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No Alternative: Resolving Disputes Japanese Style¹

Eric A. Feldman

1 Introduction

Alternative Dispute Resolution; I can think of nothing else in the legal lexicon that is as profoundly unhelpful as a tool for examining and analysing the Japanese legal system. Indeed, if it were only unhelpful, it could be easily ignored. But it is far worse than that. The words “alternative dispute resolution” are misleading, allowing us to imagine that there is a dominant, non-alternative, mainstream way of resolving disputes—courts—that we comprehend, as well as a different, alternative, almost subversive dispute resolution system that exists alongside, or perhaps in opposition to, the mainstream approach. To intone the mantra of ADR is to imply a certain sameness to the structure and process of conflict across cultures—we may have different legal rules and different court systems, but (or so implies the language of ADR) we have all found ways to deal with our disputes by reference to both a mainstream and an alternative set of norms and institutions.²

Embedded in the contrast between mainstream and alternative approaches to conflict resolution are a host of related distinctions. Mainstream dispute resolution is state-centric, alternative is private. Mainstream is formal, alternative is informal. Mainstream is slow and expensive, alternative is quick and cheap. Mainstream is rigid, cold, and impersonal, alternative is flexible, responsive, and human. None of these generalisations, I maintain, is terribly useful. Worse, they contribute to, and perpetuate, a misunderstanding of conflict and its resolution. The solution, I suggest, is to abandon not only the language of ADR, but also the false conceptual distinctions that it propagates and perpetuates.

¹ I am grateful to the University of Pennsylvania Law School for a Summer Research Grant that funded this work, to Nozomu Hirano and Moritz Bälz for their valuable comments, and to James Klima and Marika Mikuriya for research assistance.

² For an excellent, nuanced overview of dispute resolution in the US, see Carrie Menkel-Meadow, “Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the ‘Semi-formal,’” in: Felix Steffek *et al.*, (eds), *Regulation of Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford, Hart Publishing, 2013).

My definition of ADR is quite simple, though no more so than the definition generally used by those scholars who work in the field of dispute resolution. Cornell Law School's Legal Information Institute, for example, uses ADR to refer to "any means of settling disputes outside of the courtroom".³ Since without exception all people in all societies resolve only a small fraction of their disputes in the courtroom, it is both odd and in tension with the meaning of the word "alternative" to label the dominant method of resolving disputes as an alternative approach. More problematic, in Japan and surely ~~many~~ other places, the many settings relevant to the dispute resolution process highlight the futility of the Cornell distinction between the interior and the exterior of the courtroom. Surely, the courtroom is one venue where conflicts are resolved, but, in most cases, what happens in the courtroom is intimately linked to what occurs in the waiting room, the back room, the adjacent room, perhaps even the bathroom—all distinct spaces within the courthouse. Ought the courthouse and not the courtroom be the relevant space for distinguishing between alternative and mainstream dispute resolution? Better yet, perhaps the focus should be on the difference between public, governmental space *versus* private, non-state environments? Or should we be distinguishing between the nature of the parties (individuals, businesses, states) rather than the nature of the space in which they operate, or perhaps the types of procedures that are followed?

Although the Cornell definition says nothing about the substantive rules used to resolve disputes, much of the literature about ADR specifies or assumes that the black letter law animating courtroom conflicts will give way to a less rigid and more party- or case-specific resolution that is not strictly wedded to the applicable legal principles. What one finds in Japan, in contrast, is a conventional legal mindset dominating so-called ADR; legal professionals control many ADR institutions, legal procedures structure their operation, and legal norms govern their outcomes. The specific setting may not be the courtroom—though it may be just a few feet away, as discussed below—but along many, if not most, other relevant dimensions, ADR parrots the "legality" of mainstream dispute resolution.

Rather than a simple black/white categorisation of mainstream *versus* alternative dispute resolution, therefore, what we need is a cartography of dispute resolution institutions that maps the full range of approaches and traces their interaction. Although drawing such a map is well beyond the scope of this

3 "Alternative Dispute Resolution", Legal Information Institute of Cornell University Law School, (last accessed 19 November 2013), available at: http://www.law.cornell.edu/wex/alternative_dispute_resolution.

chapter, I will sketch a few tentative outlines by describing two examples of conflict resolution in Japan. Neither can justly be called “alternative”, yet neither fits the mould of what might be called mainstream or classical dispute resolution. One, judicial settlement, focuses on process; the other, compensating victims of the Fukushima disaster, engages a specific event. Together, they help to illustrate why the term ADR is so unhelpful in our effort to classify and analyse conflict domestically and cross-culturally, and provide some insight into the rich array of methods that people use to settle their disputes.

2 Judicial Dispute Resolution

Among those who study the Japanese legal system, the analytical framework of ADR *versus* court-centric dispute resolution has been influential.⁴ Much time has been spent, and appropriately so, by scholars who are interested in the selection of judges, how trials are conducted, how witnesses are called, how evidence is accumulated, who wins and who loses legal conflicts, how long trials take, the independence of the judiciary, and more.⁵ Many have also looked at what are broadly called extra-judicial approaches to conflict, including administrative compensation schemes for everything from car accidents to vaccine-related injuries.⁶ In 2001, the government sought to remedy what it considered a scarcity of ADR in Japan when the Justice System Reform Council pressed for the expansion of so-called alternative means of conflict resolution

4 Takeyoshi Kawashima, “Dispute Resolution in Contemporary Japan”, in: Arthur Taylor von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society*, (Cambridge MA, Harvard University Press, 1963), p. 41, at 41; John Owen Haley, *Authority without Power: Law and the Japanese Paradox*, (Oxford, Oxford University Press, 1991); Daniel H. Foote, “Japan’s New ADR System for Resolving Nuclear Damage Claims”, paper presented at the annual meeting of the Law and Society Association (3 June 2012), on file with author; Eric Feldman, “Law, Culture, and Conflict: Dispute Resolution in Postwar Japan”, [Faculty Scholarship, Paper 148 \(2007\)](http://scholarship.law.upenn.edu/faculty_scholarship/148), available at: http://scholarship.law.upenn.edu/faculty_scholarship/148.

5 See, for example, Mark J. Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan*, (Chicago IL, University of Chicago Press, 2003); Haley, note 4 above; Shozo Ota, “Reform of Civil Procedure in Japan”, (2001) 49 *American Journal of Comparative Law*, p. 561.

6 My work on conflict between tuna dealers in Tokyo’s Tsukiji Fish Market also fits into this category. See Eric A. Feldman, “The Tuna Court: Law and Norms in the World’s Premier Fish Market”, (2006) 94 *California Law Review*, p. 313.

for the Japanese populace.⁷ This led, in 2004, to the enactment of the Act to Promote the Use of Alternative Dispute Resolution (effective 2007, the Act's primary goal appears to be the promotion of private mediation).⁸ During the political debate over the Act, the Japan Federation of Bar Associations (JFBA) argued (and continues to insist) that lawyers play a central role in all ADR institutions.⁹ The idea that legal professionals and/or legal norms should be central to both mainstream and alternative approaches to conflict resolution is a theme in both of the case studies discussed below.

Despite the absence of a clear definition of ADR, one of its key features is that it offers an alternative to judges adjudicating disputes in court. How then should we categorise judicial dispute resolution, known as *wakai* (和解) in Japan, a process that is driven by judges, uses government facilities and resources, results in written judgments, consumes large amounts of court resources, and is only superficially consensual (see below), but does not take place in the courtroom, is not public, and has no formal precedential value? For the past several years, the phenomenon of judicial dispute resolution has been the focus of a sub-group of scholars who have been convening annually at the Annual Meeting of the Law and Society Association, and has led to the publication of "The Multi-Tasking Judge: Comparative Judicial Dispute Resolution."¹⁰ But so far, this rather large wrinkle on the analytical fabric of ADR has not been well acknowledged.¹¹

In fact, Japanese judges spend a great deal of time—in some cases, the majority of their time—not in the courtroom presiding over cases, but in the backroom actively settling them.¹² Out of public view, in a small room adjacent

7 See "Recommendations of the Justice System Reform Council for a Justice System to Support Japan in the 21st Century" (12 June 2001), available at: <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

8 The Act on Promotion of Use of Alternative Dispute Resolution, Act No. 151 of 2004 (Japan).

9 As of June 2013, 126 ADR bodies had been certified under the new law. In almost all of them, utilisation has been extremely low. See Kota Fukui, Chapter 8 in this volume.

10 Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge: Introduction to Comparative Judicial Dispute Resolution*, (Australia, Thomson Reuters, 2013).

11 There is, of course, a literature on judicial settlement in the US and elsewhere, but the practice works somewhat differently in Japan. The German system of "*Prozessvergleich*" may be a closer equivalent to *wakai*, though with different caucusing rules.

12 Indeed, the idea that what judges do is to write judgments, and that those who do it well—or at least frequently—will be promoted more quickly and enjoy greater status within the judiciary, has recently been bolstered by the empirical work of Mark Ramseyer, who writes: "... [number of opinions issued per year] matters: judges who write many

to their chambers, judges engage in a judicialised version of shuttle diplomacy, alternatively talking to defendants and plaintiffs until they come to a meeting of the minds.¹³ Despite the importance of judicial settlement, however, the literature on the topic is extremely weak.¹⁴ One explanation for the slim academic attention focused on *wakai* is that it occurs behind closed doors, well out of public view. To the best of my knowledge, no Japanese or American scholar has had the opportunity to directly observe and write about *wakai*, which may account for the fact that the scholarship on *wakai* mostly dates from the 1970s and 1980s is either written by judges who are proselytisers, attorneys who are critics, or scholars who have no direct or inside knowledge of the process.¹⁵

The *wakai* process differs dramatically from the archetype of “mainstream” dispute resolution, featuring a neutral public servant engaged in a public process of dispute resolution. But it is also in tension with the notion that ADR occurs at or within a site other than the courthouse, and with different parties than one encounters in court. In fact, *wakai* depends upon the same judges who preside over courtrooms, even though during the years they spend getting trained judges receive little formal instruction about how to settle cases. Like lawyers and prosecutors, judges are required to spend time at the Supreme Court of Japan’s Legal Training and Research Institute (LTRI) before they enter professional practice. Yet there are no classes at the LTRI about how to be an effective case settler. No one tells the students when they should broach the idea of *wakai*, how hard they should push the parties to settle, or whether they should reveal their own views of the merits of the legal claims.¹⁶ Nor is there

publishable opinions do better than those who write few. . . . [J]udges who are the most prolific in writing published opinions for the cases that fail to settle are put in better postings by the Secretariat.” ~~[Table 3.4 on this page purports to demonstrate this proposition];~~ Ramseyer and Rasmusen, note 5 above, p. 54.

- 13 My focus in this chapter is District Courts. Settlement, which I used synonymously with *wakai*, can happen in higher courts as well, but it is most common in District Courts.
- 14 There are various differences between *wakai* and *chôtei*, notably that *chotei* is a process of conciliation under the control of the judiciary that is used in many civil and family cases and precedes the start of a trial. It is usually overseen by conciliators rather than judges. Katja Funken, “Comparative Dispute Management: Court-Connected Mediation in Japan and Germany”, (2002) 3 *German Law Journal*, available at: <http://www.germanlawjournal.com/article.php?id=130>.
- 15 Although my own experience is also limited, I have been able to attend a number of *wakai* sessions in Tokyo and Kobe and to talk with the judges leading these sessions. Although my sample is small and thus more anecdotal than scientific, it is a first step in filling the significant gap in the literature about judicial settlement in Japan. See, also, Yoshiro Kusano, “A Discussion of Compromise Techniques”, (1991) 24 *Law in Japan*, p. 138, at 138.
- 16 Because LTRI students spend ten of their twelve months doing rotating internships in different areas of legal practice, they are likely to get at least some exposure to *wakai*

discussion of the legal and ethical issues involved in allowing judges both to preside over cases in the courtroom and to oversee settlements outside of the courtroom, to meet with parties individually, and to press parties to accept particular settlement outcomes by signalling the likely result if the case were to reach a final judicial determination. In short, the LTRI could potentially train judges-to-be in the art of settlement, but no such training occurs. Instead, professional legal education for judges, and for other legal professionals for whom *wakai* will soon become a central element of their practice, is silent about judicial settlement.¹⁷

None of this would much matter if *wakai* was used only infrequently. But this is not the case. Close to 30 per cent of cases filed in Japan's district courts are settled through *wakai*. Another third of filed cases are contested and reach a final judicial judgment. And a third of cases are dropped or result in default judgments. In 2012, for example, of the 168,230 cases that reached a final disposition, 69,750 were concluded by judgments (22,442 default judgments and 47,308 contested), 36,234 were withdrawn, and 57,368 (34.1 per cent) were resolved through the process of *wakai*.¹⁸ Consequently, in most years judges spend more time brokering settlements and writing settlement agreements than they do presiding over cases in court and writing legal opinions. In this sense, it is not an exaggeration to say that *wakai* is the standard, mainstream way of managing litigation in Japan, to which full-blown courtroom-based litigation ending with a final verdict represents an alternative. Marc Galanter made this point almost thirty years ago in his work on US trial courts:

The negotiated settlement of civil cases is not a marginal phenomenon; it is not an innovation; it is not some unusual alternative to litigation. It is only a slight exaggeration to say that it is litigation.¹⁹

From the perspective of judges, *wakai* appears to be appealing for two main reasons. First, the literature on the Japanese judiciary (and judiciaries everywhere?) emphasises the importance of clearing the docket for a judge's

during the time that they spend training in the judicial branch. But the training is neither systematic nor detailed.

17 Judicial settlement has the full force of a binding judgment. Indeed, Article 136(1) of the Code of Civil Procedure states that, "At any state of the court procedure in the case, the court may admonish the parties to join the process of arrangement for settlement in court presided over by judges...".

18 See http://www.courts.go.jp/about/siryō/hokoku_05_hokokusyo/index.html. An additional 4,878 cases are categorised as 'other'.

19 Marc Galanter, "... A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States", (1985) 12 *Journal of Law & Society*, p. 1, at 1.

reputation and promotion. The goal is to process as many cases as possible as quickly as possible. Judges whose backloads of cases increase are often seen as less competent than judges who can manage the pile of cases that sits on the desk of every trial court judge in Japan. And less competent judges lose out on the rewards handed out by judicial administrators, who decide where a judge's next posting will be (they are rotated every few years) and thereby determine whether a judge is tracked high or low, seen as sharp or dull, treated as a star or a dud, gets to live in Tokyo or is exiled to a remote country village.²⁰ Mark Ramseyer illustrates this nicely in an article which analyses the factors that lead judges to be appointed to the Supreme Court, where he notes that "the Secretariat promotes judges according to their docket-clearance rates".²¹ One way in which judges can increase the rate at which they dispose of cases is to try—whenever possible—to avoid presiding over trials and writing judicial opinions. The longer it takes to conduct a trial and write a judgment, the less time is left for the ensuing cases. In many instances, therefore, judges prefer to engage in judicial settlement rather than to preside over a full trial and write an opinion, since settlement is likely to be the quicker route to case disposition.²²

Second, trial court judgments can be appealed and overruled. In contrast, there is no appeal from *wakai*. Judges who settle cases are therefore judges whose legal acumen is not directly challenged. As one commentator states:

writing a decision itself is rather burdensome to the judge. Moreover, if his decision is quashed at the appellate level, he would not feel very comfortable. However, through an in-court compromise, a dispute is

20 Of course, the evaluation and promotion of judges depends upon a variety of factors, not only the ability to settle quickly ~~cases~~.

21 J. Mark Ramseyer, "Do School Cliques Dominate Japanese Bureaucracies? Evidence from Supreme Court Appointments", p. 15 (Harvard Law and Econ., Discussion Paper No. 687, 2011), available at: http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_687.pdf. Tomoyuki Ohta and Tadao Hozumi made a similar point several decades earlier: "Today, most judges are encouraged to eliminate delays in litigation or to prevent any greater delays, while being allocated a considerable number of cases, which inevitably causes increasing delays unless they work overtime. . . . To seek a reduction in time and mental burdens is a fundamental human instinct and, due to their excessive workloads, it is natural that many judges and lawyers are strongly attracted to a means of settling cases that takes less time and involves less of a psychological burden. . . . As a result, judges gasping for breath under heavy workloads and busy lawyers are apt to aim at settlement by compromise."; Tomoyuki Ohta and Tadao Hozumi, "Compromise in the Course of Litigation", (1973) 6 *Law in Japan*, p. 97, at 105.

22 Shusuke Kakiuchi, "The Significance of Wakai in Lawsuits", in: M. Ito *et al.*, (eds), *Issues in the Code of Civil Procedure*, (Tokyo, Yuhikaku, 2009), p. 248 (in Japanese).

finished, and there is no need for writing an opinion, nor is there any later review . . .²³

In fact, one judge has gone a step further, stating:

I've come to think that rendering a court decision indicates an inadequacy in the persuasive powers of the judge. In the past I had thought that for a judge to make efforts at reaching a compromise was an indication of an inadequate ability to render a court decision and I occasionally stated this publicly. I have now changed my mind 180 degrees.²⁴

Some attorneys also appear to have a preference for *wakai*. Lawyers whose cases settle are lawyers who do not lose, and avoiding loss, at least for many, may be more compelling than chasing victory, because it enables them to provide their clients with at least some satisfaction. In addition, attorneys may have a financial incentive to pursue *wakai* rather than a court judgment. Plaintiff's lawyers in Japan get paid through an arrangement that involves a mixture of retainers and contingency fees. An attorney who settles will thus be better compensated than one who loses, and a steady income for an attorney is better assured through settling cases than through all-or-nothing litigation.

But not all lawyers are enthusiastic about *wakai*. Those who are most critical generally cite what they consider to be an undue degree of manipulation by judges as the source of their concern. Anecdotes about such manipulation are common. One prominent lawyer describes a case involving a woman who sued her obstetrician after her child was born with serious medical complications.²⁵ The lawyer was confident that his evidence demonstrated that the obstetrician had not met the standard of care, and requested 1.5m USD of damages for his client. But when the judge suggested that the parties engage in settlement discussions, the attorney felt that he had to co-operate, and during the settlement discussion the judge made it clear that he ~~or she~~ believed the obstetrician had met the standard of care.²⁶ Because the same judge would preside over

23 Tetsuya Obuchi, "Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, with Special Emphasis on In-Court Compromise", (1987) 20 *Law in Japan*, at 87.

24 Shunkou Mutou, "Concerning Trial Leadership in Civil Litigation: Focusing on the Judge's inquiry and Compromise", (1979) 12 *Law in Japan*, p. 23, at 24.

25 Confidential interview with senior Japanese attorney, conducted in Tokyo, Japan, 2010.

26 One crucial norm of the settlement process is that it is considered appropriate for judges to share with parties their views on the merits of the case. By doing so, judges are strongly

the trial if the parties failed to settle, the attorney knew that his chances of a court victory were slim. As a result, he says that he felt compelled to accept the 30,000 USD settlement suggested by the judge.²⁷

The costs and benefits of *wakai* for parties is more difficult to discern, though that has not stopped a wide array of commentators from declaring that Japanese litigants have an almost innate cultural preference for *wakai*. Ohta and Hozumi, for example, note the “so-called love for compromise” that “exists among the Japanese”, and elaborate:

The reason the Japanese are fond of compromise is related to the fact that in their social relations the boundary of one’s rights and duties are only vaguely defined . . . Japanese favor a means of resolution that ‘washes away’ the dispute without clarifying rights and duties.²⁸

Shunkou Mutou, formerly a Tokyo District Court judge, concurs, declaring that:

There is no mistaking that the great majority of litigants usually desire a compromise.²⁹

Similarly, Tetsuya Obuchi notes that:

It is widely said that the Japanese are non-litigious and not legal-conscious and that they prefer to resolve disputes through out-of-court settlements.³⁰

tipping their hand, since, by indicating how they are likely to rule if a case proceeds to judgment, judges are telling the parties whether they are likely to win or lose a case and what they can expect the case to be worth. Because judges generally do this with each party separately, however, both plaintiffs and defendants may believe that the judge is pressuring them to settle by overselling the strengths of their opponent’s case, thereby getting each party to accept a less desirable outcome than they were seeking.

27 Even without undue coercion, the fact that the parties know that in the absence of compromise the judge supervising *wakai* is the same judge who will render a final judgment surely primes them for compromise. In fact, a 1999 survey of parties who were involved in *wakai* indicates that the majority of them found the process less than satisfactory. See M. Itō *et al.*, “Wakai from the Perspective of the Parties: A Roundtable Discussion of a Recent Survey”, 1008 *Hanrei Times*, p. 4, 15 October 1999 (in Japanese).

28 Ohta and Hozumi, note 21 above, at 100.

29 Mutou, note 24 above, p. 24.

30 Obuchi, note 23 above, p. 74, at 74.

And Oda and Takaishi observe that:

it is the custom in Japan both before and after the proceedings commences to spend time trying to reach a compromise. Settlement is the preferred way to resolve a dispute.³¹

Although little evidence for this alleged social preference has been offered, disputants may value the fact that *wakai* can be faster and simpler than litigation, as it requires no witnesses and less evidence, is cheaper than litigation, is more flexible than litigation, since it is less strictly bound by legal rules and often includes apology and other devices that may help to preserve and/or restore relationships among parties; and leaves at least some disputants more satisfied than they would be with litigation, since the parties to a settlement have at least some say in the outcome.³²

Wakai invites us to consider the relative importance of the different values that animate the process of dispute resolution. The time it takes to resolve a conflict is clearly an important factor, as is the cost of the dispute resolution process, the satisfaction of the parties, the legitimacy of dispute resolution institutions, the reputation of judges, and more. How ought one to evaluate the relative desirability of *wakai* versus trial/judgments, and what factors are most essential to the crafting of a “just” outcome? To what extent are gaps between the power and influence of the parties magnified or mitigated by the *wakai* process? Are the advantages offered by “better” legal counsel remediated or amplified by *wakai*?

Addressing such questions is critical for those interested in understanding the costs and benefits of different dispute resolution institutions, but the blunt analytical framework of “alternative” and “mainstream” dispute resolution provides us with little assistance. Whether one considers *wakai* to be a form of ADR, a sub-set of litigation, or something else, is far less interesting and important than empirically studying *wakai* and carefully analysing its distinctive features—a widely used process controlled by judges that occurs in the courthouse, is shaped by but not strictly wedded to legal principles, and combines voluntariness and coercion.

31 Joseph W.S. Davis, *Dispute Resolution in Japan*, (Dordrecht, Kluwer Law International, 1996), 301, 303.

32 Galanter, note 19 above, suggests that judicial settlement, and settlement more generally, may bring parties together in a less oppositional way than litigation, thereby avoiding the divisiveness of adversarialism and promoting the bonds of community.

3 Compensating Victims of the Nuclear Accident in Fukushima

The language of ADR posits the existence of a formal, state-centric, slow, expensive, and impersonal system of dispute resolution to which parties seek private, informal, fast, and flexible alternatives. Judicial dispute resolution in Japan, known as *wakai*, collapses part of this dichotomy by highlighting the indistinct boundary between “mainstream” and “alternative” dispute resolution and the many overlapping roles of judges, the ultimate “non-alternative” dispute resolvers. Similarly, the system created to compensate the victims of the 11 March 2011 triple-disaster in Japan is a good example of how a set of linked institutions can offer ~~the~~ disputants a bouquet of approaches to managing conflicts that defy simple categorisation. Rather than a division between the dominant and alternative modes of dispute resolution, Fukushima claimants can present their demands for compensation in at least three different *fora*, each with certain perceived advantages and disadvantages, all representing “alternatives” but none being truly an “alternative”. Perhaps unsurprisingly, in light of the debate over the ADR Act of 2004, the three institutions handling Fukushima-related claims are heavily dependent upon the organised bar, which plays a key role in both determining the applicable compensation norms and applying them to specific cases.

3.1 *Litigation*

The sheer number of potential claims in Fukushima would tax the limits of any system of compensation. With close to 20,000 people dead, 27,000 injured, and 300,000 living in temporary housing, as well as nearly 130,000 buildings destroyed and one million homes damaged, potential claimants quickly discovered that they faced very different options. In a sense, the most democratic institution with the potential to resolve compensation claims is the courts, open to all regardless of the type or extent of the injury experienced. In fact, for those whose harms were not caused by the nuclear meltdown, litigation is the only possible route to compensation. The Japanese government has not offered financial compensation to victims of the earthquake or tsunami, so only those whose harms can be traced to the meltdown of the Tokyo Electric Power Company’s (Tepco) Fukushima Daiichi and Daini reactors are eligible for compensation through out-of-court programmes. So far, however, few claims for Fukushima-related compensation have reached the courts, perhaps because of the scarcity of lawyers in the Fukushima region, the difficulty of identifying the precise cause of one’s harms, and the challenge of finding viable defendants when one’s harms were caused by “natural”

events.³³ If in December 2013 the legislature had not extended the statute of limitations for filing claims related to the nuclear accident in Fukushima to 10 years,³⁴ litigation (unless there was a rush to the courthouse before March 2014) would have ended up as a little-used approach to adjudicating Fukushima compensation claims and the vast majority of those harmed by the 11 March 2011 triple disaster would have remained uncompensated.³⁵

3.2 *Tepco's 'Direct' Route to Compensation*

Like other developed nations that depend upon nuclear facilities to provide at least some of their energy, Japan has a regulatory scheme that governs the management of compensation in the event of a nuclear accident. The Nuclear Damage Compensation Act explicitly provides that compensation be paid by the nuclear operator whose reactor has caused harm, and charges the Dispute Reconciliation Committee for Nuclear Damage Compensation (under the auspices of the Ministry of Education, Sports, Culture, Science and Technology (MEXT)) with the task of drafting guideless to help the operator determine

33 There have been a number of lawsuits alleging a link between the nuclear accident and suicide, and in June 2013, Tepco for the first time agreed to settle one such suit, involving a farmer unable to sell his produce in the aftermath of the meltdown. See "Tepco Admits Culpability in Fukushima Farmer's Suicide", *The Japan Times*, 7 June 2013, available at: http://www.japantimes.co.jp/news/2013/06/07/national/tepcu-admits-culpability-in-fukushima-farmers-suicide/#.UiUAUvPD_DA. In addition, there appear to be a growing number of claims brought by those who were not satisfied with the payments they received via ADR or directly from Tepco and who want to use the courts to underscore the failures and responsibilities of Tepco and the government. One class action was filed on behalf of 40 plaintiffs in December 2012; four on behalf of 1,700 plaintiffs in March 2013; another on behalf of 26 plaintiffs in May 2013. Ryuichi Yoshimura, "Fukushima Genpatsu Jiko Higai no Kyūsai," (Remedying the Harms from the Fukushima Disaster) *Hōritsu Jihō*, 85(10), 2013, (in Japanese). As of September 2013 a total of 3,800 people are said to have filed suit. See http://sankei.jp.msn.com/west/west_affairs/news/130930/waf13093018120016-n1.htm.

34 See <http://www.asahi.com/articles/TKY201312040561.html>.

35 The statute of limitations for Fukushima-related tort claims originally was 3 years and would thus have expired on 11 March 2014. See "Deadline for Fukushima Victims", *The Japan Times*, 21 August 2013, available at: http://www.japantimes.co.jp/opinion/2013/08/21/editorials/deadline-for-fukushima-victims/#.UiT_bvPD_DA; <http://ajw.asahi.com/article/0311disaster/fukushima/AJ201309210059>. Those who bring claims to the ADR process can file lawsuits within one month of the termination of their claims. See http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1335890.htm; <http://www.nhk.or.jp/kaisetsu-blog/400/161228.html>.

what constitutes appropriate compensation.³⁶ The committee created in the aftermath of Fukushima has ten members, six of whom are legal experts and four with expertise in medicine and science. To facilitate what is known as the “direct” route to compensation, the Committee, chaired by a prominent legal scholar, quickly focused on the creation of compensation guidelines, which the Chair described as embodying the “essence of court precedent”.³⁷ After a series of meetings, the Committee issued Interim Guidelines in August 2011, which were intended to serve as a template for those engaged in evaluating the merits of the submitted claims and determining the size of compensation awards.

Tepeco faced several challenges in handling claims that were potentially eligible for compensation through the “direct” route. Most immediately, the Nuclear Damage Compensation Act requires the owners/operators of nuclear facilities to carry 120 billion yen of insurance.³⁸ It also makes them strictly liable for the cost of accidents, which, in the case of Fukushima, will amount to trillions of yen, far more than the total value of Tepeco’s assets. Because Tepeco lacked the financial means to cover the costs of compensation, the government stepped in by loaning large sums of money to Tepeco via the Nuclear Damage Liability Facilitation Fund.³⁹ Compensation payments are thus channelled through Tepeco, but are now entirely state funds.⁴⁰

Tepeco’s second significant challenge was more bureaucratic. Evaluating claims and awarding compensation is a labour-intensive task that requires a

36 Act on Compensation for Nuclear Damage, No. 147 of 1961, pt. 5, sec. 18 (Japan).

37 See X. Vasquez-Maignan, “Fukushima: Liability and Compensation”, NEA NEWS 29.2, available at: <http://www.oecd-nea.org/nea-news/2011/29-2/nea-news-29-2-fukushima-e.pdf> (noting that the first compensation guidelines were adopted on 28 April 2011 and that the second guidelines were adopted shortly thereafter, on 31 May 2011).

38 More technically, Section 7 of the Act states that “... financial security shall be provided by the conclusion of a contract of liability insurance for nuclear damage or by a deposit approved by the Minister of Education, Sports, Culture, Science and Technology (MEXT) as an arrangement that makes available for compensation JPY 120 billion...”.

39 The Act states that the government may pay for compensation that exceeds JPY 120 billion “when the Government deems it necessary in order to attain the objectives of this Act,” and “to the extent that the Government is authorized to do so by decision of the National Diet.” Section 16, Nuclear Damage Compensation Act. As of November 2013, Tepeco had received 3.8 trillion yen from the Fund, which is currently limited to 5 trillion yen but is widely expected to require a higher limit. See “State Considers Loaning TEPCO Additional 3 Trillion Yen”, *The Asahi Shimbun*, 11 November 2013), available at: <http://ajw.asahi.com/article/economy/business/AJ201311110038>.

40 Hatsu Morita, “Rescuing Victims and Rescuing TEPCO: A Legal and Political Analysis of the TEPCO Bailout”, (2012) 17 *Journal of Japanese Law*, p. 34.

significant staff with skills quite different than those of most Tepco employees. Tepco sought to meet the challenge by creating a large dispute resolution infrastructure, using approximately three thousand of its own employees, hiring temporary workers, and contracting with legal professionals to build a bureaucracy of more than 13,000 people charged with administering Fukushima compensation claims. As of 15 November 2013, it had received 723,000 claims from businesses and individuals who were subject to mandatory evacuation, 656,000 of which have been resolved at a total cost of almost 3.0 trillion yen, more than twenty times the 120 billion yen liability limit specified in the Nuclear Damage Compensation Act.⁴¹

Predictably, the Dispute Reconciliation Committee for Nuclear Damage Compensation, along with the entire structure of the “direct” route for compensation administered by Tepco, has come under attack. Critics have bemoaned what they believe is the excessively long claim form, which was originally 60 pages (eventually cut back to 32 pages), the lack of a mechanism for electronic filing, the fact that the Fukushima victims seeking compensation through this system are forced to submit claims to the very party (Tepco) that many of them blame for their harms, the overly narrow scope of compensation categories and the low levels of compensation, and the limited availability of legal representation for victims.

Stepping back from these specific criticisms, it seems clear that the process of adjudicating claims created by Tepco under the Nuclear Damage Compensation Act satisfies many, if not all, of the traditional criteria for a system of alternative dispute resolution. The process exists outside of the courtroom, appears to be relatively informal, is meant to be swift and inexpensive, and is designed to be flexible and responsive. Clearly, however, it is not an *alternative*; it is the dominant institution for resolving Fukushima-related damage claims. Moreover, what one finds at the core of the system is not a set of alternative norms but a carefully-reasoned framework of rules that are meant not simply to approximate, but to mimic—whenever possible—applicable civil law principles. Other features of the compensation system, including its approach to evidence and the importance that it accords to precedent, are also closely aligned to the traditional legal system.

41 See Records of Applications and Payouts for Indemnification of Nuclear Damage, Tokyo Electric Power Company (as of 11 November 2013), available at: <http://www.tepco.co.jp/en/comp/images/jisseki-e.pdf>. The data are somewhat misleading, since an additional 1,295 million claims have been submitted by individuals who were not subject to the government’s mandatory evacuation orders but evacuated nonetheless. No information is available on how many of those claims have been compensated.

3.3 *ADR the Fukushima Way: The Nuclear Damage Claim Dispute Resolution Centre*

The creation of what is functionally a publicly-funded private court (albeit not an objective, neutral body) with Tepco at the helm has triggered the birth of yet another approach to adjudicating Fukushima claims, also provided for in the Nuclear Damage Compensation Act.⁴² Not only can claimants choose between litigation and Tepco-administered compensation, but they can also utilise what has been dubbed an “ADR” route to compensation, the Nuclear Damage Claim Dispute Resolution Centre.⁴³ The Centre, created in August 2011, is run by the Ministry of Education, Culture, Sports, Sciences, and Technology (MEXT), which is responsible for regulating the nuclear power industry in Japan.⁴⁴ Although there are no formal criteria that channel compensation claims either to Tepco or to the Centre, the expectation of those administering the Centre is that it will cater to the kinds of claims that are not clearly covered by the guidelines that govern Tepco’s approach to compensation—particularly those involving young children, pregnant women, complex damages, and claimants who bridle at the idea of directly negotiating with Tepco.

Similar to the challenge faced by Tepco in staffing its compensation programme, MEXT has also needed to rely on outside experts, mostly legal experts, for its key personnel. Heading the secretariat, for example, is a high court judge who was seconded to MEXT from the Ministry of Justice, and under him are 200 mediators and almost as many research clerks (the total size of the staff is just under 500 people), all of whom are experienced licensed attorneys seconded to MEXT from the Japan Federation of Bar Associations.⁴⁵

The Dispute Resolution Centre is in fact six linked centres, with a main office in Tokyo and five branches in the Fukushima area. In contrast to Tepco’s application for compensation, the Centre created a claim form of only 7 pages, though it too accepts only forms submitted in person or by mail, not

42 Act on Compensation for Nuclear Damage, No. 147 of 1961, pt. 5, sec. 18 (Japan).

43 According to Foote, note 4 above, the Centre was modelled in part on the United Nations Compensation Commission for Iraq, and also on Japan’s system for auto accident compensation.

44 See “Ensuring Safety of Nuclear Energy and Radiation Uses”, Ministry of Education, Culture, Sports, Sciences, and Technology, 19 November 2013, available at: http://www.mext.go.jp/english/science_technology/1303794.htm.

45 Joel Rheuben and Luke Nottage, “Now that the (Radioactive) Dust Has Settled: Resolution of Claims from the Fukushima Nuclear Disaster”, (2013) 3 *Asian Dispute Review*, p. 126. Most of the support staff was seconded from MEXT and the Ministry of Justice.

electronically.⁴⁶ The percentage of claimants represented by legal counsel is relatively low but increasing, with fewer than 20 per cent having lawyers in 2011 and less than 40 per cent in 2013.⁴⁷ Although there was an expectation when the Centre was created that cases would be managed by a panel of three mediators and would be resolved within three months, the unexpectedly large number of cases brought to the Centre has led to cases being heard by individual mediators in a time frame that is often more than twice as long as expected. The Centre had received 8,617 applications for mediation as of late November 2013, of which 6,114 had been resolved (4,779 were settled, 673 withdrawn, 661 terminated without an agreement, and 1 rejected), and is currently receiving approximately 500 new cases per month.⁴⁸

The slow pace of claims resolution at the Centre is also the result of a conscious decision made by the Centre administration, which decided that the compensation process, and the awards resulting from it, should in certain ways resemble both in form and substance a conventional legal conflict. Although proceedings of the Centre are private, the lawyers running the system appreciate the importance of articulating clear and open standards to facilitate settlement not only for their ADR cases but also for those brought directly to Tepco or filed in court.⁴⁹ In a revealing article written by the former Deputy Chief of the Centre's Secretariat, he describes the Centre as engaged in "rule-oriented ADR", applying standards from the Interim Guidelines of August 2011 (created for Tepco's "direct" route for compensation) and adopting what he calls "General Standards" that describe and quantify typical categories of harm so that mediators hearing similar claims will reach similar results.⁵⁰ According to the former Deputy Chief, "both Interim Guidelines and General Standards are based on tort law and these are a crystallization of the interpretation of

46 In fact, few official documents can be electronically submitted in Japan, and no exception has been made for Fukushima-related claims.

47 Legal fees were initially a 10,000 yen retainer and 5 per cent of the value of the compensation award, but that has shrunk to 3 per cent. It is not clear whether claimants with legal representation get higher awards, nor is it clear to what degree lawyers are attracted to representing clients in this process for financial gain.

48 See http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329118.htm. See, also, Naoki Idei, *The Nuclear Damage Claim Dispute Resolution Center*, 28 *Japan Commercial Arbitration Association Newsletter*, p. 2, September 2012, available at: <http://www.jcaa.or.jp/e/arbitration/docs/newsletter28.pdf>.

49 For information about the detailed criteria being used in the ADR process, see http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329129.htm; http://www.mext.go.jp/component/a_menu/science/detail/_icsFiles/afieldfile/2013/02/08/1329116_010.pdf.

50 Idei, note 48 above, at 2.

tort law applicable to damage claims of such massive scale". He goes on to say that "mediation proceedings tend to be like a mini-arbitration aiming at giving the mediator's non-binding ruling, rather than mediation seeking compromise and agreement among parties".⁵¹

Being consistent and following precedent is not easy in this "ADR" context, in part because submitted claims, documents, and records are kept as paper rather than as digital files, which makes it difficult for mediators to keep track of the decisions of their peers. They have tried to manage this by conducting regular internal case discussions, and also through a relaxed disclosure policy that makes it relatively easy to publicise case details and outcomes. In addition, the Centre has taken a page from US mass tort litigation, using what it calls the Champion Method to identify and settle what it thinks are representative cases so as to speed up and regularise the resolution of other similar cases.⁵² Ideally, in the view of the Centre administrators, the Centre's inability to handle a large number of claims can only be alleviated if it can effectively aggregate cases and set standards for settlement that will be applied by other institutions, especially Tepco, which is handling the vast majority of claims.⁵³

Although the Centre was initially expected to handle a relatively small number of claims, particularly those that were an uneasy fit with Tepco's compensation process, it has instead emerged as an important component of the overall Fukushima compensation effort. Described by its architect as a form of ADR, with the implication that it can handle compensation claims more flexibly, informally, and quickly than other institutions, the Centre has instead come to resemble a standard-setting court which endeavours to articulate generalisable legal principles that can serve as precedents for other Fukushima-related claims. Ironically, at least from the perspective of the literature on alternative dispute resolution, Fukushima's so-called ADR institution is deeply wedded to black letter tort law, and has explicitly embraced the idea that it can and should enunciate standards that incorporate tort principles and can be applied by other institutions.

4 Conclusion

This article has described two approaches to dispute resolution—*wakai*, and the management of Fukushima-related compensation claims—in order to

51 *Ibid.*

52 *Ibid.*, at 3.

53 *Ibid.*, at 4.

illustrate the broad spectrum of methods one finds for managing conflict in Japan. *Wakai* is orchestrated by judges within the courthouse but sidesteps the need for a full trial and a judicial opinion. Fukushima victims, at least those affected by the nuclear accident, have their choice of three venues to air their claims. The vast majority of claims have been brought through one of the two schemes designed specifically for victims of nuclear accidents, while courts have been infrequently utilised.

How ought one to categorise these two different approaches to dispute resolution? Both are heavily dependent upon legal professionals, are attentive to conventional legal procedures, and are substantively driven by the black-letter law of the civil code. Yet both are different from the archetype of litigation, with its courtrooms confrontations and all-or-nothing judicial decisions. Clearly, neither of these approaches fits the standard definition of “mainstream” dispute resolution, but just as clearly the term “alternative dispute resolution” is of little use in helping us to analyse and understand these different forms of disputing.

This chapter argues that it is time to abandon the widely-used taxonomy of disputing and its overly facile distinction between “mainstream” and “alternative”, which falls far short of capturing what is interesting and important about the many different ways in which conflicts are resolved in Japan and elsewhere. To enhance our understanding of conflict and its management, we would be far better served if we were ~~carefully to examine~~ the different forms and norms of disputing within and across borders ~~and eschew overly simple classifications.~~

