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Japan's New Civil Procedure Code: Has it Fostered a Rule of Law Dispute Resolution Mechanism?

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JAPAN'S NEW CIVIL PROCEDURE CODE: HAS IT FOSTERED A RULE OF LAW DISPUTE RESOLUTION MECHANISM?

*Carl F. Goodman**

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I. INTRODUCTION

Japan is a country whose present legal system dates to only the late Nineteenth Century. In this relatively short period, Japan's legal system has undergone dramatic changes and has been influenced by both the civil law and common law systems of Europe and the United States ("U.S.").¹ The modern Japanese legal system started as a civil law system based on French and German models;² however, before World War II, the nation modified its legal system in order to strengthen government control at the expense of individual rights.³ After the war, during the U.S. occupation of the nation, Japan modified its system to accommodate American common law notions.⁴

Throughout this period of legal adaptation, the Japanese tended to avoid using the legal system to resolve disputes, and instead used more traditional models of alternative dispute resolution, which are characterized by conciliation, compromise and mediation.⁵ This Japanese anti-litigation preference seems consistent with norms existing prior to Japan's adoption of its modern legal system in the late Nineteenth Century.⁶ More recently, the Japanese government has adopted a policy of strengthening the "Rule of Law" in Japanese society.⁷ The

1. HIROSHI ODA, *JAPANESE LAW* 7-9 (2d ed. 1999).

2. *Id.* at 29-31.

3. *Id.*

4. *Id.*

5. 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*, 20 *LAW IN JAPAN* 74, 75 (1987).

6. *Id.* at 78.

7. The "Rule of Law" concept is not easily defined. Stated attributes of Westernized Rule of Law systems include: utilizing the legal system as a primary means of ordering society; governing in a manner that adheres to the law; resolving disputes based on the application of preexisting, general, abstract and depersonalized rules to a given set of facts; and resolving disputes in terms of a winner and loser. RUDOLF B. SCHLESIGNER ET AL., *COMPARATIVE LAW* 320-22 (6th ed. 1998); U.S. Justice Sandra Day O'Connor has recently defined the Rule of Law to mean: "that laws should be enacted by democratically elected bodies and enforced by independent judiciaries." SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 33 (2003) [hereinafter O'CONNOR]. Inherent in these definitions are two basic underpinnings of the Rule of Law idea: (1) an independent judicial system to resolve disputes through enforcement and application; and (2) laws adopted by the society that are not so

Japanese Diet rewrote Japan's Civil Procedure Code in 1996 ("New Code"), to make litigation more readily available as part of the nation's policy to strengthen the Rule of Law in Japan. In 2003, the Author undertook a study, involving interviews with *bengoshi* (licensed practicing lawyers)⁸ and statistical analyses, to determine whether the New Code had made litigation the official dispute resolution mechanism of a Rule of Law society — a more favored method of resolving disputes. This Article sets forth the results of that study.

Following this introduction, Part II offers a short synopsis of the recent legal changes made in Japan and discusses the Civil Procedure system in Japan and the research project underlying this Article's study. This Part deals with some of the major changes brought about in the New Code and discusses the reasoning behind those changes.

flexible as to lack either understanding by the public or meaning sufficient to control both public (governmental) and private action.

8. Legal professionals in Japan fall into various categories. At the top of the list are the *bengoshi*, or licensed lawyers, who are authorized to represent parties in litigation before the courts and to generally give legal advice. However, there are other legal professionals in Japan, some of whom perform functions that are typically undertaken by lawyers in the U.S. Thus, legal scribes prepare documents, such as wills, and assist in the drafting of pleadings although they are not licensed lawyers. In addition, patent attorneys give advice on patent law matters, but they are not licensed lawyers. Most Japanese law departments of major companies are not staffed with *bengoshi* but are staffed with highly trained and knowledgeable graduates of *hogakubu* law faculties at Japanese Universities that provide four-year undergraduate law programs. *Bengoshi* are licensed under the "*Bengoshi Ho*" or Practicing Attorney's Act (1949 c. 205, art. 4) (Japan). To become a *bengoshi* a candidate must pass a difficult Bar examination, attend the Legal Training and Research Institute, pass another exam after completing the Institute and be registered with the local Bar Association. See HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 563 (University of Tokyo Press, 1976) [hereinafter TANAKA, THE JAPANESE LEGAL SYSTEM]. "Admission to the Japanese Bar is a prerequisite for practicing law, and admission to the Bar is accomplished by registering on the Lawyer's List (*Bengoshi Kaiim Meibo*) maintained by the Japan Federation of Bar Associations." TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN REVISED § 2.04(1) (Yasuhei Taniguchi et al. eds., Juris Publishing 2d ed. 2002) [hereinafter CIVIL PROCEDURE IN JAPAN REVISED]. "*Bengoshi*, a translation of the English word 'barrister' is in use today. The term first appeared in an occupation title in the draft of the Lawyers Law which was prepared for submission to the Diet in 1890. The term *daigennin* had currency before 1890." Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61, 64 n.5 (1956).

Part III then moves on to the effect that these changes have had on litigation as a means of resolving disputes. Specifically, Part III.A. considers the effect of the legal changes on the pace of litigation in both the Trial Court (District Court) (III.A.1.) and Appeals Courts levels (High Court and Supreme Court) (III.A.2.). Part III.A.4. explores potential reasons why the accelerated pace of litigation has not resulted in an increase in the use of litigation as a dispute resolution mechanism. Part III.B. discusses the effect of the changes made in the procedures dealing with production of evidence. Part III.B.1. then analyzes the new inquiry procedures and links the system's malfunction to procedural inadequacy stemming from the lack of sanctions for failing to respond to inquiries. Part III.B.2. examines the New Code's effect on document production and the consequences of the Japanese legal system's "self-use" document exception, which serves to effectively restrict the meaningful production of evidence. Part III.C. deals with the New Code's outcome on Japanese litigation and its effect on the Commercial Code as applied to stockholder derivative suits in Japan.

Part III.D. deals with the Japanese alternative to the class action — the Representative Action — and explores whether the New Code's changes, designed to enhance the use of such actions, has had the desired effect. Part III.E. considers the relatively new phenomenon in Japan of the "Complicated Case"⁹ and the anticipated future modifications and adaptations of provisions in the New Code that can be expected to deal with "Complicated Cases." Part III.F. discusses the relations between the Japanese Bench and Bar and how the legal changes set to increase the size of the legal profession by approximately threefold, could enhance the Rule of Law in Japan.

The conclusion, in Part IV, makes some suggestions for future changes and areas deserving of further study if the objective of strengthening the judicial system as a Rule of Law dispute resolution mechanism is to be realized in Japan.

9. Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 565 (2001).

II. AN OVERVIEW OF THE JAPANESE LEGAL SYSTEM

A. *Japan's Legislative Reforms*

In 1996, the Japanese legislature completely rewrote the nation's Civil Procedure Code.¹⁰ The rewriting of the New Code took five years to complete; however, lengthy discussion and debates regarding the need for such a fundamental change in Japan's Civil Procedure Code long preceded the rewriting effort.¹¹ The New Code was an amalgam of the old Japanese Civil Procedure Code ("Old Code") and reforms designed to speed-up the pace of Japanese litigation and create reliable means of resolving disputes.¹² Some heralded the New Code as ushering in major change for Japan's civil procedure for the Twenty-first Century.¹³ Others wondered whether the New Code would actually result in major change or would simply serve as a set of "baby steps," having little impact on how litigation in Japan would be handled in the future.¹⁴ Several English language articles have explained the changes in the New Code at its inception.¹⁵

The New Code went into effect on April 1, 1998.¹⁶ In the summer of 2003, as a response to the continued negative perception of litigation in Japan, the Japanese Diet (Japan's Parliament)¹⁷ enacted legislation requiring the completion of cases

10. Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan – A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997).

11. *Id.*

12. Ota, *supra* note 9, at 564–66.

13. *See, e.g.*, Taniguchi, *supra* note 10, at 790–1.

14. Toshiro M. Mochizuki, *Baby Step or Giant Leap?: Parties Expanded Access to Documentary Evidence Under the New Japanese Code of Civil Procedure*, 40 HARV. INT'L L.J. 285 (1999).

15. *See generally* Taniguchi, *supra* note 10; Mochizuki, *supra* note 14 (detailing changes in access to document production); Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687 (1998); Ota, *supra* note 9, 568–72; Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769 (2001) [hereinafter Goodman, *The Somewhat Less Reluctant Litigant*].

16. Ota, *supra* note 9, at 561.

17. Article 41 of Japan's Constitution provides that "the Diet shall be the highest organ of the State Power and shall be the sole law-making organ of the State." KENPŌ [Japanese Constitution], art. 41. The Diet consists of two Houses: the House of Representatives and the House of Councilors. KENPŌ,

at the trial court level within two-years of initiation.¹⁸ This legislation, as well as the New Code and the 2001 Report of the Judicial Reform Council are considered part of Japan's ongoing effort to strengthen the concept of the Rule of Law in Japanese society.¹⁹

One of the main characteristics of a society governed by the concept of the Rule of Law is that the legal system's dispute resolution mechanism (i.e., the judicial system) provides a reliable means of resolving legal disputes within a nation.²⁰ A reliable judicial system must in turn provide its litigation participants with a reasonable opportunity to obtain reasonable relief when warranted, and a reasonable opportunity to defend against unwarranted, specious, or malicious claims. Although a

art. 42. A bill becomes a law when passed by both Houses or, if rejected by the House of Councilors, is again passed by a two-thirds vote of the House of Representatives. KENPŌ, art. 59.

18. 15 Heisei [Act to Accelerate Court Procedures] Statute No. 107, art. 2. (2003) (Japan). See also *Lower House Approves Speedy Trial Legislation*, JAPAN ECON. NEWSWIRE, May 13, 2003, available at LEXIS, News & Business Library, Japan Economic Newswire File. The *Asahi Shinbun* reported that a unanimous lower House of the Japanese Diet approved a bill "to limit lower court trials to less than two years" in an effort to speed up the justice system. *Id.* The *Asahi Shinbun* described the Japanese judicial system as operating "snail-like." See *id.* As the statistics referred to *infra* show, this description appears to unduly criticize the pace of litigation in the Japanese court system, at least as it applies to average dispositions of civil cases handled after passage of the New Code. The Japanese Diet enacted the two-year law on July 9, 2003. According to the *Japan Times*, the law applies to both civil and criminal cases at the District Court, Summary Court and Family Court. *Trials to be Expedited as Judicial Reform Bills Pass*, JAPAN TIMES ONLINE, July 10, 2003, available at <http://japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030710b1.htm> [hereinafter *Trials to be Expedited*]. For a discussion of how such legislation may adversely affect the Rule of Law concept in Japan, see *infra* notes 209, 210, 212 and Part III.A.4.

19. See The Justice System Reform Council, *Recommendations of the Justice System Reform — For a Justice System to Support Japan in the 21st Century*, (proposed June 12, 2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter *Recommendations of the Judicial Reform Council*]. See also *Major Legal Reform Handed to Koizumi*, JAPAN TIMES ONLINE, June 13, 2001, available at <http://japantimes.co.jp.cgibin/getarticle.pl5?nn20010613a1.htm>. For a discussion of recommendations made by the Justice System Reform Council, see CARL GOODMAN, *THE RULE OF LAW IN JAPAN — A COMPARATIVE ANALYSIS* 265–67 (2003) [hereinafter GOODMAN, *THE RULE OF LAW IN JAPAN*].

20. SCHLESIGNER ET AL., *supra* note 7, at 11; O'CONNOR, *supra* note 7, at 65–79.

Rule of Law judicial system requires the fair treatment of all its participants, reality reveals that defendants are usually unwilling or at least non-initiating participants to litigation. In the criminal law arena, the State, typically through the prosecutor's office, initiates litigation.²¹ In a criminal case, the judicial system in carrying out a Rule of Law mandate must provide the accused defendant with a reasonable opportunity to defend him or herself in a timely proceeding, e.g., a fair trial.²² Both the Japanese and U.S. legal systems attempt to implement these ideals through Constitutional provisions guaranteeing the accused defendant in criminal cases the right to counsel,²³ the privilege against self-incrimination,²⁴ and a right to a speedy trial before an impartial tribunal.²⁵ How well these systems work to make these legal provisions a reality is not the subject

21. In Japan, the prosecutor's office retains responsibility for bringing forward criminal prosecutions. However, Japanese law does permit limited civilian review of prosecutor decisions not to prosecute. For a discussion of prosecution review commissions, see GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 293 and Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 693 (1992).

22. See, e.g., *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J. dissenting); *Brady v. Maryland*, 373 U.S. 83 (1963); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Vacher v. France*, 24 Eur. Ct. H.R. 482 (1996) (setting aside a French criminal conviction because the defendant was not given a fair hearing when his appeal was denied without receiving warning regarding any time limits for his response to the government's assertions on appeal nor did the law specify any such time limits).

23. U.S. CONST. amend. VI ("to have the assistance of counsel for his defense"). KENPŌ, art. 37 para. 3 ("At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.").

24. U.S. CONST. amend. V ("nor shall be compelled in any criminal case to be a witness against himself"); KENPŌ, art. 38 ("No person shall be compelled to testify against himself."); *X and 5 Others v. State*, 1993 (O) No. 1189, 53 MINSHU No. 3 at 514 (Sup. Ct., Grand Bench, Mar. 24, 1999) (Japan) ("In order to exercise investigative power, there may be instances where it is necessary to hold the suspect in custody and interrogate the suspect."). See generally Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415 (1991) (discussing the historical and current importance of confessions in the Japanese criminal system). See also GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 312-14.

25. U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy and public trial"); KENPŌ, art. 37 ("In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.").

of this Article or the study behind it, which solely focuses on civil non-administrative law adjudication.²⁶

In a civil justice system, the allegedly aggrieved plaintiff initiates litigation. In order to carry out a Rule of Law mandate, a civil justice system must not only provide plaintiffs with a reliable, speedy and useable system, but it must also guarantee the defendant's right to defend him or herself in order to ensure that both plaintiffs and defendants feel sufficiently confident with the legal system.²⁷ In the case of Japan, because of structural impediments, some potential plaintiffs may not feel such necessary confidence in the Japanese legal system.

In fact, many aggrieved Japanese potential litigants reject the existing judicial system in favor of alternative dispute resolution mechanisms ("ADRs") due to its unfavorable reputation. In fact, many Japanese citizens perceive the nation's judicial system as failing to offer timely and adequate relief, and/or they believe that the Japanese judicial system is an unreliable or inefficient mechanism for resolving disputes. For this reason, many Japanese litigants turn to ADR.²⁸ As a result, Japanese

26. The Judicial Reform Council in Japan has made a number of suggestions in the criminal law area, including the creation of a public defender system, reform of the interrogation of suspects system, and lay participation in criminal trials. For a discussion of the Japanese criminal justice system and the Judicial Reform Council's recommendations, see GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at ch.13 (elaborating on Japan's criminal law system).

27. See *Nelson v. Adams*, 529 U.S. 460 (2000); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Shelly v. Kramer*, 334 U.S. 1 (1948) (holding that due process requires notice and an opportunity to be heard); AMERICAN LAW INSTITUTE, *ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE*, COUNCIL DRAFT NO. 2 (Sept. 29, 2003) (Principle 5: "Due Notice and Right to be Heard") (formerly *Transnational Rules of Civil Procedure*), available at <http://www.ali.org/ali/TransCP-CD2.pdf> [hereinafter *ALI/UNIDROIT Principles*].

28. HIDEO TANAKA, *INTRODUCTION TO THE STUDY OF POSITIVE LAW* (3d ed. 1974), quoted in TANAKA, *THE JAPANESE LEGAL SYSTEM*, *supra* note 8, at 492-500 (University of Tokyo Press, 1976). Tanaka explains:

[C]onciliation has been widely used as a means of settling disputes, while regular adjudicative procedures have not been used very frequently...the primary reason why a great number of people choose conciliation rather than the formal adjudication process seems to be...to avoid the time and expense required to go through the formal legal process.

society's acceptance of the Rule of Law model may be subject to question.²⁹ This Article does not wish to challenge the utility of ADR as an adjunct to the national legal system, or as part of a Rule of Law judicial system — far from it. ADR, as an adjunct to a judicial system, is in fact a characteristic of a Rule of Law society,³⁰ but the “A” must represent a true “alternative” and not an adequate forum replacement.

In order for a judicial system to serve as a reliable means of resolving legal disputes, it must: (1) be reasonably quick (justice inordinately delayed is in fact justice denied);³¹ (2) be reasonably available (a system that taxes the complaining party so much as to make the cost benefit analysis weigh in favor of not using the system does not provide a Rule of Law solution to le-

Id. See also John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978) [hereinafter Haley, *The Myth of the Reluctant Litigant*]; Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 24 INT'L L. 443 (1991); Harold See, *Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339 (1982).

29. See Kanako Takahara, *Calls for Overhaul of Judge System Mount*, JAPAN TIMES ONLINE, Dec. 20, 1999, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn19991220b8.htm> (“Discontent with the judicial system among lawyers, politicians and business people has prompted a Cabinet advisory panel to launch discussions aimed at giving the system its first overhaul of the postwar era...”). It is suggested that it is precisely because of such discontent that the Judicial Reform Council has made recommendations designed to make the Rule of Law a more integral part of Japanese society.

30. For example, the U.S. is a Rule of Law society where ADR plays both the role of an alternative and adjunct to the nation's judicial system. The Federal Arbitration Act permits arbitration (a form of ADR) regardless of whether state law prohibits it. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2003). In addition, the Federal Arbitration Act requires that it must be interpreted as an effort by Congress to fully utilize its authority under the Interstate Commerce Clause in a manner that is consistent with the Congressional intent to override any pre-existing legal biases against arbitration. See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). See also *Mitsubishi Motors v. Solar Chrysler-Plymouth*, 473 U.S. 614 (1985) (specifying that federal law favors arbitration).

31. See *Prompt Justice*, LAS VEGAS REV.-J. ONLINE EDITION (June 12, 2002), at http://www.reviewjournal.com/lvrj_home/2002/June-12-Wed-2002/opinion/1893674.html (commenting on the “Short Trial Pilot Program” in Clark County Nevada, which has as its goal reducing the inordinate delay in civil proceedings before the court). “[I]n the current civil context no one really wins when justice lies a decade down the road...creating frustrations which can only encourage some to take the law into their own hands...or give up on [the] Justice System entirely.” *Id.*

gal problems); (3) provide a neutral judicious decision-maker;³² and (4) offer a procedure for resolving disputes that gives a virtuous plaintiff a reasonable opportunity to be made whole. These factors, however, are not absolutes and different Rule of Law societies may properly draw different boundaries,³³ making their systems: (1) work faster or slower; (2) more or less expensive; or (3) more or less plaintiff friendly when it comes to obtaining and admitting evidence — all within a zone of reasonableness.³⁴

B. A Comparison of the U.S. and Japanese Legal Systems

1. The U.S. Civil Judicial System

In the U.S., the nation expects its civil judicial system to perform law enforcement and social policy functions, which other societies delegate to the elected branches and bureaucracies.³⁵

32. *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242 (1980); *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

33. See generally ALI/UNIDROIT Principles, *supra* note 27.

34. While a neutral decision-maker is a *sine qua non* of a Rule of Law judicial system, the mechanisms for decision-making may properly vary. Thus, the American preference for a jury system is clearly not a Rule of Law requirement although the early English law alternatives — trial by combat or by ordeal — would not be consistent with a Rule of Law society as understood in the Twenty-first Century. Civil law societies do not provide for trial by jury in either criminal or civil cases, although in some civil law countries a panel of judges and laypersons may decide criminal cases. See NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM* 1058–59 (West Group 2003).

In countries where French or German approaches to procedure prevail, many criminal trials are conducted by a single judge or by a panel of judges without a jury. Where there is a panel of judges, the panel often comprises a mixture of professional and lay judges, who work together at all stages of the case.

Id. Prior to World War II, Japan experimented with a modified form of jury-trial in criminal cases. This form of jury-trial was suspended during the war and remains suspended. YOSIYUKI NODA, *INTRODUCTION TO JAPANESE LAW* 137–38 (Anthony H. Angelo trans., Univ. of Tokyo Press 1976).

35. Richard L. Marcus, *Reining in the U.S. Litigator: The New Role of U.S. Judges*, Speech at the Chuo-o University Symposium on Multiple Roles and Interaction of Judges and Attorneys in Modern Civil Litigation (June 1, 2003), quoting R. KAGAN, *ADVERSARIAL LEGALISM* 47 (2001) (“Whereas European polities generally rely on hierarchically organized national bureaucracies to hold local officials accountable to national policies, the U.S. congress mobilized a distinctly U.S. army of enforcers — a decentralized, ideologically motivated

Within the U.S. civil judicial system, the legal system draws its boundaries in such a way as to favor plaintiffs. Filing fees remain low as a consequence, and do not increase with the amount of damages sought. Similarly, the U.S. licenses a substantial number of lawyers assuring an ample supply of professional legal talent available for plaintiffs while allowing lay juries to determine the quantum of damages.³⁶ The collateral judgment rule, under which a plaintiff may recover damages from a defendant even after a third person has made the plaintiff whole,³⁷ also serves as a boundary that favors plaintiffs.

As the size of jury awards increase along with the number of available attorneys, lawyers are willing to assume cases on a contingent fee basis. The contingency fee arrangement works as judges leniently grant high fees,³⁸ which then guarantees a ready pool of attorneys.³⁹ The “American Rule” for attorneys’ fees,⁴⁰ where unsuccessful plaintiffs need not concern themselves with the expenses of reimbursing successful defendants’ attorneys, limits a potential plaintiff’s “costs” when thinking about litigation in terms of a cost-benefit analysis. Together with fee-shifting statutes that require some unsuccessful defendants to pay plaintiffs’ attorney fees but not *visa versa*, the U.S. rule tilts the playing field in favor of initiating litigation.⁴¹

Once in court, the U.S. notice of claim pleading⁴² and liberal discovery rules⁴³ similarly assist plaintiffs.⁴⁴ The U.S. jury’s au-

army of private advocacy groups and lawyers.”). Japan similarly relies on the bureaucracy to enforce the law. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 772–79.

36. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 791.

37. *See, e.g.*, *Halek v. United States*, 178 F.3d 481 (7th Cir. 1999).

38. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 792.

39. *Id.* at 793.

40. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

41. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 792.

42. FED. R. CIV. P. 8. (stating that a plaintiff need not plead facts sufficient to prove his or her case but must simply notify the other side of the basis for the claim).

43. *See generally* FED. R. CIV. P. 26–37 (stating that evidence can be obtained from the defendant during the course of the litigation).

thority to determine the award amount of compensatory and punitive damages with some but limited judicial supervision⁴⁵ has led to a fear of “runaway” juries that has now become such a part of American folklore that it has inspired the subject of a film based on a best selling novel on this matter.⁴⁶

The “pro-plaintiff” U.S. judicial system has recently come under challenge as failing to serve the “public interest.”⁴⁷ Naturally most opponents of this system are those who typically represent deep-pocket defendants, who are required to pay damage awards, such as insurers and hospitals.⁴⁸ Meanwhile, plaintiffs

44. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 789.

45. The problem of excessive damages is particularly felt in the punitive damage arena. In *BMW of North America, Inc. v. Gore*, the U.S. Supreme Court attempted to limit the amount of punitive damages that may be awarded by “federalizing” and “constitutionalizing” the issue of grossly excessive punitive damage awards. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996). The Court set aside a punitive damage award as excessive and set forth guideposts for lower courts to use in assessing the reasonableness of jury punitive damage awards. *Id.* at 573. In another case, the Court was much more specific than in *Gore* in setting the permissible limits on punitive damage awards. See generally *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). But see *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 113 Cal. App. 4th 1137 (2d Dist. 2003) & *Henly v. Phillip Morris*, 5 Cal. Rptr. 3d 42, 112 Cal. App. 4th 198 (1st Dist. 2003).

46. See JOHN GRISHAM, *THE RUNAWAY JURY* (DOUBLEDAY 1996). See also Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J. OF L., ECON. AND ORG. 306 (2000).

47. Cf. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994) (arguing that the litigious nature of U.S. society and the availability of damages in questionable circumstances is having an adverse effect on American society). See also *Lawsuit Hell, How Fear of Litigation is Paralyzing Our Professions*, NEWSWEEK, Dec. 15, 2003, at 43.

48. See, e.g., *Lloyd's Chairman Calls for Action to Tackle Compensation Culture*, INS. J., Sept. 16, 2003, available at <http://www.insurancejournal.com/news/newswire/west/2003/09/16/32323.htm> (“[Lloyd’s Chairman] said that tort reform was urgently needed to combat growing litigiousness in the U.S., which ultimately resulted in skyrocketing premiums for policy holders.”); *AAHP Board of Directors Statement on Medical Malpractice Reform*, AM. ASS’N HEALTH PLANS, June 11, 2001 (“[L]awyers have effectively tipped the balance in health care creating serious consequences that threaten purchasers’ ability to offer insurance....”), at http://www.aahp.org/Content/NavigationMenu/About_AAHP/WhatWe_Stand_For/Board_Of_Directors_Statements/MedicalMalpracticeReform.pdf; Press Release, American Benefits Council, *Kennedy-McCain “Cap” on Punitive Damages Does Not Limit Excessive Liability for Employers or Health Plans*, Feb. 7, 2001, at <http://www.americanbenefits>

and their representatives, who are trial lawyers for the most part,⁴⁹ respond that defendants who commit wrongs should not escape liability and that punitive damages serve to rehabilitate and deter “bad” actors and adequately compensate plaintiffs for their injuries. The parties, however, greatly differ on what compensation is adequate. The general public has begun to become involved in this debate as labor stoppages by physicians complaining about the high cost of malpractice insurance have made national headlines.⁵⁰ In addition, political parties in the U.S. have lined up along traditional partisan grounds — the Democratic Party supporting plaintiffs and the trial lawyers,⁵¹ and the Republican Party⁵² supporting big companies and their

council.org/newsroom/pr02-07htm; DIVISION OF ADVOCACY AND HEALTH POLICY, AMERICAN COLLEGE OF SURGEONS, *Why Americans Needs Medical Liability Reform*, at <http://www.facs.org/ahp/whyamerica.html> (last visited Oct. 19, 2003).

49. Tim Hyland, *Group to Fight Doctor Tort Reform*, BALT. BUS. J., Sept. 15, 2002, available at <http://www.bizjournals.com/Baltimore/stories/2003/09/15/story6.html> (“Maryland lawyers and victims of malpractice have formed a group to oppose caps on malpractice awards....The new group, backed by the Maryland Trial Lawyers Association...”).

50. See, e.g., Sandra G. Boodman, *What Crisis?; GAO: Malpractice Premium Spikes Don't Force Out Docs*, WASH. POST, Sept. 16, 2003, at F1, available at 2003 WL 62215778; *Texas Voters Back Limits on Malpractice Awards; Amendments Would Let Legislators Cap Noneconomic Damages in Lawsuits*, WASH. POST, Sept. 14, 2003, available at 2003 WL 62215336; *NJ Doctors Threaten State-Side Malpractice Strike*, FACTIVA GLOBAL INS. NEWS DIG., Feb. 3, 2003, available at 2003 WL 4438287; *West Virginia Surgeons Strike Against Malpractice Insurance Premiums*, FOXNEWS.COM, Jan. 1, 2003, at <http://www.foxnews.com/story/0,2933,74369,00.html>.

51. Jennifer Loven, *Bush Urges Legal Reforms, Pushes Global-Trade Efforts*, ORLANDO SENTINEL, Sept. 21, 2003, at A22, available at 2003 WL 63280768 (“Democrats see the issue as partisan, with Republicans targeting trial attorneys, traditional major sources of campaign donations for Democrats...”).

52. *Id.* The Republican Party, both through the President and its Representatives in Congress, has supported limiting the size of damage awards:

In his weekly radio address, Bush pushed for Congress to limit damage awards in medical malpractice cases...“We need to address the broader problems of frivolous litigation,” Bush said. “We need effective legal reforms that will make sure that settlement money from class actions and other litigation goes to those harmed and not to trial lawyers.” The White House backs pending GOP legislation that would sharply curtail lawyers’ contingency fees in lawsuit awards topping \$100 Million.

insurers, both sets of litigants ultimately providing their respective political party with campaign funding.⁵³

The U.S. judicial system also has been hard pressed to join this political debate. The system has responded to this pressure in a measured and judicious way by refusing to resolve the problems created by politically contentious litigation, such as the asbestos litigation mess.⁵⁴ Instead, the U.S. judicial system urges the political branches to take up their constitutionally mandated role of serving the public interest by legislating resolutions to problems such as the asbestos mess⁵⁵ while the court steps in and attempts to control “run-away” punitive damage awards.⁵⁶

Whatever the merits or demerits of U.S. boundary drawing,⁵⁷ defendants and their representatives have not yet argued that the U.S. judicial system is inconsistent with the Rule of Law, because, for example, it denies defendants a reasonable opportunity to defend themselves. Rather, while the conflicting sides differ as to where boundaries are properly drawn, all sides seem to agree that the American legal system, whatever its faults, supports a Rule of Law society.⁵⁸ This mutual agreement, however, is not the case in Japan.

Id.

53. *Id.*

54. *See, e.g.,* Norfolk & Western Railway Co. v. Ayers, No. 01-963, 2003 U.S. Lexis 1956, at *55-56 (Mar. 10, 2003) (refusing to reconfigure liability rules in asbestos litigation).

55. *Id.*

56. Federal judges who are appointed for life can afford to remain impartial in the political debate. However, impartiality is difficult to achieve in states that require the election of judges. The lure of campaign financing from one side or the other may taint the public's view of the judicial system. *See* COMM'N ON THE 21ST CENTURY JUDICIARY, AM. B. ASS'N, JUSTICE IN JEOPARDY 1-2 (2003).

57. For a discussion of whether appellate judges harbor a bias against plaintiffs who succeed at the trial level, see Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. ECON. REV. 125 (2001). *See also* Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000). *But see* Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 128 (2000).

58. The author is unaware of any due process or Rule of Law challenges to the American litigation system. Indeed, Justice O'Connor has impliedly suggested that easy access to the courts by plaintiffs seeking relief is a component of the Rule of Law in the U.S.: “In our system — and our experience has

2. The Japanese Civil Judicial System

As an historic matter, Japan requires its judicial system to perform a more limited function than the U.S. judicial system.⁵⁹ As a consequence, the Japanese judicial system has drawn its boundaries in a manner less favorable to plaintiffs.⁶⁰ In addition, the shortage of lawyers in Japan makes a contingent fee system unworkable, even if technically lawful.⁶¹ The Japanese legal system's requirement of paying a substantial part of lawyer's fee "up front" also inhibits litigation.⁶² The Japanese courts' filing fee system, which for most cases has a graduated fee that increases with the size of damages sought, increases the cost of getting one's case before the court.⁶³ The Japanese legal system has a fact-pleading requirement that obliges a plaintiff to plead facts sufficient to be successful at the start of the case.⁶⁴ Meanwhile, the system provides no means for compelling the production of facts before a case's initiation.⁶⁵ To make matters worst, plaintiffs also have little opportunity to obtain meaningful factual discovery even after the case has begun. In addition, credible plaintiffs that are willing to under-

proved its efficacy — it is the citizens themselves, through the courts, who enforce their rights...ready access to independent courts allows any citizen to press his or her claim." O'CONNOR, *supra* note 7.

59. See generally Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15.

60. See *id.* at 789 (discussing the barriers to litigation in Japan). See also Ota, *supra* note 9, at 5 (describing the process of litigation in Japan as slow, complex and expensive).

61. See Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 793 (noting that given the relatively small number of licensed lawyers permitted to handle litigation, few attorneys desire a contingent fee system). See also Ota, *supra* note 9, at 563 (discussing the shortage of lawyers in Japan).

62. Yamanouchi & Cohen, *supra* note 28, at 4.

63. See Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 791-92 ("In Japan...filing fees are typically based on the amount at issue in a case and can be quite high.").

64. MINSOHŌ [Japanese Code of Civil Procedure], art. 133, sec. 2.2 [hereinafter MINSOHŌ]. See also MINJI SOSH-O KISOHU [Japanese Rules of Civil Procedure], art. 53(1) (on file with author). Under Rule 133 of the Japanese Code of Civil Procedure, the complaint must assert "the gist and ground of" of a claim. *Id.* If deemed inadequate by the court, the court may reject the claim and, if not amended to satisfy the court the complaint will be dismissed. *Id.* at art. 137.

65. Japan has no pre-trial discovery. See MINSOHŌ, art. 163; see also Yamanouchi & Cohen, *supra* note 28, at 3.

take the cost of litigation and have evidence supporting their allegations are frequently deterred from doing so by the Japanese system's low damage awards⁶⁶ and the difficulties in executing a favorable judgment.⁶⁷ In addition to the problems described above, the Japanese general public views the nation's judicial system as being too slow to resolve disputes.⁶⁸ Faced with all of these obstacles, many potential plaintiffs in Japan are reluctant to litigate, and instead find ADR to be the more appropriate means for resolving disputes, whereas potential plaintiffs in other societies would find similar disputes more easily resolved by their nation's court system.⁶⁹ Many critics of

66. See generally JOSEPH W.S. DAVIS, *DISPUTE RESOLUTION IN JAPAN* 279 (1996).

67. See Shunko Muto, *Concerning Trial Leadership in Civil Litigation: Focusing on the Judge's Inquiry and Compromise*, 12 *LAW IN JAPAN* 23, 24 (1979) (suggesting that one basis for successful compromise of litigation is a provision under which a plaintiff actually gets paid damages rather than having to undergo the difficulties of execution after judgment). See also Mark D. West, *Information, Institutions, and Extortion in Japan and the United States, Making Sense of Sokaiya Racketeers*, 93 *NW. U. L. REV.* 767, 787 (1999) ("[C]ompanies can hire Yakuza to enforce judgments, a skill at which gangs appear to be more adept than the legal system.") [hereinafter West, *Information*]. A *bengoshi* interviewed in Nagoya supported settlement of litigation by compromise by noting both that: (1) it is easy for the losing defendant in litigation to hide assets; and (2) there are high costs to obtaining execution. Interview with *bengoshi* (A) in Nagoya, Japan (on file with author). As a consequence, it is "better for the plaintiff to get quick money." *Id.* The settlement may result in the plaintiff getting less money, but at least the plaintiff gets the settlement money. *Id.* As used throughout this article the terms *bengoshi* and lawyer are used interchangeably. For a discussion of the varying legal professionals in Japan, see notes 8, 21 & 76-78.

68. Kojima, *supra* note 15, at 687 (explaining that grave concerns about the delay and cost of litigation have diverted the Japanese people from the justice system). See also John O. Haley, *Litigation in Japan: A New Look at the Problem*, 10 *WILLAMETTE J. OF INT'L L. & DISP. RESOL.* 121, 134 (2002) (discussing the decrease in litigation time in Japan from 17.3 months in 1973 to 9.3 months in 1997 and tying such decrease in delay to the increased use of litigation in the 1970's) [hereinafter Haley, *Litigation in Japan: A New Look at the Problem*].

69. See Obuchi, *supra* note 5, at 88. See also Sato Yasunobu, *Cultural Conflict in Dispute Processing Under Globalization: International Cooperation for Legal Aid*, at <http://www.gsid.nagoya-u.ac.jp> (last visited Oct. 30, 2003). Yasunobu argues that one purpose of supporting ADR over litigation is the advancement of Japanese industry over the rights of Japanese citizens:

the Japanese judicial system have even suggested that plaintiffs' growing reliance on "extra-legal" means of resolution, such as resort to organized crime organizations, controlled violence⁷⁰ and *Sokaiya*⁷¹ have stemmed from the system's inability, or at least the perceived inability, to obtain adequate relief for plaintiffs within a reasonable time.⁷² As a result, one of the Judicial Reform Council's prime recommendations was aimed at reducing the amount of time required to resolve civil litigations.⁷³ Thus, Japan's civil litigation system may be seen as defendant-oriented while the U.S. civil litigation system may be seen as plaintiff-oriented.

It cannot be denied that the Japanese people prefer conciliation to litigation....even though litigation is initiated, it is not uncommon that a judge mediates for settlement in private in his/her chamber. Thus, the judiciary has long been left small and ineffective. This seems to have been part of a tacit industrial policy in order to discourage the promotion of human rights and the development of individual's legal consciousness in exchange for the rapid national economic growth measured by GNP or GDP.

Id.

70. See Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 LAW AND SOC'Y REV. 579, 595-97 (1976). See FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 78-123 (1987) (discussing the Buraku Liberation League's use of "denunciation struggle" to persuade bureaucrats by the threat of limited physical force) [hereinafter UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN].

71. *Sokaiya* are generally seen as corporate troublemakers who, for an extortionist price, will either remain mute themselves or will cause other shareholders to remain quiet at corporate annual meetings. Professor West defines *Sokaiya* as follows: "A *Sokaiya* (literally 'general meeting operator') is usually a nominal shareholder who either attempts to extort money from a company's managers by threatening to disrupt its annual shareholders' meeting with embarrassing or hostile questions or who works for a company's management to suppress dissent at the meeting." Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. OF L. STUD. 351, 374 (2001) [hereinafter West, *Why Shareholders Sue*]. See also Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527, 564 (2001) [hereinafter West, *The Puzzling Divergence of Corporate Law*].

72. See generally West, *Information*, *supra* note 67, at 770 (examining extortion by *Sokaiya* racketeers in a corporate context).

73. See *Recommendations of the Judicial Reform Council*, *supra* note 19, at ch. II, pt. 1, § 1 ("Reinforcement and Speeding Up of Civil Justice").

Unlike in the U.S., where the public does not feel that the judicial system's pro-plaintiff orientation creates a Rule of Law society issue, the people of Japan have raised such a concern with respect to the capability of their nation's judicial system.⁷⁴ In response, the Judicial Reform Council (the "Council") made recommendations for liberalizing the judicial system, to make the judicial system's relief more readily obtainable. The Council's proposals were grounded in the public's general Rule of Law concerns and were designed to carry out the Council's view that the Rule of Law should more fully infiltrate Japanese society.⁷⁵ To this end, the Council has suggested, among other things, increasing the number of licensed *bengoshi* authorized to represent parties in court by more than three times the number annually admitted at the time the Council began its work.⁷⁶ The Council also urged for the expansion of the roles of other Japanese legal professionals, such as judicial scriveners⁷⁷ and

74. The public's concern is reflected in the Diet's recent legislative action in creating the Law Reform Council and mandating it to examine and make recommendations concerning Japan's legal system. See Judicial Reform Council, *Points at Issue in the Judicial Reform*, at <http://www.kantei.go.jp/foreign/judiciary/0620reform.html> (last visited Jan. 12, 2003). The Council noted that the Judiciary Committee of the House of Representatives in the Diet directed it to consider such questions as the judicial appointments system, quality and quantity of legal professionals, public participation in the judicial system, etc. *Id.*

75. See generally *Recommendations of the Judicial Reform Council*, *supra* note 19.

76. At the time the Council started its work, approximately 1,000 new lawyers were admitted each year. This figure was twice the previous total of only 500 newly admitted lawyers as late as the late 1980s. See LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN 8-9 (S. Ct. of Japan 1977). The Council recommends that 3,000 new lawyers be admitted each year beginning in 2010. See *Recommendations of the Judicial Reform Council*, *supra* note 19, at ch. 1, pt. 3, § 2(2) ("How the Legal Profession Supporting the Justice System Should Be"). See also *Major Legal Reform Handed to Koizumi*, *supra* note 19 ("When the current bar exam is phased out in 2010, the number of those who pass the new bar exam should reach 3,000 a year, up from the current 1,000."). Of these lawyers, a certain number become judges and prosecutors and it has been recommended that at least some of the additional lawyers be allocated to the judges' pool in order to increase the number of judges.

77. TANAKA, *THE JAPANESE LEGAL SYSTEM*, *supra* note 8, at 563. Professor Tanaka sets forth the functions of judicial scriveners as follows:

The functions of judicial scriveners are (a) to draft documents to be filed in courts, public prosecutors' offices or local offices of the Minis-

patent attorneys,⁷⁸ in order for them to play a more active role in litigation.⁷⁹ In addition, the Council recommended increasing the pool of judges so as to reduce the backlog of cases and free judges from their tight schedules to work on more recently filed cases.⁸⁰ Further, the Council proposes to speed up the pace of litigation by enhancing the legal workforce's lawyering skills by suggesting a new and hopefully better educational system with innovative teaching methods for lawyers.⁸¹ The Japanese government has already accepted these recommendations and by 2006 and 2007 the first of the new crop of newly trained *bengo-shi* will enter the field.⁸² Similarly, efforts are under way to recruit practicing lawyers to become judges.⁸³

try of Justice on behalf of other persons, and (b) to take the necessary steps relating to the registration of transfers of title to land or other transactions in a registration office....In connection with (a) above, judicial scriveners often give legal advice to laymen in the course of drafting legal documents.

Id.

78. The function of patent attorneys is "to act on behalf of other persons in matters related to patents, 'utility models'...designs and trademarks." *Id.* at 564.

79. In the case of scriveners, the Council has suggested that they be allowed to represent parties in Summary Court proceedings and that the law be amended to allow for Summary Court jurisdiction in damage actions seeking amounts which take into account economic trends. *Recommendations of the Judicial Reform Council, supra* note 19, ch. III, pt. 3, § 7 & ch. II, pt. 1, § 5(3) ("Utilization of Specialists in Fields Adjoining the Law" & "Expansion of the Jurisdiction of Summary Courts & Substantial Increase in the Upper Limit on Amount in Controversy in Procedures for Small-Claims Litigation").

80. *Recommendations of the Judicial Reform Council, supra* note 19, ch. III, pt. 1, § 2(1) (section entitled: "Judges").

81. *Id.* at pt. 2.

82. In April 2004, Japan will usher in a new era of legal training with the opening of the new law schools recommended by the Law Reform Council. These schools will be graduate level schools and the first class of graduates will graduate in two years time. Under the new curriculum, graduates of a *hogakubu* faculty who are admitted to the new law school may graduate after a two-year class while graduates of other faculties will require three years of legal education. As a consequence the first crop of new graduates — most of whom will hopefully pass the new Bar Examination — will graduate in 2006 and the next class of three year students in 2007. *See Major Legal Reform Handed to Koizumi, supra* note 19 ("To nurture high-quality lawyers, the report calls for establishment of law schools by April 2004 that require two or three years of study....Starting in 2006, when the first graduates of the new schools are expected, a new bar exam should be established..."). In November of 2003, the Ministry of Education, Culture, Sports, Science and Technology

The Council's work does not stand-alone; the New Code preceded it. One of the New Code's main objectives is to modify the Japanese Civil Procedure so as to alleviate some of the problems that are at the core of the Rule of Law debate and ultimately, which weaken the judicial system as a means of dispute resolution.⁸⁴ The New Code made procedural, and some have suggested substantive, changes in the method by which cases are tried and also altered many evidence-gathering procedures during the trial.⁸⁵ By limiting the right of appeal to Japan's Supreme Court, the New Code attempts to speed up the date of "final judgment" by making the nation's High Court decision final, at least in most cases, which, at the same time, frees the Supreme Court to devote its time and effort to more important legal issues.⁸⁶ As counter-currents exists to the Judicial Reform Council's work (such as strengthening ADR to make it at least an equal partner with the Judicial system in resolving disputes and scrapping the "American Rule" on attorney's fees in favor of

licensed sixty-six new American style law schools. *66 Institutions Win Approval to Open U.S.-style Law Schools*, JAPAN TIMES ONLINE, Nov. 22, 2003, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20031122a6.htm>.

83. As explained in Part III.F. of this Article, such efforts are not likely to be successful absent substantial additional changes that do not appear to be forthcoming.

84. Kojima, *supra* note 15, at 687–88. Professor Kojima pinpoints making civil trials understandable and the judicial system accessible as goals of the New Code:

The reasons for the adoption of the new code can be summarized in three points...Second, civil trials today have raised grave concerns over the considerable delay and high costs of litigation, and this has diverted the Japanese people from the Justice System — the so-called "departure from justice symptom" (*shihobanare*). Unless civil trials are made easily understandable and accessible, the social functions of the civil justice system would be seriously undermined.

Id.

85. Mochizuki, *supra* note 14, at 286–87; Kojima, *supra* note 15, at 701–04; Koichi Miki, Roles of Judges and Attorneys under the Non-Sanction Scheme in Japanese Civil Procedure, Speech at the Chuo-o University Symposium on Multiple Roles and Interaction of Judges and Attorneys in Modern Civil Litigation (June 1, 2003) (transcript on file with the *Brooklyn Journal of International Law*).

86. Taniguchi, *supra* note 10, at 779–80; Kojima, *supra* note 15, at 715–17.

a “loser pays” system),⁸⁷ the “pro-plaintiff orientation” debate also comes out in favor of altering Japan’s Civil Procedure Code. These forces of the status quo are accommodated, at least to some extent, in the New Code through such obstacles to effective discovery as the self-use document exception to production⁸⁸ and the failure to provide for sanctions⁸⁹ in the new “inquiry process.”⁹⁰

C. *The Study on Japanese Litigation*

A 2001 study, about the changing Japanese legal system,⁹¹ concluded that the New Code’s concentrated evidence gathering procedures⁹² had a positive effect on speeding up the litigation process.⁹³ The study found that statistical evidence showed that the judicial system achieved dispositions at a higher absolute number than prior to the New Code; however, since the number of cases filed has changed, the ratio of dispositions to new cases filed may not be substantially different than before. The study further found that the new “inquiries procedure”⁹⁴ was not as helpful as originally thought would be the case.⁹⁵

This Article’s research purpose was to determine through interviews with Japanese *bengoshi* and through discussions with Japanese professors of law whether the New Code has in fact significantly improved litigation and made it a preferable tool for dispute resolution. In this regard, the present study primar-

87. Japan follows the “American Rule” on attorney’s fees. CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 2.04(3). The Council recommends the abolishment of the “American Rule” as a means of fostering litigation. *See generally Recommendations of the Judicial Reform Council, supra* note 19. Modification of the Rule to permit successful plaintiffs to obtain counsel fees while not shifting the burden of litigation costs to unsuccessful plaintiffs, would foster litigation but abolition of the rule would not. Abolition would change the risk/reward and cost/benefit analysis for a plaintiff — especially a small plaintiff that could not afford to pay a winning defendant’s council fees — and result in less litigation.

88. *See infra* notes 255–71 and accompanying text.

89. *See infra* Part IV.B.1.

90. *See generally* Mochizuki, *supra* note 14, at 286–87; *see also* Taniguchi, *supra* note 10, at 772–91.

91. *See* Ota, *supra* note 9, at 569–70.

92. MINSOHŌ, art. 182.

93. Ota, *supra* note 9, at 577.

94. MINSOHŌ, art. 163.

95. *See generally* Ota, *supra* note 9.

ily concentrated on new litigation rates than on disposition rates. Further, this Article's study focused on trial practice and lawyer attitudes towards the judicial system and their advice to clients concerning litigation as a dispute resolution mechanism. For this purpose, this Article's study utilized a detailed questionnaire to structure interviews and in some cases interview subjects answered the questionnaire in writing before their oral interview. A copy of the questionnaire follows this Article in Appendix A.

These interviews took place in various parts of Japan in order to assure that the results would not be skewed toward the major litigation centers of Tokyo and Osaka. In this regard, *bengoshi* were interviewed in Hiroshima, Fukuoka, Kobe, Kyoto, Nagoya, Osaka, Saitama, Sapporo, Sendai, and Tokyo. Similarly, law professors from various localities were interviewed and a High Court Judge was interviewed outside of Tokyo. Judges of the Tokyo District Court and officials of the Judicial Secretariat were interviewed in Tokyo. This Article's study reviewed the resulting statistical data, including the Judicial Secretariat's information, in an attempt to determine whether the New Code has had an effect on litigation rates, disposition rates and litigation in general.⁹⁶ In addition, all interviewed *bengoshi* were requested to recommend one change in the nation's civil procedure law that they felt would provide a significant solution to the present problems facing Japan's litigation system.

The results of this Article's study are presented below. In summary, the study concluded that while the New Code represents a major change in procedure on its face, the New Code's actual effect in areas other than the speed of disposition proved

96. Statistical information referred to herein and all statistical information compiled in the charts set out herein come from two sources: (a) *Hosoh Jiho* [compilation of annual statistics] for the years involved, and (b) statistics compiled by and provided by the Japanese Supreme Court's Secretariat. In the case of overlapping statistics, there were slight but insignificant differences. In most cases, the statistics were identical. In some situations, only one set of statistics was available, such as the Secretariat's provisional 2002 data. Appreciation is extended to Professor M. Tanabe of Hiroshima University Faculty of Law who assisted locating and translating the *Hosoh Jiho* statistical data. All 2002 data reported herein is provisional. (Statistical information is on file with the *Brooklyn Journal of International Law*). [The Article's use of this statistical data is hereinafter referred to as "The Japanese Court System's Statistics."].

disappointing. Litigation appears to be moving faster, although the trend to faster resolution was started prior to the New Code's amendment. Many Japanese lawyers expressed the view that the present trend is not significantly different or faster than the trend prior to the New Code. However, when the average time of disposition was evaluated, it appeared that the present trend appears to be significantly different from and faster than the trend prior to the New Code's enactment.

Nevertheless, most Japanese lawyers see the New Code as having little, if any, effect on the speed of litigation, as compared to the trend started prior to the New Code, although most agree that cases do move quicker today than prior to the New Code.⁹⁷ There also appears to be agreement among Japanese lawyers that the New Code complements and carries forward the trend to faster litigation initiated prior to the New Code. The courts' and lawyers' attitudes toward moving litigation faster are most significant in this regard.⁹⁸ Nonetheless, while it would seem that quicker resolution of litigation would lead to greater use of litigation to resolve disputes, this does not appear to be the case in Japan. This phenomenon requires explanation and further study, and this Article presents some thoughts on this issue.

Similarly, as Japanese litigation procedures improved, such as by the use of consolidated evidence gathering procedures, the expectation was that lawyers and litigants would have greater confidence in the judicial system as a Rule of Law dispute resolution mechanism. This too does not appear to be the case, even though the courts implemented consolidation procedures in more cases and at an even higher percentage in cases involving testimony by two or more witnesses. Moreover, the New Code's procedural devices, which are designed to make it easier for parties to obtain factual information, appear to have some, but little effect on the quality of information received. In fact, most lawyers interviewed were not more inclined to recommend liti-

97. Ota, *supra* note 9, at 577.

98. *See generally* Interview notes with Japanese legal professionals (on file with the author).

gation to their clients today than they were prior to the New Code's adoption.⁹⁹

Japan's reform of its Civil Procedure Code is an ongoing process and it is anticipated that further amendments will be adopted to address issues that have come to light recently under the new procedure.¹⁰⁰ Thus, in July 2003, the Japanese government adopted changes to assist the nation's court system in dealing with complicated cases involving expertise that the judges simply do not possess, such as an in-depth understanding of medical malpractice, intellectual property, and construction engineering cases.¹⁰¹

In addition, the Japanese government enacted changes that allowed prospective litigants to obtain information prior to the actual filing of a lawsuit. However, it remains to be seen whether the new provisions will make more evidence available

99. A lawyer in Hokkaido noted that he would be prepared to recommend litigation more frequently if he noticed a change in aid to plaintiffs, but he has not seen such a change. Interview with lawyer (K) in Hokkaido, Japan (on file with author). Another lawyer in Sapporo, who primarily represents corporate clients, noted that he would not recommend litigation more frequently and that his clients were not being sued more frequently under the New Code than under the Old Code. Interview with lawyer (C) in Sapporo, Japan (on file with author). A lawyer in Hiroshima specifically tied the self-use document production exception (MINSOHŌ, art. 220, para. 4(c-d)) to his willingness to recommend litigation, noting that he would recommend litigation more often if documents normally withheld by the defendant under this exception were produced. Interview with lawyer (M) in Hiroshima, Japan (on file with author). See MINSOHŌ, art. 220, para. 4(c-d) (defining the self-use document production exception). For a discussion of self-use documents, see *infra* notes 251-67. A lawyer in Sendai noted that in the past he informed clients that civil cases were decided faster, but this fact did not change his attitude and he does not recommend litigation any more frequently today than he did under the Old Code. Interview with lawyer (H) in Sendai, Japan (on file with author). A lawyer in Tokyo stated that he was not prepared to recommend litigation more frequently under the New Code because there was still no discovery and possession of evidence was necessary before the suit was filed in order to prove a case. Interview with *bengoshi* (S) in Tokyo, Japan (on file with author). A *bengoshi* in Hiroshima based his unwillingness to recommend litigation on the difficulties of executing on a successful judgment. Interview with *bengoshi* (V) in Hiroshima, Japan (on file with author).

100. See Taniguchi, *supra* note 10, at 790 (noting that we need to "keep a close eye on the practices developing under the New Code and initiate necessary legislation promptly").

101. See *Trial to be Expedited*, *supra* note 18.

or will simply change the timing of evidence gathering.¹⁰² This Article will discuss these recent changes. In addition to discussing the results of the research, this Article attempts to make some small suggestions as to changes that may more closely align Japan's civil procedure with the Rule of Law society proposed by the Council's 2001 Report.¹⁰³

III. JAPAN'S 1996 REFORMS IN PRACTICE

The New Code's major reforms relate to procedures geared to speed up the pace of litigation and procedures to make evidence more freely available to parties.¹⁰⁴ In a sense, the two ideas run together in the hope that providing evidence earlier in the process can have an effect on the speed of the litigation process overall. Thus, providing evidence at the earliest stages of issue identification may serve to resolve issues or at least shorten a trial's duration. In addition to evidence changes, the New Code's major structural reforms were: (1) to add a new semi-public procedure through which the parties and their counsel could, at an early stage, both define the issues and facts relating to those issues and discuss settlement, all outside the glare of a public proceeding; and (2) to consolidate evidence gathering at the trial stage.¹⁰⁵

In Japan, unlike in the U.S., trials do not take place on a daily basis with witnesses appearing one after the other until all evidence has been presented to the trier of fact.¹⁰⁶ U.S. courts designed such trial practices to meet the needs of its citi-

102. The mechanism adopted is a kind of pre-complaint adoption of the current inquiry system. As discussed *infra* at Part III.B.1 and notes 199–225, the current system does not appear to provide parties with much additional information, raising questions as to why a pre-complaint version would succeed. The answer appears to be that it is seen as a “first step” reform with later steps to include a sanctions regime for failure to truthfully respond to an inquiry. For a discussion of the inquiry system, see *infra* Part III.B.1.

103. See *Recommendations of the Judicial Reform Council*, *supra* note 19.

104. See Ota, *supra* note 9, at 568–70. See generally Mochizuki, *supra* note 14; Taniguchi, *supra* note 10; Kojima, *supra* note 15.

105. Taniguchi, *supra* note 10, at 771. See Ota, *supra* note 9, at 564.

106. Taniguchi, *supra* note 10, at 769. Japanese trials are similar to trials in most Civil Law countries. Professional career service judges meet with counsel and receive evidence on widely dispersed dates. Thus, trial dates may be separated by a week, month or more. For a discussion of trial procedures in Japan see *infra* notes 108–38 and accompanying text.

zen jurors. Jurors, who having taken time out of their daily lives to perform their civic duty, need to get back to their daily lives as quickly as possible.¹⁰⁷ For this reason, the U.S. court system cannot expect its citizen jurors to remember testimony heard weeks before they are called on to make their decision. The existence of a jury trial right in all cases at common law in which the matter in dispute exceeds twenty dollars¹⁰⁸ requires a procedure that condenses the time for trial to as small a capsule of time as is possible.¹⁰⁹ To achieve this goal, American lawyers — who in the U.S. are in charge of a case's investigation stage and also play a major role in the trial stage — must be well prepared. U.S. attorneys also have to prepare their witnesses in advance in order for testimony to go quickly and succinctly at trial.¹¹⁰ U.S. pre-trial procedure involves extensive discovery and taking the testimony of witnesses and potential witnesses outside of court and before trial, all of which serve to prepare the lawyers, parties and witnesses for the trial.¹¹¹ By avoiding surprise, the U.S. pre-trial discovery procedures also serve to shorten the length of the trial, which in turn serves the time concerns of citizen jurors.¹¹² Thus, while U.S. trials are relatively quick affairs, pre-trial procedures may take several years.

107. See AMERICAN BAR ASSOCIATION, FAMILY LEGAL GUIDE, chs. 2, 24, available at http://www.abanet.org/publiced/practical/books/family_legal_guide/cha-pter_2.pdf (How the Legal System Works) [hereinafter AMERICAN BAR ASSOCIATION, FAMILY LEGAL GUIDE].

108. U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.").

109. See, e.g., AMERICAN BAR ASSOCIATION, FAMILY LEGAL GUIDE, *supra* note 107, at chs. 2, 24.

110. See Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1, 17 (2002).

111. American Bar Association, *How the Courts Work: Steps in the Trial*, available at <http://www.abanet.org/publiced/courts/discovery.html> (last visited Feb. 2, 2003).

112. See Wagnild, *supra* note 110, at 17. Prior to World War II, Japan experimented with a form of jury trial in criminal cases. ODA, *supra* note 1, at 66–68. This system permitted a defendant, in certain categories of cases, to ask for a jury trial. *Id.* at 77–79. However, the determination of the jury was not binding on the court, and if the court disagreed with the jury, it would order a new trial. *Id.* On the other hand, if the judge supported the jury verdict, the defendant would lose the right to appeal the verdict. *Id.* Not surpris-

In civil law countries, such as Japan, a right to a trial by jury does not exist.¹¹³ As a consequence, a professional judge (or panel of judges) try cases on a full time occupational basis.¹¹⁴ Such a judge may be expected to keep detailed records of proceedings and to refer to those records when working on a case.¹¹⁵ For this reason, there is no need to have as compact a trial as in the U.S.; the “trial” in Japan consists of the proceedings before the court that occur after the filing and serving of the complaint.¹¹⁶ Under Japanese law, the trial is a public event and all trial proceedings are held in open court.¹¹⁷ While open court may serve a significant public interest in allowing the public to see how the court system operates,¹¹⁸ open court is not the best

ingly, most defendants opted not to have jury trial. The jury trial law was suspended and remains in suspension. *Id.* at 77–79.

113. *Id.* The Judicial Reform Council has suggested a form of lay participation in major crime cases in Japan, although it has rejected the U.S. style jury. *Recommendations of the Judicial Reform Council, supra* note 19. The likelihood is that Japan will experiment with a more German form of lay participation in some major criminal cases in the future. *See also Major Legal Reform Handed to Koizumi, supra* note 19 (“The report recommends the introduction of jurors in serious criminal trials. They would be randomly selected from registered voters to serve throughout a case and to consult with judges before handing out a verdict and sentence.”). A recent proposal calls for a panel of three professionals and six lay judges in cases where the death penalty or life imprisonment may be implicated. Hiroshi Matsubara, *Citizen Judge System Close to Reality*, JAPAN TIMES ONLINE, available at <http://www.apantimes.co.jp/cgi-bin/getarticle.pl5?nn20040129b2.htm> (last visited Feb. 11, 2004).

114. *See* Taniguchi, *supra* note 10, at 769–70.

115. *Id.*

116. The trial stage is also referred to as the “Plenary” or “Oral” Hearing.

117. KENPO, art. 82. The Japanese Constitution in Article 82 states:

Trials shall be conducted and judgment declared publicly...Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

Id.

118. In the U.S., one of the functions of the jury trial is to educate the public as to how the justice system operates by making the public a part of the actual operation of the system through service on the jury. AKHIL REED AMAR & ALAN HIRSH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 54 (1998). This same function is part of the reason for suggestions for more lay participation in criminal judicial proceedings in Japan. *See*

place for discussions of procedural nuances and settlement conferences. The New Code seeks to avoid this problem by institutionalizing a new procedural device called the "Preparatory Proceeding for Oral Argument,"¹¹⁹ where the court, parties, and invited persons with an interest in the matter can meet outside the public glare and discuss both the issues and the potential settlement of the case.¹²⁰ This procedural device was not actually created by the New Code but had been used on an experimental basis in some courts prior to adoption of the New Code.¹²¹ However, the New Code does provide a lawful basis for this procedure.¹²² In practice, the Japanese pre-trial procedure appears to work as follows: first, the plaintiff files its case in court; second, the court conducts a first public Preliminary Oral Hearing;¹²³ and, third, the court follows up this Preliminary Oral Hearing with a more informal proceeding to try to better define the issues and the evidence necessary to resolve the issues in the case.¹²⁴

Public Weight to Balance Scales of Justice, JAPAN TIMES ONLINE, June 4, 2003 (public participation will "raise the public's understanding of judicial procedures and their confidence in justice"), available at http://japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030604_b6.htm.

119. Kojima, *supra* note 15, at 690.

120. See MINSOHŌ, arts. 168–74 (setting out the procedures for the "Preparatory Proceeding" for oral argument).

121. Miki, *supra* note 85, at 4–5. A Preparatory Procedure prior to the formal trial was common in pre World War II civil procedure. See Kohji Tanabe, *The Processes of Litigation: An Experiment with the Adversary System*, in TANAKA, *THE JAPANESE LEGAL SYSTEM*, *supra* note 8, at 507 ("under the prewar code, after an action was commenced by filing a complaint, the judge either conducted 'preparatory procedure'...usually of several hearings, or one or several sessions of 'formal oral proceedings'...preliminary in nature. In these, he attempted to fix the issues of fact and law...").

122. See Ota, *supra* note 9, at 570. Professor Ota notes:

As a way to legally authorize the new procedure, the New Code introduced the "oral argument preparation procedure" and abolished the preparation proceeding. The oral argument procedure is open to people with interests. The Benron-ken-Wakai was basically a settlement procedure with a color of oral argument, while the new oral argument preparation procedure is structured as a preparation procedure with a color of oral argument. Under this scheme, the most important factor (settlement negotiation) retreats behind a facade.

Id.

123. MINSOHŌ, arts. 164–67.

124. Kojima, *supra* note 15, at 705.

These informal or Preparatory Proceedings for Oral Argument may be held in an informal setting with a roundtable at which all participants are at the same level.¹²⁵ Counsel from a distant location may appear by telephone and in some cases may even appear by video.¹²⁶ At these proceedings, the court may suggest, after hearing the views and concerns of the counsel for the parties, the production of documents or the response to inquiries, and will attempt to expedite the case by narrowing the issues to be tried and the witnesses and documents necessary for trial.¹²⁷ At some point, settlement discussions may be broached. The end result of such informal sessions (if settlement is not achieved) will be a kind of pre-trial order prepared by the court, which provides a road map for the trial itself.¹²⁸ Unlike U.S. pre-trial orders, the Japanese roadmap does not have any preclusive effect and the parties may attempt (and probably would be successful in such attempt) to introduce new or different issues and facts at the actual trial or Oral Proceeding.¹²⁹ Prior to the preparation of such an order, a Japanese

125. Even in a “closed” (non-public) proceeding, the court may permit parties, persons invited by parties, or others to attend these closed sessions. Miki, *supra* note 85, at 5.

126. Interview with Judicial Secretariat at the Supreme Court of Japan (on file with author). The Supreme Court of Japan Judicial Secretariat (the branch of the Court responsible for administration of the Justice System) has openly accepted new technology. The Court has also worked hard to introduce such technology into judicial proceedings both to speed up the process of litigation and to enable litigants and *bengoshi* located far from the courthouse to participate without undo cost in both time and money. A lawyer in Sapporo noted that as a result of the use of telephone and video meetings facilities, he did not have to make the long trip to Tokyo to handle many matters that did not require a personal appearance in the court. Interview with lawyer (C) in Sapporo, Hokkaido (on file with author).

127. Kojima, *supra* note 15, at 705–06.

128. Miki, *supra* note 85, at 6. Article 173 of the Japanese Code of Civil Procedure requires that the parties state the results of the preparatory proceedings in oral argument. MINSOHŌ, art. 173. Oral argument is a public proceeding and hence the results must be stated in a public proceeding. *Id.*

129. Under Article 157 of the Japanese Code of Civil Procedure, the court has (and had) the power to preclude a party from introducing evidence and arguments not addressed at the proper time. MINSOHŌ, art. 157. Under Article 167, a party wishing to introduce facts or arguments not disclosed at the preparatory proceeding must advise the other party of the reason that such facts or arguments were not originally disclosed. MINSOHŌ, art. 167. Due to the paternalistic attitude of Japanese judges and the view that the appropri-

court may attempt to bring about a settlement of the case as part of the informal discussion.¹³⁰ If settlement is not achieved during the Preparatory Proceeding for Oral Argument stage, the court will announce, in open court, the results of the procedural issues (the defining and limiting of evidence), thus preserving the fiction of public hearings.¹³¹

After such informal procedures and the “pre-trial” order, the formal procedures called the “Oral Hearings” begin.¹³² These formal procedures involve the receipt of evidence, and if the court deems necessary, the taking of testimony as well.¹³³ In complicated cases involving two or more witnesses, the court will typically utilize the new “consolidated” hearing method in which testimony is consolidated so that the examination and cross-examination of a single witness is completed on the same day and in which all witnesses are heard on the same day or within a short time of each other.¹³⁴ This procedure is substantially different from the old Japanese court procedure where witness testimony — even the testimony of a single witness — could be spaced over months and even years.¹³⁵ To aid parties and attorneys located far from the courthouse, Japanese courts may now utilize video systems to take oral testimony; such a

ate party is supposed to win, it is unlikely that preclusion would be ordered except in extraordinary situations evidencing bad faith. *Id.* arts. 157 & 167. *See also* Miki, *supra* note 85, at 17 (“Japanese Judges are already equipped with a power which allows them to dismiss allegations and evidence produced after appropriate stage of procedure has passed, under the existing Article 157(1), although they are extremely reluctant to exercise this power.”). *But see* Tanabe, *supra* note 121, at 514, 520.

130. Taniguchi, *supra* note 10, at 771.

131. *See* MINSOHO, art. 173.

132. A lawyer in Tokyo described the “public trial” aspects of the new procedure as follows: One or two public hearings; then a non-public preparatory hearing with parties (this non-public hearing stage can last several months and seeks to narrow the issues; at this stage, documents are presented and all issues are discussed); the court then prepares a statement describing the issues to be tried; the case is finally tried in a public procedure. Interview with lawyer (S) in Tokyo, Japan (on file with author).

133. *See* Kojima, *supra* note 15, at 706.

134. *See* Taniguchi, *supra* note 10, at 773.

135. *See id.*

system is even connected to medical facilities in order to enable those who are ill to testify.¹³⁶

At the conclusion of the Oral Proceedings (the trial's conclusion) the court announces the date when it will issue its decision.¹³⁷ Japanese courts issue these decisions in public, open-court proceedings. Prior to preparing and issuing the final decision, the court may advise the parties of its imminent holding in an effort to obtain a settlement.¹³⁸

A. *The Pace of Dispositions*

As one of the primary aims of the New Code was to speed up the civil litigation process, the first issue considered in the study underlying this Article was the speed with which civil litigation was handled after enactment of the New Code.

1. The Japanese District Courts¹³⁹

The average time of litigation from filing to resolution at the District Court level has declined. This speedier pace appears,

136. Interview with officials of the Judicial Secretariat in Tokyo, Japan (on file with author).

137. Kojima, *supra* note 15, at 699.

138. Advantages exist for everyone in a pre-decision settlement. From the plaintiff's perspective, a settlement in which the plaintiff gets monetary damages may warrant a "discount" from the anticipated judgment, rather than having to face appeal and the problems of execution. From the defendant's perspective, a sufficient discount may make it worthwhile to settle and not continue proceedings. From the court's perspective, settlement means that the judge does not have to write an opinion, thus saving time and obviating the need to make a win-lose decision. Moreover, by obviating appeal and execution proceedings, settlement frees up valuable judicial time and relieves a burden from an already overloaded judicial system. Some of the lawyers interviewed expressed opinions regarding the judicial system's inclination towards settlements. A lawyer in Tokyo commented that judges strongly advocate for settlements because the parties' burdens of litigation are great, and if there is a compromise, judges do not have to write an opinion (even at the appeal stage). Interview with lawyer (S) in Tokyo, Japan (on file with author). Additionally, a lawyer in Nagoya stated that settlements save judicial time at both the District Court and High Court level — an important factor since judges have no clerks and must write opinions themselves. Interview with lawyer (A) in Nagoya, Japan (on file with author).

139. This section discusses cases filed at the District Court as a first level court. The District Court also acts as an appellate court for cases started in the Summary Court.

at least in part, to have been achieved through the adoption of and utilization of the procedures contained in the New Code.¹⁴⁰ In this regard, practitioners were asked: “Have the new preliminary procedure provisions speeded up the pace of litigation?” Although the majority of *bengoshi* interviewees were of the view that litigation moved faster under the New Code than had been the case prior to amendment, most *bengoshi* accredited the accelerated pace of litigation to the legal community’s change in attitude rather than to changes brought forth by the New Code itself.¹⁴¹ These interviewees specifically noted that the pace of litigation had already been speeded up prior to the New Code’s adoption. The statistical data discussed *infra*, though, supports the view that the New Code’s procedures are responsible, at least in part, for the accelerated pace of decisions, although the attitude of judges and lawyers, for example, clearly does have some impact on the quickened pace of litigation.

The accelerated pace of litigation does not, however, appear to have had a positive effect on the use of litigation as a dispute resolution mechanism — at least at the District Court level.¹⁴²

140. Miki, *supra* note 85, at 16–17. Professor Miki concludes that the New Code has been successful in speeding up the pace of civil litigation.

The average length of civil litigation cases has shortened over the past decade and currently almost 90% of civil cases at first instance are concluded within two years, by either judgment or settlement. This must be a result of not a few judges and attorneys pushing themselves to improve their traditional way of practice. While, as already mentioned, the embryonic movement of this change had started before the reform of the Code of Civil Procedure, the New Code has provided the movement with a firm foundation. In this aspect, the 1996 reform has proven successful.

Id.

141. See, e.g., Interview with lawyer (H) in Sendai City, Japan (on file with author). The interview subject noted that long before the change in the New Code, the Court and the Bar made efforts to accelerate the pace of litigation and that such efforts had been very effective. *Id.* Note that while crediting the Code reform with placing the speedier procedures on a “firm foundation,” Professor Miki also credits the attitude of judges and lawyers for the speedier resolution of civil cases. Miki, *supra* note 85.

142. This Article concerns itself only with District Court litigation since Summary Courts limit damages available to 1,200,000 yen — and this sum is a new increase from the prior 900,000 yen limit. *Recommendations of the Judicial Reform Council*, *supra* note 19, ch. II, pt. 1, § 5(3). Statistical evi-

Thus, most (but not all) lawyers interviewed indicated that they were not suggesting litigation to clients at any higher rate than had been the case prior to the New Code's adoption. Statistical evidence supports the view that the New Code has not resulted in litigation being adopted more frequently to resolve disputes than was previously the case. An analysis of statistical data shows that the number of new "ordinary civil cases" filed since the New Code came into effect is not significantly greater than the number of such cases filed prior to the New Code's applicability. The data on the number of ordinary civil cases from 1996 to 2002 exhibits the following increase:¹⁴³

dence shows that the new Summary Court procedures have had a positive but minimal effect on the use of the judicial system as a dispute resolution mechanism. *See generally* The Japanese Court System's Statistics, *supra* note 96. Thus, there was an increase in new cases filed in Summary Court of approximately 10%, from 276,120 cases in 1997 to 306,169 cases in 1998. *Id.* However, the number fell back in 1999 and 2000, and the provisional data for 2002 shows that 312,952 cases were filed in Summary Court in that year — a relatively small increase from 1998. *Id.* Perhaps, the soon-to-be instituted ability of judicial scriveners to represent parties before the Summary Court will make Summary Court cases less intimidating for potential litigants than is currently the case. This change would further increase the use of the Summary Court to resolve relatively small legal damage issues.

143. The data shown herein is not consistent with the data used in Professor Ota's paper. *See* Ota, *supra* note 9, at 580. Professor Ota's data appears to show a dramatic increase in new cases between 1997 and 1998 and a continuation of this new higher rate of filings after 1998. *See id.* However, Professor Ota's data includes appeals filed in the District Court under a new procedure and under new data reporting procedures adopted in 1998. When these cases — which do not represent new litigation filed but rather are appeals of cases previously filed in the District Court — are factored out, the data is consistent. The data is not exact since Professor Ota's study includes filings of new administrative cases and certain other cases such as expedited bills and notes cases, whereas the data herein deals solely with ordinary civil cases. The data reported herein is consistent with data contained in Judge Michiharu Hayashi's work. J. Michiharu Hayashi, *Actual Situations and Problems After the New Code of Civil Procedure was Enacted in 1998*, 181 MINJIHO JOHO 2-13 (2001). *See also* The Japanese Court System's Statistics, *supra* note 96.

Cases From 1996-2002

Year	Number of New Cases Filed
1996	142,959
1997	146,588
1998	152,678
1999	150,952
2000	156,850
2001	155,541
2002	153,960 (provisional date)

The data makes clear that the courts are disposing of cases at a faster rate than before the New Code, reducing the court backlog; however, this reduction is at least partly due to the fact that new cases are not being filed at an accelerated pace to match the speed of dispositions.¹⁴⁴ The data indicates that such a distinction does exist.¹⁴⁵

144. The data cannot be explained away by the suggestion that raising the jurisdictional limit for Summary Court cases has taken away cases from the District Court and placed them in Summary Court. For example, the total number of newly filed cases in Summary Court and District Court in 1998 was 468,157; in 1999, 473,669; in 2000, 466,264; and in 2001, 475,000. These statistics indicate a small increase of only 6,500 cases from 1998 through 2001 and an increase of less than 2,000 cases from 1999 through 2001. See *The Japanese Court System's Statistics*, *supra* note 96. Yet, in this period, the new "small claims" one-day trial procedure was adopted. See Ota, *supra* note 9, at 570–71. This procedure should have resulted in cases that would never have reached the judicial system being filed in Summary Court and, thus, could well account for the slight increase noted. In fact, the number of small claim cases has been steadily on the rise, this is one of the great successes of the New Code. Thus, the number of small claims cases beginning in 1998 when introduced is as follows: 1998: 8,348; 1999: 10,027; 2000: 11,128; 2001: 13,504. See *The Japanese Court System's Statistics*, *supra* note 96. If these cases are factored out of the total remaining cases filed in the District Court and Summary Court together, the statistics indicate an increase from 459,809 in 1998 to 462, 119 in 2001, or an increase of only .5%. *Id.*

145. See *The Japanese Court System's Statistics*, *supra* note 96.

District Court Cases

Year	Completed District Court Cases	Pending District Court Cases
1996	145,858	110,396
1997	147,373	109,611
1998	156,683	105,606
1999	154,395	102,163
2000	158,781	100,232
2001	157,451	98,322
2002	155,755 (provisional data)	Unavailable

Moreover, since the New Code's adoption, the average speed at which cases are disposed of by the District Court has accelerated at a pace much faster than was true before the New Code. The Judicial Secretariat's¹⁴⁶ data shows:

Average Number of Months from Filing Complaint to Disposition — District Court

Year	All Cases Filed	Cases Involving Testimony of Two or More Witnesses
1992	10.9	21.8
1993	10.1	21.2
1994	9.8	20.9
1995	10.1	21.1
1996	10.2	21.3
1997	10.0	20.8
1998	9.3	20.8
1999	9.2	20.5
2000	8.8	19.7
2001	8.5	19.2

As the New Code came into effect in 1998, the comparison of pre-1998 rates and post-1998 dispositions is appropriate. Assuming that 1994's reduction is an aberration and utilizing the

146. The General Secretariat of the Supreme Court is the internal department of the court system for judicial administration. See Court System of Japan, *An Overview of the Judicial System: The Supreme Court*, at http://www.courts.go.jp/english/soshikie_2.html (last visited Nov. 15, 2003). See also The Japanese Court System's Statistics, *supra* note 96.

1993 and 1995 data (almost identical and bracketing the 1994 data), it would seem that in the four years prior to the New Code “all cases” proceeded at a relatively stable rate of decline of about .1 per month or experienced virtually no change from 1993 to the end of 1997. However, from 1998 through 2001, the rate of dispositions dramatically accelerated so that a full month and a half decrease had been achieved. For more complicated cases the decline in the four years prior to the New Code was approximately .4 of a month (again excluding 1994 as aberrational and using 1993 figures — if 1994 were used the decline was only .1 month) while in the four years after adoption the decline was from 20.8 months in 1997 to 19.2 months at the end of 2001 or a decline of 1.6 months.

The actual figures are even more dramatic than the data's sharp decline because for all cases the figures include default cases where the rate of decline cannot be significantly changed, thus providing a stable base of about two months for many cases. Moreover, there is surely a minimum amount of time required to handle any case, which also applies to complicated cases that expectedly take longer than relatively easy cases. As the litigation time decreases, further time limitations become more difficult to implement given that the judicial system still needs to provide litigants with procedural justice and adequate trial of the facts.

These statistics squarely contradict the expressed feelings of *bengoshi* that the disposition rate under the New Code is similar to the rate before the amendments.¹⁴⁷ Therefore, it is reasonable to conclude that the New Code is at least partially responsible for the accelerated rate of dispositions. Moreover, a

147. The data set out above shows that the disposition rate post-1998 is much greater than the disposition rate pre-1998. The figure of 9.3 months in the table above for 1998 corresponds to Professor Haley's use of 9.3 months for 1997. See Haley, *Litigation in Japan: A New Look at the Problem*, *supra* note 68, at 134. The one-year difference may be accounted for by the date of the publication involved or by having statistics reported one year after the actual facts. In any event, although Professor Haley notes a correlation between reducing the time of litigation and an increase in litigation in the 1970s, his 2002 article does not deal with the rate of litigation since the passage of the New Code. See *id.* Professor Haley's article does confirm that there is a perception in Japan that the judicial process takes too long. See *id.* at 127 (“Of those polled, the primary reason for hesitating to bring suit were belief that a lawsuit would take too much time (72%) and be too expensive (67.2%)”).

broader statistical analysis shows that while in the 1970s the pace of civil litigation in Japan could be considered to proceed at a "snail's pace"¹⁴⁸ (with over 15,000 cases in 1970 pending for more than 3 years and over 16,000 cases pending for over three years in 1979), the same cannot be said today. By the end of 1998, the number of cases pending for more than three years had declined to 7,614, but by the end of 2001 the number was down to 4,853.¹⁴⁹

The problem with utilizing the average time to dispose of a case as a measuring device is that averages are indeed averages. To an individual litigant the important data is how long the individual's case actually took to be resolved. And here, practicing lawyers who most aggressively litigated their cases to judgment take as long today as before the New Code.¹⁵⁰ The analysis of the time taken in resolving cases by judgment bears the following data:¹⁵¹

**Percentage of Judgment Cases Decided
in One and Two Years**

Year	Percentage of Cases Decided After One Year	Percentage of Cases Decided After Two Years
1996	15.1	13.1
1997	15.0	13.4
1998	14.2	12.8
1999	14.4	13.3
2000	14.4	14.0
2001	14.8	14.7
2002	15.4	14.7

148. *Lower House Approves Speedy Trial Legislation*, *supra* note 18. See generally *Trial to be Expedited*, *supra* note 18.

149. In the period from early 1994 to the end of 1997, the number of cases pending for three years or more declined from 10,074 to 8,798, a decrease of 1,276 cases. By the end of 2001, the number had declined to 4,853, a decrease of an additional 3,945 cases, triple the earlier rate of decline. It is reasonable to believe that the intervening event — the effective date of the New Code — had some effect on this accelerated pace of backlog disposition.

150. As the study's results show, this observation especially holds true at least at the District Court level.

151. See *The Japanese Court System's Statistics*, *supra* note 96.

Thus, the percentage of litigated cases disposed of by judgment that took either one year or two years to be resolved actually increased in 2002. Nevertheless, the disposal of litigation brought to judgment in one or two years is hardly a “snail’s pace,” and may be viewed as quite fast, especially if complicated cases are involved.

2. Appeals In Japan — The High Court and Supreme Court

Appeals from District Court dispositions (when acting as a court of first instance) may be taken to the High Court.¹⁵² From a time perspective, a plaintiff’s main concern, when seeking relief, is when their case, in its entirety, will be completed — not simply when the court of first instance will complete its consideration of the case.¹⁵³ Thus, it is relevant to consider the pace of litigation at the appellate level under the New Code. This is especially relevant for Japan because, unlike in the U.S. where appeals are taken “on the record” of the lower court’s or trial court’s proceedings, in Japan it is possible to introduce new evidence and even new theories in the High Court.¹⁵⁴ One purpose of the New Code was to limit the use of the High Court procedure as simply an extension of the trial, and indeed not just as an extension but practically a new trial with new issues and new witnesses.¹⁵⁵ Thus, part of the function of the District Court’s new preliminary procedure was to finally determine the issues in a matter, rather than leave the relevant issues open at both the trial and appeals level.¹⁵⁶ The statistical evidence supports the view that, in at least this regard, the New Code has had a great deal of success — not in eliminating all the *de novo* trial aspects of appeal but in substantially reducing the use of the High Court as a new trial court. The following data shows

152. See MINSOHŌ, art. 281.

153. See, e.g., Ota, *supra* note 9, at 571 (discussing the use of a special procedure in order to resolve minor issues in one day).

154. Under Article 297 of the Japanese Civil Procedure Code, the provisions of Chapters one through six of the Code (governing such things as introduction of evidence, trial, oral argument proceedings, etc.) are applicable to appeals. MINSOHŌ, art. 297.

155. See Ota, *supra* note 9, at 572.

156. To carry out this function, Article 298 of the Japanese Civil Procedure Code specifically makes Article 167 applicable to appeals. MINSOHŌ, art. 298.

the steady decline of *de novo* matters on appeal in Japanese courts.¹⁵⁷

**Percentage of Cases Where the High Court Received
New Evidence
in Normal Civil Cases on Appeal¹⁵⁸**

Year	Third Person Witness	Party Witness	Court Expert	Other
1996	19.0	18.0	1.4	0.6
1997	16.3	15.8	1.4	0.4
1998	15.4	14.9	1.4	0.4
1999	13.8	12.6	1.3	0.3
2000	11.4	9.7	1.2	0.3
2001	10.0	9.7	0.9	0.2

**Percentage of Cases Where the High Court Received
New Evidence in Administrative Cases**

Year	Third Person Witness	Party Witness	Court Expert	Other
1996	19.4	10.1	—	0.9
1997	25.5	10.6	0.2	0.5
1998	16.1	7.2	—	2.0
1999	15.6	5.1	0.4	—
2000	10.0	3.6	0.4	0.1
2001	13.7	3.2	0.5	0.5

In addition, the time taken to handle appeals at the High Court level has also declined.¹⁵⁹

157. See The Japanese Court System's Statistics, *supra* note 96.

158. A similar pattern exists where the District Court sits as an Appellate Court for Summary Court cases. Here, the witnesses (both party and third persons) per one hundred cases at the District Court and appeal level are as follows: (1996:37); (1997:34.5); (1998:27.4); (1999:26.9); (2000:26.1); and (2001:20.2). See The Japanese Court System's Statistics, *supra* note 96.

159. See The Japanese Court System's Statistics, *supra* note 96.

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**Average Disposition Time (Months)
at District Court and High Court**

Year	District Court	High Court
1992	10.9	11.3
1993	10.1	11.2
1994	9.8	10.9
1995	10.1	10.6
1996	10.2	9.9
1997	10.0	9.9
1998	9.3	9.8
1999	9.2	9.0
2000	8.8	8.4
2001	8.5	7.9

Of course, litigants do not appeal all cases to the High Court. Nevertheless, the virtuous potential plaintiff can realistically expect, on average, that their case will be decided on average in 16.4 months (using 2001 figures) from filing with the District Court even if the case is appealed. This time frame is far more satisfying than the average 19.9 months prior to the New Code's applicability.

However, as in the case of judgments in the District Court, the problem with averages remains. Thus, it is worthwhile to explore the percentage of judgment cases taking one or two or even three years to resolve *after* appeal has been filed. In such circumstances, although a litigant may find the percentages comforting, the absolute numbers remain relatively high — this difference is accounted for by the increased number of High Court appeals filed in 2002, for example, in comparison to 1997, the last pre-New Code year. The statistics expose this distinction:¹⁶⁰

160. *See id.*

**Judgment Cases Appealed to High Court
Number and Percentage of Cases Resolved in One, Two
and Three Years**

Year	Total Cases Appealed	One Year (Number/ Percent)	Two Years (Number/ Percent)	Three Years (Number/ Percent)
1996	8259	3402/41.2	1764/21.4	304/3.7
1997	8588	3554/41.4	1743/20.3	344/4.0
1998	9024	3531/39.1	1784/19.7	412/4.6
1999	9376	3338/35.6	1388/14.8	348/3.7
2000	9812	3114/31.7	1357/13.8	314/3.2
2001	9724	2955/30.4	1157/11.9	259/2.7
2002	9817	2973/30.3	1043/10.6	181/1.8

Thus, it appears that while the average case may be resolved in only 16.4 months through appeal, cases litigated to judgment and then appealed may take significantly longer. However, the High Court has apparently significantly reduced appeal time in judgment cases from the pre-New Code percentages to the 2002 projected percentages. Of course, as the number of appeals continue to rise — from a pre-New Code total of 8588 cases appealed to a 2002 total of 9817 appeals filed — so too will the number of cases taking longer to resolve.

As asserted previously, averages may not tell the entire story. For the potential litigant the “worst case” scenario may have greater impact than the average. Since cases that take longer on appeal are likely to be the more difficult cases which may take longer at the District Court level, it is possible that such cases distort the potential average litigant’s view of the litigation process’ duration in general. Accordingly data was sought as to how long it actually took for cases to work themselves from filing to judgment in the High Court. Apparently such data is not currently available. It is suggested that in the future such data should be compiled so that a more meaningful analysis than the simple average can be made as to how long it actually takes for cases to go to judgment — at least in complicated cases that are appealed. This Article will also discuss

other issues surrounding complicated cases.¹⁶¹ For now, it is sufficient to note that a legal system that is perceived to be incapable of rendering timely relief in complicated cases is not likely to be seen as supporting a strong Rule of Law system even if the average time to resolve cases is quite reasonable or even low.

Working backwards from the High Court's 2002 provisional data, the public's scrutiny of these litigation issues comes to light. In 2002, the High Court decided 1043 cases that had been pending in the court for two years. Accordingly, these cases had been decided in the District Court in the year 2000. In that year, the District Court decided by judgment 1,679 cases that had been pending for four years and an additional 1600 cases that had been pending for five years or more. If all 1043 appeal cases had been pending in the District Court for four or five years (a distinct possibility since the longer the case pended in the District Court, the longer its appeal would likely take), then all 1043 cases had been pending for six or seven years. Moreover, it is highly unlikely that any of the above mentioned 1043 High Court appeals cases decided in 2002 were decided by the District Court in less time than they were pending on appeal. Yet in 2000, of the 80,542 judgment cases decided, 61,454 were decided in one year or less and approximately 70,000 of the judgment cases were decided in two years or less. Of the cases decided in the District Court that took more than two years and were then appealed, it is clear that the average numbers distort the picture of how long it took to decide these cases.

Perception of how long it takes to resolve a case affects the public ideas as to whether the judicial system is a reasonable place to bring legal disputes.¹⁶² The public press, of course, influences public perception. The press, in turn, typically does

161. See *infra* Part III.E.

162. Ota, *supra* note 9, at 565 (noting that public frustration with the justice system leads some to use disreputable alternatives, such as *yakuza* (organized crime) or *sokaiya* (extortion), to resolve disputes). See *id.* See also *Docs Who Removed Wombs from Healthy Women Lose Appeal*, MAINICHI DAILY NEWS, May 29, 2003 (noting that the appeal filed by several doctors in a suit initiated in 1980s by several women who had their uterus and ovaries removed in a medical scam to overcharge the national medical insurance program was denied and the doctors were ordered to pay 510 million yen in damages), available at <http://mdn.mainichi.co.jp/news/archive/200305/29/index.html>.

not report on “average” cases. Rather, reported cases tend to be either more complicated or cases that are perceived to be noteworthy.¹⁶³ It is precisely these cases that are likely to take longer at both the District and High Court levels. These high profile cases do, in fact, move at a “snail’s pace” in many instances.¹⁶⁴ Moreover, the press rarely distinguishes between

163. See, e.g., *Highway Boss Eyes Court Battle*, MAINICHI DAILY NEWS, Oct. 18, 2003, available at <http://mdn.mainichi.co.jp/news/archive/200310/18/20031018p2a00m0dm023000c.html>.

164. At the time this Article’s underlying research was conducted in Japan, the *Japan Times* reported that the Tokyo Police had lost (at the District Court level) a significant HIV employment discrimination case. *Tokyo Loses Lawsuit Over Illegal HIV Test*, JAPAN TIMES ONLINE, May 30, 2003, available at <http://www.japantimes.com/cgi-bin/getarticle.pl5?nn20030530a8.htm>. The *Japan Times* reported that the unlawful act (as found by the Court) — compelling the HIV applicant to withdraw his application for employment — occurred in July 1998, almost five years before the decision. *Id.* The article reported that the police intend to appeal. *Id.* If an appeal is filed, it is unlikely that a decision will be rendered earlier than six or seven years from the filing of the case. Whether an appeal to the Supreme Court would be taken remains to be seen. From a U.S. legal perspective, the case appears (at least from the news report) to be uncomplicated. The fact issues are relatively simple — did the authorities perform an HIV test and did they then compel the plaintiff to withdraw his application upon discovering he was HIV positive? In fact, soon after the decision, the Metropolitan Police announced that they would postpone a previously scheduled weekend of HIV tests for new recruits. *MPD Agree to Ditch HIV Tests for Recruits*, MAINICHI DAILY NEWS, June 6, 2003, available at <http://www12.mainichi.co.jp/news/mdn/search-news/892127/HIV20tests-0-2.html>. Thus, it appears that there was no serious factual question as to whether the test was performed. *Id.* The legal question, while interesting and perhaps even novel, is not “difficult” in the sense that it does not require a great deal of time for research and debate, etc. Similarly, just two days later, the *Japan Times* reported that the Osaka High Court had reversed a District Court decision in a case seeking damages for a vessel sinking in 1945, which contained South Korean laborers who were returning to Korea after the war. *South Koreans Appeal Ship Case*, JAPAN TIMES ONLINE, June 14, 2003, available at <http://japantimes.com/cgi-bin/getarticle.pl5?n20030614 a9.htm>. The case had been pending in the District Court for nine years and the appeal was pending for almost two years, totaling eleven years. *Id.* Almost half of the plaintiffs died while the case was pending, and the matter is not yet resolved as the plaintiffs have appealed to the Supreme Court which will likely take additional years during which additional plaintiffs will likely pass away. *Id.* The likelihood is that these cases reported in the English language press were also extensively reported on in the Japanese language press.

civil and criminal cases.¹⁶⁵ Many high profile criminal cases truly move at a “snail’s pace” — such as the Sarin poisoning cases.¹⁶⁶ When the media lumps criminal cases with civil cases and the high profile civil cases move slowly, the public perception is likely to be that the resolution of all civil cases linger in the court system as well.¹⁶⁷

In any event, the question must be asked why any appeal at the High Court takes two or more years to be resolved. Since, the District Court has tried all of these cases on appeal already,

165. See, e.g., *Crippled Car Racer Wins Massive Payout*, MAINICHI DAILY NEWS, Oct. 29, 2003 (reporting that a race car driver severely injured five years ago won a 90 million yen award against race organizers, whom he blamed for the injuries he sustained in the crash), available at <http://www.12.mainichi.co.jp/news/mdn/searchnews/896962/Crippled20Car2Racer20Wins20Massive20Payout-0-1.html>; *Nary a Whimper; Guru's Trial Ends*, ASAHI SHINBUN, Nov. 1, 2003 (the founder of Aum Shinrikyo made no statement at the conclusion of his seven-year trial for murder and assault that is likely to result in a death sentence), available at <http://www.asahi.com/english/nation/TKY200311010151.html>.

166. *Lower House Approves Speedy Trial Legislation*, supra note 18; Hiroshi Matsubara, *Speedier Trials, Limited Jury System; Public Weight to Balance Scales of Justice?*, JAPAN TIMES, June 4, 2003, available at <http://japantimes.com.Jp/cgi-bin/getarticle.p15?nn20030604b6.htm>. The sarin cases refer to two incidents in which sarin gas was purposefully released to kill opponents of the Aum Shinrikyo cult or to cause massive panic. *Aum Doctor Ordered to Die in Sarin Cases*, ASAHI SHINBUN, Oct. 30, 2003, available at <http://www.asahi.com/english/nation/TKY200310300125.html>. In June 1994, cult members killed seven and made approximately 140 people sick in the Nagano Prefecture. *Id.* In March 1995, cultists released sarin in the Tokyo subway system, killing twelve and making almost 3800 sick. See *id.* See also *Nary a Whimper; Guru's Trial Ends*, supra note 165.

167. Although the judicial branch has been successful in reducing both the absolute number and percentage of cases pending for more than three years and for each category (four years, five years, ten years and over ten years) of pending cases, the fact remains that as of the end of 2000, there were 2,845 cases pending for five years or longer. See *The Japanese Court System's Statistics*, supra note 96. While this represents a scant 2.8% of all cases, this 2.8% is likely to be picked up by the popular press and thus impressed on the minds of the public. In addition to actually reducing time to decide cases, both the judicial system and the practicing Bar may require greater public awareness of the improvements that have been made in the time it takes to bring a case to resolution in the District Court. See also Haley, *Litigation in Japan: A New Look at the Problem*, supra note 68, at 127 (discussing how the litigating public in Japan responded to questions concerning their perception of the time it took to resolve litigation in Japan and how 72% of the people polled believed that litigation took too long to resolve).

and the Japanese legislature specifically designed the New Code in part to assure that all issues would be identified in these trials' early stages, there should be nothing to "try" at the High Court level. Therefore, the High Court cases should theoretically resolve cases in a shorter time frame.¹⁶⁸ However, the fact that over 1,000 cases in 2002 took two years or more for a High Court decision indicates that the New Code's reforms may not yet be fully realized at the High Court level.¹⁶⁹

Because the New Code reduced the types of cases that can be appealed to the Supreme Court,¹⁷⁰ it was hoped that most cases would end at the High Court level. Although the Supreme Court appears to be controlling its *certiorari* docket by denying *certiorari* in most cases filed, the fact remains that cases filed in the Supreme Court have been rising since adoption of the New Code.¹⁷¹ Unlike the U.S. Supreme Court's narrow and limited caseload, Japan's Supreme Court appears to be accepting more *certiorari* cases each year.¹⁷² The available statistics show that the total number of cases in which *certiorari*, appeal, or both were sought has been rising since the New Code's adoption and,

168. See, e.g., Taniguchi, *supra* note 10, at 778–79.

169. See *Certiorari 1997-2001 Chart*.

170. Article 312 of the Japanese Code of Civil Procedure limits appeal as of right. MINSOHŌ, art. 312. However, Article 312 also contains a broadly worded catch-all provision generally allowing appeals when the judgment appealed from omits the reasons for the decision or the reasons are inconsistent. Article 318 gives the Supreme Court a *certiorari* type jurisdiction, allowing the Court to accept appeals at its discretion. *Id.* at art. 318.

171. See Ota, *supra* note 9, at 579–80. See also *Certiorari 1997-2001 Chart*.

172. In Japan, determining whether the Supreme Court has the ability to control its own docket is difficult because "appeal of right" cases still exist and statistics concerning Supreme Court judgments do not distinguish between meritorious appeals and those dismissed for improper filing. See MINSOHŌ, art. 312 & 318. The Code permits the filing of a "*jokoku* appeal" with the Supreme Court for "jurisdictional reasons," namely that the composition of the deciding court was improper, one of its members was ineligible to participate in the proceedings, or jurisdiction properly resided exclusively elsewhere. *Id.* *Jokoku* appeals are also granted for other reasons, such as a defect in representation, an improper denial of an oral argument, or where there is a judicial defect in reasoning, either because the court failed to give its rationale or did so inconsistently. *Id.* Unlike the U.S. Supreme Court, which distinguishes between a dismissal and a determination under denial of "*certiorari*," dismissals of improperly filed claims in the Japanese courts are counted as judgments, making it difficult to determine whether appeals are determined on their merits or on procedure. *Id.*

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further, that Japan's Supreme Court is accepting more *certiorari* cases each year.¹⁷³

The statistical table below sets out the disposition rate of civil cases in which litigants sought either appeal or *certiorari* and the disposition of such cases from 1997 (immediately before the Code went into effect) through 2001:¹⁷⁴

Certiori 1997-2001 Chart

Year	Filed Cases		Cert. Granted	Location of Termination of Decision		
	Appeal Cert.			Appeal Granted	Cert. Denied	Cert.
1997	2,741	—	—	3,062	—	—
1998	2,542	768	1	3,040	370	0
1999	2,160	1,770	12	2,389	1,528	11
2000	2,418	2,106	26	2,410	1,820	19
2001	2,323	2,314	53	2,298	2,089	40

As the table above shows, it seems clear that attorneys are filing more *certiorari* cases each year. While the Supreme Court is denying more of these petitions, it is also accepting more cases each year. Similarly, *bengoshi* are seeking *certiorari* and filing appeals in more and more criminal cases each year. Thus, the number of cases in which litigants have sought Supreme Court review has increased from 4,086 in 1997 to 5,277 in 2001. Even so, the average number of months that a case is pending in the Supreme Court has been steadily falling since the effective date of the New Code:¹⁷⁵

173. See *Certiorari 1997-2001 Chart*.

174. See The Japanese Court System's Statistics, *supra* note 96.

175. *Id.*

**Disposition of Civil Cases in the
Supreme Court — Number of Months**

Year	Average Number of Months Pending
1992	7.6
1993	9.3
1994	7.7
1995	7.0
1996	8.7
1997	9.5
1998	8.1
1999	6.6
2000	5.4
2001	5.3

Here again, average statistics can be misleading as cases in which the Supreme Court denied *certiorari* should also be resolved relatively quickly, whereas some cases in the Supreme Court have been pending for several years. Adding a case's duration in the Supreme Court, High Court and to the District Court creates a distorted picture of Japan's entire judicial system. This distortion can, in turn, effect the public's perception of whether they can obtain timely justice from the nation's judicial system. As a result, the public's support for the judicial system may waver even more significantly and also lead to a diminution in support for the Rule of Law in general. With this in mind, the judicial system may wish to explore the question of how it can gain greater control over the appeal (as distinguished from the *certiorari* process) and whether further legislation limiting appeals to the Supreme Court and limiting evidentiary proceedings at the High Court are warranted.¹⁷⁶

176. Justice O'Connor's observation concerning the experience of the U.S. Supreme Court may be instructional. Justice O'Connor writes:

When I arrived at the Court in 1981 we received about 4,000 applications a year to review particular lower-court decisions, but we accepted and decided with full opinion only about 150 a year. Recently, the Court has been receiving about 7,000 petitions a year and has been accepting fewer than 100. The number of petitions granted de-

3. Summary of Findings

It is generally agreed that the pace at which cases are disposed of in Japan, either by judgment, settlement or otherwise, has accelerated.¹⁷⁷ Whether this change is due to the New Code or to the altered procedures devised and put into practice prior to the New Code's adoption is debated, but hardly relevant. Whether "invented" or simply adopted by the New Code, the fact remains that the new practices have quickened the pace of litigation in Japan. Moreover, the judicial branch has clearly taken steps to reduce the trial disposition period.¹⁷⁸

Still, many high profile cases take several years at the District Court level to be resolved and some cases on appeal take even two or more years to be resolved.¹⁷⁹ The New Code's provisions, designed to assure that all issues and evidentiary matters are discussed and thus defined or resolved "pre-trial," (i.e., pre-Oral Argument), do not appear to have produced that desired effect on litigation.¹⁸⁰ It is probably the case that the new Preparatory Proceedings for Argument procedure has expedited the pre-Oral Argument stage of cases and has probably limited the scope of new arguments, issues, and facts brought up later on appeal; however, this procedure has not completely pre-

clined after Congress in 1988 made the Court's appellate jurisdiction discretionary.

O'CONNOR, *supra* note 7, at 9–11.

177. See, e.g., *Supreme Court Report Illustrates Lengthy Process of Civil Trial System*, JAPAN TIMES, Apr. 6, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20010406a8.htm>.

178. In addition, the number of judges available to try cases at the District Court and High Court levels appears to have increased during the last few years. Thus, the total number of judges available to handle cases — excluding those of the Supreme Court and the Summary Court — has gone from 2121 judges in April of 1998 to 2296 in April of 2002, and to 2341 in April 2003. See *The Japanese Court System's Statistics*, *supra* note 96 (specifically the data provided by the Judicial Secretariat). This increase in the number of judges available to try cases has also undoubtedly had a positive effect on the speed with which cases are resolved. It is anticipated that the number of judges in Japan will continue to increase as the new reforms take effect, increasing the number of *bengoshi* to approximately 3,000. See *Recommendations of the Judicial Reform Council*, *supra* note 19, at ch. III, pt. 1(1).

179. See, e.g., *Docs Who Removed Wombs from Healthy Women Lose Appeal*, *supra* note 162 (noting the final appeal in this case began in 1999 and was not concluded until May 2003).

180. See, e.g., *Ota*, *supra* note 9, at 568–70.

vented new issues from being raised at a case's Oral Argument stage before the District Court, and it has not obviated new arguments, new issues and new evidence at the High Court appeal level.¹⁸¹ This problem may be due to the fact that the New Code does not contain a "preclusion order" procedure. In addition, the "paternalistic" judiciary's general unwillingness to reject new arguments and evidence also hinders procedural progress, albeit substantively more thorough.¹⁸²

4. The Failure of the Average Accelerated Pace of Dispositions to Lead to an Increased Use of the Judicial System

The speed of average dispositions at the District Court level has not been without some potential damaging effects on litigation as a dispute resolution mechanism. Thus, speed, while useful in making litigation a reasonable method of resolving a dispute in a timely fashion, may negatively effect how potential and actual litigants view Japan's judicial system. To the extent that litigants feel that they have not received an adequate hearing from the Japanese court system, its utility as an upholder of the Rule of Law concept is damaged.¹⁸³ Doubts about a hearing's adequacy may be raised when litigants feel that the system operates so quickly that they have been denied a fair opportunity to present their side of the issue. In addition, the procedures used to promote speed may raise questions as to the adequacy of the process to render what is perceived to be a "just" decision. In this connection, statistical data concerning use of witnesses in cases is consistent with the views expressed by *bengoshi* interviewees that judges do not permit party or third person witness testimony as frequently as they did a decade

181. *Id.* at 576-77.

182. See generally Miki, *supra* note 85. Masako Kamiya, *Narrowing the Avenues to Japan's Supreme Court: The Policy Implications of Japan's Code of Civil Procedure Reforms*, 4 AUSTRALIAN J. OF ASIAN L. 53, 56, 70 (2002) (noting that Japanese courts tend to have a paternalistic attitude) (on file with author).

183. See, e.g., Press Release, Japan Federation of Bar Associations, Not "Speedy Trials Bill," but "Fair and Speedy Trials Bill" (Nov. 19, 2002) (public survey showed that only 18.6% of respondents were satisfied with the current civil trial system), at <http://www.nichibenren.or.jp/en/activities/meetings/20021119.html>.

ago.¹⁸⁴ Some *bengoshi* expressed the view that when judges do not permit witness testimony and rely on written materials rather than oral testimony, they either actually deny litigants an adequate opportunity to present their, or the parties perceive the system as denying them their “day in court.”¹⁸⁵

This perception issue is significant to a Rule of Law analysis and has particular importance in Japan where judges serve as the gatekeepers to evidentiary hearings.¹⁸⁶ Judges ultimately determine whether or not witnesses, including party witnesses, will testify.¹⁸⁷ Therefore, litigants’ perceptions of an unfair or

184. See, e.g., Interview with trial lawyer (H) in Sendai, Japan (on file with author) (noting that as early as ten years ago, the court permitted witnesses to testify but that today such witness testimony is not freely permitted).

185. Some *bengoshi* noted that this reliance on written material also denied them the right of cross-examination, thus creating procedural due process issues. Under Rule 113 of the Japanese Rules of Civil Procedure, the order for taking witness testimony is direct examination, followed by cross-examination and the redirect. MINJI SOSH-O KISOKU, art. 113, para. 1. The Rule also permits examination by the court. *Id.* See also MINSOHŌ, art. 202 (setting the order of examination as the offering party first, followed by the opposing party, and then the court with judicial discretion to alter the order).

186. Although this paper is limited to civil non-administrative cases, it should be noted that Japanese judges are also gatekeepers in criminal cases. It has been reported that a Japanese District Court sentenced a British defendant to fourteen years in prison for illegal importation of drugs after a trial in which the defense was that the defendant was duped by a traveling companion and was unaware that he was carrying drugs. Apparently, after being released from Japanese custody, the traveling companion was later arrested in Belgium for duping others to carry drugs. The defendant sought the assistance of the Japanese judge in obtaining records from a European court disclosing this duping incident, but the District Court as gatekeeper refused to assist. *Court Defies Outcry in Drug Case: Briton Handed 14-year Sentence*, JAPAN TIMES ONLINE, June 13, 2003, available at <http://www.japantimes.com/cgi-bin/getarticle.p15?nn20030613a4.htm>. The judge rejected efforts by the defense “to enter evidence from a Belgium court, where [defendant’s] travel companion [was] on trial for smuggling drugs under similar circumstances.” Jake Adelstein, *Drug Trial Highlights Gap Between UK-Japan Criminal Procedures*, YOMIURI SHINBUN, July 1, 2003, available at 2003 WL 5138432.

187. See, e.g., MINSOHŌ, art. 207 (stating that courts require written summaries of proposed testimony, including the matters to be examined, prior to determining whether to permit such oral testimony). See also *id.* art. 181 (noting that the court has the authority to refuse to examine evidence offered by a party if the court finds such examination unnecessary); *id.* art. 205 (stating that the court has discretion, except when parties object, to require a witness to produce a document instead of giving oral testimony). *But see* Interview with lawyer (B) in Kyoto, Japan (on file with author) (noting that as a

inadequate judicial system reflect badly on both the court system and its judges. If wide spread, such a perception can decrease the reputation of the Japanese judicial system as a means for obtaining relief and thus can damage the use of the courts as a means for carrying out the Rule of Law. The statistical data below shows the number of witnesses allowed to testify at the District Court level.¹⁸⁸

**Witnesses at the
District Court Level (First Instance)¹⁸⁹**

Year	Third Person Witnesses	Party Witnesses
1996	38.0	48.7
1997	35.0	44.5
1998	32.3	41.6
1999	30.4	42.3
2000	29.3	39.4
2001	28.0	37.9

result of the hierarchical structure of the legal system, as well as the power of the judge as ultimate decision-maker, party objections are unlikely to be successful if a judge requests a document in lieu of oral testimony); Interview with lawyer (B) in Kyoto, Japan (on file with author) (noting that while parties bring in witnesses, the number of witnesses, as well as the number of witnesses actually testifying, is determined by the court, and as there are too few judges, they often do not have enough time to hear oral testimony). In the U.S., however, courts cannot accept a proffer of proof in place of testimony, although they may prohibit testimony that is cumulative or in violation of the Rules of Evidence. *See* *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (finding that U.S. judges serve as gatekeepers where expert testimony is proposed and a party objects on the grounds that the testimony is not based on generally accepted scientific or otherwise applicable professional opinion). *See also* FED. R. EVID. 702.

188. *See* The Japanese Court System's Statistics, *supra* note 96.

189. Excluded from this table are District Court cases where the court acts as an appeals court for Summary Court cases. In these cases, the number of witnesses per 100 cases has declined at an even faster rate. Thus, third person witnesses have declined from 16.1 per 100 cases in 1996 to 15.0 in 1997; 11.7 in 1998; 10.4 in 1999; 10.3 in 2000; and 7.2 in 2001. The number of party witnesses has similarly declined in such appeal cases from 20.9 in 1996 to 19.5 in 1997; to 15.7 in 1998; to 16.5 in 1999; to 15.8 in 2000; and to 13.0 in 2001. The decline in witness testimony at the appeals level is consistent with the intent of the New Code to make the initial court the trial court and to reduce "new trial" at the appeal level.

Although the above data slightly differs from the data set out in Professor Ota's 2001 study, both data compilations disclose that the District Courts are handling witness testimony more quickly than in the past. The number of cases involving witness testimony has declined, as has the number of witnesses per one hundred cases. Thus, in 2001, there were a total of only sixty-six witnesses (including both third person witnesses and party witnesses) per one hundred cases or less than one witness per case. Since less than a witness cannot testify, this means that there were no witnesses in at least one-third of the cases.¹⁹⁰ As some cases clearly involved testimony from two or more witnesses, the numerical assessment above displays that the percentage of cases with no witness testimony exceeded one-third. The significance of limiting the use of witnesses may be highlighted by the realization that surely the complaining party has a story to tell and, having taken the bold step of initiating litigation so as to elaborate, the plaintiff probably wants to convey their account directly to the case's decision-maker.¹⁹¹ Further, in many cases, the defending party would also equally like to explain their side of the dispute to the decision-maker. If the parties alone were to appear as witnesses, a case would require the minimum of two witnesses — the plaintiff and the defendant. However, in Japan, cases involving two witnesses are viewed as "complicated" and are unusual.¹⁹² For this reason, a losing party in Japan who wished to testify but was not permitted to in their case will find the case's decision as unjust and will consider the Japanese court system as unfair.

Research suggests that while Japanese litigants prefer the adversary system to an inquisition system, "Japanese subjects appear uncomfortable with presenting their views in a confron-

190. A *bengoshi* interviewed in Saitama (just outside Tokyo) stated in his interview that the one change he would make in civil procedure would be to permit more live witness testimony. Interview with *bengoshi* (E) in Saitama, Japan (on file with author).

191. See, e.g., Interview with trial lawyer (H) in Sendai, Japan (on file with author) (noting that his clients wanted the chance to speak directly to the court and that this practice was not permitted as freely as in the past).

192. Cf. *Supreme Court Report Illustrates Lengthy Process of Civil Trial System*, *supra* note 177 (making special reference to trials that include the use of witnesses (i.e., 25% of all trials), and the change in length from 1991 to 2001).

tation with the opposing party.”¹⁹³ Thus, Japanese litigants arguably do not wish to testify. While dealing with the abstract issue of a Japanese litigant’s preference to avoid confrontation, this research does not address the question of how a losing litigant views the fact that they could not testify.¹⁹⁴ Here, the results could be different as losing parties may resent such testimony procedures, despite any theoretical preconceptions of apparent fairness.¹⁹⁵ To complicate matters further, the failure to take witness testimony extends beyond mere refusal to hear the parties themselves.

Indeed, the facts prove even starker than the above supposition. Figures kept by the Supreme Court Secretariat show that the percentage of cases in which no witnesses testified increased, from an already high percentage of 80.9% in 1996 to 83.2% in 1998, the year the New Code went into effect, and has continued to steadily rise.¹⁹⁶

Year	Percentage of Cases with No Witnesses
1998	83.2
1999	84.3
2000	85.0
2001	85.5
2002	86.4 (provisional data)

193. Yoshiyuki Matsumura, *Procedural Justice in Dispute Resolution — Japan and the West* (June 26–29, 1991) (paper prepared for the Annual Meeting of the Law and Society Association, University of Amsterdam) (on file with the *Brooklyn Journal of International Law*).

194. Interview with *bengoshi* (C) in Sapporo, Japan (on file with author).

195. Professor Matsumura’s study used students as questionnaire subjects. See Matsumura, *supra* note 193. While the study showed that, in the abstract, the subjects preferred not to present their views in confrontational situations, the study did not deal with actual parties to litigation. *Id.* Considering the Japanese aversion to litigation, a party who has filed suit may well hold views different from the general population, represented by the students. Similarly, a party who has been sued may have attitudes altered by the experience and, thus, may not be represented by the general population view. Finally, a losing party may well have “after the event” views that differ from the generally held opinions of the population. Therefore, while the study is useful for the purposes for which it was undertaken, it does not necessarily reflect the views of parties to litigation or the views that a losing party may pass on to others about the litigation experience.

196. See *The Japanese Court System’s Statistics*, *supra* note 96.

While it is true that in default cases there is no need for witness testimony, and the data above includes a certain percentage of such cases, the declining number of witnesses in non-default cases shows that the court's role as gatekeeper has steadily eroded the use of witness testimony. Thus, in cases utilizing witness testimony, the number of such witnesses has also steadily declined — except for cases where ten or more witnesses were called.¹⁹⁷ The chart below displays this change in witness testimony.

District Courts: Number of Witnesses and Percentage of Cases

Year	1 Witness / Percentage of Cases	2-4 Witnesses / Percentage of Cases	5-9 Witnesses / Percentage of Cases	10+ Witnesses/ Percentage of Cases
1996	14,564 / 10.0%	11,647 / 8.0%	1,424 / 1.0%	172 / 0.1%
1997	13,933 / 9.5%	11,717 / 8.0%	1,263 / 0.9%	63 / —
1998	13,570 / 8.7%	11,340 / 7.2%	1,288 / 0.8%	67 / —
1999	12,437 / 8.1%	10,669 / 6.9%	1,084 / 0.7%	81 / 0.1%
2000	11,993 / 7.6%	10,618 / 6.7%	1,150 / 0.7%	67 / —
2001	11,597 / 7.4%	10,063 / 6.4%	1,043 / 0.7%	77 / —
2002	10,854 / 7.0%	9,433 / 6.1%	816 / 0.5%	110 / 0.1%

In view of this steadily declining willingness to use witness testimony in civil cases, it is easy to understand why some *bengoshi* responded that the most significant change that could be made to Japanese Civil Procedure was for the courts to permit more witness testimony. This view may also be the reason why some *bengoshi* felt that their clients did not receive a fair opportunity to present their case to the court.¹⁹⁸ The courts' exercise of their gatekeeper function to essentially dispose of witness testimony¹⁹⁹ may have a detrimental effect on

197. See *id.* The data in the above chart shows that only 0.1% of cases involve ten or more witnesses, and so this increase is not significant, except perhaps to reflect the fact that the legal system is being used in some more complicated situations. This point is discussed *infra* at Part III.E.

198. See *supra* notes 176, 187, 189–91 & accompanying text.

testimony¹⁹⁹ may have a detrimental effect on the public's perception of the Japanese judicial system as a protector of the Rule of Law and as an arm of such a system.²⁰⁰ Similarly, the courts' limitation on expert witness testimony and cross-examination for technical matters, such as patent disputes may also underlie the public's perception that Judges are currently unable to handle technical legal expertise issues.²⁰¹ Nonetheless, the judicial system faces a dual dilemma: on the one hand, the political departments demand faster resolution of cases; and, on the other, the same political forces fail to provide the judiciary with the resources needed to handle cases faster.²⁰² The end result is that the Japanese courts must do what it can to hustle the process — and this appears to mean less witness

199. As a *bengoshi* in Sendai succinctly stated: "Judges like documents more than witnesses." Interview with *bengoshi* (H) in Sendai, Japan (on file with author). Additionally, a *bengoshi* in Hiroshima noted that judges are busy, and so they are not willing to examine witnesses. Interview with *bengoshi* (L) in Hiroshima, Japan (on file with author). A *bengoshi* in Sapporo criticized the system under the New Code as being "too quick" and complained that judges "restrict witnesses;" he advocated for judges to hear more witnesses. Interview with *bengoshi* (C) in Sapporo, Japan (on file with author).

200. The practice of avoiding witness testimony is also problematic in Japanese criminal trials. It has been suggested that notwithstanding changes in the Constitution and the Code of Criminal Procedure for the creation of a more adversarial system, present process in Japan comes close to the pre-war system of "trial by dossier." See GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 300–01. See generally Ryuichi Hirano, *Diagnosis of the Current Code of Criminal Procedure*, 22 *LAW IN JAPAN* 129 (Daniel H. Foote trans.) (1989).

201. This perception has led to an amendment to the New Code to create a modified "expert Commissioner" system (July 2003). See *infra* Part III.E. U.S. judges are capable of resolving highly technical expertise-laden cases after hearing direct and cross-examination of opposing expert witnesses. Japanese judges should be just as capable of resolving such questions if given direct and cross-examination of experts in open court.

202. A *bengoshi* interviewed in Kyoto stated that if he could make one change to the civil procedure system, he would greatly increase the number of judges. Interview with *bengoshi* (B) in Kyoto, Japan (on file with author). His reasons related directly to Rule of Law concerns. *Id.* He noted that if a judge takes the time necessary to hear a case, the lawyers are pleased, but the Judicial Secretariat is not because it causes a large backlog of cases for the judge. *Id.* Thus, judges must act too quickly, leaving both parties unsatisfied. As the lawyer noted "speed alone is not satisfactory." *Id.* Furthermore, since "the parties are not satisfied, they do not feel they have received procedural justice." *Id.*

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testimony with concomitant pressures on Rule of Law concerns.²⁰³ Similarly, as cases have been handled more quickly on average, the percentage of ordinary civil cases in which both sides were represented by counsel at the District Court level has declined as the number of cases in which neither side is represented by counsel has increased. The data discloses:²⁰⁴

**First Instance District Court
Ordinary Civil Cases — Percentage of Cases**

Year	Both Sides Represented	Plaintiff Only Represented	Defendant Only Represented	Neither Represented
1996	42.2	35.5	3.3	19.0
1997	42.5	35.1	3.3	19.1
1998	40.9	34.7	3.6	30.8
1999	41.2	34.0	4.0	20.7
2000	41.3	32.9	4.4	21.4
2001	39.4	34.8	4.7	21.1

Apparently, litigants take more notice of cases and the need for professional assistance when an appeal has been filed to the High Court from an initial District Court decision. Thus, from 1996 to 2001, the percentage of High Court cases in which neither side was represented by counsel remained remarkably stable in the 5% to 6% range.²⁰⁵ The percentage of cases in which both sides were represented at the appeal stage in the High Court remained stable in the range of 75% to 78%.²⁰⁶

203. *Doctors Debate in Court as Part of New System*, JAPAN TIMES ONLINE, Jan. 8, 2003, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030109b1.htm>. In a medical malpractice case, the Court heard from a panel of experts, who after giving their individual opinions on the matter, engaged in a debate concerning the issue and was finally examined by the parties. *Id.* This “conference debate” format holds great promise in cases such as medical malpractice, where expert opinion is a critical element of the case. However, lawyers interviewed had never been involved in such a process. *Id.* It is likely that this format will be overshadowed by the new procedure adopted in July 2003.

204. See The Japanese Court System’s Statistics, *supra* note 96.

205. In 1997, the percentage of cases where neither side was represented rose by 6.6% but fell back again in 1998 to 5.0%. See *id.* In 1996, the percentage was 5.9% and in 2001, the percentage was 5.8%. *Id.*

206. Summary Court jurisdiction is limited to cases seeking less than 900,000 yen (soon to be increased to 1,200,000 yen), and as is expected, a

The declining use of counsel at the initial stage may or may not represent the public's perception of Japan's Rule of Law and judicial process issues. On its face, the declining use of legal professionals appears to represent a decline in the Rule of Law, since these professionals represent the technical expertise of the law. The previous chart shows that while the percentage of cases in which both sides are represented by counsel is declining, the percentage of cases in which only one side is so represented is increasing. Perhaps this change reflects the belief that representation by one side, when the other side is not represented, constitutes an advantage; whereas, if neither side is represented, the playing field is level for both. Or perhaps these figures represent the view that it is the judge's function to discover and find the facts in order to assure that substantive justice is achieved. Thus, professional lawyers, who may perform part of these functions in other societies, are simply not required in Japanese litigation. Furthermore, these figures may simply be a reflection of the limited availability of lawyers in Japan and/or the high cost of retaining counsel.²⁰⁷ Whatever the reason, the facts are that in over 21% of all cases no lawyers are involved at the trial court level and in over 60% of cases at

higher percentage of Summary Court cases are thus handled without counsel. *Recommendations of the Judicial Reform Council, supra* note 19, ch. II, pt. 1, § 5(3) ("Expansion of the Jurisdiction of Summary Courts & Substantial Increase in the Upper Limit on Amount in Controversy in Procedures for Small-Claims Litigation"). However, a significant percentage of Summary Court cases that are appealed to the District Court involve the use of counsel on the appeal. *See* The Japanese Court System's Statistics, *supra* note 96. But, here too, the percentage of cases in which counsel is retained has been declining. *Id.* The statistics show that the percentage of cases appealed from the Summary Court to the District Court in which neither party was represented on the appeal are as follows: 1996: 26.1%; 1997: 29.3%; 1998: 27.5%; 1999: 30.8%; 2000: 30.4%; and 2001: 31.5%. *Id.* Interestingly, the percentage of cases in which the appellant is represented by counsel has remained stable at a relatively high rate of approximately 52%. *Id.* Apparently, losing parties at both the District Court and Summary Court level seek legal advice when they move to a higher court. *See id.*

207. To the extent that the figures may reflect the paucity of lawyers in Japan, these statistics may change over time as the Judicial Reform Council recommended an increase of the annual admission of new lawyers from the present total of approximately 1,200 to 3,000, which is a dramatic increase from the previous annual 500 amount, a number that was constant for many years. *See Recommendations of the Judicial Reform Council, supra* note 19, at ch. 1, pt. 3, § 2(2).

least one party does not have counsel. These statistics appear to be inconsistent with Professor Mattei's view of the characteristics of a "Rule of Professional Law" system.²⁰⁸ Additionally, these inconsistencies raise questions as to whether a Rule of Law society can effectively operate without professional legal representation in the organ responsible for dispute resolution under the Rule of Law.

In any event, the time it takes to bring an average case to final resolution through appeal to the High Court has decreased. However, this change may prove to be purchased at too high a price if the cost of such time reduction is the opinion or belief that the judicial system is not prepared or willing to hear one litigant's side of the story. To the extent that speed has been bought at the price of third person witness and party witness testimony, the price may be too high in Rule of Law terms.²⁰⁹ It is suggested that the Japanese judicial system, including its lawyers and professors, should explore this issue.²¹⁰

The Japanese Diet recently adopted legislation that will require both criminal and civil cases to be determined at the District Court level within a two-year time frame.²¹¹ While well intended, the legal community should carefully consider the Rule of Law implications for such legislation. First, placing a time limit on judicial activities raises issues of judicial independence. While many legal scholars hope that judges will act

208. Ugo A. Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 AM. J COMP. L. 5, 16-42 (1997).

209. Since Japanese judges are viewed by many as both "paternalistic" and protectors of the parties (whether or not represented by council), the consequences of judges acting as gatekeepers and denying parties the right to either tell their stories on the witness stand or to call witnesses may compound the potential damage done to the judicial system as a Rule of Law decision-making organ, as witness testimony is not permitted in a high percentage of cases. Tanabe, *supra* note 121, at 514, 520-22. See also Miki, *supra* note 85, at 5.

210. One purpose of U.S. lawyers, who assisted in the revision of the Japanese civil and criminal procedure systems, was to replace the concept of "trial by dossier" with an oral adversary system. This objective does not appear to have been achieved in criminal adjudication and, with the decline in witness testimony in civil cases, it would appear that the objective of the occupiers was not achieved in the civil procedure arena either. Hirano, *supra* note 200, at 129, 139.

211. *Lower House Approves Speedy Trial Legislation*, *supra* note 18. See *Trial to be Expedited*, *supra* note 18.

quickly and dispose of cases expeditiously, a judge should take as much time as conscience requires in reaching a determination. Additionally, other branches of government should not compel judges to ignore conscience considerations. Second, time limits raise constitutional questions — the issue of judicial independence, which Japan's constitution guarantees, and the judicial branch's management, which is placed in the judicial branch itself. Third, in order to reach the legislatively mandated time-limit, courts may further restrict the rights of parties to testify or call witnesses — potentially further eroding public confidence in the judiciary as a mechanism for obtaining relief. Finally, such time limit legislation appears entirely hortatory and provides no means of enforcement.²¹²

While the legislation will place pressure on the judicial branch to quicken the pace of litigation, reality indicates that judges will continue to take the time necessary to fairly resolve cases — especially complicated ones. However, the judicial branch's failure to conform to legislative fiat then creates its own legal paradox, as the court system itself will in a sense fail to follow the law and its mandates. Instead, legislation that significantly increases the pool of Japanese judges may better serve the Rule of Law objectives of the Judicial Reform Council, as opposed to limiting the time frame of judicial decisions.²¹³

212. The *Japan Times* reports that the new two-year legislation makes it the clear "duty" of participants in the trial to conclude the case within two years. *Trials to be Expedited*, *supra* note 18. Thus, the legislation itself appears to not be mandatory, but simply hortatory. Moreover, although the time limits apply to both criminal and civil cases, it is impossible to believe that a criminal case will be dismissed and an accused freed simply because the trial extends past the time limit. With respect to civil cases, the general rule is already that most cases take less than two years. Thus, it is not expected that the new two-year legislation will be applied to civil cases. The reality is that judges are already under great pressure to speed up the pace of litigation to the point that criteria such as "whether the judge has managed to bring about a court-mediated settlement in civil suits within a certain time frame" and "the number of cases they have handled" are considered when deciding whether to promote a judge or not. See *Panel Seeks Transparent Career System for Judges*, JAPAN TIMES ONLINE, Sept. 13, 2000, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20000913b2.htm>.

213. The number of judges in Japan (excluding Summary Court and Supreme Court judges) has risen from 2,121 in 1998 (when the New Code went into effect) to a current total of 2,341 (for fiscal 2003 through March 2004), increasing by 10%. See *The Japanese Court System's Statistics*, *supra* note 96

*B. Production of Evidence*1. Inquiry Procedure²¹⁴

Interviewees were also questioned as to the new procedural devices for obtaining evidence and narrowing issues. The New Code's "inquiry procedure" had been designed to mirror the "interrogatory" procedure of the U.S. Federal Rules of Civil Procedure.²¹⁵ Unlike the Federal Rules however, the New Code provides neither judicial oversight of the inquiry process nor sanctions when a party fails to answer or responds inaccurately to questions.²¹⁶ Moreover, the area of inquiry is more limited than in the U.S. By relying on counsels' obligations to each other as professionals, the objective of the new procedure is to obtain information that could assist in narrowing issues and thus advance trials without damaging confidence in the system.²¹⁷

In the U.S., interrogatories serve a dual purpose. First, they are a means to clarifying the basis for the claims and defenses raised.²¹⁸ Second, interrogatories act as a "first step" discovery device typically used at the outset of a case to compel the other

(specifically the data provided by the Judicial Secretariat). Nonetheless, the fact remains that the number of judges available to try cases in Japan is quite small compared to other advanced countries. See ODA, *supra* note 1, at 403–04 (2d ed. 1999).

214. MINSOHŌ, art. 163 (noting that a party may inquire on matters necessary for the proof of factual allegations from their opposing party). However, the New Code does not require that the served party actually answer such inquiries, nor does it necessitate that answers be truthful or made under oath. Kojima, *supra* note 15, at 702–03. Additionally, the New Codes precludes inquiries that are not particularized, or which insult, embarrass, or attempt to cause undue expense to the other party and/or seek either an opinion or concern a privileged matter. MINSOHŌ, art. 163.

215. FED. R. CIV. P. 33.

216. See *U.S. for General Electric Supply Corp. v. W.E. O'Neil Const. Co.*, 1 F.R.D. 529 (D. Mass. 1941) (proper remedy for failure to answer interrogatories is a motion by default, not a motion to require answers to the interrogatories); *Michigan Window Cleaning Co. v. Martino* 173 F.2d 466 (6th Cir. 1949) (holding that if a party declines to answer interrogatories he may be precluded by the court from offering proof at trial).

217. See The Ministry of Foreign Affairs of Japan Article 14, at http://www.mofa.go.jp/policy/human/civil_rep4/article14.html (last visited Feb. 10, 2004).

218. See *McElroy v. United Air Lines, Inc.*, 21 F.R.D. 100 (W.D.Mo. 1957) (stating that one principle purpose of interrogatories is to ascertain contentions of adverse party).

side to identify potential witnesses to important events and opponent documents that may contain or lead to evidence useful to the inquiring party.²¹⁹ As a clarifying mechanism, interrogatories have not been very helpful since responses to such inquiries are typically drafted by lawyers and signed by clients.²²⁰ The “lawyering” of interrogatory responses provides insufficient information to clarify claims early in the process and leave open potential for modification later. But, as a first step discovery device, the interrogatory procedure has become a staple for litigators and proven itself very useful in the U.S.²²¹

Some Japanese writers dealing with civil procedure argued that the inquiry process was a form of “discovery” new to the Japanese system;²²² thus, interview subjects were asked whether the inquiry procedure had been previously used by them or their opposing counsel to gather information about potential witnesses or documents. No *bengoshi* interviewed had ever used the inquiry process for this purpose nor had it been used against them for this purpose. Quite naturally, no one interviewed found the inquiry process helpful in identifying witnesses or documents.²²³

The consistent theme of the responses was that the inquiry process was rarely, if ever, used, and even when used was not very helpful in narrowing issues or obtaining evidence.²²⁴ Vari-

219. See *Hercules Powder Co. v. Rohm & Haas Co.*, 3 F.R.D. 328 (D. Del. 1944) (stating that one purpose of interrogatories under Rule 33 is to ascertain facts and to procure evidence as to where pertinent evidence exists and can be obtained).

220. See *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 287 (N.D. Cal. 1991), *rev'd in part*, 765 F. Supp. 611 (N.D. Cal. 1991) (stating that interrogatories are not particularly useful because lawyers craft answers to interrogatories to reveal as little information as possible).

221. See Joseph N. Hosteny, *Using Interrogatories Saves Time and Money*, INTELL. PROP. TODAY, Dec. 2001, at 28.

222. See, e.g., Miki *supra* note 85, at 6–7 (describing the inquiry process as a “method of obtaining evidence...basically modeled on the interrogatory of the United States”). See also Taniguchi, *supra* note 10, at 776–79; Kojima, *supra* note 15, at 701, 702.

223. Reflecting the author’s U.S. litigation experience, inquiry subjects were asked: “Has the procedure for inquiry resulted in the identification and production of documents detrimental to the position of the answering party and helpful to the inquiring party?”

224. For example, an official of the Hiroshima Bar Association stated in his interview that the New Code’s inquiry procedure was not much used despite

ous explanations of this phenomenon were given, ranging from the view that the court's use, as an inquiring body, was preferable over the informal inquiry procedure to the belief that neither side was likely to provide damaging answers, especially as there was no sanction for refusal to answer or refusal to answer "at this time."²²⁵ Additionally, interview subjects were asked for their views on the conflict of ethical obligations inherent in a non-compulsory inquiry process, i.e., the conflict between the ethical duty to respond to opposing counsel and not to voluntarily damage a client's position.²²⁶ No interview subjects were willing to state that they had no obligation to respond²²⁷ nor were they willing to admit that they might inaccurately respond rather than damage their client's interests. Still, the general tenure of responses was that the obligation to the client outweighed the obligation to opposing counsel.²²⁸ Hence, some ra-

its usefulness in theory. Interview with Official (M), Hiroshima Bar Association, in Japan (on file with author). A lawyer in Kyoto stated that Japanese lawyers do not use this procedure even after the reform — for example, he had never used the procedure and opposing council had only once requested that he do so. Interview with lawyer (B) in Kyoto, Japan (on file with author). A lawyer in Kobe stated that while the inquiry procedure was initially utilized, attorneys' stopped using it. Interview with lawyer (U) in Kobe, Japan (on file with author). A lawyer in Hiroshima stated that the procedure is not used very often. Interview with lawyer (W) in Hiroshima, Japan (on file with author). These interview responses simply serve as illustrations of the multitude of responses portraying the majority view that the New Code's procedure was of little use and was accordingly used sparsely.

225. Typical was the response of a lawyer in Tokyo who noted that as there was no sanction for failing to respond as this lawyer did not use the procedure because he did not expect it would produce anything of value. Interview with lawyer (S) in Tokyo, Japan (on file with author).

226. Inquiry subjects were asked, "As the attorney for a party to whom an inquiry has been made, do you feel an obligation to provide an answer even if the answer is harmful to your client's position? If the answer could be harmful to your client's position do you feel an ethical obligation to: a) answer or b) refuse to answer the inquiry?"

227. Typical was the view of a lawyer in Hiroshima that by permitting a lawyer to make inquiry, the New Code implies that an ethical obligation to respond to the inquiry exists. *See, e.g.*, Interview with lawyer (W) in Hiroshima, Japan (on file with author). However, this lawyer also noted that if the response were harmful to the client, the lawyer should find a way to prevent such harm. *Id.*

228. One lawyer responded that he had an obligation to respond to inquiries as an attorney, but that there was no ethical conflict because if the client tells

tionale for failing to respond would be employed when such response would damage a client's position.²²⁹

On the other hand, where the answer would eventually be found in any event and disclosure at the time of response would not damage the client, responding attorneys appeared willing to voluntarily respond.²³⁰ Moreover, when circumstances make it impossible for opposing council to refuse to respond, inquiry may prove useful. For example, when an employee is injured due to an industrial accident, the employer is required to file a report with the Ministry of Labor concerning the accident.²³¹ Inquiries such as whether a report was filed and requests for a description of the report and its contents cannot be ignored because it is general knowledge that filing the report was a requirement. In such a case, inquiry can assist in producing the report.²³² However, where inquiry relates to internal documents or undocumented events, it appears that responding counsel need not and will not respond if to do so will adversely affect his or her client. In short, the process was not very well used and

him not to respond he must follow the client's wishes. Interview with lawyer (K) in Hokkaido, Japan (on file with author).

229. The response of a lawyer in Kyoto was typical — he noted that a lawyer should not say something that would disadvantage his client. Interview with lawyer (B) in Kyoto, Japan (on file with author). Thus, if the answer would hurt his client, he would either reply in an unresponsive way or would postpone answering at all. As this lawyer noted, since there was no sanction for refusal to comply, non-response was preferable to hurting his client's interest. *Id.*

230. *See, e.g.*, Interview with lawyer (E), Saitama, Japan (on file with author) (explaining the voluntary production of evidence in regular cases).

231. *See* KAZUO SUGENO, JAPANESE LABOR LAW (1992).

232. A lawyer interviewed in Hokkaido described an experience where a worker was killed on the job. The worker's family did not know the facts of the incident, but were concerned that the employer was at fault. Under Japanese Labor Law, the employer was required to make a report to the Ministry of Labor. *See* SUGENO, *supra* note 231, at 39, 284–88 (1992). The worker's family sued, and the lawyer made inquiry as to the report filed with the Ministry. The company could not deny the existence of the report because of the Labor Law's reporting requirement. After receiving the admission about the report, the lawyer requested that the court order the document produced and the report was produced. In the lawyer's opinion, once the existence of the report was shown, the court was more willing to order its production than it would have been under the previous Code. Interview with lawyer (K) in Hokkaido, Japan (on file with author).

when used, was not very helpful.²³³ Furthermore, as a “discovery device,” the process was almost completely non-existent.

At this point in U.S. litigation practice, most lawyers recognize their client's obligation to provide answers and evidence in response to opposing counsel's discovery requests.²³⁴ The reasons for this recognition of an obligation to produce (or its patronage within the legal community) are not completely clear. The availability of court sanctions in the U.S. may play a role.²³⁵ However, this reason may not be absolute or even substantial. In addition to sanctions, the U.S. litigator has a reasonably clear idea of clients' and their own ethical and legal obligations in discovery.²³⁶ To the extent that a question of loyalties may arise, the sanction mechanism (even if unused) indicates to the lawyer his and the client's primary obligations. Moreover, in the U.S., the basic obligation to respond belongs to the client possessing the requested information — not the lawyer who is the conduit for transmission.²³⁷ The willingness of U.S. judges to sanction clients for failing to accurately respond defines the role of lawyers and clients as well as influencing clients' willingness to respond in a timely and accurate manner.²³⁸

233. Professor Koichi Miki reaches a similar conclusion. *See generally* Miki, *supra* note 85. Professor Miki notes that:

A considerable number of people have pinned their hopes on [the inquiry procedure], although many others have doubted its effectiveness. Five years have passed since the New Code came into effect and it has become clear that the latter view was correct. The number of cases in which Party Inquiry is used has proven negligible.

Id. at 14.

234. *See* Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 789–90, 801 n.142. *See also* Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990) (“severe” sanctions were imposed when defendants failed to appear at depositions and produce requested documents).

235. *See* FED. R. CIV. P. 37.

236. *See* Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 786–787.

237. *See* FED. R. CIV. P. 33 for the interrogatory analogue to Japan's inquiry process that requires all interrogatories be either answered or objected to. Counsel signs objections whereas the “person” making the answer signs answers. This discloses that answers are to be made by a party, while lawyers need to make the objections.

238. Lawyers are, of course, the major players in discovery responses and have ethical obligations regarding searches for answers to interrogatories and document production in the U.S. But, the interrogatory (for example) is di-

Unlike the U.S., Japan has a non-compulsory process regarding disclosure of information. One reason for the nature of this process is that the Japanese Bar objects to a compulsory process.²³⁹ However, a compulsory process may in fact be helpful to the Bar by providing an airtight answer to complaining clients who question why information must be disclosed to the other side. Furthermore, by lifting the ethical dilemma from the shoulders of lawyers, the compulsory process results in greater use of disclosure methods by both sides and more efficient disclosure of relevant answers.

It is the author's view that the Japanese judiciary's objections to a compulsory process may reflect its unwillingness to: (1) become involved in disputes that do not affect substantive decision-making; (2) make sanction decisions that might hurt a client when the lawyer may be at fault; and (3) exclude evidence when production is conducive to substantive justice whereas exclusion is not.

However, by making the process compulsory, the judge is relieved of the time-consuming task of dealing with preliminary evidentiary and issue inquiries, and is thus able to devote more time and energy to the substantive decision-making process. Placing the inquiry process at the early stage of a case — even prior to the first Preliminary Oral Hearing and surely before or during the new Preparatory Proceedings for Oral hearing — and making disclosure compulsory in certain areas will substantially advance the issue-determining process. Meanwhile, the present process appears to have no significant effect.²⁴⁰ Further, the existence of a “sanctions regime” does not mean that sanctions will be utilized on a frequent basis. The threat of sanctions, backed up by their infrequent use, exerts pressure on parties to comply.²⁴¹

Perhaps, the biggest obstacle to a sanctions regime is the “distrust” between *bengoshi* and the judiciary.²⁴² There appears

rected to the client who signs the response. The lawyer may assist in ferretting out the information and in drafting the response as well as by objecting to over broad or otherwise improper interrogatories.

239. See Miki, *supra* note 85, at 6–7, 15. See generally Ota, *supra* note 9.

240. Miki, *supra* note 85, at 11–16.

241. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 801.

242. See *infra* Part III.F.

to be a gap in understanding and collegiality between Japanese *bengoshi* and Japanese judges that does not exist in the U.S. legal system.²⁴³ Both history and present practice make the current Bar skeptical of a system that gives judges (as government officials in a government bureaucracy) power over individual lawyers.²⁴⁴ Perhaps, a sanctions regime without U.S. remedies, such as authority to fine or otherwise sanction attorneys, will eventually arise in Japan. Japanese *bengoshi* appear to view the inquiry process as lawyer-to-lawyer, creating a lawyer response process in which the client is simply a minor player.²⁴⁵ However, lawyers do not possess the first hand knowledge required to answer factual inquiries — only the client is in possession of such first-hand knowledge. Therefore, this objection to a sanctions regime may be overcome by clarifying that the duty to respond to inquiries lies with the party (i.e., the client) — assisted by the lawyer — and thus, failure to respond properly results in imposing sanctions on the client.

The July 2003 reform adopts a “pre-lawsuit filing” inquiry process for obtaining factual information.²⁴⁶ Under the new scheme, a party contemplating litigation must send the prospective defendant a somewhat detailed letter, notifying him or her of the intent to file suit by a certain date and setting out the reasons for the suit; however, not all of the evidentiary materials required in a formal complaint must be disclosed.²⁴⁷ Once such a letter is sent, the potential plaintiff may make inquiries similar to those made in the post-filing inquiry process.²⁴⁸ There is even the possibility of receiving judicial assistance prior to filing a complaint in order to assist in the inquiry process.²⁴⁹

243. *Id.*

244. See Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 803, 806.

245. See Interview with lawyer (A) in Nagoya, Japan & Interview with lawyer (G) in Rockville, Maryland (U.S.) (on file with author).

246. See Act to Amend Civil Procedure Act and Other Relevant Acts, 15 Heisei (2003) Statute No. 108, adding articles 132–2 to 132–9 (Japan) (dealing with the pre-litigation inquiry procedure). See also Interviews with lawyers (Q & T) from Japan (on file with author).

247. Interviews with lawyers (Q & T) from Japan (on file with author).

248. *Id.*

249. Such assistance may come through filing a form of motion. The motion practice would require the payment of a fee, but not as high a fee as the filing fee for a complaint. *Id.*

Inquiry prior to complaint is potentially very important in Japan as the formal complaint requires significant factual information to be accepted by the court.²⁵⁰ Unlike the U.S., Japan's factual "discovery" cannot wait until after the complaint is filed. Inquiry as a potentially limited form of discovery is thus most important in the pre-filing stage, as it has the potential to provide a prospective plaintiff with the facts needed to file a formal complaint.²⁵¹ Moreover, filing fees in Japan are high and the new inquiry process may aid in resolving cases without the need to file a formal complaint, thus saving the potential plaintiff some expenses.²⁵² In turn, this early resolution may reduce the plaintiff's settlement demand by the amount of the forgone filing fee.

Unfortunately, the pre-filing inquiry process suffers from the same lack of a sanctions regime (just as does the post-filing process).²⁵³ Thus, the expectation is that the pre-filing process will not have the positive effect that reformers envisioned. On the other hand, this process is a first step towards the discovery of facts that make filing a valid complaint possible. Finally, if a sanctions regime is later applied to such pre-filing inquiries, the reform may have real significance.

2. Document Production²⁵⁴

When a proper request has been made for a document, the New Code permits the court to review the document *in camera*

250. See Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 801.

251. See *id.* at 789–90.

252. See *id.* at 791–92.

253. See GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 250 (discussing limitations on the court's sanctioning powers where a third person fails to produce a requested document).

254. Documents must be produced in four situations: (1) where a party in possession of a document refers to that document during the litigation; (2) where the party seeking the document is entitled to demand delivery or examination of it; (3) where the document was created for the benefit of the party seeking it or was drawn up to evidence the legal relationship of the parties (such as a contract between the parties — a kind of mutual benefit document); and (4) a catch-all provision covering any other document that is not: (a) self-incriminating, (b) privileged or containing privileged material, or (c) a document created solely for the use of the person in possession of the document (a "self-use" document). MINSOHŌ, art. 220.

to determine whether it should be produced.²⁵⁵ In the U.S., an *in camera* review permits the judicial officer to make a more informed decision about production while simultaneously protecting the fact-finder from exposure to inadmissible evidence, since the fact-finder is usually the jury, not the judge.²⁵⁶ However, in Japan, the judge is the fact-finder, and thus exposure to a contested document for *in camera* review may potentially prejudice the producer of the documents by exposing an “inadmissible” document to the fact-finder.²⁵⁷ Both in the U.S. and Japan, professional judges often operate on the assumption that they can compartmentalize evidence so that an examined, inadmissible document will not play a role in decision-making.²⁵⁸ This fiction results in juries being warned not to consider the answer to a question that has been ruled inadmissible after response. Nonetheless, common sense tells trial lawyers that the damage is done when the evidence has been seen or heard because jurors are unlikely to completely forget what they have

255. *Id.* art. 223, para. 3. To obtain a document, a party must move for its production. Article 221 of the Code provides that the motion for production must contain: “(1) Indication of the document; (2) Gist of the document; (3) The holder of the document; and (4) The fact to be proven; (5) The ground for obligation for production of the document.” *Id.* art. 221, para. 1. The New Code modifies the moving party’s obligation by loosening the duty to comply with the first two requirements when

[i]t is extremely difficult to clarify the matter mentioned in (1) or (2) of paragraph 1 of the preceding Article, at the time of the application it shall be sufficient to clarify, as a substitute for such matter, the matter which enables the holder of a document to distinguish the document under application.

Id. at art. 222.

256. In the U.S., actions at common law seeking a recovery of twenty dollars or more entitle the parties to jury trial and “no fact tried by a jury, shall be otherwise re-examined in any court of the U.S., than according to the rules of the common law.” U.S. CONST. amend. VII.

257. See Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 802 (stating that “the court that makes the *in camera* review is also the trier of fact because there is no jury.”); ODA, *supra* note 1, at 73 (stating that “the Japanese court system does not accommodate either a jury system or a system of lay assessors.”).

258. Practicing lawyers know that in trying a case before a judge rather than a jury, the rules of evidence are liberalized by the court and many documents that are inadmissible at a jury trial will come into evidence. Furthermore, the court will note that the evidence will be given such weight as it deserves, including the possibility of no weight, if deemed appropriate.

heard or seen, and the same is likely true of judges. Accordingly, *in camera* review by the fact-finder creates problems.²⁵⁹ Regardless of the potential for improper exposure, all interview subjects indicated that they had never been involved in a case where the judge made an *in camera* review of a document.²⁶⁰ However, some individuals had heard stories of cases with *in camera* review.²⁶¹ Like the inquiry procedure, this reform also appears not to have taken hold.²⁶²

In general, respondents felt that the New Code made it procedurally easier to obtain the documents required to be produced.²⁶³ Respondents found that judges were more willing to “recommend” and “suggest” that parties voluntarily produce documents than had been the case pre-New Code.²⁶⁴ Additionally, respondents felt that parties were more likely to follow such suggestions than had been the case before the New Code. On the whole, respondents felt that the creation of the New Code led more documents to be produced than had ever oc-

259. A judge interviewed outside Tokyo noted that judges do not at all like to use the *in camera* review process and will avoid doing so. Interview with High Court Judge (R) in Japan (on file with author). This judge noted that a problem exists with *in camera* review because even if the judge could divorce himself from using an improper document in his decision-making, the attorneys would object because the judge is the fact-finder. *Id.* Lawyers echoed this view. Typical was the response of a lawyer in Kobe that because judges find it difficult to forget what they have read, lawyers do not like the *in camera* review system. Interview with lawyer (U) in Kobe, Japan (on file with author).

260. A Hiroshima lawyer gave a typical response when he stated that he had never experienced a situation where a judge either made an *in camera* review or redacted a document for production. Interview with lawyer (M) in Hiroshima, Japan (on file with author). *But see* MINSOHŌ, art. 223, para. 1 (noting that redaction is permitted).

261. *See, e.g.*, Interview with *bengoshi* (C) in Sapporo, Japan (on file with author).

262. Although not specifically addressed in the questionnaire, discussion with interview subjects shows that the new “redacting” authority given to the court is also rarely, if ever, utilized.

263. For example, a lawyer in Tokyo noted that courts are reluctant to order a party to produce documents and may instead suggest production, but without sanction for failure to follow the suggestion. In any event, he did feel that while the procedure for requesting documents from the other side was easier under the New Code, actual production had not changed significantly. Interview with lawyer (S) in Tokyo, Japan (on file with author).

264. *See, e.g.*, Interview with lawyer (L) in Hiroshima, Japan (on file with author).

curred before. The view was also expressed that the government produced more documents under the New Code, especially after the 2001 Amendment covering government documents, since failure to do so would lead to unfavorable judicial decisions regarding the government's position on document production.²⁶⁵ Nonetheless, most respondents did not feel that the new document provisions significantly aided plaintiffs. In other words, significant documents that were "against a party[s] interest" were still not being produced and remained unavailable to plaintiffs.²⁶⁶ The self-use exception to document production requirements appeared to be the primary reason for the New Code's failure to significantly enhance the plaintiff's ability to obtain damaging documents from the defendant.²⁶⁷

Although the New Code contains a "catch-all" document production requirement (as well as the very narrow specific requirements for categories of documents that should be produced contained in the old Code), it also contains a list of "exceptions" to the production requirement.²⁶⁸ In addition to the type of traditional exceptions found in the U.S. system (attorney-client privileged materials, self-incriminating materials, etc.), the New Code legislatively adopted the "self-use" document exception that prevailed under the old Code.²⁶⁹ Under this exception, documents that are created solely for the use of the creator are not subject to production.²⁷⁰ The rationale behind this exception

265. A lawyer in Kobe indicated that the government did not want the Supreme Court to take a case involving the question of production of self-use documents by the government and thus, the government often voluntarily produced such documents to avoid potential litigation about the issue. Interview with lawyer (U) in Kobe, Japan (on file with author).

266. A lawyer interviewed in Tokyo noted that if a defendant tries hard to hide a document's existence, a plaintiff cannot find out that the defendant has the document. Interview with lawyer (D) in Tokyo, Japan (on file with author).

267. See Goodman, *The Somewhat less Reluctant Litigant*, *supra* note 15, at 801-02; GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 249.

268. GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 249.

269. MINSOHŌ, art. 220, para. 4(d) (noting that self-use document production is part of the "catch-all" provision of Article 220 that permits production in several instances, including when: "(4)...the document does not come under any of the followings;...(d) [a] document to be offered only for the use of a holder of a document...").

270. Documents produced for the benefit of the party seeking production (such as a receipt) and documents produced for the benefit of both parties

is to permit the free flow of ideas within the preparing entity without fear that the document will later become the object of public scrutiny.²⁷¹ The exception can be quite broad in scope and is likely to include the traditional “smoking gun,” that is, the damaging documents that U.S. lawyers are always looking for in their discovery “fishing expeditions.”²⁷² Indeed, most damaging documents maintained by a company defendant would likely be subject to the self-use exception. If given broad interpretation, the exception will likely swallow the “catch-all” nature of the New Code’s document production approach — in fact, this breadth may have been one purpose for legislating the self-use exception.

After the New Code’s adoption, the Supreme Court of Japan had at least two opportunities to discuss the self-use exception.²⁷³ In both cases, the Court broadly interpreted the exclusionary character of the exception, and thus limited the nature of the “catch-all” discovery provision.²⁷⁴ In the *Fuji Bank* case, the Court held that the self-use exception prevented the plaintiff, the family of a deceased borrower, from obtaining the loan application files from the defendant, the lender.²⁷⁵ The plaintiff argued that the files would prove that the bank officials were aware of the deceased’s inability to make the loan payments, and therefore, the lender should never have made the loan in the first place.²⁷⁶ Accordingly, the plaintiff asserted that the lender was not entitled to recover payment of the loan from the

(such as a contract) were required to be produced under the old Code and are still required to be produced under the New Code. MINSOHŌ, arts. 220–23.

271. See GOODMAN, THE RULE OF LAW IN JAPAN, *supra* note 19, at 249–50 (discussing the rationale of the Supreme Court of Japan in the *Fuji Bank* case (see *infra* note 273) “to require such documents to be produced would interfere with the frank discussion of views within the bank”).

272. See GOODMAN, THE RULE OF LAW IN JAPAN, *supra* note 19, at 249–50.

273. See *Fuji Bank v. Maeda*, Case No. 2 of 1999, 53 Minshu No. 8 at 1787 (Sup. Ct., Petty Bench, Nov. 12, 1999) (Japan), English translation available at <http://www.courtdomino2.courts.go.jp/home.nsf/ehome?OpenPage>; Case No. 35 of 2000, 54 Minshu No. 9 at 2709 (Sup. Ct. Dec. 14, 2000) (Japan), English translation available at <http://www.courtdomino2.courts.go.jp/home.nsf/ehome?OpenPage>.

274. See GOODMAN, THE RULE OF LAW IN JAPAN, *supra* note 19, at 248–50.

275. *Fuji Bank v. Maeda*, Case No. 2 of 1999 (Sup. Ct. Nov. 12, 1999) (Japan). For a discussion of the *Fuji Bank* case and the “self-use” exception, see GOODMAN, THE RULE OF LAW IN JAPAN, *supra* note 19, at 249–50.

276. *Fuji Bank*, Case No. 2 of 1999, at para. 1.1.

deceased's estate.²⁷⁷ The Supreme Court found that loan officials were entitled to the free flow of information and ideas from their subordinates and that to require the production of the file would inhibit that free flow.²⁷⁸ Since the documents in the file were prepared solely to assist the bank officials in deciding whether or not to make the loan, they were self-use documents and thus not subject to production.

A year later, in a derivative action against bank directors, the Supreme Court held that the self-use exception prevented the derivative plaintiffs from obtaining certain bank files on the grounds that the files were created for the self-use of the bank.²⁷⁹ As in the *Fuji Bank* case, the Court could have narrowly read the exception to permit discovery,²⁸⁰ holding that since this derivative action was for the benefit of the bank and the plaintiffs were standing in the bank's shoes, the document was created for the benefit of the plaintiff and thus should be produced. The Court could have also held that since they were separate from the Bank, the exception did not apply to the Directors because the documents were not created for the Directors' benefit, let alone for their sole benefit. However, the subject of this Article is not whether the Court should or should not have entered into a narrow interpretation of the exception; rather, the point is that the Court has rendered a broad interpretation of the self-use exception, thus limiting the scope of production by the lower courts.²⁸¹

277. *See id.*

278. *Id.* at para. 3.

279. Case No. 35 of 2000, 54 Minshu No. 9, 2709 (Sup. Ct. Dec. 14, 2000) (Japan).

280. Some scholars suggest that *Fuji Bank* is a broad reading of the exception and a narrow reading of the production obligation. *See* GOODMAN, THE RULE OF LAW IN JAPAN, *supra* note 19, at 249–50. The Court could have logically found that making a “good loan” was in the interest of both borrower and lender while rejecting a loan application where the hopeful borrower was unable to repay was also in the best interest of both parties. In such case, the application file could be viewed as having been prepared for the benefit of both parties and, thus, not subject to the self-use exception.

281. A High Court Judge interviewed outside Tokyo specifically referred to the determination of the Supreme Court and noted that this case is considered as the “basic case” for self-use documents and the lower courts must follow it. Interview with High Court Judge (R) in Japan (on file with author). This Judge also noted that production of self-use documents could damage privacy rights of the party in possession of the documents. *Id.*

Interview subjects clearly indicated that the *Fuji Bank* case and its limiting nature was well-known to both *bengoshi* and judges, and furthermore, both were adhering to *Fuji Bank*. Interview subjects were asked:

Q: Do you believe that the self-use document exception to production limits the ability of the plaintiff to obtain significant documentary evidence adverse to the interests of defendants? The answer was generally "yes."²⁸²

Q: Would you like to see an amendment to the Code restricting the definition of self-use documents so as to allow for greater production of self-use documents? As was to be expected, those respondents who substantively responded to this inquiry did so based on their practice preferences.²⁸³

Thus, attorneys who represented both plaintiffs and respondents desired that the Code be amended and the self-use document exception narrowed. On the other hand, those who only represented respondents felt that the provision was acceptable

282. The response of a lawyer in Nagoya was typical. He noted that the self-use exception remains very broad and has not changed with adoption of the New Code. Further, this lawyer noted that, due to the near impossibility of proving the existence of a document and the ability of the defendant to avoid admitting that a document exists (while the plaintiff must specify facts about the content of the document), very little change was effected by the New Code in most cases. Interview with lawyer (A) in Nagoya, Japan (on file with author). This lawyer was of the view that change had been achieved in connection with medical malpractice cases where the existence of documents and the subject matter of their contents were more readily available. *Id.* A lawyer in Hokkaido responded that production of self-use documents would violate the privacy rights of the party in possession. Interview with lawyer (K) in Hokkaido, Japan (on file with author). A High Court Judge also made this argument for privacy rights. Interview with High Court Judge (R) in Japan (on file with author). Further, this rationale is used by the Supreme Court in its broad reading of the self-use exception in the *Fuji Bank* case. *See Fuji Bank*, Case No. 2 of 1999, at para. 3.

283. A lawyer in Nagoya who primarily represents corporate interests responded that, in his view, plaintiff's lawyers wanted the doctrine to change while defendant's lawyers were opposed to change. Interview with lawyer (A) in Nagoya, Japan (on file with author).

as is. Some attorneys felt the question was irrelevant since pressure from business interests rendered change impossible.²⁸⁴

In general, the new document production provisions of the Code were viewed as simplifying the procedure in order to obtain documents, but failing to significantly open up the opposing party's records. In other words, although more documents were being produced in response to the judges' "requests," plaintiffs still had great difficulty obtaining defendants' documents, particularly if the documents were adverse to the defendants' interests.

C. Legislative Changes Limiting Damage Awards in Derivative Cases

In the U.S., plaintiff's counsel in class action and derivative lawsuits typically receive contingent fee awards which are set by the court after the case is resolved.²⁸⁵ Where the size of such awards is tied to the monetary damages won (or computed as won), the amount of damages that can be obtained in such cases is a strong factor in determining whether such cases are brought.²⁸⁶ Counsel has a strong incentive to sue if there is the chance of a large recovery (i.e., large fee award) and less incentive if there is a small recovery. Thus, to the U.S. lawyer, the Tokyo District Court's decision in the *Daiwa Bank* case, where huge damages were awarded against the company officials (in favor of the company via the derivative plaintiffs), represented

284. Nonetheless, the question of change has been brought up in a legislative committee with responsibility for civil procedure matters. Discussion with Professor Miki in Tokyo (on file with author). Such discussion does not mean that change will be achieved or if it is, it will be in the near future.

285. STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 550 (3d ed. 1992).

286. In some cases, plaintiffs actually receive no monetary recovery, but, nonetheless, a substantial monetary recovery is computed for fee-setting purposes. Thus, where a settlement involves the use of "coupons" to be distributed to plaintiffs so as to grant them a discount on future purchases, no money has actually changed hands but the damage award calculation for fee purposes may include the total value of the coupons, even if no receiving party ever uses a coupon for a future purchase. See generally Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991 (2002) (criticizing the use of coupon settlements in class action litigation); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMP. PROBS. 97 (1997).

the possibility that derivative suits would dramatically increase in Japan.²⁸⁷ The *Daiwa Bank* case represented an interesting example of lowered barriers leading to greater litigation, as the case was brought after the Commercial Code reduced the filing fee for derivative lawsuits.²⁸⁸

Shortly after the lower court decision in *Daiwa Bank*, and while the case was pending appeal, the Japanese Diet amended the Commercial Code to limit the recovery against a director in a derivative lawsuit.²⁸⁹ Previously, the Diet amended the environmental laws to create administrative remedies. This charge occurred after the courts rendered favorable decisions for plaintiffs in the "Big Four" pollution cases.²⁹⁰ Some scholars suggest that this legislative response was designed to take pollution cases away from the judicial system and place pollution abatement responsibilities back in the hands of Japanese administrative government officials.²⁹¹ Thus, the question was raised as to "whether this amendment [reducing damages against corporate officials in derivative cases] will stifle the prophylactic effect of

287. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 798.

288. For a discussion of the *Daiwa Bank* case and the question of whether it will lead to additional litigation, see Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 798.

289. For an English language synopsis of the amendment to the Japanese Commercial Code, see *Amendment to Limit Execs' Liability*, JAPAN TIMES ONLINE, Nov. 30, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl?nb20011130q9.htm>; *Revised Code Limits Liability of Executives*, JAPAN TIMES ONLINE, Dec. 6, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.plg?nb200011206a3.htm>. Under the amendment to the Commercial Code referred to by the *Japan Times*, director liability may be capped at the total employment benefits received by the director for a certain number of years, depending on the responsibilities of the director and whether he/she is an independent director. *Id.*

290. UPHAM, LAW AND SOCIAL POLICY IN POSTWAR JAPAN, *supra* note 70, at 35. The Big Four consist of *Aoyama et al. v. Mitsui Kinzoku*, Nagoya High Court, Aug. 9, 1972, 674 *Hanji* 25 (Japan); *Ono et al. v. Showa Denko*, Niigata District Court, Sept. 29, 1971, 22 *Kakyu Minshu* (Nos. 9–10) (Japan); *Watanabe et al. v. Chisso*, Kumamoto District Court, Aug. 9, 1972, 696 *Hanji* 15 (Japan); *Shiono et al. v. Showa Yokkaichi Sekiyu*, Tsu District Court, July 24, 1972, 672 *Hanji* 30 (Japan) (on file with author).

291. See generally UPHAM, LAW AND SOCIAL POLICY IN POSTWAR JAPAN, *supra* note 70.

derivative litigation in the future.”²⁹² Accordingly, interviewees were asked:

After the Daiwa Bank derivative lawsuit decision, the [Japanese] Diet enacted a law permitting the limitation of liability of Directors in derivative cases. What effect do you think such legislation has had on the willingness of persons to file derivative lawsuits? What do you think was the reason that the Diet passed such a limitation of liability provision?

Typically, interviewees believed that the purpose of the legislation was to make it easier for companies to obtain directors willing to serve.²⁹³ This rationale was, of course, used by the government in enacting the law. On the whole, *bengoshi* responded that they believed this to be the purpose of the law. Indeed, there is reason to believe that such limited liability may be necessary, especially as Japan's corporate law moves from boards composed solely of insiders to those on which outside independent directors are expected to hold several positions. While enacting the limited liability provision the Japanese Diet was also shifting the corporate structure in Japan to a style more similar to the U.S., with greater reliance on outside directors.²⁹⁴ However, if outside directors were subjected to the same unlimited liability that was applied to the *Daiwa Bank* defendants, outsiders might refuse to serve. In fact, there is anecdotal evidence that in recent years U.S. Boards have experienced a substantial turnover of outside directors due to candidates' concerns over potential liability.²⁹⁵

292. GOODMAN, *THE RULE OF LAW IN JAPAN*, *supra* note 19, at 198.

293. Typical was the response of a lawyer in Tokyo who commented that in his opinion, the limit on damages would not affect the number of derivative type cases brought since the end result sought was not monetary damages but change in management actions. Interview with lawyer (S) in Tokyo, Japan (on file with author). *Id.* In addition, he felt that the reason for the monetary limitation was responsive to the need to obtain directors willing to serve as such.

294. *Corporate Government and Reform of Japan's Commercial Code*, J-IRIS RESEARCH NEWSL. (Japan Investor Relations & Investor Support, Inc., Tokyo, Japan), Nov. 10, 2003, at <http://www.j-iris.com/newsletter/nl02.pdf>.

295. "Corporate America is undergoing the largest turnover in corporate boards of directors in several years as a result of the enactment of the Sarbanes-Oxley Act, representatives of an industry group representing directors and several executive search firms told BNA in recent interviews." BNA Corporate Law & Business, 34 Sec. Reg. & L. Rep. No. 47, Dec. 9, 2002, *availa-*

Surprisingly, most *bengoshi* believed that the limitation provisions had no effect on plaintiffs' decisions to file derivative actions. Although the majority of *bengoshi* interviewed had never been involved in derivative litigation, those who expressed an opinion believed that derivative plaintiffs filed suit for non-monetary reasons.²⁹⁶ Since derivative suits were not viewed as "economically" motivated, the amount of the damage award was of relatively little consequence. Moreover, some subjects believed that Japanese lawyers who filed derivative suits were not paid based on the amount recovered in the case;²⁹⁷ thus, the damage amount was not relevant to a lawyer's decision to file a derivative case. Again, respondents were of the view that factors other than economics lay behind the filing decision. To some extent, the responses were an echo of the cultural and societal arguments voiced by some scholars as to why Japanese citizens appear to be more reluctant to file lawsuits than U.S. citizens.²⁹⁸

The statistical evidence available is too slim to make any conclusion as to whether the 2001 law has had any effect on litigation rates. While interesting, the decline in the number of de-

ble at <http://corplawcenter.bna.com/pic2/clb.nsf/id/BNAP-5GJSW3?OpenDocument>.

296. Representative was the view of a lawyer in Nagoya that derivative type cases were motivated by a desire to punish bad managers and not to provide economic relief to plaintiffs or high fees to plaintiffs' lawyers. Interview with lawyer (A) in Nagoya, Japan (on file with author). For a thoughtful discussion of the potential reasons for derivative litigation in Japan, see West, *Why Shareholders Sue*, *supra* note 71, at 368–75. West suggests that there is little direct benefit to shareholders from derivative litigation in Japan, lending support to the idea that such litigation is fee driven. *Id.* However, he notes that with the exception of a small number of cases brought by an "elite" shareholders litigation consortium most derivative litigation does not produce high legal fees. *Id.* For such "non-elite" cases, motivation other than fees may be at work and for some cases it is possible that *Sokaiya* have moved into the litigation business. *Id.*

297. For a discussion of relationship between fees and recoveries in derivative cases, see West, *Why Shareholders Sue*, *supra* note 71, at 368–75.

298. For a discussion of the various theories (including cultural and societal theory) supporting the evidence that Japanese file fewer lawsuits than U.S. citizens, see Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 789–97.

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ivative cases initiated in 2001²⁹⁹ is inconclusive, especially as it mirrors the 1998 decline.³⁰⁰ The available data shows.³⁰¹

**Derivative Cases Filed From 1996-2001
in the District and High Courts**

Year	District Court		High Court	
	Newly Filed	Disposed	New Appeals	Disposed
1996	68	66	12	13
1997	88	66	11	9
1998	73	59	17	18
1999	93	77	15	11
2000	83	98	32	30
2001	68	80	28	25

Further study is required regarding derivative lawsuits, once data for 2002 and 2003 is available.

D. Representative Actions

Unlike U.S. law, Japanese civil procedure does not provide for class action suits.³⁰² In Japan, each allegedly injured party must separately claim damages.³⁰³ However, Japanese law does recognize the “representative action.”³⁰⁴ In a representative action suit, numerous parties are named as plaintiffs.³⁰⁵ From

299. In 2001, a great deal of publicity was given to the government’s bill to limit the liability of directors in derivative litigation, although the law did not get passed until December 2001, and did not become effective until May 2002. *Corporate Government and Reform*, *supra* note 294.

300. While interesting, it is noted that the drop in the number of derivative cases between 2000 and 2001 is exactly the same (15 cases) as the drop between 1997 and 1998. *See Derivative Cases Filed From 1996-2001 Chart*.

301. *See The Japanese Court System’s Statistics*, *supra* note 96. The data provided by the Secretariat differs slightly from data reported by Professor West for 1996–1999. *See West, Why Shareholders Sue*, *supra* note 71, at 356 (Table 1).

302. *See J. Mark Ramseyer, The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 *YALE L.J.* 604, 631 (1985).

303. *See id.*

304. *See Taniguchi*, *supra* note 10, at 782–83.

305. *See id.*

these plaintiffs, a small group is designated to represent the entire plaintiff group in the litigation.³⁰⁶ In this fashion, one case can try the issues and facts common to all claims made by the entire group of plaintiffs. Unlike the U.S. class action, however, all the plaintiffs must in fact be real plaintiffs who appear in the case, and the plaintiffs do not represent others similarly situated who did not join in the lawsuit.³⁰⁷

The writers of the New Code of Civil Procedure were aware of the U.S. style class action and were aware of the existing opinion that Japanese law should permit class actions.³⁰⁸ The idea of permitting U.S. style class actions was rejected by the New Code, but the “representative action” was modified to permit parties to join the action after the complaint had already been filed.³⁰⁹ This joinder provision was seen as a step towards greater access to the court process, placing the New Code somewhere between the Old Code and the U.S. class action.³¹⁰

Bengoshi interviewees were also asked whether the new representative action provisions had significantly changed the role of litigation in Japan (as class actions have significantly changed the role of litigation in the U.S.). The response was that the new change had made virtually no difference in litigation.³¹¹ Respondents felt that while some new plaintiffs may have joined suits, the New Code brought about no great change.³¹² At the time the New Code was written, one issue raised was whether representative plaintiffs’ counsel should be allowed to “advertise” the pending suit and invite others to join the litigation.³¹³ Interview subjects were asked:

306. *See id.*

307. *See id.*

308. *See id.* at 782.

309. ODA, *supra* note 1, at 395–98.

310. *See* Taniguchi, *supra* note 10, at 783.

311. For example, a lawyer interviewed in Kobe stated that he had not yet seen a representative action brought in the Kobe District Court. Interview with lawyer (U) in Kobe, Japan (on file with author).

312. Interview subjects were asked: “Have the provisions allowing for persons to join representative actions after the lawsuit has already been filed resulted in significant numbers of persons joining such suits after they have been filed?”

313. Kojima, *supra* note 15, at 719 n.208 (“Placing the burden on the plaintiffs to provide such notice would seem to undercut the potential effectiveness of this device.”).

Do you think [that] lawyers under [the] supervision of the court should be allowed to place notices in the newspapers advising persons of the filing of a representative suit and advising as to how persons may join such suits?

Responses varied greatly. Some *bengoshi* believed that they already had the right to place such advertisements without court approval.³¹⁴ Some interviewees even felt that the court should have no say in what the *bengoshi* published, while others felt the court would want no role in this issue in order to avoid responsibility for the advertisement.³¹⁵ Additionally, some *bengoshi* felt that such advertising would be bad for the Bar's public reputation, while others considered this issue as unimportant.³¹⁶ Among the various rationales for this viewpoint was the notion that lawyers already had the ability to advertise the filing of such cases through newspaper interviews and other devices, and therefore newspaper advertising was neither significant nor important. Another factor may very well be the costs of such advertisements. Unlike in the U.S., where a lawyer's contingent fee may be greatly enhanced by the size of the plaintiff class and the value of the class claim, lawyer's fees in Japanese representative cases are not related to the number of plaintiffs represented, although the "success" portion of the fee may be related to the amount of damages recovered.³¹⁷ Thus, a

314. A *bengoshi* in Saitama noted that advertising was taking place in connection with representative suits but also noted that he had recently seen some advertisements and public relations (i.e., interviews with the press, announcements to lawyers groups) relating to consumer fraud cases. Interview with lawyer (E) in Saitama, Japan (on file with author).

315. See, e.g., Interview with lawyer (U) in Kobe, Japan (on file with author).

316. See, e.g., Interview with lawyer (V) in Hiroshima, Japan (on file with author); Interview with lawyer (W) in Hiroshima, Japan (on file with author). An interviewee *bengoshi* in Saitama noted that the image of U.S. lawyers in Japan was not good and that such advertising might create a similar image for Japanese *bengoshi*. Interview with lawyer (E) in Saitama, Japan (on file with author).

317. In Japan, it is customary for the Bar Association to prepare a chart of lawyers fees for cases. The chart encompasses the "up-front" portion of the fee, based on the recovery sought, and a "success" component, based on the success in the case and typically represents a percentage recovery. Such charts were regularly published at the front of address/note/memo books prepared by the Bar Association for its members. Recently such charts, such as official guides to fees, have been moderated because of anti-trust arguments.

lawyer placing an advertisement might not be able to recoup the cost of preparing and printing such advertisements. In sum, there did not appear to be great support among *bengoshi* for an advertising option paid for by the plaintiff group.

E. Complicated Cases

In Japan, cases in which two or more witnesses testify are viewed as complicated cases.³¹⁸ In the Preparatory Proceeding for Oral Argument phase of a case, the judge will narrow the number of issues and witnesses required to try those issues to such a great extent that if two or more witnesses are needed to resolve the issues the case is, by definition, complicated.³¹⁹ Us-

For an English language Japan Federation of Bar Associations retainer and success fees schedule, see Yamanouchi & Cohen, *supra* note 28, at 448. See also West, *Why Shareholders Sue*, *supra* note 71, at 365.

318. For example, when keeping statistical records, cases are categorized as those involving only one witness and those in which two or more witnesses appear. The number of cases where only one witness appears exceeds the total of all other cases where two or more witnesses appear. See, e.g., *Average Number of Months from Filing of Complaint to Disposition Chart*, *supra* Part III.A.1.

319. The “narrowing of issues” by Japanese judges represents a significant difference in the role of the court in the U.S. and Japanese systems. In Japan, the Judge can “narrow” issues by preventing a party from raising an issue for trial without rendering a decision or order as to the validity of the issue. Moreover, a judge can use his/her narrowing of issues authority to refuse to permit witness testimony. See MINSOHŌ, arts. 165(1), 170(6) & 177. See also *id.* art. 181(1) (the court can decide whether evidence is required). Prior to the Second World War Japanese civil procedure was such that the trial judge had strong directive powers in the process of “fixing issues” and “proof taking.” Tanabe, *supra* note 121, at 507–08. For example, the court assumed the leadership and responsibility for both fixing and narrowing the issues, as the court would ‘clarify’ matters throughout the entire trial process. *Id.* Although in form this procedure was changed by the occupation to a more adversarial procedure, the reality was that the role of the judge changed little. *Id.* at 517–25. See also Kamiya, *supra* note 182, at 56. Kamiya explains:

After five decades, it appears that lawyers (and judges) still take it for granted that the presiding judge will be in control, not only during the trial...but also in case management....In other words, the adversarial structure of the proceedings has not denied courts and presiding judges the opportunity to be paternalistic, or even meddle in many aspects of the litigation.

Id. In the U.S., the court lacks such authority and as a consequence the parties are in control of the issues until the court makes a ruling that is a part of the record and thus part of the record on appeal, on the validity or invalidity

ing this methodology, the consolidated trial procedure is a useful method for dealing with testimony in complicated cases. Further, both interview responses and statistics show that this procedure is being used on an ever-growing basis. For purposes of this discussion, however, complicated cases are considered to be cases that involve complicated issues of fact — especially those involving facts typically outside the experience of the judge. Such cases usually need some form of expert advice.³²⁰ For example, medical malpractice cases require technical medical expertise, construction cases may require technical engineering expertise, and intellectual property cases may require technical expertise in any of a number of fields. In the U.S., on direct and cross-examination, expert witnesses typically present technical facts to either a judge or a jury, who usually lack such technical knowledge.³²¹ Although U.S. judges have the right to appoint experts, they rarely do so.³²² Additionally, when such experts are appointed, their opinions may be subjected to cross-examination and challenged by party witnesses.³²³

Although the rate of litigation has not increased with adoption of the New Code, there is evidence that the number of complicated cases has increased. This increase, combined with the need to further reduce the time necessary to resolve cases, is creating additional stress in the Japanese judicial system. For example, the number of medical malpractice cases brought in the District Court has risen consistently from the adoption of the New Code until today. The figures for medical malpractice cases show:³²⁴

of an issue. See, e.g., Marcus, *supra* note 35. Thus, in the U.S., the court can only narrow the issues in a case by resolving the issues raised by the parties.

320. See Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 490–93 (1988).

321. See Geoffrey M. Howard & Elizabeth A. Ybarra, *Court-Appointed Experts*, 12 NO. 1 PRAC. LITIGATOR 55, 56 (2001).

322. *Id.*

323. *Id.*

324. See The Japanese Court System's Statistics, *supra* note 96.

Malpractice Cases

Year	New Cases Filed	Backlog
1992	371	1, 257
1993	442	1,352
1994	505	1,465
1995	484	1,523
1996	572	1,595
1997	593	1,661
1998	622	1,699
1999	663	1,793
2000	775	1,878
2001	805 ³²⁵	1,968

Bengoshi and others interviewed noted this increase in complicated cases (in this sense of the term) and the need to handle such cases better than they are currently. Those interviewed agreed that the consolidated hearing system embodied in the New Code helped deal with the increase in complicated cases. Since these cases involved the use of several witnesses, they lend themselves to the consolidated hearing method. However, there was a general feeling that more needed to be done in order to move these cases along to judgment faster. As of 2001, statistical evidence showed that medical malpractice cases were resolved in an average of 32.7 months, whereas in 1999 (the year for which figures were used by the Judicial Reform Council) such cases were resolved in approximately 34.6 months at the District Court level.

The Judicial Reform Council recognized this problem in its report and made several recommendations to deal with these lengthy resolutions. Among the recommendations were using

325. From a Rule of Law judicial system standpoint, the increase in medical malpractice cases proves interesting and bodes well for the legal system as a Rule of Law mechanism. It is not known why the number of malpractice cases is increasing, but it is suggested that factors outside the New Code are responsible. Particularly important may be the public's greater knowledge of medical mistakes made by doctors and institutions such as hospitals, as well as the developing substantive law concerning patient's rights in Japan. See Yutaka Tejima, *Recent Developments in the Informed Consent Law in Japan (I)*, 36 *KOBE U. L. REV.* 45 (2002).

“expert commissioners to support judges,” improving the “[c]ourt appointed expert witness system,” and strengthening the technical expertise of the legal profession.³²⁶ The judicial system has recognized the challenge presented by these new complicated cases and is attempting to find solutions. Since it is recognized that both judges and lawyers lack technical knowledge, one idea being considered is that the judicial system should hire its own experts to work along side judges, as part of the judicial system. Thus, physicians or engineers might be hired as judicial research assistants to provide technical advice to the judge. Such a system, mimicking the system in effect for intellectual property cases, is seen as having the advantage of accuracy, since the expert is assisting in the decision-making, rather than a layperson. Expert assistance also expedites the task of issue clarification. However, such a system may have Rule of Law ramifications.

If experts are hired as a part of the court bureaucracy to advise judges *in camera*, parties will not have the opportunity to challenge the expert opinion in front of the decision-maker. Such a system may be seen as taking the decision out of the public arena and placing it in a secret arena.³²⁷ Even if experts on the court payroll are required to present their findings in open court, by denying parties the opportunity to challenge the court expert (through cross examination and/or party hired experts), parties may feel that they are being denied a public and fair process. Indeed, a system that does not permit open challenge to the expert opinion may undercut the objective of accuracy being sought. Whatever the shortcomings, the ability to cross-examine an expert and to put on expert testimony in support of a party's position does have the advantage of exposing the experts' views to public scrutiny and allowing challenges

326. *Recommendations of a Judicial Reform Council*, *supra* note 19, at ch. II, pt. 1, § 2 (“Strengthening Handling of Cases Requiring Specialized Knowledge”).

327. In discussing use of technical experts as “expert [C]ommissioners to support judges,” the Judicial Reform Council expressed concern that any such system could “assur[e] the transparency of procedures” and raised questions regarding whether expert commissioners “can be considered fair and neutral from the standpoint of both patient and doctor, and whether expert commissioners might exert some hidden influence on the process whereby judges form their decisions.” *Id.* These same concerns should apply to a new “expert employee” or “expert research assistant” system.

that the expert may not have considered. Such examination will aid the court in reaching a "correct" judgment.

Another alternative is for the court to create a list of "expert Commissioners." These Commissioners would not be full time court employees. Instead, one such Commissioner would be called upon by the court, on a case-by-case basis, to sit with the judges hearing a case. The "expert Commissioner" would advise the judge as to the expert testimony heard in the case. In effect, the "expert Commissioner" would be a "super expert," commenting on the validity of the opinions expressed in open court by witnesses. However, if the court received the views of the "expert Commissioner" *in camera* and without confrontation or possibility of contradiction, severe due process and Rule of Law questions could arise. Indeed, if taken as part of the court's deliberations and not as evidence, the views of the "expert Commissioner" would not be available for review by an appellate court.

Of course, requiring court-appointed experts, hired experts, or expert Commissioners to give the parties copies of their opinions and subjecting them to cross-examination and/or opposing expert views takes time. Nonetheless, some scholars find that the increased fairness and perceptions of fairness among parties and the public, as well as greater accuracy, is worth the extra time.³²⁸ While today's *bengoshi* are not sufficiently educated in medical or engineering matters to conduct a valuable cross-examination, the legal education system is changing and part of that change is allowing persons from faculties other than the law faculty to become *bengoshi* (and hence judges as well).³²⁹ This change may have the effect of opening the legal field up to persons with knowledge in these specialized fields. Further, one of the objectives of the new law school system is educating students on the practical aspects of lawyering.³³⁰ With an education based on the Socratic method and challenge to responses, tomorrow's *bengoshi* may be better prepared for such cross-examination than may be the case today. In an ef-

328. *Recommendations of the Judicial Reform Council*, *supra* note 19, at ch. II, pt. 2. See also Lee, *supra* note 320, at 490-93.

329. *Recommendations of the Judicial Reform Council*, *supra* note 19, at ch. III, pt. 2, § 2 (covering the Judicial Reform Council's recommendations for law schools).

330. *Id.*

fort to bring more expertise in other fields to the legal and judicial practice, perhaps new law schools should exempt some limited number of licensed or otherwise accredited professionals in specific non-law fields from the entrance exam requirements or give such persons extra consideration. Such exemption might be particularly useful where medical doctors or construction engineers (two fields where complicated cases appear to be on the rise) are law school applicants.

If cross-examination is deemed unnecessary for a civil law non-adversary system,³³¹ then expert opinion, including the views expressed by “expert Commissioners,” should, at a minimum, be made publicly available to the parties in advance of a decision. With this notice, parties can submit conflicting expert opinion or views to correct perceived errors in “expert Commissioner” advice. Additionally, this system would create a dialogue between experts and judges and might reveal areas of inquiry not considered by court-retained experts as witnesses or Commissioners. Giving the court the gatekeeper function of determining whether a party should be allowed to submit an expert to contradict a court employee expert is inadequate.³³² A judge is unlikely to permit such a contradicting witness because to do so would both sanction a challenge to a colleague and take additional time in the trial. Moreover, once the court has determined that expert advice is important in the case, failure to allow the parties an opportunity to present their own expert witness would be inconsistent with the objective of the new reforms to better train lawyers so that they can better prepare and try cases. Further, denying a party’s request to present its

331. While retaining a “civil law” based substantive law system, the post-war procedure in Japan was modeled on the U.S. adversary system, and the New Code retains the adversarial form of examination and cross-examination of witnesses. ALFRED C. OPPLER, *LAW REFORM IN OCCUPIED JAPAN* 130–34 (1976). Under Rule 114 of the Japanese Rules of Civil Procedure, cross-examination is limited to matters brought out on direct examination or matters relevant thereto as well as credibility issues. MINJI SOSH-O KISOKU, art. 114.

332. A Japanese judge’s role in determining whether a party in such circumstance can present a witness is not similar to the role of the U.S. judge under *Daubert*, since in the Japanese situation, through its actions in appointing an expert, the Court has impliedly decided that the expert advice sought meets the reliability and professional standards set in *Daubert*. For a discussion of *Daubert*, see *supra* note 187 and accompanying text.

own expert will likely lead to that party filing an appeal and urging the appeals court to hear its witness. Even in the likelihood that the appeals court refuses to hear the witness, the appeal itself will take time and will add to the costs of the litigation system.

The July 2003 reform adopts a form of the “expert Commissioner” system but does not adopt the full time expert employee system.³³³ Under the 2003 reform, the opinion of the expert Commissioner must be given in the presence of opposing counsel (or if given by phone, a record of the opinion must be made and given to counsel); counsel then has an absolute right to present an expert opinion of their own.³³⁴ The opinion of the expert Commissioner will be a part of the record in the case and thus will be available to a reviewing court.³³⁵ Since the court is compelled to hear an expert proffered by a party whose opinion differs from the expert Commissioner, the Commissioner’s opinion is not conclusive. Nonetheless, the court is likely to give greater weight to the opinion of the expert Commissioner than to that of an expert presented by a party. There is nothing inherently wrong with such a system because the expert Commissioner may be viewed by the court as neutral, while a witness proffered by a party may be viewed as somewhat less neutral.

F. Relations between the Bench and the Bar

One of the more interesting serendipitous perceptions arising from the interview process was the gap in thinking, understanding and respect between the Bench and the Bar. Among Japanese lawyers, the perception existed that judges were ei-

333. *Recommendations of the Judicial Reform Council, supra* note 19, at ch. II, pt. 1, § 2 (“Strengthening the Handling of Cases Requiring Specialized Knowledge”). In July of 2003 the Diet enacted a form of “Expert Commissioner” system to be used in complicated cases. *See* Act to Amend Civil Procedure Act and Other Relevant Acts, 15 Heisei (2003) Statute No. 108 (Japan) (adding Articles 92–2 to 92–7 to Japan’s New Code of Civil Procedure).

334. It remains to be seen whether Japanese judges will use their gatekeeper authority to limit such expert opinion to written opinion or whether they will permit the parties to present oral expert testimony. If limited to written opinion, it can reasonably be assumed that the opinion of the party expert will play little, if any, role in the determination of the case.

335. *Recommendations of the Judicial Reform Council, supra* note 19, at ch. II, pt. 1, § 2 (“Strengthening the Handling of Cases Requiring Specialized Knowledge”).

ther unwilling or lacked the time to make difficult decisions regarding the consideration evidence that could affect a case.³³⁶ Yet, lawyers appeared to be unwilling or lacked the time to educate the court regarding the necessity of making decisions or allowing of certain evidence.³³⁷ Lawyers instead wanted judges to prod opposing counsel to produce or find evidence and issues to assist their client.³³⁸ They wanted judges to suggest settlements so that cases could be resolved, rather than lawyers being the vehicles for settlement talks.³³⁹ Judges, on the other hand, complained that lawyers were ill-prepared and unwilling to do the work needed to move the cases along swiftly.³⁴⁰ Judges felt the need to be paternalistic in their approach³⁴¹ because so many parties were either not represented or were (in the judge's view) inadequately represented.³⁴²

In short, there appeared to be a significant divide between these legal professionals. This divide is mirrored in the discus-

336. *See, e.g.*, Interview with lawyer (E) in Saitama, Japan (on file with author).

337. *Id.*

338. A lawyer in Nagoya reasoned that the inquiry procedure was infrequently used because it was much better for the court to do the questioning than for counsel. Interview with lawyer (A) in Nagoya, Japan (on file with author).

339. *See, e.g.*, Interview with lawyer (M) in Hiroshima, Japan (on file with author). A judge interviewed outside Tokyo expressed the view that settlement should be in the hands of the lawyers, but that lawyers were afraid to raise settlement discussions for fear it would expose weaknesses in their case. Interview with High Court Judge (R) in Japan (on file with author). As a result, lawyers want judges to raise settlement issues, remaining sensitive to the lawyers' need for the court to initiate such discussion for fear of exposing individual case weaknesses. *Id.*

340. A judge interviewed outside Tokyo noted that due to problems with lawyer preparation, judges had to be actively involved in the cases. Interview with High Court Judge (R) in Japan (on file with author). Moreover, this judge was of the view that lawyers in general had confidence in the government, including the judicial branch, and thus wanted judges involved. *Id.*

341. Miki, *supra* note 85, at 5 ("Japanese judges tend to be paternalistic and support the weaker side....").

342. Interview with High Court Judge (R) in Japan (on file with author). Lawyers are aware of this feeling by judges. As one lawyer noted, judges have a certain "arrogance" and look down on lawyers. Interview with lawyer (E) in Saitama, Japan (on file with author). *See* Kamiya, *supra* note 182, at 70 (noting that the paternalistic attitude of courts "may be justified by the fact that the Code allows litigation to be filed and conducted without legal counsel or representatives").

sion regarding entrance requirements for new law schools that will become operational at the beginning of 2004. To begin with, issues arise regarding whether entrance exams for these new law schools should be prepared by the Ministry of Education (probably with some input by the Judicial Branch)³⁴³ or the Bar Associations. The likelihood is that two different entrance exams will be prepared and law schools will be allowed to choose one or the other and, perhaps in some cases both.³⁴⁴ Similarly, with the advent of the new law schools, what will be the role of the Judiciary's Legal Training and Research Institute?³⁴⁵

343. Although there is said to be a separation of powers in Japan, judges are regularly assigned to the executive branch to assist and work alongside administrative officials. ODA, *supra* note 1, at 395–98. This assistance can include the representation of the government in litigation as well as opining on the constitutionality of legislation throughout the legislative process. *Id.* The former creates the specter of a judge as counsel for a party, and the latter complicates the judicial function when an issue of constitutionality is raised in a case or controversy due to the likelihood that, in a highly administrative State such as Japan, their colleagues respect judges assigned to the executive branch. *See* CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 3.02(4).

In the course of their long careers and as a step in their promotion, the judges are sometimes appointed to a non-judicial task inside or outside the judiciary....Outside the judiciary, the greatest number of judges are assigned to various positions in the Ministry of Justice, as legislative or administrative staff, or as government attorneys....Generally speaking a judge's career path is regarded highly when it includes one or two of the above-mentioned special assignments.

Id. The fact that colleagues have approved of the court's ability to challenge the constitutionality of laws places a burden on courts which might have questions concerning the constitutionality of certain laws. This burden certainly places the challenging party at a disadvantage.

344. In August of 2003, eighteen thousand persons took the exam for entrance to the New Law Schools administered by the Japanese Bar, i.e., the Japan Law Foundation. However, another entrance test was administered on August 31 by the National Center for University Entrance Exams. "It is up to each graduate school to decide which tests to consider in evaluating applicants, but many graduate schools are expected to refer to both...." *18,000 Take Exams for New Law Schools*, JAPAN TIMES, Aug. 4, 2003 at <http://www.japantimes.co/cgi-bin/getarticle.pl5?nn20030804a3.htm>.

345. The likelihood is that the Institute will continue, although the time required for attendance will be shortened from eighteen months to one year and the reduction will be distributed among the various aspects of Institute study, namely the classroom, intern program and final class sessions to incorporate what has been experienced in the intern program. Discussions with

Should there be continuing legal education requirements and, if so, is it appropriate for the judges to lecture at these CLE courses? Would such lecture process be seen by the Bar as an attempt by the judicial branch to control the Bar?

Some Japanese lawyers and professors interviewed did not see this divide between *bengoshi* and judges.³⁴⁶ Others acknowledged the existence of such a divide, but contended that it was small, at least in comparison to the past divisions between the two branches of the profession.³⁴⁷ Nonetheless, comments by both the Bench and the Bar indicate that a significant divide exists. In part, this gulf is historical, based on the Bar's desire to preserve its autonomy and viewing judicial involvement in Bar matters with concern.³⁴⁸ This concern is heightened by the

Judicial Secretariat and officials at the Institute in Tokyo Japan (on file with author).

346. See generally Interview with lawyer (A) in Nagoya, Japan & Interview with lawyer (I) in Osaka, Japan (on file with author) (noting that the personality of the judge primarily affects how *bengoshi* perceive the divide between *bengoshi* and judges). But see Tanabe, *supra* note 121, at 553.

347. See Tanabe, *supra* note 121, at 553. See, e.g., Interview with lawyer (T) from Japan (on file with author).

348. At one time, all judges were graduates of the Imperial Universities and accordingly were highly respected. Rabinowitz, *supra* note 8, at 70. At the same time, the predecessor of the *bengoshi*, the *kujishi* and later the *daigennin* were not required to be graduates of any school and many had no professional training or qualifications. *Id.* at 71. In the early period of modern Japanese law the reputation of *daigennin* was so bad "that a special term of opprobrium, *sambyaku daigen*, a term which it has been suggested might best be translated as 'shyster' or 'pettifogger,' gained currency." *Id.* at 67. One purpose of the Lawyers Law of 1933 was to raise the qualifications for *bengoshi* "to the same level as those of judges and procurators." *Id.* at 75. As recently as 1974, Professor Tanaka could write:

[I]t must be said that the legal profession as a group still has a long way to go in order to gain general social acceptance of the social status it claims and of the role it plays. This is as much a question of changing the way of thinking of the general public as it is a challenge to the legal profession to improve its standing by its own efforts.

Tanaka, *supra* note 28, at 265; see also TANAKA, THE JAPANESE LEGAL SYSTEM, *supra* note 8, at 550 ("Practicing attorneys were in a lower position socially as well."). Thus, the view that being a *bengoshi* was an "honorable" profession is of relatively recent origin while the judge position was always viewed as a highly regarded public servant. In a country where the bureaucracy is highly respected, judges were (and remain) among the most highly regarded. Moreover, until the Post-war period the legal profession was under the control of the Ministry of Justice. The profession had long chafed under government

fact that Japan's Supreme Court is specifically given rule-making authority for all matters relating to attorneys.³⁴⁹ In part, the divide represents a different experience with and outlook toward the litigation process.

The Judicial Reform Council recommended that the Bar be more involved in judging and teaching.³⁵⁰ Thus, the new law schools are encouraged to use "adjunct professors" who are members of the litigating Bar,³⁵¹ and the judicial branch is encouraged to hire practicing lawyers as judges.³⁵² Although technically eligible to become judges after entering the practice of law, the reality is that "[j]udges are nearly always selected from...assistant judges with 10 or more years of experience, because public prosecutors, lawyers and law professors with 10 years experience normally are not available for appointment to a Judgeship."³⁵³ These recommendations are likely to have muted success. Some law schools appear to have adopted a policy under which the "adjuncts" work full-time for a few years, thus giving up their active practices and financial rewards.³⁵⁴ This approach is unlikely to attract the "best" of the practicing Bar.³⁵⁵ Similarly, the salary discrepancy between successful practicing lawyers and judges of similar age and experience may prevent successful lawyers from seeking judicial positions.

regulation. The Post-war occupation did away with Ministerial control and made the Bar mostly self-governing. Rabinowitz, *supra* note 8, at 76-77, 80.

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

350. See generally *Recommendations of a Judicial Reform Council*, *supra* note 19.

351. CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 3.02(2).

352. *Id.*

353. See TANAKA, THE JAPANESE LEGAL SYSTEM, *supra* note 8, at 552 (noting that practicing attorneys are reluctant to accept the decrease in income that inheres to entering the judiciary); Takahara, *supra* note 29.

354. Discussion with Professor Miki in Tokyo (on file with author).

355. The prospect for adjunct judges is better as new legislation permits judges to continue to remain in their judicial positions while teaching at law schools. Previously, judges who wanted to adjunct teach were required to take time off from their judicial positions, while under the new law such teaching is considered a judicial duty and can therefore be performed on "judicial time." See Act to Dispatch Judges, Prosecutors to National Civil Service Employees to Law Schools, 15 Heisei (2003) Statute No. 40 (Japan).

Moreover, there are currently few practicing lawyers in Japan.³⁵⁶ Transferring some of these practicing lawyers to judicial positions will further reduce the number of lawyers available for the public. A more radical approach to Bar and Bench relations may have to be considered if the gulf between them is to be addressed.

In the U.S., the divide between the Bench and the Bar is not nearly as broad as appears to be the case in Japan.³⁵⁷ One explanation is that federal U.S. judges are typically appointed after a successful (and profitable) career in the private practice.³⁵⁸ In any event, even the thought of a District Court judge appointment without any litigation experience is bizarre. Many U.S. judges were leaders in Bar Associations before joining the Bench and many continue to be actively involved in Bar Association activities after appointment.³⁵⁹ The fact is that U.S.

356. For a discussion of the practical effects of the scarcity of lawyers in Japan, see Joseph Gurnee, *Practical Aspects of Litigating in Japan: an American Lawyer's Perspective*, at <http://www.intl-lawyers.com/articles/jplaw/> (last visited Oct. 30, 2003).

357. In the U.S., the failure of Congress to raise the salaries of federal judges and bring them closer to the salaries of lawyers in major firms has created something of a gulf between the Bar and federal judges. The Need for Judicial Pay Reform, Statement of the American Bar Association President, submitted to The National Commission on the Public Service, available at <http://www.abanet.org> (last visited Nov. 16, 2003). The Bar responded by supporting the judicial branch's efforts to get pay relief. Independence of the Judiciary: Judicial Compensation, 2002 A.B.A. Legis. & Gov't Priorities, available at <http://www.abanet.org/poladv/priorities/judcom.html> (last visited Oct. 30, 2003), which states:

The ABA supports legislative action to increase judicial compensation and ensure regular cost-of-living increases for federal, state, and territorial judges and the administrative judiciary, and urges Congress to de-link Congressional pay from judicial pay. The ABA also recommends periodic, systematic review of the adequacy of federal judicial pay (along with the adequacy of pay for other top-level government officials) in order to provide our judges with adequate and fair compensation.

Id.

358. Marcus, *supra* note 35, at 28 ("U.S. Judges, too, were distinctive. Rather than emerging from professional training directed toward service in the judiciary, they came usually from the practicing Bar, and also had limited formal education.")

359. The Japanese Federation of Bar Associations is composed of local Bar Associations and "all individual lawyers...members of the bench or procuracy

judges are members of both the Bench and the Bar.³⁶⁰ Judges understand the challenges and frustrations of the private practice because they experienced them themselves. Furthermore, lawyers tend to be more understanding of the pressures placed on the Bench because there is open dialogue about these issues. Both the Bench and Bar participate in legal education activities as adjunct professors, while actively employed outside the academic world. In short, there is a commonality of experience and interests between U.S. lawyers and judges.

Meanwhile, Japanese judges are part of a career civil service system³⁶¹ and are exposed to the practice of law during their tenure at the Legal Training and Research Institute.³⁶² All trainees are required to intern in the field at law offices, prosecutor's offices and judge's chambers.³⁶³ Through these training internships, trainees are educated to respect, and at times defer, to the other branches of the legal profession.³⁶⁴ However, this exposure is only for a relatively short period at the beginning of a career and does not provide the in-depth exposure to the practice of law that comes from dealing with clients and client-related issues on a daily basis.

On the other hand, U.S. judges are not moved from location to location but are appointed to the circuit or district where they serve.³⁶⁵ As a consequence, U.S. judges have a close relationship with the communities where they live and work. That relation-

cannot be members of the Federation." CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 205(2).

360. Bureau of Labor and Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2002-2003 Edition*, Judges, Magistrates, and Other Judicial Workers, available at <http://www.bls.gov/oco/ocos272.htm> (last visited Nov. 4, 2003).

361. CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 3.02(4).

362. *Id.*

363. LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN, *supra* note 76, at 7.

364. *Id.* at 11-12. The Legal Training and Research Institute notes that:

During the field training term, legal apprentices are assigned to the district courts, the district public prosecutors' offices, and the local attorney's associations throughout the country. The field training lasts twelve months and is subdivided into three-month rotational assignments at each of the civil trial, criminal trial, public prosecution, and private practice of law.

Id.

365. 28 U.S.C. §§ 44, 133.

ship extends to others who have similar training, experience and backgrounds — in other words local lawyers. Unlike Japanese judges, U.S. judges do not live together in compounds created or funded by a judicial bureaucracy.³⁶⁶ Judges may have friends among their colleagues, but they also have friends among their former colleagues at the Bar and among the general community.

Most significantly, U.S. judges are not career judges who start their professional life as judges and seek to prosper within the judicial bureaucracy.³⁶⁷ They are not “inbred,” learning their craft from the judges who came before them. Instead, they bring new experiences and new ideas from outside the Bench to the courtroom. However, this discrepancy can lead to unfortunate consequences in individual cases; for example, judges may be unprepared to sit on the Bench, may not understand how to work within the judicial system, or may be appointed because their brother went to school with a U.S. Senator rather than because of their ability.³⁶⁸ Whatever the shortcomings, the U.S. system does provide a commonality of experience between judges and lawyers, as well as, a greater understanding and appreciation of each other's experiences. Additionally, the knowledge and experience that judges with previous litigation experience may have in representing and understanding client issues is important from the judicial standpoint.

Still, convincing *bengoshi* to give up their lucrative practices and lifestyles in communities where they have ties and are respected only to move into the bureaucratic world of the traveling Japanese judge may prove difficult.³⁶⁹ However, something

366. See Sabrina Shizue McKenna, *Japanese Judicial Reform: Proposal for Judicial Reform in Japan: An Overview*, 2 ASIAN-PAC. L. & POL'Y J. 121, 140 (2001) (noting that the Japanese system of separating judges from the rest of the community by providing them with government housing is meant to prevent judicial favoritism towards acquaintances). See also 28 U.S.C. § 44 (stating that U.S. judges shall be residents of the circuit for which appointed).

367. Marcus, *supra* note 35, at 28 (“[U.S. judges] surely did not rise through a judicial bureaucracy.”).

368. See generally American Bar Association, *supra* note 111 (noting that the U.S. judiciary is becoming increasingly politicized, creating public doubt as to whether judges make decisions on matters of fact and law or based on political pressure and special interests).

369. CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 3.02(4).

short of such a dramatic change may prove useful.³⁷⁰ Perhaps aspiring judges, who choose the judicial life when in school or at the Legal Training and Research Institute, may be required to spend five years in the active private practice before they can be appointed as judges in training. Such a requirement would assure that judges have some practical experience before ascending to the Bench.³⁷¹ This requirement would also make them active members of the Bar community before becoming judges and might help to bridge the gap between the Bench and Bar in Japan.³⁷² Additionally, practicing *bengoshi* recruited for the

370. One *bengoshi* interviewed stated that if she could change one thing about the civil justice system she would abolish the career judge system and require that all judges be appointed from among practicing lawyers. Interview with lawyer (E) from Saitama in Washington, D.C., U.S.A. (on file with author).

371. In the past, the Japanese judicial system has opposed such a suggestion. See *Supreme Court Accepts Advisory Panel on Judges*, JAPAN TIMES ONLINE, Feb. 20, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20010220a3.htm> (Supreme Court of Japan accepted a panel to assist on Judicial selection but rejected the Bar Associations suggestion that all new judges first “work as lawyers or prosecutors for five years to broaden their experience.”). However, in light of changing attitudes towards Judicial Reform, it may be well to rethink this opposition and take a more global attitude that encompasses both the staffing needs of the judiciary and the judiciary’s need for a broader base of experience in the corps of judges. See Rabinowitz, *supra* note 8, at 77 for a discussion of the Bar’s attempts, as early as 1956 — the date of the Rabinowitz article — to achieve professional “integration,” meaning “selection of members of the judiciary from the Bar rather than directly from among graduates of the Judicial Research and Training Institute.” *Id.*

372. Similarly, Japanese prosecutors tend to be career prosecutors who have never represented criminally accused clients. LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN, *supra* note 76, at 12–14 (“Upon successful completion of the final qualifying examination, a legal apprentice may choose to be an assistant judge, a public prosecutor, or a practicing attorney.”). Japanese defense lawyers, on the other hand, have rarely been prosecutors as such service entails also a career in civil service. As a consequence neither truly understands the position of the other. Whatever the shortcomings of the U.S. criminal law system, distance in experience between prosecuting attorneys and defense attorneys is not one of them. Generally, most U.S. prosecutors have spent at least some time as defense attorneys and most defense attorneys have worked as prosecutors. There exists a real revolving door between the prosecution and defense Bar. As a consequence, while the prosecutors and defense lawyers may sharply disagree on issues, they each understand the position of the other — having been the other and perhaps considering being the other in the future. Japan may wish to explore whether it is helpful to the criminal law

Bench can be exempted from the transfer requirements, under which judges are moved around the country on an average three-year cycle. Having established ties in a particular locality, these *bengoshi* may be given the option of remaining in that locality during their service as a judge. Apparently, the Japanese Supreme Court has already decided to exempt such lawyers from the travel rotation system.³⁷³ More problematic, though, is determining how to deal with the practice that a *bengoshi* judicial candidate has built up over the years. Not only must the financial value of that practice be resolved, but the goodwill created over the years must be up-kept and the clients losing a trusted counselor must be protected.

Another problem in carrying out the Reform Council's recommendation that more *bengoshi* become judges relates to the pay scale of judges — not simply where to place previously successful *bengoshi* judges without judicial experience on the pay scale, but also how to ensure that such judges receive appropriate pay consideration in the future.³⁷⁴ The likelihood is that any bureaucracy — including a judicial bureaucracy — will look more favorably on experience within its ranks than on outside experience. However, if *bengoshi* are to be recruited as judges, they must be assured as to future pay and responsibility equal to those who are their contemporaries in age and total professional experience. At the same time, if paid on the basis of experience and age alone, unsuccessful *bengoshi* may seek judicial appointment as a good alternative to unsuccessful practice. Yet, these individuals are not the *bengoshi* that the Reform Council envisions as future judges. In this regard, the practicing Bar also has a screening responsibility.

Another issue is that regarding retirement. Judges (except for Supreme Court Justices and Summary Court Judges) must re-

system and the public perception of that system to have defense and prosecutorial lawyers who have had some experience on the other side of the aisle. Having judges who were at one time defense lawyers would likely affect the decision-making in criminal cases.

373. Toshiko Takenaka, *Comparison of U.S. and Japanese Court Systems for Patent Litigation: A Special Court or Special Divisions in a General Court?*, STREAMLINING INT'L INTELLECTUAL PROPERTY NO.5, 47, 48 (2000), available at <http://www.law.washington.edu/casrip/Symposium/Number5/pub5atcl6.pdf> (last visited Feb. 15, 2004).

374. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 807.

tire at age sixty-five.³⁷⁵ Thus, a career judge who serves forty years as a judge has a significant retirement benefit. But, for a *bengoshi* becoming a judge after twenty years of experience, the retirement benefits received at sixty-five will be substantially less. Moreover, such a “*bengoshi*-turned-judge” may not wish to attempt to re-start a law practice after retirement, having already created a practice once before. Thus, such a *bengoshi* may be at a substantial disadvantage in retirement. To recruit successful, middle-aged *bengoshi*, the retirement rules may require modification. Perhaps, the law should be modified to allow “*bengoshi*-turned-judge” personnel to work until a later age or even be given retirement credit for some, if not all, of their years of active *bengoshi* practice. In any event, if the goal is to recruit successful *bengoshi*, some mechanism must be found to ameliorate the economic disadvantage that face *bengoshi* who wish to become a judge.³⁷⁶

Further, rather than providing government subsidized housing where young judges are clustered together, consideration might be given to providing newly appointed judges with a housing allowance that would enable and encourage them to live among the people whom they serve. This housing will give judges more access to the lives of the people whose cases they

375. The compulsory retirement age of lower court judges is sixty-five, except for Summary Court Judges, who retire at 70. CIVIL PROCEDURE IN JAPAN REVISED, *supra* note 8, at § 3.02(2).

376. Goodman, *The Somewhat Less Reluctant Litigant*, *supra* note 15, at 807. Without some accommodation regarding the economic disadvantage of moving from *bengoshi* to judge, the likelihood is that only unsuccessful *bengoshi* will elect to become judges — but this is not the quality of judge that the system should be attempting to recruit. Of course, *bengoshi* who are so committed to the legal reforms may sacrifice themselves for the legal system and elect to become judges. However, such *bengoshi* should not be compelled to make this personal sacrifice and it will be difficult to find large numbers of such committed *bengoshi*. For example, in 1992, only a handful of practicing *bengoshi* actually became judges. In 1992, the National Bar Federation introduced a system in which they make recommendations to the Supreme Court regarding lawyers seeking judgeships. Although thirty-seven lawyers have made the change to the bench since the system was introduced, enthusiasm for the opportunity has been minimal. The change usually involves accepting a lower salary, giving up established clients and often a transfer to courts in remote areas. Takahara, *supra* note 29.

decide and give the public greater access to judges as real people at an early stage in their professional life.³⁷⁷

IV. CONCLUSION

One objective of the New Code of Civil Procedure, and a goal of the Judicial Reform Council, was to strengthen the judicial system as a Rule of Law dispute resolution mechanism. A few steps towards this goal were making the system more readily accessible to the public and strengthening the mechanisms of decision-making, such as quickening the pace of resolution and expanding the discovery of evidence, so that the public would in fact utilize the legal system for dispute resolution.³⁷⁸ To make the system more accessible, the New Code expanded the jurisdiction of the Summary Court and introduced a new one-day small claims dispute resolution mechanism.³⁷⁹ The small claims jurisdiction of the court appears to have had the desired effect as the number of small claims cases has increased on an annual basis at a rate that far exceeds that of new case filings in the judicial system on the whole. With respect to increasing the use of the judicial system in general, the New Code does not appear to have achieved its desired goal. The fact of the matter is that when the new small claim cases are factored out of the system, the number of new cases filed has barely changed since the New Code's adoption.³⁸⁰

While the general use of the judicial system has not increased (with the exception of the small claims cases mentioned above), the pace of litigation has quickened so that on average new cases filed in the District Court are resolved relatively

377. See generally McKenna, *supra* note 366, at 140 (noting that judges are subject to transfer to different geographical locations and are provided with housing in the same area as other judges). More experienced judges, who have saved sufficient funds to purchase their own residence and who can contemplate transfers within a relatively close geographic area, already purchase their own residences and many live among the general public. *Id.* However, in their early years these judges tend to live in small, old and very inexpensive housing complexes that the Judicial Secretariat provides to them. *Id.*

378. *Id.* at 135–37.

379. MINSOHŌ, art. 370 (concerning the principles of a one-day trial).

380. See Hayashi, *supra* note 143 and accompanying text (the table demonstrates that when small claims cases factored out, the increase in new cases filed in District and Summary Courts was negligible).

quickly.³⁸¹ This increase may be due to the “legalized” procedures in the New Code or due to the fact that judges are permitting fewer witnesses to testify in open court than was the case in earlier years.³⁸² One question to be considered is why the number of new cases filed has not increased significantly since the adoption of the New Code. Undoubtedly, many other factors not considered in this study also have an effect on the number of new cases filed, such as the comparatively small size of Japanese damage awards, the continued high cost of litigation, the difficulties of collecting on a judgment, the time lag for the new *bengoshi* reforms and legal education systems to take effect, and cultural factors. But, some of the factors considered herein may also be relevant.

Although the time to resolve an average case has significantly declined since adoption of the New Code, the fact remains that high profile cases continue to take several years for resolution at the District Court level and appeals of such cases take years at the High Court level.³⁸³ Due to the previous slow pace of resolution, the Japanese legal system needs to overcome the public perception that the system operates at a “snail’s pace.” The fact that some high profile cases take many years for resolution only furthers that perception. Similarly, the perception of the public is influenced by news reports that focus not on the improvements made in the time required to resolve the average litigation, but rather on the time delays in cases of public interest, both civil and criminal.

In addition, the failure to make greater use of the judicial system to resolve legal issues may be related to the way in which the system operates. Thus, the present system’s focus on “narrowing,” rather than resolving, issues presented in a case may have an effect on the system’s use. In approximately 85% of cases in the present system, no witnesses are heard, and in cases where witnesses are heard, the number keeps declining.³⁸⁴ Cases are resolved based on written materials or a form of trial

381. See *Average Number of Months from Filing of Complaint to Disposition – District Court Chart*, *supra* Part III.A.1.

382. See *Trials to be Expedited*, *supra* note 18.

383. See *Percentage of Judgment Cases Decided in One and Two Years Chart*, *supra* Part III.A.1.

384. See *Witnesses at District Court (First Instance) Chart*, *supra* Part III.A.4.

by dossier. Additionally, in many cases, there may only be a question of law which can be decided without evidence (rather than factual issues), and in others, a party may default. Even considering the dismissal of these cases, the high percentage of cases without witnesses and the declining number of witnesses in cases with oral testimony are likely to result in appeals, primarily based on procedural justice for the appellant, rather than substantive issues. To be an adequate dispute resolution system, the judicial system must not only do justice but must be perceived by the legal community as doing justice. A system in which the litigating parties rarely have an opportunity to personally state their case in front of the decision-maker in the formal setting of a trial or Oral Hearing is likely to be looked at as “removed” from the parties and failing to provide a “day in court.” Issues exist as to whether the cost of efficiency — the accelerating trend of not hearing live testimony — is too high.

Just as a minority of high profile, slow moving cases leads to the incorrect perception that all cases proceed slowly (when in fact the average case in Japan moves rather quickly), so too the lack of witness testimony may present a “perception” problem. “Paternalistic” Japanese judges are concerned with providing “substantive justice.” Judges want to issue a substantively correct decision to ensure that the party that should win does in fact win. Such judges are more concerned with a correct decision than with the procedural niceties surrounding the process.³⁸⁵ U.S. judges, on the other hand, are more concerned with procedural niceties and less concerned with whether substantive justice is achieved, as demonstrated by the relatively few jury awards that are set aside by the trial court.³⁸⁶ Yet, the possibility exists that some Japanese citizens do not use the legal system because they feel that the system does not provide them with justice, while many U.S. citizens use the system because they feel they can attain justice. If such is the case, perception (as distinct from reality) may have an impact on the judicial system as a Rule of Law dispute resolution mechanism.

385. See Tanabe, *supra* note 121, at 520–22.

386. See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. at 568 (noting that only when an award is “grossly excessive” in relation to the State’s legitimate punishment and deterrence interests does it violate due process).

Further, the New Code reforms aim to make trials more reliable, efficient, and speedy, through the new inquiry procedure, the expanded document production language of the New Code and the new tools available to judges dealing with document production requests (*in camera* review and redacting).³⁸⁷ However, these goals appear not to have been realized in practice. Thus, *in camera* review and redaction are virtually never used and the new inquiry procedure is similarly moribund. The inquiry procedure is not used to discover evidence, nor does it appear to narrow the issues to be tried or speed up the judicial process. Whether the reason for the failure of the inquiry system lies in the system itself — i.e., the fact that there are no sanctions for failing to respond or responding accurately — or elsewhere is a matter that should be further studied. One clear conclusion is that lawyers are not using the system as the New Code intended and in this regard, the system is not achieving its objective.

Similarly, while leading to the greater production of documents through the use of court suggestions, new document procedures do not appear to lead to the greater production of significant documents, at least in cases between private parties. Whether the reason for this problem is the reluctance of courts to punish individuals for failing to respond, or the substantive rules surrounding production requirements (i.e., the self-use document exception), it appears that the New Code's catch-all document provision has not had a significant effect on making truly relevant documents available. According to *bengoshi* interviewed, the New Code's "discovery" provisions do not make it easier for a righteous plaintiff to obtain judicial relief.

Although most *bengoshi* interviewed were not prepared to suggest that litigation today be instituted because it may be resolved at any higher rate than in the past, in certain areas the pace of new filings has increased. These cases generally consist of more complicated cases, such as malpractice. Here, the reasons for increased filings may be related to factors other than the New Code and new judicial activism to speed up resolution of cases. In the malpractice field, the substantive law seems to be changing, placing a greater burden on doctors to be more open with their patients and to more closely consider their

387. See Ota, *supra* note 9, at 568–70.

patient's wishes. Perhaps, more malpractice cases are instituted today due to the combination of this higher burden on doctors and greater public awareness of medical matters (through availability of information on the World Wide Web and otherwise). Complicated malpractice cases take longer to resolve than simple litigations. Thus, although methods to enhance the efficiency of such cases should be pursued, restricting a party's ability to challenge the expert opinion of a court-employed expert may be counter-productive to obtaining a "correct" decision and to enhancing the public's perception of the judicial system as a Rule of Law system wherein justice can be obtained.

Based on the fact that the greatest rise in new cases is in the area of complicated cases and the average case is disposed of quicker than in the past, the conclusion can be reached that on the whole, cases are actually disposed of at a faster rate than the average figures would show. On one hand, the figures are skewed because all cases, even default cases, require at least two months for resolution if for no other reason than to allow for an answer and to determine whether there has been a default. On the other, the figures are skewed because non-average cases are the more complicated cases. Accordingly, the new procedures of the New Code designed to speed up litigation appear to be working. It matters not whether the reason is the "Code" itself, the judges' perceived new inclination to expedite litigation, or the "legitimization" of the pre-Code reforms by the New Code. Average cases are resolved quicker than before the New Code's adoption, and "non-average" cases are also disposed of more quickly. The fact that this improvement has not led to greater litigant use of the judicial system should be further explored if the objective of strengthening the judicial system in Japan as a Rule of Law dispute resolution mechanism is to be realized.

APPENDIX A**INTERVIEW QUESTIONS**

1. Have the preliminary procedure provisions speeded up the pace of litigation? Has the procedure resulted in significantly narrowing the issues to be tried?
2. Has the procedure allowing inquiries to be made of the other side resulted in significant discovery of facts not already known to the inquiring party?
3. As the attorney for a party to whom an inquiry has been made, do you feel an obligation to provide answers even if the answer is harmful to your client's position? If the could be harmful to your client's position, do you feel an ethical obligation to a) answer or b) refuse to answer the inquiry?
4. As a Professor of Civil Procedure Law do you believe that a lawyer who has been asked an inquiry has an obligation to provide an answer even if the answer is harmful to his client's position? If the answer could be harmful to his client's position do you feel a lawyer has an ethical obligation to a) answer or b) refuse to answer the inquiry?
5. Has the procedure for inquiry resulted in the identification and ultimate production of documents detrimental to the position of the answering party and helpful to the inquiring party?
6. Has the procedure for making inquiry of the other side resulted in significant changes in document production by one party to another? If so, how would you describe such changes?
7. Have the new document production provisions, such as the court's in camera review, the redacting of documents so that portions of a document may be produced and portions not produced, the new "catch-all" provision of the document production section CCP220(iv) had a

significant effect resulting in the production of relevant documents not obtainable under the prior code?

8. Have the new document production provisions made it easier for a potential plaintiff to be successful in litigation?

9. Have the new document production provisions resulted in more and more important documents being produced by defendants in the aid of a plaintiff's case?

10. Since the adoption of the new Code of Civil Procedure, have you observed any change in the Court's attitude toward the production of self-use documents?

11. Have you observed any change in the Court's attitude toward what the Court would consider to be a self-use document? If so, what change: a greater willingness to allow production; or less of a willingness to allow production?

12. Do you believe that the self-use document exception to production limits the ability of the plaintiff to obtain significant documentary evidence adverse to the interest of defendants?

13. Would you like to see an amendment of the Code restricting the definition of self-use documents so as to allow for greater production of self-use documents? Why?

14. What effect, if any, do you think liberalization of the self-use document exception so as to allow for production of self-use documents when the document is directly relevant to the issue of whether a party knew or should have known that its actions were improper, would have on litigation rates in Japan? Would such a change result in more litigation or would it have no meaningful effect on the number of cases that might be brought? As a litigating lawyer do you think such a change would result in your recommending that client's sue in more cases than you recommend today? Can you think of any situations in which you recommend that a client NOT sue where you would have recommended that a client sue had there been no self-use exception to the document production rule?

15. After the Daiwa Bank derivative lawsuit decision the Diet enacted a law permitting the limitation of liability of Directors in derivative cases. What effect do you think such legislation has had on the willingness of persons to file derivative lawsuits? What do you think was the reason that the Diet passed such a limitation of liability provision?

16. Have the provisions allowing for persons to join representative actions after the lawsuit has already been filed resulted in significant numbers of persons joining such suits after they have been filed? Do you think lawyers under supervision of the Court should be allowed to place notices in the newspapers advising persons of the filing of a representative suit and advising as to how persons may join such suits? Why?

17. Has the New Code of Civil Procedure affected how the judge acts during litigation in the District Court? If so, in what way? For example, is the judge more or less active (or the same) in examining witnesses or proposing settlements?

18. Do you think more or less (or the same number of) cases are referred to conciliation under the new Code than were referred under the Old Code?

19. In view of the changes made by the New Code of Civil Procedure, are you more likely to recommend that clients file civil cases in the District Court than you were under the Old Code?

20. In view of the changes made by the New Code of Civil Procedure, are you more likely to recommend that clients file civil cases in the Summary Court than you were under the Old Code?