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The Myth of the Reluctant Litigant

And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also. (Matthew 5:40.)

Now therefore there is utterly a fault among you, because ye go to law one with another—Why do ye not rather take wrong? Why do ye not rather suffer yourselves to be defrauded? (I Corinthians 6:7.)

Introduction

The belief that the Japanese are an exceptionally nonlitigious people is remarkably pervasive. Commentators, both within and without Japan, are almost unanimous in attributing to the Japanese an unusual and deeply rooted cultural preference for informal, mediated settlement of private disputes and a corollary aversion to the formal mechanisms of judicial adjudication. As a result, they say, Japanese do not take advantage of the available mechanisms for formal dispute resolution. These attitudes, they commonly add, are bolstered by a peculiar Japanese penchant for compromise, distrust of clearcut "all or none" solutions and distaste for both public quarrels and their public resolution.[1] As explained by Kawashima

The initial version of this article was presented as a paper entitled "The Litigious Japanese?" to the Southern California Japan Seminar (USC-UCLA Joint Center in East Asian Studies) on December 10, 1976.

1. This idea is repeated so frequently that a sampling of sources must suffice. The most ubiquitous are the works of Kawashima Takeyoshi. Particularly influential are his popular book *Nihonjin no hō ishiki* (Tokyo: Iwanami, 1967), especially pp. 125–203, in the title of which he coined the phrase "Japanese legal consciousness," and his article, "Dispute Resolution in Contemporary Japan," in Arthur T. von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963), pp. 41–72, probably the most widely cited English language article on Japanese law. Dan F. Henderson, *Conciliation and Japanese Law: To-*

Takeyoshi, one of Japan's leading legal sociologists and most articulate exponents of this belief, the endurance of a traditional concern for preserving cooperative personal relationships makes unwanted any definitive delineation of rights and duties through litigation. Bringing a lawsuit has meant issuing a "public challenge and provoking a quarrel."[2]

The importance of this notion is difficult to exaggerate. Most critical, upon it rests the conventional evaluation of the role of the judiciary within Japan's political and social order. The standard introductory works in English on Japanese government, for instance, uniformly dismiss the courts as politically insignificant on the basis of this perceived unwillingness of the Japanese to litigate.[3] Without

kugawa and Modern (2 vols., University of Washington Press, 1965), especially chapter VIII in vol. 2, pp. 191–200, is a frequently footnoted source for this idea, as a result of his reference to "an unusually pronounced tendency [on the part of Japanese] to avoid litigation." Most fail, however, to note the extent to which Henderson qualifies this in his analysis of "didactic" conciliation (discussed below). For other references in English, see Hideo Tanaka, *The Japanese Legal System: Introductory Cases and Materials* (Tokyo: University of Tokyo Press, 1976), pp. 254–263, 286–310; Yosiyuki Noda, *Introduction to Japanese Law* (English trans. from French; Tokyo: University of Tokyo Press, 1976), pp. 181–182; Kahei Rokumoto, "Problems and Methodology of the Study of Civil Disputes, Part I," *Law in Japan,* vol. 5 (1973), pp. 102–110; D. J. Danielski, "The Supreme Court of Japan: An Exploratory Study" in Glendon Schubert and David J. Danielski (eds.), *Comparative Judicial Behavior* (New York and London: Oxford University Press, 1969), pp. 121–156; Charles R. Stevens, "Modern Japanese Law as an Instrument of Comparison," *American Journal of Comprehensive Law,* vol. 19 (1971), pp. 673–681; Charles R. Stevens, "Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer," *Business Lawyer,* vol. 27 (1972), pp. 1271–1273 also in Richard C. Allison (ed.), *Current Legal Aspects of Doing Business in the Far East* (Chicago: American Bar Association, 1972), pp. 13–14. Others are cited elsewhere in this paper.

A few have ventured qualifications, see, e.g., Tomoyuki Ohta and Tadao Hozumi, "Compromise in the Course of Litigation," in *Law in Japan,* vol. 6 (1973), pp. 97–110; and at least two scholars, outright rejection, Kazuaki Sono and Warren L. Shattuck, "Personal Property as Collateral in Japan and the United States," *Washington Law Review,* vol. 39 (1964), p. 571 fn. 6.

These observations have had significant influence on general comparative legal studies, particularly concern with what is fashionably referred to as "legal culture." See, e.g., Henry W. Ehrmann, *Comparative Legal Cultures* (Englewood Hills: Prentice Hall, 1976), pp. 82–86; Roberto Mangabeira Unger, *Law in Modern Society* (New York: Free Press, 1976), pp. 124–131; Lawrence M. Friedman, "Legal Cultures and Social Development," *Law and Society Review,* vol. 4 (1969), pp. 19–46.

2. Kawashima, *Nihonjin no hō ishiki,* p. 140.

3. See, e.g., Ardath W. Burks, *The Government of Japan* (New York: Crowell, 1961), pp. 149–172; Nobutaka Ike, *Japanese Politics: Patron-Client Democracy*

cases the courts cannot act. Unlike other arms of the state, the courts do not apply or enforce laws on their own initiative. They must wait passively for controversies to be brought before them for decision. This notion of the nonlitigious Japanese raises obvious doubts as to the efficacy of the postwar legal reforms, which were premised on an active, American-styled judiciary. Yet even as optimistic an observer as Alfred C. Oppler, who was among those who contributed most to the Occupation's efforts to realize a judiciary capable of implementing the ideals of the postwar constitution, accepts it without question.[4]

The dilemma posed by the institutional ideal of an active judiciary in a nonlitigious society is surmounted at least in part by those, such as Kawashima, who view Japanese aversion to litigation as a gradually fading, "traditional" response.[5] Indeed, the literature is replete with observations on rising litigation rates in postwar Japan,[6] which some take as a convenient index to measure Japan's progress toward a "modern" society.[7]

Despite the ubiquity of these ideas few have bothered to appraise their accuracy or, more important, to analyze with care their implications, particularly as to the role of law and the courts. Even the most basic question has not been fully answered. Are the Japanese, in fact, unusually loath to resort to court? The common retort is to pose another question: If not, then how does one explain the apparent lack of litigation in Japan relative to the United States and the failure of the judiciary to exert a more positive influence on the political process?

This article represents an attempt to respond to these questions and, in so doing, to suggest areas for profitable future research that,

(New York: Alfred A. Knopf, 2d ed. 1972), pp. 30–32; Robert E. Ward, *Japan's Political System* (Englewood Hills: Prentice-Hall, 1967), p. 102.

4. Alfred C. Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton: Princeton University Press, 1976), p. 107.

5. See, e.g., Takeyoshi Kawashima, "The Status of the Individual in the Notion of Law, Right and Social Order in Japan," in Charles A. Moore (ed.), *The Japanese Mind* (Honolulu: East-West Center Press, 1967), pp. 271–275. This is Kawashima's main theme in this work as well as the others cited above.

6. See, e.g., Tanaka, p. 262; Charles R. Stevens, Remarks on Panel on "Developing a Pacific Community," in *Proceedings of the 71st Annual Meeting of the American Society of International Law* (1977), p. 70.

7. See, e.g., Takeyoshi Kawashima and Kurt Steiner, "Modernization and Divorce Rate Trends in Japan," *Economic Development & Social Change* (1960), pp. 213–239.

I believe, are obscured by the orthodox emphasis on Japanese aversion to litigation.

A Paradigm

The threshold problem is to define "litigiousness" in some meaningful fashion. There is little question that the Japanese generally use their courts less frequently than do Americans (although the contrast may not actually be as great as some have suggested). As indicated in Table 1, relative to the number of registered motor vehicles and motor vehicle accidents resulting in deaths, Californians filed twice as many suits as the Japanese in Tokyo and Osaka, jurisdictions with a combined population roughly equivalent to that of California (20 million).

This relative lack of litigation is not, however, a uniquely Japanese phenomenon. In Austin Sarat's and Joel B. Grossman's study of litigation rates in a selection of ten countries (Table 2), resort to court in civil cases in Japan appears to be modestly frequent.[8]

In California in 1972-73, it might be noted, 4,838 civil cases (including probate, guardianship, personal injury, death, property damage, eminent domain and small claims actions) were filed in superior and municipal courts per 100,000 persons.[9] This rate is slightly below Denmark's on the Sarat and Grossman index. As Sarat and Grossman recognize, however, the data are too crude for an accurate index of "litigiousness" or other analytical purpose.[10] They do not indicate what is meant by "civil cases" in each instance. In the Japanese case, for example, statistics on civil cases filed typically include all forms of summary proceedings as well as cases docketed for formal trial proceedings (see Figure 1). Moreover, such statistics do not take into account differences among these jurisdictions as to matters where judicial intervention is legally required, such as probate and divorce; the availability of extrajudicial institutions for adjudication of particular types of disputes, such as labor relations boards; or welfare and insurance schemes, such as workman's com-

8. Austin Sarat and Joel B. Grossman, "Courts and Conflict Resolution: Problems in the Mobilization of Adjudication," *American Political Science Review*, vol. 69 (1975), pp. 1200–1217, 1208.

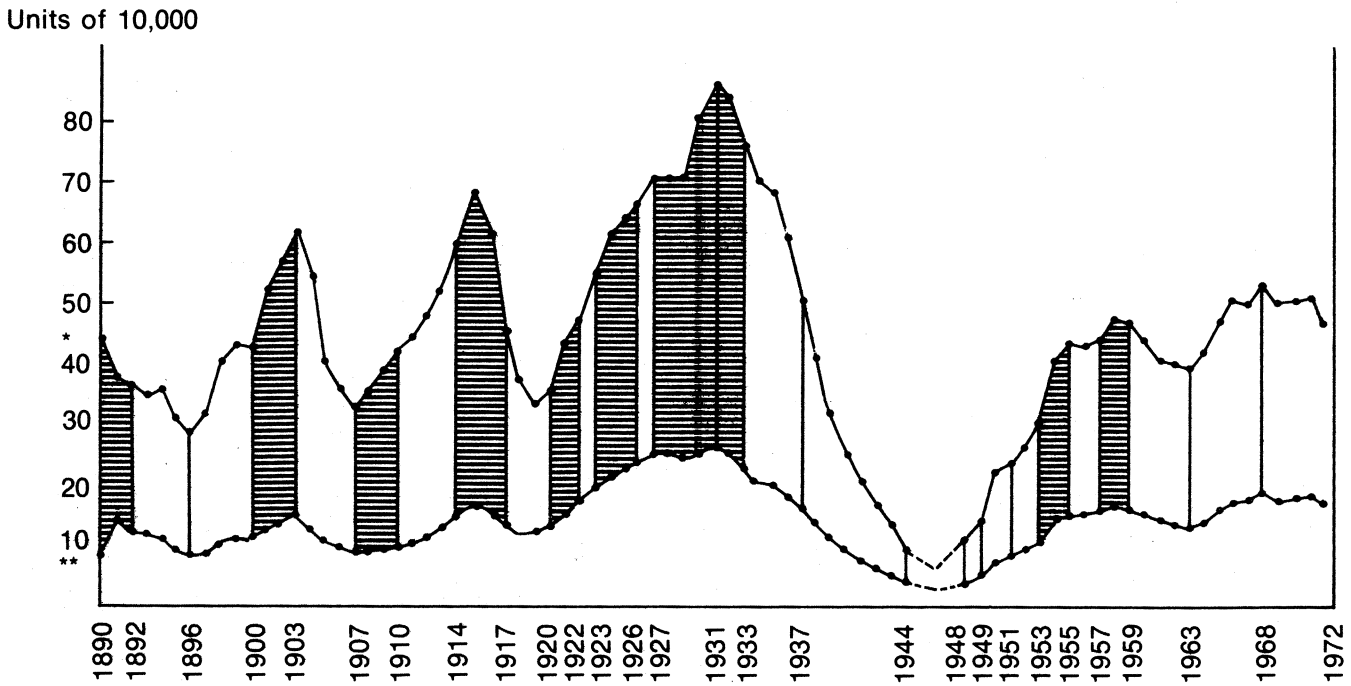
9. Judicial Council of California, *Annual Report* (Sacramento, 1974), pp. 107, 136.

10. Sarat and Grossman, p. 1208.

FIGURE 1

* New Civil Cases, Including Formal Trial (*soshō*), Compromise (*wakai*), Conciliation (*chōtei*), Summary (*tokusoku*), Provisional Attachment (*kari-sashiosae*), and Provisional Disposition (*kari-shobun*) proceedings filed in Courts of First Instance from 1890 through 1972.

** Cases Docketed for Formal Trial Proceedings.



Source: Nihon Bengoshi Rengōkai (Japan Federation of Bar Associations), *Shihō Hakusho* (White paper on the legal system) (Tokyo, 1974) p. 19.

TABLE 1
COMPARISON OF PERSONAL INJURY ACTIONS INVOLVING MOTOR VEHICLE ACCIDENTS FILED IN SUPERIOR COURTS IN CALIFORNIA AND DISTRICT COURTS IN OSAKA AND TOKYO.

	Registered Motor Vehicles	Motor Vehicle Accident Deaths	Actions Filed
California, 1972–73:	11,901,000	5,114	43,521
Tokyo and Osaka, 1969:	3,533,460	1,672	6,090
Ratio:	3.4:1	3:1	7:1

Sources: Judicial Council of California, *Annual Report* (Sacramento, 1974), p. 106; Saikō Saibansho (Supreme Court), *Shihō tōkei, Shōwa 44* (Annual report of judicial statistics for 1969) (Tokyo, 1970), pp. 122, 123; *Japan Statistical Yearbook* (Tokyo, 1971), p. 628; *Statistical Abstracts of the United States* (Washington, D.C.: Department of Commerce, 1974), p. 562.

TABLE 2

Country	Civil Cases per 100,000 Population
Australia	5,277 (1969)
Denmark	4,844 (1969)
New Zealand	4,423 (1969)
Great Britain	3,605 (1969)
West Germany	2,085 (1969)
Japan	1,257 (1970)
Sweden	683 (1970)
Finland	493 (1970)
Norway	307 (1970)
South Korea	172 (1963)

pensation; any of which may reduce or preclude resort to courts.[11] Nor do they attempt to analyze the effect of jury systems with their uncertainties of result, compulsory conciliation schemes (as in Norway), or the relationship between the number of lawyers and litigation. Nonetheless, to the extent their data permit a rough, impressionistic comparison, then if by "litigious" is meant simply the number of suits filed or disposed of per capita, Japan is quite litigious relative to some societies and notably nonlitigious compared to others.

11. For instance, use of registries in Japan for marriage, adoption, divorce, inheritance and real property transfers reduces significantly the use of courts and lawyers. See Dan F. Henderson and John O. Haley, *Law and the Legal Process in Japan*. (Mimeographed materials, University of Washington Law Library, 1977), pp. 439-468.

The orthodox view of Japanese "litigiousness," however, relates to a reluctance to litigate, not simply the amount of litigation. Even assuming such a reluctance to exist, to be meaningful in terms of evaluating the role of the judiciary it must involve more than simply a desire to avoid lawsuits. While we might conceive of an individual or community as a whole that delights in engaging the complex litany of trial procedures or activating the public intervention of a magistrate, if such exist, they are rare. For most persons a lawsuit is a last resort. Litigation, is, after all, almost always a costly and cumbersome process for resolving disputes, and ordinarily an aggrieved party to a dispute will attempt to reach informal private settlement. The overwhelming majority of disputes in most societies are in fact resolved informally.[12] As the quotes prefacing this article indicate, traditional moral censure of litigation is arguably as Christian as it is Confucian.

The paradigm process of dispute resolution for most societies, including Japan, is two or three-tiered. A dispute will typically move through several steps before reaching the courts—private negotiation between the immediate parties, perhaps mediation with the aid of a third party—but ultimately to the litigated solution only where there has been a failure to reach a settlement at each preceding stage. (These steps can be, and most often are, conducted concurrently with negotiation, mediation, and possibly both, taking place throughout trial proceedings, in some instances even after a judgment but before all appeals have been exhausted.)[13]

The critical issue is whether the parties will settle only when neither believes he has more to gain by judicial intervention. If this is

12. This is common knowledge, but of possible interest are a number of studies on how disparate types of legal disputes are resolved in the United States. See, e.g., H. Lawrence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Chicago: Aldine Publishing Co., 1970); Alfred F. Conrad, *Automobile Accidents Costs and Payments* (Ann Arbor: University of Michigan Press, 1964) ch. 6, pp. 181–182. Curtis J. Buger and Patrick J. Rohan, "The Nassau County Study: An Empirical Look Into Practices of Condemnation," *Columbia Law Review,* vol. 67 (1967), pp. 430, 440–441. Conard's University of Michigan study is particularly interesting when contrasted with the study by Professor Zensuke Ishimura and Yuriko Kaminaga, "Attorneys and Automobile Accident Cases," *Law in Japan,* vol. 9 (1976), pp. 83–116.

13. By definition this is a highly generalized model meant to be used as a tool for analysis and not necessarily as a description of a universally applicable process for all societies or all types of disputes. As I discuss later (*infra* note 57), the bulk of cases settled privately in the United States between lawyers do not involve mediation at all. See also Sarat and Grossman.

the case, a decision to settle necessarily involves an assessment of the outcome of the potential lawsuit, and the private settlement should reflect that outcome discounted by the costs (including time) and uncertainties of litigation. In this process, the judicial model operates in a manner similar to economic markets. And if the paradigm functions effectively, the legal norms that courts apply in these isolated cases become the standards used, albeit discounted, in resolving similar subsequent disputes.

Consequently, whether the Japanese are nonlitigious is in itself significant for our purposes here only if by "nonlitigious" we mean that Japanese involved in a dispute tend to reach negotiated or mediated settlements that do not reflect the litigated outcomes and one of the parties accepts a less favorable result because of an aversion to litigation in general. The frequency of litigation alone is not meaningful since the availability and successful utilization of alternative mechanisms for settlement may reduce litigation without impairing the efficacy of judicially-imposed norms. Also, a number of institutional factors can preclude litigation as a realistic option and thereby diminish substantially the influence of the courts. Indeed, resort to court would be rare to the extent that access is assured, the costs are minimal, judicial relief is effective, and the outcome is certain.

Litigation in particular types of disputes—for example, suits by children against their parents—should be distinguished. Inasmuch as in most instances litigation commonly involves a rupturing of relations as a result of public acknowledgement of the parties' inability to reach an amicable settlement between themselves in private, litigation is less likely where the parties wish to continue their relationship or where rupturing the relationship offends widely held social norms. Also, in many of these areas as a matter of public policy the courts may be given very limited jurisdiction to intervene (e.g. in disputes between husbands and wives). While we might want to isolate and investigate such specific areas where the judicial model may not be as effective, none involves the question of a general and peculiarly Japanese desire to avoid available mechanisms for formal resolution of disputes.

The Myth Reconsidered

Is there, then, any evidence of an unusual Japanese aversion toward lawsuits that leads a party to accept a settlement less beneficial than one he anticipates he would gain by suing? The answer, I believe, is negative. What little evidence there is suggests the

opposite—that most Japanese are willing to go to court in such circumstances. The recent pollution cases[14] and the thalidomide case[15] are illustrative.

A recently published inquiry into the decisions to litigate in the pollution cases documents a variety of cultural factors causing the litigants to hesitate to sue.[16] These included a sense of "shame" for physical and mental deformity, constraints on individual initiative and "selfish" behavior imposed by the demands of community unity and group consciousness, and hostility against an association with what was perceived to be—correctly, I believe—a leftist, antigovernment cause reflected in the politics of the lawyers who dominated the conduct of these trials. This experience was paralleled in part in the thalidomide case, where the apparent reason for reluctance to sue was a fear of public exposure of the children's deformities. "In a society strongly prejudiced against deformity," one of the plaintiffs' lawyers wrote, "it took considerable courage to sue."[17] In each of these cases the plaintiffs filed suit only reluctantly and as a last resort. The reluctance, however, was based on a variety of factors related to the particular circumstances and nature of the disputes, not an unwillingness to sue in general.[18]

The one arguable exception was the attitude that bringing an action for damages reflected socially unacceptable "selfishness." At first blush this would appear to be a cultural barrier to litigation in

14. Komatsu v. Mitsui Kinzoku Kōgyō, *Hanrei Jihō* (No. 635) 17 (Toyama Dt. Ct., June 30, 1971); aff'd *Hanrei Jihō* (No. 674) 25 (Nagoya High Ct., Kanazawa Br., Aug. 9, 1972); Ōno v. Shōwa Denkō K.K., *Hanrei Jihō* (No. 642) 96 (Niigata Dt. Ct. Sept. 29, 1971); Watanabe v. Chisso K.K. *Hanrei Jihō* (No. 696) 15 (Kumamoto Dt. Ct., Mar. 20, 1973); Shiono v. Shōwa Yokkaichi Sekiyu K.K., *Hanrei Jihō* (No. 672) 30 (Tsu Dt. Ct., Yokkaichi Br., July 24, 1972). For a brief discussion of these cases in English, see Tomohei Taniguchi, "A Commentary on the Legal Theory of the Four Major Pollution Cases," *Law in Japan,* vol. 9 (1976), pp. 35–62.

15. These series of cases were settled before decided by the courts; hence there is no official report. For an account of the progress of the suits, see "Diary of the Plaintiff's Attorney's Team in the Thalidomide Litigation," *Law in Japan*, vol. 8 (1975), pp. 136–187 [hereafter referred to as "Diary"].

16. Frank K. Upham, "Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits," *Law and Society Review*, vol. 10 (1976), pp. 579–619.

17. Statement by Koichi Nishida in "Diary," p. 141.

18. Inasmuch as the plaintiffs did litigate eventually, of course, they could be regarded as exceptional and this an unreliable basis for generalization. But this line of reasoning leaves us with little to work with. The details of settlements reached privately in unlitigated disputes are seldom disclosed fully and thus are shielded from public scrutiny.

general. It was overcome in these instances, however, by justifying the lawsuit as a means of bringing wrongdoers to justice, coupling compensation with a desire to prevent others from inflicting similar harm.[19] But such justifications are among the principal policies behind damage awards and private tort actions, and few plaintiffs would find similar rationalization of their motives difficult. Moreover, the success of the initial suits in these cases has produced others as well as a significant change in the standards being applied in private settlements of similar disputes.[20]

The few direct surveys of Japanese attitudes that have been made provide further support for rejecting the orthodox view. For example, in the survey by Sasaki Yoshio cited by both Dan F. Henderson and Kawashima,[21] when asked, "What would you do if a civil dispute arose and despite discussions with the opposite party you could not settle it?" 64% of the 2,098 respondents replied that they would willingly go to court.

Even more persuasive, however, is the pattern of litigation in Japan from 1890 to the present. As indicated in Figure 1 and Table 3, litigation has been *less* frequent in absolute numbers in the postwar years than the period from 1890 to the outbreak of the Sino-Japanese War in 1937. Relative to population, the contrast is even more startling. In 1934, for example, 302 new civil cases involving formal trial proceedings were initiated in courts of first instance per 100,000 persons, while in 1974 there were 135 such cases per 100,000 persons—2.2 times as many per capita in 1934 than there were in 1974.

By and large this pattern holds true for all categories of cases. While there is a slight variation in the frequencies of certain types of suits in some years, overall, over longer periods, there is a parallel rise or fall in the rate of litigation in each category. Nor do statistics reveal any aberration resulting from the prevalence of a particular type of suit during the prewar period, such as rural tenancy cases.

There was a greater frequency of litigation in absolute numbers in the prewar years in almost every category. (In the postwar period the increase in use of automobiles has led to a significant increase in personal injury actions.) Table 4, for example, shows the actual

19. Upham, p. 588.

20. These cases have produced additional litigation and at least in one instance (the Morinaga Milk poisoning case) a renegotiation of a previously settled dispute. See, e.g., Tanaka, pp. 417–443.

21. Henderson, vol. 2, p. 192; Kawashima, "The Status of the Individual in the Notion of Law, Right and Social Order in Japan," p. 272.

TABLE 3.
NEW CASES FOR FORMAL TRIAL PROCEEDINGS (SOSHŌ)
FILED 1891–1943, 1949–1974

1891	136,589		1917	132,531		1949	45,435	
1892	118,474	(293)	1918	120,641	(220)	1950	68,488	(82)
1893	111,246		1919	118,825		1951	87,817	
1894	107,442	(261)	1920	129,152	(233)	1952	87,480	(104)
1895	90,241		1921	148,850		1953	100,643	
1896	79,546	(189)	1922	169,239	(298)	1954	133,595	(157)
1897	83,927		1923	188,164		1955	144,036	
1898	98,564	(230)	1924	208,774	(358)	1956	145,935	(169)
1899	105,736		1925	225,429		1957	151,274	
1900	104,739	(239)	1926	237,244	(394)	1958	162,786	(184)
1901	121,346		1927	248,999		1959	157,252	
1902	131,758	(293)	1928	248,406	(400)	1960	147,673	(161)
1903	144,084		1929	242,757		1961	135,656	
1904	127,004	(275)	1930	249,030	(390)	1962	132,191	(140)
1905	100,681		1931	261,760		1963	128,654	
1906	90,956	(193)	1932	255,187	(387)	1964	135,849	(141)
1907	85,489		1933	228,224		1965	159,324	
1908	90,570	(189)	1934	204,731	(302)	1966	169,979	(173)
1909	94,386		1935	196,777		1967	173,383	(174)
1910	99,900	(203)	1936	180,501	(274)	1968	185,021	(184)
1911	106,499		1937	158,874		1969	172,020	(170)
1912	117,049	(231)	1938	132,069	(188)	1970	175,164	(170)
1913	130,598		1939	106,294		1971	179,256	(172)
1914	148,177	(285)	1940	88,160	(123)	1972	168,753	(160)
1915	162,545		1941	74,854		1973	150,662	(140)
1916	159,351	(298)	1943	39,905	(50)	1974	149,688	(135)

Sources: The statistics for 1891–1941 are from Nihon Teikoku Shihōshō (Ministry of Justice of the Empire of Japan) *Dai 67 Minji Tōkei Nenpō* (67th Annual report on civil case statistics) (Tokyo, 1943), pp. 103–104, Those for 1950–1974 are from Saikō Saibansho (Supreme Court) *Shōwa 49 Shihō Tōkei* Annual report of judicial statistics for 1974) (Tokyo, 1975), p. xx.

Note: These statistics represent actions involving ordinary trial procedures in civil cases. They do not include actions involving summary or special procedures (such as suits on bills and notes for provisional relief) or formal conciliation. The statistics for the postwar period include administrative suits, precluded for the prewar courts by jurisdictional limitations. Thus, as noted in the graph in Figure 1, these actions constitute only one part of the total caseload of the courts. The figures in parentheses indicate the number of new cases filed per 100,000 persons in Japan. See Table 5.

number of new filings for civil trials in courts of first instance for selected categories of cases in 1926 and 1969. The categories selected represent, with the exception of divorce actions, the standard bread and butter fare of litigation and the most numerous types of actions filed in both years. Again, in absolute numbers in 1926, several years prior to the prewar peak in 1934, there was far more

TABLE 4
COMPARISON OF CASES DOCKETED FOR FORMAL TRIAL PROCEEDINGS (*soshō*) IN COURTS OF FIRST INSTANCE, 1926–1969.

Subject of Action	1926*	1969**
a. Divorce	1383 (Dt. Cts. only)	2935 (Dt. Cts. only)
b. Actions relating to land	6894 Dt. Ct.—2890 Ward Ct.—4004	15,151 Dt. Ct.—10,193 Summ. Ct.—4958
c. Eviction & Delivery of Buildings Actions	10,315 Dt. Ct. 757 Ward Ct. 9558	7073 Dt. Ct. 4063 Summ. Ct. 3010
d. Actions for Contract Price	41,231 Dt. Ct.—2634 Ward Ct.—38,597	30,639 Dt. Ct.—11,362 Summ. Ct.—19,277
e. Actions for Money Lent	64,796 Dt. Ct.—4852 Ward Ct.—59,944	20,960 Dt. Ct.—12,215 Summ. Ct.—8754
f. Actions for Damages	5991 Dt. Ct.—2215 Ward Ct.—3776	20,071 Dt. Ct.—18,006 Summ. Ct.—2065 (Traffic Accidents = 10,968)

Sources: (*) Nihon Teikoku Shihōshō (Ministry of Justice of the Empire of Japan), *Dai-gōjuni Minji Tōkei Nenpō Taishō 15* (52nd annual report on civil case statistics: 1926) (Tokyo, 1928), pp. 30–32, 162–64.
(**) Saikō Saibansho (Supreme Court), *Shihō Tōkei Nenpō Shōwa 44* (Annual report of judicial statistics for 1969) (Tokyo, 1970), pp. 88–89, 122–23.

litigation than in 1969. Since Japan's population increased by 40% during the interval, on a per capita basis there was only a slight increase in divorce actions and suits relating to land in 1969 and, if we discount traffic accidents as peculiar to the postwar environment, no significant increase in damage actions.

Moreover, the conclusion reached after a trend analysis of the series of trial actions filed from 1891 through 1941 and from 1949 through 1974 is that there is no discernible trend *upwards* or *downwards* during either of these periods (see Table 5). This is evident graphically in Figure 2.

It is apparent that these patterns are inconsistent with conventional ideas about the reluctance of Japanese to litigate; moreover, they contradict the widely held belief that there has been a greater willingness to sue in the postwar period. In short, most of what is said or written about Japanese attitudes toward the legal process is

TABLE 5

Period	Equation Best Predicting Percentage of Change of Litigation	R^2
1891–1941:	$v_t = -.006 + .996v_{t-1} - .347v_{t-2} + u_t$	$R^2 = .582$
1949–1974:	$v_t = .054 + u_t - .711u_{t-1}$	$R^2 = .371$

v_t = percentage change in new civil trial actions (cases docketed for formal trial proceedings) filed in year t.

u_t = normally distributed random variables with mean o and variance of 1.

Note: The estimated constants in both equations were found to be statistically insignificant from 0 and as such constitute a rejection of the hypothesis that there is trend in the numbers new civil trial actions filed.

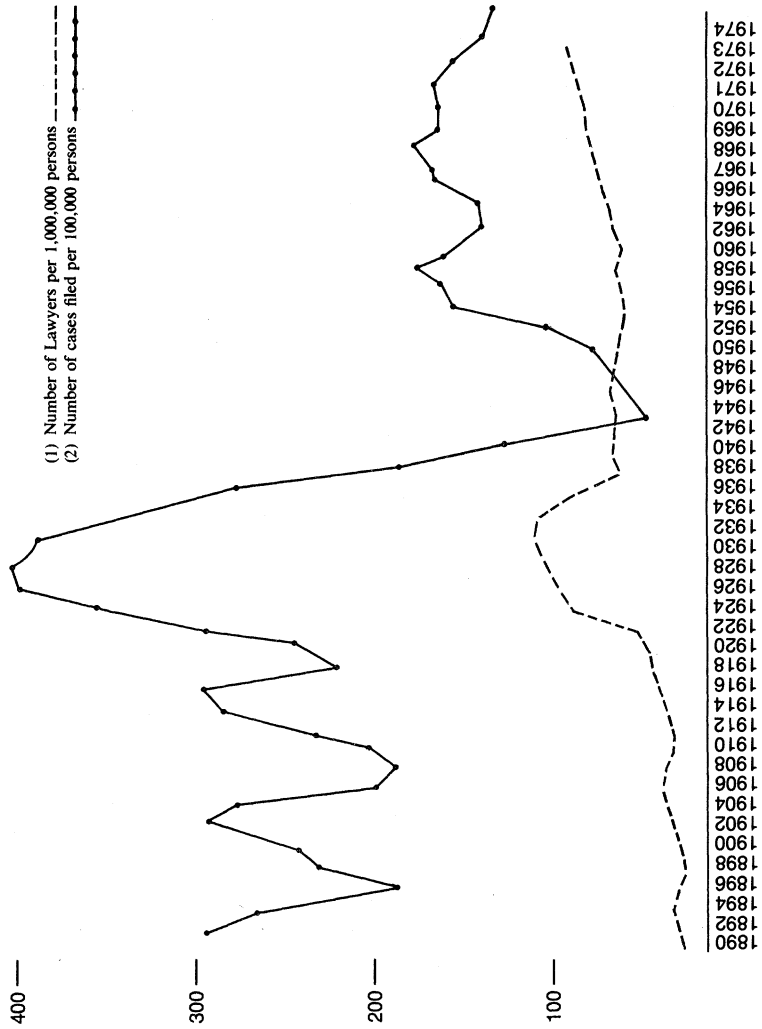
myth. But as with many myths, it contains an important element of truth.

Although, at least since the middle of the Meiji Period and perhaps even earlier, the Japanese in general may not have been unusually reluctant to litigate, the evidence points to the conclusion that to do so was offensive to some—that is, those who wished to maintain a paternalistic order based on a hierarchical submission to authority. As Henderson has detailed in his often cited (but apparently seldom read) study of conciliation in Japanese law, Tokugawa officialdom had constructed a formidable system of procedural barriers to obtaining final judgment in the Shogunate's courts. The litigant was forced each step of the way to exhaust all possibilities of conciliation and compromise and to proceed only at the sufferance of his superiors. We can only marvel at the endurance and perseverance of those who eventually prevailed. Conciliation was coerced—to use Henderson's phrase "didactic"—not voluntary.[22] Yet, as Henderson tells us, litigation increased.[23]

The modern analogues to Tokugawa conciliation are equally revealing. Formal conciliation proceedings (*chōtei*) were not instituted until enactment of the Land Lease and House Lease Conciliation Law in 1922.[24] This measure was followed in succession by the Farm Tenancy Conciliation Law of 1924,[25] the Commercial Affairs Conciliation Law of 1926,[26] the Labor Disputes Conciliation Law of 1926,[27] the Monetary Claims Temporary Conciliation Law of 1932,[28]

22. Henderson, vol. 1, p. 4.
23. Henderson, vol. 1, p. 107.
24. *Shakuchi shakuya chōtei hō* (Law No. 41, 1922).
25. *Kosaku chōtei hō* (Law No. 18, 1924).
26. *Shōji chōtei hō* (Law No. 42, 1926).
27. *Rōdō sōgi chōtei hō* (Law No. 57, 1926).
28. *Kinsen saimu rinji chōtei hō* (Law No. 26, 1932).

FIGURE 2


(1) Number of Lawyers per 1,000,000 persons
(2) Number of cases filed per 100,000 persons
400
300
200
100
1890
1892
1894
1896
1898
1900
1902
1904
1906
1908
1910
1912
1914
1916
1918
1920
1922
1924
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1973
1974

the conciliation provisions added to the Mining Law[29] in a 1939 amendment and to the Placer Mines Law[30] in a 1940 amendment,[31] the Agricultural Land Adjustment Law of 1938,[32] the Personal Status Conciliation Law of 1939,[33] and finally the conciliation provisions of the Special Wartime Civil Affairs Law of 1942.[34]

Kawashima relies heavily on the enactment of these statutes in arguing that the Japanese have been loath to litigate.[35] Yet there is nothing to suggest that they were the product of popular demand for an alternative to litigation more in keeping with Japanese sensitivities. Rather it seems more accurate to conclude that they reflected a conservative reaction to the rising tide of lawsuits in the 1920s and early 1930s and a concern on the part of the governing elite that litigation was destructive to a hierarchial social order based upon personal relationships. Thus Kawashima's views are perhaps accurate so long as limited to description of the attitudes of those who came into power in the late 1920s and 1930s rather than the Japanese people as a whole, the residual effect of which may explain (at least in part) the persuasiveness today of the idea that the Japanese are not litigious.[36]

Indicative of the rationale for modern conciliation was the recommendation of the 1919 Special Investigation Commission on Legal Institutions (*Rinji Hōsei Shingikai*) to establish conciliation proceedings for family disputes (translated by Henderson):

> It was recognized that to cleave to the type of lawsuit such as is used in the present system for family disputes would not preserve the

29. *Kōgyō hō* (Law No. 45, 1905) as amended by the Mining Law Partial Amendment Law (*Kōgyō hō chū kaisei hōritsu*), Law No. 23, 1939.

30. *Sakō hō* (Law No. 13, 1909).

31. The Placer Mines Law Partial Amendment Law (*Sakō hō chū kaisei hōritsu*), Law No. 103, 1940.

32. *Nōchi chōsei hō* (Law No. 67, 1938).

33. *Jinji chōtei hō* (Law No. 11, 1939).

34. *Senji minji tokubetsu hō* (Law No. 63, 1942).

35. Tables with comprehensive statistics on conciliation are included in Kawashima; "Dispute Resolution in Contemporary Japan," pp. 60–72; see also, Kawashima, "The Status of the Individual in the Notion of Law, Right and Social Order in Japan," p. 273.

36. This, of course, is not at all what Kawashima and others have in mind when they refer to the prevalence of traditional attitudes. Theirs is a linear model of transition from tradition to modernity. What is suggested here is more complex. The contemporary Japanese belief that they are a traditionally unlitigious people may reflect a very successful transmission of values and perceptions by those in power in the immediate prewar years.

> virtuous ways and beautiful tradition from the past, but rather it was recognized as extremely important to establish a special system to solve them amicably with compassion and based on morality.[37]

Although unsuccessful in 1919, such arguments became increasingly persuasive as litigation increased and the influence of "revisionists" in the civil and military bureaucracies grew (the Personal Affairs Conciliation Law, which provided for conciliation of such disputes, was not enacted until 1940).[38] The initial statutes for conciliation of urban and rural landlord-tenant disputes were confined to providing an optional alternative to lawsuits. But by the end of the 1930s almost all civil disputes were subject to conciliation procedures, and judges or special commissioners were empowered to require the parties to conciliate.[39] The Special Wartime Civil Affairs Law of 1942 capped the progression toward a modern version of "didactic" conciliation by providing for conciliation in all civil disputes and authorizing judges to enter a judgment without a trial where in the course of conciliation the parties failed to reach voluntary settlement.[40] During the immediate postwar period, as Justice Mano Tsuyoshi remarked in his dissent to the decision in *Suzuki v.*

37. Henderson, vol. 2, p. 216.

38. See, e.g., Robert M. Spaulding Jr., "Bureaucracy as a Political Force, 1920–45," in James W. Morley (ed.), *Dilemmas of Growth in Prewar Japan* (Princeton: Princeton University Press, 1971), pp. 33–80. The attitudes of the "revisionist bureaucrats" (to use Spaulding's term) have been aptly described under the rubric of a "collectivist ethic" in R. P. Dore and Tsutomo Ōuchi, "Rural Origins of Japanese Fascism," in *ibid.*, pp. 201–211. See also, Kenneth B. Pyle, "Advantages of Followership: German Economics and Japanese Bureaucrats 1890–1925," *Journal of Japanese Studies*, vol. 1, (No. 1 Autumn, 1974), p. 164.

39. The Land Lease and House Lease Conciliation Law of 1922 provided that trial proceedings would be suspended upon the court's receipt of a petition for conciliation by one of the parties (art. 5). The statute was amended in 1924 (Law No. 17, 1926) to provide that the trial judge could require conciliation *ex officio* (article 4–2). Similar authority was given to official rural tenancy conciliators (*kosakukan*) and judges for rural tenancy disputes under the 1938 Agricultural Law Adjustment Law (arts. 10(1), 10(2)). Comparable provisions for coercive conciliation were included in the Commercial Affairs Conciliation Law, the Monetary Claims Temporary Conciliation Law and the statutes providing for conciliation in mining cases. For detailed discussion, see Etō Yoshihiro, "*Chōtei seido no kinō to yakuwari*" (The function and role of the conciliation system), in Toshitani Nobuyoshi (ed.), *Hō to saiban* (Law and adjudication) (Tokyo: Gakuyō shobō, 1972), pp. 178–182.

40. Special Wartime Civil Affairs Law arts. 14, 16, 17, 18. Article 19(2) incorporated the "judgment in lieu of conciliation" provision of article 7(1) of the Monetary Claims Temporary Conciliation Law of 1932.

Ishigaki,[41] (upholding under the postwar constitution the Special Wartime Civil Affairs Law provision for judgment in lieu of conciliation), "there developed a tendency to regard lawsuits as a kind of vice."[42]

These measures, it should be emphasized, did not reflect objections to what the courts were doing in these cases. The period from about 1905 through the early 1920s was one of the most creative eras in Japanese jurisprudence. The judiciary was extraordinarily innovative in adapting the new European-based codes to the Japanese environment, rationalizing traditional norms within the framework of Western law. In a series of cases, the courts recognized the right of the citizen to sue the government for damages in the ordinary courts,[43] expanded the liability of private industry for pollution,[44] restricted the arbitrary power of the househead,[45] limited the exercise of private property rights where it would cause undue economic harm to the community,[46] recognized traditional security devices[47] and redefined the law on leases to insure fair treatment of tenants.[48] Although in some of those instances the courts' decisions were contrary to what we today might consider a "conservative" position, in

41. 10 Minshū 1355 (Sup. Ct., G.B., Oct. 31, 1956), translated in J. O. Haley, *The Public Law System of Japan* (Mimeographed materials, University of Washington School of Law Library, 1976). Susuki Ishigaki was effectively overruled in Nomura v. Yamaki, 14 Minshū 1657 (Sup. Ct., G.B. July 6, 1960).

42. 10 Minshū at 1361.

43. City of Tokushima v. Ose, 22 Minroku 1088 (Gr. Ct. Cass., June 1, 1916).

44. Osaka Alkali K.K. v. Tonomura, *Shinbun* (No. 1659) 11 (Osaka Ct. App., Dec. 27, 1919), on remand from 22 Minroku 2474 (Gr. Ct. Cass., Dec. 29, 1916).

45. Sonoda v. Sonoda, 7 Minroku 47 (Gr. Ct. Cass., June 20, 1901); Ikeda v. Ikeda, *Shinbun* (No. 493) 17 (Osaka Ct. App., Mar. 26, 1908); Saitō v. Saitō *Shinbun* (No. 2550) 11 (Yamagata Dt. Ct., Mar. 18, 1926); Iwabuchi v. Iwabuchi, *Shinbun* (No. 2865) 10 (Tokyo Ct. App., April 9, 1928); Nozaki v. Nozaki, *Shinbun* (No. 3111) 7 (Nagasaki Ct. App., Mar. 28, 1929). These cases are cited and discussed in Aoyama Michio, "Wagakuni ni okeru kenri ran'yo riron no hatten" (Development of Abuse of Rights Theory in Japan), in *Kenri no ran'yo* (Abuse of Rights) (Yūhikaku, 1965), p. 9, translated in Henderson and Haley, pp. 406–422.

46. See, e.g., Shinagawa v. Kurobe Rwy K.K., 14 Minshū 1965 (Gr. Ct. Cass., Oct. 5, 1935), translated in Tanaka, p. 118. See also, Kazuaki Sono and Yasuhito Fujioka, "The Role of the Abuse of Right Doctrine in Japan," *Louisiana Law Review*, vol. 35 (1975), p. 1037.

47. See discussion of the *jōto tampo* cases in J. O. Haley, *The Non-Code Security Interests: A Study of Japanese Case Law* (Unpublished LL.M. paper, University of Washington Law Library, 1971), pp. 8–52.

48. See landlord-tenant cases discussed in Tadao Hozumi, "The Structure and Function of the 'Interpretation' of Juristic Acts, Part II," *Law in Japan*, vol. 5 (1972), p. 132.

fact, often despite the thrust of the new Japanese codes, the courts adhered to a traditional scheme of values that gave priority to community welfare over individual interests and placed emphasis on social obligations and duties rather than legal rights. The results reached in such cases conformed in many cases to provisions enacted in subsequent statutes, for example the House Lease Law[49] and the Land Lease Law[50] enacted a year before the Land Lease and House Lease Conciliation Law.[51]

Another example is the Farm Tenancy Conciliation Law of 1924, enacted in response to the rural tenancy disputes of the 1920s. One recent study attributes these disputes to an increase in absentee landlords and their abandoning traditional obligations toward tenants and the local community.[52] Similarly, it appears that the rupture of the patron-client relation evidenced in suits by landlords against tenants as well as tenants against landlords, rather than the merits of their claims, was a critical concern for those who pressed for enactment of the Farm Tenancy Conciliation Law.[53] The courts had already proven their capacity to reinforce traditional relationships and concepts of responsibility despite provisions in the codes. But conciliation insured that extralegal instruction could be given the parties to remind them of their proper roles and that the traditional village hierarchy, not just the parties and the judges, would be involved.[54]

Those such as Kawashima who argue that the modern conciliation statutes evidence a generally-held desire for an alternative to lawsuits have ignored these considerations. Equally telling, however, are the statistics on the frequency of conciliation versus lawsuits during the 1920s and 1930s. As seen in Figure 3, despite enactment of the conciliation statutes, lawsuits continued to increase until the mid-1930s. At that point the number of both new trials and conciliation proceedings began to fall precipitously. The availability of conciliation as an alternative to a formal trial—even when subject to a discretionary judicial order despite the parties' wishes—did not

49. *Shakuya hō* (Law No. 50, 1921).

50. *Shakuchi hō* (Law No. 49, 1921).

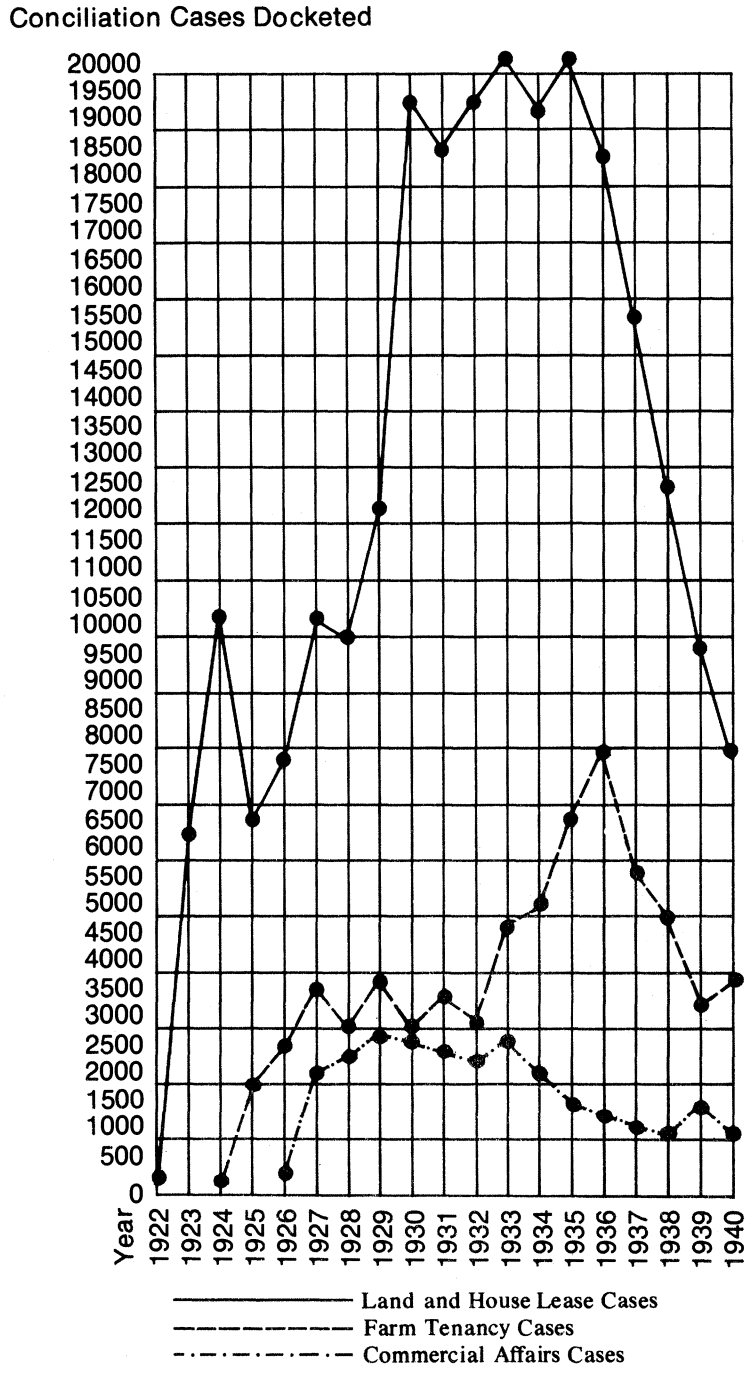
51. Hozumi, pp. 54–61.

52. Ann Waswo, "The Origins of Tenant Unrest," in Bernard S. Silberman and H. D. Harootunian (eds.), *Japan in Crisis* (Princeton: Princeton University Press, 1974), pp. 386–397.

53. Adachi Mikio, "*Kosaku chōtei hō*" (Farm Tenancy Conciliation Law), in Ukai, Kawashima, Fukushima & Tsuji (eds.), *Nihon kindaihō hattatsu shi* (History of the development of modern Japanese law) (Heisō shobō, 1959), p. 57.

54. *Ibid.*, vol. 7, pp. 66–68.

FIGURE 3


Conciliation Cases Docketed
20000
19500
19000
18500
18000
17500
17000
16500
16000
15500
15000
14500
14000
13500
13000
12500
12000
11500
11000
10500
10000
9500
9000
8500
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4500
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Year
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
Land and House Lease Cases
Farm Tenancy Cases
Commercial Affairs Cases

lead to a decrease in litigation. Instead the creation of an additional process for formal dispute resolution led to an even greater increase of cases channelled into the formal process.

The Reality of Institutional Incapacity

If the Japanese are not particularly averse to litigation, how then can we explain why they appear to use their courts far less frequently than do Americans and perhaps others? Why has litigation decreased since the war (and continues to do so)? Also, what accounts for the pervasive acceptance by Japanese themselves that they are unusually "nonlitigious"? And how do such explanations relate to the efficacy of the judicial model in Japan? To answer these questions, we should first reconsider the paradigm process of dispute resolution.

Typically, the parties to a dispute will move through stages—from direct negotiation, to third party mediation and finally to litigation—as a result of failure in the preceding stage to agree to an acceptable resolution. In this process, a relative lack of litigation can be explained by several factors.

One is the effectiveness of third party intervention. The availability of suitable third parties who are willing and able to perform this role reduces the need to invoke formal judicial intervention. At the outset, mediation requires the presence of persons who, because of position or personal relationships, command respect and are able to exercise some measure of authority. In other words, to be effective, the mediator must be someone who can command the parties' trust and their obedience to the settlement.

One would thus anticipate that suitable third parties are more readily available in a stable, closely-integrated and hierarchical society like Japan, than in a more geographically mobile, less cohesive society like the United States in which individual autonomy and social equality are emphasized. Societal expectations and habits are equally relevant. The role of the mediator becomes increasingly legitimate for both the mediator and the parties to disputes where there is repeated reliance on third parties to settle disputes. A contrast in police attitudes in Japan and the United States pointed out by David H. Bayley[55] is especially interesting in this respect. Japanese commonly rely on the police for assistance in settling disputes.[56] But

55. David H. Bayley, *Forces of Order: Police Behavior in Japan and the United States* (Berkeley: University of California Press, 1976), p. 87.

56. Henderson, vol. 2, p. 191.

despite similar popular demand in the United States, "what is different," says Bayley, "is that American police organizations have not adapted willingly to perform this function."[57] Another Japanese example is the mediating service some companies provide for employees involved in traffic accidents.[58] In short, the Japanese may be more successful in avoiding litigation because of social organization and values more conducive to informal dispute resolution through mediation.

The tendency of the Japanese to mediate does not necessarily impair the effectiveness of the judiciary, however. As we have seen, the judicial model does not depend on the actual frequency of litigation, but rather the influence of the perceived outcome of the litigation on the mediated settlement.

Resort to court is, however, reduced by another set of factors that do inhibit or enhance the utility of the judicial model as a vehicle for social control and development.[59]

First, for courts to have an impact through decisions in individual cases beyond those persons immediately affected in those cases, information about the courts and these decisions must be disseminated in order that parties to similar disputes are sufficiently aware of the legal norm for it to influence informal resolution of their dis-

57. Bayley, p. 87. Some police departments in the United States have moved toward the Japanese practice. In Seattle, for instance, a recently established Community Service Officer Section now provides counseling services, especially in landlord-tenant disputes and potentially violent family quarrels.

The lawyer in the United States is often said to perform a mediative function. See, e.g., Sarat and Grossman, p. 1204. This is not true for most cases, however. Because of the adversarial nature of a lawyer's work and the strictures of the lawyer-client relation, few lawyers are in a position to "mediate" as a neutral third party, and once one party brings a lawyer into the dispute usually the other side does likewise. Thus it is probably more accurate to view a lawyer's intervention as a form of direct negotiation. Since if the dispute is not settled litigation is the obvious next step once lawyers are involved, the mediation state of the paradigm would be skipped in these cases.

58. Ishimura and Kaminaga, p. 96.

59. Excluded from consideration is the effect of the outcome of litigation on the frequency of lawsuits. There will be less litigation where, for instance, those who are more likely to sue (e.g., those with greater financial means) perceive that they are likely to lose or that the judges are not sympathetic and the courts or the law being applied is not responsive to commercial or other needs. This may explain the relative lack of suits in Japan among businesses. Compare, e.g., J. Toshio Sawada, *Subsequent Conduct and Supervening Events; A Study of Two Selected Problems in Contract Jurisprudence* (Ann Arbor: University of Michigan Press, 1968) with Morton J. Horowitz, *The Transformation of American Law 1780–1860* (Cambridge: Harvard University Press, 1977), pp. 140–159.

putes. This does not mean the judicial model cannot work unless people are fully aware of what the courts will do. But people must be generally cognizant that the courts do provide an available option, and they must have the means to become informed about what the probable outcome will be in the specific case. Thus in societies where illiteracy rates are high or little is communicated about the courts, the judicial model will be less successful. A lack of law trained persons and the absence of published reports of court decisions, for example, are serious barriers to the effectiveness of the judiciary.

There must also be meaningful access to the courts. Access can be denied directly by jurisdictional barriers that prevent the courts from adjudicating certain types of disputes altogether.[60] Bond-posting requirements that may place an intolerable burden on the parties seeking relief[61] illustrate another form of conscious policy designed to prevent resort to courts. Limited institutional capacity also inhibits access. There must be a sufficient number of courts, of judges and lawyers, to insure that the costs and delays of litigation do not preclude lawsuits as a realistic option.

A third factor is the capacity of the courts to provide adequate relief. Courts must have available a range of remedial measures and forms of relief to suit the variety of controversies that arise. An award of monetary damages or declarations of the rights and duties of the parties will not always help the aggrieved party. In addition, especially in cases where the legal norm and thus the outcome is reasonably certain, filing suit may evidence a recalcitrant party against whom coercive measures have become necessary. Indeed, many of the cases courts handle each day do not involve any real controversy of fact or law, but simply a last resort to force the other party to perform an acknowledged legal duty. For relief to be adequate the courts must be able to provide a remedy that fits the case and have the capacity to enforce its judgments.

60. A Japanese example of this is article 61 of the Meiji Constitution, which, following continental practice, deprived judicial courts of jurisdiction over cases brought against illegal administrative actions. These cases were adjudicated exclusively by a special administrative court. (Unlike in France and Germany, in Japan there was only one.) For an exhaustive account of the establishment and role of the Japanese Administrative Court, see Hideo Wada, "The Administrative Court under the Meiji Constitution," *Law in Japan*, vol. 10 (1977), p. 1ff. Wada emphasizes the antipathy of the civil bureaucracy to judicial intervention.

61. See articles 107–117 of the Japanese Code of Civil Procedure (*Minji sōshō hō*), Law No. 29, 1890.

Assessing the effectiveness of Japanese courts in terms of these criteria, one finds first that lack of information in Japan is not a particular problem. Law is among the most popular fields of undergraduate study. The newspapers and other media cover the courts and regularly report judicial decisions. There is also in Japan an amazing abundance of legal journals and books on the law, including a plethora of layman's *Handobukku* for particular legal problems to advise the average person.[62] But evidence of other institutional barriers to litigation is ample.

The courts in Japan are even more strained to capacity than in the United States. Superior courts in California in 1971–72, for example, disposed of 964 cases per judge. In 1974, United States District Courts had a caseload of only 325 cases per judge.[63] These caseloads are considered to be excessively high.[64] Yet District Courts in Tokyo and Osaka disposed of 1,525 cases per judge in 1969 and the total Japanese caseload in 1974 was 1,708 cases per judge.[65] This results from a lack of judges. As indicated in Table 6, the number of judges in Japan has grown but little for the entire period from 1890 to the present. Thus as the population has grown the ratio of judges to the population has declined from one judge to 21,926 persons in 1890 to one judge to 52,800 persons in 1926 and one judge to 56,391 persons in 1969.

As a result of overcrowded courts, aggravated by the form of trials in Japan that (as in other civil law jurisdictions) involve recurring hearings typically spaced at one month intervals, delay is acute. The simplest trial can take over a year at the district court level, and the average is two years (Table 7). If there are appeals, the case will take about five years, but proceedings that continue for eight to ten years are not uncommon.

The relationship of delay and a lack of lawyers to frequency of litigation is revealed rather starkly in analysis of litigation in prewar Japan. As seen in Table 5 for the period between 1891–1941, the

62. See, e.g., Richard W. Rabinowitz, "Law and the Social Process in Japan," *Transactions of the Asiatic Society of Japan*, vol. 10 (3d Series, Tokyo, 1968), pp. 41–43.

63. Director of the Administrative Office of the U.S. Courts, 1974 *Annual Report* (Washington D.C., 1974), p. 196.

64. See, e.g., "Chief Justice Burger's 1977 Report to the American Bar Association," *American Bar Association Journal*, vol. 63 (April, 1977), p. 504, in which the Chief Justice called for the creation of 132 new federal judgeships.

65. Nihon Bengoshi Rengōkai (Japan Federation of Bar Associations), *Shihō hakusho* (White paper on the judiciary) (Tokyo, 1974), pp. 326–327.

TABLE 6
THE LEGAL PROFESSION IN JAPAN 1890–1973

Year	Judges	Public Procurators	Private Attorneys	Private Attorneys per 1 million persons
1890	1,531	481	1,345	33.7
1892	1,532	482	1,423	35.1
1894	1,221	383	1,562	38.0
1896	1,221	383	1,578	37.6
1898	1,244	473	1,464	34.1
1900	1,244	473	1,590	36.3
1902	1,208	363	1,727	38.4
1904	1,197	374	1,908	41.4
1906	1,179	379	2,027	43.1
1908	1,234	401	2,006	42.7
1910	1,125	390	2,008	40.8
1912	1,129	390	2,036	40.3
1914	898	386	2,256	43.4
1916	903	359	2,665	49.8
1918	1,004	478	2,947	53.8
1920	1,134	570	3,082	55.6
1922	1,150	578	3,914	68.9
1924	1,155	574	5,485	94.0
1926	1,121	564	5,936	98.6
1928	1,245	656	6,304	101.5
1930	1,249	657	6,599	103.3
1932	1,345	628	7,055	107.1
1934	1,370	648	7,082	104.6
1936	1,391	648	5,776	87.6
1938	1,470	686	4,866	69.2
1940	1,541	734	5,498	70.7
1942	1,581	625	5,231	70.3
1944	1,188	610	5,174	70.1
1946	1,232	668	5,737	75.7
1948	1,842*	1,387*	5,992	74.8
1950	2,261	1,673	5,862	70.5
1952	2,323	1,717	5,872	69.9
1954	2,327	1,717	5,942	69.7
1956	2,327	1,717	6,040	69.9
1958	2,347	1,717	6,235	70.4
1960	2,367	1,761	6,439	70.2
1962	2,450	1,796	6,740	71.3
1964	2,475	1,829	7,108	73.9
1966	2,518	1,844	7,687	78.2
1968	2,525	1,871	8,016	80.4
1969	2,580	1,946	8,580	84.6
1970	2,605	1,983	8,868	86.2
1971	2,619	2,019	9,167	88.2
1972	2,681	2,071	9,483	90.2
1973	2,688	2,076	9,921	92.0

* The figures after 1948 include the number of summary court judges and assistant procurators.

Source: Nihon Bengoshi Rengōkai (Japan Federation of Bar Associations) *Shihō Hakusho* (White Paper on the Legal System) (Tokyo, 1974), pp. 102–03.

TABLE 7
COURTS AND PROCEDURE

Average Time Required for Disposition of Civil Cases
(not including administrative cases)

A. Cases First Brought In Summary Courts
The Period from Filing in the Court of First Instance to Decision

Year	Summary Courts	District Courts (kōso)	High Courts (jōkoku)
1960	4.9 months	22.4 months	42.8 months
1965	5.7	31.6	50.7
1970	4.8	36.2	53.9

B. Cases First Brought In District Courts
The Period from Filing in Court of First Instance to Decision

Year	District Courts	High Courts (kōso)	Supreme Court (jōkoku)
1960	12.6 months	38.2 months	67.5 months
1965	12.1	40.4	67.7
1970	12.8	40.0	66.0

Source: Hideo Tanaka, *The Japanese Legal System: Introductory Cases and Materials* (Tokyo: University of Tokyo Press, 1976), p. 476.

percentage change in new civil actions filed in any given year was best predicted by a model in which a rise in actions filed in one year tended to predict a rise in the next year, but a fall in the third year. Such a trend can be explained in terms of legal institutions that are very responsive to "market" forces. As the availability of judicial relief becomes known, more lawsuits are filed. As the number of lawsuits increase so the number of lawyers also increases, resulting in even greater information about and access to the courts. If, however, the number of judges is not expanded to meet such increases, there will be greater delay as caseloads per judge become heavier. Such delay contributes in turn to a decrease in litigation.

However unlikely such an appraisal of the Japanese legal process may appear, it is consistent with subsequent analysis of the data. When the hypothesis that potential litigants respond positively to the number of lawyers per capita and delay (using the ratios of first instance civil trials completed in three months to the total number of first instance civil trials and first instance civil trials completed after one year to total first instance civil trials), the results (Table 8) show that there is a significant correlation between the number of trial actions filed in a given year with the number of lawyers per capita in that year and delay in the previous year.

TABLE 8
REGRESSIONS
(t Values in Parentheses)

Regression Equations	Dependent Variable	Constant	Independent Variables				R^2	d.f.	D.W.
(1)	NCTA	= −3566.2 (−.5151)	+ 10400.7 (1.3209) AGEMP/POP	+ 2116.2 LAG 3 MON/TO (.1873)	− 21894.7 LAG YEAR/TO (−.6123)	+ 47.833 LAWYER (11.4056)	.838	27	1.186
(2)	NCTA IDIFF	= −4103.0 (−1.0435)	+ 3817.6 (.7978) AGEMP/POP	+ 5769.3 3 MON/TO (.8924)	+ 7212.0 YEAR/TO (.3544)	+ 5.767 LAWYER (2.3677)	.401	27	.841
(3)	NCTA IDIFF	= −10642.7 (−2.8291)	+ 11903.6 (2.7821) AGEMP/POP	+ 13411.3 LAG 3 MON/TO (2.1846)	+ 45077.5 LAG YEAR/TO (2.3199)	+ 6.279 LAWYER (2.7758)	.481	27	1.126
(4)	NCTA IDIFF	= −7440.4 (−1.8642)	+ 11295.9 (2.0766) AGEMP/POP	+ 8930.3 LAG 3 MON/TO (1.3453)	+ 41563.1 LAG YEAR/TO (1.8113)	− 27.451 JUDGES (−1.8038)	.349	27	.790

NCTA = New Civil Trial Actions (cases docketed for formal trial proceedings) Filed.
AGEMP/POP = Ratio of Agricultural Employment to Total Population (from: Kazushi Ohkawa and Henry Rosovsky, *Japanese Economic Growth—Trend Acceleration in the Twentieth Century*, [Palo Alto: Stanford University Press], pp. 310–311).
LAWYERS = Per Capita Number of Lawyers.
NCTA IDIFF = Change in NCTA.
3 MON/TO = Ratio of First Instance Trial Actions Disposed of Within 3 Months to Total First Instance Trial Actions Concurrent with REAL NCTA.
YEAR/TO = Ratio of First Instance Trial Actions Disposed of Within One Year to Total First Instance Trial Actions Concurrent with REAL NCTA.
JUDGES = Per Capita Number of Judges.
LAG 3 MON/TO = Ratio of First Instance Trial Actions Disposed of Within 3 Months to Total First Instance Trial Actions Lagged One Year Behind REAL NCTA.
LAG YEAR/TO = Ratio of First Instance Trial Actions Disposed of Within One Year to Total First Instance Trial Action Lagged One Year Behind REAL NCTA.

Moreover, when the ratio of agricultural employment to the total population is included, the results show a *positive* correlation. That is, *lower* rates of agricultural employment coincide with *decreases* (or smaller increases) in the number of new civil actions. This of course does not mean that decreasing agricultural employment necessarily causes or even contributes to decreasing litigation, other factors may explain parallel declines. This result is, however, inconsistent with the notion that litigation in Japan is an index to modernization, or at least industrialization.

The postwar data is more troubling. The analysis of postwar litigation noted above (Table 5) produces a very different result from the prewar pattern. The estimate is that a positive change in one or more random variables will contribute to an increase in the number of civil suits filed in that year and to a decrease in the year thereafter (perhaps explained by delay as above), but there is no indication that these random variables operate in any cyclical fashion and as random variables they may be positive or negative in any given year. (Since the data base for the postwar period is relatively weak—25 as opposed to 50 years—no attempt was made to analyze further the postwar data.)

The failure of Japan to provide more judges and lawyers has been clearly a matter of governmental policy. As to lawyers, since the mid-1930s, entry has been limited by a strictly enforced examination system. (This would explain why the number of lawyers would have levelled off after 1935, but not the extraordinary decrease in lawyers between 1934 and 1938. [See Table 6.] For reasons that are not at all clear, nearly a third of all Japanese attorneys withdrew from their bar associations during this period.) In the postwar system with few exceptions, all members of the legal profession have had to complete an apprenticeship under the Legal Training and Research Institute (*Shihō Kenshū Sho*). To enter, a person must pass the national judicial examination (*shihō shiken*). As can be seen from the data in Table 9, the number of applicants has increased tenfold, while the number of those who pass has been limited to about 500. The most common reason given is budgetary constraint—those who attend the Institute receive government stipends. For purposes of comparison—and to put to rest any doubts about contemporary Japanese attitudes toward the legal profession[66]—the number per capita of

66. Often repeated comments on the lack of interest on the part of Japanese to become attorneys and low status of the bar are manifestly in error. See particularly Danielski, pp. 124–125; remarks by Charles R. Stevens, "Developing a Pacific Community," p. 79; Oppler, p. 107.

TABLE 9
THE JAPANESE NATIONAL LAW EXAMINATION

Year	Applicants	Persons passing final examinations (and entering the LTRI)	Percentage of successful Applicants
1949	2514	265	10.5%
1950	2755	269	9.8%
1951	3648	272	7.5%
1952	4765	253	5.3%
1953	5141	224	4.4%
1954	5172	250	4.8%
1955	6306	264	4.2%
1956	6714	297	4.4%
1957	6920	286	4.1%
1958	7074	346	4.9%
1959	7819	319	4.1%
1960	8302	345	4.2%
1961	10921	380	3.5%
1962	10802	459	4.2%
1963	11725	456	3.9%
1964	12728	508	4.0%
1965	13681	528	3.9%
1966	14867	554	3.7%
1967	16460	537	3.3%
1968	17727	525	3.0%
1969	18453	501	2.7%
1970	20160	507	2.5%
1971	22336	533	2.6%
1972	23425	537	2.3%
1973	25259	537	2.1%
1974	26708	491	1.8%
1975	27791	472	1.7%

Source: Tanaka, p. 577.

Japanese taking the judicial examination in 1975 was slightly higher than that of Americans taking a bar examination.[67] Since in the United States 74% passed compared to 1.7% in Japan, the desire to become a lawyer on the part of Japanese may be significantly higher than Americans if self-selection is considered. Moreover, the attraction of the legal profession has grown in both Japan and the United States by almost an identical degree.[68]

67. In 1975 in Japan, 27,791, persons took the judicial exam (Table 9). While in the United States 46,414 persons (36,873 first timers) took a state (or D.C.) bar examination. *The Bar Examiner,* vol. 45 (1976), p. 95.

68. In 1963 there were 11,725 applicants for the Japanese judicial examination (Table 9) and 15,761 persons (11,397 first timers) who took a U.S. bar examination. *Bar Examiner,* vol. 33 (1963), p. 87.

The limited range of remedies available to Japanese courts and the lack of contempt power to enforce their decisions are equally serious. Japanese courts in the postwar period have continued to rely on continental notions of judicial power that restrict available remedies to those provided by statute. In the area of civil law this has meant that the courts can order specific performance, award damages, or enter declaratory judgments affirming the legal relations of parties in the suit. In most instances, these remedies are effective because of voluntary compliance. But lacking the power of contempt, a court has no way to enforce its decrees on its own motion. Instead, it must rely on procurators to initiate criminal proceedings.[69]

The problem of adequate relief is even more critical in the area of actions by private citizens against the government. The options open to a court in these cases are very limited. They include, for example, declaratory relief of affirming the legality or invalidity of administrative actions or decisions of the failure of officials to act and revocation of administrative acts, and decisions.[70] The law provides the power to suspend administrative actions but includes a provision permitting the Prime Minister to object, thereby requiring the court to retract its order.[71] There is no clear provision empowering the courts to order an administrative agency to take affirmative action, although there is considerable argument on this issue among scholars, there is as yet no authoritative court decision.[72]

The limitations of the courts' capacity to respond in such instances is illustrated in the decision in *Kurokawa v. Chiba Prefecture Election Commission*,[73] holding unconstitutional the 1972 electoral system. The Japanese Supreme Court in that case was faced

69 See Japanese Penal Code (*Keihō*), Law No. 45, 1907, art. 96-2.

70. For a brief discussion in English, see Ichirō Ogawa, "Judicial Review of Administrative Actions in Japan," *Washington Law Review,* vol. 43 (1968), p. 1075.

71. The former Administrative Case Special Regulations Law (*Gyōsei jiken soshō tokurei hō*), Law No. 81, 1948), art. 10; the current Administrative Case Litigation Law (*Gyōsei jiken soshō hō*), Law No. 139, 1962, art. 27.

72. See, e.g., Naohiko Harada, "Preventive Suits and Duty-Imposing Suits in Administrative Litigation," *Law in Japan*, vol. 9 (1976), pp. 63–82. Harada cites only one case of a preventive declaratory action—Kinoshita v. Chief of the Fuchū Criminal Affairs Office, 14 *Gyōsai reishū* 1316 (Tokyo Dt. Ct., July 29, 1963) in which a prisoner sought to have the court prohibit compulsory haircuts. *Id.* at fn. 30. But see the more recent Supreme Court decision in *Higaki v. Nagano Prefecture*, 26 Minshū (No. 9) 1746 (Sup. Ct., 1st P.B., Nov. 30, 1972), recognizing declaratory preventive suits.

73. 30 Minshū (No. 3) 223 (Sup. Ct., Gt. B., April 14. 1976).

with three alternatives aside from upholding the system on the merits as it had done in its 1964 Grand Bench decision in *Koshiyama v. Tokyo Prefecture Election Commission*.[74] It could have avoided the decision through a variety of devices denying justiciability.[75] Or it could have declared the 1972 election null and void, hence raising doubts as to the validity of the Diet elected thereunder and thus all subsequent legislative actions. The third alternative, and the one it chose to follow, was to declare the system unconstitutional but to refrain from invalidating the election. As a result the government has all but ignored the decision, and the Supreme Court and the judiciary, as one-third of the justices predicted, has appeared naked and powerless as a political organ. The contrast to American reapportionment cases[76] is revealing. American courts had the power to retain jurisdiction and to force state legislatures to redistrict, setting precise guidelines for what was constitutional in these cases; while some debate the courts' wisdom in acting,[77] few question their ability to do so.

The executive in Japan is equally limited in enforcing law. In the United States regulatory law is enforced principally through the civil process with the courts acting in partnership with administrative agencies. Orders issued by agencies are ultimately backed up by court order and the threat of contempt for disobedience. Criminal sanctions are cumbersome and seldom invoked.[78] In Japan, how-

74. 18 Minshū 270 (Sup. Ct., G.B., Feb. 5, 1964).

75. Justice Amano, the sole dissenter on the merits of the election case, argued that the case should have been dismissed on the technical ground that the Chiba Prefectural Election Commission was not the proper party defendant.

76. See Baker v. Carr, 369 U.S. 186 (1962); Scholle v. Hare 369 U.S. 429 (1962); Wesberry v. Sanders, 376 U.S. 1 (1963), especially discussion on the ability of lower courts to fashion an appropriate remedy.

77. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs Merrill 1962).

78. See, e.g., Kenneth G. Elzinga and William Breit, *The Antitrust Penalties* (New Haven: Yale University Press, 1976), pp. 30–43, one of the few studies to evaluate the effectiveness of various types of sanctions. The authors conclude that, "until judges and juries are convinced beyond a reasonable doubt that the well-dressed, wealthy, articulate pillar of the community facing them is in actuality the real instigator and director of a conspiracy to cut back production, rig prices, and rob consumers and taxpayers just as effectively as a common mugger or bank robber, it is unlikely that prison sentences often will be imposed for violations of the antitrust laws. The sentence of this penalty in the antitrust arsenal is not a realistic deterrent to corporate criminality." *Ibid.*, p. 43. Similar considerations plus a marked reticence to apply criminal sanctions in most instances would appear to make resort to criminal sanctions even less effective in Japan than in the United States. On this last point,

ever, the government must rely exclusively on a criminal process that for cultural and other reasons seems to be even less available.

From this perspective the prevalence of conciliation of private disputes and "administrative guidance" (*gyōsei shidō*) by administrative authorities can be explained as basically similar responses to the absence of effective law-enforcing mechanisms in Japan.[79] If we ignore the obfuscating gloss that these are endemically Japanese phenomena, we are left with processes and a necessary reliance on consensus present in any legal order lacking effective sanctions. Both conciliation and administrative guidance invoke negotiated agreement and voluntary compliance. To the extent that sanctions exist, they tend to be indirect, informal and extralegal.

Conclusion

Few misconceptions about Japan have been more widespread or as pernicious as the myth of the special reluctance of the Japanese to litigate. In emphasizing this peculiar Japanese response, most commentators ignore the distaste for litigation and preference for informal dispute resolution common to most societies. As noted at the outset of this article, censure of litigation is arguably as much a part of the traditional Christian heritage as it is a legacy of Confucianism. What distinguishes Japan is the successful implementation of this interdiction through institutional arrangements. When we disregard the shared nature of these attitudes, we also fail to note applicable lessons from the Japanese experience. By increasing the number of judges to reduce our court delays, for instance, we may simply spur more litigation and greater social disintegration.

see, e.g., Bayley, pp. 134–159; Shigemitsu Dando, "System of Discretionary Prosecution in Japan," *American Journal of Comparative Law,* vol. 18 (1970), pp. 518–531. Dando cites statistics showing that prosecution was suspended in 87.1% of all cases involving abuse of authority by public officials as compared to 6.3% of robbery cases. *Ibid.,* p. 524 (Table 2).

79. For evidence that conciliation is used in lieu of litigation at least in part because of the inability of the legal system to provide adequate relief, see Nibu Yoshitaka, *Kaji jiken no rikō kakuho seido* (System for enforcing performance in family affairs cases) (6 *Shihō kenkyū hokokusho* (No. 8, 1954), pp. 2–7 in which it is reported that failure to comply with court judgments in family cases for distribution of property, child support and "mental suffering" awards ranged from 30 to 90 per cent by prefecture. However, compliance was significantly higher where there was conciliation. Also, it has been noted that landlords resorted to conciliation in the prewar rural tenancy cases because of difficulty in enforcing favorable court judgments. Adachi, p. 53.

The myth also directs attention away from factors that may help us to understand better some of the dynamics of Japanese life and hides from view relationships that we might otherwise profitably explore. Does the failure of the courts to provide adequate relief explain, at least in part, such apparent social abnormalities such as gangsterism and recurrent bouts of violence in Japan's otherwise remarkably crime-free society? On the other hand, does limited access to the courts also have the effect of promoting beneficial forms of mediation and other mechanisms for disputes resolution? What is the relationship between the number of lawyers and litigation in other societies?

Finally, attributing a relative lack of litigation in Japan to pervasive cultural—and thus more immutable—causes, provides justification for continuing intended and unintended barriers to a more effective judiciary. It hinders inquiry into what the proper balance should be between the need to assure adequate judicial relief and the need to maintain social harmony. "Why should we have more judges" a Minister of Finance preparing the budget might ask, "since we are not a very litigious people."

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