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THE JUDICIARY AND DISPUTE RESOLUTION IN JAPAN: A SURVEY

HAROLD SEE*

An overly brief and misleadingly simple history of the evolution of Japanese legal institutions would begin with the proposition that a century and a quarter ago Japan was a feudal society. By "opening" to the West, Japan was forced to "modernize" (Westernize) its laws. As a code system is easier than a common law system to impose wholesale on a society, the continental European civil law countries served as a model for Japan, which patterned its codes primarily on the civil code of Germany and the criminal code of France. After defeat in the Second World War and subsequent occupation by United States forces, both an independent judiciary and an adversary system were superimposed on Japan's code system. This article surveys the changes in the Japanese judiciary in their social context.

Although Japan adopted the codes of Germany and France, the pre-code society did not disappear. This is evidenced by the disparity in relative numbers of judges and lawyers in Japan and those in the code countries of West Germany and France. In West Germany there are 3,502 people per judge and in France there are 15,156, as compared with Japan's 39,028 people per judge. In West Germany there are 3,012 people per lawyer and in France there are 5,769, as compared with Japan's 14,354 people per lawyer.¹ These figures may be explained in other ways, but since Japan is a commercially and industrially developed nation, it is doubtful that they stem from a lack of conflict in need of resolution. Rather, one

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1. General Secretariat of the Supreme Court of Japan (unpublished report), reprinted in Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in *LAW IN JAPAN* 111, 152 (A. von Mehren ed. 1963). These figures are for the years 1958 (West Germany and France) and 1960 (Japan). By 1979, the population-to-attorney ratio in Japan had dropped to 10,067 people per lawyer. See *infra* notes 134-35 and accompanying text.

would suspect that alternative means of dispute resolution are utilized in Japan beyond the judicial process.

To illustrate, the following is a table which depicts the litigation which resulted from traffic accidents involving four taxi companies:²

<u>Company</u>	<u>Personal Injury Claims</u>	<u>Property Damage Claims</u>	<u>Total</u>	<u>Litigation</u>
A	221	2,041	2,262	1
B	10	195	205	1
C	4	54	58	0
D	0	approx. 42	approx. 42	0

Similar statistics may be found for personal injury litigation against the Japanese National Railways:³

	<u>1953</u>	<u>1954</u>	<u>1955</u>	<u>1956</u>	<u>1957</u>	<u>1958</u>	<u>1959</u>
Number of victims of physical injury, including death	4645	5158	5169	5451	5818	6044	6317
Number of lawsuits	20	20	22	20	19	18	24

During the period 1953 through 1959, less than one-half of one percent of the personal injury incidents involving the National Railways resulted in litigation, and less than one-tenth of one percent of the total personal injury and property damage accidents involving the four taxi companies surveyed resulted in litigation. The absence of litigation involves a complexity of factors — among them being the role of the courts in Japanese society.

I. TOKUGAWA JAPAN

To understand the role of the courts in contemporary Japan it is helpful to understand the historical development of the Japanese socio-legal structure. As early as the eighth century A.D., Japan had adopted the *Taihō* and *Yorō* (criminal) Codes which were ad-

2. Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN* 41, 42 (A. von Mehren ed. 1963).

3. *Id.* at 63.

aptations of the Sui and T'ang Codes of China.⁴ The *Taihō Ryō* and *Yorō Ryō*, which spelled out the duties of each separate social class, contained no "suggestion of the idea of *rights*."⁵ As the *ritsu-ryo*⁶ (the prohibitions and rules of administration of the *Taihō* and *Yorō*) fell into disuse a military system ascended. It was similarly without the concept of rights. The military caste lived according to a customary code based on "feelings such as affection, fidelity, abnegation, devotion to one person, the spirit of sacrifice to an idea,"⁷ and it required absolute faithfulness of the vassal to his suzerain. From this social structure resulted a clear hierarchy during the fourteenth century with the inferior classes resigning their existence to their superiors. By 1542 the Portuguese had penetrated Japan, but the Christianity they imported so disrupted the existing social order that the emperor "closed" Japan to the West, thus producing over two-and-a-half centuries of isolation.⁸ In 1853, as the culmination of Western pressures to trade mounted, Commander Perry "opened up" Japan. What Westerners encountered was the isolationist Japan of the Tokugawa (feudal) era (1603-1868):

A whole series of rules, in nature much closer to rules of propriety than morality, was developed in order to specify the conduct to be observed on all occasions when one individual came into contact with others. These rules of behaviour, analogous to the Chinese rites, were known as *giri*. There was thus the *giri* of father and son, the *giri* of husband and wife, . . . that of landowner and farmer, . . . employer and employee, . . . and so on.⁹

F. Joüon des Longrais observed that "[t]he Asia of Confucius preferred the ideal of a filial relationship based on attentive protec-

4. S. DANDO, *JAPANESE CRIMINAL PROCEDURE* 12-13 (B. George trans. ed. 1965).

5. R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 492 (2d ed. 1978).

6. See generally Y. NODA, *INTRODUCTION TO JAPANESE LAW* 22-26 (A. Angelo trans. ed. 1976).

7. F. Joüon des Longrais, *L'Est et L'Ouest. Institutions du Japon et de l'Occident comparées* (six études de sociologie juridique) 144 (1958), quoted in R. DAVID & J. BRIERLEY, *supra* note 5, at 493.

8. See R. DAVID & J. BRIERLEY, *supra* note 5, at 494 n.48.

9. *Id.* at 495. *Giri* is a duty owed to others. This duty varies greatly depending on the status of both the person to whom the duty is owed and the person owing the duty. Although the person owing the duty is expected to perform it, the recipient of the duty has no right to demand that it be performed. If he applies pressure to obtain the duty owed him, he has violated *giri*. Y. NODA, *supra* note 6, at 175.

tion and respectful subordination to that of equality."¹⁰ Behavior was governed by the *giri* and the *giri* was enforced by the attachment of social reprobation to any violation.¹¹ In a basically feudal social order with strong family and group ties such enforcement was effective.¹²

Japan became "characterized by status relations among its members, who perceived each other in terms of a network of group and family ties,"¹³ largely of a suzerain-vassal type; but the rules of behavior, the *giri*, did not form a complete and integrated social network. Rather, they operated within such groups as family or community. Among unrelated groups the general Confucian doctrine of harmony in nature applied; however, if agreement could not otherwise be reached, resort was to force.¹⁴ Where there was such resort to force, or the prospect of it, the less powerful party might attempt to bring the prestige of the emperor to bear on his side by taking the conflict to the emperor's courts.¹⁵ By and large, formal law was considered "perhaps important as a symbol, but not some-

10. F. Joüon des Longrais, at 256, *quoted in* R. DAVID & J. BRIERLEY, *supra* note 5, at 495-96.

11. R. DAVID & J. BRIERLEY, *supra* note 5, at 496.

"The rules of *giri* are not imposed by means of a system of public constraint but are sanctioned simply by a feeling of honor. Those who fail in their *giri* are seriously dishonored. . . . They lose face." Y. NODA, *supra* note 6, at 178.

12. The unique nature of Japanese society may be due in great part to the fact that Japan is an island nation, its physical separation from the continent preserving the congenital characteristics of its inhabitants. Y. NODA, *supra* note 6, at 172. The separation and resulting racial homogeneity may have created a "greenhouse condition" that has nurtured the homogeneity of thinking that characterizes the Japanese. *See id.*; Noda, *Nihon-Jin No Seikaku To Sono Ho-Kannen* (The Character of the Japanese People and their Conception of Law), 140 MISUZU 2 (1971), *reprinted in* THE JAPANESE LEGAL SYSTEM 295, 296 (H. Tanaka ed. 1976) [hereinafter cited as Noda in Tanaka]. "A Japanese believes that if another Japanese thinks differently, either he himself or the other must be wrong, it tacitly being understood that if both of them are ordinary Japanese, they must think alike."

Unlike their nomadic counterparts on the continent, the Japanese tended to settle in one place, remaining there for generations. This resulted in a close-knit familial society based upon a central concept of harmony. Hajime, *Basic Features of the Legal, Political, and Economic Thought of Japan*, in THE JAPANESE MIND 143, 148 (C. Moore ed. 1967). In such a society, the individual and his rights are less important than the group interest. *See* Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L.Q. 491, 498 (1979). To insist on one's rights brings the censure of society. Since "one's honor among one's fellows is of ultimate concern," to be censured by society or cut off from the group is a powerful deterrent. F. GIBNEY, *JAPAN: THE FRAGILE SUPERPOWER* 111 (rev. ed. 1979).

13. Danelski, *The Supreme Court of Japan: An Exploratory Study*, in COMPARATIVE JUDICIAL BEHAVIOR 121, 123 (G. Schubert & D. Danelski ed. 1969).

14. Kawashima, *supra* note 2, at 45.

15. Actually the power of government resided not in the Emperor, but in the Shogun (the military). Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 85, 92 (1952).

thing for actual use, except as a last resort."¹⁶ This function of the courts was the traditional role of a social superior (the emperor) to conciliate disputes between social inferiors.

The emperor's courts also served as an enforcement mechanism for laws promulgated by the central government. Lest this function be overemphasized, it should be noted that among the forms of law and social control—statutes and decrees, "customs, Confucianistic ideology, court precedents, village regulations and family rules"—"the bulk of the rules actually observed by the people in the country-side continued to be customary folk-ways which found their origins in communal life, not the will of the shogun."¹⁷ In fact, even the role of the courts in the enforcement of the edicts of the emperor differed from the role Western criminal courts perform. For example, in 1742 the *O-Sadamegaki Hyakkajō* (Code of a Hundred Articles), a penal code, was promulgated.¹⁸ The courts were an arm of the executive and Confucian doctrines viewed it as the function of the government (a social superior) to teach the people how to behave properly. Thus, the Code operated more as a set of instructions to officials than as a set of rules directed to the people generally.¹⁹

In the feudal system there had been only an executive, but the executive did perform judicial functions. The Shogun was the military leader of Japan. The *daikan*, the local representative of the Shogun, was the court of first instance. If he failed to achieve a settlement, the case could be referred to one of three departments of the central government, but usually the case went to the finance ministry. Finally, in exceptional cases, the Hyojosho (the "court" of last resort) would decide the dispute.²⁰

16. Danelski, *supra* note 13, at 123.

17. Henderson, *Promulgation of Tokugawa Statutes* in D. BUXBAUM, *TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA* 9, 10 (1967).

18. Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN* 5, 16 (A. von Mehren ed. 1963).

19. *Id.* Since the Code was not published to the people, it is often considered by Western scholars to have been "secret law." On this point Dan Fenno Henderson observes that "it was not the law-in-general, but just the O-Sadamegaki (and similar official guides) which was secret. What conduct was prohibited was defined by law and promulgated by the best available means." Henderson, *supra* note 17, at 10-11. "[T]he essence of Tokugawa adjudications was common sense and unfettered discretion in order that the judge (presumably a wise and good man) could shape the penalty to all the peculiar facets of each individual case." *Id.* at 15. The O-Sadamegaki served "as a uniform guide," but "not to confine them [the judges] in their exercise of discretion." *Id.* This description of the function of Tokugawa judges views them as "teachers" of the people according to Confucian ideals.

20. Henderson, *supra* note 15, at 98-99. The Hyojosho was a court of assize composed of, *inter alia*, the heads of certain ministries.

The law applied by Tokugawa "judges" was based largely on precedent and constituted an evolving "common law" which grew out of custom.²¹ Although such law may have served the Japanese well, Westerners trading in Japan were not satisfied that the Japanese judicial system would respond adequately to their interests. "Extraterritoriality" provisions were required in treaties with Western powers. Therefore, Western nations insured that if their nationals were involved in one side of a legal dispute, the issue would be tried by a judicial officer of the Western nation, and would be tried in accordance with the law of the Western nation. The existence of extraterritoriality was a continuing source of humiliation to the Japanese.²² To end extraterritoriality and in order to take a place of equality in commerce, Japan adopted Western civil and criminal codes.²³

II. THE MEIJI RESTORATION AND CONSTITUTION

The Meiji Restoration dates from 1868. Between that date and 1923 one code followed another, with numerous drafts and revisions of some of the codes.²⁴ In 1889 Japan adopted the Meiji Constitution, patterned after the Prussian Constitution and based on the concept of the sovereignty of the emperor, not of the people, with "individual rights limited by law, the cabinet largely independent of the Diet, and various organs of privilege and power, such as the Privy Council and the military independent of the Cabinet."²⁵ Consequently, the courts did not adjudicate disputes between individuals and the state, except to the very limited extent that the Administrative Court was given jurisdiction over certain disputes.²⁶ The basic sociolegal structure was not changed.²⁷

While the codes of the Meiji period were based primarily on

21. See Takayanagi, *supra* note 18, at 23.

22. For a discussion of the subject see F. JONES, *EXTRATERRITORIALITY IN JAPAN AND THE DIPLOMATIC RELATIONS RESULTING IN ITS ABOLITION 1853-1899* (rep. ed. 1970).

23. See D. ALLAN, *ASIAN CONTRACT LAW: A SURVEY OF CURRENT PROBLEMS* 6 (1969).

24. See generally Takayanagi, *supra* note 18, at 5-34.

25. Henderson, *supra* note 15, at 91. Prince Itō Hirobumi, who guided the Meiji Constitution into operation, had studied in Europe and greatly admired Bismarck. *Id.*

26. Hattori, *supra* note 1, at 129-30.

27. It is clearly overstating the case to suggest there was "no change." As Dando states, the younger members of former *samurai* families, in the Meiji Restoration, "destroyed the feudal system of government and established in its place a modern, centralized, authoritarian form of government." S. DANDO, *supra* note 4, at 16-17. But he also observes that "on calm reflection, one cannot deny that a legal system based on governmental authority serves to preserve elements of a feudal society." *Id.* at 17.

French and German law with some elements of Anglo-American and Tokugawa law incorporated,²⁸ the judicial framework was modeled after the French system.²⁹ These institutional changes did *not* revolutionize conflict resolution in Japan. As Zensuke Ishimura states, the continental system of the Meiji era "was not well suited to Japanese social conditions."³⁰ The Japanese resorted to the more convenient and less expensive informal dispute settlement devices which had their roots in feudal Japan.³¹

One of the avowed aims of the Meiji Constitution was the separation of powers, but the Supreme Court of Japan has stated that the Imperial Japanese (Meiji) Constitution has not realized the ideal of the doctrine of separation of powers.³² Although legislative power was to be exercised with the consent of the Diet, and judicial power by the courts, in practice "it was readily admitted that the Emperor or the cabinet could ordain the rule which would bind the people," and where there was a grievance against the government, the aggrieved party had to rely upon the benevolence of the executive branch of government.³³ To executive supremacy and the absence of checks and balances³⁴ may be added the following:

[A]s a result of the retention by the Minister of Justice of the power of general administrative supervision over the judiciary, personnel administration within the judiciary inevitably was influenced by the government. Particularly noteworthy is the fact that the Minister of Justice, by offering greater opportunity of promotion, could induce promising judges and procurators to enter the Ministry to perform general administrative functions. This practice not only resulted in competent jurists leaving the judiciary but also led people to think of the relationship between the Ministry of Justice and the courts in much the same light as that between a central administrative organ and its regional offices. This tendency reinforced by the traditional concept of the judiciary . . . led to a general evaluation of the status of the judge

28. Takayanagi, *supra* note 18, at 27-34.

29. *Id.* at 24-27.

30. Ishimura, *Empirical Jurisprudence in Japan*, in *COMPARATIVE JUDICIAL BEHAVIOR* 49 (G. Schubert & D. Danelski ed. 1969).

31. *Id.*

32. Maki, *The Japanese Constitutional Style* in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67*, at 3, 6-7 (D. Henderson ed. 1968).

33. *SUPREME COURT OF JAPAN, OUTLINE OF JAPANESE JUDICIAL SYSTEM 1-2* (1961). Though there was provision for the Court of Administrative Jurisdiction, in practice it was not a court but a supervisory administrative office.

34. Maki, *supra* note 32, at 6.

as inferior to that of the administrative official assigned to a Ministry's head office (though not to a regional office) The Minister of Justice, who had the power to assign judges to particular courts, also sometimes urged them to accept new assignments for the convenience of the government.³⁵

Prince Itō Hirobumi, the principal drafter of the Meiji Constitution, stated in his commentaries: "[t]he judicature is combined in the sovereign power of the Emperor as part of His executive power . . . the judiciary is only a part of the executive, and the executive, strictly speaking, is made up of two parts the judiciary and the administrative, each performing distinct services."³⁶ It was clear that the judiciary was an arm of the Emperor and that "there was no room . . . for a truly independent judiciary."³⁷

Despite the seemingly overpowering pressures against the independence of the judicial arm of government, as early as 1891 the judiciary established the principle of judicial independence. In the *Otsu* case a policeman was tried and sentenced to life imprisonment for attempting to assassinate the crown prince of Russia. Even though the criminal code did not provide for the death penalty in any case other than attempts on the lives of the royal family, the government, on the theory that the attempted assassination was analogous to an attempt on the life of a member of the royal family, had put heavy pressure on the Great Court of Judicature to levy the death sentence. The Court did not yield, though, and imposed a life sentence, thus inaugurating a tradition of independence.³⁸

The decade of the 1920's was a golden era for Japanese democracy (the *Taisho* Democracy) as the capitalist middle class engaged in political activities. However, following the Great Depression which hit Japan in 1927, a new ultranationalist autocracy arose which lasted through the Second World War.³⁹ Even during these years of autocracy the Great Court of Judicature did not completely capitulate to the desires of the executive.⁴⁰ Prime Minister

35. Hattori, *supra* note 1, at 122-23 (footnotes omitted).

36. I. HIROBUMI, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (1889) quoted in J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, at xvi-xvii (1964).

37. J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, at xvii (1964).

38. Takayanagi, *supra* note 18, at 9-10.

39. *Id.* at 12.

40. Two examples are given by Hattori, *supra* note 1, at 122 n.40.

Tojo attacked the judiciary for its uncooperative attitude and threatened remedial action. In response, the president of one court of appeals sent the prime minister a strong letter of protest.⁴¹ While this dramatic example was not the norm, it does suggest that Meiji Japan laid some foundation for an independent judiciary.

III. THE 1947 CONSTITUTION—JUDICIAL REVIEW AND JAPAN'S SUPREME COURT

The 1947 Constitution prepared under American occupation force guidance provided for an independent judiciary with the power of judicial review.⁴² The Supreme Court of Japan viewed its role as significantly changed by the new constitution:

With the enforcement of the New Constitution, great changes have been brought about in the judicial system of Japan. The highlights of the transformation are: firstly, the court has been vested with the power to determine the constitutionality of any law, order or regulation on the one hand and the power to make rules on the other; and secondly, the court has obtained a complete independence from the executive branch of the State. Under the old Constitution, the court was bound by the laws enacted by the Diet and had no authority to declare legislative enactments invalid because of their unconstitutionality. Moreover, judges as well as the prosecuting organ attached to the courts were placed under the administrative supervision of the Minister of Justice, who was in charge of not merely the budgetary matters for courts but also the matters of appointment and promotion of judges. Under the newly-established judicial system, the court is separated from the prosecuting organ completely, with public prosecutors belonging to the Public Procurator's Office under the general direction and supervision of the Minister of Justice. The power to exercise administrative supervision over the courts has now been conferred upon the Supreme Court.⁴³

The Court has also stated:

41. *Id.*

42. Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67*, at 71, 94-95 app. (D. Henderson ed. 1968). The deliberations of the Commission are reported in *JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT* (J. Maki trans. ed. 1980).

43. *SUPREME COURT OF JAPAN, OUTLINE OF CRIMINAL JUSTICE IN JAPAN 3* (1959) (citations omitted).

Under the new Constitution, the court has become the protector of the rights of the people as well as the guardian of the Constitution. In view of such an important mission assigned to the court, the independence of the judicial power—though it was also acknowledged under the old Constitution—has a greater meaning than before, and the autonomous independence of the court should be respected to a great extent.⁴⁴

Article 81 of the Constitution grants to the Court the “power to determine the constitutionality of any law, order, regulation or official act.”⁴⁵ In light of the role played by American occupation forces in drafting the Constitution, the meaning of Article 81 might seem clear. But to the Japanese, with a long history of executive supremacy and continental legal thinking, the meaning of Article 81 was not clear. Although several eminent Japanese scholars argued for the American type of judicial review, others favored a judicial review likened to Austria and West Germany—only upon invitation of certain executive or legislative bodies.⁴⁶ The Supreme Court, sitting as a constitutional court, would review a statute “in the abstract” and issue a declaratory judgment as to its validity.⁴⁷ The Supreme Court first rejected this continental view in 1948, indicating in dictum that the court’s interpretation of Article 81 corresponded with the American view of judicial review.⁴⁸ Again, in 1952, the Court rejected the notion of a constitutional court empowered to review statutes in the abstract:

[W]hat is conferred on our courts under the system now in force is the right to exercise the judicial power, and for this power to be invoked a concrete legal dispute is necessary. . . . In other words, the Supreme Court has power to examine the constitutionality of laws, orders, and the like, but this power may be exercised only within the limits of the judicial power.⁴⁹

44. SUPREME COURT OF JAPAN, *OUTLINE OF JAPANESE JUDICIAL SYSTEM* 3 (1961).

45. KENPŌ (Constitution) ch. VI, art. 81 (Japan).

46. See, e.g., Kakudo, *The Doctrine of Judicial Review in Japan*, 2 OSAKA U.L. REV. 59, 60, 69-72 (1953).

47. Henderson, *Japanese Judicial Review of Legislation: The First Twenty Years* in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS 1947-67*, at 120-21 (D. Henderson ed. 1968).

48. Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT’L & COMP. L. REV. 87, 98 (1980).

49. Suzuki v. Japan, 6 Sai-han minshū 783 (Sup. Ct., G.B. 1952), reprinted in J. MAKI, *supra* note 37, at 362, 363-64.

It appears that the Japanese interpretation of the doctrine of judicial review was influenced by American practice. Nathanson comments that "[f]rom a reading of the Japanese Supreme Court opinions . . . one would apparently gather little hint that the Justices were aware of the English and American gloss on many of the phrases which they are being called upon to interpret."⁵⁰ He continues, however, "there is little doubt that such precedents are well known to the Justices and carefully considered by them. Perhaps it is concern lest the Court appear to follow slavishly foreign precedents, which leads the Justices to eschew any mention of them."⁵¹

Even with its newly legitimized independence and the apparent adoption of an American styled judicial review, the Japanese Supreme Court has remained frugal with its independence. In the sixteen years following the adoption of the 1947 Constitution, the Court declared only two statutes unconstitutional,⁵² and one of them was no longer in effect when it was held unconstitutional.⁵³ Beginning in 1973, the Court in fairly rapid succession held three more statutes unconstitutional.⁵⁴ While these cases appear to be an indication that the Court is now willing to exercise its power of judicial review, it should be noted that all three of the cases were decided between 1973 and 1976.⁵⁵

The reticence the Court has shown in using its power of judicial review has been criticized by several commentators.⁵⁶ One writer has described the Court as "remarkably reluctant to exercise with

50. Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. L. 195, 217 (1958).

51. *Id.*

52. Nakamura v. Japan, 16 Sai-han keishu 1593 (Sup. Ct., G.B. 1962); Sakagami v. Japan, 7 Sai-han keishū 1562 (Sup. Ct., G.B. 1953). These cases are discussed in Bolz, *supra* note 48, at 100-02.

53. M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 64 (1971); Bolz, *supra* note 48, at 100.

54. Kurokawa v. Chiba Prefecture Election Commission, 30 Sai-han minshū 223 (Sup. Ct., G.B. 1976); K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, 665 Saibansho Jihō 1 (Sup. Ct., G.B. 1975); Aizawa v. Japan, 27 Sai-han keishū 256 (Sup. Ct., G.B. 1973). These cases are discussed in Bolz, *supra* note 48, at 134-37.

55. One commentator cautions that viewing the Court as reluctant to engage in judicial review prior to 1973 can result in "the danger of assuming that the justices have now simply resolved to carry out their sworn duties." Bolz, *supra* note 48, at 90.

56. See, e.g., Dionisopoulos, *Judicial Review and Civil Rights in Japan: The First Decade with an Alien Doctrine*, 12 W. POL. Q. 269 (1960); Okudaira, *The Japanese Supreme Court and Judicial Review*, 3 LAW ASIA 67, 91 (1972); Slomanson, *Judicial Review of War Renunciation in the Naganuma Nike Case: Juggling the Constitutional Crisis in Japan*, 9 CORNELL INT'L L.J. 24, 25 (1975).

any vigor the power of judicial review."⁵⁷ Compared with the present United States Supreme Court, this may seem true. The disparity in the ages and, therefore, the development of the two courts makes such a comparison inappropriate.⁵⁸ Whereas the United States Supreme Court used its power of judicial review to invalidate congressional acts only twice in its first sixty-eight years of existence, the Japanese Supreme Court has held five statutes unconstitutional in only half that time.⁵⁹

The Japanese Supreme Court has accepted restraints on the exercise of the principle of judicial review. As long as the legislative and executive branches stay within their respective spheres, the Court prefers to leave review to the electorate.⁶⁰ Its reasoning is that it is more consistent with democracy for the electorate to review the action of elected officials than for the Court to do so. By a similar rationale, when the Diet attempted to investigate the decision of a district court, the Supreme Court firmly rejected the Diet's right to interfere in judicial activities.

Another criticism of the Supreme Court involves its reluctance to forge social change or to protect individual rights.⁶¹ Maki, in reviewing the major Supreme Court decisions in the Court's first twenty years, states that there is ample support for the view that the Court has neither fought aggressively to protect individual rights nor used judicial review effectively to check the power of the other branches of government, but he considers such evidence misleading.⁶² He points out that the entire collection of freedoms—from speech, religion and assembly to academic freedom and the right of labor to organize and bargain collectively—was given to the Japanese people. The Courts did not have to create the rights. Rather, the role which remained for the Court was to give substance to these rights.

In post-war Japan there was considerable social and political dislocation and upheaval which led to abuses of the rights of others. The Court found it necessary to define, consistent with the public welfare, the limits of individual freedom. Maki concludes:

57. J. STOCKWIN, *JAPAN: DIVIDED POLITICS IN A GROWTH ECONOMY* 183 (1975), quoted in Bolz, *supra* note 48, at 92.

58. Bolz, *supra* note 48, at 133.

59. *Id.* at 133-34.

60. See J. MAKI, *supra* note 37, at xl-xlvi.

61. Nathanson, *Human Rights in Japan Through the Looking-Glass of Supreme Court Opinions*, 11 *How. L.J.* 316, 323 (1965). *Contra* E. REISCHAUER, *THE JAPANESE* 264 (1977) (stating that the courts have been zealous in the protection of individual rights).

62. J. MAKI, *supra* note 37, at xl-xlvi.

As a result of the research that has gone into this volume, I have come to the conclusion—valid, I believe, even though it is that of a nonspecialist in the field—that the two main contributions of the Supreme Court in the field of constitutional review are that it has given meaning to the content of the Constitution and that it has consistently striven to establish the rule of law under democracy in Japan.⁶³

IV. RESOLVING CONFLICT IN A JAPANESE SOCIETY

The significance of the judiciary in the overall scheme of conflict resolution in Japan is problematic. To understand the role of the judiciary one must recognize the social context in which it functions. It is the Japanese view that good people neither trouble nor are troubled by the law. "To be brought before a court, even in a civil or private matter, is a source of shame; and this fear of shame . . . is the determining motive in Japanese conduct."⁶⁴ This attitude appears to flow primarily from social and philosophical sources.

It bears reiteration that historically the Japanese have emphasized "duty" to the exclusion of any notion of "right."⁶⁵ The Confucian doctrine required loyalty on the part of the inferior and benevolence on the part of the superior. The militarist Japanese society elevated the concept of the inferior's duty and loyalty to the virtual exclusion of any other duty and denied the inferior any right of recourse to resistance.⁶⁶ An example of the severity of social duty follows:

The samurai are the masters of the four classes. Agriculturists, artisans and merchants may not behave in a rude manner towards samurai. The term for a rude man is "other than expected fellow," and a samurai is not to be interfered with in cutting down a fellow who has behaved to him in a manner other than is

63. *Id.* at xlv. It should be recalled that the term "rule of law" is more than a platitude in a society which historically based decisions on the social status of the parties.

64. R. DAVID & J. BRIERLEY, *supra* note 5, at 499.

65. The Japanese word for law, *ho*, carries with it no notion of substantive rights as embodied in Western law. It was not until the early Meiji period when the French Civil Code was being translated that the word *kenri* was coined to correspond to substantive rights. Y. NODA, *supra* note 6, at 159; Takayanagi, *supra* note 18, at 25. Prior to that time, "the law for most Japanese meant little else than the means of constraint used by the authorities to achieve government purposes." Y. NODA, *supra* note 6, at 37.

66. Henderson, *supra* note 15, at 105. Henderson lists as a basic tenet of Tokugawa Japan "A Rule of Man Instead of a Rule of Law." *Id.* at 101.

expected.⁶⁷

It bears notice that no mention is made of recourse or administrative process. The samurai were literally judge, jury and executioner. The emphasis on duty did not end with the duty of others to the samurai. The duty of loyalty "came to govern the relation between merchant and clerk, artisan and apprentice, and even between gambler and pupil—every known relationship in Japanese society."⁶⁸ "Justice" became "purely a matter of grace bestowed by the military."⁶⁹ "The fundamental principle upon which this class structure rested was that men are naturally unequal, by birth, and from that principle it followed that in all phases of life they should be treated unequally."⁷⁰ Even though social class, as defined by law, was abolished during World War II, status continues as an important factor in Japanese society.⁷¹

In conflicts between social unequals, this means the social inferior defers to the social superior:

From the construction contract arises a relationship in which the contractor defers to the owner as his patron; from the contract of lease a relationship in which the lessee defers to the lessor; from the contract of employment a relationship in which the servant or employee defers to the master or employer; from the contract of apprenticeship a relationship in which the apprentice defers to the master; and from the contract of sale a relationship in which the seller defers to the buyer (the former being expected in each case to yield to the direction or desire of the latter).⁷²

The prime virtue is obedience and resistance is considered foolish.⁷³ Though obedience, duty and loyalty are stressed, and although no recourse is given the social inferior, the Confucian doctrine is one of harmony and the relationship is to be patriarchal, not despotic.⁷⁴ "[I]n other words, he is supposed not only to domi-

67. *Id.* at 95, citing 3 J. MURDOCH, HISTORY OF JAPAN 802 (1964).

68. Henderson, *supra* note 15, at 105.

69. *Id.* at 96. It is even reported that the merchant classes, the lowest classes, had to submit to humiliation before they could use the courts. *Id.*

70. *Id.* at 92. This is a second of Henderson's tenets, that "Men are Unequal."

71. Haring, *Japanese Character in the Twentieth Century*, 370 ANNALS 133, 136 (1967) ("[T]he average Japanese needs to know the status of everyone with whom he deals before he can act with confidence.").

72. Kawashima, *supra* note 2, at 43.

73. Haring, *supra* note 71, at 135.

74. Kawashima, *supra* note 2, at 43.

nate but also to patronize and therefore partially to consent to the requests of his servant or employee."⁷⁵ Between unequals there is little chance that conflict will go beyond the relationship to a third party.

Although relationships within social groups were defined by the *giri*, relationships among social groups remained undefined. Therefore, force often came into play when a conflict arose between members of different social groups, e.g., between members of different villages.⁷⁶ The philosophy of harmony so pervaded Japanese culture,⁷⁷ however, that even here there was often amicable settlement.

For example, Anglo-American contract law excuses performance under such doctrines as frustration and impossibility only in extreme situations; otherwise the party must live with his contract—a contract which was made under conditions that invariably no longer entirely exist.⁷⁸ No such condition of immutability existed in Japan. Far from viewing a contract as something to be adhered to, the Japanese often regard a contract “as a sort of tentative agreement [which may be reformed as the circumstances change].”⁷⁹ Rather than provide for every contingency in “black-and-white terms,” some areas are left “intentionally gray, so that there will be room for modification and adaptation later on.”⁸⁰

The emphasis, drawn from the dynamic concept of harmony in nature, is one of evolving human relationships. If a contract be-

75. *Id.*

76. “A special profession, the *jidān-ya* or makers of compromises, has arisen, particularly in the large cities. Hired by people having difficulty collecting debts, these bill collectors compel payment by intimidation, frequently by violence. This is of course a criminal offense.” *Id.* at 47.

77. “Shotoku Taishi, who drafted the [Meiji] ‘Constitution of Japan,’ wrote in article 17 that harmony is to be honored.” Dai 51 Kai Teikoku Gikai Shūgi In Iinkai Sokkikoku (Stenographic Record of House of Representatives’ Committees in the 51st Session of the Imperial Diet), category 5, no. 18, 3d Session, at 2 (1926), *quoted in* Kawashima, *supra* note 2, at 53.

78. *See, e.g.*, U.C.C. §§ 2-613, 2-615; Restatement of Contracts §§ 455-61 (1932); Harris, *Contract and the Doctrine of Frustration*, 104 SOLIC. J. 966 (1960). *See also* Mahaska Co. St. Bank v. Brown, 141 N.W. 459 (Iowa 1913).

79. Noda in Tanaka, *supra* note 12, at 308.

80. Ueno, *Social, Economic and Political Trends in Japan* in AMERICAN BAR ASSOCIATION, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 24, 27 (J. Haley ed. 1978). Business contracts usually contain a good faith clause or an amicability clause. From these clauses it is inferred that if a dispute arises the parties should renegotiate. Noda in Tanaka, *supra* note 12, at 309-10. *See generally* Marks & Ono, *Japanese Attitudes Towards Commercial Agreements With the People’s Republic of China*, 7 SYRACUSE J. INT’L L. & COM. 53 (1979).

came disadvantageous to one party, the other party would not hold him to its terms.⁸¹ It is contemplated that a dispute will not arise, and if one does, it will be amicably settled and harmonious relations will be preserved.⁸² Among equals in the same village the relationship is to be intimate, and social roles are flexible "so that they can be modified whenever circumstances dictate."⁸³ Manifestations of the importance of harmony include the behavior of the creditor who *requests* his debtor to perform his obligation,⁸⁴ or the victim of an accident who gratefully accepts an apology and a nominal sum as complete satisfaction for his injury.⁸⁵

Traditional culture required that if one party apologized the other must forgive.⁸⁶ Moreover, to be brought before a court was a source of shame; therefore, to bring someone before a court was to

81. The *samurai* seem to be an exception to this rule as they are reported to have abided by their contracts. Noda in Tanaka, *supra* note 12, at 308. According to Noda, however, this was not due to any regard for the contract itself, such as is found in Western countries, but "because they did not want to compromise their honor or their face as a *samurai* [T]hey were motivated . . . by the need to satisfy their sense of self-respect." *Id.* at 309.

82. Kawashima, *supra* note 2, at 44, 47. The conditions which give rise to immutability of contracts in Western law and mutability of contracts in Japanese law may be just the opposite of those suggested in the text. In a world with little change, the cost of allowing for it is very small. On the other hand, in a world wrought with change, a contract which can hold certain factors constant can be of very great value.

83. Kawashima, *supra* note 2, at 44.

84. R. DAVID & J. BRIERLEY, *supra* note 5, at 500. One commentator states, however, that cases between moneylenders and their debtors are among the cases most often brought to court. His explanation for this is that "[t]he usurer has no delicate feelings toward his debtor." Y. NODA, *supra* note 6, at 182 & n.76.

85. R. DAVID & J. BRIERLEY, *supra* note 5, at 500. Noda describes the typical settlement of a damage case:

The most frequent means of resolving a damage case is for the victim of the injury to renounce his right to indemnity. Usually what happens is that the author of the damage comes to offer his apologies and at the same time offers a sum of money. The sum is frequently much less than the extent of the damage suffered by the victim, but the victim is quickly moved by a more or less sympathetic attitude on the part of the author of the injury. It is not the amount of the indemnity but the sincere attitude worthy of *giri-ninjo* on the part of the offender which is the important thing to the victim. Sometimes the victim is so moved by the sincerity of the author of his loss that he does not accept the sum offered to him. Exceptionally, the victim may seek reparation from the author of his loss, but even in this case he does not want to go to court. He resorts rather to the authority of some person such as a notable in the community or a police officer who has influence over the person who has injured him. More rarely the victim even proceeds to court, but this is only done in order to achieve an amicable settlement of the dispute through the good offices of the court. Such extra-judicial procedures are considered more honorable and desirable than the judicial. They save face for both parties.

Y. NODA, *supra* note 6, at 182.

86. Kawashima, *supra* note 2, at 45.

create disharmony, and "is hardly distinguishable in Japan from extortion."⁸⁷ For this reason, all but the most acrimonious of disputes are settled without resort to litigation.

V. RECONCILEMENT/CONCILIATION

The process by which interpersonal settlements are made Kawashima calls "reconcilement."⁸⁸ He describes it in the following terms: "the process by which parties in the dispute confer with each other and reach a point at which they can come to terms and restore or create harmonious relationships."⁸⁹ As conditions change and the needs of the parties change, adjustments are made to accommodate the new situation. Where the parties are not equals, the social superior, the *oyabun* (a word meaning status of a father),⁹⁰ confers with and considers the needs and desires of the social inferior, the *kobun* (a word meaning status of a son),⁹¹ and then makes a decision as to what the new relationship should be.⁹² Where social equals are involved, the same process is involved, except that neither party can impose his decision on the other. If no settlement can be facilitated, "conciliation"—reconcilement involving a third person—is utilized. This third person is preferably someone of higher status than the disputants, thereby giving his "recommendations" considerable weight.⁹³

In Tokugawa Japan, disputes were settled within the village.⁹⁴ The head of the extended family, the head of a related group of families, or the village headman acted as the conciliator. Carrying disputes to the Shogun's courts was strongly discouraged.⁹⁵ The basis on which conciliation still operates is that the conciliator's objective is to foster harmonious relationships between the parties.⁹⁶ This means neither of them should be shamed, which is what would happen if the conciliator were to say that one party

87. R. DAVID & J. BRIERLEY, *supra* note 5, at 499-500. See also Y. NODA, *supra* note 6, at 181.

88. Kawashima, *supra* note 2, at 50.

89. *Id.*

90. Haring, *supra* note 71, at 136.

91. *Id.*

92. Kawashima, *supra* note 2, at 50.

93. *Id.*

94. Henderson, *supra* note 15, at 98.

95. *Id.* at 98-99.

96. Kawashima, *supra* note 2, at 51. Conciliation seeks to "strike a balance between the two sides of a dispute, rather than necessarily determine the right and wrong of a situation." Ueno, *supra* note 80, at 27.

was right and the other wrong. On the other hand, since the dispute should never have arisen, the result should punish both parties.⁹⁷

VI. KANKAI/CHŌTEI

The period immediately following the Meiji Restoration was a period of considerable social instability. The Shogun was overthrown, the emperor was reinstated to his powers and a concerted program of "modernization" was begun. As a result of social instability the informal means of dispute resolution more frequently broke down and litigation increased. In response to this set of events the government instituted a formal process of conciliation called *kankai*.⁹⁸ Although the term literally means an "invitation to reconciliation," *kankai* became a compulsory pre-litigation procedure. Moreover, it often failed to resemble reconciliation in that settlement frequently was imposed on the parties by the court.

Instituted in 1876, *kankai* disappeared in 1890 with the adoption of the Code of Civil Procedure, but in 1922, again due to social unrest (this time resulting from urbanization and industrialization), *chōtei*, another formal means of conciliation, was established.⁹⁹ Since traditional men of status were often unavailable or ineffective as conciliators, the government substituted "mediators" whose prestige was derived from their relationship to the government. Such a procedure was not alien to the Japanese since the Japanese people historically had used the police with their position of prestige and authority in the central government to act as conciliators.¹⁰⁰ As provided by statute and Supreme Court Rules in 1951, *chōtei* operates in civil cases and involves a conciliation committee comprised of a judge and at least two lay members.¹⁰¹ A decision is not imposed, but, of course, the parties are operating "under the psychological pressure derived from the 'halo' of a state court."¹⁰² Although conciliation has been very popular in Japan, the Western practice of arbitration has not,¹⁰³ since arbitration *im-*

97. Kawashima, *supra* note 2, at 51.

98. Except as otherwise noted, the following information on *kankai* and *chōtei* comes substantially from Kawashima, *supra* note 2, at 52-56.

99. Kawashima, *supra* note 2, at 53-54.

100. *Id.* at 55-56. See von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1494 (1958).

101. H. TANAKA, *JITTEI HŌGAKU NYŪMON* (Introduction to the Study of Positive Law) (3d ed. 1974) reprinted in *THE JAPANESE LEGAL SYSTEM* 492 (H. Tanaka ed. 1976).

102. Kawashima, *supra* note 2, at 54.

103. *Id.* at 56. In recent years, however, there has been an increase in the inclusion of

poses a decision on the parties rather than allowing the parties to mold the outcome under the *influence* of a social superior.

The significance of *chōtei* as a judicial function is demonstrated by the figures for the years 1957-59.¹⁰⁴ In the District and Summary Courts, on average approximately 15,000 judicial cases per year were brought involving leased land and leased houses. At the same time there were approximately 24,000 mediation cases brought on the same subjects. Moreover, it is reported that a settlement is reached in nearly sixty percent of all civil conciliation cases.¹⁰⁵

Undoubtedly, *chōtei* owes much of its popularity and success to the social milieu in which it is operating, since the Japanese historically have placed considerable importance on harmony and have a history of experience with conciliation. Kawashima reports the following statement on the subject by a member of the Diet:

Shotoku Taishi, who drafted the 'Constitution of Japan,' wrote in article 17 that harmony is to be honored. Japan, unlike other countries where rights and duties prevail, must strive to solve interpersonal cases by harmony and compromise. Since Japan does not settle everything by law as in the West but rather must determine matters, for the most part, in accordance with morality and human sentiment (*ninjō*), the doctrine of mediation is a doctrine indigenous to Japan. . . . The great three hundred year peace of the Tokugawa was preserved because disputes between citizens were resolved harmoniously through their own autonomous administration, avoiding, so far as possible, resort to court procedure.¹⁰⁶

VII. LITIGATION IN JAPANESE COURTS

The role of the courts as conciliator does not end with formal mediation under *chōtei*. Japanese judges, as creatures of their society, are interested in harmony and compromise. Looking at the years 1952 to 1959 Kawashima discovered that over fifty percent of the judicial cases brought in District Court, and nearly sixty percent of the cases brought in Summary Court, were either withdrawn (settled by the parties in the overwhelming number of those

arbitration clauses in labor contracts. *Id.* at 56-57.

104. The figures are derived from Kawashima, *supra* note 2, at 62, Table 2.

105. Gokijo, *The Judicial System of New Japan*, 308 ANNALS 28, 37 (1956).

106. Kawashima, *supra* note 2, at 53 (quoting Stenographic Record of House of Representatives' Committees, *supra* note 77).

cases) or settled by judicial compromise.¹⁰⁷ "The courts in Japan are far from being inactive, but the most important part of their activity consists of conciliation rather than adjudication."¹⁰⁸

Prior to the Second World War Japanese civil procedure generally followed continental patterns¹⁰⁹ with the judge, a professional civil servant, taking an active role in managing the litigation and examining the witnesses. Trial was normally without a jury¹¹⁰ and occurred in a series of sessions. Judges were expected to perform a clarification function.¹¹¹ When motions were unclear the judge was expected to clarify them. When there was insufficient proof of facts the judge was expected to supplement the evidence. All this was aimed at assuring that the party who should win, did win, regardless of counsel. If this clarification function was not performed assiduously, the Great Court of Judicature reversed.¹¹²

The American occupation forces introduced a number of changes. Criminal procedure was changed from an inquisitorial toward an accusatory system with the Anglo-American emphasis on the rights of the accused.¹¹³ Lawyers were generally given a larger role in litigation and trials were consolidated in the Anglo-American fashion.¹¹⁴ Judges were no longer required to clarify and the burden was placed on the parties to submit proof and to examine witnesses.¹¹⁵ At first the bench appears to have adopted the new procedure without reservation, but the legal profession as we know it in the West is relatively new in Japan and had not enjoyed a prestige status. Attorneys were viewed as "intruders, meddling uninvited in disputes which otherwise could have been resolved in the traditional spirit of 'harmony.'"¹¹⁶ As a result, there was no

107. These figures are derived from Kawashima, *supra* note 2, at 55, 69, Table 12.

108. R. DAVID & J. BRIERLEY, *supra* note 5, at 500.

109. See von Mehren, *supra* note 100, at 1488-89.

110. Jury trial was established in 1923, but was not favored and not utilized. It was abolished in 1943 and not reinstated. Takayanagi, *supra* note 18, at 22. See also Y. NODA, *supra* note 6, at 137-38.

111. Tanabe, *The Processes of Litigation: An Experiment with the Adversary System* in LAW IN JAPAN 73, 85-90 (A. von Mehren ed. 1963).

112. *Id.* at 89-90.

113. Takayanagi, *supra* note 18, at 23.

114. Tanabe, *supra* note 111, at 101.

115. *Id.* at 90.

116. Tanaka, *supra* note 101, at 265. See Tanabe, *supra* note 111, at 78. In criminal cases, the attorney was not viewed as protecting the defendant's rights, "but as an apologist begging for mercy, or even worse, as a schemer bent on thwarting the law." Tanaka, *supra* note 101, at 265. In contrast to their view of defense attorneys, it is interesting to note that the Japanese consider a judge who imposes lenient punishment on wrongdoers to be virtuous or humane. See Noda in Tanaka, *supra* note 12, at 303. The common person in Japan is

trained, capable and respected group to carry the burden of managing litigation. This resulted in such practices as inept examination of witnesses, introduction of irrelevant evidence, and argumentative cross-examination.¹¹⁷ Objections were little used, and when they were used they were taken personally. In response to this state of affairs and to the desires of citizens to see judges actively protecting their interests, judges began once again to play an active role in managing the trial.¹¹⁸ This new role was one of cutting off irrelevant, extraneous and improper evidence, inquiring into areas neglected by counsel, requiring proper foundations to be laid, influencing the order of presentation of a case, and putting pressure on lawyers to come to trial prepared.¹¹⁹ That is, Japanese judges became active, but Japanese lawyers were given a considerably broader scope of activity than in the past.

In the decade following the Second World War, Japanese lawyers were slow to take upon themselves the task of molding litigation. This may be attributed to a composite of factors involving the bar, the public and the bench. Rabinowitz identified the following factors as impediments to the development of the Japanese bar: a general lack of understanding by the lawyers as to what their role should be; a reluctance on the part of the government to create an area of monopoly for the bar; a failure of the bar associations to develop into strong organizations; and a failure of legal education to be practice-oriented.¹²⁰ Coupled with these bar-related factors was the litigants' reluctance to use lawyers. In 1960 over forty percent of the parties in the District Courts and over sixty percent of those in the Summary Courts appeared *pro se*.¹²¹ This should not be surprising since prior to 1890 representation by counsel was strictly forbidden and public confidence in attorneys remained low.¹²² Finally, the managerial function performed by the judges¹²³

distrustful of lawyers, fearing that the lawyer may take advantage of his legal ignorance in order to make money. See Hajime, *Basic Features of the Legal, Political, and Economic Thought of Japan*, in *THE JAPANESE MIND* 143, 147 (C. Moore ed. 1967). It is not surprising that one writer has observed that Japanese attorneys have little pride in the legal profession. Y. NODA, *supra* note 6, at 148. *But cf. infra* note 156 and accompanying text (social standing of attorneys has improved in recent years).

117. Tanabe, *supra* note 111, at 101-03.

118. *Id.* at 103-05.

119. *Id.*

120. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 *HARV. L. REV.* 61, 78-81 (1956). For a listing of some of the non-lawyer specialists performing tasks which might otherwise be handled by lawyers, see Hattori, *supra* note 1, at 145.

121. Calculations based on figures appearing in Hattori, *supra* note 1, at 146 n.145.

122. *Id.* at 145. See *supra* note 116.

impeded the development of the bar. In light of Japan's history of hierarchical and paternalistic social relationships, and particularly considering the large numbers of litigants appearing without counsel, judicial management of litigation probably is not surprising.

VIII. JUDICIAL SHORTCOMINGS

Unfortunately, the management of the judicial process in Japan has been criticized for a lack of efficiency. In 1959 Chief Justice Tanaka issued the following complaint and exhortation:

The slow progress of proceedings in the courts has from antiquity been a world-wide evil. It has become a chronic disease in Japan. Anyone of common sense in Japan knows that a civil case of little importance—for example a dispute of daily occurrence over a rented house or land—will require at least three or four years^[124] before a final judgment by the court of last instance will be given, if it should go to the court of last resort. Nor will a criminal case be determined much more quickly, if appeal be taken to higher courts.

This delay in justice generally is bitterly criticized by the press. If such a condition continues, the realization of justice and the protection of fundamental human rights, which are the courts' aims, will be next to impossible, and confidence of the people in the courts cannot be expected.

In order to bring about an improvement in the situation it is imperative that judges entirely rid themselves of their inefficient and easy-going ways, characteristic of bygone times for despatching [sic] judicial business. The administration of justice calls in general, not only for sound interpretation of the law (or scholarship) and pursuit of truth (or historical sense), but also administrative efficiency. In Japan the judges have paid conscientious attention to the first and second qualities, but often not to the third. The judicial conscience must be aroused and directed to cultivating all three qualities equally; Japanese judges ought always to remember the maxim, "[j]ustice delayed is justice denied," in discharging their duties.

Prompt justice, however, will never be realized through the mental preparation and efforts of judges alone. Lawyers must share with the courts the responsibility for dilatory justice in Japan. When a lawyer is found not fully prepared for a scheduled

123. See *supra* notes 116-17 and accompanying text.

124. The length of the average trial was approximately one year. Tanabe, *supra* note 111, at 109 n.149.

hearing and asks for postponement of a hearing more than once, or proposes to introduce useless evidence, the judge in charge often assents, simply out of the desire to have the proceedings progress smoothly.¹²⁵

Although Tanaka attributes the drawn-out trial to the "inefficient and easy-going ways, characteristic of bygone times," it should be remembered that Japanese judges are influenced by their cultural values. The drawn-out, piecemeal trial allows the parties' emotions to cool and gives an opportunity for private settlement of the dispute.¹²⁶ Such a result comports with harmony better than would a judicial decree. Japanese judges have been subjected to the countervailing pressures to consolidate trials, to meet the special needs of an inexperienced bar and to provide sufficient opportunity for settlement.

The result of this process, as noted by Judge Tanabe, has been called the "planned trial."¹²⁷ Trial occurs in one session only in the simplest of cases. Ordinarily there is an initial session during which the judge is familiarized with the case. This session is thorough and includes the examination of relevant documents. After the necessary planning, two or three (or more in the most complicated litigation) proof-taking sessions are scheduled for the examination of witnesses. Following these, there is a final session during which counsel and the judge tie the evidence together through final argument. As in the civil law countries, these sessions are usually scheduled one month apart.¹²⁸

Tanaka's complaint is echoed today by commentators who cite the drawn-out, one-day-a-month trial as a factor in delaying litigation,¹²⁹ but a more frequently cited factor is the shortage of judges and lawyers.¹³⁰ There has been little increase in the number of judges since the Meiji period, while the population has nearly tripled.¹³¹ The caseload on each judge is enormous, resulting in lengthy delays in trial.¹³² According to one Japanese authority, "[t]he need

125. Tanaka, *Democracy and Judicial Administration in Japan*, 2 J. INT'L COMM. JUR. 7, 16-17 (No. 2, 1959).

126. Tanabe, *supra* note 111, at 99.

127. *Id.* at 108-09.

128. Haley, *supra* note 100, at 381.

129. Bolz, *supra* note 48, at 123; Haley, *supra* note 100, at 381.

130. See, e.g., Y. NODA, *supra* note 6, at 152; Bolz, *supra* note 48, at 121-23; Haley, *supra* note 100, at 381-83; McMahon, *Legal Education in Japan*, 60 A.B.A.J. 1376 (1974).

131. Y. NODA, *supra* note 6, at 152.

132. See Haley, *supra* note 100, at 381. In 1974, United States District Court judges had an average caseload of 325 cases, which was thought to be excessively high. In the same

to increase the number of judges is urgent."¹³³ The shortage of lawyers also is critical. As of 1979, there were only 11,536 licensed attorneys to serve a population of 116,000,000.¹³⁴ This contrasts with more than 425,000 attorneys serving a population of 226,500,000 in the United States in 1980.¹³⁵ While this shortage clearly disturbs many writers—one having reported that in “nearly 50 per cent of the cases at the trial level, one or both of the litigants are unable to obtain the services of a lawyer,”¹³⁶—the Japanese public seems unconcerned.¹³⁷

IX. THE LEGAL TRAINING AND RESEARCH INSTITUTE

The shortage of judges and lawyers has been attributed to the small number admitted each year to the Legal Training and Research Institute of Japan.¹³⁸ The Institute was established in 1957.¹³⁹ The leaders of the Japanese bench and bar conceived the Institute as a “radical new approach” in the training of future judges, lawyers, and prosecutors.¹⁴⁰ Apprentices admitted to the Institute¹⁴¹ undergo a two-year professional training program which consists of four months of study emphasizing the development of “an analytical legal mind and the skills needed to draft legal documents;”¹⁴² followed by sixteen months of field training under the supervision of practicing judges, lawyers and prosecutors; the training ends with another four months of intensive study at the Institute to receive a “final educational polishing.”¹⁴³ This

year, the Japanese caseload was 1,708 cases per judge. *Id.*

133. Y. NODA, *supra* note 6, at 152.

134. Marks & Ono, *supra* note 80, at 58 n.18.

135. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, [1982-83] OCCUPATIONAL OUTLOOK HANDBOOK 98; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, [1981] STATISTICAL ABSTRACT OF THE UNITED STATES 5.

136. McMahon, *supra* note 130, at 1379.

137. Tanaka, *supra* note 101, at 267. This absence of concern may be due to the poor opinion once held of attorneys. See *supra* note 116. But see *infra* note 156 and accompanying text. It may also stem from the fact that many litigants still appear *pro se*. See Tanaka, *supra* note 101, at 259-60.

138. McMahon, *supra* note 130, at 1379.

139. Thornton, *Training Lawyers and Judges in New Japan*, 58 JUDICATURE 128, 129 (1974).

140. *Id.*

141. See *infra* notes 148-54 and accompanying text.

142. Shikita, *Law Under the Rising Sun*, 20 JUDGES' J. 42, 44 (No. 1, 1981).

143. *Id.* at 45. Three articles on the Legal Training and Research Institute and its two-year program are the following: McMahon, *supra* note 130; Shikita, *supra* note 143; Thornton, *supra* note 140.

program has not only resulted in better trained lawyers,¹⁴⁴ it has vastly improved the relationships among the judiciary, the practicing bar, and the government prosecutorial agencies.¹⁴⁵

To become a judge, lawyer, or prosecutor one must complete the two-year program at the Institute.¹⁴⁶ Admission to the Institute is conditioned on passing the National Law Examination.¹⁴⁷ The passing rate on the examination has steadily dropped over the years as the number of applicants has increased.¹⁴⁸ Of the nearly 30,000 applicants taking the examination in 1977, only 1.6% passed.¹⁴⁹ This means only 500 apprentices were admitted that year who would have graduated in 1979.¹⁵⁰ Since the government entirely funds the training program, and pays an allowance of approximately \$10,000 per year to each apprentice,¹⁵¹ the official reason stated for the low number of admissions is that "it would cost the government too much to fund additional students."¹⁵² One writer suggests, however, that this low passing rate is a result of the government's policy of discouraging litigation.¹⁵³

Upon completion of the training program at the Institute, graduates choose to become judges, lawyers, or prosecutors.¹⁵⁴ The social standing and income of practicing lawyers have improved in the last few years¹⁵⁵ and the number of graduates choosing to become

144. See McMahan, *supra* note 130, at 1378.

145. Shikita, *supra* note 143, at 46.

146. *Id.* at 42.

147. This examination, although given before professional legal training, roughly corresponds to the bar examination in the United States. *Id.* at 45. It consists of three parts: "a multiple choice test on constitutional, civil, and criminal law; an essay exam on seven subjects—constitutional, civil, criminal, and commercial law, plus three subjects selected from laws of civil or criminal procedure, from such specialized fields as labor law, public or international law, or criminology, and from such related sciences as economics or social policy, political science, finance, or psychology; and an oral exam on the same seven topics." *Id.* at 42-43. A final exam is given at the end of the two-year program but "[i]t is noncompetitive and failure is unusual." *Id.* at 45.

148. *Id.* at 43.

149. *Id.*

150. Approximately the same number graduated that year from just one of the numerous law schools in the United States. See ASSOCIATION OF AMERICAN LAW SCHOOLS & THE LAW SCHOOL ADMISSIONS COUNCIL, [1979-80] PRELAW HANDBOOK 156. (There were 1,621 J.D. students enrolled in the Harvard University School of Law for the academic year 1978-79. Assuming that a third of these were third-year students, over 500 students graduated in 1979.)

151. Shikita, *supra* note 143, at 45.

152. Bolz, *supra* note 48, at 121.

153. Haley, *supra* note 100, at 385-86.

154. McMahan, *supra* note 130, at 1376.

155. Tanaka, *supra* note 101, at 265; Bolz, *supra* note 48, at 137.

lawyers has increased.¹⁵⁶ Since a Japanese lawyer's role is limited almost exclusively to representation in litigation,¹⁵⁷ this should facilitate litigation by making it easier for a party to obtain representation. With fewer graduates becoming judges, however, it is to be expected that the already overburdened dockets will be further strained.

X. A JAPANESE LEGAL ORDER

From the point of view of official rules, institutions and legal education, the Japanese legal system is more closely related to the civil law than to the common law. Most of Japan's substantive law codes are continental in origin. However, many individual rules, such as the Juvenile Law of 1922, Japanese Trust Law, the Code of Criminal Procedure, and the new Constitution are clearly of Anglo-American origin. Since Japanese jurists are not trained in the common law, they tend to interpret even common law rules and principles using civil law techniques.¹⁵⁸ "In many ways, however, the Japanese legal order is markedly different from Western legal orders, common and civil law alike."¹⁵⁹ Moreover, to argue the relative degree to which Japanese law is continental or Anglo-American is to miss the much larger point. The wholesale incorporation of continental code law and practice, while giving a framework for formal Japanese law, has left the lives and practices of most Japanese virtually untouched.¹⁶⁰ Von Mehren states that "[p]erhaps the most striking aspect of Japan's transition . . . is that this was accomplished while preserving many of the traditional society's patterns and values."¹⁶¹ Retention of the cultural pattern of conciliation distinguishes Japanese law from that of the Western models on which it is based.¹⁶² "Tokugawa law was predominantly customary law, and was particularly suited to Japan; and despite the fact that it was 'abolished' upon the introduction of Western codes, the living law which it reflected continues in modern Japan."¹⁶³

While the introduction of Western codes may have had little im-

156. Y. NODA, *supra* note 6, at 142.

157. Tanaka, *supra* note 101, at 257. It is very rare for an "ordinary private citizen" to consult an attorney before drawing up a will or buying or selling real estate. *Id.* at 258.

158. Takayanagi, *supra* note 18, at 22, 33-34, 37.

159. von Mehren, *supra* note 100, at 1491.

160. *Id.* at 1491-93.

161. *Id.* at 1492.

162. Wren, *The Legal System of Pre-Western Japan*, 20 HASTINGS L.J. 217, 222 (1968).

163. *Id.* at 219.

pact on Japanese society, the economic and cultural changes since the Second World War have left their mark. Industrialization has resulted in people moving to the cities to obtain an education or a job.¹⁶⁴ Once in the city, many stay, contributing to the breakdown of the old familial, group-oriented society.¹⁶⁵ The nuclear family is becoming more prevalent as many younger Japanese are unwilling to live with their parents in the traditional fashion.¹⁶⁶ Modern education has encouraged these young Japanese to think independently.¹⁶⁷ The effect of this "[l]iberation of the individual"¹⁶⁸ and the rapid change from an agrarian society to a highly industrialized society is summed up by Mikaso Hane:

The problems confronting Japan today are not unique. The decline of traditional values and institutions, and the search for meaning and purpose continue elsewhere in the industrialized, Westernized societies that have also left their tribal and familial stages far behind. Like other societies, Japan faces such problems as the dislocations and disorientations caused by the exceedingly rapid pace of change that has been brought about by science and technology; air and water pollution; the desecration of nature; the threat of nuclear destruction; the population explosion; the undermining of the sense of mystery and awe by rationalism and science; the abandonment of the sense of unity with nature and the universe that was at the root of Shinto; and the continued inability of man to stop abusing his fellowmen.¹⁶⁹

Accompanying these economic and social changes of recent years has been reported an increase in litigation.¹⁷⁰ Moreover, the type of cases being litigated is changing. At one time, the majority of cases brought into court were business related cases "concern[ing] rela-

164. C. SCHIROKAUER, *A BRIEF HISTORY OF CHINESE AND JAPANESE CIVILIZATIONS* 574 (1978).

165. *Id.* at 575.

166. *See id.* at 575, 577. While Western law has emphasized the role of the individual, Japanese law and custom has emphasized the group. *See R. DAVID & J. BRIERLY, supra* note 5, at 498-99. So important was the group in Tokugawa Japan that it was not uncommon for the headman of the village to be punished for the crimes of his villagers. Henderson, *supra* note 15, at 104-05.

167. *See* Noda in Tanaka, *supra* note 12, at 296.

168. M. HANE, *JAPAN: A HISTORICAL SURVEY* 602 (1972).

169. *Id.* at 603.

170. *See* Y. NODA, *supra* note 6, at 181 n.74. Statistics compiled by Haley show that the number of cases filed between 1949 and 1958 in general indicated a steady increase. The number of cases filed in the years 1959 to 1974, however, were rather erratic, sometimes increasing from one year to the next, sometimes decreasing. Haley, *supra* note 100, at 369, Table 3.

tionships between large enterprises which [were] competing with each other for purely economic interests, or between moneylenders and their debtors."¹⁷¹ Now it appears that personal injury and other non-business related cases are becoming more common.¹⁷²

The liberation of the individual is also being reflected in Supreme Court opinions. All pre-Second World War Great Court of Judicature opinions were *per curiam*, and, ostensibly, unanimous.¹⁷³ Article eleven of the Court Organization Law adopted in 1947 "states '[t]he opinion of every Supreme Court justice shall be expressed in written decisions.'"¹⁷⁴ A statistical analysis of the Court's opinions from 1947 to 1962 demonstrates that there has been a gradual but "progressive rise in individualism in the Japanese Supreme Court,"¹⁷⁵ and in terms of absolute number, nonunanimous decisions are approaching fifty percent.¹⁷⁶

Even with these changes, it is clear that traditional Japanese attitudes and values are prevalent.¹⁷⁷ In his article analyzing four Japanese pollution suits,¹⁷⁸ Frank Upham demonstrates that the disapproval of one's peers¹⁷⁹ and shame on the part of the victim¹⁸⁰

171. Y. NODA, *supra* note 6, at 182.

172. See THE JAPANESE LEGAL SYSTEM 405-43 (H. Tanaka ed. 1976) (selection of newspaper excerpts, many dealing with personal injury suits); Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits*, 10 L. & Soc'y REV. 579 (1976).

173. Kawashima, *Individualism in Decision-Making in the Supreme Court of Japan*, in COMPARATIVE JUDICIAL BEHAVIOR 103 (G. Schubert & D. Danelski ed. 1969). This merely followed the societal pattern of consensus which derives from the attitude that relationships within the group should be intimate and that harmony should prevail. Decisions made within the village are made by the *yūryōka-sha* ("power holders"). Haring, *supra* note 71, at 135. Discussion is open and often quite frank. Then, without a vote, the village head announces the "consensus" of the meeting.

174. Kawashima, *supra* note 174, at 103.

175. *Id.* at 117.

176. Danelski, *supra* note 13, at 137. This new rule has also resulted in increasing the Court's work load, see McMahon, *supra* note 130, at 1379, and in confusion "in many cases as to the precise rationale of the decision," Bolz, *supra* note 48, at 132.

177. It is often thought, even in Japan, that the traditional norms such as the group-centered society have declined. A. BURKS, JAPAN: PROFILE OF A POSTINDUSTRIAL POWER 209 (1981). Although the Japanese may display a "superficial affection" for new ideas and values, see M. HANE, *supra* note 169, at 602, recent surveys show "a remarkable resurgence of traditional values." A. BURKS, *supra*, at 209.

178. Upham, *supra* note 173, at 579.

179. *Id.* at 591-94.

180. "[T]he general Japanese attitude toward physical or mental deformities or abnormalities" is one of shame. *Id.* at 590. The families of a retarded or handicapped child often keep the child hidden in order to avoid the shame that would be associated with such a child. *Id.* In the pollution cases, the "weird diseases" caused by mercury and cadmium poisoning were a source of shame to the victims and resulted in a reluctance to sue the polluting companies and thereby make their shame public. *Id.* at 590-91.

remain factors discouraging litigation. There still is little "rights consciousness" among the Japanese,¹⁸¹ who have taken only their first "toddling steps toward the recognition of others' rights."¹⁸²

The traditional emphasis on apology as a remedy has not disappeared. A reporter assessing the reactions of the Minamata plaintiffs¹⁸³ on their first day of trial writes: "The significance the patients attached to this suit—it wasn't just money, just the compensation. It was to make the presidents of the companies that had inflicted this illness on them say just one word, 'I'm sorry.'"¹⁸⁴ This same principle is embodied in the practice of *shazai-kōkoku*.¹⁸⁵ In the area of unfair competition, when one party damages another's reputation or credit, the court may require that he publish an apology. Since it is consistent with notions of harmony and with private behavior, the apology resolves the dispute.¹⁸⁶

To reemphasize traditional Japanese society's role in its present judicial scheme, von Mehren points out three basic Western principles which are not widely accepted in Japan: (1) the result of one's conduct should be highly predictable; (2) "full effect is to be given to a party's legally justified claims"; and (3) disputes should be resolved without regard to the socioeconomic status of the disputants.¹⁸⁷

The first of these Western principles is irreconcilable with the Japanese notion of harmony. If one presses his "rights" to the fullest measure, then he is disruptive, even "morally wrong, subversive, and rebellious."¹⁸⁸ The second principle is contrary to the idea of compromise. A clear-cut adjudication for one party and against the other identifies the losing party as a guilty person, a dishonest man, and is a source of shame to him.¹⁸⁹ This is contrary to notions of harmony. Judges therefore hesitate to find clear-cut responsibility and prefer to attribute partial fault to each party.¹⁹⁰

181. See Y. NODA, *supra* note 6, at 173.

182. Noda in Tanaka, *supra* note 12, at 305.

183. The Minamata plaintiffs were victims of mercury poisoning and sued the company responsible for the contamination of their water supply and fisheries.

184. Upham, *supra* note 173, at 597. The presidents of the companies were not at the trial. Even if the companies lost, the president would escape "[t]he guilty conscience, the pain he should feel as a human being, the recrimination." *Id.* at 598.

185. See generally Eguchi, *The Publication of Apology ("Shazai-Kokoku") as a Remedy for Unfair Competition in Japan*, 18 OSAKA L. REV. 19 (1971).

186. See *supra* notes 85-86 and accompanying text.

187. von Mehren, *supra* note 100, at 1496.

188. Kawashima, *supra* note 2, at 45.

189. R. DAVID & J. BRIERLEY, *supra* note 5, at 499.

190. Kawashima, *supra* note 2, at 48 n.20.

Preferably, judges actively seek to bring about settlements or compromises.¹⁹¹

The third principle, that disputes should be resolved without reference to the socioeconomic status of the individual, is contrary to the idea that men are unequal and that society is properly hierarchical. Litigation is more likely to occur between, rather than within, social groups. In such a situation there is commonly resort to force, with the weaker party turning to litigation. This resort to litigation is often ineffective, since Japanese judges attach importance to a *fait accompli*.¹⁹²

Although litigation is increasing in Japan, in comparison with similarly developed industrialized nations, the number of cases litigated remains low.¹⁹³ Whether it is due to the Japanese belief that judicial methods are not conducive to harmony, the feudal attitude that one does not trouble one's lord with private matters, the fact that the Japanese are not assertive of their rights, the fact that litigation is too expensive in time and money,¹⁹⁴ the shortage of judges and lawyers, or, what is more likely, a combination of these reasons, it is apparent that most disputes do not reach the courts. And those that do reach the courts are often settled in a traditional manner under the judge's guidance. While the importation of Western codes and the American occupation has influenced Japanese law and the Japanese attitude toward law, it should also be remembered that Japan remains culturally Japanese.¹⁹⁵

191. *Id.* at 55.

192. *Id.* at 48-49.

193. See Haley, *supra* note 100, at 364 Tables 1 & 2.

194. Takayanagi, *supra* note 18, at 39. See Hajime, *supra* note 12, at 147.

195. See Y. NODA, *supra* note 6, at 183. "Japanese spirit will change in the course of time, but it will always be Japanese."