American University International Law Review

Volume 8 | Issue 1 Article 12

1992

The Role of Conciliation in the Japanese Legal System

Lynn Berat

ARTICLE

THE ROLE OF CONCILIATION IN THE JAPANESE LEGAL SYSTEM

Lynn Berat*

Above all else, esteem concord; make it your first duty to avoid discord.[1]

INTRODUCTION

The modern Japanese legal system remains rooted in traditional values in which conciliation, rather than adjudication, is the preferred method of dispute resolution. Despite heavy Western influence beginning in the 1850s and peaking during the post-World War II occupation, the Japanese legal system emphasizes harmony rather than conflict. Even the Japanese Supreme Court, the *Saikosai*, is reluctant to cause discord and rarely uses its constitutionally authorized power of judicial review.

This article examines the legal and historical factors that have contributed to the Japanese preference for conciliation rather than adjudication. It explores conciliation methods and theories, and the changes that the power of judicial review has wrought throughout the Japanese courts. The first section examines Japan's history prior to 1600. Section two traces the development of the Japanese preference for conciliation during the Tokugawa or feudal era. The third section discusses the Western impact upon the Japanese judiciary prior to World War II and the Western role in establishing an independent judiciary following World War II. Finally, the fourth section assesses the Japanese judiciary's exercise of judicial review and the current use of conciliation in the legal system.

---

* Lecturer, Yale Law School; Ph.D., Yale Law School; J.D., University of Texas.

1. CONST. IN SEVENTEEN ARTICLES (604 A.D.), art. 1, reprinted in CASE & COM., July-Aug., 1953, at 20.

I. EARLY SOCIAL STRUCTURE AND VALUES

A. THE FIRST SEVEN CENTURIES

The Japanese preference for conciliation and consensus is rooted in ideologies originating in the fifth century A.D. At that time, Japan was again exposed to Chinese culture after almost 100 years of isolation, and most importantly, to the influences of Confucianism and Buddhism.[2] Confucian and Buddhist values gained great popularity and, in 604 A.D., Prince Shotoku promulgated the Constitution in Seventeen Articles based on Buddhist mores.[3] The Seventeen Articles, the first known national codification of legal principles,[4] declared that "[c]oncord is to be honored, and discord to be averted."[5]

In 646 A.D., during the Taiko era, the Japanese government began a major reform and implemented state planning by nationalizing the kingdom and redistributing state rice plantations.[6] In addition, the government instituted the Chinese, Confucian-based class structure of *ritsu-ryo*, in which each class was required to perform a specific function within a rigid social structure.[7] The *ritsu-ryo* emphasized morality, encouraged people's good behavior, and punished them for wrongdoing.[8] However, the *ritsu-ryo* did not confer legal rights and duties upon

---

2. *See* JAMES MURDOCH, 1 A HISTORY OF JAPAN 53 (1964) [hereinafter MURDOCH] (discussing early China-Japan interactions).

3. CONST. IN SEVENTEEN ARTICLES (604 A.D.), art. 1, *reprinted in* CASE AND COM., July-Aug. 1953, at 20.

4. *Id.* art. I.

5. *Id.* art. 1.

6. *See* MURDOCH, *supra* note 2, at 142-80 (discussing the Japanese reform effort of 646 A.D.); GEORGE SANSOM, A HISTORY OF JAPAN TO 1334, 56-60 (1958) [hereinafter A HISTORY OF JAPAN TO 1334] (discussing the early stages of the Japanese reform movement of 646 A.D.).

7. A HISTORY OF JAPAN TO 1334, *supra* note 6, at 111 (describing the *ritsu-ryo* codes). The codes consisted of the *ryo*, which is the administrative and civil code. *Id.* The administrative code designated the titles, structure, and duties of all organs of the state. *Id.* The civil code regulated the duties, obligations, and privileges of all subjects of the state, from the nobility to the slaves. *Id.* The civil code outlined the conduct of traditional ceremonies, such as marriage, funerals, and religious celebrations. *Id.* The *ritsu* provided disciplinary regulations which defined the acceptable conduct of individuals. *Id. See also* GEORGE SANSOM, JAPAN: A SHORT CULTURAL HISTORY 156 (1932) [hereinafter JAPAN: A SHORT CULTURAL HISTORY] (stating that the Japanese reforms of 646 A.D. were modeled after the Sui and T'ang codes in China). The T'ang dynasty emerged in China during the sixth century, and developed into one of the most sophisticated and powerful governments in the world at that time. EDWIN O. REISCHAUER, JAPAN: PAST AND PRESENT 17-23 (1954) [hereinafter REISCHAUER]. Impressed with the successes of the T'ang centralized form of government, the Japanese sought to model their own government after that of the T'ang. *Id.* at 22-23.

8. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 111 (stating that the *ritsu* provided prohibitive and disciplinary regulations).

the populace.[9] In the government's view, the *ritsu-ryo* operated only to educate people in Confucian values.[10]

B. THE *RITSU-RYO* SYSTEM

From the sixth century to the twelvth century A.D., the Japanese promulgated several *ritsu-ryo* codes based on the Chinese T'ang Dynasty's codes.[11] *Ritsu-ryo* functioned poorly in Japan, however, and a new system of appropriating public offices and lands developed in the ninth and tenth centuries.[12] Individuals acquired estates through patronage and usurpation, and through the domination of citizens who submitted themselves to the authority and will of the strong.[13] These estates, known as *shoen*, became popular and eventually acquired an official character when the Japanese emperors granted the land owners a variety of legal immunities.[14]

---

9. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 70-74 (explaining the Chinese T'ang code upon which the Japanese based their *ritsu-ryo* codes). Fifth and sixth century Asian culture cared little about individual rights. *Id.* at 72. The Chinese T'ang code did not go far in defining the duties or rights of individuals. *Id.* at 71-72. It was believed that an individual's behavior could not be measured by "human law," but rather, only by the extent a person's offense caused a disturbance with "nature." *Id.* at 71.

10. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 70-74 (discussing Confucian and Buddhist influence on the development of Japanese law in the seventh century).

11. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 67-74 (discussing the history and advancements of the T'ang Dynasty in China).

12. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 111 (noting that the *ritsu-ryo* encountered difficulty in adapting to the demands of a rapidly developing Japanese society). *See also* Oyama Kyohei, *Medieval Shoen*, *in* 3 THE CAMBRIDGE HISTORY OF JAPAN 89 (K. Yamamura ed., 1990) (describing the *shoen* system through which property and rights, once held only by the government, were transferred to private individuals). During what is known as the Nara period, which lasted from 710 to 794 A.D., the state controlled all land in the Japanese provinces. *Id.* at 89. From 794 to 1185 A.D., the Heian period, however, the provinces developed systems whereby individuals acquired private holdings of property known as *shoen*. *Id.* at 89.

13. *See* R.H.P. MASON & J.G. CAIGER, A HISTORY OF JAPAN 5355 (1972) [hereinafter MASON & CAIGER] (describing the development of the *shoen* system). Because no monetary system then existed in Japan, state officials and members of the aristocracy received compensation in the form of land. *Id.* at 53. Also, peasants often gave up the rights in their land to a local ruling body in exchange for guarantees of security and the continuing right to harvest the land. *Id.* at 54. This system of exchange is often referred to as "commendation." *Id. See also*, Dan F. Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 85, 89 (1952) [hereinafter *Aspects of Tokugawa Law*] (discussing three phases of the Japanese feudal period).

14. *See id.* at 54-55 (stating that while some *shoen* only retained a tax immunity, many eventually became totally exempt from any control or authority of the government).

In addition to the development of private estates, a powerful military class emerged.[15] Under the *ritsu-ryo* system, the government attempted to create an army, but soldiers chose to evade service rather than supply their own provisions, weapons, and other necessities as required.[16] As a result, at the end of the eighth century, this army was replaced with one led by the powerful provincial clans that formed a new social class known as the *samurai*.[17] The *samurai* lived according to their own personal customary law, based on chivalry and a vassal's duty to the overlord.[18] In return, the lord would often grant the vassal a piece of land, or the right to collect rent or taxes from the land.[19] As reliance upon the local *samurai* grew, so did their power and willingness to openly defy the central government.[20]

C. THE MILITARY GOVERMENT

Toward the end of the twelvth century, Japan suffered through a series of civil wars and subsequently emerged as a feudal state controlled by a military leader, known as the *shogun*.[21] During the Kama-

15. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 103-07 (discussing the difficulties of eigth and ninth century Japan in implementing a system of universal military service). By emulating many Chinese values and practices, Japan also absorbed the Buddhist aversion to violence. *Id.* at 104. In 701 A.D., for example, private persons were prohibited from possessing weapons. *Id.* However, as small settlements came under frequent attack by neighboring clans, the need for security grew increasingly important. *Id.* In time, a class of private warriors emerged to provide the needed protection. *Id.* at 105.

16. *See* A HISTORY OF JAPAN TO 1334, *supra* note 6, at 104 (explaining that peasants evaded military service by running away, and the wealthy exempted themselves through reliance on their privileged status).

17. MIKISO HANE, JAPAN: A HISTORICAL SURVEY, 68-71 (1972) [hereinafter HANE] (discussing the rise of the *samurai* class). The Japanese abandoned the system of universal military recruitment in 792 A.D. *Id.* at 68. As the central government's ability to protect the provinces declined, local governors increasingly relied upon local chieftains and *shoen* proprietors for security. *Id.*

18. *Id.* at 69.

19. *Id.*

20. *Id.*

21. *See id.* at 73-76 (discussing the conflict between the Taira and Minamoto clans). In the eleventh century, two military families rose to power, the Taira and the Minamoto. *Id.* at 73. From 1156 to 1159, these two families engaged in a struggle for power in the imperial court. *Id.* In 1159, the Minamoto family was defeated and Yoritomo, a member of the vanquished family, was banished to a small coastal island. *Id.* The ruling Taira family, however, suffered through several natural disasters and uprisings. *Id.* at 74-75. In 1180, Yoritomo returned from exile, and five years later, defeated the Taira family. *Id.* at 74. Yorimoto became *shogun* of the imperial court in 1192. MASON & CAIGER, *supra* note 13, at 103. His rule marked the beginning of almost seven centuries during which the military class dominated Japan. HANE, *supra* note 17, at 76.

kura period, which lasted from 1185 to 1333,[22] largely autonomous estate owners settled their disputes with *shogunate* representatives through conciliation.[23] In the 1300s, a period of internal strife again engulfed Japan which lasted 400 hundred years.[24] These centuries of unrest ended with the victory of feudalism, and the 250 year rule of the Tokugawa family then followed.[25] The Tokugawas feared that the infusion of Western Christian missionaries, who arrived in the 1500s,[26] would result in a Western European conquest of Japan.[27] Consequently, the Tokugawas made Confucianism the official religion in Japan and began a ruthless suppression of Christianity.[28] Also, in a highly successful effort to isolate Japan from the rest of the world, the Tokugawas expelled most foreigners.[29]

II. THE TOKUGAWA, OR FEUDAL, ERA

A. FEUDALISM AND THE TOKUGAWA STRUCTURE OF GOVERNMENT

After the Tokugawas eliminated their opposition, the country settled into a period of prolonged peace.[30] During this period, Japan fostered a rigid hierarchical social structure in which it was virtually impossible for individuals to move from one class to another.[31] The emperor, as the theocratic patriarch of the state, occupied the apex of the social

22. JOHN HALL, JAPAN: FROM PREHISTORY TO MODERN TIMES 359 (1970) [hereinafter HALL].

23. *See* John M. Maki, *Conciliation and Compromise in the Law of Military Houses of the Recent Era*, *in* MEMORIAL TO DOCTOR SAITO ON HIS SIXTIETH ANNIVERSARY, LAW AND LITIGATION 206 (1942) [hereinafter Maki] (stating that disputes between estate owners and the *shogunate* were resolved through conciliation).

24. RENE DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 536 (3d ed. 1985) [hereinafter DAVID & BRIERLEY].

25. *See Id.* (discussing the inegalitarianism existing in the Tokugawa era).

26. *See* CHARLES BOXER, THE CHRISTIAN CENTURY IN JAPAN 1-40 (1967) (describing the first contacts between Western Europeans and the Japanese); *see also* JAPAN: A SHORT CULTURAL HISTORY, *supra* note 7, at 407-10 (discussing the first arrival of Jesuit missionaries in the sixteenth century). Francis Xavier, a Spanish Jesuit, arrived in the Japanese city of Kagoshima in 1549. *Id.* at 407. By 1582, 150,000 Japanese had been converted to Christianity. *Id.* at 410.

27. *See* DAVID & BRIERLEY, *supra* note 24, at 536 (explaining the Tokugawas' fear that Christianity would destroy the Japanese social order).

28. *See* DAVID & BRIERLEY, *supra* note 24, at 536 (discussing the Tokugawa persecution of Christians).

29. *See* DAVID & BRIERLEY, *supra* note 24, at 536 (stating that the Tokugawa *shogunate* adopted isolationist policies).

30. HANE, *supra* note 17, at 151.

31. *See* CHARLES DUNN, EVERYDAY LIFE IN TRADITIONAL JAPAN 8-9 (1969) (indicating that the Tokugawa *shogunate* had a rigid class structure). *See also* REISCHAUER, *supra* note 7, at 80-87 (stating that the Tokugawa preserved peace through inflexible social controls and discipline).

hierarchy, but the *shogun*, as the military leader, wielded the real power.[32] Beneath these leaders, the population was divided into seven strictly separated and immutable classes, descending hierarchically from court nobles, military nobility (or *buke*), *samurai*, farmers, artisans, merchants, and finally, outcasts and beggars.[33]

The stratification of Tokugawa Japan led to a legal system that defined relationships between social classes rather than between individuals.[34] In fact, the legal system was designed to ensure that the population respected and adhered to the class structure.[35] The 30 million Japanese were subject almost exclusively to the discretion of the military nobility, known as the *buke*, against whom the system offered little protection.[36] A *buke* member could kill any commoner, artisan, or merchant who did not exhibit proper deference.[37] Moreover, the ability of a commoner to bring suits against those deemed to be socially "superior" was prohibited.[38] Thus, the parameters of permissible behavior depended more on one's social status, rather than on any rule of law.[39]

The family provided the basic societal unit for all legal purposes, and it fully embodied the hierarchical system of inequality.[40] Responsibilities of the family, and the rights to all its property passed to the eldest son upon the father's death.[41] The Tokugawa period institutionalized

32. *Aspects of Tokugawa Law, supra* note 13, at 92. *See* Arthur T. Von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1486 (1958) (noting that the Meiji Restoration reinvigorated the Emperor's political power for the first time in approximately seven hundred years); *see also* MASON & CAIGER, *supra* note 13, at 111-12 (explaining how the *shogun* overshadowed the imperial family in the fourteenth and fifteenth centuries).

33. *Aspects of Tokugawa Law, supra* note 13, at 92-93. See DAVID & BRIERLEY, *supra* note 24, at 535 (describing the seven social classes).

34. *See* DAVID & BRIERLEY, *supra* note 24, at 535 (explaining that a Japanese person's entire lifestyle hinged on his class membership). *See also* HANE, *supra* note 17, at 162-63 (describing the system of of justice in the Tokugawa period as one of "rule by status" in which a class of persons was expected to submit themselves to the will of the class above).

35. *See* DAVID & BRIERLEY, *supra* note 24, at 454 (noting that the legal system supported the class structure).

36. *See* DAVID & BRIERLEY, *supra* note 24, at 454 (indicating that no thought was given to the concept of individual rights, particularly as between a member of an inferior class and a member of a superior class).

37. *See* HALL, *supra* note 22, at 179 (stating that the *samurai*, as the recognized heads of society, charged with maintaining civil order, felt a sense of "duty" to kill a disrespectful commoner).

38. HANE, *supra* note 17, at 162-63. Peasants also had no right to appeal the decisions of their local lords. *Id.* at 164. Those who did appeal, did so at the risk of execution, regardless of the merits of their case. *Id.*

39. HANE, *supra* note 17, at 162.

40. HALL, *supra* note 22, at 180.

41. *Aspects of Tokugawa Law, supra* note 13, at 94-95. *See* HANE, *supra* note 17, at 179-80 (describing the hierarchical family structure).

inequality through the legal, social, and religious systems.[42] For example, women were regarded as a permanent underclass as three powerful ideologies united against them: within Buddhist philosophy women were seen as "unclean creatures of temptation;"[43] under feudalism, everything "effeminate" was shunned; and, in Confucian teachings, women were instructed to be perpetually obedient to men.[44] Japan's adultery law further illustrated the inequality. The law did not afford a remedy to the wife of an unfaithful husband, while the husband was awarded the power to determine the legal fate of his adulterous wife, which included the option of execution.[45]

The Tokugawa system of government was similarly hierarchically structured and contained several checks and balances on government power. First, three men, known as *tairo* or chief policy advisors, were hired so that one could watch the others to guard against abuses of power.[46] Second, to prevent collusion and nepotism, senior councilors, or *roju* were appointed to control the heads of the magistracy.[47] Third, the Tokugawa government used censors, known as *o-metsuke*, to investigate the conduct of the *daimyo*, or feudal lords.[48] Finally, the *shogun* required that all of the *daimyo* spend alternating periods between the Tokugawa capital of Edo and their fiefs, while their families stayed as

42. *See* HANE, *supra* note 17, at 158-81 (discussing the many ways that social status and title determined the permissible bounds of individual behavior).

43. *Aspects of Tokugawa Law*, *supra* note 13, at 94. *See* DIANA PAUL, WOMEN IN BUDDHISM 3 (2d ed. 1985) (discussing the role of women in Buddhism).

44. *Aspects of Tokugawa Law*, *supra* note 13, at 94. *See* NOBUSHIGE HOZUMI, ANCESTOR-WORSHIP AND JAPANESE LAW 125 (1943) [hereinafter HOZUMI] (explaining the inferior status of women). Women found their roles assigned by a precept named the "three obediences," in which a woman was to be obedient to her father while unmarried, her husband while married, and her son when widowed. *Id.*

45. *See* HANE, *supra* note 17, at 179 (discussing the different rights held by husbands and wives). The husband could also have several wives, while a woman was expected to remain faithful even after the death of her husband. *Id. See also* HOZUMI, *supra* note 44, at 138 (detailing the Seven Grounds of Divorce under the *Taiho* Code's House-Law). A husband was able to divorce his wife for any of the following reasons: 1) sterility; 2) adultery; 3) disobedience to the father-in-law or the mother-in-law; 4) loquacity; 5) larceny; 6) jealousy; and 7) disease. *Id.* These grounds applied only with respect to a husband divorcing his wife. *Id.*

46. *Aspects of Tokugawa Law*, *supra* note 13, at 94. HANE, *supra* note 17, at 161. Initially, three *tairo* were appointed to function as a group. *Id.* This number was reduced over time, until eventually, only one councilor held the position of *tairo*. *Id.*

47. *Aspects of Tokugawa Law*, *supra* note 13, at 94. *See* HANE, *supra* note 17, at 161 (describing the role of the *roju*).

48. *Aspects of Tokugawa Law*, *supra* note 13, at 94. *See* HANE, *supra* note 17, at 161 (stating that censors were put in place to watch the *buke*).

hostages in Edo.[49] Generally, these mechanisms ensured an efficient and relatively incorruptible system capable of self-governance.

The vicarious liability of a father, as head of the family, served as an additional check on power within local government units.[50] The father was accountable for the public, as well as the private actions and duties of his family, and often received punishment for the crimes of villigers.[51] This vicarious liability reinforced the idea that the individual had no legal existence apart from his membership in a group, family, village, or class.

Group status and membership embodied the basis of morality under Confucian values.[52] The ethic of loyalty, which permeated every relationship in Japanese society, was a cornerstone of the Confucian value system.[53] These relationships[54] provided the only means by which the Confucian virtue of *jen*—a state of consciousness reflecting the individual's compassion—could be achieved.[55] In dispute resolution, individuals sought the solution that would contribute to the greatest *jen* between the parties.[56]

---

49. *Aspects of Tokugawa Law, supra* note 13, at 94. *See* HANE, *supra* note 17, at 160 (explaining the *daimyo's* temporary residence in Edo and their fiefs).

50. *See* JAPAN: A SHORT CULTURAL HISTORY, *supra* note 7, at 357-58 (discussing the role of family heads in overseeing the conduct of the household); *see also* MASON & CAIGER, *supra* note 13, at 209 (noting the father's duties to manage the affairs and property of the family).

51. *Aspects of Tokugawa Law, supra* note 13, at 104-05. JAPAN: A SHORT CULTURAL HISTORY, *supra* note 7, at 357-58.

52. *See* ROBERT ARMSTRONG, LIGHT FROM THE EAST: STUDIES IN JAPANESE CONFUCIANISM 236-40 (1974) (illustrating the concept of a moral system based on a personal self-realization of benevolence, righteousness, propriety, and wisdom).

53. *See* JAPAN: A SHORT CULTURAL HISTORY, *supra* note 7, at 110-13 (outlining the Confucian principles of obedience to the family and state, and the belief that human nature is naturally inclined to do good works). Confucius, who lived in China from 551 to 479 B.C., taught that the family is the basic social unit. *Id.* at 112. Children owe strict obedience to the teaching of both ancestors and living parents. *Id.* According to Confucius, this family structure provides the model for Chinese society in general, with the emperor being regarded as the supreme father figure. *Id. See also* HANE, *supra* note 17, at 183 (noting that Confucian philosophy emphasized four basic princples: culture, conduct, loyalty, and faithfulness).

54. *See* David J. Danelski, *The Supreme Court of Japan: An Exploratory Study*, in COMPARATIVE JUDICIAL BEHAVIOR 122-23 (G. Schubert and D. Danelski eds. 1969) [hereinafter Danelski] (describing how the impersonal relationships among Japanese reflect the failure to recognize each individual as a separate, self-determined being). Confucius emphasized five criticle relationships in society: ruler and subject, father and son, husband and wife, elder brother and younger brother, friend and friend. HANE, *supra* note 17, at 183.

55. *See* HANE, *supra* note 17, at 175, 183 (discussing the importance of righteousness and benevolence within the important societal relationships emphasized by Confucius).

56. Danelski, *supra* note 54, at 123. *See also* Yoshiro Hiramatsu, *Tokugawa Law*, 14 L. IN JAPAN 1, 37-38 (1981) [hereinafter Hiramatsu] (listing reasons that Toku-

To advance *jen*, Tokugawa Japan had a two stage dispute resolution process. In the first stage, the village headman, or *nanushi*, organized a five-family committee which had jurisdiction over both persons and property.[57] The reputation of the headman, both within his village and within the higher government structure, rested on his ability to maintain a harmonious community.[58] If the efforts of the *nanushi* and the village organization failed, the dispute moved to the Tokugawa courts.[59] The *daikan*, the *shogun's* local representative, presided over the lower Tokugawa court and heard "suits of first instance" that the *nanushi* brought on behalf of the village.[60] Severe penalties, including banishment, attached to one who reasserted a settled claim or who brought unfounded charges.[61] Thus, a case's outcome was usually predetermined before it went to court.

B. TOKUGAWA CIVIL PROCEDURE

The civil procedure which governed the limited range of claims that could be brought under the Tokugawa judicial system varied immensely depending upon the subject of the claim. Land and water disputes received the most attention; suits and claims for money were afforded less protection; suits involving Confucian feudal and family relationships were rejected completely and complainants were often punished.[62] The amount of protection extended to each type of claim reflected the relative value the *shogunate* attached to the claim.

1. Land and Water Disputes

The *shogunate's* fiscal policy, as well as its power structure, was built on rice crops and land. Thus, lawsuits involving land disputes, or *ron-sho*, between and within villages were of great economic and political

---

gawa leaders encouraged conciliations between parties). Hiramatsu provides six reasons Tokugawa administrators encouraged conciliation in private disputes: (1) more concrete settlement than by a judicial ruling, (2) respect for local customs of order and discipline, (3) encourages social harmony, (4) compensates for the lack of developed private law, (5) reduces the need for administrative facilities, (6) promotes the *Shogunate's* policy of refusing to interfere in local matters. *Id.*

57. *Aspects of Tokugawa Law*, *supra* note 13, at 98-99. *See also* HANE, *supra* note 18, at 177 (describing local administrative mechanisms).

58. *Aspects of Tokugawa Law*, *supra* note 13, at 98-99.

59. *Aspects of Tokugawa Law*, *supra* note 13, at 98-99.

60. *Aspects of Tokugawa Law*, *supra* note 13, at 98-99.

61. *Aspects of Tokugawa Law*, *supra* note 13, at 98-99.

62. *See* KINGO KOBAYAKAWA, A STUDY OF THE CIVIL LITIGATION SYSTEM IN THE RECENT ERA 127-55 (1957) [hereinafter KOBAYAKAWA] (discussing the types of claims that people could bring in Tokugawa courts).

interest to the *shogunate*.[63] Typically, *ronsho* arose between villages over water flow, floods, accretion, and new reclamation.[64] The Tokugawa courts encouraged local settlement of land and water disputes because they believed that those at the village level better understood the frequently complicated local issues.[65] Additionally, the village dispute resolution process, *basho-jukudan*, was calculated to preserve and respect local customs regarding land and water rights.[66] After the *basho jukudan* settled disagreements, the parties drafted a document of resolution and the dispute ended without a court appearance.[67]

The process of *karisumashi* provided another intermediate procedure in which Tokugawa government officials made an attempt at provisional settlement. Under the *karisumashi* procedure, a Tokugawa official traveled to the location of the dispute and arranged an agreement between the parties.[68] The agreement, in the form of a temporary judgment, remained in effect for three to five years, after which, the continued equity of the settlement was reviewed.[69]

2. *Claims for Money*

Claims for money, contract rights, and obligations arising out of commerce, called *kuji*, constituted the most frequent type of suit in the Tokugawa courts, especially among commoners.[70] *Kuji* proliferated as merchants attempted to assert their rights as creditors, particularly

---

63. *See* Otake, *The General Principle of Private Settlement in the Procedural Law of Water Use in the Recent Era*, 1 STUD. LEGAL HIST. 183-212 (1953) (stating that in an economy built on rice growing, water disputes were important and frequent).

64. *Id.*

65. *See* RYOSUKE ISHII, LEGAL MATERIALS 258 (1951) (examining the Tokugawa courts' preference for local settlements); *see also* Hiramatsu, *supra* note 56, at 37 (stating that conciliation was encouraged in money suits, and made a requirement in water disputes before a petition could be filed by the plaintiff).

66. *See* Hiramatsu, *supra* note 56, at 37-38 (describing considerations influencing local dispute resolution).

67. *See* Hiramatsu, *supra* note 56, at 37 (stating that upon agreeing to a resolution, the parties drafted a *sumikuchi shomon*, or settlement deed, which had the same effect as an official judgment).

68. Kingo Kobayakawa, *Concerning the Litigation Procedure Involving Land Suits*, 37 KYOTO L. REV. 65, 72 (1937) [hereinafter *Litigation Procedure Involving Land Suits*].

69. *See id.* (discussing the nature of the temporary judgment).

70. *See* Hiramatsu, *supra* note 56, at 34-35 (discussing the types of money suits brought by commoners during the Tokugawa era). Suits dealing in matters of commerce were classified in two categories. *Id.* at 34. First, "money suits" were claims for repayment, usually as compensation for borrowed gold or silver. *Id.* Second, "main suits" dealt with matters such as payment for pledged houses or land, payment for tenancy, disputes over the legality of transactions, and wages of servants. *Id.*

against the *samurai* members of the *buke*.[71] The Tokugawa courts treated *kuji* against *buke* members less favorably than *kuji* against commoners because of the *buke's* preeminent status in Tokugawa Japan.[72]

In approximately 1720, the *shogun* issued decrees that completely barred judicial handling of money claims by merchants against *samurai*.[73] The *shogunate* issued these decrees in order to relieve warriors and *shogunate* retainers from debt to their subordinates.[74] These mutual settlement decrees required creditors and debtors to settle all current claims out of court or not at all, and disallowed future claims.[75]

3. *Mutual Affairs and Confucian Relationships*

There were two classes of cases to which the *shogunate* courts extended no protection: mutual affairs and Confucian relationships. Mutual affairs were commercial enterprises in which businessmen made joint decisions and shared profits.[76] As joint ventures in business and internal squabbles among participants affected no vital *shogunate* interests, the Tokugawa courts did not accept mutual affairs suits and required the parties to settle.[77] By preventing official recourse to the courts, the *shogunate* forced citizens to rely on obligations made in good faith.[78]

Suits involving Confucian feudal and family relationships, such as those between a lord and his retainer or between a parent and child, also received little attention from the Tokugawa courts.[79] What scant legal treatment was available hinged upon whether the parties involved

---

71. DANIEL FENNO HENDERSON, CONCILIATION AND JAPANESE LAW — TOKUGAWA AND MODERN 106-07 (1965).

72. *Id.* In 1661, 1719, 1789, and 1843 the *shogun* issued Mutual Settlement Ordinances refusing to hear certain "money suit" petitions. Hiramatsu, *supra* note 56, at 35. Cancellation Ordinances were also issued in 1789, 1842, and 1843, simply nullified certain claims, declaring them to be worthless. *Id.*

73. CHARLES D. SHELDON, THE RISE OF THE MERCHANT CLASS IN TOKUGAWA JAPAN: 1600-1868 105-08 (1958) (asserting that the prevention of litigation by merchants against *samurai* was motivated by a desire to preserve the feudal system by freeing the *samurai* from financial distress).

74. *Id.*

75. *Id.*

76. *See* Kanada, *Mutual Affairs from the Standpoint of the Law of Our Recent Era*, 46 J. A. POL. & SOC. SCI. 545, 545-63, 683-708 (1932) (describing the differences between mutual affairs and Confucian relationships).

77. JOHN HALL, JAPANESE FEUDAL LAWS 186 (1979).

78. *Id.*

79. Kingo Kobayakawa, *Two or Three Problems in Civil Litigation of the Recent Era*, 39 KYOTO L. REV. 527-72, 777-816 (1938) [hereinafter *Problems in Civil Litigation*].

were members of the same class.[80] The Tokugawa courts only accepted suits brought by inferiors when they involved succession.[81] The courts' nearly absolute refusal to review such suits was a natural consequence of Tokugawa Japan's rigid class structure and adherence to Confucian values. The duty of loyal subordination, entrenched in both the feudal state and the family, became the chief instrument of social discipline.[82] Therefore, the review of suits brought by Confucian inferiors was seen as undermining the existing social order.[83] In fact, unless the *shogun's* interest was involved and the superior was at fault, the court assessed penalties against the inferior who filed suit against his superior.[84] Servants at fault were punished, with the master of the servant having complete discretion over the severity of the punishment.[85]

The Tokugawa government eventually adopted Article 65 of the *Osadamegaki*,[86] which stated that the courts would not hear an inferior's suit against his superior except under a limited set of circumstances.[87] The Article presumes that the subordinate, regardless of whether his accusation is true, is almost as reprehensible as the accused, simply for questioning his superior's innocence.[88] Exemplifying the Tokugawa determination to discourage false suits, Article 65, Part 1, condemned to crucifixion any inferior who filed such a suit.[89]

---

80. *See* KOBAYAKAWA, *supra* note 62, at 616-19 (describing the nature of class-based suits).

81. KOBAYAKAWA, *supra* note 62, at 616-19.

82. KOBAYAKAWA, *supra* note 62, at 616-19.

83. KOBAYAKAWA, *supra* note 62, at 616-19.

84. KOBAYAKAWA, *supra* note 62, at 616-19.

85. *See* KOBAYAKAWA, *supra* note 61, at 619 (explaining the nature of punishment).

86. JOHN HALL, JAPANESE FEUDAL LAWS 223-24 (1979).

87. *Id.* Article 65 of the *Osadamegaki* provides:

> 1. A person who falsely accuses his master or parents of committing a serious offense will be crucified.
>
> 2. Where a master or parent has been accused of an offense, if it is a serious matter involving the government, a detailed investigation will be conducted.
>
> If the accusations of the petitioner are true, the accused will submit a request to the government to lessen the penalty against him by one degree. He will also request that the government penalize the accuser himself at a punishment one degree less than that to which the accused is sentenced.
>
> Where matters submitted for adjudication do not involve the government, they will not be accepted by the courts.
>
> 3. When a master or parent is at fault and pleads hardship, certain village officials and relatives will be summoned to dispose satisfactorily of the matter upon request for relief by the accused. *Id.*

88. *Id.* at 223.

89. *Id.*

The courts also applied special procedures in divorce cases.[90] A wife in a marriage between commoners had no standing to obtain a divorce,[91] but in extreme cases of mistreatment, the *nanushi* could intervene and conciliate.[92] Conversely, a husband in a marriage between commoners could divorce his wife for a variety of reasons, but primarily for her failure to perpetuate the family line.[93] To effectuate a divorce, a husband simply presented his wife with a piece of paper stating he would have no objection if she were to remarry.[94] *Buke* divorces were treated differently from divorces between commoners. The *buke* followed formal divorce procedures that required the parties and their families to work out a mutually agreeable arrangement, which was then submitted to the *shogun* for approval.[95]

III. THE OPENING OF JAPAN TO THE WEST

The cultural emphasis on conciliation and consensus became entrenched in Japanese society during the self-imposed isolation of the Tokugawa era.[96] Then, in 1853, Japan emerged from its isolation when Commodore Perry delivered a letter from United States President Fillmore requesting that Japan reopen itself to the world.[97] The Emperor eventually complied with President Fillmore's request and by 1858, Japan had concluded commercial treaties with the United States[98] and a

90. *See* HOZUMI, *supra* note 44, at 138-431 (discussing the history of divorce law in Japan).

91. *See* HOZUMI, *supra* note 44, at 138 (discussing the Seven Grounds for Divorce available to husbands under the *Taiho* Code).

92. HOZUMI, *supra* note 44, at 138.

93. *See* HOZUMI, *supra* note 44, at 145 (stating that a husband was free to divorce his wife if she failed to deliver him any male children). A man was morally compelled by his ancestors to divorce his wife in such an instance because he had a duty to continue the family line. *Id.* at 139.

94. *See* RYOSUKE ISHII, GENERAL SURVEY OF JAPANESE LEGAL HISTORY 586 (1960) [hereinafter GENERAL SURVEY OF JAPANESE LEGAL HISTORY] (outlining the divorce procedures). The wife had no more legal right to avoid being divorced arbitrarily than she had to obtain a divorce herself. *Id.* In exceptional cases, however, such as after twelve months of desertion, the wife could divorce the husband. *Id.*

95. RYOSUKE ISHII, A MISCELLANY OF THE EDO PERIOD 152 (1959).

96. *See generally* CHITOSHI YANAGA, JAPAN SINCE PERRY (1949) [hereinafter YANAGA].

97. *See* W.G. BEASLEY, THE MEIJI RESTORATION 88-89 (1972) [hereinafter BEASLEY] (discussing Commodore Perry's expedition to Japan in 1852-53).

98. Convention between the United States of America and Japan, Regulating the Intercourse of American Citizens with Japan, June 17, 1857, *reprinted in* CENTRE FOR EAST ASIAN CULTURAL STUDIES, 1 MEIJI JAPAN THROUGH CONTEMPORARY SOURCES 16 (1969) [hereinafter CONTEMPORARY SOURCES]; Treaty of Amity and Commerce, United States-Japan, July 29, 1858, *reprinted in* CONTEMPORARY SOURCES at 27.

host of other Western nations.[99] In these treaties, Japan accepted generally unfavorable conditions regarding extraterritoriality in which Western judicial officers oversaw dispute resolution in accordance with Western laws.[100] The treaties were humiliating to the Japanese government, which eventually felt obligated to do away with them.[101]

A. THE MEIJI RESTORATION

In 1867, the last shogun handed back his political powers to the emperor and the system of military government that had lasted 700 years ended.[102] The Meiji Restoration had begun.

One of the major challenges of the Meiji Restoration was the maintenance of Japanese independence from the West.[103] To achieve this goal, the new government modernized the social and political organization of the country based on the principles of capitalism.[104] The legal system was among the first to undergo major restructuring.[105]

---

99. Treaty of Peace, Amity and Commerce, Great Britain-Japan, Aug. 26, 1857 *reprinted in* CONTEMPORARY SOURCES at 36; Treaty Russia-Japan, Feb. 7, 1855 *reprinted in* CONTEMPORARY SOURCES at 6; Treaty of Commerce, The Netherlands-Japan, Jan. 30, 1856, *reprinted in* CONTEMPORARY SOURCES at 8; Additional Articles to the Treaty between The Netherlands and Japan of 1856, Oct. 16, 1857 *reprinted in* CONTEMPORARY SOURCES at 18.

100. *See* FRANCIS CLIFFORD JONES, EXTRATERRITORIALITY IN JAPAN AND THE DIPLOMATIC RELATIONS RESULTING IN ITS ABOLITION, 1885-99 5 (1931) (discussing extraterritoriality). The Western nations demanded that if their nationals were involved in a legal dispute with the Japanese, the issue would be tried by a judicial officer of the Western nation in accordance with the law of that nation. *Id.*

101. *See* ASIAN CONTRACT LAW: A SURVEY OF CURRENT PROBLEMS 6 (David A. Allen ed., 1969) (describing the national consensus to abolish the system of extraterritoriality).

102. BEASLEY, *supra* note 97, at 277.

103. YANAGA, *supra* note 96, at 10.

104. *See* JOHANNES HIRSCHMEIER, THE ORIGINS OF ENTREPRENEURSHIP IN MEIJI JAPAN 69-245 (1964) (focusing on the initiative from the center, the spirit of enterprise in the private sector and the formative influence of entrepreneurial performance); WILLIAM LOCKWOOD, THE ECONOMIC DEVELOPMENT OF JAPAN: GROWTH AND STRUCTURAL CHANGE, 1868-1938 3-28 (expanded ed. 1968) (examining the foundations of industrialism during the Meiji era in terms of background, framework, and rise of modern industry and trade); THOMAS SMITH, POLITICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN JAPAN: GOVERNMENT ENTERPRISES, 1868-1880 1-86 (1955) (documenting the rise of modern industry and the introduction of Western technologies and methods including the building of Western style shipyards, iron foundries and arsenals during the Tokugawa period).

105. *See* JAPANESE LEGISLATION IN THE MEIJI ERA 57-127 (R. Ishii 1969) [hereinafter JAPANESE LEGISLATION IN THE MEIJI ERA] (tracing the entry phase in the development of the law during 1868-81 and the influence of Western jurisprudence); *see also* Konzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 5 (Arthur T. von Mehren ed., 1963) [hereinafter Takayanagi] (noting sweeping policy changes transforming feudal Japan into a modern state).

The French Code became the foundation of the post-Tokugawa legal system in Japan.[106] However, despite an official government request for a translation of the French Code, the Japanese government did not use it, and instead established a Japanese drafting committee chaired by a French professor, Gustave Boissonade.[107] Boissonade drafted the criminal law which the legislature adopted in 1880.[108] Thereafter, he began to work on property law, with the Japanese committee drafting portions related to traditional mores.[109] Finally, by 1891, the Japanese legislature and the Imperial Diet modified and adopted Boissonade's and the committee's drafts.[110]

Despite its legislative adoption, a faction of Japanese lawyers fought against acceptance of the new code arguing that it did not sufficiently reflect traditional customs and mores.[111] This led the Diet in 1890 to vote for the postponement of its implementation, signalling the decline of French legal influence in post-Tokugawa Japan.[112]

The lower class *bushi* led a liberal political movement that briefly gained popular support as an advocate of individual human rights and capitalism.[113] The government, however, squelched the movement and secretly began drafting a new constitution based on the Prussian model.[114] Under the absolutist Prussian model adopted in 1889, the Emperor granted rights to his subjects who were not considered to have been born with rights, as was the case under the French model.[115]

---

106. *See* Takayanagi, *supra* note 105, at 5-40 (describing the legal institutional and human aspects of the Japanese reception of Western law and denoting the numerous drafts of the new code).

107. Takayanagi, *supra* note 105, at 27-31.

108. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 528-29.

109. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 493.

110. *See* Gustave Boissonade, *Ecole de Droit de Jedo*, REVUE DE LEGISLATION 511, 511 (1874) (conveying Boissonade's opinion that Japan should not adopt purely French law, but should instead adopt any form of Western law which had proven effective in the Western experience). Boissonade also drafted a law on the organization of Japanese courts. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 480. However, in 1891 the Japanese cabinet, the *Genro-In*, chose to adopt a proposal drafted by a German, Otto Rudolf. *Id.*

111. *See generally* KENNETH B. PYLE, THE NEW GENERATION IN MEIJI JAPAN: PROBLEMS OF CULTURAL IDENTITY, 1885-1895 (1969).

112. RICHARD STORRY, A HISTORY OF MODERN JAPAN 107 (1960).

113. *See generally* GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION 61-68 (1957) [hereinafter BECKMANN] (discussing the rise of the democratic movement including the formation of the liberal party, Jixuto, and the Constitutional Reform Party, Rikken Kashinto).

114. *See id.* at 61-66 (discussing the supression of popular protest).

115. *See id.* at 66-68 (discussing the Prussian model).

Another code-drafting committee was commissioned in 1893.[116] The new committee eventually abandoned the scheme of the French Code and substituted it with that of the German Civil Code, the Burgerliches Gestzbuch.[117] In 1898, the Diet adopted the new Five Book code, retaining not only many of Boissonade's provisions, but also borrowing from other European codes.[118]

B. OTHER LEGAL DEVELOPMENTS

1. The Court System

Like the Constitution and codes, the Japanese patterned their revised judicial system after the French system. Unlike the French judiciary, however, the Japanese judiciary did not begin to become independent until an autonomous supreme court, the *Daishinin*, was established in 1875.[119] Once the government adopted the German-based Constitution, the Japanese courts changed to reflect the German influence. Otto Rudolph, a German jurist, drafted the Court Organization Law, which went into effect in 1890, and governed the operation of the Japanese judiciary until the United States occupation following World War II.[120]

Despite a judiciary organized in accordance with a Western European framework, conflict resolution in Japan remained firmly rooted in the past.[121] The Japanese resorted to the more convenient and less expensive informal dispute settlement devices that had functioned in Tokugawa Japan.[122] To encourage the continued use of conciliation, the

116. *See* GENERAL SURVEY OF JAPANESE LEGAL HISTORY, *supra* note 94, at 591 (discussing the variety of codes the committee considered).

117. *See* GENERAL SURVEY OF JAPANESE LEGAL HISTORY, *supra* note 94, at 91 (observing that the commission used the old code with French orientation and made revisions of the new code with reference to the German code).

118. *See* GENERAL SURVEY OF JAPANESE LEGAL HISTORY, *supra* note 94, at 591 (stating that the commission considered civil codes from Holland, Austria, Saxony, Spain, Zurich, Belgium, Russia, Montenegro, Portugal, and California while drafting the Japanese Code).

119. *See* JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 284-86 (offering that the Japanese Supreme Court failed to establish complete judicial independence from the government cabinet, the *Genro-In*). In 1875, regulations were enacted which gave the Justice Minister the authority to dimiss judges. *Id.* at 287. This, according to Ishii, was just one of several factors which prevented the Japanese judiciary from enjoying personal security and independence. *Id.* at 286-87.

120. *See* JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 480.

121. *See generally* Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U.L. REV. 339, 345-47 (1982) [hereinafter *The Judiciary and Dispute Resolution in Japan*] (discussing the feudal principles that still guided Japan in the late 1800s).

122. *See* Zensuke Ishimura, *Empirical Jurisprudence in Japan, in* GLENDON SCHUBERT & DAVID J. DANELSKI, COMPARATIVE JUDICIAL BEHAVIOR 49, 49-50

Justice Ministry established a conciliation procedure called *kankai*, in which dispute resolution methods were patterned after those used in the Tokugawa courts.[123] In fact, an 1875 ordinance provided that Tokugawa custom would apply to civil suits in the absence of an appropriate law[124] — including efforts toward conciliation.[125] Under the traditional procedures of conciliation, or *naizumi*,[126] a party to litigation would first sign an application for conciliation.[127] The parties then had three days to meet and accept or deny mediation.[128] Failure of either party to appear could result in punishment.[129] Thereafter, the parties were granted a certain time period to resolve their dipute.[130]

Formal conciliation procedures emerged in 1922 when the Diet enacted the practice of *chotei* into law in the Land Lease and House Lease Conciliation Law.[131] The law was designed to address problems that arose out of the conflict between traditional customs that governed the feudal landlord-tenant relationship[132] and modern property law concepts contained in the Civil Code, such as freedom of contract and free alienability.[133] The government believed that the Land Lease and House Lease Conciliation Law would both engender harmonious settle-

---

(1969) (discussing the return to informal dispute resolution mechanisms of the Tokugawa period).

123. *See* JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 308-10, 492-93 (explaining the *kankai* procedure).

124. *See* RYOSUKE ISHII, A HISTORY OF POLITICAL INSTITUTIONS IN JAPAN 23-25 (1980) (discussing the *Dajokan* system).

125. *See* JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 308 (stating that the Tokugawa court system accepted conciliation as a means for resolving private disputes).

126. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 308. *Naizumi* is the traditional term for conciliation during the Tokugawa period. *Id.*

127. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 309.

128. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 309.

129. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 309.

130. JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 309-10. Before the time period ended, the applicant for conciliation could request an extension. *Id.* Failure to make a timely request forfeited that applicant's claim in the dispute. *Id.* at 310.

131. *See* NOBURO MIYAZAKI, HISTORY OF THE JAPANESE CONCILIATION SYSTEM 112-18 (1957) [hereinafter MIYAZAKI] (explaining that a *chotei* bill was introduced in the Diet in 1911); *see generally* Tukeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY 41, 46 (Arthur T. von Mehren ed., 1963) [hereinafter Kawashima] (discussing dispute resolution methods used in modern Japan).

132. *See The Judiciary and Dispute Resolution in Japan*, *supra* note 121, at 356-57 (explaining the *chotei*).

133. *See generally* MINPO (Civil Code) OF 1909, art. 617 (stipulating tenants' rights against landlords). Under Art. 617, if the duration of the lease was not fixed, the landlord could terminate the lease at will. *Id.* A tenant in this situation, however, had a three month grace period following the landlord's request. *Id.*

ments and avoid litigation aimed at vindicating individual rights.[134] After the Land Lease and House Lease Conciliation Law, the government enacted a series of laws extending the *chotei* system into other areas of law.[135] Several of the *chotei* laws included a provision allowing the court to issue an order disposing of the controversy if *chotei* failed.[136]

2. *The Meiji Constitution*

The Meiji Constitution,[137] promulgated in 1889, reflected the traditional preference for conciliation over litigation, created a weak judiciary, and modified the role of the divine emperor.[138] The Constitution established an absolute monarchy in which sovereignty resided in the emperor who was designated the head of state and had all executive power.[139] While the Constitution created executive,[140] legislative,[141] and judicial branches,[142] there was no real separation of powers and no mechanism of checks and balances.[143] The Japanese judiciary could not effectively prevent adjudicatory disputes between individuals and the state because the emperor, not the individual, was sovereign under the Constitution.[144] Furthermore, the emperor, through his Minister of Justice, controlled the organization of the judiciary and possessed the power to review all decisions pertaining to political offenses.[145]

---

134. *See* W. KOYAMA, GENERAL SURVEY OF CIVIL CONCILIATION LAW 5-6 (1954) (noting that the government did not look favorably upon the potential explosion in property-related litigation, believing that such litigation emphasized individual rights and, therefore, was not in keeping with traditional Japanese means of dispute settlement).

135. *See* Kawashima, *supra* note 131, at 55 n.35 (noting other laws which incorporated *chotei*).

136. *See* MIYAZAKI, *supra* note 131, at 54-61 (discussing the court's options for using *chotei*, including a procedure called Substitution of Trial for Conciliation).

137. KENPO (Constitution), *reprinted in* JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 105, at 725 app. 11 [hereinafter MEIJI KENPO].

138. *See generally* BECKMANN, *supra* note 113 (providing historical background on Japan's constitutional development from 1868 to 1891); *see also* E. HERBERT NORMAN, JAPAN'S EMERGENCE AS A MODERN STATE 185-90 (1940) (reviewing the impact of the Constitution of 1889 on the government structure and political parties).

139. MEIJI KENPO ch. I.

140. MEIJI KENPO ch. IV.

141. MEIJI KENPO ch. III.

142. MEIJI KENPO ch. V.

143. *See* John M. Maki, *The Japanese Constitutional Style* 43, WASH. L. REV. 893, 896 (1968) (discussing the 1889 Constitution).

144. MEIJI KENPO, ch. I, art. IV.

145. *See* David J. Danelski, *The People and the Court in Japan, in* FRONTIERS OF JUDICIAL RESEARCH 45, 47 [hereinafter *The People and the Court in Japan*] (observing that the Minister of Justice possessed the authority to appoint and remove judges).

3. *Judicial Independence*

Despite its constitutionally limited authority, the judiciary attempted to establish a degree of independence in the *Otsu* case in 1891.[146] In *Otsu*, a Japanese policeman attempted to murder a Russian crown prince who was traveling in Japan, shocking the nation and causing fear of grave repercussions from the Russians.[147] As the Japanese penal code did not punish offenses against members of a foreign royal household, the policeman's crime fell within the jurisdiction of the general murder statute, which carried a maximum penalty of life imprisonment.[148] The Japanese government wanted to employ the death penalty, but the court refused to capitulate to the government's demand and instead sentenced the policeman to life imprisonment.[149] Thus, the *Otsu* case represents the first instance in which the judiciary exercised autonomy from the emperor.[150]

An ultra-nationalist autocracy ascended to power in Japan following the onset of economic depression in 1927 and remained in power through the conclusion of the Second World War.[151] Even during those authoritarian years, the Japanese judiciary did not submit its power to the emperor.[152] In fact, when Prime Minister Tojo once criticized the judiciary for its uncooperative attitude and threatened it with remedial action, a president of one of the courts of appeal sent a letter of protest to him.[153] Although incidents such as this were rare, they did suggest that the Japanese judiciary had established a foundation for independence.

---

146. Takayanagi, *supra* note 105, at 9.

147. Takayanagi, *supra* note 105, at 9.

148. Takayanagi, *supra* note 105, at 9-10 (providing that life imprisonment was the maximum punishment for an ordinary attempt at murder).

149. Takayanagi, *supra* note 105, at 10 (stating that the government wanted the prisoner to receive the death penalty under an application of analogous provisions concerning offenses against the imperial household).

150. *See The Judiciary and Dispute Resolution in Japan*, *supra* note 121, at 346 (stating that the *Otsu* case marked the beginning of Japanese judicial independence).

151. *See The Judiciary and Dispute Resolution in Japan*, *supra* note 121, at 12 (explaining that the seizure of political rule by army extremists and the reinstitution of "bureaucratic absolution" stalled the development of popular parliamentary participation in the 1930s).

152. *See* Takaaki Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, *in* LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY 111, 122 at n.40 (Arthur T. von Mehren ed., 1963) (depicting instances in which the courts refused to convict citizens who had criticized the government).

153. *Id.*

IV. THE POST-WAR YEARS

After Japan's defeat in World War II, the old system collapsed.[154] The American occupation forces, organized under the aegis of the Supreme Commander of Allied Powers, sought to end both the militarism and authoritarianism of its former enemy.[155] The United States wanted to pacify Japan to ensure that it never again would be a foreign policy and military threat.[156] To attain peace, the United States implemented various measures to democratize Japan's political, social, and economic processes and institutions.[157] The occupation planners believed that democracy led to peace, was superior to other political systems, and would liberate the population.[158] One of the first attempts at this experiment in democracy involved the creation of a new constitution for Japan.

A. A NEW CONSTITUTION

The Japanese government worked on several drafts of a new constitution, but in 1946 eventually introduced a version that had been secretly drafted by the Allies.[159] The Emperor officially promulgated the new Constitution in 1946 and it became effective on May 3, 1947.[160]

Popular sovereignty, individual rights, and the separation of powers were three major ideals of the Constitution. Unlike the Meiji Constitu-

---

154. *See* HALL, *supra* note 22, at 352 (stating that the new constitution, which was adopted in 1947, "fundamentally" altered the political structure in Japan. *Id.*

155. United States Initial Post-Surrender Policy for Japan, 13 DEP'T STATE BULL. 423 (1945).

156. *See* HALL, *supra* note 22, at 351-52 (outlining United States efforts to demilitarize Japan). Hall points out that, after World War II, the United States occupation force had three primary objectives: demilitarization, democratization, and rehabilitation. *Id.* at 351. The demilitarization effort resulted in the complete destruction of Japan's armed forces and military industrial base, dissolution of the ministries of the army and navy, and the complete surrender of all wartime gains. *Id.* Additionally, over 180,000 Japanese leaders were removed from office, and 25 officials were prosecuted for war crimes. *Id.*

157. *See* Kurt Steiner, *Foreword* to ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN, vii (1976) (detailing that the occupation planners found legal support for their attempts to democratize Japanese institutions in the Japanese acceptance of the Potsdam Declaration and the Instrument of Surrender).

158. *See id.* at vii-viii. MacArthur wrote: "History will clearly show that the entire human race, irrespective of geographical limitations or cultural tradition, is capable of absorbing, cherishing and defending liberty, tolerance, and justice, and will have maximum strength and progress when so blessed." *Id.* at viii.

159. *See* ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN, 43-49 (1976) (evaluating Allied influence in drafting the Japanese Constitution and efforts toward forcing the nation to accept its provisions).

160. *Id.* at 52.

tion, the 1947 Constitution gave sovereignty to the people, rather than vesting it in the Emperor.[161] This new document guaranteed to the Japanese people, among other things, equal protection under the law,[162] universal adult suffrage,[163] freedom of thought and conscience,[164] freedom of assembly and association,[165] and academic freedom.[166] The 1947 Constitution also provided that all people could have access to the courts[167] and further established separation of powers among the three branches of the government, thereby dramatically reducing the Emperor's power.[168] The document expanded the power of the judiciary in two ways: (1) it established an independent judiciary with rule-making power led by the *Saikosai* (Supreme Court), and (2) it allowed for judicial review of legislative and executive decisions.[169]

B. THE JUDICIARY

1. Judicial Review

The judiciary, like the other branches of government, was not accustomed to using this new-found power of judicial review.[170] Japanese legal scholars were divided on whether the *Saikosai* should exercise judicial review under the United States case or controversy scenario[171] or, under the continental form as practiced in Austria and West Germany, where judicial review occurs only at the invitation of certain executive and legislative bodies.[172] The confusion over the legislative in-

161. 1947 KENPO (CONSTITUTION) preamble [hereinafter 1947 KENPO].
162. *Id.* art. 14.
163. *Id.* art. 15.3.
164. *Id.* art. 19.
165. *Id.* art. 21.
166. *Id.* art. 23.
167. *Id.* art. 32.
168. *Id.* arts. 41, 65, 76. The 1947 Constitution reduced the Emperor's role to that of a figurehead. *Id.* arts. 1-8. The Emperor was limited to engaging in actions only to the extent provided for in the Constitution. *Id.* art. 4. In fact, the Constitution granted the Emperor no governmental powers and he could only act with regard to matters of state after consultation with the Cabinet. *Id.* arts. 3-4.
169. *See The People and the Court in Japan*, *supra* note 145, at 49 (noting that the 1946 Constitution instituted four major reforms concerning the judiciary); Daniel Fenno Henderson, *Japanese Judicial Review of Legislation: The First Twenty Years*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67 115 (D. Henderson ed., 1968) (observing that the judiciary's new power derived from two ideas included in the 1947 Constitution: (1) popular government necessarily implies government restricted by law; and (2) any law, constitutional or otherwise, provides justiciable rights in the courts of law).
170. Henderson, *supra* note 169, at 115.
171. U.S. CONST. art. III, § 2.
172. *See* Henderson, *supra* note 169, at 120 (distinguishing Austrian and West German practice).

tent was the basis for this scholarly debate which was so important for constitutional interpretation.[173]

In the 1948 case of *Komatsu v. Japan*, the *Saikosai* in dicta, rejected the continental form of review.[174] In 1952, in *Suzuki v. Japan*,[175] the *Saikosai* formally rejected the continental form of review in favor of the case or controversy approach, declaring that it could exercise judicial review with respect to constitutional questions only if such questions arose in a legal case or controversy.[176] Some members of the dissent argued that if the court adhered to the American form of review, it would dominate the other branches of government and thus, usurp their authority.[177]

Despite its legitimate independence, the *Saikosai* has only reluctantly exercised its new-found power of judicial review.[178] In the first sixteen years after the adoption of the 1947 Constitution, the court declared only two statutes unconstitutional.[179] First, in the 1953 case of *Sakagami v. Japan*, the Supreme Court declared an act of the Diet unconstitutional.[180] This decision, however, had little practical significance because the law was no longer in effect at the time it was declared unconstitutional.[181]

The second time the court invalidated a Diet enactment was in the 1962 case of *Nakamura v. Japan*.[182] Nakamura was one of a group of individuals who tried to smuggle textiles from Japan to Korea.[183]

---

173. *See* Henderson, *supra* note 169, at 120 (explaining that the scholars who supported the continental form of review argued that Article 81's specific grant of judicial review to the *Saikosai* transformed it into a constitutional court).

174. Komatsu v. Japan, 2 Keishu 801, 806 (Saikosai, Sup. Ct., 1948), *reprinted in* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME DECISIONS 1948-60 362-65 (1964). The court declared that "Article 81 of our Constitution should be characterized as an explicit provision adopting the type of judicial review which has been established by the United States by way of mere interpretation of the Constitution." *Id.*

175. Suzuki v. Japan, 6 Minshu 783 (Saikosai, Sup. Ct., 1952).

176. *Id.*

177. *Id.* at 784-85.

178. *See* David J. Danelski, *The Political Impact of the Japanese Supreme Court*, 49 NOTRE DAME L. REV. 955, 959 (1974) [hereinafter *The Political Impact of the Japanese Supreme Court*] (contending that the *Saikosai* avoided reviewing the constitutionality of crucial statutes and treaties through classifying such cases as nonjusticiable political questions).

179. *Id.* at 960.

180. Sakagami v. Japan, 7 Keishu 1562 (Saikosai, Sup. Ct., 1953).

181. *Id. See also* Daniel Fenno Henderson, *Japanese Judicial Review of Legislation: The First Twenty Years*, 43 WASH. L. REV. 1005, 1017-28 (1968) (discussing the *Sakagami* decision).

182. Nakamura v. Japan, 16 Keishu 1593 (Saikosai, Sup. Ct., 1962).

183. *See The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 960 (dicussing the facts of the *Nakamura* case).

Nakamura and his cohorts were captured and the textiles confiscated pursuant to Article 118(1) of the Customs Law.[184] The textiles' owner appealed, contending that his property had been seized unconstitutionally because Article 118(1) did not provide notice and a hearing as stipulated in the 1947 Constitution.[185] The *Saikosai* concurred and found that Article 118(1) violated Articles 29 and 31 of the 1947 Constitution.[186]

The judiciary did not use judicial review to invalidate a statute again until 1973 in the *Naganuma Nike* case.[187] In *Naganuma Nike*, a district court held that Article 9[188] of the 1947 Constitution prohibited the establishment of the Japanese Self Defense Force because it was an army with war-making potential.[189] Since 1976, however, no court has used judicial review to declare any statute or other official act unconstitutional.

2. *Recent Trends in Judicial Review*

The Japanese judiciary has received much criticism for its reluctance to exercise judicial review. The Japanese Court invalidated only five statutes in its first thirty years.[190] By comparison, however, the United States Supreme Court invalidated congressional acts only twice in its first sixty-eight years.[191] Also, beginning in the early 1970s, Japanese courts changed their attitude towards the use of judicial review.

---

184. *See The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 960 (describing art. 118(i) of the Customs Law).

185. *The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 960.

186. 1947 KENPO art. 29. Article 29 declares that the right to own or hold property is safe from violation. *Id.* Article 31 states that no person shall be deprived of life except according to legal procedures. *Id.* art. 31.

187. Naganuma Nike v. Japan, 298 Hanta 40 (Chisai, Dist. Ct., 1973).

188. *See* 1947 KENPO art. 9.2 (containing Japan's constitutional pledge not to maintain an army, navy, air force, or other war potential).

189. *See* William R. Slomanson, *Judicial Review of War Renunciation in the Naganuma Nike Case: Juggling the Constitutional Crisis in Japan*, 9 CORNELL INT'L L.J. 24, 24 (1975) (discussing the facts of the *Naganuma* case).

190. Sakagami v. Japan, 7 Keishu 1562 (Saikosai, Sup. Ct., 1953); Nakamura v. Japan, 16 Keishu 1593 (Saikosai, Sup. Ct., 1962); Aizawa v. Japan, 27 Keishu 265 (Saikosai, Sup. Ct., 1973); K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, 665 Saibanshu 1, (Saikosai, Sup. Ct., 1975); Kurokawa v. Chiba Prefecture Election Commission, 30 Minshu 223 (Saikosai, Sup. Ct., 1976).

191. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

For example, *Aizawa v. Japan*,[192] decided in 1973, questioned the constitutionality of Penal Code Article 200,[193] which mandated a more severe penalty for murder of a family member than for an otherwise ordinary homicide. Although a similar statute[194] was upheld in 1950,[195] *Aizawa* declared Article 200 unconstitutional because it violated the 1947 Constitution's equal protection clause.[196] Both the 1950 and the 1973 cases involved a clear conflict between traditional moral principles, such as devotion to the family, and universal values, such as equal protection. With only one dissenting vote, the 1950 Court upheld a similar provision because of the strong social and moral issues involved.[197] In contrast, the 1973 Court voted fourteen to one to overturn the penalty provision, and six of the justices argued that any difference in penalty based on family ties violated the Constitution.[198] This clearly reflected the Court's changing attitude.

Similarly, in *K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*,[199] the *Saikosai* declared unconstitutional a statutory provision which prevented new pharmacies from opening within one hundred meters of existing pharmacies.[200] The *Saikosai* applied a balancing test and ruled that adequate licensing and inspection controls existed to protect the public from contaminated drugs, and that any additional protection that might have resulted from geographical restrictions on location did not outweigh limiting the constitutional right to pursue any occupation.[201] *Sumiyoshi* is important for three reasons: (1) it was the first time a prior *Saikosai* constitutional decision had been overruled; (2) it was the first occasion on which economic legislation had been struck down; (3) it was the first time that a statute's unconstitutionality

192. Aizawa v. Japan, 27 Keishu 265 (Saikosai, Sup. Ct., 1973); *see also* John Owen Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion*, 8 L. IN JAPAN 188, 188 n.1 (1975) [hereinafter *The Freedom to Choose*] (discussing the *Aizawa* case).

193. KEIHO (Penal Code) OF 1947, Law No. 200.

194. KEIHO (Penal Code) OF 1947, Law No. 205.

195. Japan v. Yamato, 4 Keishu 2126 (Saikosai, Sup. Ct., 1950); see also John Owen Haley, *Recent Developments*, 6 L. IN JAPAN 173, 173-74 (1973) [hereinafter *Recent Developments*] (dicussing the *Aizawa* and *Yamato* decisions).

196. 1947 KENPO, *supra* note 162, art. 14.

197. *See Recent Developments*, *supra* note 195, at 174 (comparing the *Aizawa* and *Yamato* decisions).

198. Aizawa v. Japan, 27 Keishu 265 (Saikosai, Sup. Ct., 1973).

199. 665 Saibanshu 1 (Saikosai, Sup. Ct., 1975).

200. *Id.*

201. *Id.*

had a prospective impact because other licensing statutes[202] contained similar geographical restrictions.

In *Kurokawa v. Chiba Prefecture Election Commission*, the *Saikosai* declared unconstitutional a statute involving an apportionment plan for the Diet's lower house.[203] Despite a large post-war shift in population from rural to urban areas, the Diet reapportioned its lower house only twice, in 1964 and 1975.[204] Consequently, the rural districts possessed more relative voting power than the urban districts.[205] Despite this inequality, the *Saikosai*, in the 1964 case of *Ishiyama v. Tokyo Prefecture Election Commission*, rejected a claim of unconstitutionality of a particular apportionment scheme.[206] In that case, the *Saikosai* determined that the disparity in voting power did not reach the point where it was a constitutional problem.[207] Yet, only eight years later, the *Kurokawa* court held that the apportionment plan at issue violated not only the equal protection clause, but also the constitutional guarantees regarding universal suffrage and nondiscriminatory treatment of political candidates.[208] The *Kurokawa* decision is noteworthy because it represents an aggressive exercise of judicial review; the Court will pressure the Diet and if it does not respond, the *Saikosai* may take action itself.

3. *Changes in the Judiciary*

Several factors have contributed to a more active judiciary. The composition of the judiciary has changed; older judges who trained and served for a time under the Meiji Constitution slowly have been replaced by younger individuals who are more inclined to embrace liberal ideologies and institutions.[209] Additionally, the judiciary has gained

---

202. *See, e.g.*, Shimizu v. Japan, 9 Keishu 89 (Saikosai, Sup. Ct., 1955) (upholding a law requiring people to obtain licenses before operating a public bath). *See also The Freedom to Choose*, *supra* note 192, at 191 (discussing the *Shimizu* case).

203. Kurokawa v. Chiba Prefecture Election Comm'n, 30 Minshu 223 (Saikosai, Sup. Ct., 1976).

204. *Id.*

205. *Id.*

206. Ishiyama v. Tokyo Prefecture Election Comm'n, 18 Minshu 270 (Saikosai, Sup. Ct., 1964). The claimants' position was that the apportionment scheme in question violated the 1947 Constitution's equal protection clause. *Id.*

207. *Id.*

208. Kurokawa v. Chiba Prefecture Election Comm'n, 30 Minshu 223 (Saikosai, Sup. Ct., Apr. 14, 1976).

209. *See The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 963-65 (noting that in the mid-1960's, a younger and more progressive group of judges began to emerge in the lower judiciary). About 200 of these younger judges belonged to the liberal Young Jurists Association. *Id.* at 964.

prestige as an institution. Prior to World War II, the judiciary was under the control of the Minister of Justice and was considered to be at the bottom of the bureaucratic hierarchy.[210] Today, judges are viewed as full-fledged government officials.[211] Also, the *Saikosai's* power of judicial appointment has contributed significantly to the increased activity of the Court.[212] Under the 1947 Constitution, the Cabinet is required to appoint judges from a list of nominees developed by the *Saikosai* and subject to the Prime Minister's veto.[213] In the early 1970s, several individuals endorsed by the Court prevailed over the objections of the Prime Minister.[214] In addition to these factors, the increased judicial activity is also attributed to the presence of more professional and well trained judges on the Court.[215]

C. THE CONTINUING ROLE OF CONCILIATION

Adjudication of disputes is still suspect in modern Japan for various reasons. First, because many Japanese still consider court appearances shameful, conciliation remains the preferred method of non-corporate dispute resolution.[216] In fact, a person who does not observe the *giri-ninjo* (rules of behavior), but instead advances his own interests through the courts, heaps scorn upon himself and his family.[217] Second, social status also plays a substantial role in determining whether to use the courts for dispute resolution;[218] those individuals whom Japanese society perceives as inferior within the class structure defer to those

---

210. *See The People and the Court in Japan*, *supra* note 145, at 47-48 (describing the low status of Pre-World War II judges who were not trained and were also slowly promoted, resulting in the most able judges accepting administrative jobs in the Justice Ministry).

211. *See The People and the Court in Japan*, *supra* note 145, at 47 (describing pre-war Japanese judges as "step-children of the bureaucracy" due to their low prestige and visibility).

212. *See The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 962 (discussing the Court's power over judicial appointments).

213. 1947 KENPO art. 80.

214. *See The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 962-63 (stating that the *Saikosai* also influences the Cabinet with respect to the appointment of new *Saikosai* members).

215. *See* Minoru Shikita, *Law Under the Rising Sun*, 20 JUDGES' J. 42, 45-46 (1981) (detailing the training of Japanese judges).

216. *See* DAVID & BRIERLEY, *supra* note 24, at 458 (explaining that apart from large organizations, one does not assert one's rights through use of the courts).

217. *Id.*

218. *See* Kahei Rokumoto, *Problems and Methodology of Study of Civil Disputes*, 5 L. IN JAPAN 97, 102-107 (1972) (discussing influences affecting the Japanese desire to avoid litigation).

whom society perceives as superior.[219] Finally, the Western concept of individual rights conflicts with Confucian ideal of a natural human hierarchy, a powerful part of Japanese life.[220]

Examples of the continued influence of Confucian values abound in modern-day Japan. Creditors request, not demand, that debtors meet their obligations.[221] As in earlier times, when one party apologizes, the other forgives. To many Japanese, the disharmony created by suing another person is similar to extortion,[222] and thus Japanese courts spend a great deal of their time settling disputes through conciliation.[223]

The Civil Conciliation Law (CCL),[224] enacted in 1951, formally introduced conciliation into the post-war Japanese civil code. The CCL provides a mechanism for resolving disputes concerning all civil matters[225] except domestic relations, which has its own conciliation law,[226] and labor disputes. It further confers on any of the 570 summary courts, known as *Kansai*, jurisdiction over conciliation cases unless the parties designate a district court.[227] A party may request that a conciliation case be convened by filing a proposal and paying a small fee,[228] or the court may so designate a case before it.[229] A court generally manages a conciliation case with the help of a *chotei*, a conciliation committee, although the judge is permitted to manage the case alone.[230] The committee hears the case over a long period, often continuing for months. The parties may be accompanied by attorneys.[231] Most hearings begin with the chairman, usually a judge, introducing those assem-

219. *See* DAVID & BRIERLEY, *supra* note 24, at 453 (describing the *giri* as the "instructions" of superiors to inferiors).

220. *See* DAVID & BRIERLEY, *supra* note 24, at 458 (describing the conflict between Japanese tradition and Western legal concepts).

221. *See* DAVID & BRIERLEY, *supra* note 24, at 458 (stating that although the law allows it, few Japanese will use the courts to resolve interpersonal conflicts).

222. DAVID & BRIERLEY, *supra* note 24, at 458 (explaining that many Japanese consider enforcing a legally acceptable claim the equivalent of extortion).

223. *See* DAVID & BRIERLEY, *supra* note 24, at 458 (stating that the Japanese find it distasteful to allow emotions to interfere with reason, thus prefering conciliation).

224. MINPO (Civil Code), Law No. 222 of 1951, [MINPO No. 222], *translated in* 2 Daniel Fenno Henderson, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 305 (1965).

225. *Id.* art. 2.

226. *See* SHOICHI ICHIKAWA, GENERAL SURVEY OF THE LAW FOR SETTLING FAMILY AFFAIRS 55 (1954) (discussing conciliation law for domestic relations).

227. MINPO No. 222 art. 3. The case is initially heard at the Kansai with jurisdiction over the domicile, residence, place of work, or office of the defendant. *Id.*

228. *Id.* art. 10. The fee can not be greater than 100 yen for each 10,000 yen representing the amount in controversy. *Id.* art. 10, § 2.

229. *Id.* art. 20.

230. *Id.* art. 5, § 1. A judge may not, however, manage a case alone when the parties involved request a committee format. *Id.* art. 5, § 2.

231. *Saiko Saibanshoi* (Supreme Court) of Japan, Supreme Court Rules, Rule 8.

bled and explaining the spirit and purpose of *chotei* proceedings, emphasizing the difference between *chotei* and a standard lawsuit.[232] The judge asks that conciliators act in a fair and unbiased manner and stresses the confidential nature of the proceedings.[233] After the introduction, the chairman and the committee members question each party, dismiss them, and decide what action to take.[234] The committee devises appropriate settlements with, preferably, several alternatives.[235] Subsequent hearings persuade the parties to make concessions and reach a mutually agreeable solution.[236] After an agreement is reached, the parties commit the settlement to writing which becomes binding and judicially enforceable.[237] Should *chotei* fail, the parties have two weeks to file a lawsuit.[238]

The Japanese government strongly encourages conciliation and supports the education and training of conciliators.[239] Although conciliators receive only nominal fees,[240] many people are anxious to serve in these prestigious positions. Conciliators have guidelines for hearings and are encouraged to avoid becoming angry, favoring one side, or not transmitting even the unreasonable views of a party.[241]

While the courts in Japan are busy with standard lawsuits, the judiciary's primary function, according to the CCL is to encourage conciliation.[242] The CCL, however, is not the only impetus causing the judiciary to gravitate towards conciliation. Many Japanese judges, particularly the older ones, harbor Confucian values and view themselves as advocates of harmony and compromise.[243] Although concilia-

232. *Id.* Rule 12.

233. *Id.*

234. *Id.* Rule 18.

235. *Id.* Rule 12.

236. *Id.* Rule 18.

237. MINPO No. 222, art. 16.

238. *Id.* art. 19.

239. *See* SOKICHI TSUDA, THE NATURE OF CONCILIATION 6 (1953) (explaining that the government sponsors conciliators' associations to encourage participation).

240. MINPO No. 222, art. 9.

241. *Id.*

242. *See* Kawashima *supra* note 131, at 55, 69 (table 12) (detailing the 1957-59 figures for conciliation cases). During those three years, the *Chisai* and *Kansai*, combined, received approximately 15,000 leasehold-related lawsuits. *Id.* at 69 (table 12). During those same three years, 24,000 leasehold-related disputes were conciliated annually. *Id.*

243. *See The Political Impact of the Japanese Supreme Court*, *supra* note 178, at 968 (discussing the *Saikosai's* crackdown on the liberal members of the lower judiciary).

tion is the preferred method of dispute resolution, compromise is advocated even in standard lawsuits.[244]

Even so, critics maintain that the apparent lack of litigiousness is the result of institutional constraints rather than any overwhelming obeisance to Confucian preferences for conciliation. For example, Yukio Yanagida insists that "[t]he idea that Japanese people do not pursue their self-interest in the courts because of a cultural preference for harmony does not make sense to anyone who knows many Japanese."[245] Such critics point to long delays that face litigants,[246] generally forcing them to seek recourse from alternative mechanisms[247] such as insurance company claim centers, consumer centers, and direct negotiations with defendant-companies.[248] The delays in formal legal proceedings stem largely from a dearth of litigators, known as *bengoshi*, and judges.[249] There are 14,000 *bengoshi* in Japan — 11.5 for every 100,000 people.[250] The government is responsible for their numbers. It controls the bar exam which law graduates must pass to enter the Legal Training and Research Institute, the state-run *bengoshi* training school.[251] Only 600 are allowed to pass each year out of the more than 23,000 applicants.[252] Typically, 400 of those who pass become *bengoshi* while the remainder become public prosecutors or judges.[253] In addition to the lengthy delays faced by litigants, exorbitant retainer and court filing fees, which all must be paid in advance, contribute to the reliance on alternative dispute resolution mechanisms.[254] Critics thus maintain

244. *See* DAVID & BRIERLEY, *supra* note 24, at 458 (asserting that the judiciary's most important function is conciliation and not adjudication).

245. *Litigation in Japan*, at 14, *in On Trial: A Survey of The Legal Professsion*, THE ECONOMIST, July 18, 1992, at 52 [hereinafter *Survey of the Legal Profession*].

246. Susan Chira, *Litigants in Japanese Courts Encounter Lengthy Delays*, CHIC. DAILY L. BULL. Sept. 2, 1987, at 1.

247. *See generally* David Przeracki, *"Working it Out": a Japanese Alternative to Fighting It Out*, 37 CLEV. ST. L. REV. 149, 163-66 (1989) (discussing the role of "reconciliation" versus "conciliation" in contemporary Japanese society).

248. *Survey of the Legal Profession*, *supra* note 245, at 14.

249. Christopher Grassi, *How to Count Japan's Lawyers*, LEGAL TIMES, April 8, 1992, at 22; Pete Landers, *Japan's Few "Real" Lawyers Just Bit Players*, L.A. DAILY J., July 30, 1991, at B1.

250. *Survey of the Legal Profession*, *supra* note 245, at 13.

251. *Survey of the Legal Profession*, *supra* note 245, at 13.

252. *Survey of the Legal Profession*, *supra* note 245, at 13.

253. *See* Percy Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 L. & CONTEMP. PROBS. 135, 152 (1990) (stating that court dockets in Japan are overcrowded because of the low number of judges that are available to hear cases).

254. *See Survey of the Legal Profession*, *supra* note 245, at 13 (suggesting that the Japanese people often resort to insurance programs or special compensation funds in an effort to avoid the much more costly and time consuming demands of litigation); *see also* Nobutoshi Yamanouchi & Samuel Cohen, *Understanding the Incidence of*

that were the number of those allowed to pass the bar exam increased, there would be a concomitant rise in litigation.[255] Bowing to some pressure, the Ministry of Justice agreed to increase to 700 the number of those allowed to pass in 1993 but reformers charge that 2000 would be a better figure.[256]

While the current resort to alternative dispute resolution mechanisms may indeed be the result of an artifically low number of judges and lawyers, insistence that the Japanese do not favor conciliation is flawed. The fact that the government refuses to enact far-reaching legal reforms is, itself, strong evidence of an overwhelming official preference for conciliation over litigation. This may be the product of the close relationship between government and industry in Japan. Clearly, powerful segments of Japanese society still favor conciliation, although the day may come when this current position gives way to growing litigiousness.

V. CONCLUSION

Despite the many changes occurring in the Japanese judiciary, traditional attitudes and values remain influential. Popular disapproval, shame on the part of the victim, and an emphasis on apology continue to be factors discouraging litigation. Although litigation is increasing in Japan, the number of cases litigated remains relatively low.[257] Most disputes do not reach the courts. Those that do are often settled in a traditional manner under the judge's guidance. Western law has furnished the framework for Japanese law, but has not substantially undercut the traditional values of harmony and conciliation. Yet, there are signs that such enduring values may lose their allure. Having experienced the radical transformation of their society, the Japanese may be on the verge of casting tradition aside and plunging headlong into the stormy seas of litigiousness and judicial review.

Litigation in Japan: A Structural Analysis, 25 INT'L LAW. 443, 447-49 (1991) (noting that contingency arrangements, which allow lower-income plaintiffs to pursue claims, are generally avoided in Japan in favor of often prohibitively exorbitant retainer fees).

255. *Survey of the Legal Profession*, *supra* note 245, at 15.

256. *Survey of the Legal Profession*, *supra* note 245, at 15.

257. *Japanese Aversion to Filing Lawsuits is Declining*, CHIC. DAILY L. BULL., Aug. 29, 1985, at 1; *see also* Donald L. Uchtmann et al., *The Developing Japanese Legal System: Growth and Change in the Modern Era*, 23 GONZ. L. REV. 349, 356-59 (1988) (noting that the restrictive admissions policy of the Legal Training and Research Institute will continue to depress the volume of Japanese litigation, but at the cost of limiting an individual's access to the courts); J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEG. STUD. 263, 267 (1989) (stating that fewer cases per capita are litigated in Japan that in most common-law countries).