the Court at any given time—one for each of the three petty benches—would both enhance the Court's substantive expertise in constitutional matters and ensure that such matters are “vigorous[ly] debate[d].”<sup>173</sup> Justice Izumi's view that public law scholars would enhance the quality and quantity of debate is supported, moreover, by empirical evidence: law professors have a proven track record of intellectual independence, as evidenced by the fact that a disproportionately large share of the Court's concurring and dissenting opinions are authored by those Justices who hail from legal academia.<sup>174</sup> One might also add that, absent such expertise and debate, sensitive constitutional issues are too likely to be resolved in practice by law clerks,

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of judicial review outnumber those that have adopted the “American model” by a count of eighty-five to fifty-three, while another thirty-six countries employ a mixture of the two models or some other unique and unclassifiable mechanism).

172. See Izumi, *supra* note 117, at 1779.

173. *Id.* at 1778.

174. See O'Brien & Ohkoshi, *supra* note 100, at 57–58.

or *chōsakan*, handpicked by the bureaucracy for their preoccupation with fidelity to precedent.<sup>175</sup>

The appointment of any number of public law scholars to the Court may be for naught, however, if the responsibility for selecting such candidates remains in the hands of the judicial bureaucracy. Whereas it is generally understood that the appointment of private attorneys to the Court is to proceed on the basis of input from Japan's various bar associations,<sup>176</sup> there is no comparable institutional or procedural constraint on the bureaucracy when it comes to the selection of the Court's lone law professor.<sup>177</sup> Thus, as a practical matter, the bureaucracy is free to select the most conservative law professor that it can find, in any field of its choosing.

Accordingly, it is necessary to devise an institutional mechanism for identifying potential Supreme Court nominees that is largely or wholly independent of the Chief Justice and General Secretariat. The Cabinet must develop or acquire an independent capacity to identify and assess judicial candidates. Along these lines, Justice Izumi suggests the creation of a "selection committee," "consisting of judges, prosecutors, private attorneys, and scholars," that would have responsibility for advising the Cabinet on all appointments to the Court.<sup>178</sup> Such a comprehensive overhaul of the selection system would be desirable for a number of reasons, not least of all that it might break the bureaucracy's grip over the membership of the Court—provided, of course, that the members of the committee are not themselves selected by the Chief Justice or General Secretariat, and that the judges and prosecutors do not dominate the committee.

If the creation of an independent selection committee proves too ambitious, a more incremental approach might be to institute a selection process for law professors that parallels the one already in place for private attorneys by vesting the selection of candidates in a professional organization of legal academics or consortium of law schools. Just as each of Japan's leading bar associations currently feels entitled to some form of quota-based representation on the Court,<sup>179</sup> it is plausible to imagine a system in which Japan's leading law schools would be informally entitled

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175. See Law, *supra* note 1, at 1581.

176. See *id.* at 1566–68.

177. See *id.* at 1572–74 (characterizing the process for identifying candidates from legal academia as "ad hoc and unstructured, with few informal rules or understandings to guide it").

178. Izumi, *supra* note 117, at 1778.

179. See Law, *supra* note 1, at 1567.

on a rotating basis to fill Supreme Court vacancies. Indeed, an authoritative association of law schools or law professors could help to bring about such a system on its own initiative. By publicizing its own list of the most qualified candidates for the Supreme Court, such an organization could put subtle pressure upon the judiciary to choose from that list in order to avoid criticism or disapproval. Recommendations of this type would not necessarily have to be formally binding in order to be effective as a practical matter. To depart altogether from the list of recommended candidates would risk the appearance of ignoring expert consensus for no obvious reason and instead selecting judges on nakedly political or ideological grounds. And by all accounts, Japan's senior judges do care about appearances.

# A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation

By HIROSHI FUKURAI\*

## I. Introduction

In commemorating the tenth year anniversary of the JSRC, the UC Hastings conference assembled a group of socio-legal scholars and legal experts from both Japan and the U.S. to analyze the extent of the implementation of the judicial reforms suggested by the Justice System Reform Council (hereinafter JSRC). The aim of this article is to critically examine the impact of the JSRC's proposed judicial reforms in the area of criminal justice and lay participation in legal decision-making.

After two years of careful deliberation by the thirteen JSRC members on potential reforms to the Japanese justice system, the council finally submitted a detailed report (*Iken sho*) to Prime Minister Jun'ichiro Koizumi on June 12, 2001, outlining their suggestions and recommendations.<sup>1</sup> In this groundbreaking

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1. Shihō Seido Kaikaku Shingikai [JSRC], Shihō Seido Kaikaku Shingikai Iken sho: 21-seiki no nihon o Sasaeru Shihō Seido [Report of the JSRC - A Justice System for Japan in the 21st Century], June 12, 2001, available at <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/pdf-dex.html> [hereinafter *JSRC Report*]. The official English translation entitled Recommendations of the Justice System Reform Council -For a Justice System to

document, the JSRC made specific proposals to introduce two distinct systems of citizen participation in Japan's justice system: (1) *Saiban-in Seido* (a quasi-jury system or mixed tribunal) and (2) a revised *Kensatsu Shinsakai* (Japan's grand jury system or Prosecution Review Commissions (PRC)).<sup>2</sup> The establishment of these twin bodies of lay adjudication was designed to broaden the institution of decision-making in criminal matters to include a representative panel of Japanese citizens chosen at random from local communities. Japan once had an all-citizen jury system and began to use jury trials in 1928, but the system was abruptly suspended by the Japanese military government in 1943 in favor of a collegial professional bench trial system.<sup>3</sup> The lack of lay participation in the justice system in the postwar era has led to the creation of symbiotic power relations among three key agencies of Japan's criminal justice system, namely the police, prosecutors' office, and the court.<sup>4</sup>

The reintroduction of the citizen participation system in criminal proceedings thus represented one of the fundamental changes to Japan's legal structures and status quo, and this article examines such changes in lay participation and its effects in the area of criminal justice. Attorney Shunsuke Marushima who served as Senior Staff of the Secretariat in the JSRC declared that much of the reforms in criminal justice, especially with respect to prosecution and police procedures, were expected to go through dramatic and significant changes in their operational procedures because of popular participation in the administration of criminal justice in Japan.<sup>5</sup> This suggests that a critical assessment of genuine effects of

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Support Japan in the 21st Century- is available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

2. Hiroshi Fukurai, *The Re-birth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 321-28 (2007).

3. Mamoru Urabe, *A Study on Trial by Jury in Japan*, in THE JAPANESE LEGAL SYSTEM 483-91 (Hideo Tanaka ed. 1976).

4. Japan is said to have the "world's highest conviction rate" of nearly 100%. See generally DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 215 (2002). Such a near-perfect conviction rate could not have been achieved unless there has been a close and symbiotic collaborative working relation among Japan's police agencies, public prosecutors' offices, and courts.

5. Interview with Shunsuke Marushima conducted by the author at the UC Hastings College of the Law School (Sept. 8, 2012) (a interview report on file with the author) (The introduction of "the *Saiban-in* system will undoubtedly force the changes in the police procedure and investigative methods" and "reforms in the PRC [Prosecutorial Review Commission] will lead to a discussion on the reform of

the council recommendation in the area of criminal justice can be best achieved in its relation to the operative and procedural impact of the twin systems of lay adjudication.

Part II of this article first examines the two systems of lay adjudication in criminal proceedings, including the *Saiban-in Seido* (a quasi-jury system) and the revised Prosecution Review Commission (PRC). The *Saiban-in* panel that consists of three professional and six citizen judges adjudicates serious crimes committed in local communities, much like citizen participation in America's petit-jury trials.<sup>6</sup> The PRC, on the other hand, asks eleven randomly chosen Japanese citizens to examine the appropriateness of prosecutors' non-indictment decisions, an adjudicative institution to which the U.S. has no juridical equivalence. While the former deals exclusively with the adjudication process of criminal matters in Japan, the latter has a greater potential to influence the decisions made by Japanese prosecutors. The strengths and weaknesses of each of these systems will be critically examined.<sup>7</sup>

Part III then proceeds to analyze the criminal justice process itself that has been significantly impacted with the introduction of the two lay adjudication systems. At the outset, the JSRC recommendation was apt to eliminate numerous causal factors behind criminal procedural anomalies that previously led to not only wrongful convictions but also violations of criminal defendants' rights. For instance, the JSRC recommendation suggested ensuring greater transparency to the usually closed investigation and investigative processes, which in turn facilitated the deliberation of lay participants in *Saiban-in* trials. This article first examines how these problematic areas were impacted by the introduction of *Saiban-in* trials, as they were also discussed and debated by the JSRC members. These factors include: (1) the use of police detention centers as "substitute prisons" for interrogation; (2) limited access to counsel; (3) use of physical and psychological torture to extract forced confessions; (4) judicial complacency toward the use of confession documents obtained via dubious means; and (5) the lack of pretrial release for defendants.

Part III will continue to examine other consequences of judicial reforms that will invariably affect citizens' judicial capacities,

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the procuracy.").

6. Fukurai, *supra* note 2, at 311-23.

7. *Id.* at 323-28.

including the implementation of: (1) pretrial conference procedures; (2) new victim participation systems that were first introduced in 2008 and later incorporated into the *Saiban-in* trial; and (3) the National Public Defender System (*Kokusen Bengo Seido*) and the Japan Legal Support Center on *Saiban-in* trials.

Part IV will shift my focus toward an evaluation of much broader socio-legal impacts of the new systems of lay adjudication on criminal procedure; I will consider if and to what extent these new structures expanded citizens' ability to properly adjudicate crimes committed by an exclusive group of foreigners who have been historically protected under the rights of extraterritoriality, including the members of the U.S. Armed Forces stationed in Japan. The first *Saiban-in* trial of American military personnel took place in May 2010 in Okinawa.<sup>8</sup> The JSRC proposal also allowed the PRC to enforce the criminal prosecution of formally called "untouchables," namely powerful politicians, government bureaucrats, and business elites. The PRC's decision on the forceful prosecution of military personnel also instigated a bilateral negotiation between the U.S. and Japanese governments on the new conditions of the Status of Forces of Agreement (SOFA), involving the right to exercise a proper jurisdiction over military accidents or crimes committed by armed personnel while on duty.<sup>9</sup>

Finally, Part V explores the potential expansion and diffusion of *Saiban-in* trials into civil and administrative litigation. The JSRC has already suggested the possibility of incorporating citizen participation into certain classes of civil cases. And while the possible incorporation of *Saiban-in* into administrative litigation will also be explored here, the council has already recognized that administrative trials regarding disputes against governmental policies have been extremely difficult for citizens to adjudicate effectively. Yet the relevance of such analyses cannot be overstated,

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8. Hiroshi Fukurai, *People's Panel vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL'Y J. 95, 96 (2010).

9. Travis J. Tritten & Chiyomi Sumida, *AAFES Employee Indicted in Fatal Collision*, STARS & STRIPES (Nov. 25, 2011), <http://www.stripes.com/news/aafes-employee-indicted-in-fatal-collision-1.161616>. For broader socio-legal ramifications, see Hiroshi Fukurai, *Japan's Lay Judges, and Why Australia Should Listen Up*, EAST ASIA FORUM (June 28, 2012), <http://www.eastasiaforum.org/2012/06/28/citizen-adjudication-systems-in-japan-and-why-australia-should-follow-suit/>.

especially given the recent surge of civil and administrative lawsuits filed against the Tokyo Electric Power Company (TEPCO) and the Japanese government in the aftermath of the Fukushima nuclear disaster in March 2011.<sup>10</sup> Active participation of citizens in the adjudication of civil and administrative disputes has the potential to ensure that the rights of victims in these types of cases are upheld and their remedies properly dispensed. For these categories of litigation, it is important to incorporate the people's fair-minded perspectives and common sense judgments into the deliberation of such legal disputes. Lastly, Part VI will conclude with a reprisal of the overall impact of the JSRC recommendations on Japan's legal landscape.

## II. Two Pillars of Lay Adjudication: *Saiban-in Seido* and the New Prosecution Review Commission (PRC or Japan's Grand Jury System)

The JSRC suggested the introduction of two systems of lay adjudication, namely, a hybrid model of citizen's legal participation found in the *Saiban-in* trial and a revised PRC system that will review prosecutors' non-indictment decisions. The JSRC recommendation required that the PRC's deliberative decisions would no longer serve as a mere advisory role to Japanese prosecutors, but hold legally binding authority over prosecutorial decision-making.<sup>11</sup>

In part, the introduction of the lay judge systems was suggested by the JSRC members in response to the frequent criticisms of Japan's criminal justice system's shortcomings in its failure to prevent wrongful convictions and violation of criminal defendants' rights, including the use of a police detention center as a substitute prison to extract forced confessions, defendants' lack of access to defense counsel or pretrial release of criminal suspects or

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10. Yuko Kubota, *Shareholders File \$67 bln Lawsuit Against TEPCO Executives*, REUTERS (Mar. 5, 2012), <http://www.reuters.com/article/2012/03/05/tepcolawsuit-idUSL4E8E54M620120305> ("In the biggest claims of its kind in Japan, 42 shareholders filed a lawsuit . . . accusing 27 current and former TEPCO directors.") However, a total number of lawsuits filed against TEPCO are significantly less than the lawsuits filed against the British Petroleum after the 2010 Deep-water Horizon explosion and oil spill. See also *Fukushima Victims Turn from Courts in Search for Disaster Compensation*, GREENWIRE, June 26, 2012 (The amount of litigation "is minimal compared with the several hundred suits filed against BP PLC.").

11. Fukurai, *supra* note 2, at 327.

defendants, continual reliance on the use of forced confession in trials, and judges' uncritical attitudes toward the legitimacy of forced confessions.<sup>12</sup> Many Japanese and international scholars, civic activists, and victims of wrongful convictions and their families have been increasingly vocal.<sup>13</sup> These initial complaints coalesced into a substantial grassroots movement in the 1980s and 1990s and provided the impetus to facilitate the discussions to bring back the all-citizen jury system that was suspended by the Japanese military government in 1943 in the midst of WWII.<sup>14</sup> The resurrection of citizen legal participation was seen to eliminate many of causal factors of wrongful convictions and violation of human rights of criminal defendants. Lay participation in *Saiban-in* trials was also expected to inject citizens' critical insights and common sense judgments into the intimate working relationship among judges, prosecutors, and defense attorneys.

#### *A. Saiban-in Seido (A Quasi-Jury System)*

After the jury system was suspended in 1943, the resurrection of citizens' participation system in the justice system has been the major goal of many grassroots movements and progressive civic activities.<sup>15</sup> One of five major sections of the final JSRC recommendation was thus entirely devoted to the necessity of establishing the new lay participation system in Japan. The JSRC's first discussion on the creation of a lay participatory system was held in a reference material presented by Tokyo Law Professor Masahito Inouye in the 51st public meeting on March 13, 2001.<sup>16</sup>

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12. Hiroshi Fukurai & Kaoru Kurosawa, *Impact of Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan*, 7 U.S.-CHINA L. REV. 1, 3-7 (2010).

13. Fukurai, *supra* note 2, at 317-20.

14. Hiroshi Fukurai & Richard Krooth, *What Brings People to the Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S.*, 38 INT'L J. L. CRIME & JUST. 198, 200 (2010). There were also some significant anomalies of Japan's jury system, including: (1) defendants who preferred a jury trial had to give up rights to appeal; (2) the jury merely answered a set of interrogatories framed by a presiding judge who could reject its findings; and (3) a jury trial was expensive and difficult to administer. See David T. Johnson, *Early Returns from Japan's New Criminal Trials*, 36 ASIAN-PAC. J. 3 (2009), available at [http://www.japanfocus.org/-David\\_T\\_-Johnson/3212](http://www.japanfocus.org/-David_T_-Johnson/3212).

15. Fukurai, *supra* note 2, at 317-20.

16. See Sosho Tetsuzuki Eno Aratana Sanka Seido Kokushi An [A New Mixed Court System in Criminal Procedures: Suggestions for the Framework] (Mar. 13, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai51/51gaiyou.html>.

The term, "*Saiban-in*," was first coined by Inouye who explained the need to establish the hybrid jury system with the following six distinct characteristics: (1) a role for citizen or lay judges (i.e., *Saiban-in*) in the judicial process; (2) a role for professional judges in coordination with lay judges within the same process; (3) a standardized method for the selection stipulation of the rights and duties of the lay judges; (4) deliberation for final verdicts; (5) a formal method of a trial procedure and judgment; and (6) an appellate procedure.<sup>17</sup>

Inouye was subsequently asked to chair the Lay Assessor/Penal Matter Investigation Committee (LAPMIC) ("*Sabain-in Seido, Keiji Kentokai*") to implement his own recommendations on the hybrid court system. On January 29, 2004, the final report was submitted at the 31st LAPMIC meeting to the Reform Promotion Office in the Cabinet.<sup>18</sup> On March 16, on the basis of the LAMPIC report, the Cabinet Office completed its final proposal entitled "Recommendation of the Justice System Reform Council: For the Justice System to Support Japan in the 21st Century" and submitted it to the National Diet (Japan's bicameral legislative body equivalent to the Congress in the U.S.).<sup>19</sup> Finally it passed the proposal and announced that the first *Saiban-in* system be implemented in May of 2009.<sup>20</sup> The Quasi-Jury Act provides two different panels for the criminal trial.<sup>21</sup> The panel of three professional and six lay judges is selected in a contested case,<sup>22</sup>

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17. *Id.*

18. SAIBAN-IN SEIDO & KEIJI KENTOKAI, DAI 31-KAI, GIJI GAIYO [A "SAIBAN-IN" SYSTEM AND PENAL INVESTIGATION COMMITTEE, 31<sup>ST</sup> MEETING, DISCUSSION SUMMARIES] (Jan. 29, 2004), [http://www.kantei.go.jp/jp/singi/sihou/kentoukai/sai\\_banin/dai31/31gaiyou.html](http://www.kantei.go.jp/jp/singi/sihou/kentoukai/sai_banin/dai31/31gaiyou.html).

19. Noboru Yanase, *Saiban-in Ho no Rippo-Katei* (3) [*The Legislative Process for the Establishment of the Lay Assessor Law, Part Three*], 10 SHINSHU DAIGAKU HOGAKURONSHI [SHINSHU U. L.J.] 119, 123 (2008) (reviewing the legislative history of the Lay Assessor Act), available at <https://soar-ir.shinshuu.ac.jp/dspace/handle/10091/3875>.

20. *Id.*

21. Saiban-in No Sanka Suru Keiji Saiban Ni Kansuru Horitsu [The Act Concerning Participation of Lay Assessors in Criminal Trial], Law No. 63 of 2004. "Saiban-in Seido" is translated as the system of "the lay assessor" and/or "the quasi-jury." See Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233, 233-35 (2004) [hereinafter *Quasi-Jury Act*].

22. Quasi-Jury Act art. 2(2).

while one professional and four lay judges are chosen in uncontested cases where facts and issues identified by pretrial procedure are undisputed.<sup>23</sup>

The first *Saiban-in* trial took place on August 4, 2009.<sup>24</sup> As of May 2012, a total of 21,944 citizens had already presided as lay judges in *Saiban-in* trials. The majority of these trial participants responded positively to their experience in their trials. At the same time, some participants were critical of the contents of trial proceedings, such as methods and manners in which evidence was presented in trial, undue influence of professional judges throughout the trial, and crime victims' participation and their emotive influence during the deliberation. These outstanding issues will be reviewed in the latter part of this report.

### ***B. Revised Kensatsu Shinsakai (Prosecution Review Commissions (PRC))***<sup>25</sup>

The PRC was first established in 1948 with the help of the Supreme Commander for the Allied Powers (SCAP) with the explicit intent to curtail the extremely powerful prosecutorial institution of the Japanese government prior to the end of WWII.<sup>26</sup> It is, in many respects, akin to a Japanese version of the American grand jury equipped with the specific function to review and assess the propriety of prosecutors' indictment decisions. The PRC consists of eleven citizens chosen randomly from local communities.<sup>27</sup> Based on the evaluation of evidence, the PRC issues prosecutors one of the following three recommendations: (1) non-indictment is proper (i.e., the prosecutor's decision was appropriate); (2) non-indictment is improper (i.e., the prosecutor should reconsider the non-charge decision); and (3) indictment is

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23. *Id.* art. 2(3).

24. See generally Makoto Ibusuki, "Quo Vadis?" *First Year Inspection to Japanese Mixed Jury Trial*, 12 *ASIAN-PAC. L. & POL'Y J.* 24, 25-26 (2010).

25. The PRC is also referred as the Committee (or Commission) for the Inquest of Prosecution (CIP).

26. *Kensatsu Shinsakai Ho* [Prosecution Review Commission Law], Law No. 147, art. 37 (1948) [hereinafter *PRC Law*]; see also Fukurai, *supra* note 2, at 323-28.

27. For the function, purpose, and history of the PRC, see Hiroshi Fukurai, *Japan's Quasi-Jury and Grand jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 *CHICAGO-KENT L. R.* 789 (2011).

proper (i.e., the prosecutor should have prosecuted the accused).<sup>28</sup> Since nearly all indictments issued by the Japanese prosecution lead to conviction in Japan, the PRC's ex-post facto review of the appropriateness of nonprosecution decisions is extremely important for checking the potential abuse of prosecutorial power.<sup>29</sup> The near-perfect conviction of indicted cases by the prosecution also means that if one can somehow escape the indictment, his or her innocence is factually established. In other words, the abuse of indictment power by the Japanese prosecutors potentially lies in their discretion in decisions not to prosecute potential suspects or criminals. Nonetheless, the PRC's decision was merely regarded as an advisory capacity.

With respect to tremendous power vested in Japan's prosecutors, prominent American sociologist David Johnson argued that "democratizing the procuracy was a primary Occupation aim . . . [because] prewar prosecutors had abused their power by trampling [on] human rights . . . [in order to pursue] their own political objectives."<sup>30</sup> Even during the postwar era, Johnson warned that Japanese prosecutors had gradually become even more powerful than their American counterparts with respect to the following four specific areas: (1) power to access pre-indictment investigation and interrogations of suspects in substitute prisons in conjunction with the police; (2) monopoly of power to dispose of cases by making or dropping charge decisions, regardless of the strength of evidence; (3) power to recommend a proper judgment and sentencing decisions, as well as the ability to appeal acquittals; and (4) supervision over the execution of the severity of sentences, including death penalties imposed by the court.<sup>31</sup> Japan's PRC is then expected to offer tremendous reform over these areas.

Thus, given the tremendous power of Japan's prosecutors and people's responses to oversee the potential abuse of prosecutorial

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28. PRC Law, *supra* note 26, art. 27.

29. *Prosecutors or Persecutors: A Legal Scandal May Spark Reform of the Japanese Judicial System*, THE ECONOMIST (Oct. 14, 2010), <http://www.economist.com/node/17259159> (Japan "has a fishily high conviction rate, at 99.9%."); see also J. Mark Ramseyer & Eric B. Rasmusen, *Why the Japanese Conviction Rate So High?* 30 J. LEGAL STUD. 53, 53 (2001) ("Conviction rates in Japan exceed 99 percent.").

30. David T. Johnson, *Why the Wicked Sleep: The Prosecution of Political Corruption in Postwar Japan* (JPRI, Working Paper No. 34, 1997), <http://www.jpri.org/publications/workingpapers/wp34.html>.

31. JOHNSON, *supra* note 4, at 15.

authority, the JSRC first discussed the revision of the PRC Law in its seventh meeting on November 24, 1999.<sup>32</sup> More detailed discussion regarding the revision of the PRC Law took place in the 55th meeting on April 10, 2001.<sup>33</sup> Initially, there was no unified opinion on the mandatory status of the PRC decisions. The reference material submitted to the meeting showed comparisons of different opinions and reforms suggested by 13 committee members, each reflecting the preferred opinions by three powerful branches of vested interest groups, including the JFBA, the Supreme Court, and the Ministry of Justice. The Ministry of Justice recommended that only the third resolution, "indictment is proper" should be considered legally binding, while the Supreme Court agreed to consider both "non-indictment is improper" and "indictment is proper" the legally binding status.<sup>34</sup> The JFBA's recommendation was similar to that of the Ministry of Justice, adding that the approval for the decision only requires two thirds of the vote.<sup>35</sup> The JFBA also made suggestions to create the position of a "legal advisor" in support of the discussion and deliberation for the PRC members and that this individual be selected from a pool of practicing attorneys, and not from either public prosecutors or bureaucratic judges of the Japanese government.<sup>36</sup>

The Reform Promotion Office finally delegated the authority to the Quasi-Jury/Penal Matter Investigation Committee. On November 11, 2003, Committee Chair Inouye presented the summary of the recommendation in the committee meeting, suggesting that the PRC's decision be given legally binding status and that the legal advisor be selected from the rank of practicing attorneys.<sup>37</sup> The committee finally completed its report, and on May 29, 2014, the Japanese Diet enacted the Act to Revise the Code of

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32. Shihoseido Kaikaku Shingikai Dai 7 Kai Giji Gaiyo [JSRC, 7th Meeting, Discussion Summaries] (Nov. 24, 1999), <http://www.kantei.go.jp/jp/sihouseido/991126dai7.html>.

33. Shihoseido Kaikaku Shingikai Dai 55 Kai Giji Gaiyo [JSRC, 55th Meeting, Discussion Summaries] (Apr. 10, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html>.

34. *Id.*

35. *Id.*

36. *Id.*

37. KANGAERARERU KENSATSU SHINSAKAI SEIDO KAISEI NO GAIYO NI TSUITE [THE OUTLINE ON THE PRC'S REFORM TO CONSIDER] (Nov. 11, 2003), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai29/29siryou1.pdf>.

Criminal Procedure, revising the existing PRC Law.<sup>38</sup>

The revised PRC Act bestowed on the PRC the authority to demand explanations for nonprosecution decisions and made an indictment mandatory if the commission had already twice recommended prosecution. The revised law established a two-step process to make the PRC resolution legally binding. First, when the PRC decides that an indictment is proper, prosecutors will be obliged to reconsider the non-indictment decision, although the commission's decision is not legally binding at that time. If prosecutors still choose not to prosecute or if they fail to indict within three months, prosecutors will be invited to explain their inaction or non-indictment decision to the commission.<sup>39</sup> Following this, the commission will then reevaluate the case and can make a legally binding decision in favor of an indictment.<sup>40</sup> In the event of such a decision, the court must appoint a lawyer who will perform the prosecution's role until a final ruling is reached.<sup>41</sup> Since only the prosecutor has the power to indict and prosecute the accused, the actual instruction to investigate authorities, however, will still be entrusted with the prosecutors.<sup>42</sup>

The court appoints a lawyer to the newly created role of legal advisor in circumstances when the Commission needs specialized legal advice.<sup>43</sup> Such a situation is likely to arise during the second half of the two-step process - after prosecutors have rejected the PRC's initial indictment recommendation and the Commission is considering the prosecutor's second non-indictment decision.<sup>44</sup>

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38. *Keiji Soshohoto no Ichibu o Kaiseisuru Horitsu* [Act to Revise the Code of Criminal Procedure] [hereinafter PRC Act], Law No. 62 of 2004, <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

39. PRC Act arts. 41 (2)(2) & 41 (6) (2).

40. *Id.* art. 41 (6) (1).

41. *Id.* art. 41 (9) (1).

42. *Id.* art. 41 (9) (3). See Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 93 COLUM. L. REV. 684, 697 (1992) (stating that "because only the prosecutor has the power to indict, all PRC recommendations were considered merely advisory and not binding," indicting that even after the new PRC Act was passed, the prosecutor still remains authority to provide an appointed counsel prosecutorial instructions to investigate the accused).

43. PRC Act art. 39 (2) (1).

44. *Id.* art. 41 (4). It is legally "required" that the PRC acquires the assistance of a legal advisor in considering the second resolution on the same case.

### III. Impact of Lay Adjudication on Criminal Justice Procedures: Remedial Measures to Eliminate Procedural Problems in the Criminal Process

This section examines how both the practice of criminal justice and the judicial process have been affected by the introduction of the twin systems of lay adjudication. The analysis primarily focuses on the effect of the *Saiban-in* trial on the criminal justice proceedings. While the PRC does change the ways in which prosecutors make indictment decisions in criminal cases, it does not directly influence trial court proceedings themselves. The impact of the PRC on the prosecution system will be examined in the latter part of this report.

Past research has identified a multitude of causal factors that led to the prevalence of wrongful prosecutions and convictions, and they can be largely summarized into five distinct areas, as have been already indicated. Practicing attorneys and legal scholars have also identified other related factors. For example, prominent defense attorney Shojiro Goto who has worked on many wrongful conviction cases in his career pointed out: (1) the problem of prosecutors' frequent use of an arrest warrant on a separate, pretextual criminal charge in order to allow the continued interrogation of criminal suspects; (2) manufacturing of fabricated and falsified evidence; (3) purposeful suppression of exculpatory evidence and destruction of proof, and (4) judges' deeply ingrained biases and prejudices against criminal defendants.<sup>45</sup>

The following section examines whether or not the JSRC's recommendations and proposals helped to eliminate these outstanding problems and issues.

#### A. *The Use of Substitute Prisons [Daiyo Kangoku]*

With respect to the issues relating to the custody of criminal suspects, the JSRC report was seriously concerned about the use of custody facilities in police stations in lieu of actual detention facilities. The use of substitute prison has been historically responsible for the brutal investigation of the suspect by police and/or prosecutorial investigators for the extraction of coerced

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45. SHOJIRO GOTO, ENZAI [WRONGFUL CONVICTION] 216-31 (1979). See SEIKICHI UEDA & SHOJIRO GOTO, AYAMATTA SAIBAN [WRONGFUL TRIALS] 199-220 (1960); CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [RESURRECTION OF THE JURY TRIAL] 157-63 (1996) (elaborating the problem of defendants' confessional statement and a summary report of interrogation by police investigators).

confessions.<sup>46</sup> However, the word, "*Daiyo Kangoku*," appeared only once in the JSRC recommendations, merely stating that the "improper custody of suspects and of defendants must be prevented and rectified."<sup>47</sup> The JSRC recommendation thus failed to directly address the causal link between custodial detention and the use of brutal interrogation techniques by investigative officers for the forced extraction of confessions from suspects because nearly 92% of all criminal defendants in Japan result in making confessions.<sup>48</sup>

This is despite the fact that the Japanese Constitution specifically provides a comprehensive prohibition against the use of enhanced interrogation techniques, the extraction of forced confessions under lengthy detention, and self-incriminations. Article 38 states that (1) "No person shall be compelled to testify against himself," (2) "A confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence," and (3) "No person shall be convicted or punished in cases where the only proof against him is his own confession."<sup>49</sup> Similarly, Article 36 states that the "infliction of torture by any public officer and cruel punishments are absolutely forbidden."<sup>50</sup> Despite the Constitutional prohibition, the legal basis for the use of police holding cells comes from Article 1, Section 3 of the antiquated 1908 Prison Law, which was used to allow the use of detention cells in police stations for interrogation. This century-old law was finally replaced by the new Criminal Detention Law [*Daiyo Keiji Shisetsu-ho*] in 2006, but the new law still failed to abolish custodial facilities themselves or even the use of facilities for interrogation purposes.<sup>51</sup> While the JFBA proposed a series of

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46. JOHNSON, *supra* note 4, at 253-62. See generally SETSUO MIYAZAWA, *POLICING IN JAPAN: A STUDY ON MAKING CRIME* (1992).

47. Issues Related to Custody of Suspects and of Defendants, in JSRC REPORT, *supra* note 1, Ch. II, Pt. 2 (4) (2) (a).

48. JOHNSON, *supra* note 4, at 75 (stating that "the fact that 92 percent of all defendants confess is hardly surprising").

49. CONSTITUTION OF JAPAN [hereinafter *JAPAN CONSTITUTION*] art. 38. An English translation is available at <http://www.constitution.org/cons/japan.txt>. See also Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 344 n.144 (2003).

50. JAPAN CONSTITUTION art. 36.

51. JAPANESE WORKERS' COMMITTEE FOR HUMAN RIGHTS (JWCHR), *THE HUMAN RIGHTS REPORT FOR CONVEYING THE REAL CONDITION IN JAPAN 45* (2006) (stating that "*Daiyo Kangoku* continues to exist with a different name: '*Daiyo Keiji Shisetsu*' (substitute penal institute)").

recommendations to improve the right of detained criminal suspects, the special committee to discuss the actual content of the Criminal Detention Law convened for mere two months, and the strong oppositions from both the Justice Ministry and the National Police Agency gave way to limited reforms.<sup>52</sup>

The JSRC report also recognized that the use of custodial facilities and detention cells in police stations purportedly helped extend the criminal investigation and facilitate “illegal” interrogations of criminal suspects.<sup>53</sup> Even with these acknowledgements, the JSRC recommendation nonetheless failed to eliminate the substitute prisons which continue to exist today.

To help propose new remedies to these problems, including the elimination of the substitute prisons, a special committee was created in 2011. It is called “the Legal Council: The Special Committee for Criminal Justice in New Ages (SCCJNA, “*Shinjidai no Keiji-shiho Seido Tokubetsu Bukai*” hereinafter the Special Committee).” The Special Committee has 25 criminal justice experts and has attempted to address the continued problem of substitute prisons.<sup>54</sup> The SCCJNA Chair, Katsuhiko Honda, received a letter from Amnesty International, asking him to eliminate the substitute prison immediately and to introduce the use of audio and visual recording devices at each and every phase of the investigative process.<sup>55</sup>

The problem of substitute prison was first pointed out in the second SCCJNA meeting on July 28, 2011.<sup>56</sup> At its fifth meeting, Attorney Kazuko Nakayama further attributed it as the primary

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52. JFBA, KOKIN NI-HOAN TAISAKU HONBU: KEIJI KOKIN SEIDO KAIKAKU JITSUGEN HONBU NO KATSUDO KEIKA [TASKFORCE FOR TWO CUSTODIAL DETENTION LAWS: ACTIVITIES OF HEADQUARTERS FOR THE PROMOTION OF CUSTODIAL DETENTION REFORMS], Keiji Hi-Shuyosha Shoguhoh no Seiritsu [Part 3: The Passage of the Criminal Detention Law] (2006), <http://www.nichibenren.or.jp/activity/criminal/detention/taisakuhonbu.html>.

53. *Issues Related to Custody of Suspects and of Defendants*, in JSRC REPORT, *supra*, note 1, Ch. II, Pt. 2 (4) (2) (a) (“Various concerns have been pointed out regarding the custody of suspects and of defendants, such as how *daiyo kangoku* (use of custody facilities in police stations in lieu of detention facilities) should be.”)

54. Meibo [The Special Committee, Membership] (June 22, 2012), <http://www.moj.go.jp/content/000099259.pdf>.

55. Catherine Barber, *Kokai Shokan [Open Letter of the Amnesty International]* (June 2012), <http://www.amnesty.org/en/library/asset/ASA22/010/2012/ja/fdf52fbd-fac4-4fb9-b5de-e869a2c88904/asa220102012ja.pdf>.

56. MINISTRY OF JUSTICE, *The Special Committee* (July 28, 2011), [http://www.moj.go.jp/kentou/jimu/kentou01\\_00041.html](http://www.moj.go.jp/kentou/jimu/kentou01_00041.html).

cause of wrongful convictions in the past; she insisted the complete elimination of substitute prison on November 29, 2011.<sup>57</sup> The committee discussions still continue today, though it is safe to say that the government opposition, particularly, from the Ministry of Justice and the National Police Agency stands firmly against the complete elimination of interrogative facilities in Japan.

### ***B. Limited Access to Defense Counsel***

The JSRC report suggested the importance of establishing a systematic process to ensure "sufficient meetings between suspects and defense counsel" during the criminal process.<sup>58</sup> While the public defense counsel for individuals who have no legal counsel is disallowed by the government until after an indictment, the JSRC recommendation promulgated the Act to Amend the Criminal Proceedings [*Keiji Soshoho-to Ichibu Kaisei-ho*] in May 2004 and establish a National Public Defender System [*Higisha Kokusen Bengo Seido*]. The new law allows the indigent to obtain defense counsel during the pre-indictment stage of the criminal process.<sup>59</sup> Through the JSRC recommendation, a systematic process for ensuring sufficient meetings between indigent suspects and defense counsel during the criminal process has been sufficiently established.

The JFBA had previously established a free attorney-on-duty service [*Toban Bengoshi Seido*] for detained suspects, but the scope of its services has been quite limited. The Japan Legal Support Center (JLSC or "*Hoterasu*") was established in 2006 to provide basic legal support to criminal defendants. However, only those whose total net wealth, including cash and bank accounts, does not exceed a half million yen (\$6,000) are allowed to access legal services of a public defense lawyer.<sup>60</sup>

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57. THE LEGAL COUNCIL, Hosei Shingikai, Shin-jidai no Keiji-Shiho Seido Tokubetsu Bukai: Dai 5-Kai Kaigi, Gijiroku [*The Special Committee for Criminal Justice in New Ages: The Minutes of the Council Proceedings of the Fifth Meeting*] (Nov. 29, 2011), <http://www.moj.go.jp/content/000084089.pdf>.

58. JSRC REPORT, *supra* note 1, Ch. 2, Pt. 2 (4) (2) (b) ("With Regard to Measures to Ensure the Propriety of Questioning of Suspects").

59. See the following governmental site for the content of the Act, <http://www.kantei.go.jp/jp/singi/sihou/hourei/keiji.html>. The English version of the Act is available at <http://www.houterasu.or.jp/cont/100167450.pdf>.

60. Those whose net worth exceeds a half million yen can file a petition to a local bar association to acquire a lawyer. For some reason, if the lawyer was unable to represent the client, he/she can file a petition to the JLSC to acquire a public defender. For the explanation of the detailed procedure for the acquisition of a

Nonetheless, recent government statistics showed a dramatic increase in the number of defense counsels since the start of the *Saiban-in* trial in 2009. In 2007 and 2008, a total of 140,271 and 133,412 defendants received detention warrants respectively, while a little more than 6,000 defendants were able to secure court-appointed attorneys. After the introduction of *Saiban-in* trials in 2009, the number of court-appointed attorneys for criminal defendants increased to 46,666 in 2010 and 70,618 in 2011, despite the fact that less numbers of detention warrants were issued in the latter two years combined than the previous two years.<sup>61</sup>

### C. Use of Physical and Psychological Torture to Obtain Forced Confessions

Japanese investigators have historically considered the direct questioning of suspected criminals as more important and efficient than the process of conducting searches and seizures for evidence.<sup>62</sup> Thus, in practice, the use of psychological and physical tortures has been an accepted norm and became carefully systematic means of obtaining confessions. The JSRC recommendations have attempted to address the problem, and while some changes have been implemented, there has not been pervasive and effective reform. So despite some progress, the use of recording devices was still not allowed in police detention cells, where an overwhelming majority of alleged physical and psychological tortures take place.<sup>63</sup>

Until the end of the Tokugawa Period in 1868, various methods of torture were prescribed by law, and both torture and coerced confessions were considered an integral part of the criminal justice system.<sup>64</sup> The value of confession was considered not only as

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court-appointed attorney, even in situations where one's financial wealth exceeds a half million yen, please see the homepage of the Kyoto Daiichi Horitsu Jimusho [Kyoto Daiichi Law Office], <http://www.daiichi.gr.jp/publication/johobox/2006/091.html>.

61. MINISTRY OF JUSTICE, *Higisha Kokusen Bengo Seido no Tokei Shiryo* [Statistics for the National Public Defender System] (2011), <http://www.moj.go.jp/content/000100782.pdf>.

62. GOTO, *supra* note 45. See also TOSHIKI ODANAKA, ENZAI WA KOSHITE TSUKURARERU [IN THE MAKING OF THE WRONGFUL CONVICTION CASES] (1993).

63. HUMAN RIGHTS NOW, *HRN to Organize a Conference with JFBA on Transparency of Police Investigation* (Aug. 16, 2012), <http://hrn.or.jp/eng/activity/area/japan/hrn-to-organize-a-conference-with-jfba-on-transparency-of-police-investigation/>.

64. Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New*

evidentiary, but also redemptory because those who confessed could expect more lenient treatment.<sup>65</sup>

After the establishment of the modern state, the Japanese government decided to abolish torture as a principal means of soliciting confessions in 1879; however, today's investigators still rely on the use of psychological and physical torture, including intimidation and physical abuse, to extract confessions from detained suspects.<sup>66</sup> Police and prosecutorial reliance on physical and psychological violence to obtain confessions has long been criticized by both the Japanese public and the broader international human rights community because of the systematic disregards and abuses of the accused's human rights. While there are no clear statistics on the prevalence of the use of torture for obtaining confessions, Professor Toshikuni Murai estimated that, among all of voluntary and/or extraneously coerced confessions by criminal suspects and defendants in Japan, coerced and forced confessions could account for as high as fifty percent of all confession cases in Japan.<sup>67</sup> Historians, however, have argued that the prohibition against the use of torture is relatively new to Japan, arguing that the historical legacy of mistreating criminal suspects still largely prevails in the penal system, and an impasse exists that prevents the enactment of international human rights laws within Japan.<sup>68</sup>

Japan's courts have rarely overturned convictions on the basis of torture or inhumane treatment. From 1952 to the early 1990s, for example, over 12,000 complaints of torture and similar inhumane abuses were reported. However, only 15 cases were accepted by the courts, and only eight resulted in the punishment of police.<sup>69</sup> On one level, proving torture has been extremely difficult given the closed nature of the interrogation in substitute prisons. In order to make the investigative process more open and transparent, in July 2006, prosecutors began implementing the use of video-recording

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*Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 181-99 (1994).

65. *Id.* at 198-99.

66. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317, 330 (1992).

67. Teresa Watanabe, *Victims of a Safe Society: Behind Japan's Low Crime Rate and Civilized Streets is a Criminal Justice System Criticized as the Most Backward in the Industrialized World*, L.A. TIMES, Feb. 27, 1992, at A1.

68. Vize, *supra* note 49, at 343.

69. Ramlogan, *supra* note 64, at 182.

devices during their interrogations.<sup>70</sup> However, the recording was only applied to a very small number of criminal cases and was only limited to interrogations conducted by the Tokyo Prosecutors' Office.<sup>71</sup> In February 2007, a similar practice of recording interrogations was extended to eight regional prosecutorial offices. However, the recording was still limited to only 170 of all the criminal cases.<sup>72</sup> The Japanese police began recording the questioning of suspects in 2009 and prosecutors did so in 2011 on a test basis only.<sup>73</sup> In July 2012, the Supreme Public Prosecutors Office announced that some "elite" prosecutors used a recording device in all or part of their interrogation sessions during a pilot project nationwide; most of these recorded cases involved the violation of tax law and financial regulations, and not violent and serious criminal offenses.<sup>74</sup>

Japan has so far signed two key international treaties governing abuses in prisons and detention centers, namely the International Covenant on Civil and Political Rights (ICCPR) which was ratified in 1979<sup>75</sup> and the Convention Against Torture (CAT), to which Japan acceded in 1999.<sup>76</sup> Despite the signing of these international treaties, Japan continues to solicit confessions obtained through physical duress and/or psychological pressure, and safeguards against torture and self-incrimination have been systematically ignored.

Prominent legal scholar Stephen Thaman suggested a different

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70. Shinya Sakane, *Torishirabe no Kashika ni Mukete [Towards the Transparency of Investigative Processes]*, 6 LIBRA 26 (2006), available at [http://www.toben.or.jp/message/libra/pdf/2006\\_09/p26p27\\_RASINBAN.pdf](http://www.toben.or.jp/message/libra/pdf/2006_09/p26p27_RASINBAN.pdf).

71. *Id.*

72. JFBA, *Torishirabe no Rokuon Rokuga no Shiko ni Tsuiteno Kenshokekka ni Taisuru Ikensho [Opinion for the Investigative Results on the Trial of Audio-Visual Recording Devices during Interrogation]* (Mar. 18, 2009), [http://www.nichibenren.or.jp/library/ja/opinion/report/data/090318\\_3.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/090318_3.pdf).

73. *Man Given Jail Term After Entire Questioning Process Videotaped*, JAPAN ECONOMIC NEWSWIRE, Feb. 24, 2012.

74. *Prosecutors Record Most Interrogations During Own Investigations*, JAPAN ECONOMIC NEWSWIRE, July 4, 2012.

75. See generally GLOBAL RIGHTS PARTNERS FOR JUSTICE, *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Japan: A Shadow Report* (Oct. 2008), at 2, available at [http://www.globalrights.org/site/DocServer/Shadow\\_Report\\_Japan.pdf?docID=10043](http://www.globalrights.org/site/DocServer/Shadow_Report_Japan.pdf?docID=10043).

76. JFBA, *Report on the Japanese Government's Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Jan. 18, 2007), at 1, available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/JFBA.pdf>.

strategy for ensuring greater transparency in investigative processes via the adoption of the new codes of criminal procedure. According to Professor Thaman, Italy and Venezuela have both adopted new laws that require defense counsel to be present during an interrogation for any of the evidence obtained during it to be admissible in court.<sup>77</sup> The U.S. Supreme Court in *Escobedo v. Illinois* also ruled that criminal suspects have a right to counsel during police interrogation, stating that law enforcement "which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."<sup>78</sup> Prominent Japanese legal writer Chihiro Isa similarly argued that the over-reliance on the confessional evidence leads to diminished investigative efforts from the police and prosecutors to properly seek and obtain material, forensic, and/or other corroborating evidence.<sup>79</sup> Instead, such investigative methods and overreliance on confessions may often lead to more instances of wrongful convictions.<sup>80</sup>

The JSRC recommendations, on the other hand, have generally failed to closely scrutinize Japanese investigative methods and the pervasive use of confession in Japanese courts. The word, "confession" or "*Jihaku*," was used only twice in the JSRC's comprehensive report – in a section with the subheading, "With Regard to Measures to Ensure the Propriety of Questioning of Suspects." The report gave a basic treatment of the issue, stating that the use of "questioning lacks propriety, arising out of an excessive emphasis on confessions of suspects . . . [and] questioning of suspects must not be improper, and measures to prevent improper questioning naturally are necessary."<sup>81</sup>

Between 2007 and 2009, however, in an effort to respond to both domestic and international pressure, the Japanese government made some effort to promulgate a transparency law that would shed light on the criminal investigative process; but, their efforts

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77. Stephen Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 89, 105 (2001-02).

78. *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

79. CHIHIRO ISA, *SHIHO NO HANZAI [CRIMES BY THE JUDICIARY]* (2006).

80. *Id.*

81. JSRC REPORT, *supra* note 1, Ch. 2, Pt. 2 (4) (2) (b) ("With Regard to Measures to Ensure the Propriety of Questioning of Suspects").

have been systematically undermined either through the denial of the proposal by the upper house of the Diet or through the dissolution of the Diet even after both upper and lower houses gave prior approval.<sup>82</sup> In October 2009, the government also created a standing committee on judicial affairs and submitted an interim report on the committee resolutions in June 2010.<sup>83</sup> In February of 2010, the National Police Agency also convened a study group to examine the sophistication of investigative methods under the leadership of the chairman of the National Public Safety Commission, resulting in a voluntary introduction of a recording device in a limited number of interrogation sessions.<sup>84</sup>

Given recent controversies with the falsification of floppy data by the Chief and Deputy Directors at the Special Investigation Division of the Osaka Prosecutor's Office in 2010, the Supreme Court submitted the report on the falsification incident on December 24, 2010, suggesting the measures to introduce the transparency in investigative processes and restore the reputable status of the public prosecutors and their offices.<sup>85</sup> In this case, three prosecutors were indicted over the intentional tempering of data on a floppy disk in the course of their investigation into alleged abuse of Japan's postal discount system.<sup>86</sup> Another study group which was created by the Minister of Justice submitted a report on March 31, 2011, reiterating the importance of introducing transparency into investigative processes by public prosecutors.<sup>87</sup> Following this, former Justice Minister Satsuki Eda ordered the introduction of the audio-visual recording during suspect investigation and interrogation and, by September 2011, the use of recording devices were applied to 31

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82. Seiichi Hishinuma, *Homu Iinkai no Shuyo Kadai: Shihoseido Kaikaku Shingikai Ikensho Kara 10-Nen* [Main Themes of the Standing Committee on Judicial Affairs: Ten Years from the Recommendations of the JSRC], 324 RIPPON CHOSA 24, 30 (2012).

83. *Id.*

84. *Id.*

85. JAPAN SUPREME COURT, *Iwayuru Korosho Moto Kyokuchō Muzai Jiken ni Okeru Sosa, Kohan Katsudo no Mondaiten-to ni Tsuite* [Regarding the Problems of the Investigation and Trial Proceedings of the Case Involving the Innocence of the Chief Director of the Ministry of Health and Welfare] (Dec. 2010), <http://www.moj.go.jp/content/000076308.pdf>.

86. *Top Prosecutor to Quit Over Scandal*, JAPAN TIMES (Dec. 17, 2010), <http://www.japantimes.co.jp/text/nn20101217a7.html>.

87. MINISTRY OF JUSTICE, *Kensatsu no Saisei ni Mukete* [Restoring the Integrity of the Prosecutor's Office] (Mar. 31, 2011), <http://www.moj.go.jp/content/000076299.pdf>.

criminal defendants in 247 cases.<sup>88</sup> While the Japanese executive office have made some notable efforts, neither a concrete law or a set of new regulations has yet to be promulgated nor adopted to increase the transparency in the Japanese criminal justice system. The SCCJNA is thus currently assessing the proper investigative method to be used by the police and prosecutors and discussing the possible introduction of the recording device at each and every investigative process.<sup>89</sup>

#### *D. Judicial Neglect Over the Use of Confession Documents and Other Written Materials*

In addition to the fact that the criminal process still lacks effective oversight to prevent the extraction of forced confessions from criminal suspects or defendants, scholars have also pointed to the attitudes of Japanese judges as contributing to the problem. Senshu University Law Professor Toshiki Odanaka has pointed out that four features underlying the indifference and negligence of Japanese judges may lead to wrongful convictions in Japan. They are: (1) disregard of the fairness of criminal investigative processes, (2) indifference toward circumstances and conditions surrounding the suspect when soliciting confessions, (3) uncritical attitudes toward the credibility and authenticity of confessions and expert opinions, and (4) indifference toward possible internal contradictions of narratives provided by coerced confessions.<sup>90</sup>

Kwanzei University Law Professor Takashi Maruta also stated that Japanese judges' systemic disregard for the rights of the accused and near-blind acceptance of confession as the queen of all evidence may stem from their homogenous social origins and legal trainings they have received, as well as the stringent bureaucratic control exerted by the Secretariat of the Supreme Court.<sup>91</sup> He argues that judges are not independent thinkers when it comes to making legal decisions and writing legal opinions.

Judges in Japanese courts were all children of the same type of high-income parents, all studied at the same leading high schools, went to the same bar exam preparatory schools, graduated from

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88. Hishinuma, *supra* note 82, at 31.

89. See the following government site for the committee proceedings, <http://www.moj.go.jp/shingi1/shingi03500012.html>.

90. ODANAKA, *supra* note 62.

91. TAKASHI MARUTA, *SAIBAN'IN SEIDO* [THE QUASI-JURY SYSTEM] 43 (2004).

the same universities, studied at the same [legal] training institute and, without ever experiencing any other profession, spend most of their lives in court with colleagues who all share the same mode of thinking.<sup>92</sup>

Professor Maruta also suggests that Japanese judges have very little autonomy or judicial independence, as they are subject to reappointment every ten years and may be reassigned to different courts in remote regions in Japan. The threat of denying reappointment and the “shipping” of noncompliant judges to far away “satellite” courthouses has effectively been used by the Secretariat of the Supreme Court to ensure that judges follow standardized procedures, efficiently manage their case loads, and issue opinions that do not challenge the court’s legal status quo and precedents. Japanese judges who fail to skillfully dispose a large number of criminal cases become subject to negative and critical evaluations by the Supreme Court in periodic merit and promotion considerations.<sup>93</sup> The Secretariat’s critical evaluations of, and strict bureaucratic control over, the Japanese judge thus helped standardize the court’s opinions, control ideologies of individual judges, and promote efficient bureaucratic dispositions of a large number of criminal and civil cases. This is despite the fact that judges’ complete independence has been guaranteed under Article 78 of the Japanese Constitution, which states that “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.”<sup>94</sup>

The JSRC suggested the introduction of transparency and accountability into the evaluation and assessment of judicial candidates for appointment and personnel process for the merit and reappointment procedures. Under the section title of the

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92. *Id.* The excerpt (*i.e.*, the translation of Maruta’s original quote) was taken from Colin P.A. Jones, *Book Review: Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL’Y J. 363, 364 (2006).

93. TAKASHI MARUTA, BAISHIN SAIBAN O KANGAERU [CONSIDERING THE JURY TRIAL] (1990).

94. JAPAN CONSTITUTION art. 78. For the discussion of the independence of Japan’s judiciary, please see Takayuki Ii, *Japan’s Judicial System May Change, but Its Fundamental Nature Stays Virtually the Same? Recent Japanese Reforms on the Judicial Appointment and Evaluation*, 36 HASTINGS INT’L & COMP. L. REV. 459 (2013) (included in this special issue of HICLR).

"Reexamination of the Personnel System for Judges (Securing Transparency, Objectivity)" in the JSRC's final report, the reform council pointed out that "personnel evaluation that serves as the basis for the personnel management lacks transparency and objectivity . . . [and] appropriate mechanisms should be established for the purpose of ensuring, as much as possible, transparency and objectivity with regard to the personnel evaluation of judges, by making clear and transparent who should be the evaluator and the standards for evaluation."<sup>95</sup>

After the JSRC made the recommendation to reform the judge system in 2001, the Investigation Committee on the Legal Professional System [*Hoso Seido Kento-Kai*] was created by the Reform Promotion Office, and the Supreme Court, based on the committee report, created the "Rule on the Lower Court Judges Nominating Advisory Commission" on February 12, 2003.<sup>96</sup>

With the introduction of new rules into the nomination process, more than 500 new judges were added to the judiciary by 2010.<sup>97</sup> At the same time, the new system which appoints judges from the rank of practicing attorneys has not functioned as initially expected.<sup>98</sup> Despite the effort to increase the size of the judiciary, only a handful of nominations came from practicing attorneys. In 2003, when 11 attorneys were nominated, four were found to be "not qualified," and only seven were accepted as judges.<sup>99</sup> At the same time, 109 graduates from the Legal Training and Research Institute (LTRI) of the Supreme Court were nominated and 101 of them were accepted as qualified judges.<sup>100</sup> In 2009, while 106 LTRI graduates qualified as judges, only 1 attorney was accepted as a qualified judge.<sup>101</sup>

The lack of diversity among Japan's judges and their applicants, and the still relatively small size of the Japanese judiciary, did not help lessen the significant workload of average judges, affecting the

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95. JSRC REPORT, *supra* note 1, Ch. 3, Pt. 5 (3) ("Reexamination of the Personnel System for Judges (Securing Transparency, Objectivity)").

96. Takayuki Ii, *Japanese Way of Judicial Appointment and Its Impact on Judicial Review*, 5 NAT'L TAIWAN U. L. REV. 73, 94 (2010).

97. Shunsuke Marushima, *Historical Genealogy of Japan's Judicial Reform: Its Achievements and Challenges*, 2012, 36 HASTINGS INT'L & COMP. L. REV. 349 (2013) (included in this edition of HICLR).

98. *Id.*

99. Ii, *supra* note 96, at 98 (see Table 2).

100. *Id.*

101. *Id.*

nature of *Saiban-in* trials themselves. Consequently, as the *Saiban-in* trials progressed, trial judges began to allow the reading of investigative materials and in-court recitation of confessional statements, instead of creating the opportunity to directly question the defendants, witnesses, investigators, or other relevant personnel involved in the investigation of criminal cases in court. Since these investigative materials and confessional statements have been specifically written and prepared by police and/or prosecutorial investigators, they were often accused of inaccurately reflecting the contents of actual statements made by the accused or witnesses.<sup>102</sup>

These emerging trends in *Saiban-in* trials seem to resemble the over-reliance on the use of written dossiers in collegial bench trials prior to the introduction of *Saiban-in* trials in 2009. The Supreme Court reported in May 2012 that for criminal trials convened from January to June in 2011, in which defendants already admitted their guilt, in-court readings of investigative materials took twice as long as the actual questioning of the defendants themselves.<sup>103</sup> One *Saiban-in* judge who participated in a murder trial stated that "Reading of investigative records went on and on and it was extremely difficult to understand their contents. I wish that I was able to pose direct questions."<sup>104</sup>

The Supreme Court also found that the in-court recitation of investigative records and the direct questioning of defendants themselves each comprised 37% and 28% of the trial proceedings, respectively.<sup>105</sup> At the Kobe District Court, the reading of written records occupied nearly a half of the trials themselves (46%), while the direct questions of defendants was mere 21% of the entire trial proceeding.<sup>106</sup> The ratio of reading records *vis-à-vis* questioning defendants in *Saiban-in* trials improved somewhat in 2012.<sup>107</sup> But

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102. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS 261, 265 (1999) ("This practice is problematic because the manner of speech and demeanor of witnesses and of the defendant can have a strong influence on the finder of fact; if these elements are not fully considered, the defendant may not be receiving a fair trial.")

103. Shigeyuki Maekawa, *Jihaku Jiken no Saiban-in Saiban: Shomen Yomiage Chojikan-ni* [*Saiban-in Trials in Admitted Criminal Cases: Long Hours of Reading Investigative Materials*], KOBE SHIMBUN (May 22, 2012), <http://www.kobe-np.co.jp/news/shakai/0005073072.shtml>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

significant changes still need to be made to reverse the trend in the direct recitation of investigative records and materials from the court proceeding.

### *E. Limited Pretrial Release for the Accused*

Another major problem in Japan's criminal proceeding is the lack of pretrial release of the accused. There has largely been no post-indictment bail system or pre-indictment release system in Japan. Requests for pre-indictment bail are universally rejected on the ground that no such program exists, suggesting that the suspect is not entitled to bail during the "mandatory" or "pre-indictment" 23-day detention period. This is contrary to Article 89 of the Code of Criminal Procedure which states that post-indictment bail is possible in Japan.<sup>108</sup> There are, however, many grounds on which a judge may deny such a bail request by criminal suspects. Post-indictment bail thus becomes extremely difficult to obtain, and approximately 80% of the indicted await trial while in custody.<sup>109</sup>

According to the JFBA report in 1996, only 16.3% of defendants were released on bail.<sup>110</sup> The report argues that denials of charges or remaining silent are taken as indications of the defendants' tendency to destroy evidence which serves as the basis for denying bail.<sup>111</sup> As a result, Japanese judges tend to give greater weight to recommendations by prosecutors in comparison to requests by defendants and their defense counsel.

Given the fact that access to defense counsel is incredibly limited and pre-indictment release is impossible, today's defense lawyers tend to recommend that the suspect remain completely silent in custody and not engage in any conversation with police or prosecution investigators. Because Japan does not have its own equivalent set of Miranda Rights, where criminal suspects in police custody are informed of his/her rights, a movement to systematically popularize the use of Miranda warnings was introduced by a group of progressive lawyers to encourage defendants to remain silent in substitute prisons or under any other

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108. See JAPANESE FEDERATION OF BAR ASSOCIATIONS, ALTERNATIVE REPORT TO THE FOURTH PERIODIC REPORT OF JAPAN ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 57 (Sept. 1998).

109. *Id.*

110. *Id.*

111. *Id.*

custodial situation.<sup>112</sup> Attorney Takashi Takano, who created the *Miranda no Kai* (The Miranda Association), has shown that his group's efforts and strategies have been very successful. For example, prosecutors decided not to indict more than 90% of that group's clients despite their complete silence in custody.<sup>113</sup>

To bolster its argument for pre-indictment or pretrial release for criminal suspects or defendants, the JSRC cited the recommendation of the UN Human Rights Committee as the basis for the possible establishment of the pre-indictment bail system [*Kisomae Hoshaku Seido*].<sup>114</sup> The council recommendation also pointed out the problem with the issuance of warrants, as well as the uncertainties around how the judges' decisions for the request for the defendant's post-indictment release on bail were made in order to reduce improper custody of defendants in substitute prisons.<sup>115</sup> As of today, the pre-indictment bail system has yet to be established in Japan. Current JFBA President Keishi Yamagishi, in his speech at the Japan National Press Club, emphasized that it is imperative for Japan to establish a pre-indictment bail system in order to eliminate the ongoing use of substitute prisons and lengthy detentions of criminal suspects or defendants without representation by effective defense counsel.<sup>116</sup>

Former JFBA Secretary-General Shunsuke Marushima reported at the UC Hastings Symposium that there has been an increase in the rate of court dismissals of detention requests by prosecutors, as well as an increased admissions of "quasi-complaints against the

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112. Takashi Takano, *The Miranda Experience in Japan*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT* 128-39 (Malcolm K. Feeley & Setsuo Miyazawa eds. 2002).

113. See HENSHUSHA NO KOE [Editor's Voice], *Miranda no Kai* [The Miranda Association], <http://mirandanokai.net/body/news/hitokoto.html> ("Koremade miranda-ho-shiki no bengo katsudo o yatta hinin jiken no 9wari-ijo wa fukiso ni natteiru" ["In more than 90% of contested criminal cases where we applied Miranda warnings - asking the suspect to remain silent in custody - prosecutors failed to issue indictments."]).

114. *Id.*

115. JSRC REPORT, *supra* note 1, Ch. II, Pt. 2, (4) (2) (a) ("Issues Related to Custody of Suspects and of Defendants").

116. Kenji Yamagishi, *Keiji Shiho Kaikaku eno Torikumi to Higashi Nihon Daishinsai, Genpatsujiko no Hisaisha, Higaisha eno Hoteki Shien* [Strategies for Criminal Justice Reforms and Legal Assistance to Victims of East Japan Earthquake and Nuclear Accidents] (June 19, 2012), <http://www.jnpc.or.jp/files/2012/06/542922f8dd20192de70171b40e9838da.pdf>.

use of detention [*Jun Ko-koku*]" filed by defense attorneys.<sup>117</sup> Indeed, government statistics show a steady increase in the rate of the court's denial of detention requests by prosecution since 2003.<sup>118</sup> In 2008, one year before the start of the *Saiban-in* trial, the rate of dismissal was 0.77% which was trivial. It rose to 1.32% in 2010<sup>119</sup> and then 1.45% in 2011.<sup>120</sup> While the increase is still trivial, the court's denial of detention request gives defendants better access to effective legal counseling.

#### ***F. Pretrial Conference Procedures [Kohanmae Seiri Tetsuzuki]***

The JSRC proposed the introduction of a new pretrial conference procedure "in order to sort out the contested issues and to fix a clear plan for the proceedings in advance of the first trial date."<sup>121</sup> The recommendation also stated the importance of introducing a discovery procedure, suggesting that "rules regarding the timing and the scope of the disclosure of evidence should be clearly set forth by law, and . . . the need for the disclosure of evidence should be introduced as part of the new preparatory procedure."<sup>122</sup>

Despite a seemingly smooth and seamless transition from inquisitorial legal proceedings to an open adversarial trial, the introduction of a pretrial conference procedure seemed to have become one of the significant drawbacks that prevented the smooth disposition of a large number of expected citizen judge trials. The total number of *Saiban-in* trials for the first year, for example, failed to reach the desired goal set by the Japanese government, which initially expected to hold around 3,000 quasi-jury trials annually.<sup>123</sup>

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117. Marushima, *supra* note 97.

118. Hanzai Hakusho, *2010-nen Ban [The White Paper on Crimes in 2010]*, at 12 (2010), available at <http://www.moj.go.jp/content/000010214.pdf>.

119. Keiji Jiken, *2010 nen-do [Criminal Cases in 2010]*, *Dai 15 hyo: Reijo Jiken no Kekka [Results of Arrest Warrant]*, available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B22DKEI15~16.pdf>. There were 124,045 detention requests and 1,648 of them were denied.

120. Keiji Jiken, *2011 nen-do [Criminal Cases in 2011]*, *Dai 15 hyo: Reijo Jiken no Kekka [Results of Arrest Warrant]*, available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B23DKEI15~16.pdf>. There were 119,110 detention requests and 1,727 of them were denied.

121. JSRC REPORT *supra* note 1, Ch. II, Pt. 2 (1) (1) ("Introduction of New Preparatory Procedure").

122. *Id.*

123. Japanese Court Office, *Saiban-in Seido no Taisho to Naru Jiken no Kazu, 2008*

In the first year of the operation, the actual number of quasi-jury trials was approximately 40% less than the anticipated numbers, and the number of completed jury trials was a fraction of the total number of criminal cases originally assigned to lay adjudication by the Japanese government.<sup>124</sup> Thus, in order to process a large number of *Saiban-in* trials, it may be necessary to set up an efficient system of pretrial conference procedures.

Prior to the passage of the pretrial conference procedure law in 2004,<sup>125</sup> Japan's discovery laws only required that prosecutors disclose materials or statements that they planned to introduce into evidence at trial.<sup>126</sup> Thus, Japanese prosecutors had not been required to disclose contradictory statements or confessions from defendants or witnesses that might reveal weaknesses in their cases.<sup>127</sup>

The newly introduced pretrial conference forced the prosecution to disclose much broader evidence to defense lawyers, and courts also showed a tendency to support extensive evidence discovery - demanding greater prosecutorial disclosure of records and information, including discretionary work used for issuing indictments against criminal defendants.<sup>128</sup> While the new pretrial conference was also introduced with the intention of saving time by narrowing case-specific issues at trial and facilitating the speedy trial process, the retrial procedure also forced both parties to clarify the charges and applicable laws, define allegations and contested issues, delineate greater disclosures of facts and evidence, establish objections related to evidence, address the use of experts if any, and

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[*Criminal Cases Qualified for the Quasi-Jury Trial, 2008*] (Aug. 26, 2008), <http://www.saibanin.courts.go.jp/shiryō/pdf/03.pdf>.

124. A total of 554 cases were completed by the end of May 2010.

125. KEIJI SOSHO HO [CODE OF CRIMINAL PROCEDURE] art. 316-2.

126. JOHNSON, *supra* note 4, at 40-41.

127. *Id.*

128. Ibusuki, *supra* note 24, at 56 & n.90 ("The recent Supreme Court's judgments suggest the disclosure to be favorable for the defense.") The expansive discovery requests in the pretrial conference were also noted by the JFBA's report, resulting in a long waiting period. Nonetheless, despite the long waiting list for *Saiban-in* trials, the JFBA supports the thorough pretrial procedures, including greater disclosure of evidence. See JFBA, *Comment on the 1st Anniversary of the Saiban-in System* (May 21, 2010), <http://www.nichibenren.or.jp/activity/document/statement/year/2010/100521.html>. ("A [more] sufficient period of [pretrial conference] time must be secured for preparation of a defense.")

finally determine hearing and trial dates.<sup>129</sup> As a result, the preparation phase of the new mandatory pretrial arrangement procedure began to take many months.

For instance, during the first year of its operation, the average length of a pretrial conference procedure was 4.2 months (4.0 months for uncontested cases and 4.8 months for contested cases).<sup>130</sup> After three years of operation, the average length of pretrial conference was extended to 5.7 months overall, with 4.7 months for uncontested cases and 7.1 month for contested cases.<sup>131</sup>

Only a quarter of pretrial procedures lasted more than four months (28.8%) in the first year.<sup>132</sup> After three years, 64% of pretrial conference lasted four months or beyond.<sup>133</sup> For the contested cases, nearly half of them required more than four months to complete the pretrial arrangement procedure (45.8%) in the first year.<sup>134</sup> But, after three years of operation, 83.1% of contested cases needed the pretrial conference of four months and longer.<sup>135</sup>

The procedural disparity is also reflected on the number of procedural meetings that the pretrial conference required. The average pretrial conference required 3.7 meetings, i.e., 3.3 meetings for uncontested and 4.5 meetings for contested cases.<sup>136</sup> After three years of operation, the average meetings extended to four times overall, with 3.5 for uncontested cases and 4.8 times for contested cases.<sup>137</sup>

The lengthy pretrial conference procedure also affected the overall facilitation of the lay justice process. For instance, the average procedural period from the initial indictment to judgment

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129. KEIJI SOSHO HO art. 316-5.

130. JAPANESE COURT OFFICE, *Saiban-in Saiban no Jisshi Jokyo ni Tsuite: Tokubetsu Shukei Shiryo [Implementation of the Quasi-Jury Trial: Special Statistical Summaries]* [hereinafter *Statistics-2010*] (April 2010), [http://www.courts.go.jp/saikosai/about/iinkai/saibanin\\_kondan/siry0\\_07/pdf/siry0\\_5.pdf](http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siry0_07/pdf/siry0_5.pdf).

131. JAPANESE COURT OFFICE, *Saiban-in Saiban no Jisshi Jokyo ni Tsuite: Tokubetsu Shukei Shiryo [Implementation of the Quasi-Jury Trial: Special Statistical Summaries]* [hereinafter *Statistics-2012*] (March 2012), available at [http://www.saibanin.courts.go.jp/topics/pdf/saibanin\\_kekka.pdf](http://www.saibanin.courts.go.jp/topics/pdf/saibanin_kekka.pdf).

132. *Id.* at Table 9.

133. *Id.*

134. *Statistics-2010*, *supra* note 130, at Table 9.

135. *Statistics-2012*, *supra* note 131, at Table 9.

136. *Statistics-2010*, *supra* note 130, at Table 10.

137. *Statistics-2012*, *supra* note 131, at Table 10.

was approximately 6 months, i.e., 5.8 months in uncontested cases and 6.8 months in contested cases.<sup>138</sup> Out of the 308 cases examined by the Supreme Court Office, two-thirds of them (206 or 67%) completed the entire criminal process from indictment to the judgment within six months.<sup>139</sup> Nonetheless, the remaining one third took more than six months, including some criminal cases which required more than a year to complete.<sup>140</sup>

These figures suggest that, for the first year, in the average of six months from the indictment to the judgment, four months (two-thirds) were spent on the pretrial conference procedure alone. Once the lengthy pretrial conference is over, the criminal case itself was expedited to complete within two months to reach a final judgment by the *Saiban-in* panel.

Hence, in order to process a large number of the *Saiban-in* trials as projected by the Japanese government and to provide participatory opportunities to many Japanese citizens, it may be necessary to shorten the lengthy preparatory period of the pretrial conference procedure. At present, this lengthy pretrial preparation has contributed to a significant delay in the overall adjudication of criminal trials. While the pretrial conference arrangement may be able to prevent an innocent person from unnecessary prosecution and provide him/her with much needed legal protection, a more elaborate, yet efficient system needs to be adopted in the future operation of the *Saiban-in* trial.

### ***G. Institution of the National Public Defender System and Japan Legal Support Center***

The JSRC emphasized in 2001 that a new legal support organization had to be created in order to “manage the public defense system [which] should be fair and independent, and public money should be introduced for [the] operation of the system through a proper mechanism.”<sup>141</sup>

The Japan Legal Support Center (JLSC) was established on April 10, 2006 and began its operation on October 2, 2006. The National Public Defender System (NPDS) was also established

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138. *Id.* at Table 11 (1).

139. *Id.*

140. *Id.*

141. JSRC REPORT, *supra* note 1, Ch. II, Pt. 2, (1) (b) (“How the Concrete System Should be Introduced”).

within the JLSC in October 2006 and provides legal services related to the court-appointed defense lawyers. At the first phase of introducing the national public defender system, the criminal cases available to the NPDS only included the most serious and violent offenses that were under consideration of the death penalty.<sup>142</sup> In May 2010, applicable cases were extended to other crimes with punishment of three years' incarceration or more.<sup>143</sup>

According to David T. Johnson, approximately two-thirds of criminal defendants in Japan were represented by state-appointed defense lawyers.<sup>144</sup> While the number of court-appointed defense lawyers in 2006 was 10,733, use of the system increased exponentially so that that number reached nearly 20,000 in 2010 (i.e., 19,566).<sup>145</sup> The number of requests for national public defender services by criminal defendants in the post-indictment stage also increased accordingly from 37,717 in 2006 to 69,634 in 2010, and the number of requests for legal representation in the pre-indictment stage multiplied from a mere 3,436 in 2006 to 70,917 in 2010, more than a 20-fold increase in just four years.<sup>146</sup>

The number of regional centers that provide legal services also increased from 6 in 2006 to 29 in 2010, simultaneously adding more staff attorneys from 24 in 2006 to 217 in 2010, as part of executing the JFBA's stated mission of providing competent legal services to people in remote areas in Japan.<sup>147</sup> The salary of the court-appointed defense lawyers also increased substantially following the introduction of the National Public Defender System in 2006. Attorney Shunsuke Marushima who served as Senior Staff of the JSRC Secretariat stated that demands for higher attorney fees and more rewarding salary structures proposed by the JFBA for the National Public Defender System were accepted by the Ministry of

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142. Ministry of Justice, Higisha Kokusen Bengo Seido no Gaiyo [Summary of the National Public Defender System], available at <http://www.moj.go.jp/content/000100781.pdf>.

143. *Id.*

144. Johnson, *supra* note 14 ("About two-thirds of criminal defendants in Japan are represented by state-appointed attorneys [*kokusen bengonin*].").

145. JFBA, *Hosojinko Seisaku ni Kansuru Kinkyu Teigen* [Urgent Suggestions to the Changes in Legal Professionals] (Mar. 17, 2011), [http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327\\_shiryu.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_shiryu.pdf).

146. *Id.*

147. THE JAPAN LEGAL SUPPORT CENTER (JLSC), HO TERASU TOKEI NENHO: HEISEI 22-NENDOBAN [THE JLSC ANNUAL REPORT: THE YEAR 2010], 54 (2011), available at [www.houterasu.or.jp/cont/100453223.pdf](http://www.houterasu.or.jp/cont/100453223.pdf).

Finance after careful research by the bar association.<sup>148</sup>

The JFBA suggested that the court-appointed defense lawyer be paid 365,800 yen (approximately \$4,570)<sup>149</sup> for defending one defendant in a *Saiban-in* trial with two pretrial conference hearings and seven hours of trial work over three days in court. The national public defender will now be paid for the basic salary of four pretrial conference hearings for 170,000 yen (\$2,100) and 240,000 yen (\$3,000) for uncontested and contested cases respectively. When there are two or more defendants, the fees for the defendant who contested their criminal charges reduced to 190,000 yen (\$2,300).<sup>150</sup>

The original JFBA guideline also suggested 773,000 yen (\$9,600) for five pretrial conference hearings and twenty hours over five days of trial, while the government suggested that 300,000 yen (\$3,700) for pretrial hearings of 5 to 7 attendance with a trial of three days or more. There are other considerations as to the content and extent of services that defense attorneys are legally able to provide to the defendant, which would improve the monetary rewards for the court-appointed defense lawyers.<sup>151</sup> Nonetheless, the job of criminal defense still falls far short of being financially lucrative given the amount of labor it requires, especially compared with other civil service and consulting work. Overall, the JSRC recommendations aimed to establish an effective legal service organization and to provide legal counseling services at both the pre- and post-indictment stages of criminal justice process. The number of trial attorneys willing to work as court-appointed defense counsels also increased exponentially after the introduction of the American-style law schools in 2004 and implementation of the *Saiban-in* trial in 2009, and the new and more rewarding salary structure for court-appointed defense lawyers in the *Saiban-in* trial and other criminal cases laid out the stable economic foundation to a large group of young and new practicing attorneys in Japan.<sup>152</sup>

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148. Marushima, *supra* note 5.

149. The dollar conversion is based on the ratio of one dollar being equivalent to approximately 80 Japanese yen.

150. JLSC, *supra* note 147, at 46.

151. *Id.*

152. Kenji Utsunomiya, Speech for SIL Session at ABA in San Francisco: Changes of Role of Lawyers Over the Past Ten Years, at 2-3 (Aug. 6, 2010), available at <http://www2.americanbar.org/calendar/section-of-international-law-2010-annual-meeting-san-francisco-ca/Documents/Utsunomiya%20Speech.pdf> (in recognizing that "the unprecedented rapid increase in the lawyer population has led to the

### H. Victim Participation Programs

The JSRC recommendation emphasized the importance of extending legal protection to crime victims, as well as the creation of a liaison conference between crime victims and related government agencies.<sup>153</sup> The JSRC recommendation also pointed out that public prosecutors are obliged to take into consideration "the feeling of victims of crime" in their investigative process of rape and other sexually explicit or sensitive cases.<sup>154</sup>

Since December 2008, victims and their families have been allowed to participate in criminal proceedings, following the implementation of a revised Code of Criminal Procedure (CCP).<sup>155</sup> Victim participation became available for cases of intentional crimes such as indecent assault and rape, or ones that result in the death of a person or serious bodily injury or death through negligent conduct in breach of duty of care or in automobile operation, arrest and confinement, or kidnapping and human trafficking.<sup>156</sup>

Historically, crime victims and their families were only allowed to watch the trial from the gallery seats, but the new law positioned them as active participants of the prosecutorial processes, allowing them opportunities to express their opinions about the facts concerned and the application of law, examine and question witnesses and the accused if necessary, submit their recommended sentences, and offer supplemental closing arguments in addition to those of the prosecutor.<sup>157</sup>

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problem of young lawyers having difficulty finding jobs," JFBA President Utsunomiya stated that "[A]ccess to court-appointed attorneys has now [sic] been expanded . . . [and] over 50% of the attorneys throughout the country have registered in the rolls for court-appointed defense attorneys"). For the establishment of Japan's law school system and its impact on legal profession, see Mayumi Saegusa, *Why the Japanese law school system was Established: Co-Optation as a Defensive Tactic in the Face of Global Pressure*, 34 LAW & SOC. INQUIRY 365 (2009).

153. JSRC REPORT, *supra* note 1, Ch. II, Pt. 2 (5).

154. JSRC REPORT, *supra* note 1, Ch. III, Pt. 4 (1) ("Elevation of the Quality and Ability Demanded of Public Prosecutors").

155. For detailed historical analyses of the emergence of Japan's recent victim participation program, see Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC'Y 47 (2008). See also Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT'L J.L., CRIM., & JUST. 149 (2010).

156. See Toshihiro Kawaide, *Victim's Participation in the Criminal Trial in Japan*, 10 J. JAPAN-NETHERLANDS INST. 48 (2010).

157. See Koichi Hamai & Tom Ellis, *Genbatsuka: Growing Penal Populism and the Changing Role of Public Prosecutors in Japan?*, 33 JAPANESE J. SOC. CRIMINOLOGY 67 (2008),

Today the JLSC provides systemic assistance to crime victims and their families in multiple ways, mainly through their victim participation system. The center also provides attorney candidates for victim participants and designates and notifies the court of the candidates of court-appointed lawyers based on the requests of victim participants. The court is then required to select a lawyer for victim participants since many of them have limited financial resources.<sup>158</sup>

There are three major problems with Japan's victim participation system when applied to *Saiban-in* trials. First, victims themselves are not independent from the criminal justice process, and as a result, are required to work collaboratively with Japanese prosecutors. When victims' opinions and strategies of their trial participation do not comply with those of prosecutorial strategies and trial process, they may not be presented in court at all.<sup>159</sup> In comparison to the victim participation system in Germany which civil law system became the bedrock of Japan's legal foundation,<sup>160</sup> the Japanese counterpart has largely failed to exert its judicial independence and authority from the influence of prosecutors. For example, German victim participants are given the equal legal status as those of prosecutors and defendants and are allowed to appeal prosecutorial decisions, if necessary.<sup>161</sup>

Active trial participation by crime victims in Japan is also problematic because the guilt of the defendant of an accused crime has yet to be established at the conviction phase of the criminal trial. Because of the legal uncertainty that the defendant may or may not be the true perpetrator of the alleged crime, participation of crime victims in the conviction phase of the trial violates the precept of the

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available at <http://www.port.ac.uk/departments/academic/icjs/staff/documentation/filetodownload,86506,en.pdf>. See also JAPANESE CABINET OFFICE, *Column: Support for Crime Victims From the Japanese Legal Support Center* (2009), available at <http://www8.cao.go.jp/hanzai/whitepaper/english/2009/pdf/p26-30.pdf>.

158. JAPANESE CABINET OFFICE, *supra* note 157 (suggesting that the requirement for applying for victim participation is that their total wealth must not exceed 1.5 million yen (\$18,700)).

159. Junko Komatsu, *Higaisha Sanka Seido no Mondai-ten to Kadai* [Victim Participation Systems, Their Problems, and Challenges], FACULTY OF LAW, KEIO U. (Oct. 19, 2010), available at <http://www.clb.law.mita.keio.ac.jp/ohta/openzemi2.pdf>.

160. Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 1, 3 (2012) ("[T]he legal system in Japan was almost entirely based on the German civil law system.")

161. *Id.*

presumed innocence in the criminal process, and victims' expressed condemnation and explosion of emotive sentiments in the courtroom certainly has the potential to tip the scale of justice toward conviction of the defendants.

Secondly, Japan's victims were barred from participating in criminal cases where prosecutors decided not to indict. This is contrary to the German system where victims can use legal means to mount a private prosecution of criminal cases.<sup>162</sup> The only venue left for Japan's crime victims is to file a complaint to the local PRC, hoping that its review may result in a forced prosecution of criminal suspects.

Another problem of crime victim participation is victim participants' use of the compensation of damage order system [*Songai Baisho Meirei Seido*]. Once guilt is established in court, the JLSC assists victims in their application for the compensation of damages, enabling the court to order perpetrator reparations for damages and making it possible to reduce the necessary time or financial and mental burden through the initiation of a civil suit against criminal defendants. While defendants can appeal the court's compensatory order, this quasi-civil system of the victim participation program prevents the traditional avenue for out-of-court settlements between crime victims and crime perpetrators. Ibaragi Bar Association President Yundo Adachi once pointed out that victim participation often exposes the negativity of criminal offenses and accentuates the excessive malice engaged in by the perpetrators, thereby reducing the possible cooperation and collaboration required to reach equitable settlements by both parties.<sup>163</sup> While the defense is allowed to appeal the court decision on the compensatory order, the damage order system often becomes detrimental to reconciliatory negotiations necessary to reach out-of-court settlements that economically strapped crime victims often desperately desire.

### *I. Voices of Lay Participants on Crime Victim Participation*

Active participation of crime victims in *Saiban-in* trials also

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162. *Id.*

163. Yundo Adachi, *Higaisha Sanka Seido Oyobi Songai Baisho Meirei Seido Do-nyu ni Hantaisuru Kaicho Seimei* [Presidential Announcement Against the Introduction of the Victim Participation and Compensation of Damage Order Systems] Apr. 19, 2007 (on file with the author).

introduced many ambiguities and increased doubts about the program's deliberative merits among lay participants themselves. In the Supreme Court Report on the *Saiban-in* trials in 2011, one lay judge complained that "there was a discrepancy in the statements made by the defendant and the victim . . . We, the lay judges, felt that there was not sufficient amount of evidence in both quality and quantity."<sup>164</sup> Another lay participant stated that there was clear "contradiction in statement between the victim and defendant. [There was also] a lack of evidence and we were unable to make a fair decision."<sup>165</sup>

Another participant decried that "this system [of crime victim participation] tends to place much greater emphasis on the feeling of crime victims, creating a tendency [among us] to impose harsher sentences upon the defendant. In order for us to make a fair decision, much improvement must be made to this existing system."<sup>166</sup> While one *Saiban-in* judge said that "the experience was heartbreaking, after facing both family members of both the defendant and crime victim,"<sup>167</sup> another stated that "I did not know what was proper to believe between the crime victim and the defendant, including their families. I try not to think deeply and let it drag down later on."<sup>168</sup>

One lay participant said that trial participation of victims and their families had a long-lasting impact, adding that "I felt the applicative limit of law, shared nuances of utter mortification of crime victims, wondering what is just and fair throughout the trial. Even I returned home, I was so stressed psychologically that I had to cry often."<sup>169</sup>

Conversely, some called for the increase in active victim participation because the prosecutors often resorted to reciting the statement made by victims without letting them to speak in person during the trial, and thus there was "not sufficient materials of

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164. JAPAN SUPREME COURT, *Saiban-in to Keikensha ni Taisuru Anke-to: Chosa Kekka Hokoku-sho: Heisei 23-nendo* [Survey on Quasi-Jury Participants: Report of Analytic Results for the Year 2011] [hereinafter 2011 Survey], 144 (March 2012), available at [http://www.saibanin.courts.go.jp/topics/pdf/09\\_12\\_05-10jissi\\_jyoukyou/h23\\_q1.pdf](http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h23_q1.pdf).

165. *Id.* at 172.

166. *Id.* at 165.

167. *Id.* at 159.

168. *Id.* at 160.

169. *Id.* at 163.

evidence both in quantity and quality. We heard direct testimony of defendants, but for crime victims, it was only investigative materials and statements [introduced in trial] and it was difficult [for us] to understand the true feeling of crime victims. I wish we heard direct testimony from the victims."<sup>170</sup> In 2009, another lay participant made a similar comment on victim participation that "I wanted to know more about the daily activities of both the victim and defendant, their life experience, and personal characters, which were not presented in the trial."<sup>171</sup> Another lay judge emphasized the necessity of direct participation of related parties, including crime victims, stating that "there was no chance to directly communicate with defendant, victim, or prosecutors, or defense attorney [to have a better understanding of the trial]."<sup>172</sup>

One lay judge said that victim participation was important because "I had a profound feeling and thought about the crime, its background and motives. It gave me an opportunity to share the feeling of a defendant and victim."<sup>173</sup> Another participant said that both crime victim participation and defendant testimony deepened the understanding of the trial process, stating that "I have always looked at the case from the victim's perspective, but now I know multitudes of reasons and complex backgrounds also exist on the side of defendants as well."<sup>174</sup>

After having said that he/she developed a better understanding of the situation of crime victims, one lay judge added, "even if it were a temporal experience, I experienced something I never did before, including the [understanding of] life history of the defendant, and an opportunity to think about feelings of crime victims."<sup>175</sup> Another lay participant summarized the experience with testimony made by both a defendant and victim, stating that "I felt a tremendous relief once my duty was over, and our decision was something reasonable for both a victim and defendant. [The

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170. *Id.* at 172.

171. JAPAN SUPREME COURT, *Saiban-in to Keikensha ni Taisuru Anke-to: Chosa Kekka Hokokusho: Heisei 21-nendo* [Survey on Quasi-Jury Participants: Report of Analytic Results for the Year 2011] [hereinafter 2009 Survey], 126 (Mar. 2010), available at [http://www.saibanin.courts.go.jp/topics/pdf/09\\_12\\_05-10jissi\\_jyoukyou/03-1.pdf](http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/03-1.pdf).

172. *Id.* at 160.

173. *Id.*

174. *Id.* at 141.

175. 2011 Survey, *supra* note 164, at 182.

decision is] something people in our society could accept. Or perhaps some other decision may have been proper, but all these feelings are integrated together inside [our decision]."<sup>176</sup>

Lastly, some lay judges were initially reluctant to participate in the *Saiban-in* trial specifically because they did not want to become emotionally involved with crime victims or defendants. In particular, one lay judge, who originally did not want to serve in a trial because he/she did not want to be involved in cases related to crimes or anything that can endanger one's life or body or safety, said, "It is burdensome to pass on a judgment based on my personal feeling, and I also felt that it is also a heavy responsibility to have some kind of connection with the defendant and/or crime victims and other people affected by the crime."<sup>177</sup>

While the JSRC's suggestion was important for extending participatory rights of crime victims within the justice system, the victim participation program seemed to pose multitudes of problems especially with respect to the ambiguities and confusions among lay participants who pointed out significant discrepancies in the testimonies given by defendants and crime victims, which likely affect the content of discussions in the deliberation. The 2010 defense lawyer survey in Yokohama also indicated that, in trials where the defendants disputed the crime, "the testimony by crime victims failed to match or even make any reasonable sense against the testimony given by defendants. [Victim testimony] does not even corroborate with arguments presented by prosecutors or the court."<sup>178</sup> Legal scholar Shinichi Ishizuka also pointed out that crime victim participation in the *Saiban-in* trial dilutes a clear separation of the conviction and sentencing phases of judicial decision-making, and victim participation became the prosecutors' effective instrument and procedural tool to help convict criminal defendants by exploiting the emotive outrage of victims against defendants. Thus, Ishizuka warns against the use of the victim participation programs in the *Saiban-in* trial, suggesting that the final trial rendering must be strictly based on investigative materials,

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176. *Id.* at 186.

177. 2009 Survey, *supra* note 171, at 141.

178. HIRONORI TAKEUCHI, HIGAISHA SANKA ANKE-TO NO KEKKA HOKOKU [REPORT ON THE RESULTS ON CRIME VICTIM PARTICIPATION SURVEY] 1 (2011), available at [http://www.nichibenren.or.jp/library/ja/committee/list/data/higaisha\\_enquete.pdf](http://www.nichibenren.or.jp/library/ja/committee/list/data/higaisha_enquete.pdf).

forensic evidence, and/or credible testimonies given by related parties only, thereby excluding crime victims and their families.<sup>179</sup>

#### IV. Collateral Impact of Two Systems of Lay Adjudication

##### A. Citizen Adjudication of Military Crimes in Saiban-in Trials

The twin systems of lay adjudication, namely the *Saiban-in* trial and revised Prosecution Review Commissions (PRC), have had significant socio-political ramifications for many Japanese citizens who have long felt vulnerable and helpless against policies of the government and predatory business practices of powerful corporations. The first significant, collateral impact of the introduction of the *Saiban-in* trial was the lay adjudication of military crimes committed by U.S. Armed Forces personnel stationed in Japan. In May 2010, a 19-year-old American soldier in Okinawa was tried for robbery and injuring a cab driver.<sup>180</sup> A judicial panel of five female and one male lay judges and three professional judges convicted and sentenced the soldier to three to four years in a Japanese prison.<sup>181</sup> One lay judge, in a post-verdict interview, said that he hopes the sentence "would serve as a deterrence" to American military personnel who often commit crimes in Okinawa.<sup>182</sup> The written judgment by the court also echoed the importance of having severe sentences acting as an effective deterrence against pervasive military personnel's crimes against Japanese citizens in Okinawa, stating that the trial outcome "cannot ignore deterrent effects against similar crimes from being committed in the future."<sup>183</sup> This *Saiban-in* trial became the first ever trial of an American serviceman in Japan's lay court.

The second *Saiban-in* trial commenced in Okinawa in December 2010, when another American soldier was adjudicated by the lay judges for sexual assaults.<sup>184</sup> After three days of trial, the panel of

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179. Shin'ichi Ishizuka, *Keiji Saiban ni Okeru Higaisha no Yakuwari* [The Role of Crime Victims in Criminal Trials], 36 GENDAI SHIHO 92 (2008).

180. For this trial, see Fukurai, *supra* note 8.

181. *Id.*

182. *Id.* at 797.

183. Hanketsu Shushi [Final Judgment], at 3 (May 27, 2010).

184. David Allen & Chiyomi Sumida, *Marine Indicted on Sexual Assault and Trespassing Charges on Okinawa*, STARS & STRIPES (Aug. 25, 2010), <http://www.stripes.com/news/pacific/okinawa/marine-indicted-on-sexual-assault-and-trespassing-charges-on-okinawa-1.115882>.

lay and professional judges found the American defendant guilty and sentenced him to three years and six months in a Japanese prison.<sup>185</sup>

Why are so many crimes committed by American military personnel in Okinawa? It is important to note that Okinawa was once an independent kingdom before Japan annexed it as part of the jurisdictional territory by the modern Japanese state in 1879. The new Japanese government then treated the Okinawa islands as a de-facto advance military outpost for the defense of main Japanese islands, as well as a strategic forwarding base to project its colonial policies in the rest of Southeast Asia. As a result, from the first days of the Asian-Pacific War with the Allied Forces, the Islands of Okinawa were fortified to serve as key strategic locations for airbases and bastions of defense for Japan's main islands.

In the Battle of Okinawa in 1945, more than ten thousand American soldiers, ninety thousand Japanese troops, and more than one hundred thousand Okinawans, which is nearly one-third of Okinawa's prefectural population at the time of war, died over a nearly ninety-day battle in Okinawa.<sup>186</sup> After Japan lost the war in 1945, the U.S. and Japan signed the San Francisco Peace Treaty in 1951, and the U.S. government declared Okinawa as its main military colony, and from then on has used it as an important strategic military outpost for the wars in Korea and Vietnam.<sup>187</sup>

Today, Japan serves as a strategic home for the U.S. Third Marine Division, the U.S. Seventh Fleet, and the U.S. Forces Japan,<sup>188</sup> and three quarters of American military facilities in Japan are located on the island of Okinawa.<sup>189</sup> The Japanese government

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185. *Kyosei Waisetsu Chisho Beihei no Koso Kikyaku [Denial of Appeal by American Soldier Convicted of Sexual Assault]*, OKINAWA TIMES, May 11, 2011.

186. Fukurai, *supra* note 27, at 794-95.

187. *Id.*

188. See U.S. DEP'T OF DEFENSE, *Base Structure Report Fiscal Year 2011 Baseline: A summary of DoD's Real Property Inventory 7* [hereinafter *Base Structure*] (2011), available at <http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf>. See also U.S. DEP'T OF DEFENSE, *Active Duty Military Personnel Strength by Regional Area and by Country 3* (Mar. 31, 2011), available at <http://www.globalsecurity.org/military/library/report/2011/hst1103.pdf>. See also CHALMERS JOHNSON, NEMESIS 178 (2008) (Using various governmental data, Johnson stated that "the United States had stationed some 36,365 uniformed military personnel in Japan, not counting 11,887 sailors attached to the Seventh Fleet at its bases at Yokosuka (Kanagawa Prefecture) and Sasebo (Nagasaki Prefecture).").

189. Johnson, *supra* note 188, at 179.

reports that between 1952 and 2004, American soldiers, military employees, and dependents committed crimes or caused accidents in a total of 201,481 cases that resulted in the death of 1,076 civilians.<sup>190</sup> The data, however, excludes crimes or accidents on the Island of Okinawa from 1945 to 1972, during which Okinawa remained under U.S. military jurisdiction. Despite the widespread victimization of local residents by military personnel and dependents, there had never been a lay trial in Japan against foreign soldiers, their dependents, or civic military employees. Direct citizen participation in *Saiban-in* trials thus became the first important legal mechanism against the culture of impunity shared among many American soldiers toward residents in Okinawa and other Japanese islands with large U.S. military bases.

### ***B. Broader Investigative Applications of the PRC Oversight Function***

A unique feature of the new Prosecutorial Review Commissions (PRC) is its ability to extend the investigative jurisdiction beyond criminal cases to possible civil and administrative matters such as malfeasance, misfeasance, or nonfeasance against public officers and/or corporate elites. With the PRC's new ability to issue legally binding prosecutorial decisions, it has now become the single-most important institution of civic oversight over the allegation of corporate predation and governmental abuse of power.

Immediately after the implementation of the new PRC Act in 2009, all-citizen panels issued the forced indictment for the Deputy Police Chief of the Akashi Police Station in the Hyogo Prefecture in January,<sup>191</sup> and three past presidents of JR-West, one of Japan's largest and most powerful corporations, in March 2010.<sup>192</sup>

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190. Hiroshi Hayashi, *Higashi Ajia no Beigunkichi to Seibaibai, Seihanzai* [American Military Bases in East Asia, Prostitution and Sexual Crime], 29 AMERICA-SHI KENKYU 1 (2006), available at <http://www.geocities.jp/hhhirofumi/paper75.pdf> (referring to crime statistics provided by the Japanese Defense Facilities Administration Agency, on July 1, 2005).

191. *Akashi Hodokyo Jiko: Naze Koredake Jikanga Kakattanoka – Izoku Kaiken* [Akashi Pedestrian Incidents: Why Did It Take This Long? – Testimony of Victims' Families] [hereinafter *Akashi*], SANKEI NEWS (Jan. 27, 2010), <http://sankei.jp.msn.com/affairs/trial/100127/trl1001272216017-n1.htm>.

192. *JR Nishi Rekidai 3 Shacho, Kyoseikisoe: Kobe Daiichi Kensatsu ga Kiso Giketsu* [Kobe PRC Decides on Indictment Against Three JR-West Presidents] [hereinafter *JR Nishi*], SANKEI NEWS (Mar. 26, 2010), <http://sankei.jp.msn.com/affairs/crime/100326/crm1003261636020-n1.htm>.

Despite numerous calls for the prosecution of the Akashi Deputy Police Chief for his failure to institute effective police oversight to prevent a deadly stampede incident in Akashi City in 2001, the Japanese prosecution refused to initiate an official criminal investigation on numerous occasions.<sup>193</sup> The deadly stampede resulted in the injuries of 274 people and deaths of nine children, ranging from five months to nine years of age, who were crushed to death in a crowded pedestrian bridge.<sup>194</sup> Upon the receipt of a civic complaint to the Hyogo Prosecutorial Review Commission, the civic panel deliberated the case on numerous occasions, deciding each time that the officer be indicted and prosecuted, but local prosecutors continued to ignore the PRC recommendations.<sup>195</sup> The prosecutors' disregard for the PRC's decisions continued until 2009, when the families of the victim resubmitted their complaint to the PRC once again to recommend that the officer be indicted and prosecuted.<sup>196</sup> The second PRC decision finally forced the local prosecutors to indict and prosecute the police officer.<sup>197</sup>

After setting a new precedent on the forcible indictment against the deputy police chief, the PRC in the same prefecture went on to deliberate on a corporate malfeasance case involving a train derailment incident, which killed 107 and injured 555 others.<sup>198</sup> After a brief investigation, the Japanese prosecutors decided not to indict the three former presidents of the JR-West, indicating that they were not directly responsible for the failure to install the Automatic Train Stop (ATP) system, which could have halted the speeding train from slamming itself into a multi-story parking garage in the ground floor of the nearby apartment building.<sup>199</sup> The Hyogo PRC decided that the leading cause of the deadly accident was the company's mismanagement and administrative policy that favored its profit motives over the safety of their customers.<sup>200</sup> In March 2010, the PRC decided for the second time that the three

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193. Fukurai, *supra* note 2, at 345-47.

194. *Id.*

195. *Id.*

196. *Id.*

197. Akashi, *supra* note 191.

198. *JR West, Victims' Relatives Mark Amagasaki Crash*, JAPAN TIMES (Oct. 26, 2005), <http://search.japantimes.co.jp/cgi-bin/nn20051026a4.html>.

199. *Id.*

200. *JR West's Actions Show Lack of Remorse, Resolve*, DAILY YOMIURI, Oct. 24, 2009, at 4.

former JR-West presidents be indicted for professional negligence resulting in injuries and deaths.<sup>201</sup>

The recent forced prosecution of corporate and government elites also demonstrated that the PRC's investigative authority might be easily extended to crimes committed by other social groups that Japanese prosecutors have been historically reluctant to prosecute. This includes the American Armed Forces personnel stationed in Japan. In January 2011, a vehicle driven by a 24-year-old American military employee killed a 19-year-old Japanese driver in Okinawa.<sup>202</sup> Okinawa prosecutors decided not to indict the military employee because they determined that the accident took place while he was on duty, and the U.S.-Japan Status of Forces Agreement (SOFA) grants the U.S. military the right to exercise primary jurisdiction over on-duty crimes or incidents.<sup>203</sup> In April, a mother of a deceased youth filed a complaint with the Naha PRC to review the Okinawa prosecutors' non-indictment decision.<sup>204</sup> Meanwhile, further investigations into the cause of the traffic accident revealed that the American driver consumed alcohol at an official party at the U.S. military base prior to the accident.<sup>205</sup> In May, the Naha PRC chose to reverse the prosecutors' non-indictment decision, stating that the indictment was proper for the given case.<sup>206</sup>

After the PRC announced its decision to prosecute the individual, the U.S. and Japanese governments decided to begin a round of discussions on new rules that may allow civilian workers

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201. JR Nishi, *supra* note 191.

202. *Japanese Man Dies After Vehicle Collision with AAFES Employee on Okinawa*, STARS & STRIPES (Jan. 13, 2011), <http://www.stripes.com/news/pacific/Okinawa/japanese-man-dies-after-vehicle-collision-with-aafes-employee-on-okinawa-1.131710>.

203. *Beigunzoku, Kisosoto Chiikyotei ga Hikokusekini ["Indictment is Proper" for Military Employee: SOFA is on Defendant's Seat]* [hereinafter *Beigunzoku, Kisosoto*], OKINAWA TIMES (May 29, 2011), [http://www.okinawa-times.co.jp/article/2011-05-29\\_18467](http://www.okinawa-times.co.jp/article/2011-05-29_18467).

204. *Beigunzoku Fukiso Izoku Kenshin ni Fufuku Mositate [Victim's Family Files Complaint to the PRC Against the Non-Indictment of American Military Employee]*, RYUKYU SHINPO (Apr. 25, 2011), <http://ryukyushimpo.jp/news/storyid-176467-storytopic-111.html>.

205. *Drinking at U.S.F 'Official Event' Is Regarded as Part of 'Official Duty,'* JAPAN PRESS WEEKLY, (Apr. 24 & 26, 2011), <http://www.japan-press.co.jp/modules/news/index.php?id=1784>.

206. *Beigunzoku, Kisosoto, supra* note 203.

in American military bases to be tried in Japanese court for incidents that occur while on-duty, and in November, a bilateral governmental committee finally agreed on a new interpretation of the SOFA guidelines, in which the U.S. military still retains primary jurisdiction in cases involving military personnel who are on official business. However, if the U.S. military declines to prosecute a civilian component of military personnel, Japan has 30 days to formally request permission to try the case in its own court system.<sup>207</sup> Two days after both governments reached the agreement, the Naha prosecutors indicted the American military employee and a Japanese court convicted and sentenced him to eighteen months in Japanese prison.<sup>208</sup> The sentence of incarceration was a stark contrast to the previous year's U.S. military decision to simply punish the defendant by revoking his driving privilege for five years.<sup>209</sup>

For three years from 2008 and 2010, Japanese prosecutors had decided not to indict 52 American military employees because of the SOFA provision.<sup>210</sup> The PRC forced the bilateral discussion on the legality of the SOFA jurisdiction over on-duty crimes or accidents caused by American military personnel and made possible the forced prosecution of civilian components of U.S. Armed Forces personnel. Its very existence provides effective civic oversight of the conduct and activities of American military personnel in Okinawa and other prefectures in the main islands that have U.S. military bases and facilities.

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207. Travis J. Tritten & Chiyomi Sumida, *AAFES Employee Indicted in Fatal Collision*, STARS & STRIPES (Nov. 25, 2011), <http://www.stripes.com/news/aafes-employee-indicted-in-fatal-collision-1.161616>.

208. Travis J. Tritten & Chiyomi Sumida, *American on Okinawa Gets 18 Months in Prison for Vehicular Manslaughter*, STARS & STRIPES (Feb. 22, 2012), <http://www.stripes.com/news/pacific/okinawa/american-on-okinawa-gets-18-months-in-prison-for-vehicular-manslaughter-1.169343>.

209. *Id.*

210. *Beigunzoku no Hanzai, Sabakarezu 06-nen Kara Saibanken ni Kuhaku [Non-Prosecution of Crimes Committed by Military Employees: Lack of Jurisdiction Since 2006]*, ASAHI SHIMBUN, (Nov. 13, 2011), <http://www.asahi.com/national/update/1112/TKY201111120625.html>.

## V. Possible Applications of *Saiban-in* Trials to Civil and Administrative Litigation<sup>211</sup>

The next step to further democratize Japan's legal system is to consider the application of *Saiban-in* trials in civil and administrative matters, beyond just criminal cases. The possible adoption of lay adjudication in civil disputes sheds further critical insight into the JSRC's report, which originally suggested a possible expansion of citizen participation into certain civil cases. Nonetheless, the investigation committee created by the Reform Promotion Office to implement the JSRC recommendation had failed to propose any substantive model of citizen participation in civil law.

### A. Application of Quasi-Jury Trials to Civil Disputes

With respect to citizen participation in civil justice, the JSRC report emphasized the importance of introducing citizen participation into "litigation procedures as expert commissioners . . . [and citizens are to be] involved in all or part of trials and support[ing] judges from the standpoint of their own specialized expertise."<sup>212</sup> The JSRC report also anticipated a broader civic participatory model in other areas in the near future, stating that "a new system [of a mixed tribunal] should be introduced, *for the time being in criminal proceedings*, enabling the broad general public to cooperate with judges by sharing responsibilities, and to take part autonomously and meaningfully in deciding trials [emphasis added]."<sup>213</sup>

Since the Japanese government was required to review the system of the *Saiban-in* trial on the third year of its operation in 2012, any discussion on the possible adoption of lay adjudication in civil or even administrative disputes will have tremendous socio-legal

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211. Professor Matthew J. Wilson at the University of Wyoming College of Law discussed the importance of extending lay adjudication into the area of civil disputes. See Matthew J. Wilson, *Prime Time to Take Another Step Forward: Expanding Lay Participation in Japan from Serious Criminal Trials to Civil Trials* 2012), 46 AKRON L. REV. — (2013) (publication forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2063269](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063269). This section extends his discussions and examines the application of lay adjudication into specific areas of civic and administrative disputes in Japan.

212. JSRC REPORT, *supra* note 1, Ch. IV, Pt. 1 (2) (1) ("Expansion of Participation Systems in Other Fields (1) Civil justice System").

213. JSRC REPORT, *supra* note 1, Ch. IV, Pt. 1 (1) ("Introduction of New Participation System in Criminal Proceedings").

ramifications in today's Japanese society.

For example, the *Saiban-in* trial may be adopted in civil cases involving radiation victims of the Fukushima nuclear disasters. In March 2011, the meltdown of the Fukushima Daiichi Nuclear Power Plant spewed high radioactive particles into the atmosphere and contaminating hundreds of thousands of residents in Fukushima Prefecture and adjacent areas.<sup>214</sup> An independent Diet commission that investigated the Fukushima catastrophe concluded in July 2012 that the crisis at the Fukushima nuclear plant was "man-made and not a natural disaster, fundamentally [as] the result of a long-corrupt regulatory system that allowed Tokyo Electric Power Co. (TEPCO) to put off critical safety measures."<sup>215</sup> Nonetheless, the Japanese court so far has repeatedly refused civil damage claims to TEPCO brought by its stockholders, radiation victims, and their families.<sup>216</sup>

Citizen participation in civil and administrative matters related to the victims of the Fukushima nuclear disaster will allow the deeper consideration and discussion on the protection of the rights of the victims and to help secure their rightful claim to economic redress for damages created by the nuclear power plant owned and operated by TEPCO. Radiation victims also claim compensation against the Japanese government which granted TEPCO the continuous operation of nuclear plants despite prior records on the systematic violation of safety regulations and numerous falsifications of inspection records at the Fukushima power plant.<sup>217</sup>

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214. *Japanese Nuclear Crisis: Year Later, Uncertainties Remain*, HOUSTON CHRONICLE, Mar. 10, 2012, at A19.

215. Kazuaki Nagata, *Nuclear Crisis Man-Made: Diet Panel*, JAPAN TIMES, Jul. 6, 2012.

216. *Toden no Menseki Hitei wa Tekiho, Kabunushi no Baisho Seikyu o Kyakka* [TEPCO's Immunity to Responsibility is Lawful: Court's Denial to Compensatory Liability by Stockholders], SANKEI NEWS (Jul. 19, 2012), <http://sankei.jp.msn.com/affairs/news/120719/tr12071916250005-n1.htm>; *Tadano Jisatsu ni Shitakunai: Genpatsujiko ni Jisatsu, Izokura Toden Teiso* [Refuse to Treat it as Mere Suicide: Bereaved Family Sued TEPCO for Suicide After Nuclear Accident], SANKEI NEWS (May 18, 2012), <http://sankei.jp.msn.com/affairs/news/120518/tr12051818250003-n1.htm>; *Toden ni Baisho Motome Teiso, Iwate de Hatsu, Kome Seisan-hojin* [First Time, Rice Producers in Iwate Prefecture Filed Lawsuit to Seek Compensation for TEPCO], KYODO (May 2, 2012), <http://www.47news.jp/feature/kyodo/news05/2012/05/post-5530.html>; Kazuaki Nagata, *Protest Rally Against Noda, Oi Restarts Intensifies*, JAPAN TIMES, June 30, 2012 (stating that the class-action lawsuit was filed by "42 shareholders of Tokyo Electric Power Co. . . . [to] pay 5.5 trillion [yen] in total damages to TEPCO").

217. Hiroshi Fukurai, *The Embrace of the Atomic Energy Program in Japan: The*

University of Wyoming Law Professor Matthew Wilson provides the following two important rationales for extending the application of *Saiban-in* trials to civil disputes: (1) participation in civil disputes would strengthen, educate, and empower the general citizenry; and (2) lay adjudication will also promote better reflection of societal values and policy.<sup>218</sup> Professor Wilson further suggested that "extending the lay judge system to . . . civil trials is consistent with . . . [the JSRC] reforms. . . . Japan should take advantage of the current environment and seriously explore the possibility of integrating citizen participation into the civil justice system."<sup>219</sup> Lay adjudication in future civil disputes involving TEPCO and government liabilities certainly creates a space where people's sentiments and sense of civil justice will be introduced into the deliberation of future civil cases.

### *B. Application of Quasi-Jury Trials to Administrative Cases*

The JSRC recommendation suggested a possible application of lay adjudication in civil areas. Nonetheless, the JSRC failed to make specific suggestions on the implementation of lay participation in administrative disputes.

Attorney Shunsuke Marushima, a keynote speaker in the UC Hastings symposium on the impact of the JSRC reform, stated that the number of administrative litigation cases brought to Japanese court has been historically very low - only 1,400 cases were filed in 2000.<sup>220</sup> The rate of rejection was about 20%, and Japanese courts ruled in favor of the plaintiff in only 10% to 15% of administrative cases.<sup>221</sup> And although the number of administrative litigation has somewhat increased to 2,100 in 2010, a total number of cases still remain extremely low in comparison to administrative litigation in other countries.<sup>222</sup> Attorney Marushima suggested that that administrative litigation was a form of legal procedure that has been extremely difficult for citizens to use in settling disputes, and in the

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*U.S. Government, Japanese Nuclear Ambition, and Corporate Profitization on the Nuclear Energy Programs*, a paper presented at the Second East Asian Law and Society Conference in Seoul, South Korea, Oct. 1, 2011 (unpublished manuscript) (on file with the author).

218. Wilson, *supra* note 211, at 19-21.

219. *Id.* at 25.

220. Marushima, *supra* note 97.

221. *Id.*

222. *Id.*

majority of administrative cases, Japanese courts ruled in favor of the government or public institutions over citizens.<sup>223</sup> And that was one of the major factors why the number of Japan's administrative cases has been relatively very small.<sup>224</sup>

The JSRC report helped to initiate extended discussions on how to strengthen the checking function of administrative litigation by the judiciary; it also helped to pass the first revision of the Administrative Litigation Act.<sup>225</sup> The first revision of the act contained a provision toward expanding one's legal standing to file a lawsuit, mandating litigation injunction, and extending the statute of limitations for filing cases.<sup>226</sup> Nonetheless, many unresolved challenges still remain, as the second phase of the review for revisions was scheduled to commence in five years.<sup>227</sup> And even as the Administrative Appeal Act and the freedom of information system have been enacted, Attorney Marushima indicated that there has been little political interest for reform in the second phase of the planned reviews.<sup>228</sup>

If the adjudication of administrative cases was given in the hands of *Saiban-in* participants, not in the collegial bench of professional judges, many plaintiffs may find it advantageous to file administrative lawsuits against the government or other public institutions. There should be serious discussions on determining the mitigated requirements for mandatory litigation injunction and provisional relief for the plaintiffs, strengthening the review of administrative discretion, and establishing planned litigation and litigations involving court orders.<sup>229</sup> Such reforms must target all appropriate administrative agencies or affected groups of citizens to initiate significant changes in Japan's adjudication of administrative cases and advance the substantive administrative law in Japan.

## VI. Conclusions

On September 7th and 8th 2012, the UC Hastings conference assembled a group of socio-legal scholars to examine the extent of

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

the implementation of the judicial reforms suggested in the JSRC's 2001 report. This article then examined the ramification of the proposed judicial reforms in the area of criminal justice and lay participation in legal decision-making.

The establishment of the National Public Defender System and the Japan Legal Support Center in 2006 provided vital legal resources and services to criminal suspects and defendants at both the pre- and post-indictment stages of the criminal process. Both institutions also helped eliminate many regions and areas that previously had very limited access to lawyers and legal experts. On the other hand, little to no significant changes were made to discriminatory police investigative procedures. The JSRC recommendations failed to eliminate some of the important key factors that led to wrongful convictions and violations of criminal defendants' rights, including the use of police detention centers as substitute prisons for interrogating criminal suspects and extracting forced confessions. The police and prosecution continue to conduct interrogation activities without the use of an audio and visual recording device during interrogation. The investigation committee (LAMPIC) also failed to implement a pre-indictment bail system; a criminal suspect in Japan is still unable to obtain his or her release from police custody at the pre-indictment stage of the criminal process.

Despite these shortcomings, perhaps the greatest achievement of the JSRC was the creation of the *Saiban-in* system where citizens participate in determining trial outcomes and sentences. It is monumental considering that it took more than six decades to introduce a new system of lay adjudication after Japan's military government suspended the jury system in 1943. The JSRC recommendation also made a significant procedural improvement on the PRC by giving its decisions legally binding force in reviewing the indictment decisions of prosecutors. The twin systems of lay adjudication were at the forefront of instigating the prosecution of previously highly "protected" groups, including prominent politicians, government bureaucrats, corporate elites, and American military personnel.

Lastly, this report explored the potential for adopting lay adjudication in civil litigation, which was previously suggested by the JSRC report. Such a consideration is significant and timely given that the Japanese government is required to review the *Saiban-in* system after the third year of its operation. After the nuclear

meltdown at the Fukushima Daiichi Nuclear Power Plant in March 2011, the courts have been persistent in rejecting the lawsuits filed against TEPCO and the Japanese government by radiation victims and their families seeking proper redress. Now is the time for the Japanese government to reconsider the possible extension of lay participation into legal decision-making in civil and administrative matters.

THE EFFECTS OF LIBERALIZATION ON  
LITIGATION: NOTES TOWARD A THEORY IN  
THE CONTEXT OF JAPAN

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ABSTRACT

*This Essay examines the under-studied relationship between liberalization and litigation. Liberalization should lead to expanded civil litigation for four reasons: (1) new market entrants are less subject to informal sanctions and may have a greater propensity to go to court; (2) privatization transfers resources away from the state, expanding the number of transactions subject to civil law regimes; (3) liberalization reduces the government's ability to resolve disputes outside the courts; and (4) liberalization leads to economic development, which is generally litigation-enhancing. We test these propositions using a unique dataset of prefecture-level civil litigation data in Japan during the 1990s. Using panel data, we find a small but significant effect of foreign firms on litigation.*

INTRODUCTION

In his classic 1978 article, *The Myth of the Reluctant Litigant*, John Haley used institutional analysis to demolish the dominant culturalist view of Japanese litigation behavior.<sup>1</sup> Haley's foil, Takeyoshi Kawashima, had applied the dominant modernization theses of his time to understand Japanese law and society.<sup>2</sup> Haley, on the other hand, was prescient in shifting the analysis to institutional factors. Within two decades, the various new institutionalisms had come to dominate the social sciences,

and with them sociolegal studies as well. Thanks to Haley, Japanese law became a bellwether of this broader trend.<sup>3</sup>

This Essay revisits the litigation debate from a quite distinct angle, one that might be called "Taking Kawashima Seriously."<sup>4</sup> For many decades, scholars have puzzled over the relationship between legal institutions and economic development. By and large, this literature has treated law as an independent variable that constrains or facilitates growth.<sup>5</sup> Far less attention has been paid among economists and lawyers to the effect of development on litigation, which was Kawashima's implicit framework. It has been observed for some time that law and economic development likely have a reciprocal relationship.<sup>6</sup> Not only does good law facilitate development, but development creates new demands on the legal system and arguably increases the scope of transactions governed by law in the economy. Yet there has been very little exploration of this direction of causality in the recent literature.

In an earlier paper, we identified a complex relationship between development and litigation rates, using prefecture-level data from Japan.<sup>7</sup> On the one hand, litigation is countercyclical. Holding other factors constant, growth seems to dampen demand for litigation. As the economic pie expands, forgiving behavior has lower marginal costs and so there is less willingness to go to court.<sup>8</sup> On the other hand, higher per capita income seems to increase demand for litigation. More wealth implies more transactions per capita, so that even if the rate of "bad" transactions stays constant, there is more litigation in the economy. We found that the growth effect was larger than the wealth effect, but that both were statistically significant determinants of increased litigation in Japan in the

3. The litigation debate in Japan was also an early topic for economic analysis of comparative law. See J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989); J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988).

4. See Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC'Y REV. 219 (1987); Tom Ginsburg & Takao Tanase, Japanese Litigiousness and "Taking Kawashima Seriously," Proceedings from the 2005 Sho Sato Conference in Honor of Takao Tanase (Feb. 12–13, 2005), available at [http://www.law.berkeley.edu/centers/ilr/pub\\_sho\\_sato\\_2005](http://www.law.berkeley.edu/centers/ilr/pub_sho_sato_2005).

5. See Tom Ginsburg & Thomas Ulen, What We Know—and Don't Know—About Law and Economic Development (on file with authors); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

6. See Lawrence Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969).

7. See Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant?: An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006).

8. *Id.*

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1. John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

2. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur Taylor von Mehren ed., 1963).

1990s.<sup>9</sup> We did not, however, identify the mechanisms by which the economy affects litigation rates.<sup>10</sup>

In this Essay, we suggest that liberalization—defined as the elimination of barriers to entry of newer players in the market—is a key determinant of resort to legal dispute resolution mechanisms. By allowing in new players, liberalization expands the pool of economic actors and disrupts cooperative equilibria that may have previously emerged and become stabilized. New players may be less embedded in reputational networks that can contribute to informal forms of contract enforcement. Furthermore, liberalization creates a more competitive environment, pushing firms to adopt more vigorous strategies to seek economic advantage. These factors may make both new and old firms less “forgiving” of opportunism by contract partners.

The Essay is organized as follows. Part I explores the theoretical relationship between liberalization and litigation. Part II describes liberalization in Japan in the 1990s, and explains why foreign firms may have acted as agents of transmission of new norms. Part III concludes with a discussion of the implications of the analysis for Haley’s thesis and for theories of law and development.

#### I. LIBERALIZATION AND LITIGATION

The 1990s saw significant shifts toward liberal political economy in many countries of the world. Pushed by the so-called “Washington Consensus,” policy reform in developing countries revolved around a series of measures designed to enhance the role of markets.<sup>11</sup> Sometimes known as neoliberalism, these policies were an example of a more general process of liberalization, comparable to other such movements in history. Liberalization means many things to different people, including greater emphasis on fiscal discipline, privatization, and rollback or removal of substantive government regulation. At its core, however, liberalization involves the relaxation and removal of barriers to marketplace entry so as to facilitate enhanced opportunities for trade.

We believe that liberalization might contribute to greater demand for litigation through a number of modalities. First, the elimination of barriers to entry encourages new market participants to conduct economic activity,

9. *Id.*

10. *Id.*

11. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (John Williamson ed., Inst. for Int’l Econ. 1990).

and these participants may, *ceteris paribus*, be more likely to litigate when disputes arise. Second, liberalization reduces the direct role of government in the economy, increasing demand for civil dispute resolution. Third, liberalization reduces government’s capacity to act as a substitute dispute resolver, shifting disputes toward the courts. Fourth, liberalization can indirectly encourage more litigation through its effect on wealth. This, however, is offset by the growth effect, which dampens litigation. We discuss each of these modalities in turn.

#### A. New Entrants

A major goal of liberal economic policies is to allow new entrants into the marketplace. Other things being equal, new entrants may have a greater propensity to sue than established players in particular markets. Sociologists of law have long observed that litigation is less likely in close-knit groups because of the relationship-breaking quality of going to court.<sup>12</sup> Close-knit groups develop norms through repeated interactions over time. Norms can provide guidance to appropriate behavior, which can reduce the frequency of breach. When breach does occur, repeated interactions allow players to punish opportunism. Punishment can occur directly, when the injured party refuses to transact with the norm-violator, or by third parties who enforce reputational sanctions.

Reputation-based contract enforcement is easier to apply when all participants know each other. As the number of players in a market expands, the use of reputational sanctions becomes more difficult, as such actions depend on second order norms about sanctioning wrongdoing. New players, in particular, are unlikely to benefit from these reputational sanctioning mechanisms, and are also less likely to suffer from them as information on past performance is less available. Hence both new players, and established players who are transacting with new players, may be more likely to go to court when problems occur. New entrants might be more likely to be plaintiffs or defendants than established players.

In some cases, selective liberalization of particular sectors can have a broader effect by allowing the entry of particular agents of litigious behavior. Most obviously, liberalization of legal services markets in recent years has allowed foreign law firms to penetrate previously closed arenas. Lawyers, like any other actors, bring with them new strategies and

12. See Donald Black, *The Boundaries of Legal Sociology*, 81 *YALE L.J.* 1086 (1972); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338 (1997).

technologies to try to advance their interests, and it is quite likely that these strategies would tend more toward formal than informal dispute resolution.<sup>13</sup> As foreign lawyers adopt more formalistic strategies, local firms may respond in kind, ratcheting up the willingness of parties to go to court.

### B. Privatization

A second reason that liberalization is likely to encourage litigation is that liberalization programs, at least in recent decades, are typically accompanied by privatization—the reduction in direct government provision of goods and services that are not true public goods. Privatization by definition means that more of the economy is in private hands. Even assuming that rates of litigation among market actors are constant, we should see greater overall rates of civil litigation as more transactions are subject to that legal regime, as opposed to administrative court systems that sometimes have jurisdiction over government contracting.<sup>14</sup>

Of course, even when government is directly involved in the provision of goods and services, it might willingly allow itself to be sued, avoiding doctrines of sovereign immunity. Government is likelier to do this when it does not maintain its own monopoly in the relevant sector. For example, a government-owned oil company would find itself paying a higher cost of capital and higher prices for supplies if it did not allow itself to be sued, for contract partners would demand greater returns in exchange for the risk of government non-performance. But when government effectively retains a monopoly, for example in many areas of welfare provision, it may not allow itself to be sued in contract or tort. Altogether, then, we should expect that privatization would encourage litigation.

Note that the transfer of resources to the private sector interacts with the presence of new entrants to enhance incentives to litigate. Privatization by definition expands the scope of transactions subject to civil litigation regimes; it can also lead to the expansion of the number of firms. When government sells assets, it sometimes does so to new entrants into the market. One can characterize liberalization as leading to the entry of new potential plaintiffs into the economy, while privatization involves the

13. George Nnona, *Multidisciplinary Practice Through Developing-Country Lenses: The Imperatives of the Nigerian Regulatory Context*, 25 BERKELEY J. INT'L L. 346 (2007).

14. MAHENDRA B. SINGH, *GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE* 50–62 (1985).

creation of new potential defendants. Together, the presence of new plaintiffs and new defendants makes the establishment of a reputational equilibrium difficult. Information on past performance may be unavailable; hence players may be more willing to go to court at the first sign of opportunism.

### C. Removal of Government As Substitute Dispute Resolver

Another reason liberalization expands litigation is that the removal of substantive regulation reduces government's ability to resolve disputes directly. To understand this point, consider that extensive government regulation can dampen or serve as an effective substitute for litigation. When government regulation is extensive, and the government is directly involved in the production of goods and services, firms that do business with the government can expend energy in political rent-seeking rather than bringing cases to court. In addition, when government discretion is high, it can exert collateral leverage over private firms and suppress disputes among the various players in a sector. Substantive deregulation, by reducing discretionary controls over the economy, also reduces government ability to impose costs on firms that it wishes to sanction—and this means that the government is less attractive as a dispute resolver.

Japanese political economy provides an example of the role of regulation in dispute resolution. In the high-growth period, the Japanese government retained control over numerous resources needed by firms, including capital, export credits, and licenses.<sup>15</sup> The government frequently utilized these tools to direct firms into business decisions that the government felt were desirable, and to eliminate “excess competition” from the system. Indeed, in some cases, the government would punish firms for deviations in one area using collateral tools that affected another business decision.<sup>16</sup> When private firms in a particular sector would have disputes, the government was in a good position to help resolve them. Toshiyuki Kōno characterizes this function as that of a “motionless mediator,” a role in which government sat at the center of regulatory networks and resolved disputes among firms.<sup>17</sup> This managerial function

15. CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982).

16. Michael Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 927–28 (1984); Haley, *supra* note 1.

17. Toshiyuki Kōno, *Judges and Mediators in Japan: The Administration As Motionless Mediator?*, in *JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM* 69 (Harald Baum ed., 1997); see also JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 139–68

of government may have been one factor in suppressing litigation during the high-growth period. The government role in dispute suppression was hardly visible, but many knowledgeable observers report its existence.<sup>18</sup>

It is not clear whether the under-capacity of the legal system was a cause or effect of the tight business-government ties, but the two sets of institutions were without a doubt complementary. Because the government handled many disputes and suppressed others, there was relatively little demand for formal resolution of disputes by the courts. However, as the legal system became more powerful in the 1990s, the bureaucracy lost power. This shift can be seen today in the market for talent, as top graduates of the prestigious University of Tokyo Faculty of Law increasingly turn to legal professions rather than front-line ministries.<sup>19</sup> We also see a clear shift of disputes from bureaucratic toward legal resolution. For example, in 2005, Sumitomo Trust & Banking brought a lawsuit to block a proposed merger between UFJ and Mitsubishi Tokyo.<sup>20</sup> This suit would have been unimaginable in Japan just a decade earlier, because the Ministry of Finance would have resolved it behind closed doors.

Generalizing this point, governments that heavily regulate the economy—particularly those that employ extensive bureaucratic discretion—may play a crucial role in suppressing some disputes from ever emerging and in resolving those that do emerge. This function would generally serve to dampen litigation. As regulatory tools disappear with liberalization, government's dispute-suppressing role may also decline.

#### D. The Wealth Effect

Finally, liberalization can indirectly contribute to more litigation. A staple of the law and development literature was an assumption that modernization would lead to greater reliance on formal institutions.<sup>21</sup> Most obviously, wealthier societies have more transactions per capita, so that even if tendencies to litigate remain constant, there will be more disputes to resolve. Of course, this must be balanced against the fact that there are

(1991); Bruce Aronson, *The Brave New World of Lawyers in Japan* 5-16 (working paper, Aug. 16, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008334#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008334#PaperDownload).

18. See, e.g., Kōno, *supra* note 17.

19. Curtis Milhaupt & Mark West, *Law's Dominion and the Market for Legal Elites in Japan*, 34 *LAW & POL'Y INT'L BUS.* 451, 469-73 (2003).

20. Curtis Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 *COLUM. L. REV.* 2171 (2005).

21. See Friedman, *supra* note 6.

opportunity costs to litigation. Time and money spent in court are more valuable in richer societies, even if the absolute value of the transactions at stake is also higher. We take no view on whether these two effects offset. Still, we believe the findings of our earlier work are likely to be robust. Growth tends to suppress litigation because the opportunity costs are higher, while the marginal cost of "forgiving" behavior is lower. Wealth, on the other hand, encourages litigation because of greater transactional density. Assuming that the effects we observed in our earlier article are robust, liberalization would contribute *indirectly* to more demand for litigation through a wealth effect, even as short-term growth effects dampened demand.

## II. LIBERALIZATION IN JAPAN

Japan experienced significant liberalization in the 1990s, and provides an ideal testing ground for some of the conjectures presented here. During the high growth period, Japan was famous for its low rates of litigation.<sup>22</sup> It also had significant barriers—formal and informal—to foreign entry into many markets.

Traditional accounts of Japanese political economy emphasize the significant role of the government in the economy.<sup>23</sup> Government regulators, it is usually argued, had a good deal of discretion in regulatory policy, and, importantly for our argument, played a role in suppressing and managing disputes. Firms relied on the government to resolve disputes over the allocation and use of property rights. Some scholars describe how the government provided a substitute for legal forms of dispute resolution, actively channeling disputes away from the courts by setting up alternative fora.<sup>24</sup> Others emphasize an even less formal role in which firms looked to government to resolve problems arising from intense competition. In this account, government bureaucrats stood at the center of policy networks, a position that allowed them to coordinate across firms and issue areas.<sup>25</sup>

22. See Ginsburg & Hoetker, *supra* note 7, at 31; Christian Wollschläger, *Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics*, in *JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM* 89, 93-94 (Harald Baum ed., 1997).

23. See JOHNSON, *supra* note 17.

24. FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 *LAW & SOC'Y REV.* 651, 675-78 (1990).

25. Kōno, *supra* note 17, at 69. This image is somewhat controversial, in large part because of the work of J. Mark Ramseyer and his co-authors. See J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* (1993); J. MARK RAMSEYER & MINORU

A central feature of Japanese political economy was so-called convoy capitalism.<sup>26</sup> The basic idea was that entire economic sectors should move as a convoy, with leaders helping to bring up laggards. Key firms would not be allowed to go out of business, allowing economy-wide promises, including lifetime employment, to be met. In return for their role in helping out weaker firms during downturns, the leading firms received regulatory forbearance. This system, of course, is the consummate relational or insider regulatory scheme, with most communication being informal and taking the role of “administrative guidance” rather than formal legal commands.

One of the results of the economic downturn in the 1990s was a set of significant adjustments in the relationships among economic actors and the government. These were spurred, in part, by pressure from outside, particularly from the Structural Impediments Initiative (“SII”) talks with the United States in the late 1980s.<sup>27</sup> Believing that informal trade barriers were largely responsible for low market share among American firms in Japan, the United States government pushed for greater transparency, a freer flow of information, and the adoption of rules such as an administrative procedures act. Japan’s mandarins largely resisted these calls. But the economic downturn associated with the bubble economy provided new political impetus for adjustments in governance.

In particular, the brief fall of the Liberal Democratic Party in 1993 led to the passage of the Administrative Procedures Law.<sup>28</sup> This law encouraged transparency, forcing government officials either to refrain from or formalize practices of “administrative guidance.” Many believed that these formal rules regulating government activity would be merely cosmetic and would not lead to significant change.<sup>29</sup> But apparently they had a significant effect. For example, well-placed observers report that

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NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999). The thrust of this work has been to show that Japan’s bureaucrats were serving the interests of the country’s long-governing Liberal Democratic Party and did not exercise overall control over the economy. Instead their discretion was highly constrained. These political links became much clearer as Japan’s economy stumbled badly beginning in 1989. The image of bureaucratic dominance began to give way to a more nuanced view of the bureaucracy as merely one participant in policy networks.

26. See Yoshinori Shimizu, *Convoy Regulation, Bank Management, and the Financial Crisis in Japan*, in *JAPAN’S FINANCIAL CRISIS AND ITS PARALLELS TO U.S. EXPERIENCE* 57 (Ryoichi Mikitani & Adam S. Posen eds., 2000).

27. Warren Murayama, *The WTO: Domestic Regulation and the Challenge of Shaping Trade*, 37 *INT’L L.* 677 (2003).

28. Administrative Procedure Act, Law No. 88 of 1993; Tom Ginsburg, *Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 *AM. J. COMP. L.* 585, 586 (2001).

29. See *id.*

government officials stopped answering questions as to the legality of proposed activities, which in turn increased demand for private legal advice.<sup>30</sup>

Another reason that firms might have begun to turn away from government was a general decline in the reputation of the bureaucracy. Japan’s vaunted bureaucrats, who had been seen as supermen in the 1980s, had in fact presided over an economic bubble of outrageous proportions. Their steps to bring the economy out of recession were largely failures. No doubt this significantly eroded the willingness of private firms to trust government. These ties were further eroded as government began to break the implicit promises that had sustained the business-government networks for so long, particularly the convoy system. In the financial sector, for example, it was widely believed that government had made an implicit promise that firms would not be allowed to fail.<sup>31</sup> In 1997, however, the prominent securities firm Yamaichi Securities went under. This was followed a few weeks later by the failure of Tokuyō City Bank.<sup>32</sup>

In response, the Japanese government launched the so-called “Big Bang” to encourage rationalization of the banking sector.<sup>33</sup> In exchange for a bailout program, Japan’s banking, insurance, and securities sectors were significantly opened to foreign investment and ownership. The approach was a shift toward more formal and transparent regulation, and away from the “ex ante planning” model of economic policy.<sup>34</sup> A wave of mergers followed and a vigorous competition ensued.

It was widely reported that foreign banks became much more aggressive about collecting bad loans and debts in the 1990s.<sup>35</sup> Because debt collection is considered a form of civil litigation in Japan, this alone led to increased rates of litigation, and is consistent with our theory linking liberalization to litigation. In addition to the financial sector, non-financial firms invested. Total inward foreign direct investment (“FDI”) flows increased from ¥678 billion in 1997 to ¥2.1 trillion by 2001, tripling the

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30. See Atkinson, *supra* note 17.

31. See JENNIFER A. AMYX, *JAPAN’S FINANCIAL CRISIS: INSTITUTIONAL RIGIDITY AND RELUCTANT CHANGE* (2004).

32. *Id.* at 182.

33. See *id.*

34. JUSTICE SYSTEM REFORM COUNCIL, *RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL—FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY* (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

35. See, e.g., Yasuharu Nagashima & E. Anthony Zalom, *The Rise of the Large Japanese Business Law Firm and Its Prospects for the Future*, in *LAW IN JAPAN: A TURNING POINT?* 136 (Daniel H. Foote ed., 2008).

stock by 2002.<sup>36</sup> Presumably, the entry of new players into the market corresponded with significant changes in strategy.

We also expect that the entry of foreign firms led Japanese financial institutions to be more aggressive about debt collection. In short, liberalization seemed to lead to a positive increase in incentives to use formal mechanisms of dispute resolution while undermining the leverage that had underpinned firm reliance on government to resolve disputes.

Beyond entry of new players, Japan undertook some element of privatization during the period in question. Most notable was Prime Minister Junichirō Koizumi's effort to privatize the massive postal savings system so as to facilitate market allocation of capital.<sup>37</sup> Koizumi sought to transform the very basis of the postwar political economy and to change the way his political party operated.

Finally, liberalization in the legal services sector further bolstered formal methods of dispute resolution. Into the early 1990s, foreign lawyers were subject to strict regulation which limited their practice in Japan and prevented them from hiring or going into partnerships with Japanese lawyers. Partly in response to the SII talks and other forms of U.S. pressure, the law was amended in 1994 to become less restrictive. In 2003, partnerships between foreign and Japanese lawyers were finally allowed. This corresponded with a much more competitive market for legal services, and with the growth of larger corporate law firms.<sup>38</sup>

In short, Japan underwent significant regulatory changes in the 1990s that liberalized the economy. These had an increasingly observable effect, accelerating after 1998, on FDI and the entry of foreign firms. As the legal market also liberalized, we observed a sharp increase in litigation in Japan.<sup>39</sup> Our analysis here is speculative and suggestive only. Elsewhere, we demonstrate more systematically that litigation is responsive to liberalization.<sup>40</sup>

36. Ministry of Econ., Trade & Indus., Inward Foreign Direct Investment (FDI) Trends in Japan, [http://www.meti.go.jp/english/policy/index\\_FDI\\_into\\_Japan.html](http://www.meti.go.jp/english/policy/index_FDI_into_Japan.html) (follow "Inward Foreign Direct Investment (FDI) Trends in Japan" hyperlink).

37. Susan Carpenter, *Koizumi's Reform of Special Corporations*, 3 J. INT'L BUS. & L. 67, 69–70 (2004).

38. See Aronson, *supra* note 17; Nagashima & Zaloom, *supra* note 35, at 140–45.

39. Ginsburg & Hoetker, *supra* note 7, at 36–37.

40. Tom Ginsburg & Glenn Hoetker, *Liberalization and Litigation: Evidence from Japan* (unpublished manuscript, on file with authors).

### III. LIBERALIZATION AND MODERNIZATION THEORY

Our analysis is primarily institutional in character, but allows for some connection with cultural theories of litigant behavior. We see outsiders as crucial agents of litigation behavior, prone to use more formal means of resolving disputes because they are less embedded in culturally specific networks. We believe that outsiders do contribute to greater levels of litigation in a society, and that these effects increase over time, presumably because other agents copy the outsider strategy. This provides a hypothesis about cultural change with regard to litigation behavior.

In the 1950s and 1960s, modernization theory saw the emergence of universally applied, general rules of behavior as a particular feature of modernity, and as normatively desirable. Kawashima saw in Japan's relatively low litigation rates in the 1960s a residual pre-modern consciousness, implying that legal consciousness would change with time and Japan would move toward higher ("normal") rates of litigation.<sup>41</sup>

Other "height of modernization" theorists noted a decline of litigation as societies modernized. Litigation, noted Lawrence Friedman, sometimes declines with economic growth.<sup>42</sup> Friedman has argued that litigation decreases because of rising costs.<sup>43</sup>

Our argument is inconsistent with Friedman's conjecture and supports Kawashima's view. Proponents of the view that Japanese culture was anti-litigious were essentially describing an institutionally-sustained equilibrium in which incentives to litigate were suppressed. Analysts talked about or rationalized this state of affairs as a cultural aversion, and to the extent that their discourse had impact on downstream agents, sustained the low-equilibrium outcome by suppressing agents' incentives to deviate. Cultural discourse and institutional factors thus reinforced themselves in a recursive process.

As Haley and other critics of cultural theories have long argued, cultures are dynamic and change over time. By facilitating the entry of new agents, liberalization promises (or threatens) to disrupt previously stable equilibria, facilitating a shift to new equilibria. We have described such a process in Japan: a stable institutional equilibrium came under pressure as a result of economic downturn; a new political coalition

41. Kawashima, *supra* note 2, at 43.

42. Lawrence Friedman, *Litigation in Society*, 15 ANN. REV. SOC. 17, 24 (1989).

43. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. U. L. REV. 786, 801 (1967) ("[T]he tremendous expansion of business could have led to an appetite for litigation far beyond the capacities of the courts, the rising price of going to court has prevented this from happening.").

adopted liberalizing policies; and agents responded by changing behavior, producing greater levels of litigation than had previously been imaginable. This account supplements the institutional incentives story pioneered by Haley in 1978.<sup>44</sup>

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44. Haley, *supra* note 1.

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## Succession Law and Inheritance Disputes in Japanese Family Court Conciliation

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in collaboration with Akiko Taniguchi

The purpose of this paper is to present the function of conciliation<sup>1</sup> in Japan's family courts in the context of the statutory provisions and social realities in the area of succession. Succession law might seem out of place in a conference on family law. However, the sections on succession in Japan's Civil Code follow directly after those on familial relations, and they are closely interrelated; together, these are generally considered to make up "family law" as the term is used in Japan. Family law in general and succession law in particular were radically changed during the postwar period. The family life of the Japanese did not change overnight but has been in a process of gradual change, in terms both of lifestyle and of everyday people's legal perceptions. Both of these have affected the way conciliation cases are presented to the family court. While the longevity of the population has remarkably improved since the postwar period, the way people live has not completely changed for social and economic reasons. It is often observed today that one of the children, most likely the eldest son, lives with his elderly parents and his wife after their own children have grown up and left the parents' home. At the same time, people's legal consciousness has changed to a considerable degree, and they have become more assertive of what they regard as their rights. Family court conciliation has been a popular arena for legal fights among assertive heirs for a greater or more preferable portion of an estate. Inheritance disputes are normally brought to the family court conciliation in the form of a petition for partition of an estate. Both conciliators and judges consider these the most complex of the kinds of cases that can be resolved by

1. As discussed in more detail herein, conciliation in Japanese family court is a court-administered mediation procedure in which a panel of mediators, or conciliators, attempt to bring the parties to an agreement that will resolve the dispute. Conciliators typically meet with each party individually in private caucuses and act as the conduit of information between the parties. In addition to inheritance disputes, the procedure is used for cases such as divorce, child custody, and child support disputes.

conciliation. One of the reasons for such exceptional complication, of course, stems from the very nature of the dispute, which is always multi-party and, like all other family disputes, involves a highly emotional element in addition to highly complex legal questions. Another source of complexity seems to arise from the very nature of the Japanese succession law itself, as explained later herein. Statistics shows that petitions for conciliation of disputes on partition (*isan bunkatsu*) have steadily increased since the inception of the postwar system.<sup>2</sup> In the following, I shall first present an overview of the Japanese succession law in a historical perspective and the family court conciliation system in general, then proceed to examine some specific problems that are recurrent in inheritance disputes, and finally try to reach a conclusion on the role of family court conciliation today in inheritance disputes.

### Overview of Japanese Succession Law and Family Court Conciliation

#### Short History

Japanese succession law, which has been included in the Civil Code since the original Civil Code of 1898, was radically reformed after the second World War to incorporate the principles of equality of the sexes and the dignity of individuals declared in the new Constitution promulgated on November 3, 1946, and taking effect beginning May 5, 1947. Because the substantive family law and succession law in the previous Civil Code was seen to be at odds with these newly introduced constitutional principles, those provisions of the Civil Code had to be amended by the time the new Constitution came into effect.

The Japanese government under the direction of the occupation authority (GHQ) hastily undertook legislative action in order to bring the provisions of Civil Code into conformity with the Constitution, but a comprehensive amendment of the chapter for succession could not be completed by the time the new Constitution came into effect. Therefore, a law with only ten articles was provisionally adopted to change fundamental principles and came into force at the same time as the postwar Constitution. The final bill to amend the Civil Code, after being approved by GHQ, passed the Diet on December 22, 1947, as Law no. 40 of 1947, and came into force on January 1 of 1948.<sup>3</sup>

2. The number of petitions has increased as follows: It was below 1,000 in the 1940s, reached 3,000 in the 1960s, 5,000 in the 1980s, jumped to 8,000 in the 1990s, and well over 10,000 nowadays (10,317 in 2007) according to Annual Judicial Statistics published by General Secretariat of Supreme Court. Other types of cases with numerous petitions for conciliation are cases involving marital disputes and child custody. They were 80,046 combined in 2007.

3. For an account in English of the postwar family law reform generally, see Yozo Watanabe, "The Family and the Law: The Individualistic Premise and Modern Japanese Family Law," in von

Succession is one of the more complex areas in every legal system. It is closely related to the national tradition and social *moeurs*. This hasty postwar legislation, which was also very radical in its contents, has been pointed out as one of the sources of today's recurrent problems. I shall first explain the basic principles of the prewar succession law and then how it was changed, and not changed, by the postwar legislation.

#### Traditional Succession Law

The old succession law under the Civil Code of 1898 was based on the pre-1868 feudal values of the samurai class.<sup>4</sup> Its central weight was on the concept of *ie* (or *ie*), literally meaning "the house." The *ie* represented a conceptualized and highly idealized large family governed by the head of the house, quite apart from the social reality even at the time. The Civil Code of 1898 accommodated the centuries old tradition that an *ie* must by all means be continued by the eldest male child, who becomes the next head of the house. When there was no male child, the Code allowed a daughter to become the head but did not allow her to marry and leave her house, because that would terminate the house. The law also liberally permitted adoption, in accordance with the prevalent social practice, in order to preserve the house. It also institutionalized a special form of marriage in which a second or third son from another house married a woman who was the head of a house to continue her house by assuming her family name. Married women were made legally incompetent. For succession to an *ie*, even an illegitimate male child was preferred to legitimate daughters as long as he was recognized by the father.

Mehren ed., *Law in Japan: The Legal Order in a Changing Society* (1963), 364; Yasuhide Kawashima, "Americanization of Japanese Family Law, 1945-1975," *Law in Japan* 16 (1983), 54; Tamie Bryant, "Marital Dissolution in Japan: Legal Obstacles and Their Impact," *Law in Japan* 17 (1984), 73; also in French, Tomohei Taniguchi, Yasuhei Taniguchi "La révision du Code civil japonais et les conditions actuelles du mariage au Japon (1959), mise à jour," in *Etudes de Droit Japonais*, Préface de Jacques Robert et Xavier Blanc-Jouvan (Paris, 1989), 91.

4. The history of the Japanese Civil Code started with studying the French Napoleonic Code Civil of 1804. French advisor, Gustave Boissonade, drafted the first Japanese civil code in cooperation with a group of Japanese scholars. Boissonade is said to have accepted to codify the principles of Japanese traditional family and succession laws, although necessary legal technicalities had to be imported from the relevant French law. After the rejection of the Boissonade draft in 1890, a new draft which would become the 1898 Civil Code was drafted by Japanese scholars alone on the basis of the contemporary draft of the German Civil Code. They incorporated the traditional principles in the German styled Code, but because of their earlier involvement in the making of the Boissonade draft a French influence remained in the final product which is said to be still noticeable in today's succession law.

Succession under the prewar law normally meant inheritance of the status as head of the house accompanied with inheritance of the whole family patrimony. In short, the eldest son could monopolize everything, namely the status and the property. The totality of the estate owned by the deceased passed to him. Neither his siblings, male or female, nor the surviving wife of the deceased, would receive any inheritance unless a will provided otherwise, although certain legal and moral obligations to take care of the house members attached to the status as the head of house. This type of succession, that is, a succession to the head of the house, was the rule and called *katoku-sōzoku* [head of house succession], and it occupied the principal place in the prewar succession law. Head of house succession could also occur when a head of a house voluntarily "retired" from that position, called *inkyō*.

On the other hand, the prewar succession law also provided for a different type of succession that occurred when a person other than a head of the house died leaving an estate. Such cases did not involve succession of the status as the head of the house, but only inheritance of property rights. The 1898 Code had a set of special provisions applicable to this type of succession called *isan sōzoku* or estate succession. Here a set of different principles applied from those in the *katoku-sōzoku*. Namely, children of the deceased, male or female, enjoyed an equal share in the inherited property, excluding, however, the wife of the deceased. There were also a number of provisions to be applied to both types of succession, such as provisions for the acceptance and waiver of succession, the absence of heirs, wills, and legally secured portions, with some special rules for the *katoku sōzoku*. For example, in the latter type of succession, a waiver of succession was not permitted even if the debt owed by the deceased exceeded the value of the estate. In practice, most successions were *katoku sōzoku* and the *isan sōzoku* was an unimportant possibility, if at all, because a mere family member would rarely leave a sizable estate. Therefore, the jurisprudence in the area of *isan sōzoku* remained rather undeveloped throughout the prewar period.

#### Postwar Reforms

The postwar reforms of Japanese family law changed many basic features of the old system. First, the concept of *ie* as the central legal institution<sup>5</sup> was abolished and the married couple was made the maximum family unit. Accordingly, the head

5. For a detailed analysis of the postwar process of the abolition of the *ie* as a legal institution and its survival in the form of *koseki* (the family registration system), see Mikihiko Wada, "Abolition of the House (*ie*) under the Occupation—Or the Two Faces of *Koseki*: A Janus," *Law in Japan* 26 (2000), 99. The collapse of *ie* as social reality had already been pointed out in the early 1930s by leading legal scholar Sakae Wagatsuma. *Ibid.*, 108.

of the house lost importance as the symbol of the *ie*. As there was no longer an *ie* to be continued by a successor, there was no longer such a thing as *katoku-sōzoku*. Similarly, succession due to a voluntary retirement (*inkyō*) of the head of the house was abolished, and so there was no longer succession without death. Succession law now concerns itself only with the property owned by a deceased, whoever he or she is. Second, equality between men and women was realized by abolishing all discrimination against women. Married women were no longer legally incompetent and the restriction of marriage for the sake of continuation of the *ie* was wiped out. And with the reforms surviving wives became entitled to a one-third share of the estates of their deceased husbands.<sup>6</sup>

Although these were important substantive changes, the postwar succession law was not a completely new product. The legal mechanism of the new succession law was borrowed from that of the pre-existing system of property succession (*isan sōzoku*) which had applied when a person other than a head of a house died. A quick amendment was only possible by the postwar legislature deleting the provisions for the *katoku sōzoku* and making the provisions for the *isan sōzoku* generally applicable with some minor but important modifications, such as a change in the status of spouse as an heir, in order to make the "new" succession law compatible with the new constitutional mandates. Otherwise, most of the features of the prewar succession law were preserved and the jurisprudence established by the courts under the old system still enjoys a degree of precedential value. Moreover, interestingly enough, the basic structure of *isan sōzoku* adopted by the 1898 Code was basically borrowed from the French law of the nineteenth century.<sup>7</sup>

While the succession law was changed, the traditional system of adoption was preserved in the family law part of the postwar Civil Code. Adoption combined with the *ie* system had long been regarded as an important legal as well as social institution which supported the maintenance of the traditional family system. For centuries, adoption was used as an instrument for perpetuating an *ie* by obtaining a good successor from outside. When a couple did not have a male child, a minor or adult male, often chosen from relatives, was adopted. The postwar reform did not change the freedom of adoption under the old law. The only requirement under the current law for an adoption is that the adopting parent must be older than the person adopted—but this can be by as little as a year or even a month.<sup>8</sup> Under this

6. The surviving spouse's share was later increased to one half in 1981.

7. See *supra* note 4.

8. Civil Code, art. 793. Adopted person becomes a legal heir of the adopting parent, but the original parents must be shown in the family registry (*koseki*) and the adoptee continues to be a legal heir of the original parent. Adoption of an infant in anonymity was first introduced to the Japanese

liberal policy the adoption of an adult is still widely practiced when a couple does not have a child, and this can add further complication to an already complicated inheritance dispute.

#### *Current Succession Regime*

The main features of the new postwar succession regime are as follows (The statutory shares of various legal heirs were changed in 1981 to increase the share of the spouse, which almost always means the surviving wife. The post-1981 portions are in parentheses below).

Unless otherwise designated by a will, the property belonging to a deceased person at the time of the death "automatically" passes to the legal heirs in the following proportion:

- i. In the most typical situation where the spouse and children are surviving, the spouse gets one third (since 1981, one half) and the children get two third (since 1981, one half), with shares of each child being equal.
- ii. Where the spouse and one or both parents are surviving, the spouse gets one half (since 1981, two thirds) and the parent or parents get the other half (since 1981, one third), with shares of each parent being equal.
- iii. Where the spouse and one or more siblings are surviving, the spouse gets two thirds (since 1981, three fourths) and the siblings get one third (since 1981 one fourth), with shares of each sibling being equal.
- iv. Where only the parents, spouse, or siblings is surviving, everything goes to him, her, or them. If none are surviving, no one can inherit even if related to the deceased by blood, except for substitute succession as explained below in vi. Then, the whole estate goes to the national treasury.<sup>9</sup>
- v. If both legitimate children and recognized illegitimate children are surviving, the latter can get only half of what the former gets.<sup>10</sup> And a sibling sharing only one parent receives only half the portion of a sibling by both parents.

family law in 1987, but as of the present it is not widely practiced at all. Civil Code, art. 817-2 et seq. For centuries of Japanese history, adoption helped people to move upward across social classes and statuses.

9. However, by an amendment of 1962, the family court may now decide to give all or a part of the estate to a person who lived together with the deceased and took care of the latter (*tokubetsu enkashu* or specially related person).

10. The constitutionality of this provision under Const. art. 14 (the equality under the law clause) has been upheld by a controversial decision of the Supreme Court. *Hanako v. Haruko*, 49 *Minshū* 1789 (Sup. Ct., July 5, 1995).

vi. Substitute succession occurs when a successor, either a child or a sibling of the deceased, is already dead but is survived by his or her own children. Thus, grandchildren, and even great grandchildren if the eligible grandchild is dead, can receive what their parent could have received if still living. If no such direct descendant exists, nephews and nieces can receive what their parent (a sibling of the deceased) could have received. This does not occur, however, in favor of surviving children of the spouse when the children were born from a previous marriage and not adopted by the deceased husband.

vii. All or part of an estate can be disposed of as its owner likes by a will as long as it does not violate the legally secured portions (*iryūbun*) of heirs. The secured portion is one half of the statutory share for the spouse and children. It is one third for the parent(s), and there is none for siblings.

viii. If one of the legal heirs has received a special pecuniary benefit as a gift by a will or on the occasion of marriage, adoption, education, etc., the amount of such a benefit must be added to the amount of the existing estate in order to calculate the amounts of the shares of each heir, including the beneficiary, and then the amount of the benefit is subtracted from the share of the beneficiary.

ix. If an heir has contributed to the augmentation of the estate, the augmented amount (*kiyobun*) belongs to the contributor heir. Therefore, the shares of other heirs must be calculated on the basis of the amount of estate less such contribution. This system was introduced by the 1980 amendment to the Civil Code as explained later.

Thus, the surviving spouse is always a legal heir and the maximum scope of heirs may extend in any event only to the great grand child or to the nephew or niece. Postwar Japanese society was not immediately ready to accept the new succession regime. Most citizens took the traditional primogeniture for granted. Especially in rural communities the new regime implied dismemberment of farming land. De facto primogeniture was legally achieved by younger children voluntarily waiving their statutory shares. Gradually, however, the population became educated in the principles of the new succession law. As a result, heirs became increasingly assertive of their entitlements under the law, giving rise to inheritance disputes. These were disputes arising from a fundamental mismatch between legal norms and prevalent societal norms.

#### *Creation of Family Courts and the Conciliation System*

Another postwar innovation was the creation of the family courts after the model of family courts in American state court systems. The family courts were given basically two kinds of jurisdiction, one for the protection and correction of delinquent

juveniles and the other for dealing with family disputes. The latter jurisdiction includes two procedural systems: the conciliation of family disputes, and the adjudicatory disposition of certain family matters as designated in the Civil Code relating to the family and succession laws, ranging from declaration of incompetency and appointment of a guardian to the disqualification of a legal heir due to misconduct. Perhaps curiously, the principal family law cases such as divorce, recognition of illegitimate children, and determination of paternity, were retained in the jurisdiction of the district courts based on a theory of distinction between "contentious" and "non-contentious" cases.<sup>11</sup> In short, the family court was given only jurisdiction for adjudication of the so-called "non-contentious" cases under the Domestic Relations Adjudication Law (*Kaji shimpan-hō*). This jurisdictional limitation was finally lifted in 2003 and now these "contentious" family disputes, such as divorce cases, have come under the jurisdiction of the family court and are tried under the general principles laid down by the Code of Civil Procedure as modified by the Domestic Relations Litigation Law (*Jinji soshō-hō*) of 2003.<sup>12</sup>

The first task of family court conciliation when officially established in 1947 was to deal with the conflicts that were arising as a result of legal norms that were mismatched to prevalent social norms. Appointed conciliators were generally senior community members and represented the dominant social ideology of their time and place. An important task of the family court conciliators at this period was to find bridges between the traditional social norms and the newly introduced legal idealism by securing agreements between disputing parties. However, a survey conducted by a group of academics in the 1950s revealed that the conciliators at that period in fact tended to impose traditional values on dissident claimants

11. Distinction between the contentious and non-contentious jurisdiction originates in civil law (cf. German *Freiwillige Gerichtsbarkeit*, French *jurisdiction volontaire* or *graceuse*, etc.). Typically, a non-contentious case takes no adversarial form, such as petition for appointment of a guardian. But many of them are in fact adversarial, dealing with a serious conflict of interest. There have been a series of decisions by the Supreme Court on the constitutionality of various "non-contentious" cases. In short, the Supreme Court has held that a matter to be decided by a discretionary determination by the court may be treated as "non-contentious" and made subject to a summary and informal procedure under the Non-contentious Case Procedure Law. For discussion of this issue, see Yasuhei Taniguchi, "Constitutional Guarantees in the Civil Procedure of Japan," in Mauro Cappelletti and Denis Talon, eds., *Fundamental Guarantees of the Parties in Civil Litigation* (Milan, 1973), 567.

12. In this type of litigation in which the consideration of the public policy must prevail, certain restriction is imposed on the parties' freedom to make an admission and to settle the case. See Yasuhei Taniguchi, Pauline Reich and Hiroko Miyake, eds., Hattori-Henderson, *Civil Procedure in Japan*, 2nd ed., (2002, written before the current law but no substantial change has been brought in this respect) §9.03.

by suppressing their legal rights under the new family and succession law.<sup>13</sup> Such criticism later led to the introduction of mandatory retirement age of seventy for conciliators.

#### *Conciliation in Family Court*

A short explanation of the basic structure of the family court conciliation would be appropriate here. Family court conciliation is conducted by a three-member conciliation panel consisting of a family court judge and two conciliators (one male and one female), who serve on a part-time basis. Most family court conciliators are not legal professionals. A majority of female conciliators are housewives. Male conciliators are retired businessmen, retired court clerks, etc. Male or female professionals, such as lawyers, tax attorneys, or surveyors are also recruited and assigned to cases that require their particular expertise. Family court judges are just normal judges who happen to be assigned to one of the fifty family courts in the country. Conciliators are appointed by the Supreme Court upon recommendation by the chief judge of each family court. Two conciliators meet the parties without presence of the judge several times at appropriate interval (about a month) until an agreement is reached or found impossible. The judge, who is the presiding member of the panel, participates in the sessions only at important junctures, although the conciliators give reports of progress and ask the judge's advice throughout the process. According to statistics, the average success rate of family conciliation has been between 40% and 50%, but the rate varies greatly among different kinds of dispute. The success rate of disputes arising from the partition of a decedent estate in 2005 was 61.2%.

The family division of the family court, separate from the juvenile division, deals with three kinds of cases, (1) formal litigation over domestic matters such as divorce, (2) adjudication of so-called non-contentious matters, as mentioned above, and (3) family conciliation. The latter two matters are regulated by a special statute according to which a failed conciliation is prerequisite (mandatory preliminary conciliation) to bringing an action, such as a divorce action, in the family court under Domestic Relations Litigation Law of 2003. Inheritance disputes normally arise in the form of a dispute over the way an estate should be divided among the claimant heirs.

13. Dan F. Henderson, *Conciliation and Japanese Law* (Seattle, 1965), II, 223. "Domestic relations conciliation proceedings are a substantial part of the total *chōtei* system under the post-World War II statutes." *Ibid.*, 208. Here Prof. Henderson deals with the problems of conciliation under the modern Japanese legal system after having presented a detailed historical study of the conciliation under the Tokugawa regime in Volume I.

Article 907(1) of Civil Code provides that a partition of a decedent estate can be achieved by a collective agreement by the heirs. In the event of non-agreement, however, art. 907(2) provides that the family court decides upon a petition how to divide the estate among the heirs. According to the Domestic Relations Adjudication Law a petition for partition is treated as a non-contentious matter for adjudication (*shimpan*). The same law further provides that the family court receiving such a petition may refer the matter to conciliation. But a party to an inheritance dispute is not prevented from resorting to conciliation in the first place. Thus, a dispute about the partition of decedent estate reaches the conciliation either directly by an application for conciliation filed by an interested party or by a referral from a judge.

When an agreement is not reached in conciliation, the judge member of the conciliation panel terminates the conciliation proceedings and renders a decision after holding a further hearing if necessary. Although the matter is highly contentious, this jurisdiction is ironically defined as "non-contentious," the rationale being, according to the Supreme Court, that the judge is not bound by any specific rules of substantive law as to how to divide the assets among the heirs except for the respective percentage share of each heir fixed by the Civil Code. Although the law specifically mentions as the factors to be considered "the nature of the property included in the estate, the age, profession, health condition, life conditions of each heir and all other circumstances," the Court considers that the judge is given the freedom to exercise a wide discretion in order to create an adequate legal relationship between or among the parties.<sup>14</sup>

Conciliation proceedings are confidential and the terms of successful conciliations are not published. However, some adjudications by the family court in non-contentious matters, such as partition of a decedent estate, are published in the monthly publication by the family court. When adjudications are published they may be followed by other courts and can enjoy certain precedential value.

An example of judicial doctrinal creativity was seen in the recognition of a "contribution" by an heir. One of the recurring problems arising from the new succession law was about how to treat a contribution made by one of the heirs to enrichment of the estate. Without any explicit provision in the Civil Code, the issue was solved by innovative family court judges and it eventually led to an amendment of the Civil Code. As mentioned above, the new succession law adopted the principle of equality of shares of the inheritance among the children. In reality, however, the eldest son tended to live with the parents and work together for the family business,

for example. A fortune in the name of the deceased may have in fact been built by virtue of the contribution of the eldest son living and working together. It was felt unfair to divide the estate equally among the children in disregard of the contribution by the eldest son. Conciliators usually successfully persuaded junior children to give a greater share to such an eldest son. When no agreement is obtained and conciliation fails, the judge must decide how to divide the estate. There are several reported cases where the family court judges gave a greater share to the eldest son or any other heir who had contributed to augmentation of the estate. This was controversial because the judge was given only the power to divide an estate according to the legally fixed percentage shares of respective heirs and no power to alter such percentages belonged to the judge.

In 1980, however, Civil Code was amended to solve this problem legislatively. Art. 904-2 was added to provide that the total amount of the estate to be divided is determined first by subtracting from the value of the existing estate the amount of contribution made by an heir and such amount is added to the share of the contributor. The amount of contribution can be negotiated, and if no agreement is reached the family court decides it as a non-contentious matter. Contribution issues often arise in conciliation for partition of an estate. An important task of the conciliators is to try to induce an agreement on these issues.

This is just one example of the recurring issues in the family court conciliation of inheritance disputes. In the following, some of these problems will be explored in the context of social changes and relevant legal rules.

### Recurring Issues in Partition Conciliation Today

#### *Aging Population as Cause of Inheritance Disputes*

Japanese people now live long, among the longest in the world. This welcome phenomenon has given rise to a host of problems which did exist at the time of legislation but were not very apparent.<sup>15</sup> In the following, some of the problems or sources of problems engendered by this demographic change will be pointed out.

Successions today tend to take place when a person dies at a very old age and his or her children are also old, very often already retired. These children have often been separate for a long time from each other and established their respective life styles and financial conditions. There may have developed a great difference among them in physical and psychological closeness to the deceased parent. It is still likely, however, that one of the children, most likely the eldest son, has been living with

14. *Morimoto v. Morimoto*, 20 *Minshū* 360 (Sup. Ct., March 2, 1966).

15. See generally, Misa Izuwara, "Care and Inheritance: Japanese and English Perspectives on the 'Generational Contract,'" *Aging and Society* 22 (2002), 61.

the parents and his wife has been mainly in charge of taking care of her elderly parents in-law. It is even possible that the eldest son is already dead and his widow is alone de facto responsible for taking care of her in-laws. Without a will, the succession law gives an equal share to each child and nothing to their spouses. If one of the children is already dead, his wife is not entitled to a substituted succession, although his children are. But those children may be grown adults and not in good terms with the mother. Even worse is the situation where she has children out of her earlier marriage with someone else. Neither she nor her children will receive any inheritance, even though she has lived together with and taken care of the deceased. A will can be written in order to change this result, but, as discussed further below, the law of wills is not without problems. It suffices here to mention that old age makes it difficult to write a will properly.

In addition, since both men and women live long, two successions often occur one after another within a relatively short interval. Normally a man dies first and his wife inherits one half of the estate. But being already aged she is not expected to survive for a long time. Anticipating this, and because the family life does not change much as long as she is living, often no action is taken for partition of the decedent's estate until the widow finally dies. But the time period before she dies is unpredictable. If she lives for many more years, the situation may change in the meantime or some sort of unauthorized action may intervene to complicate the situation. For example, the eldest son might sell a piece of property that should belong to the father's estate before the mother dies. Or, the house in which the mother and the eldest son's family were living has been rebuilt or expanded at the eldest son's expenses. If this has happened, the succession following the mother's death will become very complicated with "double succession" problems.

Generally, the deteriorating mental abilities of elderly persons creates opportunities for a variety of fraud or quasi-fraudulent activities victimizing them. When such a dubious action has been taken or is suspected to have been taken by one of the legal heirs, it will generate and aggravate a partition dispute once the elderly is dead. In 1999, the Civil Code was amended to better protect those persons who are not yet incompetent or even quasi-incompetent by creating the system of "assistance" in addition to the pre-existing systems of incompetency and quasi-incompetency.<sup>16</sup> At the same time, a separate statute was enacted by which a guardianship can be contractually created in anticipation of a mental disablement.<sup>17</sup> However, these legislations do not seem to have any remarkable result yet in reducing the

16. Civil Code, art. 16 (assistance) in addition to the pre-existing incompetency (art. 7) and quasi-incompetency (art. 12).

17. Law concerning Voluntary Guardianship Contract of 1999.

number of frauds perpetrated against the elderly, let alone reducing the intensity of inheritance disputes.

#### *Problems of the Will*

Japanese law recognizes the freedom to dispose of one's own property through a will as long as it does not violate the legal heirs' respective secured portions (generally one half of the statutory share). Therefore, it would seem that many succession disputes could be avoided by writing an appropriate will in advance of one's death. However, during the time since the inception of the Civil Code in the late nineteenth century until recently, wills have been rarely written in Japan. Under the prewar system of *katoku sōzoku* as the predominant form of succession, there was little incentive to write a will unless some extraordinary circumstance required it. The law and the social reality also coincided in most cases. The eldest son's family lived with his parents and eventually inherited the whole estate. The surviving mother did not get any share; therefore no successive inheritance occurred when she died later. When a person who was not the head of house died, the situation could be more complicated. But a succession of a non-head was unimportant, as pointed out above.

When a host of problems started to occur under the postwar succession law, academics and practitioners recommended writing a will. The most secure form of a will is by a notarized document. Notaries also took this opportunity to expand their service. Such efforts to raise awareness did not have an immediate effect, mainly because of a general reluctance to write a will and partly because of lack of a real necessity to do so. But people came to consider this possibility more seriously as personal wealth grew in the 1970s and 80s. By that time, succession disputes had also reached a level of popular recognition. Litigation involving the validity and effect of a will increased, resulting in some important decisions by the Supreme Court.

One of the most important decisions by the Supreme Court was about the way the language of a will can be phrased in order to give a certain piece of real property to one of the legal heirs. The doctrine adopted by the Court can be better understood in context of the basic principles of Japanese succession law. Under Japanese succession law, property rights automatically pass to the heirs at the moment of death without any process of liquidation. However, an estate normally consists of a variety of property, such as real property, personal property, bank deposits, shares of stock, cash, etc. When several heirs jointly inherit an estate, this automatic passing of the rights occurs only in an abstract level.<sup>18</sup> Each heir can acquire the

18. Civil Code, art. 896.

title to a specific piece or pieces of property only through a process of partition of the estate.<sup>19</sup> Until that happens, the whole estate is subject to co-ownership by all the heirs.<sup>20</sup> When a partition by an agreement cannot be achieved, the family court will decide, on petition by an heir, how to partition the estate after considering all circumstances including the nature of the properties included in the estate, the age, occupation, physical condition of each heir, etc.<sup>21</sup> As mentioned before, this is one of the so-called non-contentious cases provided for in the Domestic Relations Adjudication Law.

The law allows a will to determine the way the estate is to be partitioned.<sup>22</sup> A will becomes effective as soon as its writer dies. It was argued that, when this is combined with the doctrine of automatic passing of right, the title to a specific piece of property could pass automatically to a particular heir as designated by a will. On the basis of this theory, certain innovative notaries initiated a practice of dressing up a will by using the following phraseology, "I hereby make [specific piece of real property] to be inherited by [a particular heir]." The question arose about whether the designated heir alone may apply for registration of the specified real property in his or her name with the real property registry, a government office within the Ministry of Justice. Normally, such registration can be obtained only by a joint application of all the heirs on the basis of an agreed plan of partition. The Supreme Court has answered this question affirmatively. It was held that the heir is allowed to register the title by a single application as soon as the testator is dead because the designated heir has already obtained the title to the piece of property without any process of partition.<sup>23</sup>

This Supreme Court decision met a mixed reception. It was welcome as expediting the process of partition by eliminating certain pieces of property from the estate to be partitioned, thereby reducing the complexity of partition. It has also been criticized for several reasons. Because the application of this jurisprudence is not limited to a notarized will, a privately written will can also enjoy the same treatment. A real property registration then could be had too easily without establishing the substantive validity of the will. This would unduly shift the burden to dispute

19. *Ibid.* art. 909.

20. *Ibid.* art. 898.

21. *Ibid.* art. 905.

22. *Ibid.* art. 908.

23. *Kamide v. Shimada*, 45 *Minshū* 477 (Sup. Ct., April 19, 1990). The same purpose could have been attained by making a will for a bequest of specific piece of real property. It is said that the practice was motivated for saving the real property registration fee. This fee, which is prorated to value of the property to be registered, was set much lower for succession (0.06%, now 0.04%) than for bequest (0.25%, now 0.20%). Today, the rates are lower, but the practice persists.

the validity onto other heirs. The validity of wills is in fact often disputed in conciliations. A privately written will must be certified as such by the family court. But the certification tends to be a mere formality. The court is not given the power to determine the substantive validity of a will presented before it for certification. It is not the same thing as the Common Law probate proceedings.

Another problem may occur when such a will violates other heirs' secured portions. Once a registration is obtained for a piece of real property, only a formal lawsuit can undo it unless the beneficiary of such a will voluntarily admits the violation and cooperates to undo it. Normally the beneficiary does not, and argues, for example, that he or she is entitled to keep the already registered property either because the original share is greater than the statutory share due to his or her "contribution" to the estate or because the claimant earlier received a "special benefit" which makes the legal share of the claimant small enough not to be violated by the will.

An inherent danger of this easy practice has also been pointed out in view of a possibility that several conflicting wills can be written successively and their effect can be disputed later while a registration has been completed on the basis of one of them. A *fait accompli* has its own strength and may invite complicated litigation.<sup>24</sup> This kind of problem is often associated with the weakened mental condition of an elderly parent. He or she, having mentally and physically weakened, tends to want to be nice to all children, perhaps expecting a nicer treatment from them. He or she may write several different wills in response to the demands of each child. The validity of the will must ultimately be determined through a lengthy formal declaratory action.

For all these reasons, critics of immediate property recording based on wills argue that even if such a will exists a formal partition process should take place and a registration should be obtained only on the basis of a finalized partition plan achieved either by an agreement of all concerned reached out of court or in the Family Court conciliation, or by a decision of the Family Court. I personally consider the critics' view more persuasive.

24. *Totoki v. Tōa Seiki Kōgyō K.K.*, 796 *Hanrei Taimuzu* 81 (Supreme Court Sept. 12, 1990) presents the kind of problem that may arise. In this case, four wills existed of which the fourth was notarized the day before the death. That last will, which revoked the third will, which had been written six years before, was declared null and void by the court due to the mental incompetence of the testator. The Supreme Court upheld the registered title on the basis of the revived early will.

*Dispute on Custody of Religious Items and Ancestral Documents*

Under the prewar *katoku sōzoku*, the Buddhist or Shintoist family altar, family tomb and genealogical documents were important items to be kept by the head of house although they normally did not have any pecuniary value. Because these items can not and should not be partitioned among the heirs, the law provides that "ownership of genealogical records, of utensils of religious rites, and of tombs and burial grounds passes to the person who, according to custom, is to preside over the rites for the ancestors" unless the deceased has designated such a person. According to the traditional custom, such a person is definitely the eldest son. A change in lifestyles has made the selection of such a person difficult. In the old days, every house had a family altar (mostly Buddhist). Today, there is no place for such a thing in a western style urban apartment. Succession to these items means only a burden, but they are difficult to throw away. This issue does not normally cause a serious problem in the partition of a decedent estate but sometimes comes up due to differing conceptions of the importance of these items and invites an emotional fight.

## Resolution of Inheritance Disputes

*Issues in Conciliation of Inheritance Disputes*

Conciliation of a partition dispute, properly speaking, only aims at dividing an estate among the eligible heirs according to the legally prescribed shares of each heir. This sounds straightforward, but in fact this alone already is not an easy task. If the wife and two children are surviving, the statutory shares are one half for the wife and one fourth for each child. If the estate consists only of a house where the widow is still living, it is not possible to divide the house. There are several ways to realize a partition. The simplest method would be for the three heirs to jointly sell the house and divide the proceeds. The widow may buy or rent a house or an apartment with a one-half portion of the proceeds. This is often difficult to achieve because the widow has a strong emotional attachment to the house. In that case, the house can be registered as a co-owned property in respective shares. This is a perfectly legitimate way of partition. If one of the children wants to own the house, he or she could achieve this by paying a proportionate price to the other heirs. There is a great variety of options available, but the preferences of heirs can differ and collide with each other, resulting in serious disputes. Conciliators try to lead the parties to a plan acceptable to all.

This is already difficult to achieve, but in fact is still the simpler type of case. Yet an additional layer of complexity is added when there are disputes about the scope of the estate, scope of heirs and ultimate percentage share of each heir, and in reality these substantive points are often disputed in conciliation for partition.

Unless these substantive issues are somehow resolved, no partition can be attained. How much the deceased person really owned is sometimes difficult to find. What is presented by those heirs who were close to the deceased can be disputed by other heirs who insist that there must be something more and those close people are hiding important assets. Sometimes evaluation of certain property contained in an estate is difficult. If the owner of a small family company dies, for example, the value of the shares in the company must be determined, but this is very difficult because there is no objective market price for such shares. The scope of heirs is sometimes disputed by saying, for example, that an alleged heir is not a real child although registered as such. More frequent is a dispute about the ultimate share of each heir which must be calculated through a complicated process taking into account received benefits, contributions to the estate, the effect of a will, the effect of claims for secured portions, and so on.

These issues can be settled by an agreement of everyone concerned at least for the purpose of partition of an estate. In theory, however, some issues cannot be finally settled by an agreement. Whether a person is a real child or not is a matter of public policy. Even if the person is treated as a child by agreement and took part in the partition, the issue may be reopened later by instituting a declaratory action to the contrary effect. Most issues can be legally settled by an agreement. But if an agreement is not reached, the issue must be resolved either through a formal litigation or through a non-contentious judicial decision to be rendered by the family court judge depending on the kind of problem at issue. For example, the extent of contribution can be agreed upon but failing an agreement the family court judge will determine it.<sup>25</sup> To the contrary, an issue whether a particular piece of property belongs to the estate or to somebody else can only be finally settled through litigation between the heirs jointly and the claimant. Even if such property is given to an heir as a result of partition, the question can be reopened if the real owner wants to reclaim it.

*Methodology of Conciliation*

Logically speaking, all these preliminary issues must be settled before the conciliation panel can deal with the core task of partition itself. These preliminary issues are theoretically discrete from the question of how to partition an estate, the scope of which can become clear only after these preliminary issues are cleared. In reality, however, these issues are dealt with together and mingle with the issue of partition itself. These preliminary issues affect the final share of each heir and, therefore, each heir may take a different approach to the partition. For example, if the share of an

25. Civil Code, art. 904-2 paras. (1)-(2).

heir becomes very small because he or she has agreed to resolve a certain preliminary issue in certain way, the partition can be easily achieved by paying off a small amount of cash to him/her. Such give-and-take may take place in the process of conciliation.

The judge who is the chairperson of the conciliation panel may play an important role in persuading the parties. If the parties do not come to an agreement, the judge will decide all these preliminary issues as well as the partition itself. This is normally the same judge who was the chairperson of the conciliation panel, albeit acting in a different capacity, namely as the adjudicator in a non-contentious matter. According to the Supreme Court, an issue of substantive rights ("contentious matter" differentiated from the "non-contentious matter") may be passed upon as a premise in non-contentious proceedings without any binding effect. Therefore, the chairperson's legal view has a considerable influence although his disposition of preliminary substantive law questions (such as scope of an estate and scope of heirs) is not *res judicata*.<sup>26</sup>

Family court investigators may also play an important role in the conciliation process. One of the characteristics of the family court is that it is equipped with staff called family court investigators (*chōsakan*), who have background in fields such as sociology, psychology, criminology, and psychiatry. They play an important role in assisting judges in family as well as juvenile cases. Family conciliators also benefit from their service. They can go see the condition of the house or land to be partitioned and report back to the panel, for example. If a party appears weak-minded, an expert investigator may take appropriate actions to assist such a person.

Conciliation panels normally meet the parties separately, called caucusing. This method could be criticized as unfair because a party is heard in absence of other and opposing parties. If conciliation is unsuccessful, then the chairperson judge will decide the matter on the basis of the information gathered during conciliation. However, such criticism is almost unheard of in Japan. There has been an experiment by an innovative family court judge to conduct conciliation with all parties always in presence. Judge Igaki, then in the Kishiwada Branch of Osaka Family Court, reported that the success rate was higher than when each party was heard separately. Apparently his experiment did not include partition disputes, but his analysis was that a face-to-face conversation between parties who had not talked with each other for a long time must be useful to foster mutual understanding,

26. *Morimoto v. Morimoto*, supra note 16, deciding that these preliminary substantive law issues decided as premises in a non-contentious proceedings for the partition can be re-litigated later in a formal action (with one Justice dissenting on this point).

facilitating conciliation. It may be so in partition cases as well, but the practice does not seem to have gained any general support.

### Conclusion

It is certainly not easy to reach any conclusion from a cursory analysis as presented here. In my view, however, a fundamental problem exists in the way the Japanese succession law is constructed. As explained above, it is based on the theory that the property right passes to the heirs automatically at the time of death in accordance with the proportions prescribed by law. This is, however, an unrealistic approach. As discussed above, the matter is not so simple. This is like the bankruptcy in which various conflicting interests are examined and adjusted so that each interest holder eventually can receive his or her proper share in an estate. Without such a systematic liquidation process administered by some responsible person, a proper partition is difficult. When a will is written, an administrator of the will must be named in the will and, if not, one must be appointed by the family court. But the independence of an administrator is not guaranteed and its power is often disputed. As a matter of practice, a systematic administration of an estate may entail a high cost and is not worth doing unless a sizable estate exists. It is said that the world legal systems are divided into two camps in this respect, namely the system of automatic passing of title in civil law countries and the system of liquidation in common law countries. The Japanese system is not unique, but rather is shared by many other civil law countries. What is being done in other civil law countries to solve similar problems must be studied. But my tentative conclusion is that in Japan conciliation plays the role, albeit imperfectly, of an administrator for the liquidation of the decedent estate.

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## Promotion of Workplace Gender Equality and the Impact of Free Market Principles in Japan

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### Abstract

*This paper discusses whether promotion of workplace gender equality in accordance with the United Nations Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and promotion of free trade competition are compatible in Japan. CEDAW is one of the conventions on fundamental international human rights, whereas free trade competition is a fundamental principle of international economic law. While it is undisputable that both are important international norms, can we truly comply with these norms simultaneously in the same depth? In order to answer this question, this paper explores the issue from the viewpoint of CEDAW. I review how CEDAW has been implemented domestically; how the Japanese labour market has been liberalized reflecting the principle of free trade, and how this liberalization of labour market has given the impact of workplace gender equality. The year of 1985, when Japanese government ratified CEDAW, was the first step for Japanese female workers to achieve equal working conditions with male workers. The government implemented "the Equal Employment Opportunity Act" for the first time, and discrimination against women in private employment was prohibited. While laws and regulations to promote female workers' status have increased since 1985,*

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*the stream of deregulation at the labour market seems to have a significant impact on employment of female workers. As a tentative conclusion for this paper, I argue that there is a gap between aspiration and reality: while compliance with CEDAW in the workplace and promotion of free trade are theoretically compatible, in reality promotion of free trade has had a negative impact on the promotion of workplace gender equality in Japan.*

### Introduction

In this paper I discuss whether promotion of workplace gender equality in accordance with the United Nations (UN) Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and promotion of free trade competition are compatible in Japan. CEDAW is one of the conventions on fundamental international human rights, whereas free trade competition is a fundamental principle of international economic law. While it is undisputable that both are important international norms, can we truly comply with these norms simultaneously in the same depth?

In order to answer this question, this paper explores the issue from the viewpoint of CEDAW. I conducted six pilot interviews with a government agency, the corporate personnel of commercial firms, a non-governmental organization (NGO) working on improvement of the status of women, and a journalist working on this issue; as well as a literature review. In the conclusions offered to this complex question in this piece, I argue that there is a gap between aspiration and reality: while compliance with CEDAW in the workplace and promotion of free trade are theoretically compatible, in reality promotion of free

trade has had a negative impact on promotion of workplace gender equality in Japan.

## Domestic Implementation of CEDAW

### Ratification of CEDAW by the Japanese Government and its Implementation in the Workplace from 1985-1999.

The UN General Assembly adopted the CEDAW in 1979 for the purpose of promoting the equality of rights for women, which is a basic principle of the United Nations (UNDP, 1999). Upon ratification by twenty Member States, the Convention entered into force in 1981. Japan ratified the CEDAW in 1985 without reservations. As a State Party to CEDAW, Japan is legally obliged to “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... (f) to take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*” (CEDAW, 1979, art. 2, emphasis added). Namely, the Convention obliges state parties to eliminate discrimination against women not only by public agencies but also by private individuals, such as corporate employers.

In order to implement CEDAW domestically, the Japanese government took various measures. In particular, with respect to promotion of gender equality in the workplace, the government took several legislative actions between 1985 and 1999 (Gender Equality Bureau, 2011a, p. 58). In 1985, the government enacted the Equal Employment Opportunity Act (EEOA) (*Koyō no bun'ya ni okeru danjo no kintō na kikai oyobi taigū no kakuhotō ni kansuru hōritsu*) to remedy the discrimination against women in private

employment. This Act was the first Japanese law to prohibit sexual discrimination in private employment. EEOA allowed women to compete with men for career track positions with opportunities for promotion. EEOA also prohibited employers from posting help-wanted advertisements segregated into male and female categories, except when such advertisements did not limit the employment opportunities of women. However, EEOA was not so effective in remedying workplace discrimination against women in reality for the following reasons: (1) EEOA did not provide any sanctions and relied on employers' voluntary efforts; (2) different treatment of men and women in employment such as “women only” was not prohibited on the ground that it did not limit the employment opportunity of women; and (3) an employer's consent was required to initiate mediation to solve labour disputes under the scheme of EEOA.

Later, in 1997, EEOA was largely reformed to strengthen prohibitions on discrimination against women mainly by making the following revisions: (1) different treatment of women itself became illegal discrimination; (2) equal treatment of women and men in employment and promotion became mandatory as opposed to voluntary; (3) employees were given the ability to initiate labour dispute mediation under the scheme of EEOA without the consent of the employer; (4) the government had the power to disclose the names of vicious employers as a sanction; (5) the government began supporting employers who adopted positive actions to improve the status of women; and (6) the revised EEOA imposed a new obligation on employers to pay due consideration to prevent sexual harassment at the workplace (Aizawa, 2005, p. 68).

In 1991, the government enacted the Child Care Leave Act (*Ikuji kyūgyōtō ni kansuru hōritsu*), triggered by the so-called “1.57

shock" – the average birthrate in Japan reported in 1990. This Act granted employees who had a child under one year old the legal right to take childcare leave. It also obliged employers to take necessary measures to enable their employees to take care of their children without leaving the workplace, such as a system of shorter working hours. The Act was reformed and renamed the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (*Ikuji kyūgyō, kaigo kyūgyōtō ikuji mataha kazokukaigo o okonau rōdōsha no fukushi ni kansuru hōritsu*) in 1995 to grant employees the right to take leave when the employee has to take care of one of his or her family members (not necessarily a child under one year old).

The government also adopted the "New National Action Plan for the Year 2000" (*seireki 2000 nen ni mukete no shin kokunai kōdō keikaku*) in 1987 for the first time and revised it in 1991, aiming to achieve a "gender-equal society." In the next year, the government appointed a Minister of Women Problems (*fujin mondai tantō daijin*) for the first time, and the Office for Gender Equality and the Headquarters for the Promotion of Gender Equality were established in 1994. In 1997, the Council for Gender Equality was legally established in the General Administration Office of the Cabinet and, based on its deliberations, the Basic Act for Gender-Equal Society (*danjo kyōdō sankaku kihonhō*) (hereinafter Basic Act) was finally enacted in 1999.

The Basic Act is a "basic law (*kihon hō*)"<sup>1</sup> to declare the basic policy to promote a gender-equal society. Article 1 provides the purpose of this Act as follows:

<sup>1</sup> This type of laws regulates the major important fields of national policy. Its characteristic is that these laws are recognized as merely a program of

In consideration of the urgency of realizing an affluent and dynamic society in which the human rights of both women and men are respected and which can respond to changes in socioeconomic circumstances, the purpose of this law is to comprehensively and systematically promote formation of a Gender-equal Society by laying out the basic principles in regard to formation of such a society, clarifying the responsibilities of the State and local governments and citizens, and also stipulating provisions to form the basis of policies related to promotion of formation of a Gender-equal Society.

The Basic Act stipulates five basic principles in building a gender-equal society (Articles 3-7): (1) respect for human rights of men and women; (2) due consideration for gender neutrality in the social system and customs; (3) equal participation of men and women in policy making and political decisions; (4) balancing of family life and other activities; and (5) international cooperation.

From the review of the legislative and administrative activity from 1985 to 1999 stated above, enactment of the Basic Act was one substantial achievement for realizing a gender-equal society, which Japan undertook, to achieve by ratifying CEDAW. The fifth principle of the Basic Act – international cooperation – means that formation of a gender-equal society in Japan should be promoted in a harmonized manner with international efforts including CEDAW. Article 19 of the Basic Act also states that, "to promote formation of a Gender-equal Society based on international cooperation, the State shall make efforts to take necessary measures for exchanges of information with foreign

the policy and thereafter several independent laws are issued in order to implement the policy showed in the basic law.

governments and international institutions, and the smooth promotion of international mutual cooperation related to formation of a Gender-equal Society.” Accordingly, the Basic Act strengthens a concrete legal ground for the government to take necessary measures to implement various policies to comply with CEDAW.

As part of its obligation under CEDAW, Japan must submit periodic reports to the Committee on Elimination of Discrimination Against Women (hereinafter “Committee”) every four years. The Committee reviews Japan’s periodic reports and publishes observations on them. Under Article 19 of the Basic Act, the Japanese government has an obligation to take account of the observations the Committee publishes and adopt the necessary measures to follow recommendations given by the Commission. In August 2009, the Committee published the concluding observations on the sixth periodic report submitted by Japan, which is discussed in section III.

#### Current Scheme to Promote Gender Equality

In 2000, the government approved by Cabinet decision the “Basic Plan for Gender Equality” (*danjyo kyōdō sankaku kihon keikaku*) (hereinafter “Basic Plan”) (Gender Equality Room, 2000), the first plan based on the Basic Act. The Basic Plan is composed of three parts: Part 1 states basic principles in promoting a gender-equal society, Part 2 states basic policy directions and concrete policies to be implemented, and Part 3 explains how to execute the Basic Plan. In Part 2, the Basic Plan refers to “securement of equal opportunity and treatment of men and women in the area of employment.” It states as follows:

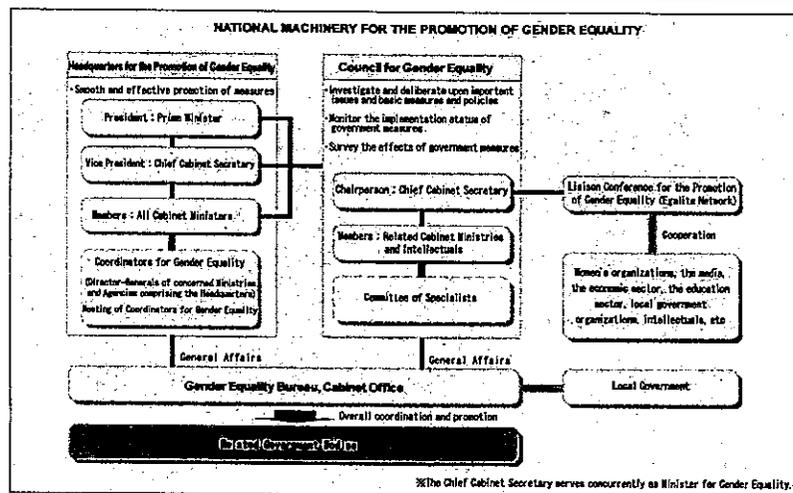
“In the present conditions of advanced globalization and intensive international

competition, it is necessary to advance policies to secure fair competition. This also results in promoting social participation of women because these policies help individuals to bring out their abilities regardless of gender. However, upon change of economic structure, we are concerned that employment becomes temporarily unstable, which may have a negative impact on women. Therefore, we should advance policies to establish a safety net and to prevent a situation where women are differently treated on the basis of gender.”

The Basic Plan proposes four concrete policies to promote gender equality in the area of employment: (1) promotion of policies to secure equal opportunities and treatment of men and women in the area of employment; (2) promotion of policies for health management of mothers; (3) support women so that they can manifest their aptitude; and (4) adjustment of labour environments reflecting various working styles.

Up to December 2010, the Basic Plan has been revised three times. The Third Basic Plan (Gender Equality Bureau, 2010a), approved on December 17, 2010 and also composed of three parts, has the same short title (“securement of equal opportunity and treatment of men and women in the area of employment”) in Part 2. This time the Basic Plan includes concrete target numbers such as ratios of female managers in private corporations and ratios of female labourers in the market, which is discussed in section III.

The following figure shows the current national machinery to promote a gender-equal society, which means that the mechanism shown below is a system to check and promote compliance of CEDAW as well.



Source: Gender Equality Bureau. (2011b). National machinery for the promotion of gender equality. Retrieved from [http://www.gender.go.jp/english\\_contents/category/prom/index.html](http://www.gender.go.jp/english_contents/category/prom/index.html).

## Current Status of Women and the Impact of Labour Market Deregulation on Women

### *Reality of Workplace Gender Equality in Japan*

The framework to secure compliance with CEDAW, which is stated in Part II, seems to have been well established and organized, and the environment to secure workplace gender equality seems to have been put into place. However, the reality of female labour surprisingly lags behind even today (Gender Equality Bureau, 2010b, p. 26)<sup>2</sup>. Although 41.9% of the labour force in Japan consisted of women in 2009, the average wage level of full-time female employees was only 69.8% of that of male employees. While only 22.3% of men earn less than 3 million yen

<sup>2</sup> Summary of the White Paper is also available in English (Gender Equality Bureau, 2010c).

among those who have continued to work for a year, 66.4% of women fit in this category. Not many women hold “leadership positions” in corporations: only 4.9% of department managers, 7.2% of section managers, and 13.8% of sub-section chiefs are women. Further, about 70% of full-time female workers leave their workplaces permanently after their first childbirth, even though 24.2% of them answered that they “wanted to continue to work.”

The above data is also reflected in an international assessment of gender equality of the state. The United Nations Development Programme (UNDP) annually publishes an index called the HDI (Human Development Index), which indicates the level of human development in each country, and the GEM (Gender Empowerment Measure), which indicates the level of female participation in politics and economy. According to the 2009 figures published by the UNDP, while Japan’s HDI ranked 10th among 182 countries, its GEM ranked 57th among 109 countries (UNDP, 2009, p. 186).

Based on this situation, the government’s Third Basic Plan of 2010 puts target numbers to promote gender equality at workplace: (1) the ratio of women who hold a department manager or higher position in private sectors should be raised from 6.5% in 2009 to around 10% in 2015; (2) the ratio of private sectors that introduce any positive action to promote workplace gender equality should be raised from 30.2% in 2009 to over 40% by 2014; (3) the employment rate of women between age 25 and 44 should be raised from 66% in 2005 to 73% by 2020; (4) the ratio of women who continue to work after having the first child should be raised from 38% in 2005 to 55% by 2020, and so on (Gender Equality Bureau, 2010a).

*Concluding Observations by the CEDAW in 2009*

The Concluding Observations of the CEDAW: Japan (CEDAW, 2009) also point out slow progress on Japan's female employment situation. It first criticizes that some concerns expressed by the Committee in previous concluding observations in 2003 have been "insufficiently addressed," and it notes that the situation of women in the labour market is one of the fields that have not been addressed in particular (CEDAW, 2009, para. 15).<sup>3</sup> In addition, the CEDAW (2009, para. 27) states that it "notes with regret that no temporary special measures are in place to accelerate de facto equality between men and women or to improve the enjoyment by women of their rights in the State Party, in particular with regard to women in the workplace and the participation of women in political and public life," and "the Committee urges the State Party to adopt... temporary special measures, with an emphasis on the areas of employment of women and participation of women in political and public life, including women in academia, and with numerical goals and timetables to increase representation of women in decision-making positions at all levels" (CEDAW, 2009, para. 28, emphasis added). Now, the Japanese government has been asked to provide "detailed written information on the implementation of the recommendations" as to what kind of temporary special measures are to be taken within two years (CEDAW, 2009, para. 59).

<sup>3</sup> Even in its previous observations in 2003, the Committee stated that it "urges the State party to amend its guidelines to the Equal Employment Opportunity Law and to increase its efforts towards accelerating the achievement of de facto equal opportunities for women and men in the labour market through, inter alia, the use of temporary special measures in accordance with article 4, paragraph 1, of the Convention." (CEDAW, 2003, para. 370).

The Concluding Observations by the CEDAW Committee in 2009 clearly point out that in the workplace, Japan does not sufficiently comply with the Convention regardless of the existence of seemingly well-established national machinery. In order to explore the reasons for this, the discussion below deals with the labour policy shift and its impact on the labour market.

*Impact of Deregulation of the Labour Market*

The deregulation of the labour market has been a global trend since the 1990s (Araki, 2007) and the Japanese labour market is no exception. In the case of Japan, deregulation policy (*kisei kanwa seisaku*) in general was strongly promoted during the 1990s as a national policy, which also accelerated deregulation of the labour market. In particular, the Koizumi Cabinet (2001-2005) aggressively promoted deregulation with the slogan of "the reform without sanctuary" and labour market regulation was also a target area for deregulation.

In May 2001, the Koizumi Cabinet adopted the Cabinet decision "Three Year Plan for Promoting Deregulation Reform" (*Kisei kaikaku suishin sankanen keikaku*) (Cabinet, 2001). In this plan, one of the fundamental purposes for the reform is stated as "realizing an internationally open economic society." The basic policies for the reform are, among others, "economic regulation should be free in general and social regulation should be kept to the minimum," and "regulation should be based on international harmonization." The basic direction of the Koizumi Cabinet was to eliminate regulations that impeded competition, which was called "New Liberalism" and was also a global trend for a few decades (Drabek & Laird, 1998).

Under the Three Year Plan, the field of employment and labour relations was also listed as a target field which should be

deregulated (Araki, 2007). The Comprehensive Deregulatory Commission submitted the first report on promotion of deregulation in July 2001. The report proposed to review the regulation of dispatching workers as a regulatory reform so that the reform enabled smooth labour movement in the market. Accordingly, the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (ADW) (*Rodosha hakenhō*) was revised in 2004 to largely eliminate the regulations on dispatching workers. The ADW was originally established in 1986 to legalize worker-dispatching services in sixteen designated areas of services that were stipulated in the law (Takanashi, 2007, p. 26-48). Since its enactment, the ADW was revised four times before the 2004 reform to relax regulation step by step. The most significant reform before 2004 was the revision of 1999, by which the ADW adopted the “negative-list system” meaning that worker-dispatching services could be used for all kinds of occupations as a basic rule except for the areas of services that were listed in the law. The reform of 2004 further accelerated this tendency to liberalize the worker-dispatching market. The revised ADW legalized dispatching services for manufacturing industries that were in the area of services that predicted a great demand of temporary workers, and expanded the period of accepting dispatching workers from one year to up to three years.<sup>4</sup> As stated, this reform was conducted in order to strengthen the competing power of private sectors located in Japan and to contribute to the promotion of free competition among corporations, as well as to meet the needs of diverse working styles of workers.

After the reform of the ADW in 2004, the number of dispatched workers was dramatically increased from 500,000 in

<sup>4</sup> The 2004 revision also clarified rights and duties of both dispatching and dispatched entities.

2003 to 850,000 in 2004 (Statistics Bureau, 2011). The total number of dispatched workers continued to increase until the Lehman Shock<sup>5</sup> happened in 2008. As a natural result, corporations shifted to decrease the number of regular employees that were much more expensive than non-regular employees. In 2007, one third of total employees (excluding directors) became irregular employees in Japanese private sectors (Statistics Bureau, 2011). However, women served as an adjusting valve to an appreciable extent: 68.7% of irregular employees (temporary workers, part-time workers, contract employees, etc.) were women. The ratio of regular employees to non-regular employees for men was 81.7% to 18.3% in 2007, whereas that ratio for women was 46.5% to 53.5%. The graph below shows how the demand for dispatching workers has been largely filled by female employees.

<sup>5</sup> On September 15, 2008, the US investment bank Lehman Brothers collapsed, which had a significant impact even on Japanese economy and unemployment rate raised due to this event.

## Succession Law and Inheritance Disputes in Japanese Family Court Conciliation

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in collaboration with Akiko Taniguchi

The purpose of this paper is to present the function of conciliation<sup>1</sup> in Japan's family courts in the context of the statutory provisions and social realities in the area of succession. Succession law might seem out of place in a conference on family law. However, the sections on succession in Japan's Civil Code follow directly after those on familial relations, and they are closely interrelated; together, these are generally considered to make up "family law" as the term is used in Japan. Family law in general and succession law in particular were radically changed during the postwar period. The family life of the Japanese did not change overnight but has been in a process of gradual change, in terms both of lifestyle and of everyday people's legal perceptions. Both of these have affected the way conciliation cases are presented to the family court. While the longevity of the population has remarkably improved since the postwar period, the way people live has not completely changed for social and economic reasons. It is often observed today that one of the children, most likely the eldest son, lives with his elderly parents and his wife after their own children have grown up and left the parents' home. At the same time, people's legal consciousness has changed to a considerable degree, and they have become more assertive of what they regard as their rights. Family court conciliation has been a popular arena for legal fights among assertive heirs for a greater or more preferable portion of an estate. Inheritance disputes are normally brought to the family court conciliation in the form of a petition for partition of an estate. Both conciliators and judges consider these the most complex of the kinds of cases that can be resolved by

1. As discussed in more detail herein, conciliation in Japanese family court is a court-administered mediation procedure in which a panel of mediators, or conciliators, attempt to bring the parties to an agreement that will resolve the dispute. Conciliators typically meet with each party individually in private caucuses and act as the conduit of information between the parties. In addition to inheritance disputes, the procedure is used for cases such as divorce, child custody, and child support disputes.

conciliation. One of the reasons for such exceptional complication, of course, stems from the very nature of the dispute, which is always multi-party and, like all other family disputes, involves a highly emotional element in addition to highly complex legal questions. Another source of complexity seems to arise from the very nature of the Japanese succession law itself, as explained later herein. Statistics shows that petitions for conciliation of disputes on partition (*isan bunkatsu*) have steadily increased since the inception of the postwar system.<sup>2</sup> In the following, I shall first present an overview of the Japanese succession law in a historical perspective and the family court conciliation system in general, then proceed to examine some specific problems that are recurrent in inheritance disputes, and finally try to reach a conclusion on the role of family court conciliation today in inheritance disputes.

### Overview of Japanese Succession Law and Family Court Conciliation

#### Short History

Japanese succession law, which has been included in the Civil Code since the original Civil Code of 1898, was radically reformed after the second World War to incorporate the principles of equality of the sexes and the dignity of individuals declared in the new Constitution promulgated on November 3, 1946, and taking effect beginning May 5, 1947. Because the substantive family law and succession law in the previous Civil Code was seen to be at odds with these newly introduced constitutional principles, those provisions of the Civil Code had to be amended by the time the new Constitution came into effect.

The Japanese government under the direction of the occupation authority (GHQ) hastily undertook legislative action in order to bring the provisions of Civil Code into conformity with the Constitution, but a comprehensive amendment of the chapter for succession could not be completed by the time the new Constitution came into effect. Therefore, a law with only ten articles was provisionally adopted to change fundamental principles and came into force at the same time as the postwar Constitution. The final bill to amend the Civil Code, after being approved by GHQ, passed the Diet on December 22, 1947, as Law no. 40 of 1947, and came into force on January 1 of 1948.<sup>3</sup>

2. The number of petitions has increased as follows: It was below 1,000 in the 1940s, reached 3,000 in the 1960s, 5,000 in the 1980s, jumped to 8,000 in the 1990s, and well over 10,000 nowadays (10,317 in 2007) according to Annual Judicial Statistics published by General Secretariat of Supreme Court. Other types of cases with numerous petitions for conciliation are cases involving marital disputes and child custody. They were 80,046 combined in 2007.

3. For an account in English of the postwar family law reform generally, see Yozo Watanabe, "The Family and the Law: The Individualistic Premise and Modern Japanese Family Law," in von

Succession is one of the more complex areas in every legal system. It is closely related to the national tradition and social *moeurs*. This hasty postwar legislation, which was also very radical in its contents, has been pointed out as one of the sources of today's recurrent problems. I shall first explain the basic principles of the prewar succession law and then how it was changed, and not changed, by the postwar legislation.

#### Traditional Succession Law

The old succession law under the Civil Code of 1898 was based on the pre-1868 feudal values of the samurai class.<sup>4</sup> Its central weight was on the concept of *ie* (or *ie*), literally meaning "the house." The *ie* represented a conceptualized and highly idealized large family governed by the head of the house, quite apart from the social reality even at the time. The Civil Code of 1898 accommodated the centuries old tradition that an *ie* must by all means be continued by the eldest male child, who becomes the next head of the house. When there was no male child, the Code allowed a daughter to become the head but did not allow her to marry and leave her house, because that would terminate the house. The law also liberally permitted adoption, in accordance with the prevalent social practice, in order to preserve the house. It also institutionalized a special form of marriage in which a second or third son from another house married a woman who was the head of a house to continue her house by assuming her family name. Married women were made legally incompetent. For succession to an *ie*, even an illegitimate male child was preferred to legitimate daughters as long as he was recognized by the father.

Mehren ed., *Law in Japan: The Legal Order in a Changing Society* (1963), 364; Yasuhide Kawashima, "Americanization of Japanese Family Law, 1945-1975," *Law in Japan* 16 (1983), 54; Tamie Bryant, "Marital Dissolution in Japan: Legal Obstacles and Their Impact," *Law in Japan* 17 (1984), 73; also in French, Tomohei Taniguchi, Yasuhei Taniguchi "La révision du Code civil japonais et les conditions actuelles du mariage au Japon (1959), mise à jour," in *Etudes de Droit Japonais*, Préface de Jacques Robert et Xavier Blanc-Jouvan (Paris, 1989), 91.

4. The history of the Japanese Civil Code started with studying the French Napoleonic Code Civil of 1804. French advisor, Gustave Boissonade, drafted the first Japanese civil code in cooperation with a group of Japanese scholars. Boissonade is said to have accepted to codify the principles of Japanese traditional family and succession laws, although necessary legal technicalities had to be imported from the relevant French law. After the rejection of the Boissonade draft in 1890, a new draft which would become the 1898 Civil Code was drafted by Japanese scholars alone on the basis of the contemporary draft of the German Civil Code. They incorporated the traditional principles in the German styled Code, but because of their earlier involvement in the making of the Boissonade draft a French influence remained in the final product which is said to be still noticeable in today's succession law.

Succession under the prewar law normally meant inheritance of the status as head of the house accompanied with inheritance of the whole family patrimony. In short, the eldest son could monopolize everything, namely the status and the property. The totality of the estate owned by the deceased passed to him. Neither his siblings, male or female, nor the surviving wife of the deceased, would receive any inheritance unless a will provided otherwise, although certain legal and moral obligations to take care of the house members attached to the status as the head of house. This type of succession, that is, a succession to the head of the house, was the rule and called *katoku-sōzoku* [head of house succession], and it occupied the principal place in the prewar succession law. Head of house succession could also occur when a head of a house voluntarily "retired" from that position, called *inkyō*.

On the other hand, the prewar succession law also provided for a different type of succession that occurred when a person other than a head of the house died leaving an estate. Such cases did not involve succession of the status as the head of the house, but only inheritance of property rights. The 1898 Code had a set of special provisions applicable to this type of succession called *isan sōzoku* or estate succession. Here a set of different principles applied from those in the *katoku-sōzoku*. Namely, children of the deceased, male or female, enjoyed an equal share in the inherited property, excluding, however, the wife of the deceased. There were also a number of provisions to be applied to both types of succession, such as provisions for the acceptance and waiver of succession, the absence of heirs, wills, and legally secured portions, with some special rules for the *katoku sōzoku*. For example, in the latter type of succession, a waiver of succession was not permitted even if the debt owed by the deceased exceeded the value of the estate. In practice, most successions were *katoku sōzoku* and the *isan sōzoku* was an unimportant possibility, if at all, because a mere family member would rarely leave a sizable estate. Therefore, the jurisprudence in the area of *isan sōzoku* remained rather undeveloped throughout the prewar period.

#### Postwar Reforms

The postwar reforms of Japanese family law changed many basic features of the old system. First, the concept of *ie* as the central legal institution<sup>5</sup> was abolished and the married couple was made the maximum family unit. Accordingly, the head

5. For a detailed analysis of the postwar process of the abolition of the *ie* as a legal institution and its survival in the form of *koseki* (the family registration system), see Mikihiko Wada, "Abolition of the House (*ie*) under the Occupation—Or the Two Faces of *Koseki*: A Janus," *Law in Japan* 26 (2000), 99. The collapse of *ie* as social reality had already been pointed out in the early 1930s by leading legal scholar Sakae Wagatsuma. *Ibid.*, 108.

of the house lost importance as the symbol of the *ie*. As there was no longer an *ie* to be continued by a successor, there was no longer such a thing as *katoku-sōzoku*. Similarly, succession due to a voluntary retirement (*inkyō*) of the head of the house was abolished, and so there was no longer succession without death. Succession law now concerns itself only with the property owned by a deceased, whoever he or she is. Second, equality between men and women was realized by abolishing all discrimination against women. Married women were no longer legally incompetent and the restriction of marriage for the sake of continuation of the *ie* was wiped out. And with the reforms surviving wives became entitled to a one-third share of the estates of their deceased husbands.<sup>6</sup>

Although these were important substantive changes, the postwar succession law was not a completely new product. The legal mechanism of the new succession law was borrowed from that of the pre-existing system of property succession (*isan sōzoku*) which had applied when a person other than a head of a house died. A quick amendment was only possible by the postwar legislature deleting the provisions for the *katoku sōzoku* and making the provisions for the *isan sōzoku* generally applicable with some minor but important modifications, such as a change in the status of spouse as an heir, in order to make the "new" succession law compatible with the new constitutional mandates. Otherwise, most of the features of the prewar succession law were preserved and the jurisprudence established by the courts under the old system still enjoys a degree of precedential value. Moreover, interestingly enough, the basic structure of *isan sōzoku* adopted by the 1898 Code was basically borrowed from the French law of the nineteenth century.<sup>7</sup>

While the succession law was changed, the traditional system of adoption was preserved in the family law part of the postwar Civil Code. Adoption combined with the *ie* system had long been regarded as an important legal as well as social institution which supported the maintenance of the traditional family system. For centuries, adoption was used as an instrument for perpetuating an *ie* by obtaining a good successor from outside. When a couple did not have a male child, a minor or adult male, often chosen from relatives, was adopted. The postwar reform did not change the freedom of adoption under the old law. The only requirement under the current law for an adoption is that the adopting parent must be older than the person adopted—but this can be by as little as a year or even a month.<sup>8</sup> Under this

6. The surviving spouse's share was later increased to one half in 1981.

7. See *supra* note 4.

8. Civil Code, art. 793. Adopted person becomes a legal heir of the adopting parent, but the original parents must be shown in the family registry (*koseki*) and the adoptee continues to be a legal heir of the original parent. Adoption of an infant in anonymity was first introduced to the Japanese

liberal policy the adoption of an adult is still widely practiced when a couple does not have a child, and this can add further complication to an already complicated inheritance dispute.

#### *Current Succession Regime*

The main features of the new postwar succession regime are as follows (The statutory shares of various legal heirs were changed in 1981 to increase the share of the spouse, which almost always means the surviving wife. The post-1981 portions are in parentheses below).

Unless otherwise designated by a will, the property belonging to a deceased person at the time of the death "automatically" passes to the legal heirs in the following proportion:

- i. In the most typical situation where the spouse and children are surviving, the spouse gets one third (since 1981, one half) and the children get two third (since 1981, one half), with shares of each child being equal.
- ii. Where the spouse and one or both parents are surviving, the spouse gets one half (since 1981, two thirds) and the parent or parents get the other half (since 1981, one third), with shares of each parent being equal.
- iii. Where the spouse and one or more siblings are surviving, the spouse gets two thirds (since 1981, three fourths) and the siblings get one third (since 1981 one fourth), with shares of each sibling being equal.
- iv. Where only the parents, spouse, or siblings is surviving, everything goes to him, her, or them. If none are surviving, no one can inherit even if related to the deceased by blood, except for substitute succession as explained below in vi. Then, the whole estate goes to the national treasury.<sup>9</sup>
- v. If both legitimate children and recognized illegitimate children are surviving, the latter can get only half of what the former gets.<sup>10</sup> And a sibling sharing only one parent receives only half the portion of a sibling by both parents.

family law in 1987, but as of the present it is not widely practiced at all. Civil Code, art. 817-2 et seq. For centuries of Japanese history, adoption helped people to move upward across social classes and statuses.

9. However, by an amendment of 1962, the family court may now decide to give all or a part of the estate to a person who lived together with the deceased and took care of the latter (*tokubetsu enkasha* or specially related person).

10. The constitutionality of this provision under Const. art. 14 (the equality under the law clause) has been upheld by a controversial decision of the Supreme Court. *Hanako v. Haruko*, 49 *Minshū* 1789 (Sup. Ct., July 5, 1995).

vi. Substitute succession occurs when a successor, either a child or a sibling of the deceased, is already dead but is survived by his or her own children. Thus, grandchildren, and even great grandchildren if the eligible grandchild is dead, can receive what their parent could have received if still living. If no such direct descendant exists, nephews and nieces can receive what their parent (a sibling of the deceased) could have received. This does not occur, however, in favor of surviving children of the spouse when the children were born from a previous marriage and not adopted by the deceased husband.

vii. All or part of an estate can be disposed of as its owner likes by a will as long as it does not violate the legally secured portions (*iryūbun*) of heirs. The secured portion is one half of the statutory share for the spouse and children. It is one third for the parent(s), and there is none for siblings.

viii. If one of the legal heirs has received a special pecuniary benefit as a gift by a will or on the occasion of marriage, adoption, education, etc., the amount of such a benefit must be added to the amount of the existing estate in order to calculate the amounts of the shares of each heir, including the beneficiary, and then the amount of the benefit is subtracted from the share of the beneficiary.

ix. If an heir has contributed to the augmentation of the estate, the augmented amount (*kiyobun*) belongs to the contributor heir. Therefore, the shares of other heirs must be calculated on the basis of the amount of estate less such contribution. This system was introduced by the 1980 amendment to the Civil Code as explained later.

Thus, the surviving spouse is always a legal heir and the maximum scope of heirs may extend in any event only to the great grand child or to the nephew or niece. Postwar Japanese society was not immediately ready to accept the new succession regime. Most citizens took the traditional primogeniture for granted. Especially in rural communities the new regime implied dismemberment of farming land. De facto primogeniture was legally achieved by younger children voluntarily waiving their statutory shares. Gradually, however, the population became educated in the principles of the new succession law. As a result, heirs became increasingly assertive of their entitlements under the law, giving rise to inheritance disputes. These were disputes arising from a fundamental mismatch between legal norms and prevalent societal norms.

#### *Creation of Family Courts and the Conciliation System*

Another postwar innovation was the creation of the family courts after the model of family courts in American state court systems. The family courts were given basically two kinds of jurisdiction, one for the protection and correction of delinquent

juveniles and the other for dealing with family disputes. The latter jurisdiction includes two procedural systems: the conciliation of family disputes, and the adjudicatory disposition of certain family matters as designated in the Civil Code relating to the family and succession laws, ranging from declaration of incompetency and appointment of a guardian to the disqualification of a legal heir due to misconduct. Perhaps curiously, the principal family law cases such as divorce, recognition of illegitimate children, and determination of paternity, were retained in the jurisdiction of the district courts based on a theory of distinction between "contentious" and "non-contentious" cases.<sup>11</sup> In short, the family court was given only jurisdiction for adjudication of the so-called "non-contentious" cases under the Domestic Relations Adjudication Law (*Kaji shimpan-hō*). This jurisdictional limitation was finally lifted in 2003 and now these "contentious" family disputes, such as divorce cases, have come under the jurisdiction of the family court and are tried under the general principles laid down by the Code of Civil Procedure as modified by the Domestic Relations Litigation Law (*Jinji soshō-hō*) of 2003.<sup>12</sup>

The first task of family court conciliation when officially established in 1947 was to deal with the conflicts that were arising as a result of legal norms that were mismatched to prevalent social norms. Appointed conciliators were generally senior community members and represented the dominant social ideology of their time and place. An important task of the family court conciliators at this period was to find bridges between the traditional social norms and the newly introduced legal idealism by securing agreements between disputing parties. However, a survey conducted by a group of academics in the 1950s revealed that the conciliators at that period in fact tended to impose traditional values on dissident claimants

11. Distinction between the contentious and non-contentious jurisdiction originates in civil law (cf. German *Freiwillige Gerichtsbarkeit*, French *jurisdiction volontaire* or *graceuse*, etc.). Typically, a non-contentious case takes no adversarial form, such as petition for appointment of a guardian. But many of them are in fact adversarial, dealing with a serious conflict of interest. There have been a series of decisions by the Supreme Court on the constitutionality of various "non-contentious" cases. In short, the Supreme Court has held that a matter to be decided by a discretionary determination by the court may be treated as "non-contentious" and made subject to a summary and informal procedure under the Non-contentious Case Procedure Law. For discussion of this issue, see Yasuhei Taniguchi, "Constitutional Guarantees in the Civil Procedure of Japan," in Mauro Cappelletti and Denis Talon, eds., *Fundamental Guarantees of the Parties in Civil Litigation* (Milan, 1973), 567.

12. In this type of litigation in which the consideration of the public policy must prevail, certain restriction is imposed on the parties' freedom to make an admission and to settle the case. See Yasuhei Taniguchi, Pauline Reich and Hiroko Miyake, eds., Hattori-Henderson, *Civil Procedure in Japan*, 2nd ed., (2002, written before the current law but no substantial change has been brought in this respect) §9.03.

by suppressing their legal rights under the new family and succession law.<sup>13</sup> Such criticism later led to the introduction of mandatory retirement age of seventy for conciliators.

#### Conciliation in Family Court

A short explanation of the basic structure of the family court conciliation would be appropriate here. Family court conciliation is conducted by a three-member conciliation panel consisting of a family court judge and two conciliators (one male and one female), who serve on a part-time basis. Most family court conciliators are not legal professionals. A majority of female conciliators are housewives. Male conciliators are retired businessmen, retired court clerks, etc. Male or female professionals, such as lawyers, tax attorneys, or surveyors are also recruited and assigned to cases that require their particular expertise. Family court judges are just normal judges who happen to be assigned to one of the fifty family courts in the country. Conciliators are appointed by the Supreme Court upon recommendation by the chief judge of each family court. Two conciliators meet the parties without presence of the judge several times at appropriate interval (about a month) until an agreement is reached or found impossible. The judge, who is the presiding member of the panel, participates in the sessions only at important junctures, although the conciliators give reports of progress and ask the judge's advice throughout the process. According to statistics, the average success rate of family conciliation has been between 40% and 50%, but the rate varies greatly among different kinds of dispute. The success rate of disputes arising from the partition of a decedent estate in 2005 was 61.2%.

The family division of the family court, separate from the juvenile division, deals with three kinds of cases, (1) formal litigation over domestic matters such as divorce, (2) adjudication of so-called non-contentious matters, as mentioned above, and (3) family conciliation. The latter two matters are regulated by a special statute according to which a failed conciliation is prerequisite (mandatory preliminary conciliation) to bringing an action, such as a divorce action, in the family court under Domestic Relations Litigation Law of 2003. Inheritance disputes normally arise in the form of a dispute over the way an estate should be divided among the claimant heirs.

13. Dan F. Henderson, *Conciliation and Japanese Law* (Seattle, 1965), II, 223. "Domestic relations conciliation proceedings are a substantial part of the total *chōtei* system under the post-World War II statutes." *Ibid.*, 208. Here Prof. Henderson deals with the problems of conciliation under the modern Japanese legal system after having presented a detailed historical study of the conciliation under the Tokugawa regime in Volume I.

Article 907(1) of Civil Code provides that a partition of a decedent estate can be achieved by a collective agreement by the heirs. In the event of non-agreement, however, art. 907(2) provides that the family court decides upon a petition how to divide the estate among the heirs. According to the Domestic Relations Adjudication Law a petition for partition is treated as a non-contentious matter for adjudication (*shimpan*). The same law further provides that the family court receiving such a petition may refer the matter to conciliation. But a party to an inheritance dispute is not prevented from resorting to conciliation in the first place. Thus, a dispute about the partition of decedent estate reaches the conciliation either directly by an application for conciliation filed by an interested party or by a referral from a judge.

When an agreement is not reached in conciliation, the judge member of the conciliation panel terminates the conciliation proceedings and renders a decision after holding a further hearing if necessary. Although the matter is highly contentious, this jurisdiction is ironically defined as "non-contentious," the rationale being, according to the Supreme Court, that the judge is not bound by any specific rules of substantive law as to how to divide the assets among the heirs except for the respective percentage share of each heir fixed by the Civil Code. Although the law specifically mentions as the factors to be considered "the nature of the property included in the estate, the age, profession, health condition, life conditions of each heir and all other circumstances," the Court considers that the judge is given the freedom to exercise a wide discretion in order to create an adequate legal relationship between or among the parties.<sup>14</sup>

Conciliation proceedings are confidential and the terms of successful conciliations are not published. However, some adjudications by the family court in non-contentious matters, such as partition of a decedent estate, are published in the monthly publication by the family court. When adjudications are published they may be followed by other courts and can enjoy certain precedential value.

An example of judicial doctrinal creativity was seen in the recognition of a "contribution" by an heir. One of the recurring problems arising from the new succession law was about how to treat a contribution made by one of the heirs to enrichment of the estate. Without any explicit provision in the Civil Code, the issue was solved by innovative family court judges and it eventually led to an amendment of the Civil Code. As mentioned above, the new succession law adopted the principle of equality of shares of the inheritance among the children. In reality, however, the eldest son tended to live with the parents and work together for the family business,

for example. A fortune in the name of the deceased may have in fact been built by virtue of the contribution of the eldest son living and working together. It was felt unfair to divide the estate equally among the children in disregard of the contribution by the eldest son. Conciliators usually successfully persuaded junior children to give a greater share to such an eldest son. When no agreement is obtained and conciliation fails, the judge must decide how to divide the estate. There are several reported cases where the family court judges gave a greater share to the eldest son or any other heir who had contributed to augmentation of the estate. This was controversial because the judge was given only the power to divide an estate according to the legally fixed percentage shares of respective heirs and no power to alter such percentages belonged to the judge.

In 1980, however, Civil Code was amended to solve this problem legislatively. Art. 904-2 was added to provide that the total amount of the estate to be divided is determined first by subtracting from the value of the existing estate the amount of contribution made by an heir and such amount is added to the share of the contributor. The amount of contribution can be negotiated, and if no agreement is reached the family court decides it as a non-contentious matter. Contribution issues often arise in conciliation for partition of an estate. An important task of the conciliators is to try to induce an agreement on these issues.

This is just one example of the recurring issues in the family court conciliation of inheritance disputes. In the following, some of these problems will be explored in the context of social changes and relevant legal rules.

### Recurring Issues in Partition Conciliation Today

#### *Aging Population as Cause of Inheritance Disputes*

Japanese people now live long, among the longest in the world. This welcome phenomenon has given rise to a host of problems which did exist at the time of legislation but were not very apparent.<sup>15</sup> In the following, some of the problems or sources of problems engendered by this demographic change will be pointed out.

Successions today tend to take place when a person dies at a very old age and his or her children are also old, very often already retired. These children have often been separate for a long time from each other and established their respective life styles and financial conditions. There may have developed a great difference among them in physical and psychological closeness to the deceased parent. It is still likely, however, that one of the children, most likely the eldest son, has been living with

14. *Morimoto v. Morimoto*, 20 *Minshū* 360 (Sup. Ct., March 2, 1966).

15. See generally, Misa Izuwara, "Care and Inheritance: Japanese and English Perspectives on the 'Generational Contract,'" *Aging and Society* 22 (2002), 61.

the parents and his wife has been mainly in charge of taking care of her elderly parents in-law. It is even possible that the eldest son is already dead and his widow is alone de facto responsible for taking care of her in-laws. Without a will, the succession law gives an equal share to each child and nothing to their spouses. If one of the children is already dead, his wife is not entitled to a substituted succession, although his children are. But those children may be grown adults and not in good terms with the mother. Even worse is the situation where she has children out of her earlier marriage with someone else. Neither she nor her children will receive any inheritance, even though she has lived together with and taken care of the deceased. A will can be written in order to change this result, but, as discussed further below, the law of wills is not without problems. It suffices here to mention that old age makes it difficult to write a will properly.

In addition, since both men and women live long, two successions often occur one after another within a relatively short interval. Normally a man dies first and his wife inherits one half of the estate. But being already aged she is not expected to survive for a long time. Anticipating this, and because the family life does not change much as long as she is living, often no action is taken for partition of the decedent's estate until the widow finally dies. But the time period before she dies is unpredictable. If she lives for many more years, the situation may change in the meantime or some sort of unauthorized action may intervene to complicate the situation. For example, the eldest son might sell a piece of property that should belong to the father's estate before the mother dies. Or, the house in which the mother and the eldest son's family were living has been rebuilt or expanded at the eldest son's expenses. If this has happened, the succession following the mother's death will become very complicated with "double succession" problems.

Generally, the deteriorating mental abilities of elderly persons creates opportunities for a variety of fraud or quasi-fraudulent activities victimizing them. When such a dubious action has been taken or is suspected to have been taken by one of the legal heirs, it will generate and aggravate a partition dispute once the elderly is dead. In 1999, the Civil Code was amended to better protect those persons who are not yet incompetent or even quasi-incompetent by creating the system of "assistance" in addition to the pre-existing systems of incompetency and quasi-incompetency.<sup>16</sup> At the same time, a separate statute was enacted by which a guardianship can be contractually created in anticipation of a mental disablement.<sup>17</sup> However, these legislations do not seem to have any remarkable result yet in reducing the

16. Civil Code, art. 16 (assistance) in addition to the pre-existing incompetency (art. 7) and quasi-incompetency (art. 12).

17. Law concerning Voluntary Guardianship Contract of 1999.

number of frauds perpetrated against the elderly, let alone reducing the intensity of inheritance disputes.

#### *Problems of the Will*

Japanese law recognizes the freedom to dispose of one's own property through a will as long as it does not violate the legal heirs' respective secured portions (generally one half of the statutory share). Therefore, it would seem that many succession disputes could be avoided by writing an appropriate will in advance of one's death. However, during the time since the inception of the Civil Code in the late nineteenth century until recently, wills have been rarely written in Japan. Under the prewar system of *katoku sōzoku* as the predominant form of succession, there was little incentive to write a will unless some extraordinary circumstance required it. The law and the social reality also coincided in most cases. The eldest son's family lived with his parents and eventually inherited the whole estate. The surviving mother did not get any share; therefore no successive inheritance occurred when she died later. When a person who was not the head of house died, the situation could be more complicated. But a succession of a non-head was unimportant, as pointed out above.

When a host of problems started to occur under the postwar succession law, academics and practitioners recommended writing a will. The most secure form of a will is by a notarized document. Notaries also took this opportunity to expand their service. Such efforts to raise awareness did not have an immediate effect, mainly because of a general reluctance to write a will and partly because of lack of a real necessity to do so. But people came to consider this possibility more seriously as personal wealth grew in the 1970s and 80s. By that time, succession disputes had also reached a level of popular recognition. Litigation involving the validity and effect of a will increased, resulting in some important decisions by the Supreme Court.

One of the most important decisions by the Supreme Court was about the way the language of a will can be phrased in order to give a certain piece of real property to one of the legal heirs. The doctrine adopted by the Court can be better understood in context of the basic principles of Japanese succession law. Under Japanese succession law, property rights automatically pass to the heirs at the moment of death without any process of liquidation. However, an estate normally consists of a variety of property, such as real property, personal property, bank deposits, shares of stock, cash, etc. When several heirs jointly inherit an estate, this automatic passing of the rights occurs only in an abstract level.<sup>18</sup> Each heir can acquire the

18. Civil Code, art. 896.

title to a specific piece or pieces of property only through a process of partition of the estate.<sup>19</sup> Until that happens, the whole estate is subject to co-ownership by all the heirs.<sup>20</sup> When a partition by an agreement cannot be achieved, the family court will decide, on petition by an heir, how to partition the estate after considering all circumstances including the nature of the properties included in the estate, the age, occupation, physical condition of each heir, etc.<sup>21</sup> As mentioned before, this is one of the so-called non-contentious cases provided for in the Domestic Relations Adjudication Law.

The law allows a will to determine the way the estate is to be partitioned.<sup>22</sup> A will becomes effective as soon as its writer dies. It was argued that, when this is combined with the doctrine of automatic passing of right, the title to a specific piece of property could pass automatically to a particular heir as designated by a will. On the basis of this theory, certain innovative notaries initiated a practice of dressing up a will by using the following phraseology, "I hereby make [specific piece of real property] to be inherited by [a particular heir]." The question arose about whether the designated heir alone may apply for registration of the specified real property in his or her name with the real property registry, a government office within the Ministry of Justice. Normally, such registration can be obtained only by a joint application of all the heirs on the basis of an agreed plan of partition. The Supreme Court has answered this question affirmatively. It was held that the heir is allowed to register the title by a single application as soon as the testator is dead because the designated heir has already obtained the title to the piece of property without any process of partition.<sup>23</sup>

This Supreme Court decision met a mixed reception. It was welcome as expediting the process of partition by eliminating certain pieces of property from the estate to be partitioned, thereby reducing the complexity of partition. It has also been criticized for several reasons. Because the application of this jurisprudence is not limited to a notarized will, a privately written will can also enjoy the same treatment. A real property registration then could be had too easily without establishing the substantive validity of the will. This would unduly shift the burden to dispute

19. *Ibid.* art. 909.

20. *Ibid.* art. 898.

21. *Ibid.* art. 905.

22. *Ibid.* art. 908.

23. *Kamide v. Shimada*, 45 *Minshū* 477 (Sup. Ct., April 19, 1990). The same purpose could have been attained by making a will for a bequest of specific piece of real property. It is said that the practice was motivated for saving the real property registration fee. This fee, which is prorated to value of the property to be registered, was set much lower for succession (0.06%, now 0.04%) than for bequest (0.25%, now 0.20%). Today, the rates are lower, but the practice persists.

the validity onto other heirs. The validity of wills is in fact often disputed in conciliations. A privately written will must be certified as such by the family court. But the certification tends to be a mere formality. The court is not given the power to determine the substantive validity of a will presented before it for certification. It is not the same thing as the Common Law probate proceedings.

Another problem may occur when such a will violates other heirs' secured portions. Once a registration is obtained for a piece of real property, only a formal lawsuit can undo it unless the beneficiary of such a will voluntarily admits the violation and cooperates to undo it. Normally the beneficiary does not, and argues, for example, that he or she is entitled to keep the already registered property either because the original share is greater than the statutory share due to his or her "contribution" to the estate or because the claimant earlier received a "special benefit" which makes the legal share of the claimant small enough not to be violated by the will.

An inherent danger of this easy practice has also been pointed out in view of a possibility that several conflicting wills can be written successively and their effect can be disputed later while a registration has been completed on the basis of one of them. A *fait accompli* has its own strength and may invite complicated litigation.<sup>24</sup> This kind of problem is often associated with the weakened mental condition of an elderly parent. He or she, having mentally and physically weakened, tends to want to be nice to all children, perhaps expecting a nicer treatment from them. He or she may write several different wills in response to the demands of each child. The validity of the will must ultimately be determined through a lengthy formal declaratory action.

For all these reasons, critics of immediate property recording based on wills argue that even if such a will exists a formal partition process should take place and a registration should be obtained only on the basis of a finalized partition plan achieved either by an agreement of all concerned reached out of court or in the Family Court conciliation, or by a decision of the Family Court. I personally consider the critics' view more persuasive.

24. *Totoki v. Tōa Seiki Kōgyō K.K.*, 796 *Hanrei Taimuzu* 81 (Supreme Court Sept. 12, 1990) presents the kind of problem that may arise. In this case, four wills existed of which the fourth was notarized the day before the death. That last will, which revoked the third will, which had been written six years before, was declared null and void by the court due to the mental incompetence of the testator. The Supreme Court upheld the registered title on the basis of the revived early will.

*Dispute on Custody of Religious Items and Ancestral Documents*

Under the prewar *katoku sōzoku*, the Buddhist or Shintoist family altar, family tomb and genealogical documents were important items to be kept by the head of house although they normally did not have any pecuniary value. Because these items can not and should not be partitioned among the heirs, the law provides that "ownership of genealogical records, of utensils of religious rites, and of tombs and burial grounds passes to the person who, according to custom, is to preside over the rites for the ancestors" unless the deceased has designated such a person. According to the traditional custom, such a person is definitely the eldest son. A change in lifestyles has made the selection of such a person difficult. In the old days, every house had a family altar (mostly Buddhist). Today, there is no place for such a thing in a western style urban apartment. Succession to these items means only a burden, but they are difficult to throw away. This issue does not normally cause a serious problem in the partition of a decedent estate but sometimes comes up due to differing conceptions of the importance of these items and invites an emotional fight.

## Resolution of Inheritance Disputes

*Issues in Conciliation of Inheritance Disputes*

Conciliation of a partition dispute, properly speaking, only aims at dividing an estate among the eligible heirs according to the legally prescribed shares of each heir. This sounds straightforward, but in fact this alone already is not an easy task. If the wife and two children are surviving, the statutory shares are one half for the wife and one fourth for each child. If the estate consists only of a house where the widow is still living, it is not possible to divide the house. There are several ways to realize a partition. The simplest method would be for the three heirs to jointly sell the house and divide the proceeds. The widow may buy or rent a house or an apartment with a one-half portion of the proceeds. This is often difficult to achieve because the widow has a strong emotional attachment to the house. In that case, the house can be registered as a co-owned property in respective shares. This is a perfectly legitimate way of partition. If one of the children wants to own the house, he or she could achieve this by paying a proportionate price to the other heirs. There is a great variety of options available, but the preferences of heirs can differ and collide with each other, resulting in serious disputes. Conciliators try to lead the parties to a plan acceptable to all.

This is already difficult to achieve, but in fact is still the simpler type of case. Yet an additional layer of complexity is added when there are disputes about the scope of the estate, scope of heirs and ultimate percentage share of each heir, and in reality these substantive points are often disputed in conciliation for partition.

Unless these substantive issues are somehow resolved, no partition can be attained. How much the deceased person really owned is sometimes difficult to find. What is presented by those heirs who were close to the deceased can be disputed by other heirs who insist that there must be something more and those close people are hiding important assets. Sometimes evaluation of certain property contained in an estate is difficult. If the owner of a small family company dies, for example, the value of the shares in the company must be determined, but this is very difficult because there is no objective market price for such shares. The scope of heirs is sometimes disputed by saying, for example, that an alleged heir is not a real child although registered as such. More frequent is a dispute about the ultimate share of each heir which must be calculated through a complicated process taking into account received benefits, contributions to the estate, the effect of a will, the effect of claims for secured portions, and so on.

These issues can be settled by an agreement of everyone concerned at least for the purpose of partition of an estate. In theory, however, some issues cannot be finally settled by an agreement. Whether a person is a real child or not is a matter of public policy. Even if the person is treated as a child by agreement and took part in the partition, the issue may be reopened later by instituting a declaratory action to the contrary effect. Most issues can be legally settled by an agreement. But if an agreement is not reached, the issue must be resolved either through a formal litigation or through a non-contentious judicial decision to be rendered by the family court judge depending on the kind of problem at issue. For example, the extent of contribution can be agreed upon but failing an agreement the family court judge will determine it.<sup>25</sup> To the contrary, an issue whether a particular piece of property belongs to the estate or to somebody else can only be finally settled through litigation between the heirs jointly and the claimant. Even if such property is given to an heir as a result of partition, the question can be reopened if the real owner wants to reclaim it.

*Methodology of Conciliation*

Logically speaking, all these preliminary issues must be settled before the conciliation panel can deal with the core task of partition itself. These preliminary issues are theoretically discrete from the question of how to partition an estate, the scope of which can become clear only after these preliminary issues are cleared. In reality, however, these issues are dealt with together and mingle with the issue of partition itself. These preliminary issues affect the final share of each heir and, therefore, each heir may take a different approach to the partition. For example, if the share of an

25. Civil Code, art. 904-2 paras. (1)-(2).

heir becomes very small because he or she has agreed to resolve a certain preliminary issue in certain way, the partition can be easily achieved by paying off a small amount of cash to him/her. Such give-and-take may take place in the process of conciliation.

The judge who is the chairperson of the conciliation panel may play an important role in persuading the parties. If the parties do not come to an agreement, the judge will decide all these preliminary issues as well as the partition itself. This is normally the same judge who was the chairperson of the conciliation panel, albeit acting in a different capacity, namely as the adjudicator in a non-contentious matter. According to the Supreme Court, an issue of substantive rights ("contentious matter" differentiated from the "non-contentious matter") may be passed upon as a premise in non-contentious proceedings without any binding effect. Therefore, the chairperson's legal view has a considerable influence although his disposition of preliminary substantive law questions (such as scope of an estate and scope of heirs) is not *res judicata*.<sup>26</sup>

Family court investigators may also play an important role in the conciliation process. One of the characteristics of the family court is that it is equipped with staff called family court investigators (*chōsakan*), who have background in fields such as sociology, psychology, criminology, and psychiatry. They play an important role in assisting judges in family as well as juvenile cases. Family conciliators also benefit from their service. They can go see the condition of the house or land to be partitioned and report back to the panel, for example. If a party appears weak-minded, an expert investigator may take appropriate actions to assist such a person.

Conciliation panels normally meet the parties separately, called caucusing. This method could be criticized as unfair because a party is heard in absence of other and opposing parties. If conciliation is unsuccessful, then the chairperson judge will decide the matter on the basis of the information gathered during conciliation. However, such criticism is almost unheard of in Japan. There has been an experiment by an innovative family court judge to conduct conciliation with all parties always in presence. Judge Igaki, then in the Kishiwada Branch of Osaka Family Court, reported that the success rate was higher than when each party was heard separately. Apparently his experiment did not include partition disputes, but his analysis was that a face-to-face conversation between parties who had not talked with each other for a long time must be useful to foster mutual understanding,

26. *Morimoto v. Morimoto*, supra note 16, deciding that these preliminary substantive law issues decided as premises in a non-contentious proceedings for the partition can be re-litigated later in a formal action (with one Justice dissenting on this point).

facilitating conciliation. It may be so in partition cases as well, but the practice does not seem to have gained any general support.

### Conclusion

It is certainly not easy to reach any conclusion from a cursory analysis as presented here. In my view, however, a fundamental problem exists in the way the Japanese succession law is constructed. As explained above, it is based on the theory that the property right passes to the heirs automatically at the time of death in accordance with the proportions prescribed by law. This is, however, an unrealistic approach. As discussed above, the matter is not so simple. This is like the bankruptcy in which various conflicting interests are examined and adjusted so that each interest holder eventually can receive his or her proper share in an estate. Without such a systematic liquidation process administered by some responsible person, a proper partition is difficult. When a will is written, an administrator of the will must be named in the will and, if not, one must be appointed by the family court. But the independence of an administrator is not guaranteed and its power is often disputed. As a matter of practice, a systematic administration of an estate may entail a high cost and is not worth doing unless a sizable estate exists. It is said that the world legal systems are divided into two camps in this respect, namely the system of automatic passing of title in civil law countries and the system of liquidation in common law countries. The Japanese system is not unique, but rather is shared by many other civil law countries. What is being done in other civil law countries to solve similar problems must be studied. But my tentative conclusion is that in Japan conciliation plays the role, albeit imperfectly, of an administrator for the liquidation of the decedent estate.

## Promotion of Workplace Gender Equality and the Impact of Free Market Principles in Japan

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### Abstract

*This paper discusses whether promotion of workplace gender equality in accordance with the United Nations Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and promotion of free trade competition are compatible in Japan. CEDAW is one of the conventions on fundamental international human rights, whereas free trade competition is a fundamental principle of international economic law. While it is undisputable that both are important international norms, can we truly comply with these norms simultaneously in the same depth? In order to answer this question, this paper explores the issue from the viewpoint of CEDAW. I review how CEDAW has been implemented domestically; how the Japanese labour market has been liberalized reflecting the principle of free trade, and how this liberalization of labour market has given the impact of workplace gender equality. The year of 1985, when Japanese government ratified CEDAW, was the first step for Japanese female workers to achieve equal working conditions with male workers. The government implemented "the Equal Employment Opportunity Act" for the first time, and discrimination against women in private employment was prohibited. While laws and regulations to promote female workers' status have increased since 1985,*

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*the stream of deregulation at the labour market seems to have a significant impact on employment of female workers. As a tentative conclusion for this paper, I argue that there is a gap between aspiration and reality: while compliance with CEDAW in the workplace and promotion of free trade are theoretically compatible, in reality promotion of free trade has had a negative impact on the promotion of workplace gender equality in Japan.*

### Introduction

In this paper I discuss whether promotion of workplace gender equality in accordance with the United Nations (UN) Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and promotion of free trade competition are compatible in Japan. CEDAW is one of the conventions on fundamental international human rights, whereas free trade competition is a fundamental principle of international economic law. While it is undisputable that both are important international norms, can we truly comply with these norms simultaneously in the same depth?

In order to answer this question, this paper explores the issue from the viewpoint of CEDAW. I conducted six pilot interviews with a government agency, the corporate personnel of commercial firms, a non-governmental organization (NGO) working on improvement of the status of women, and a journalist working on this issue; as well as a literature review. In the conclusions offered to this complex question in this piece, I argue that there is a gap between aspiration and reality: while compliance with CEDAW in the workplace and promotion of free trade are theoretically compatible, in reality promotion of free

trade has had a negative impact on promotion of workplace gender equality in Japan.

### Domestic Implementation of CEDAW

#### Ratification of CEDAW by the Japanese Government and its Implementation in the Workplace from 1985-1999.

The UN General Assembly adopted the CEDAW in 1979 for the purpose of promoting the equality of rights for women, which is a basic principle of the United Nations (UNDPI, 1999). Upon ratification by twenty Member States, the Convention entered into force in 1981. Japan ratified the CEDAW in 1985 without reservations. As a State Party to CEDAW, Japan is legally obliged to “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... (f) to take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*” (CEDAW, 1979, art. 2, emphasis added). Namely, the Convention obliges state parties to eliminate discrimination against women not only by public agencies but also by private individuals, such as corporate employers.

In order to implement CEDAW domestically, the Japanese government took various measures. In particular, with respect to promotion of gender equality in the workplace, the government took several legislative actions between 1985 and 1999 (Gender Equality Bureau, 2011a, p. 58). In 1985, the government enacted the Equal Employment Opportunity Act (EEOA) (*Koyō no bun'ya ni okeru danjo no kintō na kikai oyobi taigū no kakuhotō ni kansuru hōritsu*) to remedy the discrimination against women in private

employment. This Act was the first Japanese law to prohibit sexual discrimination in private employment. EEOA allowed women to compete with men for career track positions with opportunities for promotion. EEOA also prohibited employers from posting help-wanted advertisements segregated into male and female categories, except when such advertisements did not limit the employment opportunities of women. However, EEOA was not so effective in reneeding workplace discrimination against women in reality for the following reasons: (1) EEOA did not provide any sanctions and relied on employers' voluntary efforts; (2) different treatment of men and women in employment such as “women only” was not prohibited on the ground that it did not limit the employment opportunity of women; and (3) an employer's consent was required to initiate mediation to solve labour disputes under the scheme of EEOA.

Later, in 1997, EEOA was largely reformed to strengthen prohibitions on discrimination against women mainly by making the following revisions: (1) different treatment of women itself became illegal discrimination; (2) equal treatment of women and men in employment and promotion became mandatory as opposed to voluntary; (3) employees were given the ability to initiate labour dispute mediation under the scheme of EEOA without the consent of the employer; (4) the government had the power to disclose the names of vicious employers as a sanction; (5) the government began supporting employers who adopted positive actions to improve the status of women; and (6) the revised EEOA imposed a new obligation on employers to pay due consideration to prevent sexual harassment at the workplace (Aizawa, 2005, p. 68).

In 1991, the government enacted the Child Care Leave Act (*Ikuji kyūgyōtō ni kansuru hōritsu*), triggered by the so-called “1.57

shock" – the average birthrate in Japan reported in 1990. This Act granted employees who had a child under one year old the legal right to take childcare leave. It also obliged employers to take necessary measures to enable their employees to take care of their children without leaving the workplace, such as a system of shorter working hours. The Act was reformed and renamed the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (*Ikuji kyūgyō, kaigo kyūgyōtō ikuji mataha kazokukaigo o okonau rōdōsha no fukushi ni kansuru hōritsu*) in 1995 to grant employees the right to take leave when the employee has to take care of one of his or her family members (not necessarily a child under one year old).

The government also adopted the "New National Action Plan for the Year 2000" (*seireki 2000 nen ni mukete no shin kokunai kōdō keikaku*) in 1987 for the first time and revised it in 1991, aiming to achieve a "gender-equal society." In the next year, the government appointed a Minister of Women Problems (*fujin mondai tantō daijin*) for the first time, and the Office for Gender Equality and the Headquarters for the Promotion of Gender Equality were established in 1994. In 1997, the Council for Gender Equality was legally established in the General Administration Office of the Cabinet and, based on its deliberations, the Basic Act for Gender-Equal Society (*danjo kyōdō sankaku kihonhō*) (hereinafter Basic Act) was finally enacted in 1999.

The Basic Act is a "basic law (*kihon hō*)"<sup>1</sup> to declare the basic policy to promote a gender-equal society. Article 1 provides the purpose of this Act as follows:

<sup>1</sup> This type of laws regulates the major important fields of national policy. Its characteristic is that these laws are recognized as merely a program of

In consideration of the urgency of realizing an affluent and dynamic society in which the human rights of both women and men are respected and which can respond to changes in socioeconomic circumstances, the purpose of this law is to comprehensively and systematically promote formation of a Gender-equal Society by laying out the basic principles in regard to formation of such a society, clarifying the responsibilities of the State and local governments and citizens, and also stipulating provisions to form the basis of policies related to promotion of formation of a Gender-equal Society.

The Basic Act stipulates five basic principles in building a gender-equal society (Articles 3-7): (1) respect for human rights of men and women; (2) due consideration for gender neutrality in the social system and customs; (3) equal participation of men and women in policy making and political decisions; (4) balancing of family life and other activities; and (5) international cooperation.

From the review of the legislative and administrative activity from 1985 to 1999 stated above, enactment of the Basic Act was one substantial achievement for realizing a gender-equal society, which Japan undertook, to achieve by ratifying CEDAW. The fifth principle of the Basic Act – international cooperation – means that formation of a gender-equal society in Japan should be promoted in a harmonized manner with international efforts including CEDAW. Article 19 of the Basic Act also states that, "to promote formation of a Gender-equal Society based on international cooperation, the State shall make efforts to take necessary measures for exchanges of information with foreign

the policy and thereafter several independent laws are issued in order to implement the policy showed in the basic law.

governments and international institutions, and the smooth promotion of international mutual cooperation related to formation of a Gender-equal Society.” Accordingly, the Basic Act strengthens a concrete legal ground for the government to take necessary measures to implement various policies to comply with CEDAW.

As part of its obligation under CEDAW, Japan must submit periodic reports to the Committee on Elimination of Discrimination Against Women (hereinafter “Committee”) every four years. The Committee reviews Japan’s periodic reports and publishes observations on them. Under Article 19 of the Basic Act, the Japanese government has an obligation to take account of the observations the Committee publishes and adopt the necessary measures to follow recommendations given by the Commission. In August 2009, the Committee published the concluding observations on the sixth periodic report submitted by Japan, which is discussed in section III.

#### Current Scheme to Promote Gender Equality

In 2000, the government approved by Cabinet decision the “Basic Plan for Gender Equality” (*danjyo kyōdō sankaku kihon keikaku*) (hereinafter “Basic Plan”) (Gender Equality Room, 2000), the first plan based on the Basic Act. The Basic Plan is composed of three parts: Part 1 states basic principles in promoting a gender-equal society, Part 2 states basic policy directions and concrete policies to be implemented, and Part 3 explains how to execute the Basic Plan. In Part 2, the Basic Plan refers to “securement of equal opportunity and treatment of men and women in the area of employment.” It states as follows:

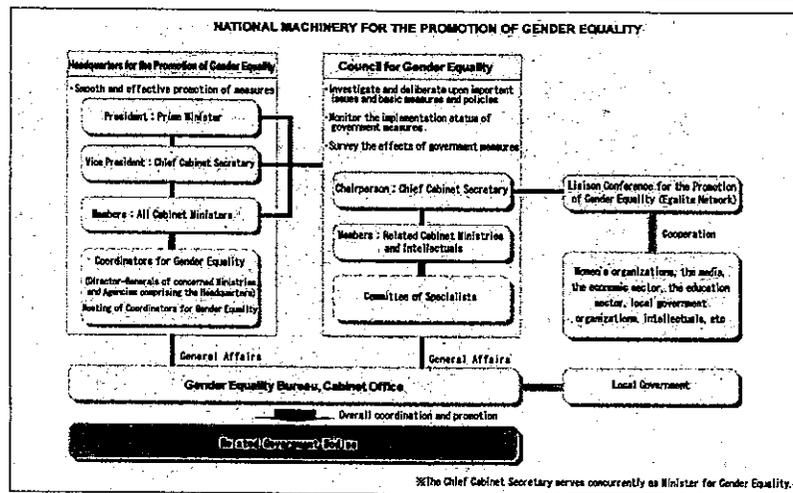
“In the present conditions of advanced globalization and intensive international

competition, it is necessary to advance policies to secure fair competition. This also results in promoting social participation of women because these policies help individuals to bring out their abilities regardless of gender. However, upon change of economic structure, we are concerned that employment becomes temporarily unstable, which may have a negative impact on women. Therefore, we should advance policies to establish a safety net and to prevent a situation where women are differently treated on the basis of gender.”

The Basic Plan proposes four concrete policies to promote gender equality in the area of employment: (1) promotion of policies to secure equal opportunities and treatment of men and women in the area of employment; (2) promotion of policies for health management of mothers; (3) support women so that they can manifest their aptitude; and (4) adjustment of labour environments reflecting various working styles.

Up to December 2010, the Basic Plan has been revised three times. The Third Basic Plan (Gender Equality Bureau, 2010a), approved on December 17, 2010 and also composed of three parts, has the same short title (“securement of equal opportunity and treatment of men and women in the area of employment”) in Part 2. This time the Basic Plan includes concrete target numbers such as ratios of female managers in private corporations and ratios of female labourers in the market, which is discussed in section III.

The following figure shows the current national machinery to promote a gender-equal society, which means that the mechanism shown below is a system to check and promote compliance of CEDAW as well.



Source: Gender Equality Bureau. (2011b). National machinery for the promotion of gender equality. Retrieved from [http://www.gender.go.jp/english\\_contents/category/prom/index.html](http://www.gender.go.jp/english_contents/category/prom/index.html).

## Current Status of Women and the Impact of Labour Market Deregulation on Women

### *Reality of Workplace Gender Equality in Japan*

The framework to secure compliance with CEDAW, which is stated in Part II, seems to have been well established and organized, and the environment to secure workplace gender equality seems to have been put into place. However, the reality of female labour surprisingly lags behind even today (Gender Equality Bureau, 2010b, p. 26)<sup>2</sup>. Although 41.9% of the labour force in Japan consisted of women in 2009, the average wage level of full-time female employees was only 69.8% of that of male employees. While only 22.3% of men earn less than 3 million yen

<sup>2</sup> Summary of the White Paper is also available in English (Gender Equality Bureau, 2010c).

among those who have continued to work for a year, 66.4% of women fit in this category. Not many women hold “leadership positions” in corporations: only 4.9% of department managers, 7.2% of section managers, and 13.8% of sub-section chiefs are women. Further, about 70% of full-time female workers leave their workplaces permanently after their first childbirth, even though 24.2% of them answered that they “wanted to continue to work.”

The above data is also reflected in an international assessment of gender equality of the state. The United Nations Development Programme (UNDP) annually publishes an index called the HDI (Human Development Index), which indicates the level of human development in each country, and the GEM (Gender Empowerment Measure), which indicates the level of female participation in politics and economy. According to the 2009 figures published by the UNDP, while Japan’s HDI ranked 10th among 182 countries, its GEM ranked 57th among 109 countries (UNDP, 2009, p. 186).

Based on this situation, the government’s Third Basic Plan of 2010 puts target numbers to promote gender equality at workplace: (1) the ratio of women who hold a department manager or higher position in private sectors should be raised from 6.5% in 2009 to around 10% in 2015; (2) the ratio of private sectors that introduce any positive action to promote workplace gender equality should be raised from 30.2% in 2009 to over 40% by 2014; (3) the employment rate of women between age 25 and 44 should be raised from 66% in 2005 to 73% by 2020; (4) the ratio of women who continue to work after having the first child should be raised from 38% in 2005 to 55% by 2020, and so on (Gender Equality Bureau, 2010a).

*Concluding Observations by the CEDAW in 2009*

The Concluding Observations of the CEDAW: Japan (CEDAW, 2009) also point out slow progress on Japan's female employment situation. It first criticizes that some concerns expressed by the Committee in previous concluding observations in 2003 have been "insufficiently addressed," and it notes that the situation of women in the labour market is one of the fields that have not been addressed in particular (CEDAW, 2009, para. 15).<sup>3</sup> In addition, the CEDAW (2009, para. 27) states that it "notes with regret that no temporary special measures are in place to accelerate de facto equality between men and women or to improve the enjoyment by women of their rights in the State Party, in particular with regard to women in the workplace and the participation of women in political and public life," and "the Committee urges the State Party to adopt... temporary special measures, with an emphasis on the areas of employment of women and participation of women in political and public life, including women in academia, and with numerical goals and timetables to increase representation of women in decision-making positions at all levels" (CEDAW, 2009, para. 28, emphasis added). Now, the Japanese government has been asked to provide "detailed written information on the implementation of the recommendations" as to what kind of temporary special measures are to be taken within two years (CEDAW, 2009, para. 59).

<sup>3</sup> Even in its previous observations in 2003, the Committee stated that it "urges the State party to amend its guidelines to the Equal Employment Opportunity Law and to increase its efforts towards accelerating the achievement of de facto equal opportunities for women and men in the labour market through, inter alia, the use of temporary special measures in accordance with article 4, paragraph 1, of the Convention." (CEDAW, 2003, para. 370).

The Concluding Observations by the CEDAW Committee in 2009 clearly point out that in the workplace, Japan does not sufficiently comply with the Convention regardless of the existence of seemingly well-established national machinery. In order to explore the reasons for this, the discussion below deals with the labour policy shift and its impact on the labour market.

*Impact of Deregulation of the Labour Market*

The deregulation of the labour market has been a global trend since the 1990s (Araki, 2007) and the Japanese labour market is no exception. In the case of Japan, deregulation policy (*kisei kanwa seisaku*) in general was strongly promoted during the 1990s as a national policy, which also accelerated deregulation of the labour market. In particular, the Koizumi Cabinet (2001-2005) aggressively promoted deregulation with the slogan of "the reform without sanctuary" and labour market regulation was also a target area for deregulation.

In May 2001, the Koizumi Cabinet adopted the Cabinet decision "Three Year Plan for Promoting Deregulation Reform" (*Kisei kaikaku suishin sankanen keikaku*) (Cabinet, 2001). In this plan, one of the fundamental purposes for the reform is stated as "realizing an internationally open economic society." The basic policies for the reform are, among others, "economic regulation should be free in general and social regulation should be kept to the minimum," and "regulation should be based on international harmonization." The basic direction of the Koizumi Cabinet was to eliminate regulations that impeded competition, which was called "New Liberalism" and was also a global trend for a few decades (Drabek & Laird, 1998).

Under the Three Year Plan, the field of employment and labour relations was also listed as a target field which should be

deregulated (Araki, 2007). The Comprehensive Deregulatory Commission submitted the first report on promotion of deregulation in July 2001. The report proposed to review the regulation of dispatching workers as a regulatory reform so that the reform enabled smooth labour movement in the market. Accordingly, the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (ADW) (*Rodosha hakenhō*) was revised in 2004 to largely eliminate the regulations on dispatching workers. The ADW was originally established in 1986 to legalize worker-dispatching services in sixteen designated areas of services that were stipulated in the law (Takanashi, 2007, p. 26-48). Since its enactment, the ADW was revised four times before the 2004 reform to relax regulation step by step. The most significant reform before 2004 was the revision of 1999, by which the ADW adopted the “negative-list system” meaning that worker-dispatching services could be used for all kinds of occupations as a basic rule except for the areas of services that were listed in the law. The reform of 2004 further accelerated this tendency to liberalize the worker-dispatching market. The revised ADW legalized dispatching services for manufacturing industries that were in the area of services that predicted a great demand of temporary workers, and expanded the period of accepting dispatching workers from one year to up to three years.<sup>4</sup> As stated, this reform was conducted in order to strengthen the competing power of private sectors located in Japan and to contribute to the promotion of free competition among corporations, as well as to meet the needs of diverse working styles of workers.

After the reform of the ADW in 2004, the number of dispatched workers was dramatically increased from 500,000 in

<sup>4</sup> The 2004 revision also clarified rights and duties of both dispatching and dispatched entities.

2003 to 850,000 in 2004 (Statistics Bureau, 2011). The total number of dispatched workers continued to increase until the Lehman Shock<sup>5</sup> happened in 2008. As a natural result, corporations shifted to decrease the number of regular employees that were much more expensive than non-regular employees. In 2007, one third of total employees (excluding directors) became irregular employees in Japanese private sectors (Statistics Bureau, 2011). However, women served as an adjusting valve to an appreciable extent: 68.7% of irregular employees (temporary workers, part-time workers, contract employees, etc.) were women. The ratio of regular employees to non-regular employees for men was 81.7% to 18.3% in 2007, whereas that ratio for women was 46.5% to 53.5%. The graph below shows how the demand for dispatching workers has been largely filled by female employees.

<sup>5</sup> On September 15, 2008, the US investment bank Lehman Brothers collapsed, which had a significant impact even on Japanese economy and unemployment rate raised due to this event.