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Andrew M. Pardieck

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LAYERS OF THE LAW: A LOOK AT THE ROLE OF LAW IN JAPAN TODAY

Andrew M. Pardieck[†]

Abstract: In 1967, Professor Kawashima wrote about a world of vaguely defined rights and norms in Japan. This article argues that world still exists. But it now co-exists with a world that commonly defines rights, in great detail, and regularly invokes them. There are layers of the law in Japan. Primary ordering of relationships and services is often based on complex, legalistic contracts and regulation; secondary ordering is often based on equity, Japanese notions of equity.

Examples from contract, employment, and environmental law and practice illustrate this. For each, this paper examines both sides of the coin—transactional ordering and litigated outcomes. Leases may be so detailed that they address liability for a broken toilet paper holder. Yet, if challenged in court, leases may be re-written to reflect current economic circumstances or the “consensus of society.” Employment contracts may start with indemnification requirements and end with termination rights, but if they are litigated, the courts will look for just cause. Volumes of regulation govern when a nuclear reactor may operate, but the final decision is based on a “gentlemen’s agreement” and local consensus.

As a result, negotiation occurs first in the shadow of detailed rights and obligations, and, if contested, then in the shadow of law, equity, and local consensus. The role of law in Japan has changed enormously since 1967, and will change in the decades to come, but an accurate description of what it is now starts with Professor Kawashima’s discussion of vaguely-defined rights and an understanding of the layers of the law described in this paper.

[†] Andrew M. Pardieck, Assistant Professor of Law, Southern Illinois University School of Law. With thanks to the participants at the Festschrift Conference in Honor of Professor John O. Haley, and in particular, Professors John Haley, Mark Ramseyer, and Mark Levin for their helpful comments and suggestions. Professors Nobuhisa Segawa, Luke Nottage, and Trevor Ryan also graciously offered their time and suggestions. Any errors or omissions are solely mine. Translations are mine where English language sources are unavailable.

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I. INTRODUCTION

What is the role of law in a society where a residential lease contract is so involved that it addresses toilet paper holders and shower hoses, yet an unwritten “gentlemen’s agreement” governs operation of a nuclear power plant? What is the role of law in a society where fifty-page contracts governing employee relationships ignore decades of clearly established law? How does one make sense of law in a society with a rapidly declining general population and a rapidly increasing population of legal professionals, or one with increasingly broad application of criminal law and a decreasing prosecution rate?

The writings on law and society in Japan are voluminous, but none adequately answer these questions and describe the Japan that exists today. One can't ride the subways in Japan now without seeing advertisements for attorneys. One can't watch the news without hearing of Japanese who are no longer willing to wait for or trust the government. One can't sign a lease or a services contract without sensing a gap between the academic literature and the Japan that exists today. Working, living, or even visiting Japan leaves one with the visceral sense that law in Japan is changing. This article looks to explain some of those changes and proposes a different framework for understanding the role that law plays in Japan today.

It does so by addressing both public and private law subjects and examining both sides of the legal coin—transactional issues as well as dispute resolution. Doing so suggests an explanation for how law functions in Japan that differs from those offered by Professors Kawashima, Haley, Ramseyer, and others who have commented on the “legal consciousness” (*hō ishiki*) of the Japanese.

In 1967, Professor Kawashima published his work on the legal consciousness of the Japanese, *Nihonjin no Hōishiki*, and it has been the subject of debate since.¹ Despite wide criticism, it remains relevant—in part. Professor Kawashima described a “pre-modern legal consciousness” in Japan that created a rift between Japan's modern codes, particularly the Civil Code, and the world in which most Japanese lived.² He pointed to a fundamental “gap” between “law at the normative level” and “law at the [black] letter level.”³ The Japanese, according to Professor Kawashima, have a weak sense of individual rights.⁴ While rights under modern law are based on objective standards defined at the level of the individual, Japanese norms “compromise towards reality.”⁵ He points repeatedly to rights that “exist but don't exist” (*aru yō na/nai yō na*).⁶

¹ See TAKEYOSHI KAWASHIMA, *NIHONJIN NO HŌISHIKI* iv (1967) [hereinafter KAWASHIMA, *NIHONJIN NO HŌISHIKI*]. Professor Kawashima published a second, revised edition in 1987. *Id.* Professors Feldman and Nottage have both summarized and reflected on this debate. See generally Eric A. Feldman, *Law, Culture, and Conflict: Dispute Resolution in Postwar Japan*, in *LAW IN JAPAN: A TURNING POINT* 50 (Daniel H. Foote ed., 2007); Luke Nottage, *The Cultural (Re)Turn in Japanese Law Studies*, 39 *VICTORIA U. OF WELLINGTON L. REV.* 755, 761-766 (2008). See also Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn To Litigation*, 35 *J. LEGAL STUD.* 31, 33-36 (2006).

² KAWASHIMA *NIHONJIN NO HŌISHIKI*, *supra* note 1, at 4-5.

³ *Id.* at 197-98.

⁴ See *id.* at 15, 17, 19, 29. No term for “rights” even existed prior to the Meiji Reformation. *Id.* at 16.

⁵ *Id.* at 22-29.

⁶ *Id.* at 93, 104, 116, 139, 151.

According to Professor Kawashima, while modern Japanese property law recognizes comprehensive and exclusive ownership rights, traditional Japan does not.⁷ Urban Japanese leasing storage space in rural villages during World War II found farmers wearing their clothing and using the items being “stored.”⁸ While modern contract law is premised on clear, specific definitions of rights and obligations, Japanese practice is based on informal agreements “where there is and there isn’t a contract,” and “where there is and there isn’t a promise.”⁹ Storeowners who refuse to take back a purchased item are “rigid and heartless.”¹⁰ A government purchaser is a superior party and expected to be receptive to entreaties by an inferior contractor to modify the contract.¹¹ Promises are dependent on relationships,¹² and the contracts that result are indefinite, with “tentative” (*ichō*) rights and liabilities.¹³

Professor Kawashima described dispute resolution in similar terms. While courts find facts and clearly define rights, the Japanese prefer rights and obligations that “exist but don’t exist.”¹⁴ In conciliation, rights and obligations are tentative and those unwilling to give ground heartless and unyielding.¹⁵ The goal is “a rounded resolution” (*maruku osameru*), without a determination of rights, which preserves the relationship and community.¹⁶

Professor Kawashima also predicted change. He predicted an increase in rights consciousness, leading to an increase in litigation.¹⁷ He anticipated an increase in appeals to “legal standards,” an increase in demand for authoritative decisions defining clear, fixed rights, and notions of individual equality taking precedent over social relationships.¹⁸

Many have taken exception to Professor Kawashima’s description, in particular, his suggestion of a cultural proclivity for conciliation rather than litigation and a cultural preference for vague agreements over clear contracts. Professor Haley came first, suggesting that there is no evidence

⁷ *Id.* at 66-69, 73.

⁸ *Id.*

⁹ *Id.* at 87, 93.

¹⁰ *Id.* at 94. An urban housewife who criticizes a farmer for selling potatoes that were promised to her to another “lacks common sense.” A promise is a promise but it depends on the relationship. If it’s between relatives or people of the same village, it is given greater weight. *Id.* at 92.

¹¹ *Id.* at 1-2, 107, 116.

¹² *Id.*

¹³ *Id.* The Japanese avoided specific, definite contracts because they precluded “flexibility” (*yūtsū*), “entreaty” (*kongan*), and “favor” (*onkei*). *Id.* at 117.

¹⁴ *Id.* at 139.

¹⁵ *Id.* at 151.

¹⁶ *Id.* at 160, 167.

¹⁷ *Id.* at 186.

¹⁸ *Id.* at 187-88, 197.

that the Japanese have a cultural aversion to litigation causing them to accept mediated settlements less beneficial than judicial outcomes.¹⁹ Surveys of Japanese suggest a willingness to sue, and surveys of Japanese history suggest a pattern of litigation.²⁰ The difference in post-World War II Japan is institutional incapacity. While there are social organizations conducive to informal dispute resolution, there is not meaningful access to the courts.²¹

Professor Ramseyer has suggested that neither primacy of culture nor primacy of costs explain low litigation rates in Japan.²² According to Professor Ramseyer, “the popular notion that the Japanese behave in ways uncorrelated to judicial outcomes is flatly false.”²³ According to Professor Ramseyer, empirical evidence on litigation rates and settlement verdicts for automobile accidents demonstrates a decreased need for formal judicial process.²⁴ Japanese settle disputes in light of readily predictable litigation outcomes.²⁵ They bargain in the shadow of the law, and they do so because of efficiency, not inefficiency, in the formal process.²⁶

Other Japanese law scholars have built on this discussion. Some have offered “a political perspective.”²⁷ Professor Upham, reviewing the government’s attempts to resolve the pollution cases of the 1960s and 1970s, suggested that the Japanese State encouraged mediation and conciliation as a means to control disputes.²⁸ Professor Tanase analyzed automobile accident

¹⁹ John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. OF JAPANESE STUDIES 359, 366-367 (1978).

²⁰ *Id.* at 368; see also JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 83 (1994); CARL STEENSTRUP, *A HISTORY OF LAW IN JAPAN UNTIL 1868* 80-107 (E.J. Brill ed., 1991). Both discuss extensive litigation during the Ashikaga and Tokugawa periods, as well as the early Showa era.

²¹ Haley, *The Myth of the Reluctant Litigant*, *supra* note 19, at 379-80. Professor Haley cites to bond-posting requirements, filing costs, clogged courts, and a lack of remedies, as discouraging use of formal process, while the effectiveness of third-party intervention lessens the need. *Id.* at 378-87.

²² J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, XVIII J. LEGAL. STUD. 263, 267-68 (1989) [hereinafter Ramseyer & Nakazato, *The Rational Litigant Settlement Amounts and Verdict Rates in Japan*].

²³ J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* XVII (1999) [hereinafter RAMSEYER & NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH*].

²⁴ Ramseyer & Nakazato, *The Rational Litigant Settlement Amounts and Verdict Rates in Japan*, *supra* note 22, at 280-81, 289-90. Professor Foote has suggested generalization based on traffic accident data is “dangerous.” See generally Daniel H. Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 LAW IN JAPAN 19 (1995). Professor Ramseyer has argued broader applicability. See J. Mark Ramseyer, *The Effect of Universal Health Insurance on Malpractice Claims: The Japanese Experience*, 2 J. LEGAL ANALYSIS 621, 656 n. 2 (2010) [hereinafter Ramseyer, *The Effect of Universal Health Insurance on Malpractice Claims*].

²⁵ See RAMSEYER & NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH*, *supra* note 23, at 92-95.

²⁶ See *id.* Professor Ramseyer points to the absence of juries, a judiciary that prizes uniformity and applies a national body of law, and judges who signal likely outcomes over discontinuous trial sessions and use detailed, public formula to calculate damages, as all contributing to settlement of claims. See *id.*

²⁷ Ginsburg & Hoetker, *supra* note 1, at 36; Nottage, *supra* note 1, at 764.

²⁸ FRANK K. UPHAM, *LAW & SOCIAL CHANGE IN POSTWAR JAPAN* 53-66 (1987). Professor Upham describes, *inter alia*, the attempts by local and national governments to force mediation between Chisso

compensation and found management of disputes by the Japanese elite in order to maintain low levels of litigation and insulate the government from challenge.²⁹

More recently, Professors Ginsburg and Hoetker reviewed these theories in light of statistics showing a “stark” increase in litigation in the 1990s.³⁰ They found the increase attributable to procedural reforms, the expansion of the Japanese judiciary and bar, and economic change following the collapse of Japan’s economic bubble.³¹ In other words, culture and predictability did not change; the economy and the institutional incapacity cited by Professor Haley did. Easier access to the courts and economic bad times account for the stark increase in litigation.

What all of this misses, at least in describing the Japan of today, is evidence suggesting that Professor Kawashima’s traditional world of weak rights and ambiguous norms still exists; but it co-exists with a complex, almost hyper-legal society. Shifting the focus from culture to rights suggests there are layers of the law in Japan. The layers start with formal ordering that precisely defines rights and duties on an individual level: residential leases address minutiae, and volumes of public regulation detail when a nuclear power plant may operate.³² Secondary ordering, however, circumscribes that formal order. It does so by incorporating traditional notions of equity, Professor Kawashima’s rights that “exist but don’t exist.” Judicial decisions rewrite leases based on fairness and current economic circumstances, and operating decisions for nuclear power plants are based on local consensus.³³ Vaguely defined norms still exist, and are often dispositive, but they come into play after navigating detailed legal norms. Concrete norms define the territory, but, if challenged, they often give way to vague norms that define an equitable outcome.³⁴ As a result, negotiation occurs not in the shadow of the law, but in the shadow of private ordering

Corporation and those poisoned by the mercury it discharged into Minamata Bay. *Id.* After failed mediation and adverse court decisions, the national government established new compensation funds and new mediation and conciliation bodies to review environmental pollution cases, again removing the bulk of those cases from the court system. *Id.*

²⁹ Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC’Y REV. 651, 656-57 (1990). According to Professor Tanase, the Japanese State controls demand for formal legal process without coercion by limiting its efficiency so that state-supported and private alternative dispute resolution becomes more attractive. *Id.*

³⁰ See Ginsburg & Hoetker, *supra* note 1, at 25-27. Statistics cited by Professors Ginsburg and Hoetker show a spike starting in 1992. *Id.* at 35. Japan’s economic bubble burst in 1991. See *Sekai no Shuyou Kabushiki Shijou*, ASAHI SHINBUN CHOKAN, Oct. 8, 1996, at 13.

³¹ See Ginsburg & Hoetker, *supra* note 1, at 25-27.

³² See *infra* Parts II.B. & IV.A.

³³ See *infra* Parts II.C. & IV.B.

³⁴ See *infra* Parts II-IV.

based on a detailed enumeration of rights. When that negotiation fails, appeals to vague rights, notions of fairness, and the “consensus of society” follow.

The remainder of the article will support this discussion with specifics. Parts II and III examine private law issues: contract law and practice, followed by employment law and practice. Part IV will address a public law subject, environmental law, and focus specifically on the regulation of nuclear power. These subjects are addressed here for two reasons: first, each subject has seen significant development in the law that warrants discussion; second, they collectively illustrate the layering of legal norms in Japan. For each section, the discussion begins with a review of the transactional documents or public regulation that initially defines rights and obligations. An examination of secondary ordering in the courts of law or public consensus follows. The conclusion then briefly discusses other examples, including recent attempts to use contract law to deter crime. From contracts to crime, whether one examines private law or public law, one finds that Japan is a country now governed by layers of the law.

II. CONTRACT LAW & PRACTICE IN JAPAN

In thinking about contracting practice in Japan, Professor Kawashima again provides the starting point. He suggests that oral agreements are common, and “even when written agreements are drafted their contents are generally very simple:”³⁵

When we compare this situation with the situation in European and American business transactions . . . where contractual rights and duties are set forth in detail “to the point of being permeated with minutiae” that provides for every possible contingency and where contracts are often printed in their full particulars in letters that are so small that one cannot read them without a magnifying glass, we can understand the very conspicuous Japanese peculiarity in this regard.³⁶

In Japan, Professor Kawashima observed “a tendency to avoid clarity and legally enforceable rights and duties with a concomitant desire to maintain flexibility in light of supervening events.”³⁷ His comments have been

³⁵ Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *LAW IN JAPAN* 1, 15 (1974).

³⁶ *Id.*

³⁷ John O. Haley, *Rethinking Contract Practice and Law in Japan*, 1 *J. EAST ASIA AND INT’L L.* 47, 50 (2008).

echoed by some and challenged by others.³⁸ Some practitioners have suggested that the Japanese are much more likely than U.S. parties to rely on oral agreements, and when there is a written agreement, it tends to be less detailed.³⁹ Professors Uchida and Taylor state that an “axiomatic feature of ‘Japanese contracts’ prior to the 1990s was the brevity and perfunctory language of contract documentation.”⁴⁰

Others have suggested that there is little difference between Japanese and Western contracting practice. According to Professor Ramseyer, “[l]ike Jason and Freddie Krueger,” stereotypes about Japanese contracting practice “just will not die. Unfortunately, even if not dead, most are dead wrong.”⁴¹ Professor Ramseyer argues that the Japanese negotiate and write extensive contracts, and their contracts are not necessarily vague or necessarily short.⁴² With professional judges and fewer choice of law issues, one might expect less specificity on the margins.⁴³ But parties to repeat deals in Japan do specify the important terms. Automobile manufacturers and suppliers will sign a “basic contract,” but this is followed by a host of documents specifying production schedules and the like.⁴⁴ Professor Ramseyer argues that a two-tiered contracting scheme explains both the U.S. and Japan: so long as the relationship continues, the parties structure their interaction by non-binding terms; however, all relationships end, so they also draft parallel, legally-enforceable contracts that govern the terms of their end game.⁴⁵

³⁸ See, e.g., Young et al., *Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate*, 34 GEO. WASH. INT’L L. REV. 789, 792 (2003).

³⁹ See *Evidence of Distinct Attitudes in Typical US and Japanese Contracts*, in LAW AND INVESTMENT IN JAPAN 280-81 (Yanagida et al. eds. 2000); Carl J. Green, *Japan: “The Rule of Law Without Lawyer” Reconsidered*, reprinted in MILHAUPT ET AL., THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY 179, 181-182 (2d ed. 2012).

⁴⁰ Takashi Uchida & Veronica L. Taylor, *Japan’s “Era of Contract,”* in LAW IN JAPAN: A TURNING POINT 472 (Daniel E. Foote ed., 2007). Professor Foote explains this brevity in terms of “relational contracts.” See Daniel E. Foote, *Evolution in the Concept of Contracts*, reprinted in LAW AND INVESTMENT IN JAPAN 293-98 (Yanagida et al. eds., 2000). Attitudes towards contracts depend on the nature and duration of the relationship of the parties. *Id.* at 468. Japanese companies seek to develop a long-term stable relationship based on trust, and those long-term relationships obviate the need for long, extensive contracts. *Id.* Cross-shareholding between companies magnifies this trend, resulting in less need for detailed, specific contracts. *Id.* Companies operating outside of the cross-sharing holding relationship face reputational risk—the risk of alienating one company and burning several bridges, which again alleviates the need for complex contracts. *Id.* In comparison, Japanese companies are willing to, and do, demand complex, detailed contracts with foreign companies—those with whom they do not have a relationship, and who are not subject to the same kind of reputational risk. See *id.* at 468; KENNETH PORT & GERALD MCALINN, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 458 (2003).

⁴¹ RAMSEYER & NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH*, *supra* note 23, at 61.

⁴² *Id.* at 62.

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 65. To prevent opportunistic behavior during the relationship, they rely on future profits and reputation. See *id.*

A review of contracts obtained over the past several years suggests an element of truth in all of this discourse.⁴⁶ Some contracts remain deceptively simple, providing no more than a bare-bones structure for the relationship. Some contracts are remarkably detailed, “permeated with minutiae,” literally requiring a magnifying glass to read. A review of both the contracts and recent case law suggests a two-tiered contracting scheme, but one different from that suggested by Professor Ramseyer. The first tier is detailed and based on the specific terms of the contract. When relationships end and the courts are involved, however, different norms apply: not the detailed norms of the contract, but the vague norms of the court applying its own conception of equity.

This section examines language from recent contracts: first those categorized here as “traditional” contracts because of their continued use of vaguely defined rights and obligations; and then those characterized as “modern” contracts because they define rights in remarkable detail. A discussion of the courts’ re-interpretation of contracts in recent cases follows.

A. *“Traditional Contracts”*

What Professor Kawashima would likely consider “traditional” contracts are still used today. They cover only the most basic terms and leave a lot to the imagination. One professionally prepared contract template for purchasing real property covers a little over a page and simply identifies the parties, price, earnest money, delivery, parcel to be delivered, costs of recording, risk of loss prior to delivery, and a right to terminate on breach of contract.⁴⁷ Breach is not defined, no contingencies are covered, and there is no discussion of the method of payment or financing.⁴⁸ There is no discussion of representations or disclosures; no discussion of inspections or access; no discussion of warranties, tax, or survey information.⁴⁹

One still sees traditional contracts for services, covering only the most basic terms, and intentionally incorporating ambiguity. Parties will define basic obligations and the price, and then state that “with regard to compensation, where there are changes in the requested services established . . . or other change in circumstances, the parties . . . may, on consultation,

⁴⁶ The contracts were obtained from practitioners in Tokyo, consulting firms, and practice manuals. They include contracts for goods and services, lease agreements, employment contracts, and contracts for the sale of real property, used by companies ranging in size from small and medium-sized to multi-national.

⁴⁷ Contract on file with author (Sept. 6, 2005), arts. 1-11.

⁴⁸ *Id.*

⁴⁹ *Id.*

change the compensation terms.”⁵⁰ Leases often include similar language, stating that the parties may demand a change in rent during the contract term when it has become “inappropriate” (*fusōtō*) because of “an increase or decrease in taxes assessed on the land or building;” “an increase or decrease in the value of the land or building or other change in economic conditions;” or the rent has become unreasonable “when compared to rents charged for comparable buildings nearby.”⁵¹

Leases often include vague statements prohibiting tenants from engaging in acts which “cause inconvenience” (*meiwaku*) to neighboring tenants or property holders, violation of which, at least on their face, provide grounds for terminating the contract.⁵² Contracts often include vague statements regarding compliance with the law⁵³ and inevitably end with a general meet and confer provision: the parties “will consult in good faith to devise a resolution when events not covered in this contract arise or when a conflict arises as to the interpretation or execution of this contract.”⁵⁴

B. *Modern Contracts*

These contracts stand in sharp contrast to others used today—contracts that Professor Kawashima would describe as “permeated with minutiae that provides for every possible contingency.”⁵⁵ In contrast to the bare-bones real estate contract referenced above, a residential lease now used by a large property management company in Tokyo contains pages assigning rights and liabilities for every contingency imaginable, including, for example, terms covering renters’ liability for damages, lessor’s disclaimers of liability, “prohibited acts,” early termination of the lease, termination prior to occupancy, conditions which void the contract, separate

⁵⁰ Contract on file with author (July 1, 2008), art. 2.

⁵¹ Contract on file with author (Mar. 15, 2012), art. 4(3) (1-3). These clauses are based, in part, on the Doctrine of Changed Circumstances, which provides that “a contract party has the right to require an adjustment of the terms of the agreement or, if no mutual compromise can be reached, to rescind the contract where (1) there has been a change of circumstances, that (2) has occurred after the contract was concluded but prior to the time for performance, (3) could not have been foreseen by the parties, (4) is not attributable to the fault of either party, and (5) renders performance under the terms of the contract unconscionable.” See Haley, *Rethinking Contract Practice and Law in Japan*, *supra* note 37, at 61. These provisions were regularly invoked after March 11, 2011. Interview with property manager (Tokyo 2012). Notes on file with author.

⁵² Contract on file with author (May 15, 2012), art. 10(2).

⁵³ Contract on file with author (July 1, 2008), art. 8.

⁵⁴ Contract on file with author. Other language commonly used states, “[w]here no term is established in this contract, or where there is doubt regarding the interpretation of terms in this contract, [the parties] will confer in good faith and seek to resolve the issue smoothly.” Contract on file with author (July 1, 2008), art. 8.

⁵⁵ Kawashima, *The Legal Consciousness of Contract in Japan*, *supra* note 35, at 15.

conditions for terminating the contract and surrendering the premises, and terms incorporating by reference other terms.⁵⁶

The level of detail is best illustrated by what follows the enumerated terms: extensive charts incorporated by reference, including one that details the lessee's responsibility to repair or replace.⁵⁷ One section specifically enumerates liability for things like damage to shower hoses, rubber stoppers, and toilet paper holders. Separate sections address common areas and include provisions for burnt out light bulbs; entrance areas, and damage to the door peephole; the kitchen; living room; electric fixtures; water and waste systems; and liability for items like damaged telephone jacks and towel racks.⁵⁸

Separate charts follow this one apportioning liability based on length of occupancy. For occupancy under three months, the lessor is one-hundred percent responsible for repairing or replacing the window screens; after three months, the lessor is fifty percent responsible. For occupancy under three months, the lessor is one-hundred percent responsible for repairing or replacing the shower hose; after that it is responsible for fifty percent of the costs.⁵⁹

In addition to the lease, there is a separate "Explanation of Important Terms" enumerating fifty-two important items, some different from the lease. This is followed by a separate "Explanatory Document Based on the Ordinance for the Prevention of Disputes Relating to Leasing Residences," which repeats the terms and charts apportioning liability when vacating the property.⁶⁰ The result is a residential lease document, spanning a dozen pages in tiny font, attempting to apportion liability down to the light bulbs and toilet paper holders.

This focus on defining rights and obligations is found elsewhere. Leases have long required that a personal guarantor assume joint and several

⁵⁶ Contract on file with author (Sept. 21, 2011) at arts. 11, 14-22. Additional terms cover subleases; the term of the lease; permissible uses for the property; renewal of the lease; refusal to renew; rent and management fees; late payment; deposits; assignment of charges for utilities, taxes, and the like; assignment of costs for repairs; renters' liability for damages, lessor's disclaimer of liability, and renter's insurance requirements; lessor's right of entry; lessor's abandonment of lease; terms for terminating the contract; terms for surrendering the premises terms for joint guarantors; required notices to lessor; required compliance with separate terms of use incorporated by reference; choice of jurisdiction; terms regarding return of "key money;" special terms for when corporate entities act as lessees; terms governing use of parking spaces and a separate subset of enumerated "special provisions" governing everything from use of personal information to relationships with organized crime. *Id.* at 1-10, 12-13, 23-27.

⁵⁷ *Id.* at Annexed Table (Beppyō) Nos. 1-3.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

liability for the payment of any debts.⁶¹ Some now require guarantors to consent to notarized contracts, so that lessors can collect on debts without fully litigating the dispute.⁶² Lessees must agree to provide the necessary information to create the notarized document, and shoulder half the cost to do so.⁶³

The same trend towards complexity and strict apportionment of liability is not found just in property contracts. A recent service contract provides an example. At the request of its auditor, a service provider for small to medium-sized businesses renegotiated all of its contracts in order to insert disclaimers of liability and additional confidentiality requirements. The contract still includes standard terms identifying the parties, the purpose of the contract, the services provided, and the like,⁶⁴ but it also now requires the buyer to assume liability for any and all acts of its employees, whether done privately or in the scope of employment.⁶⁵ For some services, the provider warrants best efforts but now disclaims “any and all legal responsibility.”⁶⁶ For other services, the provider explicitly limits its liability to damage caused by intentional acts or gross negligence, and limits remedies to specifically exclude consequential damages.⁶⁷ The contract now contains extensive confidentiality provisions, covering even the existence of the contract,⁶⁸ as well as requirements for handling personal information.⁶⁹

Confidentiality requirements are now regularly the subject of separate addenda to contracts, regardless of the nature of the services.⁷⁰ Contract

⁶¹ See, e.g., SHŌJI SHINOZUKA, SHINBAN SHAKUCHI/SHAKUYA NO KISO 134 (1984); Ministry of Land, Infrastructure, Transport and Tourism, Minkan Chintai Jūtaku wo Meguru Genjō to Kadai (Feb. 24, 2009), available at <http://www.mlit.go.jp/common/000034783.pdf>; Charles Lewis, *Renter guarantee system a headache for foreigners*, THE JAPAN TIMES Apr. 23, 2013, available at <http://www.japantimes.co.jp/community/2013/04/23/issues/renter-guarantor-system-a-headache-for-foreigners/#.UXW1ArWG3pU>.

⁶² Contract on file with author (May 15, 2012), art. 26. Notarization in Japan establishes documentary and substantive authenticity. A notarized contractual obligation for the repayment of money allows its holder to move directly to the enforcement state of the proceedings in court. See Michael K. Young & Constance Hamilton, *The Legal Profession*, in JAPAN BUSINESS LAW GUIDE, ch. 7, ¶7-900 (Mitsuo Matsushita ed., CCH Australia Ltd. 1988), reprinted in CURTIS J. MILHAUPT ET AL., THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY 46, 54 (2006). For an exhaustive study of civil law notaries, particularly those in Latin America, see Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT’L L & COMP. L. REV. 389 (1995-1996).

⁶³ Contract on file with author (May 15, 2012), art. 26.

⁶⁴ Contract on file with author (Sept. 14, 2011). arts. 1-19. The stated terms address assignment rights, the timing and method of payment, conditions for termination, choice of laws, and an agreement to meet and confer in good faith to resolve disputes relating to the contract. *Id.*

⁶⁵ *Id.* at art. 7.

⁶⁶ *Id.* at art. 10.

⁶⁷ *Id.* at art. 14.

⁶⁸ *Id.* at art. 8.

⁶⁹ *Id.* at art. 9.

⁷⁰ Contract on file with author (Nov. 29, 2011).

addenda will set forth detailed requirements for when a service provider enters a purchaser's facilities. Pages will detail "information management" requirements, including appointment of "contract managers" and "information management supervisors."⁷¹ They will require signed confidentiality pledges, and agreements to on-site inspection of computer systems and facilities, with or without notice.⁷²

These contracts reflect, in part, increased complexity in the law. The confidentiality requirements are, in part, attempts to comply with Japan's Personal Information Protection Act and the Electronic Communications Enterprise Act.⁷³ They also reflect increased concern about liability—defining it, disclaiming it, and limiting remedies. This concern is part of a larger shift, advocated by the Justice System Reform Council ("JSRC") in 2001, from a society based on "preemptive administrative regulation to one based upon *ex post facto* oversight and remedies [and] personal responsibility."⁷⁴ The end result, while not uniform, is primary ordering based on increasingly detailed, complex contracts.

C. Courts and Contracts

Regardless of the detail in the contract, when contested, Japanese courts often revise them.⁷⁵ They have a long history of doing so, and scholars have translated representative decisions.⁷⁶ What is remarkable is

⁷¹ *Id.* at art. 3.

⁷² *Id.* at art. 6.

⁷³ See generally Kojin Jōhō no Hogo ni Kan Suru Hōritsu [Personal Information Protection Act], Law No. 57, 2003 Hōrei teikyō de-ta shisutemu [Hōrei DB], <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (last visited May 14, 2013); Denki Tsuushin Jigyō Hō [Electric Communications Enterprises Law] Law No. 86, 1984 Hōrei teikyō de-ta shisutemu [Hōrei DB], <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (last visited May 14, 2013).

⁷⁴ See Uchida & Taylor, *supra* note 40, at 457, excerpting, and more succinctly translating, portions of the JSRC report, available in its entirety in *Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century*, 2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119, 127.

⁷⁵ Japanese courts modify contracts based on public policy, public welfare, good faith, or an abuse of rights, "depending on the context of the particular relationship." Trevor Ryan, *The Trust in an Ageing Japan: Has Commercialization Precluded the Trust from Reaching its Welfare Potential?*, 7 ASIAN J. COMP. LAW 10 (2012).

⁷⁶ In 1912, a Tokyo court found that the parties "lacked any intent" to be bound by certain portions of the written lease, and voided notice to terminate based on it. A 1982 Osaka court evaluated the termination clause in a written lease by looking at the parties' relative need for the property finding that there were "reasonable grounds" to enforce the contract *if* the lessor also paid the lessee his moving expenses. See Tokyo Chisai [Tokyo Dist. Ct.] July 3, 1912, 804 Hōritsu Shinbun 24, trans. by J. Mark Ramseyer reprinted in MILHAPUT ET AL., THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY *supra* note 62, at 394-96; Osaka Chisai [Osaka Dist. Ct.] Apr. 28, 1982, 476 Hanrei Taimuzu 130 trans. by J. Mark Ramseyer reprinted in Milhaput et al., *supra* note 62, at 395-396. Scholars suggest the housing shortages in the 1950s prompted the courts to weigh the relative needs of the lessor and lessee for the property, with greater concern for the lessee. Nobuhisa Segawa, *Fudousan no Chintaishaku*—

that courts continue to blue-line contracts, to re-write their terms, and, in some instances, to create new ones out of whole cloth. As the parties define their rights and obligations in ever-greater detail, the courts continue to revise them, based on vague notions of fairness. A recent example, discussed next, comes from a series of Supreme Court cases handed down over this past decade dealing with claims brought by sophisticated business entities, often major real estate developers, to lower contractually-mandated rent.

1. *Sublease Cases*

In traditional Japan, regardless of the lease, a lessor was expected, as a favor, to reduce the rent following a bad harvest, death in the family, or other exceptional hardship.⁷⁷ The lessee, in turn, was expected to provide additional labor or other return of the favor granted.⁷⁸ Articles 11 and 32 of the Land and Building Lease Act turned that favor into a legal right.⁷⁹

Article 11 states that if rent for land becomes “unreasonable” as a result of changes in taxes, land prices, or the rent departs from comparable rents for similar properties in the vicinity, the parties may request a rent increase or decrease.⁸⁰ They may do so regardless of the contract terms, and if the parties can’t agree on the increase or decrease, the renter may pay an amount it deems reasonable, pending judgment by the court. If the court finds that amount insufficient, the lessee must pay the difference, with interest.⁸¹ The same statutory framework exists, pursuant to Article 32, for adjustment of rent for building space.⁸²

During Japan’s economic bubble, land developers approached landowners with grand plans.⁸³ The plans, and contracts based on them,

Sono Gendai teki Kadai, at 3, in *Fudōsan no Chintai shaku no Kadai to Tenbō* (Matsuo & Yamano eds., 2012). The 1960s and greater housing stocks saw development of eviction fees and other monetary remedies considered sufficient to create reasonable grounds for eviction. *Id.* Not limited to leases, a 1970 Nagoya High court reviewed a recording contract, revising it because of “excessive profiteering.” Nagoya Chisai [Nagoya Dist. Ct.] Jan. 30, 1970, Hanrei Taikei 27403456, trans. by J. Mark Ramseyer *reprinted in* Milhaput et al., *supra* note 62, at 307.

⁷⁷ See KAWASHIMA, NIHONJIN NO HŌISHIKI, *supra* note 1, at 22-29.

⁷⁸ *Id.*

⁷⁹ Shakuchi Shakuya Hō [Land and Building Lease Act], Law No. 90 of 1991, *translated in* Ministry of Justice, Japanese Law Translation, *available at* <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=68&y=19&co=01&ky=land+and+building+lease+act&page=4>.

⁸⁰ *Id.* at art. 11. A statutory exception excludes requests where the contract provides a fixed term during which rent shall not be increased. *Id.*

⁸¹ *Id.* at art. 11(2) & (3).

⁸² *Id.* at art. 23.

⁸³ Tokuhō Kaisetsu [News Alert Commentary], 1140 HANREI TAIMUZU [HANTA] 68 (Mar. 15, 2004); Segawa, *supra* note 76, at 5.

generally provided for the landowner to build the building(s) to an agreed design and the developer to rent them in their entirety and then sublease space to individual renters.⁸⁴ The master leases generally established a fixed rent for the building, with riders providing for automatic rent increases during the term of the contract.⁸⁵ Based on these plans and estimated revenue streams, the property owners financed construction of the building(s).⁸⁶ After the collapse of the bubble and real estate market, developers asked for reduced rent, landowners refused, and litigation followed.⁸⁷ Developers sought “confirmation” of reduced rent payable on the master lease, and sometimes refund of “excess rent paid;” landowners sought payment of unpaid rent.⁸⁸

Following a split in the lower courts,⁸⁹ in 2003, the Supreme Court issued its first opinion applying Article 32 to these sublease contracts.⁹⁰ In 1986, Mitsui Fudosan, one of the largest real estate developers in Japan, approached a corporate landowner in Tokyo and agreed to rent all of the space in a proposed building for a period of fifteen years, for ¥1.9 billion per annum.⁹¹ The contract provided for a ten percent rent increase every three years during the lease.⁹² Based on this, the property owner obtained financing for construction, and, with construction complete, the first tenants moved in in 1991.⁹³ The real estate market collapsed shortly thereafter: by 1994, market values were fifty percent of the agreed rent; by 1997, they were thirty-five percent. Mitsui Fudosan repeatedly requested rent reductions for the building; the owner refused; and Mitsui Fudosan unilaterally reduced its rent payments. The owner then filed suit.⁹⁴

The district court held that Article 32 did not apply and required payment of the contractually-mandated rent.⁹⁵ The high court held that Article 32 did apply, but the contract was, in essence, an outsourcing

⁸⁴ Tokuhō Kaisetsu, *supra* note 88, at 68; Segawa, *supra* note 76, at 5.

⁸⁵ *Id.* at 68-71.

⁸⁶ Tokuhō Kaisetsu, *supra* note 83, at 68; Segawa, *supra* note 76, at 5.

⁸⁷ Tokuhō Kaisetsu, *supra* note 83, at 68; Segawa, *supra* note 76, at 5.

⁸⁸ Tokuhō Kaisetsu, *supra* note 83, at 68; Segawa, *supra* note 76, at 5.

⁸⁹ *See, e.g.*, Tokyo Kōtō Saibansho [Tokyo High Ct.] Jan. 25, 2000, Hei 10 (ne) no. 3894, 1020 HANREI TAIMUZU [HANTA] 157 (applying Art. 32 on a limited basis); Tokyo Kousai [Tokyo High Ct.] Oct. 27, 1999, Hei 10 (ne) no. 5145, 1017 TAIMUZU [HANTA] 278 (affirming application of Art. 32). Tokyo Kōtō Saibansho [Tokyo High Ct.] Mar. 5, 2002, Hei 13 (ne) no. 4033, 1087 HANREI TAIMUZU [HANTA] 280 (rejecting application of Art. 32).

⁹⁰ Saikō Saibansho [Sup. Ct.] Oct. 21, 2003 Hei 12 (uke) no. 573, Hei 12 (uke) no. 574, 1140 HANREI TAIMUZU [HANTA] 68.

⁹¹ *Id.* at 68.

⁹² *Id.* at 69.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 69.

contract rather than a simple lease and Article 32 should be applied to reduce the rent only to the initially agreed level.⁹⁶ The Supreme Court reversed, holding that the contract was clearly a lease contract, to which Article 32 applied without waiver or limitation.⁹⁷ As a result, when reviewing requests for rent reduction, courts “should review in its totality the circumstances giving rise to the lessor and lessee’s decision in fixing the amount of rent as well as other circumstances.”⁹⁸

The Supreme Court expounded on this “totality of the circumstances” standard in subsequent cases. Part of the debate related to proper characterization of the contracts. Some courts argued that property developers and management companies working with property owners to develop a property undertake a “joint venture” rather than simply lease building space, and Article 32 should not apply.⁹⁹ Others argued that with “order-made” buildings, where an owner builds to a lessee’s specifications and the building cannot readily be used for other purposes, the contracts function more like “outsourcing contracts,” and Article 32 should not apply.¹⁰⁰ The Supreme Court rejected both arguments, and in those cases strictly applied Article 32 and re-wrote the leases.¹⁰¹

Other courts have held that demands for rent reduction should be recognized only in special circumstances where the terms of the contract have “lost fairness and violate good faith.”¹⁰² When an appellate court applied that standard finding that the corporate lessee was not suffering from financial difficulty, there had been no change in public assessments, and, hence, no special circumstances supporting reduction, the Supreme Court reversed.¹⁰³ It found error in considering only the lessee’s overall financial

⁹⁶ *Id.*

⁹⁷ *Id.* at 70, 73.

⁹⁸ *Id.* at 70, 73. This totality of the circumstances review requires consideration of (a) the process by which the rent terms were decided and their relationship to the market price for rent for other similar properties; (b) the anticipated income and expenditures for the defendant in subleasing the property, including the parties’ awareness regarding anticipated changes in occupancy at different rent levels; and (c) the plaintiff’s anticipated receipt of key money and requirements for repayment of any financing. *Id.*

⁹⁹ Saikō Saibansho [Sup.Ct] Mar. 10, 2005, Hei 14 no. 1954, 1179 HANREI TAIMUZU [HANTA] 185, 186.

¹⁰⁰ *Id.* at 186.

¹⁰¹ *Id.* at 186. See also Saikō Saibansho [Sup.Ct] Oct. 21, 2003, Hei 13 (uke) no. 573, 1149 HANREI TAIMUZU [HANTA] 68; Saikō Saibansho [Sup.Ct] Oct. 23, 2003, Oct. 23, 2003 Hei 14 (uke) no. 852, 1140 HANREI TAIMUZU [HANTA] 79; Saikō Saibansho [Sup.Ct] Nov. 8, 2004, Hei 15 (uke) no. 869, 1173 HANREI TAIMUZU [HANTA] 192.

¹⁰² Saikō Saibansho [Sup.Ct] Mar. 10, 2005 Hei 14 (uke) no. 1954, 1179 HANREI TAIMUZU [HANTA] 185.

¹⁰³ *Id.* at 185-86.

condition and land assessments when “[a]ll of the circumstances should be comprehensively considered.”¹⁰⁴

Part of the debate revolved around the scope of Article 32. In a 2003 opinion, the Supreme Court acknowledged that the rent and automatic increases were significant factors in signing the contract at issue.¹⁰⁵ As a result, “the point of view of fairness” required consideration of these terms even if they weren’t binding, and precluded application of Article 32 to rent paid *prior* to occupancy of the building.¹⁰⁶ In a 2008 decision, the Supreme Court reviewed multiple demands for rent reduction and determined what changes in circumstances would be considered when.¹⁰⁷ The rationale provided explains the court’s focus. The Supreme Court found that the automatic rent increases were based on the parties’ “predictions about future economic circumstances” and not based on an agreement at the point of the increase about what constituted reasonable rent “based on actual economic conditions.”¹⁰⁸ To rectify that, the courts substitute their analyses based on current economic conditions for the parties’ earlier predictions about the future.

In a 2003 decision, the Supreme Court upheld a claim for rent reduction, despite the parties’ entry into a lease and a separate “confirmation” agreement guaranteeing the rent.¹⁰⁹ In order to convince the property owner to build, the real estate development company had specifically guaranteed above market rents in two separate documents.¹¹⁰ The high court enforced the terms of the contract, and the Supreme Court reversed.¹¹¹ The Tokyo High Court’s decision on remand is notable because of its fact-specific analysis.¹¹²

The high court found that the owner had relied on the rent confirmation in entering into the joint venture, taking out the loans, and

¹⁰⁴ *Id.* at 186-88.

¹⁰⁵ Saikō Saibansho [Sup.Ct] Oct. 21, 2003 Hei 12 (uke) no. 123, 1140 HANREI TAIMUZU [HANTA] 75, 78.

¹⁰⁶ *Id.*

¹⁰⁷ Saikō Saibansho [Sup.Ct] Feb. 29, 2008 Hei 18 (uke) no. 192, 1267 HANREI TAIMUZU [HANTA] 161. Only changes in circumstances between the initial contract and the first request for reduction are considered initially. For later demands, if the court upholds the first request for reduction, it considers the date of the later request as the starting point for determining economic change. If the court rejects the first request, the starting point would default to the original contract date. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Saikō Saibansho [Sup.Ct.] October 23, 2003 Hei 14 (uke) no. 852, 1140 HANREI TAIMUZU [HANTA] 79.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 80, 81.

¹¹² Tokyo Kōtō Saibansho [Tokyo High Ct.] Dec. 22, 2004, Hei 15 (ne) no. 5399, 1170 HANREI TAIMUZU [HANTA] 122, 123, 127.

investing in the project.¹¹³ But it found “a significant change in economic circumstances” and, in comparison with surrounding rents, that the guaranteed rent had become “unreasonable” (*fusōtō na mono*).¹¹⁴ The court then examined in detail the owner’s anticipated income, repayment plan, and the decrease in taxes and interest rates. It found that “from the perspective of fairness,” the rent should be reduced regardless of the guarantee, to the extent doing so would not jeopardize the loan repayments.¹¹⁵ The court examined the parties’ negotiation efforts, and based on “consideration of all the circumstances in their totality,” decided on a “reasonable” amount that was approximately ten percent less than the contracted rent for the initial period.¹¹⁶

This type of fact-sensitive analysis in determining “reasonable” rent, regardless of the contract, is standard. In a 2004 decision, the Supreme Court found that a large real estate developer had approached a textile manufacturer about redeveloping land.¹¹⁷ The parties entered into a lease providing for fixed rent with five percent bi-annual increases.¹¹⁸ After the manufacturer razed a closed factory and constructed the planned buildings, the developer sought decreases in the rent and demanded return of “excess rent” paid.¹¹⁹ The high court found, *inter alia*, that the express terms of the contract prohibited rent reduction below the contracted amount, and those terms were “an absolute condition” for the landowner to develop the property.¹²⁰ The court noted, however, the remarkable economic changes occurring following collapse of the bubble and invalidated two of the rent increases.¹²¹

The Supreme Court reversed, finding this remedy too limited. The concurring and dissenting opinions bookend the debate.¹²² The dissent argued that the history of the Act makes clear that it was intended to protect “socially weaker parties,” i.e. residential tenants, and this was a joint venture between sophisticated parties.¹²³ According to the dissent, the Act’s purpose

¹¹³ Tokyo High Ct Dec. 22, 2004, *supra* note 119, at 122, 123, 127.

¹¹⁴ *Id.* at 123, 128. The court found that the actual rental income for the building was approximately half that expected. The court noted that the owner’s property taxes had decreased by a third, and the interest rates paid on the construction loans were variable and falling. *Id.*

¹¹⁵ *Id.* at 123, 128.

¹¹⁶ *Id.* at 123.

¹¹⁷ Saikō Saibansho [Sup.Ct.] Nov. 8, 2004, (uke) no. 869, 1173 HANREI TAIMUZU [HANTA] 192.

¹¹⁸ *Id.* at 192.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 192.

¹²¹ *Id.* at 192.

¹²² *Id.* at 193.

¹²³ Saikō Saibansho [Sup.Ct.] Nov. 8, 2004, (uke) no. 869, 1173 HANREI TAIMUZU [HANTA], *supra* note 117 at 193, 197.

was not to reassign profits between sophisticated parties; “freedom of contract” should prevail.¹²⁴ The concurring opinion focused on “fairness,” as opposed to freedom of contract.¹²⁵ In this case, because the interest due on the construction loans had decreased, it was “fair” to decrease the rent as well.¹²⁶ To allow only the lessor to benefit from the unforeseeably large drop in interest rates, when those interest rates formed the basis for determining rent under the contract, “lacks fairness.”¹²⁷

Other decisions have applied this type of analysis to direct leases for “order-made” buildings and standard leases for common building space.¹²⁸ The Supreme Court has applied this analysis to cases involving leases of land.¹²⁹ Whether it is a contract for the lease of land or a building, a sublease or a direct lease, the focus in the courts is on substantive fairness in light of current, as opposed to anticipated, conditions.¹³⁰ In doing so, the courts redefine the relationship. The parties clearly assign risks and liabilities in their contracts and “confirmation agreements.” The courts revise those assignments. When the courts elect to apply Article 32 instead of enforcing the terms of the contract, clear divisions of rights and responsibilities give way to notions of equity and “fairness.”

2. Lease Renewal & Other Cases

These cases are not an anomaly. The courts have recently engaged in substantive review of clearly designated contractual terms in reviewing “renewal fees” for leases.¹³¹ They have done the same for supply contracts and insurance agreements.¹³² In each of these areas, recent Supreme Court

¹²⁴ *Id.* at 197.

¹²⁵ *Id.* at 196.

¹²⁶ *Id.* at 193. The concurring opinion focused on “the original intent of the contract,” suggesting that “not only the cost of the building and the rents charged for similar, proximately located buildings, but also the method for servicing debt on the property is a foremost consideration in establishing the rent term,” such that if interest rates fall the rent should as well. *Id.* at 196.

¹²⁷ *Id.* at 197.

¹²⁸ See Segawa, *supra* note 76, at 6-7.

¹²⁹ Saikō Saibansho [Sup.Ct.] June 12, 2003, Hei 14 (uke) no. 689, 1126 HANREI TAIMUZU [HANTA] 106.

¹³⁰ Some scholars have suggested that courts are preserving relationships, i.e. the courts treat the parties as partners in a partnership that cannot readily be terminated because of a poor economic climate or other circumstances. The courts craft a judicial resolution with this in mind, engaging in small-scale debt restructuring, prior to significant economic disruption. See Segawa, *supra* note 76, at 7-8.

¹³¹ See, e.g., Takagi Harumichi, *Hanrei Kenkyū Inkaï Heisei 23 Nen Kōshinryō Hanrei Kenkyū no Hōkokushō*, TOKYO SHIHŌ SHŌSHIKAI SAMTAMA SHIKAI, available at <http://www.3tama.org/kenshu/hanrei/3.htm>.

¹³² See Tooru Kamiyama, *Keizoku teki Baibai Keiyaku ni Kan suru Hito Kōsatsu*, 5 HOKUDAI HŌGAKU KENKYŪKA [JUNIOR RESEARCH JOURNAL] 1, 3 (Nov. 1998); Shindo & Nakajima, *Chūshaku* §§

decisions rein in dramatic departures from the terms of the contract, but the starting point is the same. It expressly involves consideration of the equities.

With regard to lease renewals, practices vary by region but lessors, pursuant to the contract, commonly assess a renewal fee at the end of the lease term if a lease is renewed.¹³³ The renewal fees can be substantial, the equivalent of one to two months' rent, though amounts are sometimes negotiable. They are also subject to challenge.¹³⁴

While challenges to renewal fees began as early as the 1960s, the 1996 revisions to the small claims provisions in the Code of Civil Procedure and the 2000 passage of Japan's Consumer Contract Act accelerated these claims.¹³⁵ And the courts have started invalidating renewal fees.¹³⁶ In a 2009 decision, the Osaka High Court invalidated renewal fees in a one-year lease that required key money of ¥60,000, monthly rent of ¥45,000, and a lease renewal fee of ¥100,000.¹³⁷ The court found this renewal fee, imposed every year, violated the Civil Code's Article 1(2) good faith requirement as incorporated into the Consumer Contract Act.¹³⁸ The renewal fee did not function as consideration and imposed an excess burden on the lessee beyond that provided for in the Civil Code.¹³⁹ It "lacked a rational basis" given the difference in information available to the lessor and lessee;¹⁴⁰ the Land and Building Lease Act limitations on the lessor's ability to terminate the lease;¹⁴¹ and the significant economic burden the fee imposed on the lessor.¹⁴²

537-539 *Daishansha no Tame no Keiyaku*, SHINPAN CHŪSHAKU MINPŌ (13) SAIKEN (4) 776 (Igarashi Kiyoshi & Taniguchi Kohei eds.) (2006).

¹³³ *Id.*

¹³⁴ See Segawa, *supra* note 76, at 11-12.

¹³⁵ See *id.*

¹³⁶ *Kōshinryō Saibanrei no Shōsai Hikaku*, TŌKYŌ SHIHŌ SHŌSHIKAI SANTAMA SHIKAI (December 2010), available at www.3tama.org/kenshu/hanrei/koushinryou2.pdf (last visited July 2, 2012).

¹³⁷ Osaka Kōtō Saibansho [Osaka High Ct] Aug. 27, 2009 Hei 20 (ne) nos. 474, 1023, 2062 HANREI JIHŌ 40.

¹³⁸ Article 10 of the Consumer Contract Act nullifies contract clauses that "impair the interests of consumers one-sidedly." More specifically, contract clauses that (a) restrict consumer rights or impose duties on consumers beyond that provided in default provisions the Civil and Commercial Codes and (b) that "impair the interests of consumers" in a manner that violates the good faith provision of the Civil Code are deemed to be void. *Shōhisha Keiyaku Hō* [Consumer Contract Act], Law No. 61 of 2000, art. 10, translated in Ministry of Justice, Japanese Law Translation, available at <http://www.japaneselawtranslation.go.jp>

¹³⁹ Article 601 of the Civil Code provides: "A lease shall become effective when one of the parties promises to make a certain thing available for the using and taking the profits by the other party and the other party promises to pay rent for the same." Minpō [Minpō] [Civ. C.] art. 601, translated in Ministry of Justice, Japanese Law Translation, <http://www.japaneselawtranslation.go.jp>.

¹⁴⁰ Osaka Kōtō Saibansho [Osaka High Ct] Aug. 27, 2009, *supra* note 138.

¹⁴¹ The court is referring to Article 28, which sets out "Requirements for Refusing to Renew a Building Lease Contract" and states that notice of termination requires a showing, based on the parties relationship, the conditions of the building, and offers of compensation, "that there are justifiable grounds

Subsequent courts split on the issue,¹⁴³ and the Supreme Court weighed in by reviewing three renewal fee cases in 2011.¹⁴⁴ The court upheld each renewal fee, finding the Consumer Contract Act applicable but not violated.¹⁴⁵ The Supreme Court found that the renewal fees functioned as either prepayment or supplemental rent, and that they had a “rational economic basis.”¹⁴⁶ The court held “an unambiguous and concretely enumerated renewal clause in a lease contract will not constitute contractual language which ‘impairs the interests of consumers unilaterally against the fundamental principle provided in Civil Code Article 1(2),’” so long as there are no “special circumstances suggesting, *inter alia*, that the amount of the renewal fee is too high in light of such factors as the renewal term of the lease contract.”¹⁴⁷ Lower courts are now determining whether renewal fees are “too high,” and in some cases still voiding the plain language of the contract.¹⁴⁸ The result is that the contractual term does not necessarily define rights. It provides the starting point for an analysis based on fairness.¹⁴⁹

The focus on fairness extends to long-term supply contracts.¹⁵⁰ Professor Haley has written about the judicial treatment of these contracts and discusses several notable decisions.¹⁵¹ In one, Hokkaido Ford Tractor, K.K. attempted to terminate a tractor franchise pursuant to the notice and termination provisions in the contract.¹⁵² The franchisee sued and the Sapporo High Court, in response, enjoined Ford from selling product to any

for doing so in addition to the circumstances pertaining to the necessity of using the buildings on the part of the building lessor and the lessee.” Land and Building Lease Act, *supra* note 79, art. 28.

¹⁴² *Kōshinryō Saibanrei no Shōsai Hikaku*, *supra* note 136.

¹⁴³ *Id.* Osaka Kōtō Saibansho [Osaka High Ct.] Oct. 29, 2009, Hei 29 (ne) no. 1211, 2064 HANREI JIHŌ [HANJI] 65; Osaka Kōtō Saibansho [Osaka High Ct.] Feb. 23, 2010, Hei 21 (ne) no. 2690, 1372 KIN’YŪ SHOUJI HANREI [KINYŪ HANREI]14; Osaka Kōtō Saibansho [Osaka High Ct.] May 27, 2010, Hei 21 (ne) no. 2548, Dai-ichi Hōki Hō Jōhō Sōgō Database, Case Id. No. 28161602. A 2009 Kyoto District Court also found the renewal fees were “a unilateral infringement on consumer benefits,” with no “legally justifiable grounds.” *Contract Renew Fees Violate Tenant Rights*, JAPAN TIMES, July 24, 2009.

¹⁴⁴ Saikō Saibansho [Sup.Ct.] July 15, 2011 Hei 22 (o) no. 863, 1361 HANREI TAIMUZU [HANTA] 89.

¹⁴⁵ *Id.*

¹⁴⁶ The court also found use of renewal fees wide spread and noted that they had not been struck down previously for violating public policy. Their use was clearly and concretely explained in the contract, and the disparity between the information and bargaining power of the lessor and lessee not so great as to demand correction. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Kyoto Chihō Saibansho [Kyoto Dist. Ct.] Feb. 29, 2012, Hei 21 (wa) no. 4696, 92 SHŌHISHA NYU-SU 257. See, e.g., Harumichi, *supra* note 132.

¹⁴⁹ Scholars have suggested that Article 10 of the Consumer Contract Act is being interpreted more broadly than the good faith provisions of the Civil Code. Segawa, *supra* note 76, at 12.

¹⁵⁰ Kamiyama, *supra* note 133, at 3.

¹⁵¹ Haley, *Rethinking Contract Practice in Japan*, *supra* note 37, at 64-67.

¹⁵² Sapporo Kōtō Saibansho [Sapporo High Ct.] Sept. 30, 1987, Sho 62 (ra) no. 49, 667 HANREI TAIMUZU [HANTA] 146-147.

other dealer in the region for a period of one year.¹⁵³ While Ford complied with the terms of the contract, it did not have “unavoidable reasons” to terminate it.¹⁵⁴

The court found that the contract provision providing for yearly renewal, absent three months advance notice, should be interpreted to mean that “only where there are unavoidable circumstances requiring ending the contract is it permitted to give notice” of termination.¹⁵⁵ The court reasoned that because Ford had renewed the annual contract for over fifteen years, and the retailer had invested in research and incurred labor costs assuming renewal and without ability to establish a similar franchise, it was “extremely irrational” to impose on the retailer significant losses while allowing Ford to profit from the business that the retailer had developed.¹⁵⁶

Courts have defined “unavoidable circumstances” narrowly: “absent unavoidable circumstances, such as a complete rupture of trust in the relationship, it is appropriate to find that the contract cannot be terminated or its renewal refused.”¹⁵⁷ Some courts have improvised notice provisions where none are found in the contract.¹⁵⁸ Some courts have established new contractual requirements that the purchaser have breached the agreement, or developed credit problems, or acted in bad faith before termination is permissible.¹⁵⁹

More recent decisions reviewed by the Supreme Court have upheld termination of long-term supply contracts, leading some to suggest an increased reluctance to interfere with the contract.¹⁶⁰ But, in each case, the courts upheld the notices to terminate following a clear breach of other terms of the contract.¹⁶¹ The starting point for practitioners remains the same: regardless of the language of the contract, “a Japanese court is likely to

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 146, 148.

¹⁵⁶ *Id.* at 146-47.

¹⁵⁷ Osaka Kōtō Saibansho [Osaka High Ct.] Oct. 25, 1996, Hei 8 (ne) no. 190, 1595 HANREI JIHŌ [HANJI] 70.

¹⁵⁸ See Kamiyama, *supra* note 133, at 3.

¹⁵⁹ *Id.* Courts offer a number of reasons why they re-write the contracts. They do so most commonly to protect investments in people and resources and prevent or cushion the blow to the purchaser’s business. They also cite the need to protect a long-established relationship; to recognize the research or other business development contributions made by the purchaser to the supplier’s business; to protect the expectation interests of the retailer or the weaker party to the contract. They re-write the contracts because termination of contracts are to be the exception and not the rule; because, regardless of the one year renewable contract term, a one-year term is not economically feasible for the retailer; or to protect the interests of the down-stream buyer, relying on the retailer and its relationship with the manufacturer. *Id.* at 10-11. The courts are re-writing contracts based on Japanese notions of equity and protecting relationships.

¹⁶⁰ See Haley, *Rethinking Contract Practice in Japan*, *supra* note 37, at 65-67.

¹⁶¹ *Id.*

require ‘justifiable and unavoidable reasons’ in order to allow unilateral termination” of a “continuous contract.”¹⁶² And the reason remains the same: regardless of the contract, “the non-terminating party typically will make business decisions relying on the expected long duration of the agreement (and Japanese courts believe that such reasonable expectations should be protected).”¹⁶³

Japan’s group term life insurance cases show a similar pattern, with courts—at least the lower courts—revising detailed contracts. Japanese companies have purchased group term life insurance policies naming the employees as the insured since the 1930s, but, for decades, administrative guidance resulted in most policies prohibiting companies from naming themselves as beneficiaries.¹⁶⁴ With deregulation and increased competition that changed, and that change sparked protest.¹⁶⁵ In 1970, a cargo ship sunk off the coast of Hokkaido and its entire crew perished.¹⁶⁶ The shipping company received ¥1 million in insurance proceeds per crew member, and paid ¥100,000 to each surviving family.¹⁶⁷ Public outcry led to new disclosure and consent requirements.¹⁶⁸ Insurance companies, however, continued to market the policies as a means to cover employer losses.¹⁶⁹ The policies typically lasted one year and covered all employees, with the employer paying the entire premium.¹⁷⁰ By the mid-1990s, 79.6% of companies with over one-thousand employees and 60% of all businesses in Japan purchased group term policies; 49.7% of them paid nothing to the survivors of its employees.¹⁷¹

In the mid-1990s, survivors began suing the decedent’s former employer and the insurance companies, demanding payment of the insurance proceeds.¹⁷² And courts began finding for the plaintiffs.¹⁷³ They did so on one of two grounds: (a) they found an implied agreement between the company and the employee for the company to pay over a significant portion

¹⁶² Stephen D. Bohrer & Akio Hoshi, *Doing Deals in Japan: An Introductory Guide for U.S. Practitioners*, THE M & A LAWYER (Thomson Reuters), Oct. 2010, at 10.

¹⁶³ *Id.*

¹⁶⁴ See background discussion in Chihō Saibansho [Nagoya Dist. Ct.] Mar. 6, 2001, Hei 9 (wa) no. 2716, 1093 HANREI TAIMUZU 228, 232-33.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 233-34.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 235-36.

¹⁷⁰ Yuichi Fukushima, *Dantai Teiki Hoken Mondai no Genjo to Sono Yukue*, at 171 (Koueki Zaidan Hōjin Seimei Hoken Bunka Senta- Paper), available at www.jili.or.jp (last visited Sept. 21, 2012).

¹⁷¹ *Id.* at 236.

¹⁷² *Id.* at 236.

¹⁷³ Shindo & Nakajima, *supra* note 133, at 776-77.

of the proceeds to the employee's survivors; or (b) the courts construed the contract between the insurance provider and the company as a "contract for the benefit of a third party," pursuant to Civil Code Section 537.¹⁷⁴ The plain language of Civil Code requires that the obligor "promise[] in a contract" that he or she will "tender a certain performance" to a third party,¹⁷⁵ meaning that the courts were implying a term that the Civil Code otherwise requires be made explicit.

The most significant of these cases involved Sumitomo Light Metal Industries.¹⁷⁶ In 1994, three Sumitomo employees passed away from natural causes.¹⁷⁷ Sumitomo, pursuant to its company work rules and an agreement with the employee union, paid each of their spouses approximately ¥10 million as a death benefit;¹⁷⁸ insurers, pursuant to life insurance policies covering these employees, paid Sumitomo approximately ¥183 million.¹⁷⁹

The surviving spouses filed suit claiming an express or implied agreement to pay over all or a substantial portion of the insurance proceeds.¹⁸⁰ Sumitomo contended that the proceeds were intended to fund corporate pension and welfare funds covering all its employees and there was no express or implied agreement to pay more than the death benefits agreed to in the work rules.¹⁸¹

The Nagoya High Court revised the contract, in no uncertain terms. It held that group term insurance was intended to benefit the employee and a contracting party diverting these funds to other uses "violated the public order and morals."¹⁸² It found that the documents that confirmed that "all or a portion of the insurance proceeds would be used to pay survivor benefits based on the company work rules" should be construed instead as an agreement to pay, "at a minimum, an amount rising to a level considered to

¹⁷⁴ *Id.*

¹⁷⁵ Article 537 (1) of the Civil Code states: "If one of the parties promises in a contract that he/she will tender a certain performance to any third party, the third party shall have the right to claim that performance directly from the obligor." *Minpō* [MINPŌ] [CIV. C.] art. 537, para. 1.

¹⁷⁶ See Nagoya Chihō Saibansho, Mar. 6, 2001, *supra* note 165, at 288; Nagoya Kōtō Saibansho [Nagoya High Ct.] Apr. 24, 2002, Hei 13 (Ne) no. 245, 829 RŌDŌ HANREI 38; Saikōsai Saibansho [Sup. Ct.] Apr. 11, 2006, Hei 14 (wa) no. 1358, 1212 HANREI TAIMUZU 102; Fukushima, *supra* note 171, at 171-172; Takeshi Matsuda, *Dantai Teiki Hoken ni Okeru Hihokensha no Chii*, 40 SANDAI HŌGAKU (Nos. 3/4) 67 (2007).

¹⁷⁷ Nagoya Chihō Saibansho, Mar. 6, 2001, *supra* note 165, at 228-229.

¹⁷⁸ *Id.* at 228-229.

¹⁷⁹ *Id.*, 242-250. Sumitomo obtained consent to the policies through the agreement with its employee union. *Id.* at 251. See also Fukushima, *supra* note 171, at 173.

¹⁸⁰ Nagoya Chihō Saibansho, Mar. 6, 2001, *supra* note 165, at 228.

¹⁸¹ *Id.*

¹⁸² Saikōsai Saibansho, Apr. 11, 2006, *supra* note 176 at, 105, citing Nagoya Kōsai [Nagoya High Ct.] Apr. 24, 2002, Hei 13 (Ne) no. 245, 829 RŌDŌ HANREI 38.

be socially significant.”¹⁸³ The court found this agreement created a contract for the benefit of a third party and ordered Sumitomo to pay each surviving spouse approximately one half of the insurance proceeds.¹⁸⁴

The Supreme Court reversed. It found no legislative policy requiring payment of more than a portion of the insurance proceeds, and, so long as consent was obtained, no violation of the public order and morals. It found no grounds to support either an express or implied agreement to pay more than the death benefits provided for in the work rules.¹⁸⁵

The issue is now largely resolved.¹⁸⁶ Group term policies now clearly identify the portions payable to the employee’s survivors, and cap the portion payable to the employer at no more than twenty million yen.¹⁸⁷ But the process is telling. The parties start off with identified rights and obligations set out in the insurance contracts, company work rules, and employer-employee agreements. Once challenged, the lower courts rewrite those rights and obligations so that they are “fair.” To use the language of the Nagoya court, to require payment at a level “considered to be socially significant.” The contract provides a starting point; an evaluation of the equities follows.

D. Contract Law Conclusion

Professors Taylor and Uchida have suggested that following deregulation in the 1990s, a new role for contract form and practice, grounded in the “classical view of contracts,” has swept across Japanese society.¹⁸⁸ They describe a “conquest of contract,” and even the paradigm of family being replaced by contract.¹⁸⁹ Part of this stems from a shift to an *ex post facto* model based on personal responsibility.¹⁹⁰ Part of this stems from increasing belief that economic efficiency can be achieved “on the basis of discrete contracts.”¹⁹¹ Regardless of the cause, the “written contract” is now

¹⁸³ *Id.*

¹⁸⁴ *Id.*; Nagoya Chihō Saibansho, Mar. 6, 2001, *supra* note 165, at 240.

¹⁸⁵ Saikōsai Saibansho, Apr. 11, 2006, *supra* note 176, at 106.

¹⁸⁶ Matsuda, *supra* note 176 at 67; Fukushima, *supra* note 171, at 171; Saikōsai Saibansho, Apr. 11, 2006 April 11, 2006, *supra* note 176, at 106.

¹⁸⁷ Matsuda, *supra* note 176 at 67; Fukushima, *supra* note 171, at 171.

¹⁸⁸ Taylor & Uchida, *supra* note 40, at 454, 455.

¹⁸⁹ *Id.* at 465. Neither endorses this shift but question the extent to which Japanese society can commit to norms where “non-contractual social relations and social relations governed by relational contracts are displaced by the discrete contract.” *Id.* at 474.

¹⁹⁰ *Id.* at 456.

¹⁹¹ *Id.* at 462.

“the device for constructing the relationship, apportioning risk, and also for articulating new concerns.”¹⁹²

A review of recent contracts suggests that they are right, down to the level of shower hoses and rubber stoppers. A review of recent case law suggests that there is more. Professors Taylor and Uchida question whether courts will support “a communitarian vision of commerce in which smaller or weaker transaction parties are protected through operation of law, or whether ‘the market’ should dictate transaction outcomes.”¹⁹³ The lease renewal cases and group term insurance cases suggest the lower courts continue to view justice as protecting the weaker transaction party. The sublease cases involve sophisticated corporate entities and suggest that, even without a disparity in bargaining power or knowledge, the courts will intervene to revise a contract so that it is “fair.”

The result is that there are now two sets of norms at work. The first layer imposed by the written contract, provides a complex, division of rights and liabilities. The second layer, applied by the courts, incorporates a totality of the circumstances test to achieve substantive fairness in the contract. Sophisticated parties evaluate risk and reward, and dicker specific terms to a contract. Or, they inject specific terms and broad imposition of liability into adhesion contracts. In either case, when contested, the courts re-evaluate. Just as courts re-ordered relationships in the 1950s and 1960s requiring “reasonable grounds” to terminate a residential lease, they re-order contractual relationships now, even among sophisticated parties, to achieve a “fair” result.¹⁹⁴

The end result is that when disputes arise parties to a contract negotiate first in the shadow of increasingly detailed contracts. And when those negotiations fail and the legal process is invoked, they negotiate in the shadow of equitable norms applied by the courts.

III. EMPLOYMENT LAW & PRACTICE IN JAPAN

Employment law presents another subset of contracts and another example of law in Japan operating on two levels, with primary ordering based on complex, detailed contractual norms and secondary ordering based on more ambiguous, equitable standards. A review of employment documentation and the case law interpreting it shows that detailed contracts

¹⁹² *Id.* at 473.

¹⁹³ Taylor & Uchida, *supra* note 40, at 469.

¹⁹⁴ *See* Segawa, *supra* note 76, at 8-9.

specifically defining rights and obligations routinely conflict with the equitable norms applied by the courts.¹⁹⁵

A. *The Employment Relationship*

Employer-employee relationships in Japan are varied these days. An employer may employ a half-dozen different types of employees, including “life-time” or regular employees; fixed-term employees; part-time employees; “dispatch” employees, employees provided by a temporary agency; and employees seconded from affiliated companies.¹⁹⁶ The focus here is on regular employees.

Most do not receive a contract for employment or an engagement letter.¹⁹⁷ The employer-employee relationship begins with receipt of an informal offer of employment (*naiteisho*).¹⁹⁸ That informal offer of employment simply states that an unofficial offer of employment is being extended to the prospective employee to begin work on a certain date.¹⁹⁹ The employment relationship itself is governed by separate documents, including an employee Covenant on Employment (*shūshoku seiyakusho*),²⁰⁰ a Personal Guaranty (*mimoto hoshōsho*),²⁰¹ and the Work Rules (*shūgyō kisoku*).²⁰² The first two documents are provided with the informal offer of employment and require signatures and affixing the employee’s personal seal as a condition for starting work.²⁰³ The last document, the Work Rules, is usually provided to employees when they start work.²⁰⁴ As set out below,

¹⁹⁵ For comprehensive discussion of employment law issues, in Japanese, *see, e.g.*, KAZUO SUGENO, RŌDŌ HŌ (9th ed. 2010) and, in English, *see, e.g.*, HIDEKI THURGOOD KANO, JAPAN STAFF EMPLOYMENT LAW GUIDE (2010); Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of Stability?*, 43 UCLA L. REV. 635 (1996).

¹⁹⁶ *See, e.g.*, KANO, *supra* note 196, at 17-18; Yutaka Asao, Overview of Non-Regular Employment in Japan (Japanese Institute for Labour Policy and Training) available at www.jil.go.jp/english/reports/documents/jilpt-reports/no.10_japan.pdf (last visited Dec. 21, 2012).

¹⁹⁷ Makoto Ishida, *Kigyō Sōshiki to Rōdōhō-Hendō no Rekishi to Kadai*, 206 SHŪKAN RŌDŌHŌ 14, 21 (2004). Most regular employees are not provided with a written contract; the company’s work rules are considered the employment contract. *Id.*

¹⁹⁸ *Id.*; Offers of Employment (2007-2012) on file with author.

¹⁹⁹ Ishida, *supra* note 198, at 21.

²⁰⁰ Covenants on Employment (1957, 2007-2012) on file with author.

²⁰¹ Personal Guarantees (2007-2011) on file with author.

²⁰² Work Rules (2009-2012) on file with author.

²⁰³ *See* Covenants on Employment, *supra* note 201; *see also* Personal Guarantees, *supra* note 202; *see also* Osaka Pref. Govt., *Rōdō Sōdan Q & A 11*, available at <http://www.pref.osaka.jp/sogorodo/roudouqa/qa11.html>.

²⁰⁴ *See, e.g.*, Tokyou Rōdōkyoku, *Shuugyou Kisoku Sakusei no Tebiki*, available at http://tokyo-roudoukyoku.jsite.mhlw.go.jp/hourei_seido_tetsuzuki/roudoukijun_keiyaku/k-kisoku.html (last visited Sept. 20, 2012); Rōdō Keiyaku Hō [Labor Contract Act], Law No. 128 of 2007, art. 7, translated in Ministry of Justice, Japanese Law Translation, available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=0&y=0&co=01&ky=labor+contract+act&page=20>.

the contents of each of these documents have trended towards increasing specificity and attempts to contractually impose liability on employees— attempts which have been thwarted by the courts.

1. *Covenant on Employment*

In 1957, a group of manufacturers published a template for the employee's Covenant on Employment that enumerated just three articles. The new employee vowed to 1) uphold the work rules, work in good faith, and avoid disrupting the workplace; 2) not disclose confidential information, either during or after employment; and 3) compensate the employer for losses caused to the company by the employee's intentional or grossly negligent acts.²⁰⁵ The employee acknowledged in the oath that if he or she violated the covenant, he or she may be terminated or face other disciplinary action.²⁰⁶

A 2007 template requires more. In it a new employee promises to 1) abide by the work rules, supervisor's directions, and work in good faith; 2) refrain from disclosing, either during or after employment, any confidential information held by the company; 3) refrain from engaging in any political or group activities that would disrupt the workplace; 4) compensate the employer for any damages caused to the company intentionally or through gross negligence; and 5) refrain from objecting should the employee's place or type of work be changed because of business necessity.²⁰⁷

A recent 2011 example goes further still. The new employee pledges, as a condition of employment, to 1) faithfully observe all relevant laws, the work rules, and other rules and directives; 2) refrain from engaging in any conduct that damages the reputation or credibility of the employer or its clients; 3) affirm that no misrepresentations were made in the employee's application materials; 4) maintain the confidentiality of employer and client information; and 5) refrain from removing confidential information from the workplace.²⁰⁸

The 2011 covenant then focuses on liability. The employee must expressly pledge, as a condition of employment, that 6) if the employee leaks company information outside the company, during employment or after, *or* is found to be responsible for other “incidents” resulting in damage to the company, the employee will assume liability to compensate the

²⁰⁵ Amagasaki Kōgyō Keikyō, *Seiyakusho Oyobi Mimoto Hoshōsho no Mondaiten to Shoshikirei*, 1423 RŌSEI JIHŌ 26 (May 24, 1957).

²⁰⁶ *Id.* at 26.

²⁰⁷ Covenant on Employment (Mar. 10, 2007), on file with author.

²⁰⁸ Covenant on Employment (Oct. 3, 2011), on file with author.

employer for any damages suffered. The employee must also acknowledge that 7) if he or she violates these covenants, relevant laws, the work rules, or other regulations and policies, he or she may be subject to disciplinary action including termination, and, if these violations result in “direct or indirect” damage to the employer, the employee again “assumes full liability.”²⁰⁹

While one might expect a confidentiality agreement, how many entry-level employment relationships elsewhere start with an indemnification agreement, repeated twice to make absolutely clear where liability lies? The literature suggests requesting such covenants is “the norm” among employers.²¹⁰ A recent survey of private universities suggests that, regardless of whether provided for in the Work Rules, 86.5% of the universities require employees sign Covenants on Employment.²¹¹

The implication is that their use is widespread, and that the starting point in ordering employment relationships in Japan is a document detailing specific rights and obligations in a manner and to a degree not found even in “litigious” countries. Some have suggested that the purpose of the covenant is to “raise awareness” and that it has no legal meaning in and of itself; it is simply a “factual act” (*jijitsu kōi*).²¹² The language of the covenant, however, is the language of contract clearly defining rights and liability, assumptions of risk, and indemnification.²¹³

2. *Personal Guarantees*

The concern about indemnification, repeated twice in the covenant, continues in the personal guaranty document demanded of new employees. Pursuant to this document, a third party assumes joint liability, with the new employee, and agrees to indemnify the company for any damage sustained by the company as a result of actions of the employee.²¹⁴

Personal guarantees have been used for decades.²¹⁵ The earliest personal guarantees were used simply to confirm identity.²¹⁶ Some included promises to search for and return employees who had run away or to accept

²⁰⁹ *Id.* The document concludes with a separate section detailing the employee’s agreement regarding employer use of his or her personal information. *Id.*

²¹⁰ Osaka Pref. Govt, *Rōdō Soudan Q & A 11*, *supra* note 204; Chieko Shitayama, *Shinnyuu Shain ni Teishutsu Saseru Shourui no Houritsu Mondai to Tadashii Atsukaikata*, KIGYOU JITSUMU 88 (Mar. 2008).

²¹¹ *Seiyakusho-Mimoto Hoshoshou ni Kan Suru Anketo Kekka*, 426 SHIGAKU KEIEI 89 (Aug. 2010).

²¹² *Id.* at 90-91; Osaka Pref. Govt, *Rōdō Soudan Q & A 11*, *supra* note 204.

²¹³ *Id.* Cases that have challenged the covenants have focused on employee refusal to submit them. *Id.*

²¹⁴ Personal Guarantees, *supra* note 201.

²¹⁵ KAWASHIMA, *NIHONJIN NO HŌISHIKI*, *supra* note 1, at 108-13.

²¹⁶ *Id.* at 108.

responsibility for employees who fell ill.²¹⁷ Guarantees after World War II came to focus on liability. A 1959 survey suggested that 94% of companies required personal guarantees.²¹⁸ In them, the guarantors would vaguely “accept full responsibility to ensure no inconvenience is caused to the employer by employing this person”²¹⁹ or more specifically “to promptly compensate the company for damages caused by the employee to the company.”²²⁰

A 2007 template has the guarantor agreeing to “promptly compensate,” jointly with the employee, the employer for “any monetary damages or damage to the employer’s good name caused by the employee.” The employer, in turn, agrees to notify the guarantor without delay if (a) it becomes aware of any facts suggesting that the employee may not be fit for employment or act in good faith, which may give rise to liability on the part of the guarantor, or (b) the employee changes position, and this results in added liability or a difficulty of supervision on the part of the guarantor.²²¹

The 2011 example again goes further. It has the third party act as a “personal guarantor” of the new employee for “all aspects” of the new employee and “guarantee” that the new employee will “work faithfully and observe the Covenant on Employment, Work Rules, and other applicable rules and directives.”²²² There is broad language about vague concepts like “working faithfully,” but the guarantor also specifically assumes “full liability,” jointly with the employee, to “immediately compensate” the employer for any damages “direct or indirect” if the employee violates any provision on the Covenant on Employment, Work Rules, or other rules or directives, for a period of five years from the date of the contract.²²³

From early on, the courts have limited such imposition of liability.²²⁴ As early as 1929, a Japanese court reviewed a personal guarantee for an employee that imposed unlimited liability on the guarantor and limited it to a “reasonable amount.”²²⁵ Later courts adopted and expanded this holding,²²⁶

²¹⁷ *Id.* at 109.

²¹⁸ *Id.* at 109.

²¹⁹ *Id.* at 108.

²²⁰ Amagasaki Kōgyō Keikyō, *supra* note 206, at 26.

²²¹ Personal Guaranty (Feb. 17, 2007), on file with author.

²²² *Id.*

²²³ Personal Guaranty (Oct. 2, 2011), on file with author. *Id.*

²²⁴ Amagasaki Kōgyō Keikyō, *supra* note 206, at 26, 30.

²²⁵ KAWASHIMA, NIHONJIN NO HŌISHIKI, *supra* note 1, at 110-11.

²²⁶ *Id.*

and the Diet codified it in the Law Regarding Personal Guarantees enacted in 1933.²²⁷

The Personal Guarantees Law limits the guarantee to a renewable period of five years, three if no term is stated.²²⁸ It requires that the employer notify the guarantor 1) if there is evidence of unsatisfactory work performance or bad faith; or 2) if there are any material changes in the type of work the employee performs or its location.²²⁹ In either case, following notice, the law allows the guarantor to cancel the guarantee.²³⁰ If the employer fails to provide such notice, that provides grounds to reduce the liability of the guarantor.²³¹ Regardless of notice, the law instructs a court before imposing liability to consider “each and every circumstance, compared with the other,” including those circumstances giving rise to the guarantor becoming a guarantor, and the work responsibilities and personal history of the employee.²³²

Standard interpretation of these provisions is that if the employer promoted the employee to a position of responsibility, the employer should be held responsible, not the guarantor.²³³ Courts have held a refusal to provide a personal guaranty constitutes grounds for dismissal.²³⁴ But, in reviewing a claim for damages based on the guarantee, they will examine any negligence on the part of the employer, the circumstances giving rise to the claim, and changes in the employee’s work or physical condition, i.e. courts will examine the circumstances in their totality. As a result, simple negligence on the part of the employee will rarely give rise to an order for the guarantor to pay damages, and if any are ordered they are limited in amount.²³⁵

Some sources suggest requesting a personal guarantee is “the norm,”²³⁶ and surveys suggest the reason for utilizing these contracts is to raise employee awareness and provide a basis for claiming employee

²²⁷ Mimoto Hoshōnin ni Kan Suru Hōritsu [Law Regarding Personal Guarantees], Law No. 42 of 1933, art. 1 Hōrei teikyō de-ta shisutemu [Hōrei DB], available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

²²⁸ *Id.*

²²⁹ *Id.* at art. 3, para. 2.

²³⁰ *Id.* at art. 4.

²³¹ Amagasaki Kōgyō Keikyō, *supra* note 206, at 26, 30.

²³² Law Regarding Personal Guarantees, *supra* note 227, art. 3, para. 2, art. 5.

²³³ Amagasaki Kōgyō Keikyō, *supra* note 206, at 26, 30.

²³⁴ Osaka Pref. Govt., *Roudou Soudan Q & A 11*, *supra* note 204.

²³⁵ *Id.*

²³⁶ *Id.* A recent survey of private universities suggests that 52.7% request personal guarantees, whether provided for in the work rules or not. *Seiyakusho-Mimoto Hoshoshō ni Kan Suru Anketo Kekka*, *supra* note 212, at 90.

liability if a problem arises.²³⁷ The effect is to create layers of the law governing employment relationships, starting with detailed documents assigning rights and liabilities, which the case law and statutory law then eviscerate.²³⁸

But employers continue to use them, creating more complex, detailed impositions of liability in the process. Instead of bargaining in the shadow of the law, employers bargain for more than the law permits and negotiate on that basis until the dispute escalates to the point of intervention by legal counsel or the courts. At that point, specific norms are modified or replaced by “totality of the circumstances” standards.

3. *Work Rules*

After the employee walks in the door, the Work Rules govern employee rights and duties. Work Rules are mandatory for any employer with over ten employees,²³⁹ and, as Japan’s Labor Contract Act makes clear, they are considered a binding contract between the employer and the employee.²⁴⁰ No signatures are required, but the document must be filed with the local labor bureau.²⁴¹ Any changes must be negotiated with a representative of the majority of employees in the work place, who will submit an opinion letter regarding the changes that is filed with the labor bureau.²⁴²

²³⁷ *Id.*; Yamashita Chieko, *Shinnyuushain ni Teishutsu Saseru Shorui no Houritsu Mondai to Tadashii Atsukai*, KIGYŌ JITSUMU 88 (March 2008).

²³⁸ Professor Kawashima cites to personal guarantees as evidence of the gap between the law and expectations. KAWASHIMA, *NIHONJIN NO HŌISHIKI*, *supra* note 1, at 109-12. The vague language of the contract suggests unlimited liability on the part of the guarantor but in practice neither employer nor the guarantor expect such liability. Guarantors sign the document based on relationships, a sense of obligation (*giri*), and representations the new employee will not cause problems. If problems do arise, the expectation is that the employer and guarantor will negotiate a solution, and in practice they do, with the guarantor accepting some liability in some cases and not in others. When courts have been confronted with claims, they have adjusted them, on a case-by-case basis, rendering specific terms indefinite. According to Professor Kawashima, the Law Regarding Personal Guaranties was drafted and passed by the Ministry of Justice Civil Affairs section to reconcile this difference between the law and people’s general perceptions of what it means to act as a guarantor. *Id.*

²³⁹ *Id.* Rōdō Kijun Hō [Labor Standards Act], Law No. 49 of 1947, art. 89-90, *translated in* Ministry of Justice, Japanese Law Translation, <http://www.japaneselawtranslation.go.jp>.

²⁴⁰ Labor Contract Act, *supra* note 204. Article 7 states that if an employer informs the employee of reasonable rules of employment, those rules, unless modified in a separate writing, provide the “contents of the labor contract.” *Id.* Articles 9 *et seq.* codify the process and standards for “change to the contents of a labor contract based on rules of employment.” *Id.*

²⁴¹ Tokyō Rōdōkyoku [Tokyo Labor Bureau], *Shūgyō Kisoku no Sakusei Todokede*, http://tokyoroudoukyoku.jsite.mhlw.go.jp/hourei_seido_tetsuzuki/roudoukijun_keiyaku/s-kisoku.html (last visited June 4, 2012).

²⁴² *Id.* Articles 9 & 10 of the Labor Contract Act provide a framework for the employer to change the work rules without the consent of representatives of the work place. Article 9 precludes, absent consent, a change to the work rules adversely that affects employees unless that change satisfies Article 10. Article

Standard work rules contain extensive terms covering hiring and probation; requirements for the employee's personal guarantors; terms covering transfer and leave; retirement and dismissals; work hours, breaks, and holidays; pregnancy and childcare leave; rules of conduct; use of company assets; confidentiality requirements; safety and hygiene rules; standards and procedures for disciplining employees; and compensation for work-place injuries.²⁴³ Separate rules setting out standards and procedures for disbursing salary and benefits are commonly incorporated by reference into the Work Rules.²⁴⁴

B. *Courts and the Rights to Dismiss*

This "employment contract," addressing everything from uniforms to lunchtime, might be a hundred pages long. Their standards of conduct and dismissal provisions, however, are noteworthy because the rights and obligations enumerated are, again, just the starting point.

An employer's right to dismiss an employee under the Work Rules is commonly divided into "ordinary dismissal" and "disciplinary dismissal."²⁴⁵ Discussion of both types, and related case law, follows. Once again employers bargain for more than the law permits, until the courts intervene and specific rights are replaced by reasonableness and "the common sense of society."

1. *Ordinary Dismissal*

Standard bases in the Work Rules for ordinary dismissal include 1) when it is determined that the employee is unable to bear the work because of a physical or mental disability; 2) when it is determined that the employee's ability or work record is inadequate such that employment is not

10 provides that if notice is given and if the change to the rules is reasonable "in light of the extent of the disadvantage to be incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed rules of employment, the status of negotiations with a labor union or the like, or any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract shall be in accordance with such changed rules of employment." Labor Contract Act, *supra* note 205. The ability of the representative of the majority of the employees in the workplace to influence changes in the workplace depends largely on employer/employee relationships. Labor bureaus will not reject filing of changes to the work rules because of objections lodged by employee representatives. Challenges to the validity of those changes require filing a complaint with a labor tribunal or the courts. *See, e.g.,* Japan Institute for Labor Policy and Training, *Rōdō Mondai Q & A (Kaiseiban)*, available at http://www.jil.go.jp/rodoqa/05_kisoku/05-Q01.html (last visited Dec. 21, 2012).

²⁴³ NOBUNORI ISHIZAKI ET AL., SHŪGYŌ KISOKU NO HŌRITSU JITSUMU 660-701 (2010); *see also* Work Rules, *supra* note 206.

²⁴⁴ ISHIZAKI ET AL., *supra* note 243, at 680.

²⁴⁵ *Id.*; Work Rules, *supra* note 202.

appropriate; 3) when there is no improvement after warnings regarding unsatisfactory work attitudes; 4) when the employee fails to cooperate and adversely impacts work done by other employees; 5) when there is downsizing of the enterprise or other unavoidable business necessity; and 6) when there are other conditions evidencing a lack of qualifications to work as a company employee.²⁴⁶

Setting aside the first criterion and what it says about disability law in Japan,²⁴⁷ the remaining criteria suggest that if you don't do your job or if the employer doesn't need you, the employer can fire you. The courts, however, have long suggested something different. They have for decades substantively reviewed and regularly invalidated ordinary dismissals by the employer.²⁴⁸

While the Civil Code provides that when no term is fixed either party may terminate the employment relationship on two weeks' notice,²⁴⁹ in 1975, the Supreme Court held that "[t]he exercise of the employer's right to dismiss shall be null and void as an abuse of right if the dismissal is not based on reasonable cause or is viewed as improper from the general viewpoint of society."²⁵⁰ Subsequent courts have held that "even when there is a reason for ordinary dismissal, the employer is not always permitted to dismiss the employee."²⁵¹

More recent cases tell the same story. In 2006, Kitagawa Sangyō, a kitchenware manufacturer, fired a regular employee after eight years with the company.²⁵² A Tokyo District Court reviewed the dismissal and found that the employee had violated company work rules, repeatedly. The

²⁴⁶ ISHIZAKI ET AL., *supra* note 243, at 667; *see also* KANO, *supra* note 196, at 234; Work Rules, *supra* note 203; *compare* Ryuichi Yamakawa, *From Security to Mobility? Changing Aspects of Japanese Dismissal Law*, in LAW IN JAPAN: A TURNING POINT 486 (Daniel H. Foote 2007).

²⁴⁷ *See, e.g.*, Jun Nakagawa & Peter Blank, *Future of Disability Law in Japan: Employment and Accommodation*, 33 LOY. L.A. INT'L & COMP. L. REV. 173 (2010).

²⁴⁸ *See, e.g.*, Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of Stability?*, *supra* note 196.

²⁴⁹ Civil Code, *supra* note 174, at art. 627.

²⁵⁰ *See* Yamakawa, *supra* note 246, at 487. The abuse of rights doctrine was codified in Article 1(3) of Civil Code in 1947, and states that "[n]o abuse of rights shall be permitted." Its origins date back to decisions by the Supreme Court of Cassation during the Taisho period and before that to the reception of France law during the Meiji Reformation. Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037, 1039 (1975). In 1919, in *Shimizu v. Japan*, the Supreme Court of Cassation enunciated the doctrine, finding the National Railway had abused a legal right to run trains through a switching yard, when it did so in a manner that resulted in pollution that killed a famous pine tree located nearby. *Id.* at 1041.

²⁵¹ *Shioda v. Kōchi Broadcasting Company*, 268 RŌDŌ HANREI 17 (Sup. Ct. Jan. 31, 1977) trans. by Kazuo Sugeno, *reprinted in* MILHAUPT ET AL., *supra* note 62, at 545, 546.

²⁵² Tokyo Chisai [Tokyo Dist. Ct.] Sept. 18, 2007, 947 RŌDŌ HANREI 23, translated by Elizabeth Cantu, *reprinted in* MILHAUPT ET AL., THE JAPANESE LEGAL SYSTEM: CODES, CASES, AND COMMENTARY 641 (2d ed. 2012).

employee had, *inter alia*, erased email data from a company computer and lied about it; misrepresented his title and authority in correspondence with suppliers; obstructed attempts to gather related correspondence; and slandered other employees.²⁵³ The court, however, found these acts “are not so abhorrently blameworthy that they could justify firing an employee.”²⁵⁴ The court pointed out that no prior disciplinary action had been taken against the employee; the employer had known about the violations for over a year before dismissing him, which suggested that they did not deem the violations serious; and the employee had committed no further “particularly troublesome deeds.”²⁵⁵ As a result, despite the work rule violations expressly providing for termination of the employee, the dismissal “lacks any objective reasonableness and, is improper according to the sense of society, and is invalid.”²⁵⁶

The courts treat poor performance similarly to work rule violations. More often than not, it is simply not enough to justify dismissal.²⁵⁷ In 1999, a Tokyo District Court reviewed Sega Enterprises’ dismissal of an employee after eight years of employment.²⁵⁸ After years of problems, the employee’s boss told him to look for work elsewhere in the company; citing attitude problems, no other department would take him. Sega then dismissed the employee for “deficient work ability and no prospect for improvement.”²⁵⁹ The court, on review, recognized numerous attempts to find work the employee could perform, and that the employee’s evaluations ranked in the bottom ten percent of the company.²⁶⁰ But the court ruled that simply because the worker was below average did not justify termination.²⁶¹ The employer had an obligation to provide additional, comprehensive education and instruction because there appeared to be room to improve the employee’s performance. The court found no evidence of comprehensive education and instruction, and, as a result, insufficient evidence to support a finding of “deficient work ability and no prospect for improvement.”²⁶²

²⁵³ *Id.* at 642-49.

²⁵⁴ *Id.* at 652.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ RŌDŌ HANREI NI MIRU KAIKŌKIJUN TO JITSUMU 128 (Rōdō Hanrei Kenkyūkai ed., 2010).

²⁵⁸ Tokyo Chisai [Tokyo Dist. Ct.], Oct. 15, 1999, Hei 11 (Yo) no. 21055, 1050 HANREI TAIMUZU 129, 770; *see also* RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 258, at 128-129; NIHON RŌDŌ BENGODAN, (*Ikensho*) *Kaiko Ru-ru nado no Shuchi ni Kan Suru Ikensho* (Sept. 26, 2003), available at <http://roudou-bengodan.org/proposal/detail/gen030926a.php>.

²⁵⁹ Tokyo Chisai [Tokyo Dist. Ct.], Oct. 15, 1999, *supra* note 258 at 133-35.

²⁶⁰ *Id.* at 137.

²⁶¹ *Id.* at 138.

²⁶² *Id.*

In 2001, a Tokyo District Court reviewed an insurance company's termination of an employee for "conspicuously poor work abilities."²⁶³ The court found that employment until retirement is presumed under Japan's employment system and, as a result, dismissal of a regular employee based on poor work performance extremely disadvantageous to the worker.²⁶⁴ The court held that real obstruction or damage to the business or its operations is necessary, or there must be a risk of significant damage such that the employer must remove the employee from the company. There can be no prospect for improvement, no extenuating circumstances, and no possibility for transfer or demotion.²⁶⁵ The court in this case found the employees' termination a part of the company's efforts to restructure, rather than based on significantly poor work performance, and voided it as an abuse of rights.²⁶⁶

Courts affirm dismissals, but it takes a lot. Tokyo Marine Insurance Company dismissed an employee who spent years on sick leave and, while not on sick leave, came to work late and repeatedly failed to follow instructions, requiring significant company time spent correcting errors. Pursuant to its Work Rules, it found "remarkably poor work ability so as to hinder company performance" and terminated the employee.²⁶⁷ He sued, arguing that his performance was not so bad as to "disrupt proper business function."²⁶⁸ In 2000, a Tokyo District Court found that was not the standard, but, even if it was, this employee's performance presented a risk of "disrupting proper business function" and no abuse of rights as a result.²⁶⁹

Courts that have found below average work skills a sufficient basis to terminate the employee emphasize the extensive efforts by the employer to avoid termination. In 2001, a Tokyo District Court reviewed the dismissal of an employee hired as an "installation specialist" at the consulting firm Proudfoot Japan, Ltd.²⁷⁰ The court found the employee in his first year and a half worked on five projects and for four did not possess the average level of skills required, and that his gaining the necessary skills was unlikely. The

²⁶³ Tokyo Chisai [Tokyo Dist. Ct.], Aug. 10, 2001, Hei (Yo) no. 21081, 1116 HANREI TAIMUZU 148-149; *see also* RÖDÖ HANREI NI MIRU KAIKÖ KIJUN TO JITSUMU, *supra* note 257, at 126-27; NIHON RÖDÖ BENGODAN, *supra* note 258.

²⁶⁴ Tokyo Chisai [Tokyo Dist. Ct.], Aug. 10, 2001, *supra* note 263, at 152-53.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 155-56.

²⁶⁷ Tokyo Chisai [Tokyo Dist. Ct.], July 28, 2000, Hei (wa) no. 19747, 797 RÖDÖ HANREI 65; *see also* RÖDÖ HANREI NI MIRU KAIKÖ KIJUN TO JITSUMU, *supra* note 257, at 130.

²⁶⁸ Tokyo Dist. Ct. July 28, 2000, *supra* note 267.

²⁶⁹ *Id.*

²⁷⁰ Tokyo Chisai [Tokyo Dist. Ct.], Apr. 26, 2000, Hei (wa) no. 6384, 789 RÖDÖ HANREI 21; *see also* RÖDÖ HANREI NI MIRU KAIKÖ KIJUN TO JITSUMU, *supra* note 257, at 132.

employer and employee spent three months negotiating different work responsibilities, *i.e.* another job, but were unable to reach an agreement, after which the employee was terminated. The court found an “objectively reasonable basis” for the dismissal and no abuse of rights.²⁷¹

The end result is that while the Work Rules clearly provide the employer with the right to dismiss bad employees, the courts regularly modify that right. They substantively review disciplinary decisions and frequently invalidate them. The Work Rules are a detailed employment contract specifically allocating rights and responsibilities, but they present only the first layer of legal norms governing the relationship. The second layer, available after invoking the legal process, applies equity and reviews whether the dismissal was “justified” or “an abuse of rights.”

2. *Economic Dismissal*

The work rules cited above, and most others, reserve a blanket right to dismiss based on economic necessity, in other words to restructure. The courts have limited that right as well. Economic dismissals, categorized as a type of “ordinary dismissal,” must satisfy four “requirements” or “factors”.²⁷² There must be a showing of 1) necessity to reduce the workforce; 2) good faith efforts by the employer to avoid dismissals; 3) reasonable criteria in selecting employees to be discharged; and 4) reasonable efforts to explain and obtain the consent of the trade union or workers regarding the dismissals.²⁷³

Early cases and commentary interpreted the above as “requirements”, all of which must be met in order to justify dismissal. The Tokyo High Court’s 1979 Tōyō Oxygen Company decision defines this approach.²⁷⁴ Following extended losses, Tōyō Oxygen announced its decision to shut down a division and dismiss the employees. It negotiated retirement allowances with the unions, which the majority of division employees rejected. The employees filed suit alleging an abuse of the right to dismiss.²⁷⁵

The district court found proof of an economic need to close the division, but a failure to prove that the process was “socially reasonable”

²⁷¹ Tokyo Chisai [Tokyo Dist. Ct.] Apr. 26, 2000, *supra* note 271.

²⁷² Yamakawa, *supra* note 246, at 487; RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 137.

²⁷³ Yamakawa, *supra* note 246, at 487-88.

²⁷⁴ Tokyo Kōsai [Tokyo High Ct.] Oct. 29, 1979, Sho 51 (Ne) no. 1028, 401 HANREI TAIMUZU 41 trans. by Kazuo Sugeno, *reprinted in* MILHAUPT ET AL., *supra* note 62, at 547.

²⁷⁵ *Id.*

(*shakai teki sōtōsei*) and found for the plaintiffs.²⁷⁶ The Tokyo High Court affirmed the dismissals, but, in doing so, confirmed that such dismissals must satisfy three substantive requirements and a separate procedural requirement:

First, the closing . . . must be based upon unavoidable necessity from the viewpoint of a reasonable management of the enterprise Second, dismissal due to the closure . . . should not be arbitrary on the employer's part. Such a dismissal can be held not arbitrary only if there is no room for transferring the employees . . . Third, the selection of the actual retirees should be based on objective and reasonable criteria.²⁷⁷

The court then required procedural fairness: “regardless of any labor agreements . . . proceeding without the acceptance of the union or without sufficient negotiation regarding the dismissal, or implementing dismissals that violate good faith procedural principles . . . will void the dismissal.”²⁷⁸

Recent courts have relaxed this standard, requiring only that these “factors” be considered as part of “the totality of the circumstances.”²⁷⁹ In 1999, National Westminster Bank closed its trade finance division and, after determining that there was no other position suitable for plaintiff's skills, dismissed him. In reviewing the dismissal, the Tokyo District Court characterized the above standard as: “a categorization of factors to consider in determining whether a termination . . . amounts to an abuse of the right of dismissal. They are not intended as discrete legal requirements.” Decisions regarding dismissal are “to be made examining in its totality the individual, concrete circumstances of each case.”²⁸⁰

Applying this standard, the court found no abuse of rights. As available positions at the bank all required expertise that plaintiff lacked, it was “practically impossible” to continue the employee in his current position at his current salary, and his dismissal was “rational” as a result. The court focused on the bank's “good faith efforts.” The bank gave due consideration to “living maintenance” (*seikatsu iji*) by providing a substantial retirement package and unlimited access to re-employment services,²⁸¹ and it made repeated efforts to explain and gain acceptance to the dismissal by

²⁷⁶ *Id.*

²⁷⁷ *Id.*; RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 138-39.

²⁷⁸ Tokyo Kōsai, Oct. 29, 1979, *supra* note 274, at 43.

²⁷⁹ Yamakawa, *supra* note 246, at 501; RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 140, 143; Tokyo Chisai [Tokyo Dist. Ct.] January 21, 2000, Hei 11 (yo) no. 21217, 782 RŌDŌ HANREI 23.

²⁸⁰ Tokyo Chisai [Tokyo Dist. Ct.] Jan. 21, 2000, *supra* note 279.

²⁸¹ *Id.*

participating in numerous “group negotiations” (*dantai kōshō*) with the employee’s union.²⁸²

The court showed newfound deference to the employer, finding that “restructuring is intended to strengthen competitiveness,” and this “type of business decision relating to operational planning is one based on a high level of technical expertise,” which “should be respected.”²⁸³ But even where dismissal is justified, the court weighed this deference against disruption to the workers’ livelihood and held that sufficient consideration must be given to the affected workers’ living needs for the near future; assistance with finding new employment provided; and negotiations conducted to gain the acceptance of the affected workers.²⁸⁴ “Good faith efforts in dealing with the restructuring are required.”²⁸⁵

Commentators now suggest that there two different paradigms used for reviewing economic dismissal, the “four requirements” theory and “four factors” theory.²⁸⁶ Whether four requirements or four factors, what one finds is another discrepancy between the private, first level ordering that contractually defines the employer-employee relationship and reserves a blanket right of termination to the employer, and second level ordering that involves court review to determine whether the dismissals were justified and “good faith efforts” made to avoid restructuring and mitigate its effects. Restructuring limited to economic necessity and the necessity to mitigate its effects on employees are nowhere to be found in the Work Rules; they are found in the case law.²⁸⁷

3. *Disciplinary Dismissal*

The Work Rules also commonly provide a list of grounds for disciplinary dismissals, or termination for cause. The employer may dismiss for cause for, *inter alia*, falsification of business reports adversely impacting the business; violation of confidentiality requirements; theft or misuse of

²⁸² *Id.* The employer negotiated with the employee and his union seven times over the course of three months regarding the employee’s termination and retirement package.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 138-42.

²⁸⁷ Commentators have suggested that the degree of financial difficulty necessary to justify restructuring is determined on a case-by-case basis, with reference to Toyo Oxygen’s standard of “unavoidable necessity based on rational management of the company.” This requires something less than possible bankruptcy and something more than simple business need. *Id.* at 141. Similarly, the “duty to avoid dismissal” involves a case-by-case review examining steps take prior to restructuring including implementation of hiring freezes, furlough days, negotiated pay cuts and other attempts to reduce operating costs, soliciting voluntary retirement, and job placement services. *Id.* at 142.

company property; accepting bribes or bribing public officials; bad faith, egregious violation of a company directive or rule; intentional acts resulting in significant damage to the company; and a catch-all of “other inappropriate conduct of a similar magnitude.”²⁸⁸ The bar for disciplinary dismissal, however, is high.

The starting point is the Supreme Court’s 1977 decision in *Kōchi Broadcasting*.²⁸⁹ There, a radio announcer overslept twice, and lied about it the second time.²⁹⁰ His employer dismissed him, and he filed suit arguing dismissal was too severe a punishment and constituted an abuse of the right of dismissal. The courts, at each stage, voided the dismissal. The Supreme Court found that a “dismissal could be null and void as an abuse of the right of dismissal when the dismissal is extremely unreasonable and not to be admitted to be appropriate based on the common sense of society depending on the actual circumstances of the individual case.” For the newscaster, “[j]udging from these circumstances, to dismiss plaintiff is rather too severe and tends to lack reasonableness. Thus the dismissal could possibly be regarded as inappropriate in the common sense of society.”²⁹¹

The Supreme Court in 1977 explicitly acknowledged the consensus of society may conflict with the Work Rules: “[t]he employer may not always discharge workers even when there exists a fact that constitutes reason for dismissal stipulated under work rules. If a dismissal is excessively unreasonable and impermissible from the viewpoint of general society, such a dismissal shall be null and void as an abuse of right.”²⁹²

More recent lower courts have affirmed disciplinary dismissals, but they do so following an exhaustive review and it takes more than violating the Work Rules. In 2002, a Tokyo District Court reviewed a claim for wrongful termination brought by an employee hired as a newspaper reporter.²⁹³ After ten years of inaccurate articles, problems with sources and colleagues, and missed deadlines, the newspaper transferred him to HR.²⁹⁴ In his new assignment, he continued to make mistakes and refused to follow instructions, for which his employer reprimanded him. He began to leave early, for which his employer docked his pay, and again refused to follow

²⁸⁸ ISHIZAKI ET AL., *supra* note 243, at 687.

²⁸⁹ *See, e.g.*, RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 178; Nihon Rōdō Bengodan, *supra* note 258.

²⁹⁰ Saikōsai Saibansho [Sup. Ct.], Jan. 31, 1977, 268 RŌDŌ HANREI 17 trans. by Kazuo Sugeno *reprinted in* MILHAUPT ET AL., *supra* note 62, at 545, 546.

²⁹¹ *Id.*

²⁹² Yamakawa, *supra* note 246, at 486.

²⁹³ Tokyo Chisai [Tokyo Dist. Ct.] Apr. 22, 2002, Hei 11 (wa) no. 4526, 830 RŌDŌ HANREI 52; *see also* RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 181.

²⁹⁴ Tokyo Chisai [Tokyo Dist. Ct.] Apr. 22, 2002, *supra* note 293.

instructions, for which the newspaper suspended him. After his suspension, he simply stopped coming to work. The employer emailed, faxed, and sent certified letters, requesting that he submit a leave of absence form or return to work; he refused. In 2002, they fired him.²⁹⁵ The employee argued this was an abuse of rights. The court focused on the repeated absences and repeated refusal to follow instructions. It found the employee committed gross violations of the work rules, and the employer made numerous attempts to correct the situation before terminating him.²⁹⁶ In its totality, this justified the employer's termination of the employee.²⁹⁷

In 2005, the Fukuoka High Court reviewed a wrongful termination claim in which a driving school instructor used a company laptop to frequent dating websites.²⁹⁸ Over the course of four months, he sent approximately 800 messages, one-half during work hours, and posted solicitations for sex. He used his company email address for this, and the postings were publicly accessible. After discovering the activity, and in light of previous disciplinary problems, the company asked him to resign. He refused. The company suspended him, and, after a meeting of their disciplinary committee, fired him.²⁹⁹ The employer sued alleging an "abuse of rights," and the Fukuoka High Court found that the employee had violated his obligation to work during work hours and recklessly damaged the reputation of the company, for which termination was appropriate.³⁰⁰

What is remarkable is that this was a close call: the district court found the termination was an abuse of rights. It found that most of the messages sent were harmless; the solicitations for sex limited in number; and the instructor had not been negligent in his teaching or driving instruction. The court observed that the company had no computer use policy, and the messages had not been the subject of any complaints or attention by the media until after suit was filed, such that there was no real harm to the reputation of the company. The district court found that the disciplinary dismissal was "a little too severe" and an abuse of the right of dismissal.³⁰¹

In order for disciplinary termination to be deemed justified by the courts, practitioners suggest that the dereliction of duty must be gross, continue over a period of time, and the termination proceeded by progressive

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Fukuoka Kōsai [Fukuoka High Ct.] Sept. 14, 2007, Hei 19 (ne) no. 76, 1223 HANREI TAIMUZU 188; *see also* RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 184.

²⁹⁹ Fukuoka Kousai [Fukuoka High Ct.] Sept. 14, 2007, *supra* note 298, at 188, 190-91.

³⁰⁰ *Id.* at 191.

³⁰¹ Fukuoka Chisai Kurume Shibu [Fukuoka Dist. Ct. Kurume Sec.] Dec. 17, 2006, Hei 15 (wa) no. 375, 1223 HANREI TAIMUZU 192, 197-98.

sanctions and repeated opportunities to improve.³⁰² All of this becomes part of the employer's "duty to make efforts to avoid termination."³⁰³ While the Work Rules state that if an employee fails to perform or performs poorly, the employer can fire him or her, if challenged, the courts impose a duty on the employer to avoid dismissal. Repeated attempts to retrain, find work that the employee can do, and sanction progressively are necessary to avoid an "abuse of rights."³⁰⁴

C. *Employment Law Conclusion*

These judicial standards have been codified. Amendments in 2003 to Japan's Labor Standards Act state "[a] dismissal shall be null and void as an abuse of right if the dismissal is not based on reasonable cause or is viewed as improper from the general viewpoint of society."³⁰⁵ Japan's Labor Contract Act, effective 2008, reiterates this: "[a] dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid."³⁰⁶ Disciplinary action, in general, may be voided, "if such disciplinary action lacks objectively reasonable grounds and is not found to be appropriate in general societal terms in light of the characteristics and mode of the act committed by the worker pertaining to such disciplinary action and any other circumstances."³⁰⁷

The end result is a set of legal norms, first enunciated by the courts, now codified, that provide the courts with a means to review employer action and impose equitable standards, standards based on the totality of the circumstances and "general societal terms." Those standards are applied,

³⁰² RŌDŌ HANREI NI MIRU KAIKŌ KIJUN TO JITSUMU, *supra* note 257, at 187.

³⁰³ *Id.* at 184, 187.

³⁰⁴ Levels of discipline vary but commonly include letters of reprimand, which require submission of letters of apology; reduction in pay; suspension from work; demotion; dismissal for cause; and disciplinary dismissal. *See* ISHIZAKI ET AL., *supra* note 243, at 684. Steps before dismissal, demotion and or a cut in pay, based on poor performance receive similar review by the courts. *See* Hiroyuki Morisaki & Hitomi Takanori, *Hanrei ni miru Mondai Shain Taiō: Dai Ni Kai: Kōkaku*, BUJINESU HŌMU, Feb. 2010, at 106. The basic standard enunciated by the courts states: "[e]xercise of the rights of personnel management, including demotion, fall basically within the discretionary business judgment of the employer, and will not be deemed illegal unless the decision is remarkably deficient based on the common sense of society." In determining whether the employer has exceeded the discretion afforded, the demotion's "business and organizational necessity; culpability of the employee in terms of degree, abilities, suitability, or other deficiencies, and its degree; the disadvantage to be suffered by the employee and degree; the promotion and demotion practices at the company, and the like should all be considered in their totality." *Id.*

³⁰⁵ Labor Standards Act, *supra* note 239, at art. 18-2, para. 1.

³⁰⁶ Labor Contract Act, *supra* note 204, art. 16.

³⁰⁷ *Id.* art. 15.

however, only after application and challenge to a very different set of norms.

First level ordering in the hiring documents, the Covenant on Employment and Personal Guarantee, state that the employee is responsible for any damage he or she causes the company. Second level ordering, by the courts, limits that. First level ordering in the Work Rules provides that employers can fire an employee who doesn't perform or is no longer necessary and demand indemnification for any damages. Second level ordering limits that.

Some practitioners suggest that “a good HR manager can get rid of a lot of employees” by “convincing them that their retirement is inevitable.”³⁰⁸ But they are convinced out, rather than forced out. Bargaining happens not “in the shadow of the law,” but in the shadow of detailed contracts. After the dispute escalates and the power of the courts is threatened or invoked, then the more ambiguous norms of the courts apply.

IV. LAW & NUCLEAR ENERGY IN JAPAN

Environmental law and more specifically the legal infrastructure regulating the Japanese nuclear industry is complex and provides a public law example of this layering of the law. Wide-ranging regulations and various regulators oversee the planning, construction, and operation of a nuclear reactor, but all of this leads to the narrow end of a funnel at which the prefectural governor and local city mayors sit. Local government officials decide, based on a “gentlemen's agreement,” whether or not a reactor operates.

A. *Regulating Nuclear Energy*

This section of the paper is not about March 11 or its causes,³⁰⁹ but it does introduce the law governing nuclear energy in Japan and that introduction suggests a complicated formal legal structure followed by a layer of informal norms. “Western” norms and practice have not replaced “traditional” norms and practice as Professor Kawashima suggested; “western” norms and practice, meaning clear delineation of rights and obligations, operate in conjunction with “traditional” consensus-based

³⁰⁸ Interview with registered foreign lawyer (Tokyo 2012) (on file with author).

³⁰⁹ Professor Ramseyer offers an explanation: he points to the corporate form and the moral hazard that arises from liability capped at the fire-sale value of power companies' net assets. J Mark Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines: The Case of Japan*, 13 THEORETICAL INQ. L. 457 (2012) [hereinafter Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*].

norms. A discussion of the basic statutory framework, regulatory structure, licensing and inspection system, and then judicial and local government review follows.

1. *Statutory Framework*

Regulation of the nuclear industry in Japan starts with the Basic Nuclear Energy Act.³¹⁰ First passed in 1955, it establishes a framework for nuclear energy research, development, and use.³¹¹ It limits each to peaceful use and requires establishment of safety measures and international cooperation.³¹² In pursuit of “peaceful use” and “securing safety,” the act establishes three basic principles for the industry: independence, openness, and civil, as opposed to military, use.³¹³

Within this basic framework, the Nuclear Substances, Nuclear Fuel and Nuclear Reactor Regulation Act (“Regulation Act”)³¹⁴ and the Prevention of Radiation Injuries due to Radioisotopes Act (“Radiation Injuries Prevention Act”)³¹⁵ are the primary technical statutes.³¹⁶ The former regulates commercial nuclear reactors producing electricity; creates a regulatory framework for their establishment and construction; provides authority for safety regulations, licensing, and inspections; and establishes a framework for imposing penalties for noncompliance.³¹⁷ The Regulation

³¹⁰ Genshiryoku Kihon Hō [Basic Nuclear Energy Act], Law No. 186 of 1955, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; see also Kantei [Cabinet Office], *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, at II-1; KENKICHI HIROSE, WAKARIYASUI GENSHIRYOKU KISEI KANKEI NO HŌREI TEBIKI 6 (2011).

³¹¹ Genshiryoku Kihon Hō [Basic Nuclear Energy Act], *supra* note 310, arts. 1-2; see also Kantei, *supra* note 310; HIROSE, *supra* note 310, at 6-8.

³¹² Basic Nuclear Energy Act, *supra* note 310; see also Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 313 at II-1; HIROSE, *supra* note 313.

³¹³ HIROSE, *supra* note 310, at 6; LDP and Komeito additions to the June 2012 Nuclear Regulatory Commission Establishment Act revised the Basic Nuclear Energy Act so that it now states that nuclear energy is to be “used with the goal of contributing to the security of Japan.” Cabinet members have suggested this language does not change the three principles of independence, openness, and civilian use, but the change does reflect thinking by many that Japan’s civilian nuclear industry operates as military deterrent. *Genshiryoku Kihon Hō: Mokuteki ni ‘Anzen Hoshō’ Kisei Hō no Fusoku De*, MAINICHI SHIMBUN (June 21, 2012), <http://mainichi.jp/select/news/20120622k0000m010083000c.html>; *Japan’s military defense chief Morimoto sees nuclear plants as a deterrent, favors 25% option for energy mix*, THE JAPAN TIMES (Sept. 6, 2012), <http://www.japantimes.co.jp/print/nn20120906b4.html>.

³¹⁴ Kakugenryō Busshitsu, Kakunenryōbusshitsu Oyobi Genshiro no Kisei ni Kan Suru Hōritsu [Nuclear Substances, Nuclear Fuel and Nuclear Reactor Regulation Act (“Regulation Act”)], Law No. 166 of 1957, available at <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

³¹⁵ Hōshasei Dōi Genso Nado ni Yoru Hōshasen Shōgai no Bōshi ni Kan Suru Hōritsu [Law on the Preventions of Radiation Injuries due to Radioisotopes (“Radiation Injuries Prevention Act”)], Law No. 167 of 1957, available at <http://law.e-gov.go.jp/htmldata/S32/S32HO167.html>.

³¹⁶ HIROSE, *supra* note 310 at 8.

³¹⁷ The Regulation Act is broken down based on activity, *e.g.*, refinement, processing, nuclear reactors, storage, re-processing. With regard to reactor operation, Chapter 4 of the Act regulates the

Act's stated goals are comprehensive regulation that prevents accidents and protects public safety; protects fissile material and public security; and complies with international treaty obligations regulating the peaceful use of nuclear materials.³¹⁸

The Radiation Injuries Prevention Act establishes a regulatory framework for handling all radioactive materials.³¹⁹ Incorporating International Commission on Radiological Protection ("ICRP") standards, the act regulates the registration, sale, lease, transportation, handling, and disposal of radioactive materials.³²⁰ It establishes standards for the placement of facilities utilizing radioactive materials, their construction, maintenance, and inspections.³²¹ It establishes usage standards, exposure standards, industry standards, inspections relating to industry workers and health maintenance requirements, record-keeping requirements, ongoing education requirements, as well as standards for transportation and handling of radioactive materials.³²² The law is supplemented by the Technical Standards for the Prevention of Radiation Injuries Act,³²³ which establishes a Radiation Deliberative Council that is tasked with developing standards for the prevention of radiation exposure injuries.³²⁴ Regulatory agencies promulgating related standards are required to consult this deliberative council,³²⁵ and ensure that the new standards incorporate those established under the Radiation Injuries Preventions Act.³²⁶

establishment and operation of reactors; Chapter 6 nuclear energy enterprises; Chapter 6(3) welding and other inspections; and Chapter 8 penalties for noncompliance. Regulation Act, *supra* note 314; *see also* Kantei, *supra* note 310. Rules based on the statute include, *inter alia*, the Rules Relating to the Establishment and Operation of Nuclear Reactors for Generating Electricity and Notice establishing Radiation Limits. *Id.*

³¹⁸ HIROSE, *supra* note 310, at 30. Regulated entities include refiners; processors; reactor operators; post-use storage, processing, and disposal operations. *Id.* at 31.

³¹⁹ Radiation Injuries Prevention Act, *supra* note 315.

³²⁰ *Id.* *See also* Mombukagakusho [MEXT], *Waga Kuni no Genshiryoku Anzen Kisei Nado no Hou Taikei Ni Tsuite*, available at, http://www.mext.go.jp/a_menu/anzenkakuho/anzenkakuho/1260977.htm (last visited Sept. 7, 2011). Japan incorporates the ICRP radiation exposure standards, through its Law regarding Technical Standards for the Prevention of Radiation Injuries (Houshasen Shougai boushi no Gijutsu Teki Kijun ni Kan Suru Houritsu). HIROSE, *supra* note 310 at 20, 23.

³²¹ Radiation Injuries Prevention Act, *supra* note 315.

³²² *Id.* Article 6 requires operators to meet MEXT technical standards in order to obtain approval for construction and operation.

³²³ Hōshasei Shōgai Bōshi no Gijutsu teki Kijun ni Kan Suru Hōritsu [Law on Technical Standards for the Prevention of Rational Injuries] Law No. 162 of 1958 (Hōrei teikyō dēta shisutemu) [Hōrei DB], <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; HIROSE, *supra* note 313 at 22.

³²⁴ Law on Technical Standards for the Prevention of Rational Injuries, *supra* note 323, at art. 1. The council, a *shingikai*, is housed within the Ministry of Education, Culture, Sports, Science and Technology (MEXT). *Id.*

³²⁵ *Id.* at art. 6.

³²⁶ HIROSE, *supra* note 310 at 23; Radiation Injuries Prevention Act, *supra* note 315.

The Electricity Businesses Act (“Electricity Act”) provides comprehensive regulatory coverage of all power companies, and also regulates nuclear power plants.³²⁷ With regard to commercial nuclear reactors, the Electricity Act establishes separate design and construction guidelines, as well as an approval process for construction; pre-use inspections; and regular facility inspections.³²⁸ The result is that commercial nuclear power plants are subject to safety regulation drawn from both the Regulation Act and the Electricity Act, as well as ordinances, rules, and notices promulgated pursuant to these statutes.³²⁹

These “basic” laws are supplemented by more specialized statutes, including the Basic Disaster Response Act (“Response Act”)³³⁰ and the Compensation for Damages from Nuclear Energy Act (“Compensation Act”).³³¹ The Response Act was passed in 1999, after employees improperly mixed fuel at the Tokaimura Nuclear Reprocessing facility and the fuel reached criticality, killing two employees and dispersing radiation into the surrounding area.³³² The Response Act followed establishing additional operator requirements to prevent accidents, and providing authority for the government to issue nuclear emergency declarations, establish a nuclear accident response headquarters, and implement emergency measures.³³³

³²⁷ Denki Jigyō Hō [Electricity Businesses Act], Law No. 170 of 1964 (Hōrei teikyō dēta shisutemu) [Hōrei DB], <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, II-1.

³²⁸ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310 at II-1. Rules regulating the safety of nuclear reactors based on this statute include the Electricity Businesses Enforcement Rules, the Ordinance Defining Technical Standards for Energy Generating Nuclear Power Facilities, and the Technical Standards Relating on Levels of Radioactivity from Electricity Producing Nuclear Power Facilities. *Id.*

³²⁹ HIROSE, *supra* note 310 at 9. Cabinet Ordinances (Seirei), Ministerial Ordinances (Shōrei), and Notices (Kokuji) implement each of these basic statutes. Kantei [Cabinet Office], *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, II-4, available at <http://www.kantei.go.jp/jp/topics/2011/pdf/02-shikumi.pdf> (last visited March 6, 2012).

³³⁰ Kantei [Cabinet Office], *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-5. HIROSE, *supra* note 310 at 19. Following the JCO incident, the Nuclear Reactor Regulatory Act was revised to include additional safety guidelines and regulations implementing additional safety inspections for currently operating nuclear plants. *Id.* at 20. The Special Measures Law for Responding to Nuclear Disasters, enacted in 1999, supplements the Basic Disaster Response Act. Genshiryoku Saigai Taisaku Tokubetsu Sochi Hō [Special Measures Law for Responding to Nuclear Disasters], Law No. 156 of 1999 (Hōrei teikyō dēta shisutemu [Hōrei DB]), available at, <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

³³¹ Genshiryoku Songai Baishō ni Kansuru Hōritsu [Compensation for Damages from Nuclear Energy Act (“Compensation Act”)] Law No. 47 of 1961, Hōrei teikyō dēta shisutemu [Hōrei DB], available at, <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

³³² HIROSE, *supra* note 310, at 19, 23. Employees preparing fuel for its fast breeder reactor overfilled a mixing tank, which reached criticality. See also NOBORU UTATSU, GENSHIRYŌ SONGAI BAISHŌ HŌRITSU MONDAI 84 (2012).

³³³ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310 at II-5; HIROSE, *supra* note 310 at 19, 238.

Japan has not signed onto international agreements addressing liability for nuclear damage,³³⁴ but its Compensation Act establishes a domestic compensation framework.³³⁵ It creates a strict liability regime for “nuclear energy enterprises,”³³⁶ which covers “injuries arising from nuclear fission, nuclear radiation arising from nuclear materials, or other related toxic effects.”³³⁷ The strict liability is unlimited in scope, but it is limited to the operator, the nuclear energy enterprise.³³⁸ The act provides for rights of indemnity if the damage is caused by the intentional acts of a third party, but the operator remains liable.³³⁹ The stated purpose of the act is to facilitate payment of claims for compensation by eliminating the need for proof of negligence or intent; by eliminating the need to identify responsible parties; and by eliminating limits to those claims.³⁴⁰

The Compensation Act requires all nuclear power plant operators to insure against risk.³⁴¹ They do so primarily through private insurance with the Japanese Atomic Energy Insurance Pool, and secondarily with the government.³⁴² The act mandates private insurance of ¥120 billion per reactor generating over 10,000 kilowatts.³⁴³ The Compensation Act, along with a separate Nuclear Energy Damage Compensation Indemnification Contract Act, also establishes a framework for “assistance” by the Japanese government to compensate claims (a) in excess of the above amount, or (b) for damage not covered because of force majeure.³⁴⁴ Both laws contemplate

³³⁴ Hirose, *supra* note 310, at 246-47, 254. Japan is not a signatory to the Paris Convention on Third Party Nuclear Liability or the Vienna Convention on Civil Liability for Nuclear Damage. *Id.*

³³⁵ HIROSE, *supra* note 310, at 246-47. *See also* UTATSU, *supra* note 332, at 28-29.

³³⁶ Compensation Act *supra* note 331, art. 3(1). Art. 5(1) focuses liability on the operators and not the designer, constructor, or other actors. *Id.* *See also* UTATSU, *supra* note 332, at 33.

³³⁷ Compensation Act *supra* note 331, at art. 2(2). *See also* UTATSU, *supra* note 332, at 33.

³³⁸ HIROSE, *supra* note 310, at 247.

³³⁹ Compensation Act *supra* note 331, art. 5.

³⁴⁰ HIROSE, *supra* note 310, at 248-49. Plaintiffs must prove causation and damages. Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 466. There are no provisions regarding how causation is established or what damages are covered. Basic civil law principles apply. *See, e.g.,* Nichibenren, *Tōkyō Denryoku ni Tai Suru Songai Baishō Seikyū Sōron 3-4*, www.nichibenren.or.jp/library/ja/ja/special_them/data/manual01.pdf (last visited Dec. 21, 2012). Article 18 of the Compensation Act establishes a Committee for the Resolution of Disputes relating to Damages from Nuclear Energy. That committee functions as a mediation council; an investigatory body investigating damages; and a deliberative council establishing guidelines for determining the scope of damages covered. Compensation Act, *supra* note 331, at art. 18.

³⁴¹ Compensation Act *supra* note 331, art. 6. *See also* UTATSU, *supra* note 332, at 31. Pursuant to Art. 33(2) of the Regulation Act, failure to properly insure could result in cancellation of the operating permit for the nuclear reactor. *Id.*

³⁴² HIROSE, *supra* note 310, at 249. Art. 8 requires a nuclear power injury liability compensation insurance contract. Art. 10 requires a separate insurance compensation contract. *See* UTATSU, *supra* note 332, at 33.

³⁴³ Compensation Act *supra* note 331, at art. 7(1).

³⁴⁴ *Id.* at art. 10.

that the power company remains liable for any amounts paid by the government through low interest loans or other government assistance.³⁴⁵

Force majeure changes things. Nuclear power plant operators are strictly liable for any injuries causally related to radiation exposure, unless “the damage occurs as a result of societal unrest or an anomalous, massive natural calamity.”³⁴⁶ Insurance contracts entered into with the Japanese Atomic Energy Insurance Pool, pursuant to Article 8 of the Compensation Act, specifically exclude accidents caused by earthquakes, tsunami, or volcanic eruptions, events covered by a supplemental insurance contract with the State.³⁴⁷ The Japanese government in that instance assumes liability.³⁴⁸

After March 11, early debate focused on whether the force majeure exception to strict liability applied. Commentators argued that it did not and that the exception to strict liability should be narrowly construed; they argued that for the force majeure exception to apply the events must be unforeseeable and without precedent in Japanese history.³⁴⁹ Historical records and simulations by the Tokyo Electric Power Company (“TEPCO”) quickly disposed of any such suggestion.³⁵⁰ On May 10, 2011, TEPCO announced that it would provide compensation under the Compensation Act and applied for government assistance to do so.³⁵¹

In summary, numerous statutes and ordinances provide standards for radiation protection. They establish regulatory frameworks for “inspections” by regulatory agencies; “examinations” by regulatory agencies; industry “maintenance standards;” industry “compliance standards;” emergency response procedures; administrative sanctions; and compensation for

³⁴⁵ *Id.* at art. 16; UTATSU, *supra* note 332, at 34.

³⁴⁶ Compensation Act *supra* note 331, at art 3.

³⁴⁷ *Id.* at arts. 3, 8; Compensation Act Enforcement Rules Art. 2; UTATSU, *supra* note 332, at 34.

³⁴⁸ If the exculpatory clause doesn’t apply, the central government remains responsible for damages in excess of ¥120 billion and assistance as required under Compensation Act *supra* note 331, art. 16(1). If the exculpatory clause applies, the central government assumes primarily responsibility for relief and necessary measures. *Id.* art. 17. Scholars have suggested that operator liability based on tort principles remains a possibility. Tadashi Otsuka, *Kankyō Hou ni Okeru Hiyō Futan to Genshiryōku Songai Baishō*, Hokkaido University Presentation Materials 35 (Sept. 3, 2012). Presentation materials on file with author.

³⁴⁹ UTATSU, *supra* note 332, at 33-35. Otsuka, *supra* note 348, at 32-33.

³⁵⁰ Reiji Yoshida, *Probe poised to take Tepco to task*, THE JAPAN TIMES, June 7, 2011; *see also* Kazuaki Nagata, *New atomic regulator launches, vowing no more disasters*, THE JAPAN TIMES Sept. 20, 2012. Scholars have described March 11 as a “high-damage, high-probability event.” Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 457, 479, 484.

³⁵¹ UTATSU, *supra* note 332, at 36. Following March 11, the Diet passed the Nuclear Energy Damages Compensation Assistance Organization Act, with the organization funded by government and the nine nuclear power plant operators and three related entities. In August 26, 2011, the Diet also passed the “Special Law Concerning Environmental Pollution arising from the Release of Radiation from the Nuclear Reactor Accident accompanying the 2011 March 11 Tohoku Region Pacific Ocean Earthquake.” *See* Otsuka, *supra* note 348, at 59.

damages.³⁵² Primary attempts at ordering, based on black letter law, establish a complex statutory regime; its complexity matched only by the complexity of the regulatory structure implementing it.

2. *Regulating Nuclear Energy*

There are a hodge-podge of ministries, commissions, and agencies that have regulated the nuclear industry in Japan.³⁵³ As shown in the chart in Appendix A, the Ministry of Economy Trade and Industry (“METI”), the Ministry of Education, Science, Technology, and Sports (“MEXT”), and their predecessors, along with affiliated entities and the Cabinet Office all played central roles up until September 2012.³⁵⁴

Safety regulation of commercial reactors started with the Resource Energy Division at the former Ministry of International Trade and Industry.³⁵⁵ In 2001, as part of broader administrative restructuring, METI was created and along with it the Nuclear and Industrial Safety Agency (“NISA”), an external bureau staffed with approximately 300 employees, affiliated with METI’s Resource Energy Division.³⁵⁶ Prior to September 2012, METI held principal responsibility for the regulation of commercial nuclear reactors in Japan, as well as responsibility for promoting nuclear energy.³⁵⁷ Pursuant to a grant of authority in METI’s Establishment Law, NISA conducted the actual evaluation of construction applications, construction licensing, pre-use and other inspections, and advised METI on decisions relating to regulatory activities.³⁵⁸

³⁵² HIROSE, *supra* note 310, at 11.

³⁵³ Yuka Hayashi & Chester Dawson, *Japanese Struggle with Shape of Nuclear Regulation*, WALL ST. J., March 25, 2012, (“[o]versight has also been fragmented”); Tatsujiro Suzuki et al., *Anzen Kisei ni Okeru ‘Dokuritsusei’ to Shakai teki Shinrai—Beikoku Genshiryoku Kisei Inkai wo Sōzai Toshite*, 4 SHAKAI GIJUTSU KENKYŪ RONBUSHU 161, 167 (Dec. 2006).

³⁵⁴ The June 20, 2012 Nuclear Regulatory Commission Establishment Act created an independent regulatory commission designed to streamline, and improve, regulation. Genshiryoku Kisei Inkai Secchi Hō [Nuclear Regulatory Commission Establishment Act], Law No. 47 of 2012 Hōrei teikyō de-ta shisutemu [Hōrei DB], *available at*, http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi_

³⁵⁵ The Nuclear Energy Policy Section for the Electricity and Gas Division oversaw public relations, research, safety, international cooperation, disposal, investigations, and technology related to nuclear energy. Suzuki et al., *Anzen Kisei ni Okeru ‘Dokuritsusei’ to Shakai teki Shinrai*, *supra* note 353, at 161, 166.

³⁵⁶ *Id.* at 167; Research Organization for Information, Science and Technology (“RIST”), Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō (11-02-01-01) at 1, *available at* http://www.rist.or.jp/atomica/data/dat_detail.php?Title_Key=11-02-01-01 [hereinafter RIST, Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō]; Kantei [Cabinet Office], *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-5.

³⁵⁷ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-5.

³⁵⁸ *Id.*; RIST, Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō, *supra* note 356, at 1.

In 2003, as part of efforts to ensure independence from the nuclear industry, the Japanese government established the Japan Nuclear Energy Safety Organization (“JNES”), a public corporation tasked with developing independent technical expertise with which to analyze and evaluate the safety of commercial nuclear power generators.³⁵⁹ Staffed with approximately 400 employees, JNES worked with NISA to provide expertise relating to safety standards and inspections. It also directly conducted inspections of some nuclear facilities.³⁶⁰

Prior to September 2012, MEXT regulated experimental and research nuclear facilities, and it provided general environmental and radiation monitoring for all facilities.³⁶¹ The Regulation Act provided for MEXT oversight over experimental reactors and fuels and tasked MEXT with ensuring compliance with international obligations.³⁶² The Response Act outlined MEXT’s role in responding to nuclear accidents, and the Radiation Injury Prevention Act authorized MEXT to implement regulations relating to the release of radioactive materials.³⁶³ The Science & Technology, Academic Policy & Safety Division within MEXT maintained separate offices dealing with radiation regulation; nuclear regulation; environmental accident response; compensation measures, and international nuclear safety issues.³⁶⁴

At the same time, the Japan Atomic Energy Commission (“JAEC”) and the Nuclear Safety Commission (“NSC”) operated as independent commissions within the Prime Minister’s Cabinet Office.³⁶⁵ Since its inception in 1956, the JAEC has been tasked with establishing national policy “for the promotion of research, development, and utilization of

³⁵⁹ Suzuki et al., *Anzen Kisei ni Okeru ‘Dokuritsusei’ to Shakai teki Shinrai*, *supra* note 353, at 161, 167.

³⁶⁰ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-3; HIROSE, *supra* note 310, at 17; Tatsujiro Suzuki et al., *Genshiryoku Anzen Kisei ni Okeru Dai Sansha Kikan no Yakuwari*, 2 SHAKAI GIJUTSU KENKYUU RONBUNSHUU 275, 276 (Oct. 2004); Suzuki et al., *Anzen Kisei ni Okeru ‘Dokuritsusei’ to Shakai teki Shinrai*, *supra* note 353, at 166-167. JNES performed safety inspections and evaluations formerly entrusted to the Nuclear Power Engineering Corporation (Genshiryoku Hatsuden Gijutsu Kikou). *Id.*

³⁶¹ Mombukagakusho [MEXT], *Waga Kuni no Genshiryoku Anzen ni Kansuru Soshiki Ni Tsuite*, available at, http://www.mext.go.jp/a_menu/anzenkakuko/anzenkakuho/1260978.htm (last visited Sept. 7, 2011).

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Genshiryoku Inkkai Oyobi Genshiryoku Anzen Innkai Setchi Hō [Atomic Energy Commission and Nuclear Safety Commission Establishment Law] Law No. 188 of 1955, art. 1, Hōrei teikyō de-ta shisutemu [Hōrei DB], available at, <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

nuclear energy.”³⁶⁶ In 1974, following a radiation leak on the nuclear vessel *Mutsu*, the Prime Minister’s Office, moved safety regulation from the JAEC to a newly established division in the Science and Technology Agency, and then, in 1978, to the newly established NSC.³⁶⁷

As part of the 2001 administrative restructuring, the NSC became an independent office within the Cabinet Office.³⁶⁸ The purpose of the NSC was to provide a “double check”: the NSC was tasked with third party oversight of all the other agencies regulating nuclear power, as well as oversight over the nuclear power industry itself.³⁶⁹ The NSC provided secondary evaluations of construction and operation applications for nuclear facilities and conducted secondary inspections.³⁷⁰ Separate sections within the commission investigated and established nuclear safety engineering standards; conducted “special investigations,” including investigating litigated claims; conducted nuclear safety inspections for commercial reactors, including planning and construction inspections; conducted “regular” inspections; and engaged in rule-making activities.³⁷¹ The NSC could issue recommendations or warnings (*kankoku*) via the Prime Minister’s Office, and the Prime Minister was to “respect” the decisions of the NSC.³⁷²

³⁶⁶ Japan Atomic Energy Commission, *The Mission*, available at http://www.aec.go.jp/jicst/NC/about/index_e.htm (last visited Mar. 6, 2012); Email correspondence with JAEC official (Jan. 10, 2013), on file with author. Japanese law was silent with regard to nuclear security. The JAEC, on its own initiative, established an advisory committee on nuclear security and published basic policies regarding the subject. *Id.* The law is not silent with regard to its goal to develop nuclear energy. The Japan Atomic Energy Agency Establishment Act specifies that part of the JAEC’s mission is to develop a Fast Breeder Reactor and nuclear fuel cycle. *Id.*

³⁶⁷ Kokka Senryaku Shitsu, *Genshiryoku Inkaei no Koremade no Katsudō to Keii* (1950 Nendai - Genzai) at 6; summary of document available at, <http://www.enecho.meti.go.jp/info/committee/kihonmondai/33th/33-3.pdf> (last visited May 1, 2012); Suzuki et al., *Anzen Kisei ni Okeru ‘Dokuritsusei’ to Shakai teki Shinrai*, *supra* note 353, at 161, 165-166.

³⁶⁸ *Id.*

³⁶⁹ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-5.

³⁷⁰ *Id.* A former secretariat of the NSC suggests the NSC played four roles: 1) to act as a “double-check” on the examinations conducted by the regulatory agency in issuing construction permits; 2) to establish basic safety inspection standards; 3) to “check” the regulatory activity of the government agencies regulating nuclear power generators; and 4) to respond to nuclear emergencies. HIROSE, *supra* note 310, at 10.

³⁷¹ Suzuki et al., *Anzen Kisei ni Okeru ‘Dokuritsusei’ to Shakai teki Shinrai*, *supra* note 353, at 165-166. The NSC issued its first warning or recommendation in 2002, through the Prime Minister to METI relating to TEPCO. *Id.* at 166. METI, in turn, issued warnings to TEPCO relating to problems with TEPCO’s inspections of its nuclear reactors. See METI Natural Resources Division, *Heisei 15 Nendo Jūyō Jikō*, <http://www.enecho.meti.go.jp/topics/hakusho/2004/html/160g0020.html> (last visited Dec. 27, 2012).

³⁷² *Id.*

After March 11, criticism led to reform.³⁷³ Government officials announced plans for creation of a “highly independent” nuclear regulatory commission to replace NISA.³⁷⁴ The stated goal was to remove safety regulation from METI, the ministry in charge of promoting use of atomic energy, and to unify the major regulatory functions conducted by NISA and METI, the NSC, JAEC and MEXT into one regulatory body.³⁷⁵ After months of disagreement regarding the authority and structure of the new agency, on June 20, 2012, the Diet passed the Nuclear Regulatory Authority [NRA] Establishment Act.³⁷⁶ The new five-member commission is structured, as shown in Appendix A, to have “legally guaranteed independence,” with commission members appointed by the Diet.³⁷⁷ They will operate as an Article 3 Commission, affiliated with the Ministry of the Environment, and oversee approximately 500 regulators with limited ability to transfer to other agencies or industry.³⁷⁸

The new regulatory commission began work September 2012, following continued disagreement in the Diet and recess appointments of the commissioners by the Prime Minister.³⁷⁹ The new regulatory structure is stream-lined compared to before, but it remains part of a complex structure that engages in detailed, primary ordering. The basic regulatory framework for inspecting and licensing commercial nuclear reactors, for now, remains the same with the NRA assuming the roles played by NISA and the NSC.³⁸⁰

³⁷³ Debate highlighted the regulators’ ineffective oversight and slow response to the Fukushima crisis. See, e.g., *Human error amplified crisis: Amano*, THE JAPAN TIMES, March 12, 2012; Kazuaki Nagata, *Further restarts hinge on new watchdog*, THE JAPAN TIMES, June 17, 2012.

³⁷⁴ *IAEA to get report on plan for better regulatory system*, THE JAPAN TIMES, Sept. 13, 2011; *New Nuke safety bodies get OK*, THE JAPAN TIMES, June 15, 2012.

³⁷⁵ “METI bureaucrats are reassigned every few years, mainly based on seniority, and often shuttle[d] between the nuclear promotion and regulation sections.” Kazuaki Nagata, *Nuke watchdog a ‘cosmetic change’*, THE JAPAN TIMES, Sept. 20, 2012; *Cabinet OKs new nuke watchdog*, THE JAPAN TIMES Aug. 16, 2011; Yuka Hayashi & Chester Dawson, *supra* note 353; Kazuaki Nagata, *Further restarts hinge on new watchdog*, *supra* note 376.

³⁷⁶ Nuclear Regulatory Commission Establishment Act, *supra* note 354.

³⁷⁷ *Cabinet OKs new nuke watchdog*, *supra* note 375; Kazuaki Nagata, *supra* note 373; Genshiryoku Kiseicho Hatsu Daichoukan ni Zen Keishi Soukan, NHK (Sept. 12, 2012), <http://www3.nhk.or.jp/news/html/20120912/k10014964801000.html>; Kazuaki Nagata, *supra* note 351.

³⁷⁸ Kazuaki Nagata, *supra* note 350; Cabinet Secretariat, *Genshiryoku Kisei Iinkai Secchi Houan no Gaiyou*, <http://www.cas.go.jp/jp/genpatsujiko/info/seiritsu.html> (last visited Dec. 21, 2012).

³⁷⁹ Kazuaki Nagata, *Further restarts hinge on new watchdog*, *supra* note 373; *Seifu, Genshiryoku Kisei Iinkai wo 19 Nichi Hassoku, Inchoura Shushoo Kengen de Ninmei*, NIHON KEIZAI SHIMBUN (Sept. 11, 2012), http://www.nikkei.com/article/DGXNASFS11002_R10C12A9MM0000/. Diet members were unable to reach agreement on who should be appointed to the new commission. *Id.*

³⁸⁰ See Regulation Act, *supra* note 314 (Law No. 47 of June 27, 2012 Supplementary Provisions); *Two of Japan’s nuclear safety bodies fade into the sunset*, THE JAPAN TIMES, Sept. 19, 2012.

3. *Licensing and Inspecting Nuclear Power Plants*

Regulation starts with oversight of inspections conducted by the nuclear power plant operators.³⁸¹ NISA, pursuant to a grant of authority from METI, required each nuclear facility to develop and implement a maintenance (*hozen*) program³⁸² and each operator to undertake “safety management inspections,” including pre-use safety management inspections, welding safety management inspections, and regularly scheduled safety management inspections.³⁸³ NISA and the NSC then conducted inspections of the inspections or inspected the facilities independently.³⁸⁴ The NRA now completes the inspections.

Separate safety regulatory schemes exist for commercial, experimental, and research nuclear reactors.³⁸⁵ With commercial reactors, inspections are divided into four stages, with regulatory examinations or inspections occurring at the 1) planning and design stage; 2) construction stage; 3) operational stage; and 4) decommissioning.³⁸⁶ Violations of safety standards at any stage may result in administrative penalties, including prison sentences of up to a year and fines of up to ten million yen; suspension of an operating license for up to one year; or revocation of the license.³⁸⁷

Pursuant to the Regulation Act, power plant operators must receive the approval of the METI Minister, now the NRA, to construct a new nuclear reactor.³⁸⁸ Power companies begin the process by picking a site,³⁸⁹ which requires an environmental assessment prepared pursuant to the

³⁸¹ HIROSE, *supra* note 310, at 14.

³⁸² *Id.*

³⁸³ *Id.* METI, pursuant to the Regulation Act, licensed establishment plans and construction methods, pre-use inspection, welding methods, safety measures, regular inspections, operating plans, safety compliance, and oversight inspections of operations management supervision. Pursuant to the Electricity Businesses Act, METI licensed construction plans, pre-use inspections, welding inspections, safety rules filings, regular inspections. RIST, Hatsudenyo Genshirō no Anzen Kisei no Gaiyō, *supra* note 356, at 1.

³⁸⁴ HIROSE, *supra* note 310, at 15.

³⁸⁵ *Id.* at 33, 62, 71.

³⁸⁶ *Id.* at 31. MEXT retained authority to regulate the safety of all experimental and research reactors. Their review process, with the exception of the planning stage is similar to that for commercial reactors. RIST, Genshiryoku Shisetsu no Secchi (Henkō) ni Kakawaru Anzen Shinsa (11-01-01-04), *available at* <http://www.rist.or.jp/> (last visited Mar. 7, 2012) [hereinafter RIST, Genshiryoku Shisetsu no Secchi (Henkō) ni Kakawaru Anzen Shinsa]. *See also* MEXT, Genshirō no Secchi, Unten, Nado, *available at* http://www.mext.go.jp/a_menu/anzenkakuho/genshiro_anzenkisei/1260755.htm.

³⁸⁷ HIROSE, *supra* note 310, at 32; Regulation Act, *supra* note 314, at arts. 177-184.

³⁸⁸ Regulation Act, *supra* note 314, at art. 23(1). Article 24 provides the standard for approval, and Article 26 filing and approval standards for changes. *Id.* *See also* Kantei [Cabinet Office], *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-2; HIROSE, *supra* note 310, at 34, 36.

³⁸⁹ Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 464.

Environmental Assessment Act and Energy Enterprises Act.³⁹⁰ With the application, the plant operator must submit basic construction plans, with regulators examining whether those plans meet the standards set out in the Regulation Act.³⁹¹ Prior to September 2012, approval was based on a preliminary evaluation of the application by NISA, followed by a secondary evaluation and an opinion letter offered by the NSC. NISA examined whether the submitted materials met licensing standards, including whether they presented any structural problems that would interfere with accident prevention.³⁹² NISA would also solicit the opinion of the JAEC regarding security measures; use consistent with Japan's long-term plan for nuclear energy; and the financial health of the prospective licensee.³⁹³ The NSC opined on construction, technical ability to operate the plant, and disaster prevention measures, including ability to withstand an earthquake.³⁹⁴ The METI minister was required to "duly respect" the opinion of the NSC.³⁹⁵ After September 2012, the NRA decides.³⁹⁶

³⁹⁰ METI would solicit the opinion of the local governors during this process, make recommendations as necessary, and "take all available measures to protect the environment." They would hold public hearings in order to "obtain the understanding" of local citizens, and, following the hearings, meet with heads of related ministries then develop a Basic Energy Development Plan and designate the area as an Important Electricity Development District. RIST, *Hatsudenyo Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 2; RIST, *Genshiryoku Shisetsu no Secchi (Henkō) ni Kakawaru Anzen Shinsa*, *supra* note 386.

³⁹¹ Regulation Act, *supra* note 314, art. 24. RIST, *Genshiryoku Shisetsu no Secchi (Henkō) ni Kakawaru Anzen Shinsa (11-01-01-04)*, *supra* note 389.

³⁹² RIST, *Genshiryoku Shisetsu no Secchi (Henkō) ni Kakawaru Anzen Shinsa*, *supra* note 386.

³⁹³ Regulation Act, *supra* note 314, at art. 24; email correspondence with JAEC official, *supra* note 369. Following the September 2011 regulatory reforms, responsibility for use consistent with long-term planning and ensuring the financial health of the licensee was transferred to the NRA. *Id.*

³⁹⁴ See Regulation Act, *supra* note 314, at art. 23(2). Review standards are set out in Article 24 of the Regulation Act and in METI Technical Standards Ordinance No. 62. HIROSE, *supra* note 310, at 36. Secondary examinations by the NSC made use of advisory committees, such as the Nuclear Reactor Safety Specialist Committee, which focused on differences from earlier designs, new technical standards and research data, special attributes of the proposed location, and technical ability to safely operate the facility. Earthquake resistance standards are set out in the NSC's Examination Guidelines for Earthquake Resistance Design for Electricity Producing Nuclear Reactor Facilities (*Hatsudenyou Genshiro Shisetsu ni Kansuru Taishin Sekkei Shinsa Shishin*) (Sept. 2006). See Hirose, *supra* note 310, at 18. See also Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-2. *Genshiryoku Anzen Iinkai, Hatsuden you Genshiryou Shisetsu ni Kansuru Taishin Sekkei Shinsa Shishin* (2006), available at <http://www.nsr.go.jp/archive/nsc/shinsashishin/pdf/1/si004.pdf>.

³⁹⁵ RIST, *Genshiryoku Shisetsu no Secchi (Henkō) ni Kakawaru Anzen Shinsa*, *supra* note 386. The METI minister would also request an opinion letter from the AEC. *Id.*

³⁹⁶ Regulation Act Article 24 continues to require the NRA solicit the opinion of the JAEC regarding peaceful use in processing a license application. Email correspondence with JAEC official, *supra* note 369. With regard to any use at all, in 2012 Japan announced a new energy policy phasing out nuclear energy, and then backtracked. One government official described "zero-nuclear status" as "an ambition, not a commitment." The METI Minister then committed to construction of new, previously approved reactors, and, more recently, the new Abe Cabinet has suggested that it will permit construction of new reactors. Hiroko Tabuchi, *Japan's New Leader Endorses Nuclear Plants*, N.Y. TIMES, Dec. 31, 2012, at A8; Masami Ito, *Abe Cabinet signals big changes ahead*, THE JAPAN TIMES, Dec. 28, 2012; Mitsuru Obe, *Japan to Reconsider Nuclear Phaseout*, WALL ST. J., Dec. 28, 2012; Takashi Mochizuki et al., *Japan Seeks Slow*

Following approval and prior to construction, the power company must, pursuant to the Electricity Act, have its construction plan approved, and file an Electricity Notice of Change.³⁹⁷ Design and construction plan specifics must comply with both Regulation Act standards and Electricity Act standards, including pre-approval of design plans relating to fuel.³⁹⁸

During the construction process, the Electricity Act requires that the plant pass multiple “pre-use” inspections.³⁹⁹ They include on-site and off-site pre-use safety inspections, regular inspections, regular safety inspections, and safety rules compliance inspections.⁴⁰⁰ The Electricity Act provides for separate inspections covering welding and fuel.⁴⁰¹ It also requires “Pre-Use Safety Management Inspections” by the power company: internal inspections intended to determine compliance with construction plans and technical standards.⁴⁰² Regulators evaluate the method, process, and results of these internal inspections.⁴⁰³

The Regulation Act requires the operator to establish approved, internal safety rules prior to operation.⁴⁰⁴ The Regulation Act also requires

Nuclear Phase-Out, WALL ST. J., Sept. 14, 2012; *New reactor projects still on: Edano*, THE JAPAN TIMES, Sept. 16, 2012.

³⁹⁷ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-2; Electricity Businesses Act, *supra* note 330, at art. 9; HIROSE, *supra* note 310, at 34-35. The Notice of Change Filing requirements are set out in the Electricity Businesses Act at Article 9. Article 47(1) provides for the promulgation of technical standards. Hatsudenyou Genshiryoku Setsubi ni Kansuru Gijutsu Kijun of Sadameru Shōrei [Ordinance Establishing Technical Standards Relating to the Establishment of Commercial Nuclear Reactors], MITI Ordinance No. 62 (June 15, 1965), Hōrei teikyō de-ta shisutemu [Hōrei DB], <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

³⁹⁸ *Id.*; see also Electricity Businesses Act *supra* note 327, at art. 9, 47. RIST, *Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 3. Standards for licensing include a determination that 1) there is no risk the nuclear reactor will be used for anything other than peaceful purposes; 2) there is no risk that this license will threaten the planned development and use of nuclear energy; 3) there is a sufficient economic and technical base to construct the nuclear reactor and sufficient technical ability to operate it; and 4) there are no problems with accident prevention measures with the proposed reactor, reactor location, construction, facility, or fuel. RIST, *Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 2.

³⁹⁹ Electricity Businesses Act *supra* note 327, at art. 49(1) requires “Pre-use Inspections” by METI based on standards set out in METI ordinances. HIROSE, *supra* note 310, at 36-42. Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-3.

⁴⁰⁰ RIST, *Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 3.

⁴⁰¹ Electricity Businesses Act, *supra* note 327, at arts. 51-2. Fuel inspections cover fuel design, processing, transportation, and handling. *Id.* at 51(1)(3); HIROSE, *supra* note 310, at 38; Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 310, at II-3.

⁴⁰² *Id.*; Electricity Businesses Act, *supra* note 327, at art. 50-2.

⁴⁰³ HIROSE, *supra* note 310 at 38; Research Org. for Info., Sci. and Tech., *Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 4. Similar inspections for research reactors are made pursuant to the Reactor Regulation Law; The Ministry of Economy, Trade, and Industry evaluates the company’s process, methods, and schedules for conducting these inspections and inspection results, pursuant to Electricity Act Art. 50(2). Research Org. for Info. Sci. and Tech., *Hatsuden-yō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 3.

⁴⁰⁴ Regulation Act, *supra* note 314, at art. 37(1); Electricity Businesses Act, *supra* note 327, at art. 42. See also HIROSE, *supra* note 310, at 39-41. Prior to September 2012, operators filed their internal

designation of a safety officer for the reactor, a “Primary Reactor Technician,” and filing of that designation.⁴⁰⁵ The Regulation Act then requires creation and approval of internal Nuclear Materials Security Rules,⁴⁰⁶ notice filing of a “Nuclear Materials Security Management Officer,”⁴⁰⁷ as well as filing of a Notice of Use of Internationally Regulated Materials.⁴⁰⁸

The Regulation Act requires submission of operating plans.⁴⁰⁹ Once started, the operator is then subject to regularly scheduled safety inspections.⁴¹⁰ NISA, now the NRA, inspects the facility’s maintenance program; conducts regularly scheduled inspections; regularly scheduled inspections of the operator’s internal safety management program; and inspections based on the facility’s age.⁴¹¹ Regulatory inspections depend on the facility but are to be conducted not more than thirteen or eighteen months since the last regularly scheduled inspection.⁴¹² There are also fixed ten-year safety reviews, and additional evaluations of the facility prior to its operation beyond a thirty-year period.⁴¹³

The Regulation Act provides authority for on-site office and plant inspections, including document requests and record and equipment inspections; operator interviews and questioning of relevant persons; and confiscation for examination or testing of nuclear and other materials.⁴¹⁴ The Electricity Act also establishes a framework for “regularly scheduled inspections.”⁴¹⁵ Enforcement regulations provide the details: they allow the government inspections to be conducted on-site by government regulators

regulations with METI for approval by the METI minister. Now their internal regulations are filed with and reviewed by the NRA. The Commercial Power Generating Reactor Rules enumerate the subject matter for the internal rules, and include provisions governing facility operations and management, inspections, radiation management, security management, safety education, and quality management. HIROSE, *supra* note 313, at 39.

⁴⁰⁵ HIROSE, *supra* note 310, at 41.

⁴⁰⁶ Regulation Act, *supra* note 314, at art. 43-2(1).

⁴⁰⁷ *Id.* at art. 43(3); HIROSE, *supra* note 310, at 41.

⁴⁰⁸ HIROSE, *supra* note 310, at 42.

⁴⁰⁹ Regulation Act, *supra* note 317, at art. 30; HIROSE, *supra* note 313, at 42.

⁴¹⁰ Kantei, *Jikomae no Waga Kuni no Genshiryoku Anzen Kisei Nado no Shikumi*, *supra* note 357 at II-3.

⁴¹¹ Regulation Act, *supra* note 314, at art. 30; HIROSE, *supra* note 310, at 43.

⁴¹² HIROSE, *supra* note 310, at 48-49. The time frame depends on designation by the METI minister.

Id.

⁴¹³ *Id.* at 15, 48. The life cycle of nuclear reactors is the subject of debate, with consideration of a forty-year operational limit and exceptions to the limit. See *New nuke safety bodies get OK*, THE JAPAN TIMES (June 15, 2012), <http://info.japantimes.co.jp/text/nn20120615a2.html>; *NISA to let reactor run beyond 40 years*, THE JAPAN TIMES (June 7, 2012), <http://info.japantimes.co.jp/text/nn20120607a3.html>.

⁴¹⁴ Regulation Act, *supra* note 314, at art. 68; HIROSE, *supra* note 310, at 51; Research Org. for Info., Sci., and Tech., *Hatsudenyō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 5.

⁴¹⁵ Electricity Businesses Act, *supra* note 327, at art. 54; HIROSE, *supra* note 310, at 47, 49-50.

accompanying operator employees during their regularly scheduled inspection(s) *or* by conducting a record review of the operator's regularly scheduled inspections.⁴¹⁶

Apart from government inspections, the Electricity Act provides for "regularly scheduled safety management inspections" by the operator requiring inspection, recording, and preservation of items designated by ordinance.⁴¹⁷ As with the pre-use inspections, the act provides for agency review of these internal inspections, covering both the process and methodology for the inspections, as well as the inspection results.⁴¹⁸ Separately an "Integrity Evaluation System" (*kenzensei hyōka seido*) requires the operators to confirm compliance with all current technical standards during both regularly scheduled inspections and operator inspections.⁴¹⁹

Apart from these inspections, the Regulation Act mandates "Safety Inspections" (*hōan kensa*) at least four times a year, which include review of operator compliance with both internal safety and security regulations.⁴²⁰ Finally, the Regulation Act provides for Nuclear Materials Security Inspections, as well as a separate Security Measures Inspections by MEXT.⁴²¹

In short, primary ordering starts with the basic laws. They organize the regulators and establish a detailed licensing and inspection program. At each stage, black letter law provides a complex, detailed scheme for determining where and when a nuclear reactor operates.

B. Courts and Nuclear Energy

Whether a nuclear power plant runs, however, depends not only on the regulators and these inspections but also on the judicial process. Groups of individuals living near nuclear reactors have repeatedly filed administrative lawsuits seeking revocation of operating licenses, as well as civil lawsuits seeking injunctions against the operation of nuclear plants.⁴²²

⁴¹⁶ Electricity Businesses Act Enforcement Regulations art. 90(2); HIROSE, *supra* note 310, at 47.

⁴¹⁷ Electricity Businesses Act, *supra* note 327, at art. 55; HIROSE, *supra* note 310, at 47, 49-50; RIST, *Hatsudenyō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 4.

⁴¹⁸ Electricity Businesses Act, *supra* note 327, at art. 55(4); HIROSE, *supra* note 310, at 50.

⁴¹⁹ Electricity Businesses Act, *supra* note 327, at arts. 39 and 55; HIROSE, *supra* note 310, at 46.

⁴²⁰ These inspections must also occur after designated events, which include when starting and stopping reactor, replacing fuel, or undertaking other specified operations involving cooling systems or reactor container water levels. *See* Regulation Act, *supra* note 314, at art. 37(5); HIROSE, *supra* note 310, at 50; RIST, *Hatsudenyō Genshirō no Anzen Kisei no Gaiyō*, *supra* note 356, at 5.

⁴²¹ HIROSE, *supra* note 310, at 51.

⁴²² Administrative litigation in Japan is a distinct subset of civil litigation, filed pursuant to the Administrative Case Litigation Act. *See, e.g.,* Narufumi Kadomatsu, *Judicial Governance Through*

In 1973, plaintiffs filed suit against the government seeking revocation of the establishment license for the Ikata Dai-ichi Nuclear Power Plant in Shikoku.⁴²³ In 1975, about 400 plaintiffs brought a similar suit seeking to shut down the Fukushima Dai-Ni Nuclear Power Plant.⁴²⁴ In 1992, after years of expert testimony and appeals, the Supreme Court ruled on both cases.⁴²⁵ The court affirmed both licensing decisions, affording broad technical discretion to the government in deciding whether to grant an operating license.⁴²⁶

In the Ikata case, the Supreme Court held that there must be “mistakes or omissions that are difficult to overlook” (*kanka shigatai kago, ketsuraku*) in the investigation or decision-making process in order to find “irrationality” and, hence, illegality in licensing the reactor.⁴²⁷ In the Fukushima case, the Supreme Court found it appropriate to limit inquiry to issues relating to the safety of the basic design, and not review all of the safety inspections required under the Regulation Act.⁴²⁸ Within these constraints, the Supreme Court found no “irrationality” in these cases, but it did shift the burden of proof.⁴²⁹ It held that while the plaintiffs in principle bear the burden of proof, given that the defendant agencies have all of the relevant records, if the defendant fails to claim and prove rationality, the court would adopt a factual inference that there was irrationality in the agency’s decision.⁴³⁰ The court afforded the government deference, after review and shifting the burden of proof.⁴³¹

The same year, the Supreme Court recognized standing for citizens seeking to invalidate the operating license for the Monju Fast Breeder

Resolution of Legal Disputes?—A Japanese Perspective, 4 NAT’L TAIWAN U. L. R. 141, 145-152 (2009). See also Professor Levin’s discussion of litigation under the act. Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT’L L. & POL. 419 (2001).

⁴²³ UTATSU, *supra* note 332, at 75; Saikōsai Saibansho [Sup. Ct.] Apr. 10, 1992 Sho (gyō tsu) no. 133, 804 HANREI TAIMUZU 51 (Ikata).

⁴²⁴ UTATSU, *supra* note 332, at 74; Saikōsai Saibansho [Sup. Ct.] Apr. 10, 1992, Hei 2 (gyō tsu) no. 147, 804 HANREI TAIMUZU 65 (Fukushima); See also Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 468.

⁴²⁵ UTATSU, *supra* note 332, at 74-76.

⁴²⁶ Saikō Saibansho [Sup. Ct.] Apr. 10, 1992 (Ikata case), *supra* note 423; Saikō Saibansho [Sup. Ct.] Apr. 10, 1992, (Fukushima case), *supra* note 429.

⁴²⁷ Saikō Saibansho [Sup. Ct.] Apr. 10, 1992 (Ikata case), *supra* note 423, at 61.

⁴²⁸ Saikō Saibansho [Sup. Ct.] Apr. 10, 1992 (Fukushima case), *supra* note 424, at 68.

⁴²⁹ Saikō Saibansho [Sup. Ct.] Apr. 10, 1992 (Ikata case), *supra* note 423, at 61.

⁴³⁰ *Id.* Japanese courts shifted the burden of proof in the Minamata and other pollution cases in the 1970s. UPHAM, *supra* note 28, at 43-44. They do so now routinely in other areas of the law. Yuka Kaneko, *A Procedural Approach to Judicial Reform in Asia*, 23 COLUM. J. OF ASIAN L. 313, 336 (2010); Ramseyer, *The Effect of Universal Health Insurance on Malpractice Claims*, *supra* note 24, at 675 & no. 52.

⁴³¹ UTATSU, *supra* note 332, at 75-76.

Reactor in Fukui.⁴³² After remand, a cooling system malfunctioned resulting in a fire at the reactor and the government shutting it down.⁴³³ The district court still found the plant safe; the Nagoya High Court did not.⁴³⁴ The high court found that a high degree of care was required in safety examinations of this next-generation commercial reactor, that the national government had the burden of proving safety, and that both substantively and procedurally the government's safety inspections fell below the required level of care. The court found the safety inspections of the reactor facility needed "to be redone in their entirety" and voided the license.⁴³⁵ In 2005, the Supreme Court overturned the injunction finding no "mistakes or omissions that are difficult to overlook" and no "illegality" in the licensing process.⁴³⁶

Civil suits have fared no better. In 1999, a Sapporo District Court decision reviewed plaintiffs' demand for an injunction against the operation of Hokkaido Tomari Nuclear Reactors Nos. 1 & 2.⁴³⁷ The court rejected plaintiffs' claims, but it did recognize an "abstract risk of danger is always present that nuclear power generation invites a result that cannot be reversed."⁴³⁸ In a suit seeking to enjoin operation of the Shiga Nuclear Power Plant No. 2, residents living around the plant argued that they were subjected to a risk of radiation exposure beyond permissible levels, and the Kanazawa District Court agreed: "in operating the nuclear reactors . . . the plaintiffs are exposed to a concrete risk of injury to life, body, and health."⁴³⁹ The court imposed on the national government and power company a burden of proof of safety, and found, in this case, that the safety inspection

⁴³² Saikōsai Saibansho [Sup. Ct.] Sept. 22, 1992, Hei gan (gyō-tsu) no. 130, 801 HANREI TAIMUZU 83, 91; UTATSU, *supra* note 335, at 75. Litigation started when local residents sued MITI to void the permit it issued in 1983 to build the Monju Fast Breeder Reactor. The Fukui District Court dismissed their claim for lack of standing; the Nagoya High Court granted standing to those nearest the plant; the Supreme Court expanded standing and remanded in 1992. Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 470.

⁴³³ Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 470.

⁴³⁴ Fukui Chisai [Fukui Dist. Ct.] Mar. 22, 2000, Hei 4 (gyō u) no. 6, 1043 HANREI TAIMUZU 122, 258 (Japan); reversed Nagoya Kōsai Kanazawa Shibu [Nagoya High Ct. Kanazawa Branch] Jan. 27, 2003, Hei 12 (gyō ko) no. 12, 1117 Hanrei Taimuzu 83, 210.

⁴³⁵ Nagoya High Ct. Kanazawa Branch, Jan. 27, 2003, *supra* note 439, at 210.

⁴³⁶ Saikōsai Saibansho [Sup. Ct.] May 30, 2005, Hei 15 (gyō-hi) no. 108, 1191 HANREI TAIMUZU 175, 179. Other suits seeking injunctions have reached a similar result. A Fukushima court dismissed a suit seeking an injunction against use of plutonium enriched MOX at the Fukushima Dai-ichi reactor, and courts have found standing but dismissed on the merits cases involving reactors in Onagawa, Ehime, Tokai-mura, Takahama, Tomari, and Kashiwazaki. See Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 469-470.

⁴³⁷ Sapporo Chisai [Sapporo Dist. Ct.] Feb. 22, 1999, Sho 63 (wa) no. 2041, 1676 HANREI JIHŌ 3.

⁴³⁸ *Id.* Plaintiffs failed in a similar suit seeking to enjoin Hokuriku Shiga Nuclear Power Plant No. 1. See Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 469.

⁴³⁹ Kanazawa Chisai [Kanazawa Dist. Ct.] Mar. 24, 2006, Hei 11 (wa) no. 430, 1277 HANREI TAIMUZU 317, 372.

standards were inadequate.⁴⁴⁰ That court issued an injunction against operation of the plant that was, again, short-lived. In March 2009, the Nagoya High Court overturned the decision finding insufficient evidence of a risk to the plaintiffs' health and safety.⁴⁴¹ The Supreme Court declined to hear the appeal and affirmed the high court in October 2010.⁴⁴²

Plaintiffs groups have also sued to block the sale of land for use as a reactor, without success.⁴⁴³ They have purchased stock in the power companies and filed derivative suits opposing reactor operations, without success.⁴⁴⁴ Plaintiffs have filed suits for money damages, without success.⁴⁴⁵ Following the Tokaimura accident, courts even found plaintiffs who did sue had received larger provisional payments than warranted and ordered them to repay JCO the excess.⁴⁴⁶

To date, private causes of action seeking revocation of operating licenses in administrative suits and seeking injunctions prohibiting operation in civil suits have all failed. But local residents continue to sue: local residents have recently filed suit against the Japan Atomic Power Company seeking a temporary injunction to prevent the restart of two reactors in its Tsuruga nuclear power plant in Fukui Prefecture;⁴⁴⁷ local residents have again filed suit against Hokuriku Electric Power Company seeking to shut-down the two nuclear reactors at Shika.⁴⁴⁸ There are numerous Fukushima-related suits, both civil and criminal, now pending.⁴⁴⁹

⁴⁴⁰ *Id.* at 326-27.

⁴⁴¹ Nagoya Kousai [Nagoya High Ct.] Mar. 18, 2009, Hei 18 (ne) no. 108, 1307 HANREI TAIMUZU 187, 282.

⁴⁴² In October 29, 2010, the Supreme Court rejected an appeal. See UTATSU, *supra* note 332, at 78.

⁴⁴³ Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 471-72.

⁴⁴⁴ *Id.* Following a cooling system malfunction, in 1989 local citizens contested operation of the Fukushima Dai Ni reactors, through a shareholders suit. A Tokyo district and high court, deferred to specialists who opined it safe to restart the reactor, and rejected the suit. *Id.* at 469.

⁴⁴⁵ *Id.* at 472-75; UTATSU, *supra* note 332, at 81-92.

⁴⁴⁶ Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 475. Thousands did receive compensation following the Tokai-mura incident. They did so through administrative procedures established by the power companies, pursuant to guidelines established by the Science and Technology Agency's Atomic Energy Damage Investigation Committee. UTATSU, *supra* note 335, at 81-92.

⁴⁴⁷ *Residents sue over Tsuruga reactors*, THE JAPAN TIMES, Nov. 9, 2011, http://www.japantimes.co.jp/news/2011/11/09/national/residents-sue-over-tsuruga-reactors/#.UTlkaBx_CSo.

⁴⁴⁸ *Residents sue to scrap Shika nuke reactors*, THE JAPAN TIMES (June 27, 2012), <http://info.japantimes.co.jp/text/nn20120627a8.html>. In 2006 the Kanazawa District Court enjoined operation of the No. 2 reactor at Shika, a decision overturned by the Nagoya High Court in 2009 and Supreme Court in 2010. *Id.*

⁴⁴⁹ Fukushima-related suits include a criminal complaint filed by 1,300 people alleging criminal negligence on the part of both TEPCO and government regulators and four civil "class-action" lawsuits aggregating the claims of approximately 1650 plaintiffs, as, as well as individual actions. U.S. service members participating in Operation Tomodachi have also filed suit in U.S. court claiming damages for

Even if a power company prevails in litigation, however, that still does not mean its nuclear power plant will operate. It can meet all the regulatory requirements, pass all the inspections, and win in court, but another layer of norms still apply.

C. “Gentlemen’s Agreements”

Authority for regulating the safety of the nuclear industry resides in the central government; with the exception of periods during designated nuclear disasters, no legal authority to regulate is provided to local governments.⁴⁵⁰ But whether or not a nuclear power plant runs depends on a “gentlemen’s agreement” (*shinshi kyōtei*) between the power company and local governments.⁴⁵¹

These gentlemen’s agreements exist outside of any regulatory framework and without any legal basis.⁴⁵² Prior to March 11, they were the subject of criticism, with commentators lamenting that local governments have, without a legal basis, “wielded a *de facto* right of refusal” to permit plants built in their prefectures to operate.⁴⁵³ Others have complained that this *de facto* requirement has become “a barrier to effective business operations.”⁴⁵⁴

The agreements started with TEPCO’s agreement with the Fukushima Prefectural government in 1969.⁴⁵⁵ Similar agreements with other prefectures, including Fukui, Shizuoka, and Ibaragi Prefectures, followed.⁴⁵⁶ The written basis for the “gentlemen’s agreement” is an agreement signed by

exposure resulting from TEPCO lying about the radiation risk. *See 1,300 file complaints against TEPCO*, THE JAPAN TIMES (June 12, 2012), http://www.japantimes.co.jp/news/2012/06/12/national/1300-file-complaints-against-tepco/#.UTlnhhx_CSo; *Family of nuke crisis suicide victim to sue TEPCO for damages*, THE JAPAN TIMES (May 10, 2012) http://www.japantimes.co.jp/news/2012/05/10/national/family-of-nuke-crisis-suicide-victim-to-sue-tepco-for-damages/#.UTlmmRx_CSo; Chico Harlan, *Nuclear redress will never approximate losses*, THE JAPAN TIMES (June 27, 2012), http://www.japantimes.co.jp/news/2012/06/27/national/nuclear-redress-will-never-approximate-losses/#.UTllqRx_CSo; Government, Tepco sued over fallout, THE JAPAN TIMES (Mar. 12, 2013), <http://www.japantimes.co.jp/news/2013/03/12/national/government-tepco-sued-over-fallout/#.UXL7qbWG3pU>; *Eight U.S. sailors sue Tepco for millions for falsely downplaying Fukushima radiation exposure*, THE JAPAN TIMES (Dec. 28, 2012), <http://info.japantimes.co.jp/text/nn20121228a3.html>.

⁴⁵⁰ Shin-etsu Sugawara, et al., *Genshiryoku Anzen Kyōtei wo Meguru Hito Kōsatsu [A Study on the Nuclear Safety Agreements Compared with the Pollution Control Agreements]*, 10 NIHON GENSHIRYOKU GAKKAI WABUN RONBUNSHU 119 (2011).

⁴⁵¹ *Genpatsu no Saikidou tte Dō Iu Koto?*, ASAHI SHINBUN (July 5, 2011), at 2.

⁴⁵² Sugawara, et al., *supra* note 450, at 119. Local governments have been criticized, as a result, for “excessive involvement” leading to opaqueness in the regulatory process. *Id.*

⁴⁵³ *Id.* at 119, 121.

⁴⁵⁴ *Id.* Where praised, they have been characterized as augmenting deficiencies in governmental regulation. *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

the power company with the local prefecture and city government where the plant is to be located.⁴⁵⁷

A 2005 agreement entered into by the Fukui Prefectural Government, local governments, and the companies operating the five nuclear power plants in Fukui provides one example.⁴⁵⁸ It is full of “must endeavor to” language.⁴⁵⁹ It states that the agreement’s purpose is to “preserve the safety of the surrounding environment and the workers at the power generation plant.”⁴⁶⁰ In order to accomplish this, Article 1 sets out that the power company and local governments are to “function as one.”⁴⁶¹ The power company “in order to preserve the safety of the surrounding environment and the power plant workers, must take every measure possible.”⁴⁶²

This includes observing all related laws and performing “in good faith” the obligations of the agreement.⁴⁶³ According to the agreement, the power company must, among other things, pro-actively develop quality control measures and strengthen risk management systems; develop new technologies and improve existing systems; thoroughly educate, train, and supervise both employees and contractors working at the facility; develop comprehensive nuclear accident plans and protective measures against nuclear emergencies; and develop environmental protection measures.⁴⁶⁴

Other terms are more concrete. The power company must obtain the agreement of the local governments prior to the construction of new facilities and prior to significantly altering existing plans.⁴⁶⁵ It must contact local governments in advance of new fuel or spent fuel shipments.⁴⁶⁶ It must communicate information regarding construction, operating conditions, environmental radiation measurements, and reactor surveys.⁴⁶⁷ The power company must immediately contact the local government in the event of an emergency; operation of emergency cooling measures; leakage of radioactive substances; unplanned stoppages and malfunctions; radiation

⁴⁵⁷ Fukui Agreement (May 16, 2005) on file with author.

⁴⁵⁸ *Id.*; Sugawara, et al., *supra* note 450, at 119, 124.

⁴⁵⁹ “The direction to ‘endeavor’ or make best efforts...is not uncommon in Japanese legislation “where a gentle touch is desired.” Mark A. Levin, *Civil Justice and the Constitution: Limits on Instrumental and Judicial Administration in Japan*, 20 PAC. RIM L. & POL’Y J. 265, 303 n. 164 (2011).

⁴⁶⁰ Fukui Agreement Preamble, *supra* note 462.

⁴⁶¹ *Id.* art. 1.

⁴⁶² *Id.* art. 2.

⁴⁶³ *Id.* art. 2(2).

⁴⁶⁴ *Id.* arts. 2(3) & 4. Other “musts” include strengthening measures relating to aging facilities; sharing information with sub-contractors and product manufacturers; developing measures to ensure the safety of the workers, reduction of radiation exposure, and reduction of radioactive waste.

⁴⁶⁵ *Id.* at art. 3. *See also* Sugawara et al., *supra* note 450, at 125.

⁴⁶⁶ Fukui Agreement, *supra* note 457, at art. 5.

⁴⁶⁷ *Id.* art. 6.

poisoning of workers beyond established standards; other injury; or other similar events.⁴⁶⁸ Local governments retain the right to demand reports from the power company and conduct on-site inspections of the facility.⁴⁶⁹ Representatives of the local community may accompany central government regulators on inspections if there is a risk to the health of local residents.⁴⁷⁰

The agreement provides that local governments may demand stoppage, limited use, or improvements to the reactors where, based on previous reports or an on-site inspection, additional safety measures are determined necessary; special measures are necessary to prevent the release of radiation following an accident or emergency; or special measures are determined necessary following review of accidents at other nuclear power generating facilities.⁴⁷¹ The agreement also provides for an “agreement regarding resumption of operations”⁴⁷² if operations at a reactor are terminated pursuant to one of the above conditions, or if operations are terminated following an accident resulting in the formation of a special investigation committee by the national government.⁴⁷³

The requirement of local government approval for operation has been interpreted broadly.⁴⁷⁴ While the agreements concluded with local governments require only that the power company report to the local government regarding regularly scheduled inspections, the power companies in practice explain the results of inspections and seek the approval of the local governments prior to restarting a reactor.⁴⁷⁵ There is no legal requirement to do so, but there is the reality that future approval for additional construction or substantial changes in operations, which are covered by the agreement, would be difficult to obtain absent cooperation at other times.⁴⁷⁶

⁴⁶⁸ *Id.* art. 7.

⁴⁶⁹ *Id.* art. 8. See also Sugawara, et al., *supra* note 450, at 125. The Fukui Prefectural Government conducted one such onsite inspection following an incident in August 2004 at Bihama Nuclear Power Station. Sugawara, et al., *supra* note 450, at 125.

⁴⁷⁰ Fukui Agreement, *supra* note 457, art. 9. See also Sugawara et al., *supra* note 450, at 125.

⁴⁷¹ Fukui Agreement, *supra* note 457, at art. 10.

⁴⁷² *Id.* art. 11.

⁴⁷³ *Id.*

⁴⁷⁴ *Teiki Kensa ga Owattemo Jimoto no Rikai ga Fukaketsu Da Yo*, ASAHI SHINBUN (July 5, 2011) at 2.

⁴⁷⁵ *Id.* This right of refusal has also been applied by analogy to incidents resulting in an unscheduled shutdown of a reactor. Sugawara et al., *supra* note 450, at 119, 126.

⁴⁷⁶ *Teiki Kensa ga Owattemo Jimoto no Rikai ga Fukaketsu Da Yo*, *supra* note 474, at 2. The power company goes on to agree to compensate local residents “in good faith” and immediately undertake measures to prevent further damage if damage has been caused as a result of operation of the power plant. Fukui Agreement, *supra* note 457, at art. 12. The power company agrees to engage in thorough education and training as well as develop clear and speedy communication networks as part of strengthening its nuclear accident response measures. *Id.* at art. 13. The company must inform the local governments of any

Even before March 11, commentators noted an increase in local government intervention.⁴⁷⁷ The agreements have frequently resulted in separate examinations by prefectural governments apart from the statutory inspection process, with approval decisions based on undisclosed criteria made by the local heads of government, at times long after completion of the central government's regulatory inspections.⁴⁷⁸

The result has been a variety of standards applied by local governments to reactor construction and re-starts.⁴⁷⁹ In May 2010, prior to the restart of the Monju Fast Breeder reactor, local governments demanded not only additional safety measures but also additional regional "revitalization efforts" by the central government as a condition for restarting the reactor.⁴⁸⁰ Some argue local governments have held nuclear plants hostage in exchange for more economic aid. Others suggest that the local governments seek to incorporate "societal considerations" into the approval process.⁴⁸¹

Regardless of the motives, local governments have the final say.⁴⁸² But even that statement is shrouded in ambiguity. As Japan debated the re-start of its nuclear reactors following March 11, national officials affirmed that "local consent" is necessary, but there was no consensus about what constituted local—whether local consent is limited to the town and

special press conferences or releases regarding the power plant. *Id.* at art. 14. The company agrees to respond in writing and on local government forms to information requested. *Id.* at arts. 3, 5, and 6. Both parties are to designate a contact person to facilitate communications. *Id.* at arts. 15 & 16. The parties also agree that either party may propose revisions to the agreement if the need arises; both parties agree to "negotiate in good faith regarding revisions to the agreement"; to negotiate and set out any additional necessary details in a separate memorandum; to negotiate regarding concerns arising relating to provisions in the agreement or matters not addressed therein. *Id.* at arts. 17-19..

⁴⁷⁷ Sugawara et al., *supra* note 450, at 119, 129.

⁴⁷⁸ *Id.* at 124-25.

⁴⁷⁹ *Id.* at 126.

⁴⁸⁰ *Id.* 126.

⁴⁸¹ *Id.* at 124.

⁴⁸² *Mayor OKs Genkai Plant Reactor Restart*, THE JAPAN TIMES (Nov. 2, 2011), <http://www.japantimes.co.jp/news/2011/11/02/national/mayor-oks-genkai-plant-reactor-restart/#.UWXjZhmHzoc>. The mayor of the town "effectively approved Kyushu Electric Power Co.'s plan to restart a nuclear reactor halted due to human error." *Id.* Communities throughout Japan have refused to allow reactors to restart following routine maintenance. Yuka Hayashi et al., *Japan Premier Pushes Nuclear-Plant Restarts*, WALL ST. J. (Sept. 21, 2011), <http://online.wsj.com/article/SB10001424053111904194604576582240847767666.html>. "Under Japanese law, local governments have no power to dictate the operation of nuclear power plants. But all of Japan's nine regional utilities that own and operate nuclear plants have safety agreements with hosting municipal and prefectural governments in which those authorities are given some say in plant operations." Mari Iwata & Eleanor Warnock, *Tokyo Clears 2 Reactors for Restart*, WALL ST. J. (Apr. 14, 2012), <http://online.wsj.com/article/SB10001424052702303624004577341591983335470.html>.

prefecture in which the reactor is located, or extends to surrounding towns and prefectures that might be affected by the plant's operation.⁴⁸³

In seeking to restart the Oi reactors in Fukui Prefecture following March 11, the central government first assumed the former, but, in the face of opposition from surrounding towns and prefectures, it attempted to persuade officials from the surrounding areas.⁴⁸⁴ The METI Minister opined that local consent should not be decided “mechanically and numerically” but “comprehensively” and “based on political judgments and responsibilities.”⁴⁸⁵

The search for “local consent” split local residents in Oi. Critics of nuclear power pointed to continued safety concerns and supporters pointed to employment and related tax revenue that provided up to sixty percent of the town's budget.⁴⁸⁶ In the end, economics won out.⁴⁸⁷ The central government approved the re-start of the Oi reactors, and requested local consent.⁴⁸⁸ The Oi municipal assembly reviewed, at the mayor's request, whether to restart the reactors and endorsed doing so.⁴⁸⁹ They were followed by the seven-prefecture and two-city Union of Kansai Governments, which ultimately deferred to the central government.⁴⁹⁰ The local nuclear reactor

⁴⁸³ Fukutaro Yamashita, *Meaning of 'local' authority unclear*, THE DAILY YOMIURI, March 15, 2012, at 3.

⁴⁸⁴ *Noda's reactor restart scenario thwarted*, THE JAPAN TIMES, May 8, 2012, http://www.japantimes.co.jp/news/2012/05/08/national/nodas-reactor-restart-scenario-thwarted/#.UWZH_RmHzoc. Some commentators suggested that regulations governing evacuation areas should be used as a guidepost to determine local consent, but recent changes expanding evacuation areas from ten kilometers to thirty kilometers significantly increased the number of local governments from which consent would be required. *Confusion over 'local entities'*, THE DAILY YOMIURI, March 25, 2012, at 2.

⁴⁸⁵ Yamashita, *Meaning of 'local' authority unclear*, *supra* note 488, at 3; *Confusion over 'local entities'*, *supra* note 483, at 2.

⁴⁸⁶ Akiyoshi Hatamoto & Noriko Hara, *Local Communities Await Decision on Reactors*, THE DAILY YOMIURI, March 15, 2012, at 3. Martin Fackler, *Japan's Premier Seeks Support for Using Nuclear Power*, N. Y. TIMES, June 8, 2012, http://www.nytimes.com/2012/06/09/world/asia/japans-prime-minister-seeks-public-support-for-nuclear-energy.html?_r=0. “Reactors bring massive subsidies, jobs, and tax revenue.” Ramseyer, *Why Power Companies Build Nuclear Reactors on Fault Lines*, *supra* note 309, at 464. A 2004 METI pamphlet promises over ¥39 billion in subsidies during the ten years from the initial environmental impact statement to operation and over ¥50 billion in subsidies and revenue during the first ten years of operation. *Id.* at 465.

⁴⁸⁷ Eric Johnston, *Official Kansai's Reactor Nod Puzzles*, THE JAPAN TIMES, June 7, 2012, <http://info.japantimes.co.jp/text/nn20120607a5.html>; Fackler, *supra* note 486.

⁴⁸⁸ *Oi Assembly Says Yes to Restarting Reactors*, THE JAPAN TIMES (May 15, 2012), <http://www.japantimes.co.jp/news/2012/05/15/national/oi-assembly-says-yes-to-restarting-reactors/#.UWeX4RIAutR>; *Pushing Back, Fukui Governor Calls for Clear Nuclear Policy*, THE JAPAN TIMES, May 16, 2012, <http://www.japantimes.co.jp/news/2012/05/16/national/pushing-back-fukui-governor-calls-for-clear-nuclear-policy/#.UWe6IB1AutQ>.

⁴⁸⁹ *Oi assembly says yes to restarting reactors*, *supra* note 488.

⁴⁹⁰ *Kansai governor; Oi reactors restart is state's call*, THE JAPAN TIMES, May 31, 2012, <http://www.japantimes.co.jp/news/2012/05/31/national/kansai-governors-oi-reactors-restart-is-states-call/#.UWeY9xlAutQ>; *Fukui governor asks why Oi reactors should be restarted*, THE JAPAN TIMES, June

safety commission affiliated with the Fukui Prefectural government then approved the restart.⁴⁹¹ The governor of Fukui prefecture then gave his approval, and transmitted it to the central government along with a request for greater safety measures, training, and research.⁴⁹² Final approval by the central government followed.⁴⁹³ In short, regardless of all the law defining when a reactor can operate, the central government sought and obtained the consent of local governments, broadly defined, before restarting the reactors.⁴⁹⁴

D. *Law and Nuclear Energy Conclusion*

There is an elaborate regulatory structure governing operation of nuclear power plants in Japan—law and regulation everywhere you look. But when it comes time to flip the switch, that law and the process it dictates takes a backseat to a “gentlemen’s agreement.” The result is local government applying an undefined standard of review and consensus determining whether or not a nuclear reactor should operate.

March 11 and its aftermath demonstrate that both layers of the law, formal and informal, failed. The point here is to understand that there are multiple layers of norms governing the process. Concrete rights and obligations have not replaced Professor Kawashima’s rights that “exist but don’t exist.”⁴⁹⁵ Detailed norms now operate in conjunction with gentlemen’s agreements and “rights that exist but don’t exist.”

This layering of formal and informal norms is echoed in TEPCO’s post-March 11 application for assistance from the government. On May 10, 2011, pursuant to Article 16 of the Compensation Act, TEPCO submitted to

5, 2012, <http://www.japantimes.co.jp/news/2012/06/05/national/fukui-governor-asks-why-oi-reactors-should-be-restarted/#.UWeZlhlAutQ>.

⁴⁹¹ *Official Kansai’s Reactor Nod Puzzles*, *supra* note 489; *Local nuclear safety commission says Oi reactors safe to restart*, THE JAPAN TIMES, June 11, 2012, <http://www.japantimes.co.jp/news/2012/06/11/national/local-nuclear-safety-commission-says-oi-reactors-safe-to-restart/#.UWeZ2hlAutQ>.

⁴⁹² Kazuaki Nagata, *Reactors at Oi to be reactivated*, THE JAPAN TIMES, June 17, 2012, <http://info.japantimes.co.jp/text/nn20120617a1.html>; Mitsuru Obe & Chester Dawson, *Nuclear-Plant Restart Highlights Split in Japan*, WALL ST. J. (June 17, 2012), <http://online.wsj.com/article/SB30001424052702303444204577460272545747302.html>.

⁴⁹³ Nagata, *Reactors at Oi to be reactivated*, *supra* note 492; *Nuclear-Plant Restart Highlights Split in Japan*, *supra* note 494.

⁴⁹⁴ Industry officials had urged the central government to move quickly, impliedly regardless of local consent: “The final decision is up the government, or the prime minister . . . I would like to ask the prime minister to make a bold decision quickly.” *Edano Not for Restarting Oi Reactors Temporarily*, THE JAPAN TIMES, May 30, 2012, <http://www.japantimes.co.jp/news/2012/05/30/national/edano-not-for-restarting-oi-reactors-temporarily/#.UWe68RIAutQ>. Decisions without obtaining consent remain a possibility when informal norms apply.

⁴⁹⁵ See KAWASHIMA, NIHONJIN NO HŌISHIKI *supra* note 1, at 93, 104, 116, 139, 151.

the Japanese government a request for assistance.⁴⁹⁶ The request (*onegai*) starts off with an apology and acceptance of responsibility:

As a result of the accident at this company's Fukushima Dai-ichi Nuclear Power Plant, for those living near the plant and for society at large, the company has caused great concern and inconvenience for which it sincerely apologizes. The company, at this point, sincerely accepts the fact that it is the cause of nuclear energy damage, and, from the perspective of realizing prompt compensation to all those who suffered injury, will provide compensation based on the Compensation Act....⁴⁹⁷

The request ends with a plea: "by all means, we humbly request Japanese government assistance."⁴⁹⁸

Note the language of entreaty, apology, and acceptance of responsibility. It is not the language of contract or of rights and obligations. It is not language made with an eye towards litigation. It is the type of language found in Professor Kawashima's discussion of superior and inferior relationships.⁴⁹⁹ It is the type of language found in Tokugawa pleadings, where government action was a benevolent grant not a right.⁵⁰⁰ The Compensation Act provides a formal legal structure to apply for government assistance, but TEPCO's application takes the form of an apology and a plea.

It is difficult to imagine a company facing similar liability in the U.S. leading with an apology and lodging a humble plea for assistance with the government.⁵⁰¹ It is easy to imagine that happening in Professor

⁴⁹⁶ Compensation Act, *supra* note 331, art. 16. The act states that "the government will provide necessary assistance to the nuclear energy enterprise for that enterprise to pay compensation for damages when damages have arisen from nuclear energy exceeding the liability for the nuclear energy enterprise to provide compensation as set out in Article 3, and it is determined necessary to meet the aims of this Act." *Id.*

⁴⁹⁷ TEPCO, *Genshiryoku Songai Baisho ni Kakawaru Kuni no Shien no Onegai* (May 10, 2011), available at http://www.meti.go.jp/earthquake/nuclear/pdf/songaibaisho_110511.pdf. See also UTATSU, *supra* note 332, at 36.

⁴⁹⁸ *Id.*

⁴⁹⁹ KAWASHIMA, NIHONJIN NO HŌSHIKI, *supra* note 1, at 103.

⁵⁰⁰ See, e.g., Dan Fenno Henderson, *Nuinოსuke v. Chūbē: Conciliation in Tokugawa Civil Trials*, reprinted in THE JAPANESE LEGAL SYSTEM: CASES, CODES & COMMENTARY 1,13 (Milhaut et al., eds., 2012); John O. Haley, *Rivers and Rice: What Lawyers and Legal Historians Should Know About Medieval Japan*, 36 J. JAPANESE STUDIES 310, 347 (2010); Dan Fenno Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 83, 92-93, 100-102 (1952).

⁵⁰¹ It is difficult to imagine a company operating in the U.S. repeating that apology after being named as a defendant by thousands of injured plaintiffs. Tepco recently did just that. In a news conference it stated "our safety, culture, skills, and ability were all insufficient.... We must humbly accept our failure to prevent the accident, which we should have avoided by using our wisdom and resources to be better prepared." Mari Yamaguchi, *Utility company shoulders blame for Japan nuclear crisis*, BOSTON GLOBE,

Kawashima's Japan.⁵⁰² Whether operation or compensation, regulation of the nuclear power industry in Japan occurs on two levels: it starts with a complex formal regulatory and compensatory scheme, and ends with relationships and rights that "exist but don't exist."

V. CONCLUSION

This article discusses three areas of the law and from that discussion makes a broader argument about how law functions in Japan today. One could ask if these areas are representative.

One could also look elsewhere. In commercial law, Japan now provides thirty-nine different corporate forms to choose from.⁵⁰³ In contrast to that complexity stands the Supreme Court's 2010 enunciation of its business judgment rule, which provides for review of process *and* substance: "so long as there are no conspicuously unreasonable points in the decision-making process and substance, the board of directors will not be found to have breached their duty of care."⁵⁰⁴

One could look to the Tokyo Metropolitan Government's 2011 ordinance targeting those who willingly or unwittingly do business with organized crime.⁵⁰⁵ Businesses now have a "duty to endeavor" (*dōryoku gimu*) to include in all contracts language permitting termination, without notice, if it is discovered that the other party is in some way affiliated with organized crime.⁵⁰⁶ Discovery of affiliation between any employee and a member of organized crime now, at least in theory, provides grounds for immediate termination of contracts for everything from leases to the supply of vending machines.⁵⁰⁷ Landlords are refusing to rent apartments to and

Mar. 30, 2013), <http://www.bostonglobe.com/news/world/2013/03/30/utility-company-shoulders-blame-for-japan-nuclear-crisis/3Pr80cDmbql5KXhmqAL2wN/story.html>.

⁵⁰² See KAWASHIMA, NIHONJIN NO HŌSHIKI, *supra* notes 2-21.

⁵⁰³ JAPAN CORPORATION LAW GUIDE 54-56 (2009).

⁵⁰⁴ Saikōsai Saibansho [Sup. Ct.] July 15, 2010, Hei 21 (uke) no. 183, at 4, SAIKŌ SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ], <http://www.courts.go.jp>.

⁵⁰⁵ Tokyo Bōryokudan Haijo Jōrei [Tokyo Metropolitan Ordinance on the Elimination of Organized Crime], Ordinance of March 18, 2011, arts. 12-14, http://www.keishicho.metro.tokyo.jp/sotai/haijo_seitei.htm. See also Keishichō, *Jōrei no Gaiyō*, http://www.keishicho.metro.tokyo.jp/sotai/haijo_seitei.htm (last visited Feb. 29, 2012).; Daisuke Wakabayashi & Jeff Bater, *U.S. Imposes Sanctions on Japan Organized Crime*, WALL ST. J. (Feb. 23, 2012), <http://online.wsj.com/article/SB1000142405297020391830457241844134189560.html>; Mark Schreiber, *Anti-yakuza Laws Are Taking Their Toll*, THE JAPAN TIMES (Mar. 4, 2012), <http://www.japantimes.co.jp/news/2012/03/04/national/anti-yakuza-laws-are-taking-their-toll/#.UWemfxlAutQ>.

⁵⁰⁶ *Jōrei no Gaiyō*, *supra* note 505; Tokyo Metropolitan Ordinance on the Elimination of Organized Crime, *supra* note 511, art. 18.

⁵⁰⁷ E.g., Sept. 14, 2011 and Dec. 26, 2011 contracts on file with author. One of Japan's most successful talk show hosts was forced to resign from his management company following revelations of past ties to a member of organized crime. See Wakabayashi & Bater, *supra* note 505.

banks refusing to open bank accounts for those suspected of ties to organized crime.⁵⁰⁸ Some driving schools now require their students' pledge "absolutely no ties to organized crime" before the school will certify their attendance allowing them to apply for a driver's license.⁵⁰⁹ The aim of the ordinance is understandable; the means employed shows a willingness to expand the law and contract's reach into every corner of society.

In contrast stands the increasing use of prosecutorial discretion not to prosecute.⁵¹⁰ Prosecution rates for general crimes declined from approximately 45% in 2000 to 36.2% in 2010; prosecution rates for special crimes declined during the same period from over 70% to 56.3%.⁵¹¹ Criminal law now dictates the terms of routine contracts, but, at the same time, the exercise of discretion within the criminal justice system has grown.

Rather than reviewing additional areas of the law, however, the evidence warrants stepping back, and returning to Professor Kawashima's discussion of the role of law in Japan. Professor Kawashima described law in Japan as like an heirloom sword, something to be displayed and admired but not used.⁵¹² Japanese law scholars have debated the validity of the analogy since.⁵¹³ The discussion here suggests that a different debate is necessary.

The law now fences off, in increasingly small parcels, much of the landscape of Japanese society. Legal norms, including private ordering and public laws, are readily visible and commonly invoked. While these fences define the territory and provide the starting point in resolving disputes, if challenged they often give way. They give way to secondary ordering that occurs in the undefined spaces of equity. As a result, negotiation in Japan often occurs not in the shadow of the law, but in the shadow of primary attempts at ordering, and when negotiation fails, then based on notions of fairness and consensus.

⁵⁰⁸ Schreiber, *supra* note 505.

⁵⁰⁹ *Id.*

⁵¹⁰ Saikō Saibanshō, *Keiji Tetsuzuki*, http://www.courts.go.jp/saiban/syurui_keizi/keizi_01_02/index.html (last visited Apr. 4, 2012). Prosecutors may decide not to prosecute if there is insufficient evidence that the suspect committed the crime or if there is sufficient evidence but, in light of considerations including the suspect's character, age and circumstances; the severity of the crime and any extenuating circumstances; and the circumstances following commission of the crime, the prosecutor decides that it is "not necessary" to prosecute. *Id.* See also, Midori Daisuke, *Kensatsukan no Sotsui Sairyō to Sono Genkai*, 676 HŌGAKU SEMINA 141 (Apr. 2011); Masaki Yamamoto, *Kensatsukan Seido to Kiso Sairyōken*, in *NIHON KEIJIHŌ NO RIRON TO TENBŌ* 85 (2002).

⁵¹¹ Keisatsusho, Heisei 22 Nendo Hannzai Hakusho, http://hakusyo1.moj.go.jp/jp/57/nfm/n_57_2_2_2_3_0.html (last visited Feb. 22, 2012); Keisatsusho, Heisei 23 Nendo Hannzai Hakusho, <http://hakusyo1.moj.go.jp/jp/58/nfm/images/full/h2-2-3-02.jpg> (last visited Jan. 24, 2013).

⁵¹² KAWASHIMA, *NIHONJIN NO HŌSHIKI*, *supra* note 1, at 47.

⁵¹³ See *supra* notes 19 to 31.

A Japanese lease will detail liability for damaged shower hoses and rubber stoppers, but, if challenged, a Japanese court will void a contractually mandated rent increase when it doesn't reflect current economic circumstances. Employers routinely impose broad liability on their employees and invoke detailed work rules that conflict with decades of judicial decisions, but, if an employee pushes hard enough, the fence gives way to judicial standards of "just cause." Japan now seeks to regulate criminal behavior through private contracts, but prosecutors exercise more discretion now than before in deciding not to prosecute. Public law defines the conditions for a nuclear reactor to run, but those fences give way to a gentlemen's agreement, and that gentlemen's agreement depends on local government and local consensus. Black letter norms give way to back door consensus.

The analysis could stop here. But there is another dimension to this discussion, and it relates to the actors. Who defines these layers of the law? In each of these examples, they are institutional actors. Businesses draft the detailed leases and work rules. The national government implements comprehensive regulatory regimes governing use of nuclear power and attempts to reduce crime. In each of these examples, detailed definitions give way to equitable or consensus-driven norms. These equitable norms are also defined by institutional actors—the judiciary, or prosecutor's office, or local government officials.

What is missing from this picture is that individuals, not institutions, drive the process. Individuals are the ones rattling the fences, pursuing an equitable resolution despite the language of the contract or the law, and they are increasingly willing to do so through the courts. As depicted in Appendix B, the numbers of civil filings show an almost uninterrupted rise during the postwar period.⁵¹⁴ In 1949, 41,086 civil actions were filed in district courts in Japan.⁵¹⁵ By 2009, that number was over 259,000.⁵¹⁶ The change in summary court claims is rarely discussed, but even more pronounced. In 1949, claimants filed 5,197 suits.⁵¹⁷ In 2009, claimants filed 686,000.⁵¹⁸ Recent statistics for all summary court filings, including those

⁵¹⁴ See Appendix B, *infra*.

⁵¹⁵ *Id.*

⁵¹⁶ Somusho Tōkeikyoku [Ministry of Internal Affairs & Communications, Statistics Bureau], *Soshō Jiken Oyobi Chōtei Jiken no Shuruibestu Shinju/Kisai Jikensū* (2004-2009), <http://www.stat.go.jp/data/nenkan/25.htm> (last visited Mar. 1, 2012).

⁵¹⁷ Saikō Saibansho [Sup. Ct.], *Saibansho no Shinju Jikensu no Suii (1949-2002)*, http://www.courts.go.jp/saikosai/about/iinkai/zinsokuka_kentoukai/01/sinzyu2.html (last visited Mar. 1, 2012).

⁵¹⁸ *Id.*

for debt collection and conciliation, are down significantly.⁵¹⁹ But the number of civil cases litigated in summary courts continues to rise.⁵²⁰ Japanese individuals show an ever-increasing willingness to go to court over the small stuff.⁵²¹

In the public law realm, local consensus now comes with increasing citizen participation. Administrative law claims have trended higher over the past two decades.⁵²² A former Supreme Court justice describes the change in rights consciousness as “people’s eyes have opened,” and they no longer accept the government as an absolute.⁵²³ March 11 accelerated this. An “insidious legacy” of March 11 is “shaken trust” in the government.⁵²⁴

This increasing willingness to file civil claims and decreasing willingness to trust the government combines with two important demographic trends also depicted in Appendix B. The first relates to Japan’s population. Scholars suggest that the “Japanese are disappearing in slow motion.”⁵²⁵ The U.N. projects that Japan’s 2010 population of 127 million will shrink by 20% by 2050.⁵²⁶ By 2075, Japan’s Statistics Bureau estimates a population of 68 million, about half the current population.⁵²⁷

Compare that to a second important demographic trend: the increase in legal service providers. In 1950, there were 5,827 attorneys in Japan.⁵²⁸

⁵¹⁹ The Supreme Court breaks summary court filings into four categories: civil suits, debt collection, conciliation, and other. Saikō Saibansho [Sup. Ct.], Dai 2-4 *Minji/Gyōsei Jiken no Shinju Jiken no Saikin 5 Nenkan no Suii*, <http://www.courts.go.jp/shiotokei/graph/pdf/B20No2-4.pdf> (last visited Nov. 12, 2012). For the most recent period available, from 2004 through 2008, overall summary filings dropped almost 27%, from 1,894,659 to 1,386,684; litigated cases increased over 35%, from 374,686 to 577,383. *Id.*

⁵²⁰ *Id.*

⁵²¹ Jurisdictional limits for summary court have changed over time. They are currently ¥1,400,000 or approximately \$17,500 at 80 yen to the dollar. See http://www.courts.go.jp/saiban/syurui_minzi/minzi_04_02_05/index.html (last visited Mar. 1, 2012).

⁵²² There were 1,191 administrative litigation cases recorded in 1990 rising to 2,915 in 2005. Numbers fell between 2006 and 2009, but increased again in 2010, the most recent year available, to 2,661. Somusho Tōkeikyoku, *Soshō Jiken Oyobi Chōtei Jiken no Shuruibestu Shinju/Kisai Jikensū* (2005-2010), available at <http://www.stat.go.jp/data/nenkan/25.htm> (last visited Feb. 14, 2013); Somusho Tōkeikyoku, *Soshō Jiken Oyobi Chōtei Jiken no Shuruibestu Shinju/Kisai Jikensū* (2004-2009), *supra* note 523; Somusho Tōkeikyoku, *Soshō Jiken Oyobi Chōtei Jiken no Shuruibestu Shinju/Kisai Jikensū* (1985-2004), www.stat.go.jp/data/chouki/zuhyou/28-15-b.xls (last visited Jan. 24, 2013). See also Luke Nottage & Stephen Green, *Who Defends Japan?: Government Lawyers and Judicial System Reform in Japan*, 13 *ASIAN-PAC. L. & POL’Y J.* 129, 137, 141-145, 171 (2011).

⁵²³ Interview with former Supreme Court Justice, in Tokyo (Apr. 19, 2012).

⁵²⁴ John M. Glionna, *A cloud of distrust over Japan*, *THE DAILY YOMIURI*, Mar. 19, 2012, at 7.

⁵²⁵ Michael Auslin, *Japan’s Age of Denial*, *WALL ST. J.*, Jan. 19, 2012, <http://online.wsj.com/article/SB10001424052970204301404577170023087570342.html>.

⁵²⁶ *Id.*

⁵²⁷ Somusho Tōkeikyoku [Ministry of Internal Affairs & Communications, Statistics Bureau], *Jinkō no Suii to Shōrai no Jinkō*, <http://www.stat.go.jp/data/nihon/02.htm> (last visited Mar. 1, 2012).

⁵²⁸ Nihon Bengōshi Rengōkai [Japanese Federation of Bar Associations], *Bengōshi no Jissei Chart 1-1*, www.nichibenren.or.jp/library (last visited Mar. 1, 2012).

In 2010, there were 28,789.⁵²⁹ Over the past two decades alone, attorney numbers have approximately doubled.⁵³⁰ Since the first group of law school graduates passed the new bar exam in 2006, attorney numbers have increased by approximately 1,700 per year.⁵³¹ Setting aside the Judicial System Reform Council's goal to admit 3,000 new attorneys per year and assuming increases similar to those since 2006,⁵³² the population of attorneys will double again in the next two decades. Even if policy changes and pass-rates decline, the attorney population will continue to increase as the general population decreases. Over 30% of registered attorneys today have practiced less than five years, suggesting that most within this group are relatively young and likely to practice for the foreseeable future.⁵³³

The number of judicial scriveners has increased as well, and the scope of services they provide grown.⁵³⁴ The Japan Federation of Judicial Scriveners reported 19,638 registered judicial scriveners for 2009, compared to 13,500 in 1989.⁵³⁵ The number of administrative scriveners has increased significantly.⁵³⁶ The Japan Federation of Administrative Scrivener Associations listed 42,328 registered administrative scriveners for 2011, compared to 16,000 in 1989.⁵³⁷ The number of students graduating with an undergraduate degree in law has declined in recent years, but continued to average over 40,000 per year over the past decade.⁵³⁸ Demographic trends suggest a rapidly declining general population and a rapidly increasing population of legal professionals.

⁵²⁹ *Id.*

⁵³⁰ Nihon Bengōshi Rengōkai [Japanese Federation of Bar Associations], *Hōsō Jinkō Seisaku ni Kanuru Kinkyū Teigen*, <http://www.nichibenren.or.jp/activity/document/opinion/year/2011/110327.html> (last visited March 1, 2012).

⁵³¹ *Id.* at 1 (based on 2006-2010 numbers).

⁵³² Justice System Reform Council, *supra* note 72, at 134.

⁵³³ See Japanese Federation of Bar Associations, *Bengōshi no Jissei Chart 1-1*, *supra* note 530, at 1.

⁵³⁴ Nihon Shihōshōshikai Rengōkai [Japan Federation of Administrative Scriveners Associations], *Shihō Shoshi Towa*, <http://www.shiho-shoshi.or.jp/index.html> (last visited Mar. 9, 2012). Japan Federation of Judicial Scriveners Associations, *Hanshai ni yoru Hōteki Toraburu no Kaiketsu (ADR)*, http://www.shiho-shoshi.or.jp/activity/var_consulting/adr.html (last visited Mar. 9, 2012); Shihō Shoshikai Rengokai, *Kanii Soshō Dairi Kankei Gyōmu no Hani*, SHIHŌ SHOSHI MONTHLY (Sept. 2009).

⁵³⁵ Nihon Shihōshōshikai Rengōkai [Japan Federation of Administrative Scriveners Associations], *Shimin ni Mijikana "Kurashi no Hōritsuka"*, <http://www.shiho-shoshi.or.jp/activity/lawyer/lawyer.html> (last visited Mar. 1, 2012); E. Charles Routh, *Dispute Resolution in International Trade*, C395 ALI-ABA 675, 678 (1989).

⁵³⁶ Nihon Gyōsei Shoshi Kai Rengōkai [Japanese Federation of Administrative Law Scrivener Associations], *Tani Kaibestu Kaiinsū Ichiran*, <http://www.gyosei.or.jp/gyomu/index.html> (last visited Mar. 9, 2012).

⁵³⁷ *Id.*; Routh, *supra* note 542, at 678.

⁵³⁸ See Mombukagakusho [MEXT], *Gakkō no Kihon Chōsa*, <http://www.e-stat.go.jp/SG1/estat/NewList.do?tid=000001011528> (last visited March 9, 2012) (2006 numbers unavailable).

The numbers can't help but influence the role that law plays in Japanese society. One can no longer ride the trains without seeing advertisements for legal assistance.⁵³⁹ Judicial scriveners offer twenty-four hour hotlines to consult on debt restructuring.⁵⁴⁰ Japanese attorneys, once primarily denizens of the courtroom, now advertise for business writing wills and contracts.⁵⁴¹ They will help probate estates, divide up assets after divorce or a death in the family, or help restructure debts.⁵⁴² They will pursue pain and suffering (*isharyō*) claims following an auto accident and help with insurance and housing problems.⁵⁴³ They offer evening and weekend office hours, will respond for free to telephone and email inquiries, and offer payment plans "that won't be a burden."⁵⁴⁴

How does this tie into the layers of the law found in Japan? Bargaining in Japan happens first within the shadow of the contract and, if challenged, then within the shadow of the law and the "consensus of society." Absent challenge, the detailed lease controls, even if it conflicts with case law. Absent challenge, the work rules prevail, even if they directly conflict with case law. Unless 'local consensus' demands otherwise, public regulation controls.

What happens if challenge comes cheaper? There are more challenges to primary attempts at ordering. There is greater reliance on the courts, which apply equitable principles. There are more challenges to and through local governments, which seek to craft local consensus. Even as Japanese law grows more complex and legal rights and obligations are defined in greater detail, challenges to those defined rights and obligations will continue. Secondary layers of the law, Professor Kawashima's "rights that exist but don't exist"—will remain important. Understanding the role of primary ordering, based on detailed rights and obligations, and secondary ordering, based equity and the "consensus" of society, is fundamental to understanding the role that law plays in the Japan of today and will play in the Japan of tomorrow.

⁵³⁹ Photos of advertisements on file with author.

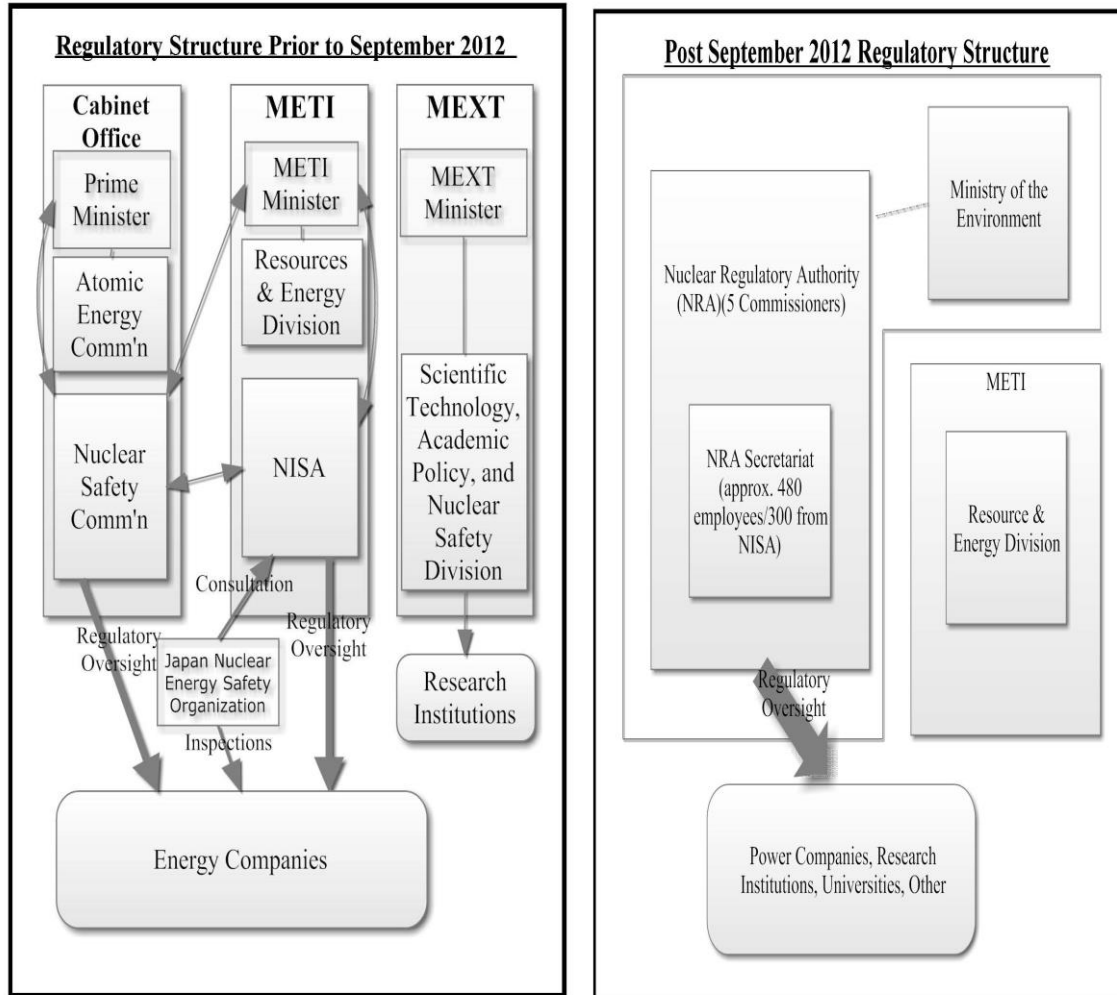
⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.*

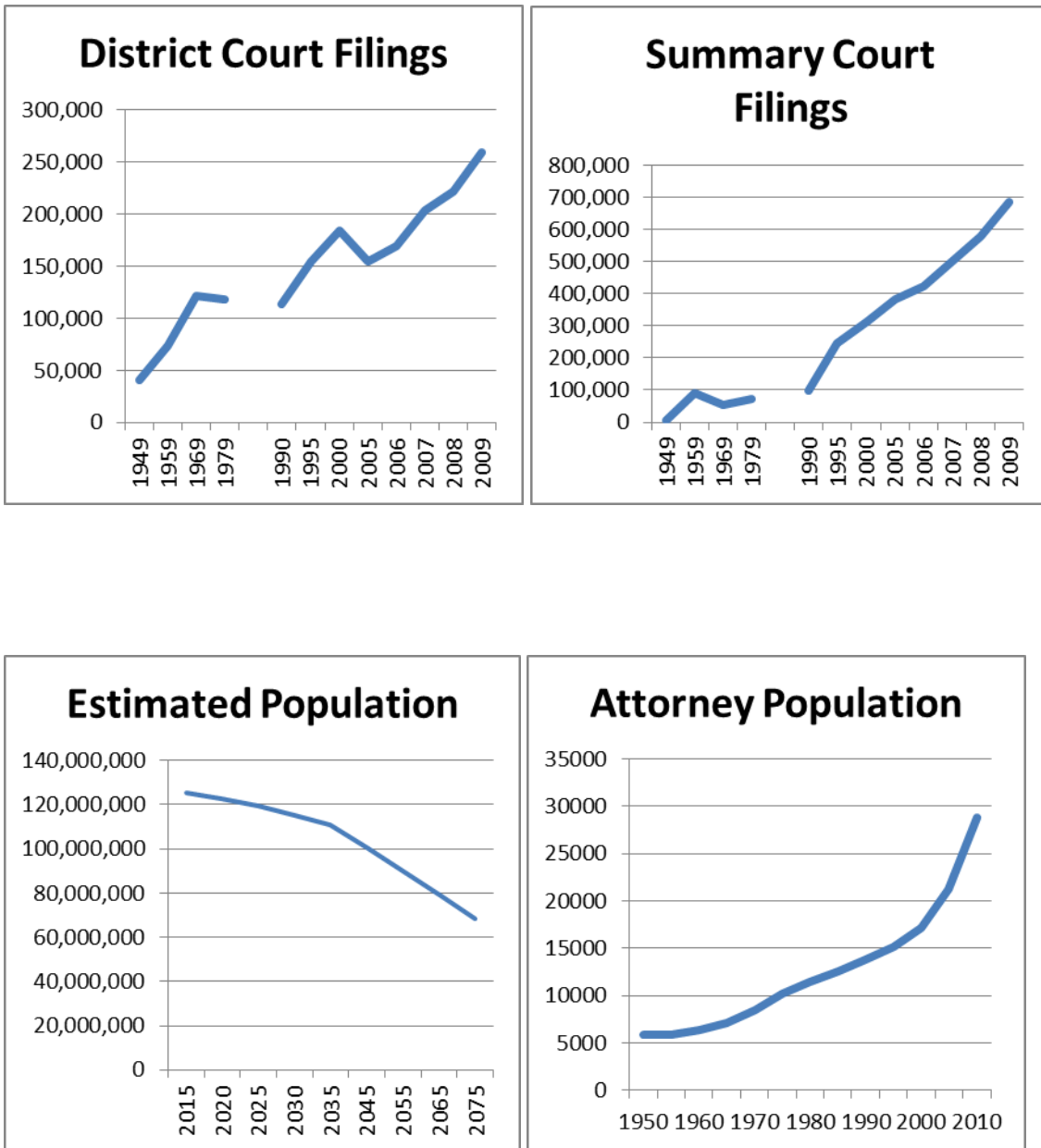
⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

APPENDIX A⁵⁴⁵

⁵⁴⁵ Charts based on Cabinet Office, *Jikomae no Waga Kuno no Genshiryoku Anzen Kisei nado no Wakugumi*, <http://www.kantei.go.jp/jp/topics/2011/pdf/02-shikumi.pdf> (last visited Mar. 6, 2012); Mombukagaskusho [MEXT], *Genshiryoku/Hōshasen Anzen Kakuho*; Kantei [Cabinet Office], *Genshiryoku Kisei no Tame no Atarashii Taisei Ni Tsuite*, <http://www.kantei.go.jp/jp/headline/genshiryokukisei.html> (last visited July 31, 2012).

APPENDIX B⁵⁴⁶



⁵⁴⁶ Charts based on Saikō Saibansho [Sup. Ct.], *Saibansho no Shinju Jikensu no Sui*, *supra* note 517; Somusho Tōkeikyoku [Ministry of Internal Affairs & Communications, Statistics Bureau], *Jinkō no Sui to Shōrai no Jinkō*, *supra* note 530, at 2-1; Nihon Bengōshi Rengōkai [Japanese Federation of Bar Associations], *Hōsō Jinkō Seisaku ni Kan Suru Kinkyū Teigen*, *supra* note 533 at 1; Nikkei Guro-karu [Nikkei Global], *De-ta de Miru Chiiki—Bengōshi to Shihō Shoshi no Zōkaritsu*, NIKKEI GURO-KARU No. 115 (Jan. 5, 2009) available at www.nikkei-rim.net/glocal/glocal_pdf/115PDF/115data.pdf.