on the ground that the marriage continues to subsist technically. . . . According to the facts established by the court below, while the appellant and the appellee are husband and wife, it was not until their conjugal relations had broken down completely that the appellant manifested his intention to avoid the gift agreement entered into between them. It is, therefore, the opinion of this court that the judgment of the High Court voiding the manifestation of the appellant's intention is correct.

COMMENT

The draftsmen of the Civil Code gave two grounds for Article 754 [then Article 792], namely, (i) that "a wife might enter into a contract with her husband under his strong influence or a husband who doted on his wife might lose his freedom of will" and (ii) that performance of a contract between husband and wife should be based upon affection and that enforcement of such a contract through legal means might have detrimental effects upon the peaceful relationship of the family.

Later scholarly opinions have criticized the merits of this explanation and proposed the deletion of Article 754 from the Civil Code. They have pointed out that the first ground does not explain why one of the spouses cannot enforce the contract even if he or she proves that the contract was entered into by the free will of the parties, nor why Article 754 says that such a contract can be avoided only during the subsistence of marriage. They have also denied the validity of the second ground, because they believed that it does not explain why one of the spouses can avoid such a contract and sue in court for the recovery of property whose title has already been transferred under the contract to the other party of the marriage.

The court, persuaded by these scholarly opinions, tried to limit the scope of the application of this article. The leading case of the Great Court of Judicature is its Judgment of October 5, 1944, 23 Minshū 579. In this case the plaintiff (husband) cohabited with another woman, and completely neglected his wife. He entered a contract with his wife to convey the title to their matrimonial home to her and he duly registered the transfer. Subsequently he avoided the contract and sued for the transfer of the title back to him. The court gave judgment for the defendant on the ground that the contract in question was entered into when the marital relationship had already broken down and

therefore should not fall under Article 754 [then Article 792] of the Civil Code.

This brief history may also give you some idea about the role of scholarly opinions in Japan.

Questions:

(1) What, if any, are the new principles decided by the principal case of 1967 as compared with the above-mentioned precedent of the Great Court of Judicature? What, if any, is the practical meaning of Article 754 of the Civil Code after this 1967 case?

(2) The decision of the Supreme Court takes the position that the term "at any time during the subsistence of marriage" as used in Article 754 of the Civil Code should be interpreted not merely as any time during which the marriage technically continues to subsist but as the time during which it continues to subsist both in form and in reality. But neither Article 754 nor any other article contain any passage indicating the availability of such an interpretation, explicitly or otherwise. Under the Civil Code, a marriage becomes effective upon registering it in accordance with the Family Registration Act (*Koseki Hō*)[e] (Civil Code art. 739(1)). In the case of a divorce, a divorce by mutual consent also becomes effective upon registering it. (Divorce by a decree of the court becomes effective at the time of the entry of judgment.) Thus, the Civil Code indicates a design to identify clearly the beginning and the termination of a marriage. According to this position, it seems natural to interpret the term "at any time during the subsistence of marriage" as the time during which a given marriage is legally effective. What, then, is the rationale of the decision of the Supreme Court quoted above?

SUPREME COURT JUDGMENT, FEBRUARY 16, 1961
[JAPAN v. UDAGAWA]
15 Minshū 244

REFERENCES:

Civil Code, Article 709. A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

e) 1947 c. 224.

Article 710. A person who is liable in damages in accordance with the provisions of the preceding Article must make compensation therefor even in respect of non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

Article 715. A person who employs another to carry out an undertaking is bound to make compensation for damage done to a third person by the employee in the course of the execution of the undertaking; Provided, however, that this shall not apply, if the employer has exercised due care in the appointment of the employee and the supervision of the undertaking or if the damage would have ensued even if due care had been exercised.

[The plaintiff was hospitalized at a branch hospital of the University of Tokyo Hospital. To help her recover from physical exhaustion, she received a blood transfusion on the recommendation of Doctor *B* of the branch hospital. Later it was discovered that Donor *A* of the blood was a person suffering from syphilis, though he had no visible syphilitic symptoms at the time of the blood transfusion. As a result, the plaintiff was infected with syphilis. The plaintiff filed a suit for damages against the State, which was the employer of Doctor *B*, as the University of Tokyo is a national university.

The plaintiff charged Doctor *B* with the following instances of negligence: (1) Doctor *B* neglected to conduct a serum reaction test on *A*'s blood immediately prior to the transfusion on the ground that the result of a serum reaction test on *A*'s blood conducted 15 days before had been negative with respect to syphilis; (2) Doctor *B* neglected to subject *A* to any visual examination, palpation or oral questioning.

To this the defendant answered (1) that to ascertain the results of a serum reaction test takes more than 24 hours and that as a blood transfusion is ordinarily done in an emergency situation where time is a critical element, it is general practice among doctors to dispense with a serum reaction test when there is a reliable certificate showing negative reaction, (2) that in the present case, even if a serum reaction test had been conducted, its result would have been negative since not enough time had elapsed since A contracted syphilis, and (3) that in this case, a visual examination, palpation or oral questioning would not have discovered A's infection with syphilis.

The court of first instance gave judgment for the plaintiff,

which was affirmed by the High Court. The defendant appealed to the Supreme Court. Affirmed.

The reasons given by the court are as follows:]

Granting that symptoms, other than those which a medical doctor can detect from a patient he personally examines, and other matters that may prove useful for his diagnosis of the condition of the patient are inferior in their accuracy and dependability to information obtained through a serum reaction test, visual examination, palpation and auscultation, there are cases where the doctor's only recourse is to an oral questioning of the patient. Even when the blood donor produces a reliable test certificate indicating a negative reaction to a serum test, or a membership card identifying himself with a blood bank, such certificate or membership card does not necessarily justify the conclusion that transfusion of his blood carries with it no risk of infecting the recipient with syphilis. Since it is an established fact that there is no scientific method available for making a definitive diagnosis regarding the existence of latent syphilis, the doctor should have made every conceivable check through questioning the donor (who should know better than anybody else whether there had been any reason to believe that he might have been infected with syphilis) to make sure to his own satisfaction that there is no such danger, although the information thus gathered is admittedly of marginal dependability. (We wish to point out that in this case the need for a transfusion was not so critically urgent as to make it impossible to conduct such checks.) Given the facts, it must be said that it is a just and proper judgment that such a precaution is a bounden duty of the doctor in exercising good care of his patient.

The attorneys for the appellant argue that since it is an established practice of the medical profession to dispense with questioning a donor when he produces a test certificate or a membership card, as the said donor had done, Doctor *B*'s action in dispensing with further questioning does not constitute negligence in the performance of his duty. However, the existence or nonexistence of a duty of good care is something to be determined from the standpoint of law. Even if there had been an established practice, as the defense claims, the existence of such a practice merely serves at best as a factor to be considered in determining the relative gravity of a given case of negligence. There is no reason to believe that the existence of such a practice automatically relieves the doctor of his duty of care.

The appellant's brief also contends that even granting that

the doctor is obliged to question each and every donor in the manner described above, it is not to be expected, statistically, that questioning a person suspected of venereal infection who makes his living by selling his blood will pry out of him truthful answers, and that therefore the judgment below which held that the doctor was obliged to question even such a person is tantamount to imposing an unduly onerous duty of care on the doctor in utter disregard of empirical rules[f] or reason. However, even if the donor was a professional blood seller, the court finds it difficult to agree with the appellant's contention that all such donors, without a single exception, whatever their personal background, will not give truthful answers to the questions put to them, simply because they are professional blood sellers. It is true that Donor *A* was a professional blood seller, but according to the decision of, and the facts established by, the court of first instance, at the time that he sold his blood to the plaintiff he did not have to rely solely on the income derived from the sale of his blood for his livelihood. Furthermore, with respect to the possibility of his having been infected with syphilis, he stated that he simply had not been asked the question. One cannot therefore assert that this form of questioning would not have produced any findings suggesting the existence of syphilitic infection in his blood, even if Doctor *B* had gingerly asked Donor *A* detailed and specific questions, wording them in such a way as to elicit truthful answers.

In this respect, the original judgment states: "On the other hand, even if the donor had been a professional blood seller, detailed and specific questioning by the doctor regarding matters pertinent to determining the existence or absence of such a danger would have induced the donor to answer the questions. Such a discussion with the donor could have provided the doctor with opportunities to observe the donor's reaction to various questions put to him, and it is conceivable that the whole series of questions would have had a psychological pressure on the donor, persuading him to open his heart and let the doctor have glimpses of the truth." In view of the facts that have been established at the trial, this judgment of the lower court shall be upheld. This court finds no error in the original judgment. This court rejects the contention of the appellant on the ground that it merely attempts to argue the case in abstract terms.

f) The term "empirical rule" (*keiken-soku*) means the rules prevailing in the natural course of the affairs of the world. In addition to the rules of natural science, it includes the foretelling of a man's future course of action and rules of plain common sense. Let us suppose, for instance, that "the defendant put up at an inn overnight. The same night, he sneaked into the next room and ransacked the pockets of the raincoat of the occupant who was a total stranger to him, and pilfered a purse containing ¥2,622.50. The empirical rule of our day-to-day life tells us that the defendant took the purse out of another's pocket not as a ploy for making the acquaintance of the occupant of the next room but simply to steal the money." (Supreme Court Judgment, August 5, 1948, 2 Keishū 1123, at 1124).

The appellant's brief further asserts that even if the doctor was obliged to question the donor, questioning in the manner referred to in the original judgment is too onerous a duty for the doctor to perform. But it must be recalled that by the very nature of the business in which the doctor is engaged, a business which deals with the life and health of the patient (*i.e.*, the medical profession), the doctor is necessarily required to take all possible precautions in order to protect the patient from avoidable dangers.

This is not a case where Doctor *B* could not foresee the consequences despite the fact that he had subjected the donor to an adequate questioning of the type expected of a medical doctor; had the doctor questioned the donor effectively, he could conceivably have foreseen the possible consequences, but he elected to neglect any proper questioning. Instead, he merely asked the donor "How do you feel?" and conducted the transfusion immediately thereafter. As a result, the patient was infected with syphilis. It therefore follows that the original judgment is correct in holding the doctor liable for violating the duty of care required of members of his profession. This court finds no error in the original judgment and rejects the contention of the appellant.

COMMENTS

1. In this suit, the plaintiff filed a claim for damages in amounts given below in the left column, to which the court awarded damages as shown in the right column. This may serve as an example of the way in which Japanese courts award damages.

(i)	Expenses incurred in connection with and during the hospitalization:	¥41,224	¥25,624
(ii)	On account of the illness the plaintiff has difficulty in walking and is suffering amblyopia, with the result that she is now unable to		

	conduct classes of dress-making, flower arrangement and tea ceremony. The damages sustained due to this illness:	¥196,634.66	¥196,634.66[g]
(iii)	On account of the illness, the plaintiff was divorced from her husband. Damages for mental suffering from the divorce and other related causes:[h]	¥860,000	¥200,000
	Total	¥1,097,858.66	¥422,258.66

2. In the above-cited case, the suit was filed not against Doctor *B* who actually conducted the transfusion but against his employer, the State, pursuant to Article 715 of the Civil Code. In the court below, the State (defendant) argued that since there was no failure on the part of the State to exercise due care in employing Doctor *B* at the branch hospital of the University of Tokyo Hospital or in its supervision of his performance of his duties, the State was not liable for his conduct under the proviso to Article 715 of the Civil Code. However, the court rejected the argument on the ground that there is no evidence positively establishing the absence of such fault in its appointment of the doctor

g) Since the plaintiff receives at the time of judgment in the form of damages the payment of benefits which would otherwise accrue over a period of time, the interest which would accrue from the sum during that period must be deducted. Of the various formulae dealing with such a situation, the Hoffmann formula is widely used. Under this formula, the amount due the plaintiff is $A/(1+nr)$, A standing for the amount due, n the number of years and r the annual interest rate.

In a case, for instance, where a party's loss is assessed as the loss each month of a net benefit worth ¥100,000 over a succeeding period of 20 years, the Japanese courts used to compute A as ¥100,000×12×20=¥24,000,000. Now that the Civil Code art. 404 sets the rate of interest in cases where there is no agreement at 5% per annum, the damages in this case will amount to ¥12,000,000. But under this method, too much is deducted in interest (*i.e.*, even on the first ¥100,000 which the party will collect the following month, interest for the entire 20 years is deducted). This was one of the reasons why damages awarded by Japanese courts were small. In recent years, however, Japanese courts have adopted a new method, the "new Hoffmann formula," whereby they apply the Hoffmann formula to the loss of net income for each year and add up the sums thus obtained to arrive at the total amount of damages to be awarded. Lately, however, some Japanese courts have adopted the Leibnitz formula which is to be shown as $A/(1+r)^n$.

h) Awards of consolation money under Article 710 of the Civil Code and the computation of its amount are left to the discretion of the court. In this case, the court awarded the plaintiff a sum of ¥200,000 in consolation money.

or in its supervision of his subsequent conduct. If the plaintiff had had to bear the burden of proving positively the existence of such fault on the part of the State, she would have stood little chance of winning this case.

. . . .

In civil suits, the question of where the burden of proof lies is determined on the basis of the nature of the case. The court allocates the burden to the plaintiff or to the defendant according to its assessment of which allocation will serve to achieve a reasonable result. However the way an article applicable thereto is written serves as a guide in determining where the burden of proof lies. For instance, in the case of Article 715 of the Civil Code the burden of proof rests with the plaintiff on matters referred to in the main sentence of the article (which ends before the word "Provided"), while it is up to the defendant to prove matters covered by the proviso. The employer, therefore, remains on the safe side of the line until the injured person succeeds in proving that the act or acts of the employee, the injuring party, constitute a tort as prescribed in Article 709 of the Civil Code, that there exists a master and servant relationship between the defendant and the injuring party, and that the act or acts of the injuring party have been committed in the course of the execution of the employer's undertaking. Once these allegations have been established by the plaintiff (the injured person), the employer must prove positively either that he exercised due care in the appointment of the employee and in his supervision of the employee's performance of his duties, or that the accident would have inevitably occurred even if he had exercised due care in his supervision of the employee's performance of his duties. If he fails to establish these facts, he will lose the case.

Questions:

(1) Do you find any "negligence" in this case in the sense we use the term in our daily life? The court held that the doctor was legally "negligent." What are the grounds on which the court has arrived at such conclusion?

(2) As a matter of fact, courts seldom find that the exercise of due care as provided in Article 715 of the Civil Code is proved. What are the practical grounds of such reluctance by the courts to hold it proven?

(3) Article 3 of the Automotive Accident Damages Compensation Act (*Jidōsha Songai Baishō Hoshō Hō*)[i] provides:

i) 1955 c. 97.

"Any person who, while operating an automotive vehicle for his own purpose, has killed or injured an another person or persons in the course of such operation of an automotive vehicle, shall be liable for damages caused to others by the automotive vehicles so operated; Provided, however, that this shall not apply to cases where such person has proved that he and the person who drove the automotive vehicle did not fail to exercise due care, that there was wilful conduct or negligence on the part of a third person other than the injured or the driver, and that there was no structural or functional defect in the automotive vehicle."

What effect has this article on the question of burden of proof?

(4) Article 3, Paragraph 1 of the Act concerning Compensation for Radioactive Damage (*Genshi-ryoku Songai no Baishō ni kansuru Hōritsu*)[j] provides as follows:

"In case any radioactive damage is caused to a person or persons in the course of operation of a nuclear reactor, the entrepreneur of the nuclear power business operating the nuclear reactor shall be liable for such damages; Provided, however, that this shall not apply to cases where such damage has been caused by a calamity or a social upheaval of an extraordinarily large scale."

Which of the two principles, the principle embodied in Article 709 of the Civil Code or the principle embodied in Article 3 of the Act concerning Compensation for Radioactive Damage, is closer to the effect of Article 3 of the Automotive Accident Compensation Act?

SUPREME COURT JUDGMENT, FEBRUARY 19, 1952
[INOUYE v. INOUYE]
6 Minshū 110

REFERENCE:

Civil Code, Article 770. A husband or wife can bring an action for divorce only in the following cases:

(i) If the other spouse has committed an act of adultery;
(ii) If he or she has been deserted maliciously by the other spouse;
(iii) If it is unknown for three years or more whether the other spouse is alive or dead;
(iv) If the other party suffers from severe mental disease and recovery therefrom is hopeless;

j) 1961 c. 147.

(v) If there exists any other grave reason for which it is difficult for him or her to continue the marriage.

Even in cases where any or all of the grounds mentioned in items (i) to (iv), inclusive, of the preceding paragraph exist, the Court may dismiss the action for divorce, if it deems the continuance of the marriage proper in view of all the circumstances.

[A Divorce Suit: The Supreme Court affirmed the decision of the court below dismissing the petition seeking a divorce, on the following ground.]

The statement of reasons for appeal claims that the appellant is entitled to be granted a divorce under Article 770, Paragraph 1, item (v) of the Civil Code which reads "if there exists any other grave reason for which it is difficult for him or her to continue the marriage." According to the facts found by the court below, however, the primary reason which has made it difficult for the appellant [husband] to continue the marriage with the appellee [wife] is the fact that he maintains a mistress and has neglected the appellee. If the appellant terminates his illicit relations with the mistress and restores good conjugal relations with the appellee, the marriage between the appellant and the appellee would surely be maintained harmoniously. The whole matter, therefore, is entirely up to the will of the appellant. It is preposterous to say that there exists a "grave reason for which it is difficult for him to continue the marriage." (The appellant further alleges that the appellee did some excessive acts. But according to the facts found by the court below, the excesses of the appellee simply were acts of jealousy. It therefore follows that once the causes of the appellee's jealousy are eliminated, excessive acts on her part will disappear in no time at all.)

The appellant may claim that his emotional attachment to the mistress has grown to a point where his reason no longer holds sway, but this is nothing more than a self-serving justification. It was the appellant himself, in the first place, who selfishly started the clandestine extra-marital relationship with the mistress. Now he says he no longer can live together with the appellee because he cannot stand her any more on account of his attachment to his mistress. If the appellant is allowed to have his own way, it is tantamount to saying that he can "give her a kick after stepping upon her" [in other words, to add insult to the injury] to use a common phrase. The law never tolerates such immoral self-indulgence. To uphold virtue and to disallow im-

morality is the most important duty of the law. All laws must be construed in this vein.

The appellant's brief talks about the necessity of paying due regard to the appellant's mistress, but it must be said that her misfortune is of her own making. If she had an affair with a man knowing that he was married and then thought of taking over the appellee's place as his wife, she was mistaken from the very beginning. Or else she might have been deceived into an illicit sexual relationship with the appellant. Even if such had been the case it does not justify protecting the mistress, who was at least negligent in causing the situation to arise, at the sacrifice of the appellee, the legal wife of the appellant. The licentiousness of sexual relationships which has become rampant since the end of the war is truly deplorable. If the court allows the interpretation that the divorce sought by the appellant in this case is legally permissible, the decision would run a grave risk of adding fuel to the already raging flame of licentiousness. . . .

The court deeply commiserates with the misfortune of the child born of the appellant and the mistress. The parents are entirely to blame for the child's sad position. They must be keenly aware of their responsibility to the child and do everything in their power to alleviate the burden of the misfortune borne by the child. The child's position is pitiable, but the court cannot grant the petition at the sacrifice of the appellee. It is acknowledged that the provision of the said article does not require the existence of a blameworthy act on the other party, but this does not mean that such an immoral and self-serving claim should be granted. Although the judgment below uses different language, it in effect says the same thing as the present decision, and its judgment is entirely proper. So the reasons for appeal are groundless. (Generally, cases such as the present one are rather involved. Decisions must be based on the findings of a detailed investigation of the related circumstances and are not to be dealt with in general terms. The judgment of the Supreme Court, however, must be based on the facts found by the lower courts. According to such facts, there is no room for any decision other than the present decision.)

COMMENTS

1. (1) There are two ways of obtaining a divorce in Japan, divorce by consent and divorce by a decree of the court.

(2) *Divorce by Consent* (*Article 763 of the Civil Code*). If the

spouses agree to a divorce, all they have to do is to fill out a form as provided by the Family Registry Act (*Koseki Hō*) and orders enacted under that law, and file it at the office of the city, ward, town or village where they live or where they are registered in the family registry. This form must be signed by the spouses and two witnesses,[k] but no other form is required. Neither spouse need appear at the city or other appropriate office personally.

It occasionally happens that a form for divorce is completed by forging the signature of one of the spouses and is received by the city or other appropriate office and entered in the family registry. When the last two books of the Civil Code concerning family law were completely amended in 1947, a proposal was made to add a provision to Article 764 to the effect that a divorce by consent should take effect only after submitting a confirmation of the will of the parties to the family court. Indeed, this proposal passed the House of Councillors, but it failed to find a place in the Civil Code because the House of Representatives did not vote for it.

Divorce by consent was adopted when the original Civil Code was put into effect in 1898. Prior to that time, the husband could dissolve the marital relationship merely by expressing his intention to divorce the wife, though he was required to issue a formal letter in which he promised not to raise any objection to the re-marriage of the divorced wife.[l] The wife had no means of seeking a divorce until 1873, when a proclamation of the Great Council of State allowed the wife to bring a suit for divorce in the court. The only way for a wife to be freed from the bond of matrimony was to flee from the husband, enter a nunnery and spend a certain number of years there as a nun. Only then was she freed from her previous bond.[m]

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k) Civil Code arts. 764, 739.

l) It was customary to write this letter in three and a half lines. Consequently such a letter was commonly called "*mikudari-han*" ("three and a half lines").

m) From the middle of the eighteenth century, this privilege of freeing the wife from the matrimonial bond was limited to a small number of temples. There were only two in the Kantō Area—within roughly a 70 mile radius from Edo (the old name of Tokyo)—the nearest to Edo being Tōkei-ji Temple in Kamakura, situated about 30 miles from Edo. The wife had to enter the compound of the temple without being captured by the husband or his men. A nice fiction developed. If the wife could throw her slipper into the compound, she was technically regarded as having physically entered it, even though as a matter of fact she had been captured before passing through the gate of the temple.

The required period of residence in the nunnery was *ashikake san nen*, *i.e.*, until she greeted her second new year there, but often she could obtain a letter of divorce from her husband earlier, through negotiation.

(3) *Divorce by a Decree of the Court (Article 770 of the Civil Code).* Article 813 of the Civil Code as originally enacted in 1898 enumerated 10 causes for granting a decree of divorce. Each of them, except item (ix), which provided that one could sue for divorce if it had been uncertain for three years or more whether the other spouse was alive or dead, and item (x) which was based on the *iye* (household) system, provided for grounds for divorce based upon on the misconduct of the other spouse.[n] The basic notion of divorce under this provision was that divorce was something to be awarded to the spouse who had not committed any material misconduct against the other spouse who was guilty of such misconduct.

The 1947 amendment to the Civil Code, however, has abandoned this "principle of fault" and adopted the "principle of incompatibility," *i.e.*, that a divorce should be granted when

n) The old Article 813 reads as follows:

"A husband or a wife may bring a suit for divorce only if there is one of the following causes:

(i) If the other spouse has committed bigamy;

(ii) If the wife has committed adultery;

(iii) If the husband has been found guilty of the crime of adultery [as co-defendant with another's wife with whom he had intercourse, there being no penal statute punishing the husband's adultery as such];

(iv) If the other spouse has been found guilty of the crime of forgery, bribery, indecency, theft, robbery, obtaining property by fraud, embezzlement, receiving property criminally obtained [by theft, embezzlement, etc. with knowledge of the fact], or of offenses specified in Articles 175 or 260 of the Penal Code or is sentenced to a 'major imprisonment' (*jū-kinko*) for a term of three years or more;

(v) If the other spouse has ill-treated or grossly insulted him or her so that it has made further living together unbearable;

(vi) If the other spouse has deliberately deserted him or her;

(vii) If an ascendant of the other spouse has ill-treated or grossly insulted him or her;

(viii) If the other spouse has ill-treated or grossly insulted his or her ascendant;

(ix) If it has been uncertain for three years or more whether the other spouse is alive or dead;

(x) In the case of *muko-yōshi* (adoption of a man at the same time as marriage between him and a daughter of the adoptive father), if the adoption is dissolved, and in the case of marriage of an adopted son with a daughter of the adoptive family, if the adoption has been dissolved or annulled."

Articles 814–818 provided for various reasons to bar a suit for divorce, such as, for example, condonation of adultery.

Some of these enumerated grounds for divorce can only be understood by bearing in mind that it was the age when the Japanese family law was based upon the notion of *iye* (household), the lineal family. Under this notion, very high consideration was given to good relationships between a wife (or a husband) and the parents of the other spouse.

the conjugal relations have collapsed to the point where the maintenance of the marriage has become meaningless, irrespective of who is to blame. *See* Paragraph 1, item (v) and Paragraph 2 of Article 770 of the Civil Code. Thus items (i) through (iv) of Paragraph 1 of Article 770 are in their nature only illustrative of "grave reason(s) for which it is difficult for him or her to continue the marriage."

(4) A great majority of divorces in Japan are by consent. If the spouses disagree, they or one of them may bring the matter to the conciliation procedure in the family court. Only after the conciliation procedure has failed to solve the problem is an adjudicative procedure taken.

There were 108,382 divorces in Japan in 1972. (There is a trend for a greater number of divorces. This figure is 36.4% more than that in 1966.) This figure includes 11,702 divorces by consent reached through the conciliation procedure. Only in 1,572 cases were divorces effected by a decree of a court.[o]

Questions:

(1) Do you think the decision of the Supreme Court cited above runs counter to this principle of incompatibility?

(2) Article 770, Paragraph 2 of the Civil Code provides that "Even in cases where any or all of the grounds mentioned in items (i) to (iv), inclusive, of the preceding paragraph exist, the Court may dismiss the action for divorce, if it deems the continuance of the marriage proper in view of all the circumstances." It is to be noted that the above provision omits item (v) of the preceding paragraph. Doesn't the Supreme Court decision cited above in effect mean to rephrase the provision of Paragraph 2 to read, in part, "in items (i) to (v), inclusive, of the preceding paragraph"? If so, can it be justified?

(3) There was no child of the marriage between the plaintiff and the defendant in this case. Should the existence of the illegitimate child be a sufficient ground under item (v)? Would not the need to legitimize the child be a "grave reason"?

(4) On what sort of evidence or argument did the court base its moral judgment in this case? Can you put such evidence to the court in Japan?

o) 100 cases by family courts and 1,472 cases by district courts. SHIHŌ TŌKEI NENKAN, SHOWA 47 NEN, KAJI-HEN (Annual Judicial Statistics for the Year of 1972: Family Matters) 306–09; *id.*, MINJI-HEN (Civil Cases) 132–33.

Anonymous v. Anonymous*

41 *Minshū* 1423

(Supreme Ct., Sept. 2, 1987)

Translated by the Supreme Court of Japan

Editorial Note: Civil Code Article 770, paragraph 1, item 5 provides that divorce may be based on "grave reason for which it is difficult to continue the marriage." Prior to this case, however, the Supreme Court had ruled that even where a complete breakdown of the marital relationship had occurred, the responsible party could not be granted a divorce under Article 770.

Judgment

...

The original judgment shall be reversed.

The case shall be remanded to the Tokyo High Court.

Reasons

...

1.1. ... According to the ... legislative history and the wording of the provisions of Article 770 of the Civil Code, it can be understood that item 5, paragraph 1 of the said Article provides that one of the spouses may seek divorce against the other through filing a suit when they have become unable to pursue cohabitation, which is the purpose of marriage, and there are no prospects of reconciliation. Also, it cannot be inferred that any divorce sought by a spouse who is responsible for having caused the ground provided [in item 5, paragraph 1] should not be granted.

On the other hand, in our country, from the standpoint of due respect for the will of the spouses concerning a divorce, in addition to the institutions of divorce through mutual agreement (Article 763 of the Civil Code), divorce through conciliation (Article 17 of the Law for Determination of Family Affairs) and divorce through determination (paragraph 1, Article 24 of the said Law), the institution of judicial divorce is available for the cases where one of the spouses does not consent to divorce. The causes for judicial divorce are stipulated by law as mentioned above, and, when such grounds are acknowledged to exist, one of the spouses may seek divorce through an action against the other. Under such system of judicial divorce, if divorces were to be always granted where the ground provided by item 5 exists, the court would be compelled to permit the spouse responsible for having caused the ground to take advantage of it and the will of the other spouse would be disregarded, and it eventually might bring about results that negate a judicial divorce system. Thus, it is needless to say that any action which may cause such results should not be permitted.

2. [S]ince the substance of marriage is the carrying on of communal life with serious intent for the purpose of spiritual as well as physical conjugation, when one or both of the spouses decidedly has lost the aforementioned intent as well as become devoid of the substance of communal life as husband and wife, and reached the state of no expectation whatever for its restoration, it should be said that the basic substance from the viewpoint of social life has been lost, and in such condition, it may be said that continuance of the marriage based merely on the family register would be unnatural. However, since divorce disrupts the social and legal order of marriage, it is proper that a claim for divorce must be a matter that does not go against the concept of justice, equity, and social ethics, and in this sense, it should be said that a claim for divorce should be matters that may be acceptable when viewed in light of the principle of good faith and trust which is the guiding doctrine in the entire Civil Code that also includes family laws.

3. Thus, in determining whether a claim for divorce on the ground provided by item 5 sought by the spouse solely responsible for it (hereinafter referred to as "responsible spouse") is acceptable in terms of the principle of good faith and trust, the mode and degree of responsibility of the responsible spouse should be considered. Moreover, consideration should be given to the intent of the other spouse to continue the marriage and his or her feelings towards the plaintiff, and the mental, social, and economic situation of the other spouse as well as the situation of custody, education, and welfare of the children between the husband and wife, especially the immature children, in case the divorce is granted, and the life formed after the separation, for example, if one or both spouses have already formed a relationship of de facto marriage, the situation of his or her mate and the children. ...

[E]ven if the claim for divorce was by the responsible spouse, when the separation of the husband and wife has reached a substantially long period, in weighing their age and the period of cohabitation, and when they have no immature children, it is proper to construe that the said claim should not be denied solely because the claim was by the responsible spouse, unless there exist special factors, such as would place the other spouse into a mentally, socially, or economically harsh situation if the divorce is acknowledged, which would render the admission of the claim for divorce to be inconsistent with social justice. In such situations, the responsibility for having caused the ground provided in item 5 or the mental or social situation of the other spouse, etc., should no longer be emphasized, and the economic disadvantages the other spouse may suffer through divorce should be primarily compensated through distribution of property or recovery of consolation money that he or she may seek at the time of or after divorce.

4. All precedents of this Court ... contrary to the above mentioned edicts must be overruled.

II. The brief history of the marriage of the Appellant and the Appellee and other facts found by the lower court are as follows: (1) The Appellant and the Appellee reported their marriage on February 1, 1937, and became husband and wife, but as a child was not born, the first daughter A and the second daughter B ... were adopted on December 8, 1948. (2) Although their marriage progressed tranquilly in the beginning, they have become estranged from each other since 1949, when the Appellee became aware of the Appellant's extramarital relationship with C, and they have lived separately to date since August of the same year, when the Appellant started to cohabit with C. On September 7, 1954, the Appellant recognized his paternity on D (born on January 7, 1950) and E (born on December 30, 1952), both of whom are the Appellant and C's children. (3) Suffering from a severe economic situation after the separation, the Appellee sold the house registered under the Appellant's name, which the Appellee had been entrusted for disposal by the Appellant for the sake of guaranteeing her living expenses, for two hundred and forty thousand yen in February 1950, and the amount was applied to her living expenses, but except for that the Appellee has never received any economic assistance from the Appellant. (4) Having sold the house, the Appellee rented a room in her elder brother's house, mastered doll-making techniques, etc., and made her living as an employee of a doll shop until 1978, whereas she has neither occupation nor property at present. (5) The Appellant, a president of two precision gauge-manufacturing companies as well as a director of a real estate-leasing company, enjoys a quite stable economic life. (6) The Appellant brought an action for divorce at the Tokyo District Court in 1951, but the Court dismissed his claim for divorce on February 16, 1954, finding that he was a responsible

*Excerpted from the Supreme Court of Japan Internet site (www.courts.go.jp) with minor stylistic modifications. Reprinted by permission. Identities of the litigants are often concealed in Japanese case reporters.

spouse because his extramarital relationship with C and purposeful abandonment of the Appellee to cohabit with C caused the failure of their marriage, and the judgment became final in March 1954. (7) In December 1983, the Appellant suddenly visited the Appellee and asked her to consent to their divorce and dissolution of adoptive relations with A and B, but the Appellee [refused]. In 1984, the Appellant applied in vain for divorce conciliation against the Appellee at the Tokyo Family Court where he offered the Appellee one million yen in cash and an oil painting, then he filed this suit.

III. In considering the admissibility of this claim following the rule detailed in I above and the facts summarized in II above, although the Appellant should be called a responsible spouse on the basis of item 5, paragraph 1, Article 770 of the Civil Code, the Appellant's claim should not be rejected unless there exist special factors mentioned above, because the Appellant and the Appellee lived separately for approximately thirty-six years even until the end of the lower court's oral hearing and this period itself is quite long independent of the period of their cohabitation and their ages, and they have no immature child.

Gary S. Becker

*A Treatise on the Family**

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The Gain from Divorce

A husband and wife would both consent to a divorce if, and only if, they both expected to be better off divorced. Although divorce might seem more difficult when mutual consent is required than when either alone can divorce at will, the frequency and incidence of divorce should be similar with these and other rules if couples contemplating divorce can easily bargain with each other. This assertion is a special case of the Coase theorem (1960) and is a natural extension of the argument . . . that persons marry each other if, and only if, they both expect to be better off compared to their best alternatives.

A risk-neutral couple would divorce with mutual consent if, and only if,

$$Z^m < Z_d^m,\ Z^f < Z_d^f, \quad (10.1)$$

where Z^m and Z_d^m are the husband's expected commodity wealth from staying married and divorcing respectively, and Z^f and Z_d^f are defined similarly for the wife. If bargaining is cheap and easy, this necessary and sufficient condition can be stated more simply as

$$Z_{mf} \equiv Z^m + Z^f < Z_d^m + Z_d^f \equiv Z_d^{mf}. \quad (10.2)$$

Obviously, if the inequality in (10.2) does not hold, the inequalities in (10.1) could not hold. That (10.2) also implies (10.1) can be shown by assuming that, say, the husband's wealth would be reduced by divorce ($Z_d^m < Z^m$) even though their combined wealth would be raised ($Z_d^{mf} > Z_{mf}$). The wife could still "bribe" him to consent to a divorce by offering him a settlement that would offset his direct loss from divorce ($Z^m - Z_d^m$). She would also be better off as long as the settlement was less than their combined gain ($Z_d^{mf} - Z_{mf}$).

Less obvious perhaps is that (10.2), but not (10.1), is still a necessary and sufficient condition for divorce when either can divorce at will, or when only the husband can divorce at will, as in traditional Islamic societies. If he would gain from divorce ($Z_d^m > Z^m$) but their combined wealth would be reduced, she could bribe him not to seek a divorce by offering him a greater share of their married output. Conversely, if he would lose from divorce but their combined wealth would increase, she could bribe him to seek a divorce by offering him a large settlement.

The history of divorce is filled with examples of settlements that induce recalcitrant spouses to consent. Only husbands could seek a divorce among Jews in the Arab world during the Middle Ages, yet "in many, if not most cases about which we have more detailed information, one gets the impression that the female partner was the initiator of the divorce proceedings, mostly, to be sure by renouncing what was due her" [her dowry and other marriage gifts] (Goitein, 1978, p. 265; italics added). And over 90 percent of the divorces in Japan between 1948 and 1959 were by mutual consent (Rheinstein, 1972, table 5), even though either spouse alone could initiate a divorce suit.

Still, one might reasonably argue that legal rules make a difference: the anger and other emotion generated by divorce proceedings make bargaining costly and time-consuming, or a spouse might consent to a divorce only because his (or her) life is made difficult until he does (Friedman, 1969; Goitein, 1978, pp. 265–266; Saunders and Thomson, 1979). To obtain quantitative evidence on the effects of legal rules, consider the radical change in 1970 when California became the first state to grant divorce at the request of either spouse (no-fault divorce); previously, divorce required either mutual consent or proof of "fault" in an adversary proceeding.

The average annual rates of growth of divorce rates in California and the rest of the country during the 1960s were 3.6 percent and 4.0 percent respectively. We can crudely estimate what the California rates would have been if the state had not gone to no-fault divorce by assuming that the rate of growth in divorce rates between any two years during 1969 to 1976 would have equaled the rate of growth for the rest of the country multiplied by the ratio of their average growth rates during the 1960s (0.9 = 0.036/0.040). These "predicted" rates in Figure 10.1 [omitted] are substantially below the actual rates for California in 1970 and 1971, slightly below in 1972, about equal to the actual rates in 1973 and 1974, and slightly above the actual rates in 1975 and 1976. The change to no-fault divorce does not appear to have had a lasting effect on the divorce rates in California, although divorces may have been increased for a couple of years.

Even if the change from mutual consent and fault to no-fault divorce apparently had little lasting effect on divorce rates, the distribution of the gains from divorce, $Z_d^{mf} - Z_{mf}$ in (10.2), may have been significantly altered. In particular, if men have been more willing than women to divorce partly because they are not given custody of children and partly because they have many opportunities to meet other women while still married, no-fault divorce reduces their incentive to obtain their wives' consent with generous settlements. After 1970, alimony and child-support payments in California apparently did decline relative to father's income (Dixon and Weitzman, 1980, table 2).

The inequality in (10.2) is a simple and easily implemented criterion for analyzing the effects of different variables on the propensity to divorce. One has only to determine whether the joint wealth of a married couple would be increased by divorce, without worrying about how the increase is divided or about who has legal access to divorce. To illustrate, a negative income tax system or aid to mothers with dependent children raises separation and divorce rates among eligible families in that the incomes of divorced and separated persons are raised relative to the incomes of married persons. These programs, in effect, provide poor women with divorce settlements that encourage divorce.

The expected wealth from remaining married would be raised if one spouse earns more than had been expected, or if any other trait of either spouse turns out to be better than expected. Nevertheless, and somewhat paradoxically, the marriage would be more likely to dissolve than if their expectations had been realized. The combined wealth of husband and wife from a divorce would be increased even more than their wealth from remaining together because they are no longer well-matched: the person with the better-than-expected traits should be matched with a "better" person than his spouse, and she should be matched with a "worse" person than he turns out to be. This implication of (10.2) is also supported empirically: marriages are more likely to dissolve when

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J. Mark Ramseyer

Judicial (In)dependence in Japan*

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"The Supreme Court sure defers to bureaucrats these days," suggested Ebato to Taniguchi. Tetsuo Ebato was a freelance journalist. Masataka Taniguchi had retired from the Supreme Court a year earlier.

"You're right. I wonder why," replied Taniguchi.

"Maybe it's because the Prime Minister has the last word in appointing chief and associate justices," said Ebato.

Taniguchi was less sure. "Professor [and former Supreme Court justice] Dandō says so too, but I wonder. I thought judges just had to obey their conscience, follow the law, and write opinions. But when I said so to [Tōhoku University professor] Odanaka, he wouldn't have it. 'You're wrong,' he said. 'The judges I know who're conscientious and write good opinions spend all their time circulating through provincial district courts.'" . . .

Institutions

If there is a difference in the independence of Japanese and American courts, it does not derive from the constitutional text. The texts are instead quite close. The Japanese Constitution guarantees judges their independence: "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws." And it promises them "adequate compensation which shall not be decreased during their term of office."

Notwithstanding their nominal independence, however, Japanese judges have not been as free as their American federal peers. Like senior American politicians, LDP leaders could decide who would become a judge. Unlike American politicians, during their nearly four decades in power they also manipulated the system to reward and punish those they made judges. Their ability to do so stemmed primarily from the way they recruited and posted judges. Judges in Japan join the bench in their 20s. During their career, they then rotate through a variety of judicial posts. By controlling access to the favored posts, the men and women in the Supreme Court Secretariat (the courts' administrative offices, staffed by judges) can reward and punish judges. By controlling the Secretariat, the LDP could control the judges.

Whether Japanese judges lived well or lived poorly thus depended on their status with the LDP leaders. Most basically, Japanese judges serve 10-year terms which the cabinet can freely decide whether to renew. If regularly renewed, they can work until age 65. Yet when they receive pay increases, where they work, and what they do are all matters that the judges at the Secretariat decide. In theory, these assignments are something the (LDP appointees to the) Supreme Court determine. In practice, the justices delegate the task to the judges in the Secretariat.

Crucial to the LDP, therefore, was the composition of the Secretariat. The LDP controlled it by appointing politically reliable justices to the Supreme Court (including at least one who knew first-hand how the Secretariat worked). Those justices then staffed the Secretariat with younger politically reliable judges. The result was indirect—but substantial—LDP control over the courts.

Most Japanese judges share basic preferences about the type of appointment they want. Granted, a few judges prefer small town life and some dislike

appellate work. In general, though, most Japanese judges prefer an urban post to a rural post. They prefer a family court to a branch court, a district court to a family court, and a high court to a district court. They prefer a chief-judgeship to associate judge status. And they hope for an occasional administrative position in the Secretariat or at one of the ministries. [In general], most judges can realistically hope for at least one stint as a chief judge in a district or family court. Generally, they obtain it near the end of their career. As 58 of the judges in this class of 1951 also served at least once on a high court, they can also realistically hope for an appellate position.

Although the lengths of assignment vary, judges generally work for three years in each post. Before reassignment, they can request preferred appointments. Nominally, they can even refuse transfers they do not want. In fact, they refuse them at their peril. By 1969, Judge Shigeharu Hasegawa had worked in Hiroshima for 17 years and his wife was sick. When he declined an out-of-town transfer that year (it was a promotion to a neighboring high court), he was out of a job: the cabinet refused to reappoint him to his next 10-year term.

Political Control

The Fukushima incident. According to many observers, the LDP began to manipulate judicial careers toward political ends in the late 1960s. Before then, they argue, few judges asserted any political independence. As judges did not indulge their politics, the Secretariat could assign them to judicial posts without considering their politics.

The "crisis," these observers claim, came when right wing ideologues began attacking judges for their liberal bias. Eager to placate their conservative constituents, the LDP launched a witchhunt. It criticized recent court decisions, and urged the cabinet to make independent judges pay for their independence. By March 1969, the Minister of Justice could declare that the time had come "to jam the cogs of the courts."

The man who took center stage in the ensuing controversy was Shigeo Fukushima, a district judge born in 1930. He had joined the judiciary in 1959, and had just begun his second 10-year term in 1969 when he found on his docket a controversy. Nearly 200 local citizens had sued the Japanese government over a planned missile base. Because Article 9 of the Constitution banned military force, they claimed, that base was unconstitutional.

Fukushima was a leader in a leftist organization of lawyers, law professors, and judges called the Young Jurists' League. Although the LDP had been fighting to repeal Article 9, the League was explicitly dedicated to preserving the 1947 Japanese Constitution, and implicitly dedicated to fighting those repeal attempts. This potential for conflict worried local chief judge Kenta Hiraga. Lest Fukushima ban the proposed base, Hiraga wrote him a letter explaining why, were he deciding the case, he would refuse the injunction. But to no avail. Fukushima ignored the letter and enjoined the base.

Fukushima did not keep his dispute with Hiraga quiet. Instead, he circulated copies of Hiraga's letter to his friends in the League, and some of them circulated copies to the press. Within a few days, the letter was in the newspapers. The press and professoriate accused Hiraga of subverting judicial independence, and the Diet launched impeachment proceedings. Nonetheless, Hiraga emerged relatively unscathed. On October 19, 1970, the impeachment committee reprimanded him but then dismissed the charges. After additional reprimands from his District Court and the Supreme Court, he joined the Tokyo High Court.

Fukushima fared worse. He too faced impeachment proceedings, in his case for leaking the letter to the press. But where the committee dismissed Hiraga's charges, it ruled against Fukushima. It did let Fukushima stay where he was for a while, however, and Fukushima himself remained adamantly "independent." He railed against the judicial bureaucracy in print. And notwithstanding Supreme Court decisions to the contrary, in 1973 he held the entire Japanese military unconstitutional (quickly overturned, of course). Although the Secretariat eventually brought him to the Tokyo District Court for a time, it soon

dispatched him to rural family courts. By 1989, he was 59 years old and had served without relief in provincial family courts for over 12 years. Rather than continue, he quit.

Public critics. Although the Supreme Court and Secretariat apparently did not punish judges merely for joining the Young Jurists' League, they did penalize those who directly and publicly criticized their administrative policies. Take Masamichi Hanada. Appointed in 1957, Hanada had started his career right. He had graduated from the University of Tokyo (the most selective university in the country) and begun his career at the Tokyo District Court (the prized starting assignment). He then did a judicial stint in Japan's northern-most island, and returned to Tokyo by 1963. Nonetheless, in 1971 his career began to come apart. That year, the cabinet and Supreme Court refused to reappoint (for a second 10-year term) a League judge named Yasuaki Miyamoto. To Americans, the resulting fracas sounds more like a university tenure fight than anything judicial: they fired Miyamoto because of his politics, claimed his friends; they fired him because he was slow and mediocre, claimed the others. In any case, Hanada appointed himself the public spokesman on Miyamoto's behalf. He lost his fight, and Miyamoto lost his job.

For his prominence in the Miyamoto dispute, Hanada paid dearly. In 1972 the Secretariat transferred him to a branch office, in 1976 to a family court, and in 1979 back to a branch office. By 1987, he was 56 years old and had spent the last 15 years in branch offices or family courts. Like Fukushima, he quit. His co-principal signatory on a petition to the Court over the Miyamoto affair was Minoru Takeda. In 1972, the Secretariat transferred Takeda from the Tokyo District Court to a branch office. He stayed in branch offices for the next 11 years

To capture the severity with which the Secretariat treated these men, consider . . . what the members of Hanada's class were doing at the time he was working in family courts and branch offices. Of class members still working in 1981, 16 were high court judges, 21 were district court judges, and six held administrative posts. Only two others were ordinary judges in branch offices. By April 1987 when Hanada resigned, of the remaining 43 judges, six were chief judges, 12 were high court judges, 13 were district court judges, three were family court judges, and six held administrative posts. Only two were branch office heads and only one was an ordinary branch office judge. The person who eventually replaced Hanada in one of his branch office posts was a judge 16 years his junior.

Others who protested the Supreme Court's treatment of Miyamoto similarly suffered. Take the four judges who contributed to a 1972 book on the Miyamoto affair called *Security of Status for Judges*. One was Hanada. A second was Katsuhiko Moriya. The year after the book appeared, the Secretariat transferred him to the northern provincial Family Court, and as of 1990 he had spent the last 11 years on family matters, four in a branch office. A third was Tsuneo Suzuki. The year after the book appeared, the Secretariat demoted him from the Tokyo District Court to a branch office. Moriya and Suzuki were both national university graduates (on average, Japanese national universities are more selective than private universities), and both have since spent at least some time on a high court. But the fourth, Masahiro Tanaka, went to a private university and suffered worse. The year after the book appeared, the Secretariat moved him to a branch office. As of 1990, he had stayed in branch offices for the 17 years since.

The campaign cases. Although it does not do so consistently, the Secretariat can also penalize judges for writing politically incorrect opinions. It has done so most readily when the decisions threaten vital LDP positions. The various judges who held the Japanese campaign rules unconstitutional provide a good example. The Public Offices Elections Act drastically restricts the tactics candidates can use. Because incumbents obtain media coverage through their official functions while challengers do not, these restrictions benefit incumbents. Because the LDP has had the most incumbents, they have benefited the LDP.

Section 138(a) of the Elections Act bans door-to-door canvassing. In 1950 the Supreme Court had held a similar ban constitutional, but by the late 1960s people had again started challenging it as a violation of their free-speech rights. In the first of these cases, a 1967 Tokyo District Court decision, the court suggested—gingerly—that §138(a) might be unconstitutional.

The Supreme Court responded almost immediately: §138(a) was indeed constitutional. That did not stop judge Haruhiko Abe. A University of Tokyo graduate who started his career at the Tokyo District Court, Abe was one of the most able members of the League. He was also one of the most outspoken. In 1968, sitting temporarily in a summary court as an assistant judge with less than 5 years' experience, Abe held the canvassing ban flatly unconstitutional. Lest there be any doubt, this was the very ban the Supreme Court had upheld against the same challenge a few months earlier. When his initial 10-year term expired in 1972, observers rumored that the Court would not reappoint him, but not so. It did reappoint him—into oblivion. The Secretariat gave him family law responsibilities for several years, and then moved him to a branch office. By 1990, 35 members of Abe's class had already served one or more terms on a High Court. Abe had been in branch offices since 1979.

Since its 1967 decision, the Supreme Court has held the canvassing ban constitutional at least another seven times. The ban's political importance is obvious and, perhaps for that very reason, some lower court judges persist in fighting it. When they do, they suffer badly. Wholly aside from politics, one would not expect the Secretariat to promote quickly judges who ignore Supreme Court precedent. But politics are not aside—for by all odds the Secretariat punishes more harshly those judges who ignore precedent in these politically controversial cases than it does those who ignore it in more mundane disputes.

One-time League member Tetsurō Sō, for example, held the ban unconstitutional in 1978. As of late 1990, he was still in a branch office. He had spent three of the 13 years since the decision in family court and five in branch offices. Judge Kunio Ogawa held the ban unconstitutional in early 1979, and as of 1990 still had not left branch offices. Only former League member Shigemi Anazawa escaped branch offices for voiding the canvassing ban. He held it unconstitutional in 1980, and spent the years since handling family law cases in various northern provincial courts.

The potential punishment may be clearest with judges like Abe who show the most promise. Take Judge Masato Hirayū, who held the same ban unconstitutional in September 1979. A star University of Tokyo recruit like Abe, he too began his career in the prestigious Tokyo District Court. Although not a formal League member, he had overlapped with Miyamoto at the Tokyo District Court and participated in a study group with him. After holding the ban unconstitutional, Hirayū stayed in a branch office until 1987. He then returned to a district court, but still with family law responsibilities. By the end of 1990, he had spent 11 of his 23 years on the bench in a branch office. [T]hat placed him in the last eight percent of his class. Among his University of Tokyo peers, it placed him at the very bottom. . . .

Toward an Electoral Theory of Judicial Independence

In the United States, political leaders consider ideology in appointing judges, but leave judges once in office alone. That style of judicial independence may be a good thing—but apparently it is essential neither to economic prosperity nor to electoral democracy. Japan is rich, Japan is free, and Japan has had judges that (by many American jurisprudential standards) are not independent. Hence the predictive theoretical puzzle: why do politicians in some electoral democracies (e.g., in the U.S.) leave judges (once appointed) pretty much alone, while others (e.g., in Japan) do not?

The constitutional text does not answer the puzzle. Both the U.S. and the Japanese constitutions promise judges much the same independence—yet notwithstanding the similar texts, the two judicial systems generate radically different results. If the text were the determining factor, American politicians could do pretty much what LDP politicians did in Japan—yet notwithstanding that opportunity, they do not.

Instead, electoral politics may suggest (tentatively, to be sure) the answer: for reasons Rosenbluth and I detail in our book, LDP politicians had much higher odds of staying in power than either Democratic or Republican politicians have had. Rationally expecting to stay in office long, they manipulated the courts; rationally expecting to alternate with each other in office, Republicans and Democrats implicitly agreed to leave their judges (once appointed) alone.

To see why political leaders might make these calculations, take first the LDP. By 1990, it had been in power continuously for 35 years, and could see no viable opposition party in the wings. It had stayed in power by giving Japanese voters largely what they wanted, and could rationally expect very high odds of staying in power in the future (though odds of less than 1.0, as the summer 1993 elections showed ex post). If so, the LDP had strong incentives to try to control the courts. After all, it wanted not just to enact its programs but to implement them. For that, it did not need judges who did as they pleased. It needed judges who did as they were told.

By contrast, take two political parties that alternate in power, and suppose that both are risk-averse. Although D is in power now, it expects to lose power periodically in the future. Although R is out of power, it expects to gain power periodically. In this situation, D and R may rationally adopt what amount to cooperative strategies in an indefinitely repeated game: both parties may agree not to manipulate the courts to their partisan advantage (i.e., will agree to keep courts independent) while in power.

In this world, despite the potential gains in programmatic implementation that accrue from monitoring courts, both D and R (and the voters they represent) may find it advantageous to keep courts independent. The reason derives from the way each may rationally expect the other to reciprocate. If both expect that (a) their returns while out of office from an implicit hands-off-the-courts rule (the cuts in the losses they would otherwise suffer by being out of office) will have a present value greater than (b) their returns to manipulating courts while in office, then both will have an incentive to keep the courts independent. Both will sacrifice some effectiveness in how they implement their programs while in office, but both may earn larger offsetting gains by lessening their losses while out of office.

If all this is true, then judicial independence may largely be an artifact of the electoral market: judicial independence may be relatively less likely where one political party dominates elections, and relatively more likely (though not inevitable) where two parties alternate in power. And if so, then maybe the consultants drafting the constitutional texts to maintain independent courts in the new democracies in Europe and elsewhere are approaching the issue entirely wrong. Maybe the issues do not involve constitutional texts at all. Maybe they just involve elections.

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John O. Haley

Judicial Independence in Japan Revisited*

25 Law in Japan 1, 2, 8–18 (1995)

At issue is whether through cabinet appointment of career judges and Supreme Court justices, the political groups in power are not only able to but actually do effectively determine, if not the outcome of particular cases, at least the ideological directions of judge-made and interpreted legal rules. No one questions the possibility of such control. By lodging the authority to appoint judges and justices with the cabinet, as detailed below, the postwar constitution was intentionally designed to achieve a degree of political accountability. At least for the Americans who contributed to the drafting of the postwar constitution, judicial independence did not mean judicial autonomy. Although individual judges were to be bound by their "conscience" (*yokushin*) as well as the law in each case they adjudicated, direct political control over the appointment of Supreme Court justices and lower court career judges was intentionally provided. . . .

Judicial Autonomy

Despite the attempt to assure a degree of political accountability, Japan's new constitutional structure has operated to ensure greater not less judicial autonomy and political insulation. At least to this extent, [occupation official Charles] Kades' fears of a judicial oligarchy have been realized, albeit without the powers that would have given them cause. Yet the political checks remain and do influence judicial administration. Those who administer the career judiciary are mindful that their autonomy depends on the trust of political leadership in their ability to maintain a corps of effective and competent judges whose decisions are within predictable and generally accepted parameters. Individual judges also function within the shadow of potential political intrusion. They cannot help but be aware that in adjudicating highly publicized, politically sensitive cases, they can be held professionally accountable for their decisions. Nevertheless, direct oversight is exercised by judges themselves. The response of the judiciary, particularly senior judges in charge of its administration, to the potential politicization of the courts in the 1970s, secured the necessary political and arguably public confidence for them to continue to claim immunity from politics. In the end, however, the judiciary, not the political branches of the Japanese government, determines the parameters of responsible judicial behavior. This conclusion is best understood through close examination of the process for appointment and promotion of career judges as well as Supreme Court justices, the career judiciary's influence on the Court, and the mechanisms for judicial socialization. These are among the principal factors that help to explain the cohesion of the judiciary and its autonomy.

Appointment and Promotion

. . . Despite the greater potential for at least indirect influence on the Supreme Court by political leaders and the electorate, it remains in fact one of the most autonomous highest courts in the industrial world. Appointments to the court are formally among Japan's most politically significant. The Chief Justice is nominated by the cabinet with ceremonial appointment by the emperor and is accorded the same rank and salary as the prime minister. The other fourteen justices have equal rank and salary as ministers of state and are appointed by the cabinet. The statutory

requirements for appointment to the Supreme Court are rather broad. Article 41 of the 1947 Court Organization Law provides:

> Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than forty years of age. At least ten of them shall be persons who have held one or two of the positions mentioned in item (1) or (2) for not less than ten years, or one or more of the positions mentioned in the following items for a total period of twenty years or more:
> (1) Chief judge of a high court
> (2) Judge
> (3) Summary court judge
> (4) Public procurator
> (5) Lawyer
> (6) Professor or assistant professor of jurisprudence in a statutorily designated university.

Hence the potential for political appointments is rather great.

In fact, however, since the first justices were selected, rarely if ever have purely political considerations influenced even the appointment of the Chief Justice. In a paper on the administrative control of the Supreme Court's General Secretariat over individual judges, Setsuo Miyazawa notes that the promotion of Justice Kazuto Ishida as Chief Justice in 1969 was the result of the advice to Prime Minister Eisaku Satō by a conservative politician, former Justice Minister Tokutarō Kimura. Although Miyazawa suggests that the recommendation of Ishida over Justice Jirō Tanaka, a former University of Tokyo law professor, was motivated by concerns over a series of liberal decisions, Kimura was, as Miyazawa emphasizes, a long time friend and former colleague of Ishida. In any event, such incidents have been rare certainly since 1969. Who becomes a Supreme Court justice or the Chief Justice has been largely determined by the judges who administer the judiciary. More typical than the Ishida appointment is the *Mainichi Shimbun* Social Affairs Bureau account of the appointment of Ryōhachi Kusaba as Japan's twelfth Chief Justice in February 1990. Two months before the appointment, soon-to-retire Chief Justice Kyōichi Yaguchi visited the official residence of then–Prime Minister Kaifu. The purpose was to inform the Prime Minister of the judiciary's choice for his replacement, a choice made with the participation of the principal administrators of the judicial branch—all career judges themselves. Kaifu did not object. As one official is quoted to have said (translated into idiomatic English): "We wouldn't have the vaguest idea who anyone they might suggest was, and we wouldn't have any way of finding out whether they would be suitable. The Supreme Court people have researched this. We trust their judgment." A similar procedure has been followed in the appointment of every Chief Justice for a quarter of a century. Trust counts.

Prime Minister Kaifu's trust had context. Since 1971 the judiciary has denied promotion and reappointment as full judge to only one assistant judge. That year Assistant Judge Yasuaki Miyamoto was excluded from the list submitted to the cabinet. No reason was given, but the cause was widely acknowledged: Miyamoto's membership in the leftist Seihōkyō (Young Lawyers Association, *Seinen Hōritsuka Kyōkai*), which had been formed in the early 1950s. By 1971 about 230 judges had joined, many during the late 1960s at the height of radical student activity in Japan. The senior judiciary was clearly concerned and began to take a variety of steps to prevent the Seihōkyō influence. Nearly two-thirds of the Legal Training and Research Institute apprentices denied appointment as assistant judges between 1970 and 1976 were Seihōkyō members. Career judges who belonged were subject to discriminatory treatment in court assignments and promotions. Still, denial of reappointment was an extreme measure, and the response to Miyamoto's denial was immediate. Nearly a third of Japan's judiciary protested in one form or another. Articles and books denouncing the case poured forth.

For many the independence of individual judges from the judiciary itself was the issue. In the words of Tohoku University law professor Toshiki Odanaka, "From the perspective of judicial democracy (*minshushugi shihō*) . . . active associations of judges are to be welcomed, for through them democratic movements of various forms and organizations must develop within the courts." And, as Odanaka noted,

judges also enjoy basic civil rights and freedoms. New consideration was given to the ambiguous words of article 76, originating in the American draft of the constitution, that judges were to be "independent in the exercise of their conscience." There was no question, however, that the decisions on appointments, reappointments, and assignments were made by judges, not politicians.

We need to recall first their broader context in evaluating the importance of these events. They occurred in the midst of a decade of global radical student activity. Paris, Berkeley, and Prague no less than Tokyo witnessed student protests against those in authority. Beginning in 1966 students in Tokyo began to occupy university buildings. The general education campus at Kyōto University remained occupied for nearly a decade. Demonstrations were so violent at the University of Tokyo that in 1968, for the first and only time in its history, entrance examinations were cancelled. Consequently, there was no graduating class from the Tōdai law faculty in 1972. . . .

. . . In Japan, the Miyamoto incident had two apparent if somewhat paradoxical consequences. First, it affirmed the trust of conservative political leadership in the judiciary's self-policing mechanisms to prevent ideological shifts leftward. Without belaboring the obvious, prior to 1970 senior judges in Japan, in contrast to Italy, had not lost control over judicial promotions and the attitudes and activities of younger judges. Nor in exercising that control did the Japanese judiciary lose the confidence of either the government or the public. Instead the career judiciary in Japan strengthened its influence on Japan's highest and most political court.

Second, however, the embarrassing outcry it produced among scholars, lawyers and, more importantly, judges themselves made it difficult for any future judicial administrators ever again to deny reappointment and promotion to assistant judges for political reasons. As a result the judiciary as an institution gained both greater political trust and more secure judicial tenure. In any event the stakes were high, particularly with respect to the character of constitutional decisions. This is best understood in terms of the career judiciary's influence on Japan's highest and most political court.

The Career Judiciary's Influence on the Court

All but four of Japan's twelve chief justices have themselves been career judges. Only one lawyer (Fujibayashi), appointed in 1976, followed the next year by the one prosecutor (Okahara), have held the office. Two University of Tokyo law professors (Kotarō Tanaka and Kisaburō Yokota) were appointed back to back as the second and third Chief Justices in 1950 and 1960. The remaining eight were all career judges, five of whom had previously held the position of *Saikōsai jimu sōchō*, the judiciary's highest administrative post.

Similarly, by convention a third of all Supreme Court justices are appointed from the career judiciary, with another third from the practicing bar and the remaining five of the fifteen justices other persons of "attainment in their profession with a knowledge of law." Thus at least five of the fifteen justices at any one time have spent their entire professional lives, usually from their mid-twenties, as judges. Between 1947 and 1992, for example, 107 persons served as justices. Excluding the first appointments in 1947, which included three former Great Court of Cassation justices and one former Councilor of the Administrative Court, of these 107, 35 held a high judicial post at the time of their appointment, and all but one of the 35 were in fact career judges. Four others had begun their professional lives as judges.

Equally significant are the career paths of the justices selected from the judiciary. Of the 35 judges who have been appointed to the Supreme Court, 32 were serving as chief judge of a high court at the time of appointment: 15 from the Tokyo High Court, 10 from the Osaka High Court, 4 from the Nagoya High Court, and 2 from the Fukuoka High Court, with the most recent appointment from the Sapporo High Court. A justiceship is thus the highest rung of a career ladder that has been consistently determined first by the judge's seniors and at the finish by his or her judicial peers, not agencies, political or otherwise, outside of the courts.

The relative lack of ruling party or other political influence on Supreme Court appointments is also indicated by the non-career judge appointees. Since the appointments of the first justices in 1947, 29 lawyers, 10 prosecutors, 9 legal scholars, 4 diplomats and only 5 administrative officials have been appointed. Of the lawyers, a third (10) were bar presidents and 3 were vice presidents at the time of their appointment. In addition, Shunzō Kobayashi, who was serving as Chief Judge of the Tokyo High Court at the time of his appointment, had spent most of his professional life as a practicing attorney, having also served as president of the Second Tokyo Bar Association. The predominance of former bar officials exemplifies the influence of the bar itself, rather than political leaders, on which attorneys are selected to become justices: One of the nine legal scholars and two of the five former administrative officials were also former judges, and one of the legal scholars was a former attorney. Moreover, all of the five former administrative officials were serving in one of Japan's most politically neutral administrative posts as head of the Cabinet Legislation Bureau or its Diet equivalent at the time of appointment. Even in the case of the four diplomats appointed to the Supreme Court, all of whom were former ambassadors who rose through the ranks of the Foreign Affairs Ministry, political considerations appear to have been secondary to a purely bureaucratic concern to reward members who have served well.

One of the most striking features of the composition of Japan's Supreme Court is the age of the justices. Since 1952 only two persons under sixty years of age have ever been appointed to the court, Jirō Tanaka and Ken'ichi Okuno, both of whom were 58. Only one justice was sixty. No one born after 1929 has ever served on Japan's highest court, and all but three of the 108 postwar justices have served less than ten years. Not until 1990 was anyone appointed who received legal education in post-war Japan.

Japan's career judges staff all of Japan's district and high courts as well as the principal administrative offices necessary for the management of the entire judicial branch. In addition, about thirty *chōsakan* (or research judges) are appointed from the senior ranks of the career judiciary to assist the Supreme Court. As a result, the influence of Japan's career judges extends throughout the judicial system from the Supreme Court through the summary courts. No governmental organ in Japan enjoys such extensive autonomy or freedom from political control or influence.

Socialization of the Career Judiciary

This is not to say, however, that judges in Japan have the sort of individual autonomy common in the British and American traditions or even the French civil law tradition. To the contrary, judges in Japan are intentionally denied such independence. Many Japanese scholars, such as Setsuo Miyazawa, criticize this lack. They tend to neglect, however, the benefits of both certainty and uniformity that such independence would preclude.

In order to maintain as much uniformity and certainty in the law as possible, the Japanese judiciary is structured to ensure the greatest possible cohesion and conformity. In the words of former Chief Justice Hattori, although "the Supreme Court is not allowed to order a judge to do or not do something in connection with a case before him upon the pretext of administrative supervision, it may issue general instructions to judges with regard to the disposition of judicial business as a whole." By continual rotation, collegial decisionmaking, seminars, and periodic conferences, particularly among judges of a single district or high court, Japan's judges seek to avoid inconsistency in all aspects of the judicial process from the initial filing of a lawsuit through the final decision on appeal.

The socialization of young assistant judges is given the highest priority. Again in the words of the late Chief Justice Hattori:

> The most important task of the judiciary is the training of younger, inexperienced assistant judges. In addition to the daily training of junior members of a three-judge bench through hearing and trying cases, the training for assistant judges is roughly divided into five programs. The first is a comparatively short introductory course given to assistant judges immediately after their appointment. Its purpose is to provide them with a general idea of their future work and to aid them in preparing for judicial service. The other four training programs are seminar-type programs given in the first, third, fourth, and ninth years after their appointment.

The objective of such training, as explained by the judges in the Legal Training and Research Institute who carry it out, is to ensure the highest degree of competence. The emphasis is technical—to enable soon-to-become full judges who will for the first time be able to decide cases as a single judge to resolve the cases before them appropriately. In-service training sessions for full judges tend to focus on court administration, such as how to deal with an enormous caseload in the most expeditious manner, and on new developments in the law.

Judicial training is more about case management than ideology. The caseload of Japanese judges is staggering by nearly any standard. Without any discretionary appeals, Japan's Supreme Court justices must decide over 4000 cases each year, either en banc or as a petty bench. This means that each justice is generally responsible for reviewing about 1,300 cases annually. Although procedures for summary disposition have been introduced, the number of appeals the court must decide remains a major problem that reduces the quality of its decisions. The caseload for lower court judges is similar. On average Japanese district court judges dispose of over 1500 actions per judge each year, of which about 300 involve litigated lawsuits. No summary judgment procedures exist in Japan. Therefore, all lawsuits filed are either settled or pursued through trial to judgment. And all judgments must include both the judges' findings of fact and application of law. Under such circumstances, judicial management and the efficient disposition of cases are given considerable priority over other matters, including any thought over the appropriate direction of any particular legal doctrine or nationwide uniformity of judgments in like cases. Such issues, along with the social consequences of the courts' interpretation of particular legal rules and principles, are of course considered by judges, but these are rarely more than minor concerns.

Uniformity is not even a stated goal. It is nevertheless a product of the process and structure for judicial training. Intended or not, the emphasis on three year rotation to a wide variety of courts nationwide for assistant judges, and their service on three-judge panels, in combination with periodic training programs prior to reappointment with promotion, above all else represent a process of socialization through which the values, expectations, and underlying assumptions of senior judges are passed down. Younger judges learn—and are intended to absorb—the standards and expectations that will be applied to them for promotion and assignment. Judicial cohesion and uniformity are the result.

Such uniformity is strengthened by the remarkable homogeneity of Japan's career judges. The vast majority are graduates of the law faculties of only four universities—two public and two private—the University of Tokyo, Kyōto University, Chūō University and Waseda University. Among all graduates of the Legal Training and Research Institute appointed as assistant judges between December 1947 and April 1955, over 28 percent were graduates of the University of Tokyo, followed by Kyōto graduates (15%), and Chūō graduates (13%). In fourth place were graduates of Tohoku University (2%), followed closely by Kyushu and Waseda (1.7% each). These percentages have been remarkably consistent for the entire postwar period with only a slight decrease in the number and percentage of Tokyo graduates and corresponding increase in the percentage (but not the number) of Kyōto and Chūō graduates through the early 1960s.

Several conclusions can be drawn from the educational background of Japan's contemporary judiciary. First, in addition to a common socializing experience in the Legal Training and Research Institute, the majority of Japan's judges also share common undergraduate experiences. Although they lived from childhood in various parts of Japan, more than half spent their formative years as university students in metropolitan Tokyo. They were taught and presumably influenced by a handful of elite legal scholars, who also probably graduated from the same universities. Especially in the case of University of Tokyo

graduates, their classmates and closest university friends, both radical and conservative, are most likely to have either become government officials or joined one of Japan's major financial or industrial companies, if they have not also passed the national legal examination and become either a procurator or lawyer. In other words, Japan's judges are members of the small, cohesive economic and political elite that dominates both conservative and radical politics in Japan.

The relative stability of the judiciary is another one of its predominant characteristics. Of the 77 judges appointed in 1960, for example, 45 (58.5%) were on the bench thirty years later in 1990, two serving as summary court judges after having retired. One had reached mandatory retirement age and three were deceased. Of the others who had left the bench before mandatory retirement age, three resigned within the first five years, one to join a law faculty, the other two to enter private practice. Eight resigned after serving twenty-five years as a judge, four to become notaries and four to enter practice. All of the remaining 17 resigned to enter private practice, six having served five to ten years, six, ten to twenty years, and five, twenty to twenty-five years.

The career path of Japanese judges is equally stable. Take, for example, the careers of two judges selected at random from those serving on the Tokyo High Court in 1990. One was born in Tokushima Prefecture on Shikoku in September 1937. A graduate of Chūō University, she passed the national legal examination in September 1962, entered the Legal Training and Research Institute in April 1963, and graduated with the 17th class in 1965. In April of that year she was appointed assistant judge and posted to the Osaka District Court. Three years later she was transferred to the Kanazawa Family Court. And three years later she was assigned to the Ministry of Justice, where she served for seven years (1971–1978). In April 1978 she was transferred to the Urawa Family Court and in 1980 to the Tokyo District Court. A year later she was appointed as a *chōsakan*. In 1984 she returned to the bench as a judge of the Tokyo District Court and was assigned general administrative responsibilities for that court in 1986. In April 1990 she was posted to the Tokyo High Court.

The second judge was also appointed in April 1990 to serve on the Tokyo High Court. Born in Aichi Prefecture in March 1941, he also graduated in the 17th class of the Legal Training and Research Institute and was initially posted to the Tokyo District Court as an assistant judge. Three years later in 1968 he was assigned to the Hachinohe branch of the Aomori District Court. In 1971 he became an instructor at the Institute and three years after that was appointed to the Naha District Court on Okinawa, becoming a full judge in 1975. He too was appointed *chōsakan*, in 1976, and was transferred to an administrative post with the Tokyo High Court in 1977. In 1980 he was transferred to the Tokyo District Court and a year later to the Osaka District Court. In April 1984 he returned to the Tokyo District Court, first to the bench and then from 1986 until his appointment to the Tokyo High Court in general administration.

Conclusion

Evaluation of judicial independence in postwar Japan should be made within the broader comparative context of other civil law systems. To consider any aspect of Japanese law or legal structure solely from an American perspective risks the imposition of uniquely American premises and cultural values on a system organized within a very different legal tradition. Japan's postwar jurisprudence—especially the constitutional rules and principles that define the allocation and scope of law-making and law-enforcing authority—rests on fundamental values broadly shared within the civil law tradition as well as more specific understandings held by Japan's judges regarding their role and their powers.

In Japan these values combine to produce a remarkably cohesive but cautiously conservative judiciary that permits legal change but only at a carefully managed and gradual pace in keeping with the judges' sense of community values and their felt need for a consistent corpus of judicially articulated legal rules and principles. The personal conservatism of senior judges who have dominated the administrative offices of the judiciary need not be questioned. Their particular political values are less significant, however, than the broader collective institutional concerns for freedom from outside direction and the long-term influence of the courts within Japan's governmental structure. That autonomy and influence ultimately rest on public trust. . . .

One conclusion is certain. The Japanese judiciary has in fact maintained a remarkable degree of cohesion and autonomy within the shadow of potential political control. Those who argue to the contrary that politicians in Japan direct the courts and its decisions distort the facts and profoundly mislead.

1969 Beijing-Shanghai-Japan Industrial Exhibition *v.* Japan
(The COCOM Case)

560 *Hanrei jihō* 6
(Tokyo D. Ct. July 8, 1969)

Translated by Charles R. Stevens and Kazunobu Takahashi*

Judgment

The claim of the plaintiff is dismissed. The cost of the suit shall be borne by the plaintiff.

Facts

In November 1968, the plaintiff Association applied to the Minister of International Trade and Industry for approval to export about 3,000 items for display in the 1969 Japanese Industrial Exhibition to be held in Peking and Shanghai, China, from March to June 1969. Pursuant to Article 48 (1) of the Foreign Exchange and Foreign Trade Control Law and Article 1 (6) of the Export Trade Control Order, the Minister adopted a "disapproval disposition" concerning 19 items, the export of which would conflict with the COCOM Agreement.

Dissatisfied with this disposition, the plaintiff Association brought a suit in Tokyo District Court against the Minister of International Trade and Industry (MITI) to set aside the disapproval disposition on the ground that said disposition was illegal because the Minister's discretionary power exercised in this case was unwarranted under said Law and Order. Later, when the Exhibition in Peking was over and the one in Shanghai was cancelled, the plaintiff modified his suit and instituted a suit against the State to demand damages of one million yen (about U.S. $2,800) resulting from the alleged illegal administrative disposition.

Reasons

I. *Undisputed Facts Between the Parties*

The following facts are not in dispute:

1. The plaintiff is an organization with the same title as the Exhibition involved in this case and was in charge of carrying out said exhibition. In 1967, a Japanese Scientific Machinery and Tool Exhibition was held in Tientsin, China, sponsored by the Kokubōsoku [the abbreviation of Kokusai Bōeki Sokushin Kyōkai: the International Trade Promotion Association]. Said Kokubōsoku was an organization estab-

*Reprinted by permission of the translators. The plaintiff was represented by Akio Date, the District Court judge in the *Sunakawa* case.—Eds.

A. *Disputes in Modern Japan*

Steve Lohr

Tokyo Air Crash: Why Japanese Do Not Sue*

New York Times, March 10, 1982

Tokyo, March 9—On the morning of Feb. 9, the skies were clear and the weather balmy when a Japan Air Lines DC-8 plunged into Tokyo Bay 300 yards short of the Haneda Airport runway, killing 24 people. A few days afterward, Yasumoto Takagi, president of Japan Air Lines, embarked on a sojourn of obligation that in Japan is the expected behavior of a top executive whose company is involved in such a tragedy. Mr. Takagi visited the families of most of the crash victims, apologizing profusely and paying homage on his knees before the Buddhist funeral altars in the homes of the bereaved.

The Government is still investigating the crash, but the circumstances could scarcely have been more unusual, and all the evidence so far points to pilot error. Seiji Katagiri, the pilot, had a history of "psychosomatic disorders" and had been urged to see a psychiatrist, raising questions about whether the airline should have allowed him in the cockpit. Mr. Katagiri may face criminal charges.

Still, Japan Air Lines has not yet been sued by any relatives of the passengers who died in the crash and it is unlikely that the company will be sued. "If this had happened in the United States," James Weatherly, a spokesman for Japan Air Lines, said, "we probably would have seen a wave of million-dollar suits. But people don't sue here."

By contrast, 12 suits have been filed thus far since an Air Florida Boeing 737 jet struck a bridge and crashed into the Potomac River on Jan. 13, seconds after taking off from National Airport in Washington, D.C., killing 78 people. "This is a nonadversarial, nonlitigious society," observed Tadashi Yamamoto, director of the Japan Center for International Exchange, a not-for-profit organization in Tokyo. "And I think that is reflected in how a misfortune like this airplane crash is handled."

The reluctance of Japanese to go to court stands in stark contrast with practices in the West, especially in the United States. International comparisons of lawsuits are imprecise. But Government figures show that in 1979 about 160,000 civil suits were filed in Japan, while the comparable total in the United States was several million. There are about half a million lawyers in the United States, compared with just over 10,000 in Japan, which has half the population of the United States.

The lack of litigiousness in Japan is often cited as an economic advantage. The Japanese, it is said, do not spend much time, money or energy suing each other but, instead, concentrate on outproducing other nations. That Japan is a relatively suit-free society is generally attributed to its cohesive culture, with its heritage of shunning open confrontation.

In his recent book, "The Litigious Society," Jethro K. Lieberman, a journalist who is a graduate of Harvard Law School, writes: "Litigiousness is not a legal but a social phenomenon. It is born of a breakdown in community, a breakdown that exacerbates and is exacerbated by the growth of law. But until there is a consensus on fundamental principles, the trust that is essential to a self-ordering community cannot be."

To a remarkable degree, the requisite consensus on fundamental principles exists in Japan. Legal practices and habits also reflect a society's values, according to Carl J. Green, a Washington lawyer and a senior research fellow at the Harvard Law School specializing in the Japanese legal system. In Japan, Mr. Green says, the harmony of community is valued most and people go to court only as a last resort.

The Courtroom as a Forum

In the United States, by contrast, the rights of the individual are given priority and the courtroom is a key forum in which the conflicting claims of individuals are arbitrated. "We would be unhappy with the Japanese system," Mr. Green said.

In Japan, liability settlements are typically decided in out-of-court negotiations. For example, the previous serious accident involving a Japan Air Lines plane was on Sept. 27, 1977, when 33 people were killed in a crash in Kuala Lumpur, Malaysia. In that case no suits were filed. Instead, the airline and families of the victims held private consultations to determine the compensation. These negotiations were handled on a case-by-case basis, with the settlements differing depending on the victim's age, salary and family responsibilities.

At present, and until April 1, there is a liability law applying to plane crashes that sets a maximum of about $140,000 for each victim. Yet Japan Air Lines has indicated that it will not necessarily limit settlements to that level, even though the accident occurred before April. "It's all negotiable," Mr. Weatherly said. "That's the way things work here." However, the negotiations could not begin until Mr. Takagi of Japan Air Lines made his rounds.

Japanese corporations are seen to bear moral as well as legal responsibility for calamities. "If the top man shows this moral responsibility, then the financial negotiations are likely to be handled much more smoothly," said Shōhei Nairō, spokesman for Japan's Foreign Ministry. The Japanese Government owns 40 percent of Japan Air Lines.

New York Times, Mar. 10, 1982. Copyright © 1982 The New York Times Company. Reprinted by permission. [Paragraphs in the original have been consolidated. — Eds.]

Susan Chira

If You Insist on Your Day in Court, You May Wait and Wait and Wait*

New York Times, September 1, 1987

Tokyo, Aug. 31—Hideo Yokochi was 48 years old when he filed suit against a Japanese company whose contaminated cooking oil gave him a liver disorder and a severe skin disease. Now he is 59. After 11 years in court—Mr. Yokochi filed suit in 1976, six years after the first plaintiff in the cooking-oil case went to court—his legal battle has finally ended, not with a decision, but with a settlement. Mr. Yokochi and 1,895 other victims of cooking oil contaminated with PCB's received payments ranging from $20,000 to $30,000, less than half the money they had originally asked for.

But Mr. Yokochi said the financial hardships of pursuing the case persuaded the plaintiffs to settle. Many of those affected by the cooking oil were too sick to work, and some had to go on welfare. Meanwhile, the suit dragged on—at a cost of about $33,000 a month for the action covering all 1,895 plaintiffs.

The cooking-oil case is one of the longest on record, but it is not unusual in Japan for complex lawsuits to take more than 10 years to go through the courts. Japan has become known as a land where people do not sue, obeying a cultural taboo against resorting to the courts. But many here suggest that if Japanese do not sue as much as Americans, it is more because doing so is such an ordeal than out of a cultural embrace of harmony. Trials are long, court fees can be high, and judges often exert pressure to settle.

New York Times, Sept. 1, 1987. Copyright © 1987 by The New York Times Company. Reprinted by permission. [Paragraphs in the original have been consolidated. — Eds.]

'Legal System Is Bankrupt'

Such a system, critics charge, can also hurt less powerful groups in Japanese society—those who do not have enough money to pay for expensive court cases or those without enough political influence to press for changes in Japan's legislature. "Japanese like this image of themselves as a harmonious, nonlitigious society, but it's more a myth than anything else," said Isaac Shapiro, a partner at Skadden, Arps, Slate, Meagher & Flom who grew up in Japan and whose practice includes Japan.

Indeed, more than twice as many lawsuits were filed last year as 10 years ago, suggesting that whatever cultural taboos on litigation that do exist are breaking down, said Nobuyoshi Toshitani, a professor of law at the University of Tokyo. Professor Toshitani argued that many elements in the Japanese legal system discourage lawsuits and promote settlements. "In one word, the Japanese legal system is bankrupt," he said.

The Judges Are Busy

Professor Toshitani says he believes that the Government has a deliberate policy of encouraging conciliation—a policy that has ample historical precedent. In the Tokugawa period, form 1603 to 1867, for example, authorities severely discouraged lawsuits. In the 1920's and 1930's, when the number of lawsuits shot up, the authorities changed laws to require conciliation.

Even now the Government limits the number of lawyers and judges, Professor Toshitani said. Every year, 30,000 aspiring lawyers compete for just 500 places at a Government-run school that certifies lawyers, judges and prosecutors. Overworked judges and lawyers handle such a heavy caseload that trials are often scheduled at the rate of one session a month. "Judges are extremely busy, handling hundreds of cases at one time," said Shigeo Uchida, the chief attorney for the plaintiffs in the contaminated oil case. "Setting up dates for the next session is always difficult. But since this case attracted wide social attention, the tempo was rather fast compared to other cases. There were two sessions in one month, and each was for a full day."

The cooking-oil case took so long partly because there were so many victims and it took time for them to prove that the cooking oil caused their symptoms. But even in routine cases, lawsuits take much longer in Japan than in the United States. In 1985, it took an average of 12.4 months from the time a civil suit was filed in Japan's district court to its final disposition; last year the median length of time for civil suits in the entire United States Federal District Court system was seven months. Japan has 2,810 judges, according to the Supreme Court; the United States, with a population about twice as large, has 18,000 major judges, according to "The American Bench," a directory of judges.

Mining Case Is Settled

A spokesman for Japan's Supreme Court said that he did not believe it was necessary to increase the number of judges, but that officials had been working to try to streamline the process. "Considering the importance of the judge's job, we need to secure people with deep knowledge of the laws," the spokesman said. "So we cannot increase the number of students passing the test too drastically."

For the most part, the longer a lawsuit takes, the more willing both parties are to accede to settlements. Just last month, a settlement was reached in a 15-year-old case in which victims of Japan's worst coal mining disaster filed suit against the Mitsui Mining Company. An explosion in 1963 killed 458 people and many others suffered from carbon monoxide poisoning. The miners first tried to reach an out-of-court settlement, and then a total of 390 people filed suit against the company in 1973. Most accepted a settlement proposed by the court—of just one-eighth of their original demands. . . . "I am tired," one plaintiff told the *Asahi Shimbun* newspaper. "I want the case settled out of court so I can put the whole affair behind me."

Pressures to settle are built into the court system, Professor Toshitani said. Each level of the court has a special conciliation division, and in family court all disputes must be subject first to conciliation before any suits may be filed. Judges often recommend, and preside over, compromise settlements.

Frank K. Upham

*Law and Social Change in Postwar Japan**

30–39, 42–43, 47–48 (1987)

Pollution in Minamata

Minamata is a small city in Kumamoto Prefecture on Kyushu, the southernmost of Japan's four main islands. The surrounding economy is largely dependent on fishing and agriculture, but since 1908 Minamata City itself has been the site of production facilities of the Chisso Corporation, which specialized initially in nitrogen-based chemical fertilizers and later in plastics. The presence of Chisso in the city was both an envied source of employment and financial support for the local citizens, and a frequent source of controversy as conflict between chemical production and commercial fishing developed. Beginning as early as 1926 local fishermen periodically demanded and received compensation for pollution damage to their fisheries, but it was not until the early 1950s that events proved pollution to be causing much more profound damage than a decline in the commercial fishing catch:

> By 1953, ominous evidence appeared in Minamata. Birds seemed to be losing their sense of coordination, often falling from their perches or flying into buildings and trees. Cats, too, were acting oddly. They walked with a strange rolling gait, frequently stumbling over their own legs. Many suddenly went mad, running in circles and foaming at the mouth until they fell—or were thrown—into the sea and drowned. Local fishermen called the derangement "the disease of the dancing cats," and watched nervously as the animals' madness progressed.
>
> Inexorably, the dancing disease spread to humans. By the early 1950's, a number of Minamata fishermen and their families were experiencing the disquieting symptoms of a previously unknown physical disorder. Robust men and women who had formerly enjoyed good health suddenly found their hands trembling so violently they could no longer strike a match. They soon had difficulty thinking clearly, and it became increasingly difficult for them to operate their boats. Numbness that began in the lips and limbs was followed by disturbances in vision, movement, and speech. As the disease progressed, control over all bodily functions diminished. The victims became bedridden, then fell into unconsciousness. Wild fits of thrashing and senseless shouting comprised a later stage, during which many victims' families, to keep the afflicted from injuring themselves or others, resorted to securing them with heavy rope. About forty percent of those stricken died.

Because the symptoms were concentrated in the relatively poor fishing villages on the outskirts of Minamata City, residents of more affluent areas assumed that they were caused by hygienic deficiencies in the afflicted households. Their general reaction was to shun the victims and their families as carriers of a contagious disease. This reaction and the victims' own shame and guilt kept the symptoms from being medically discovered until 1956, and it was another year before probable causation was attributed to the consumption of local fish. But by 1957 the sale of Minamata fish had been banned, and suspicion had begun to focus on Chisso as the likely source of the disease.

In August of 1958 the victims of mercury poisoning, certain of both the cause of their suffering and the culprit, formed the Mutual Assistance Society to negotiate with Chisso, following the pattern of the previous fishery negotiations. Chisso rebuffed the Society's initial efforts, but the identification in 1959 by Kumamoto University researchers of organic mercury from Chisso's effluents as the causal agent had a drastic effect on fishing and brought the diseased patients powerful allies in the form of local fishermen. That August, members of the Minamata City Fishermen's Union demonstrated in front of Chisso's gates demanding compensation, purification of the bay, and pollution abatement. The company responded that, since causation of Minamata disease was "scientifically

ambiguous," they could offer only a minor sum in the form of a solatium or sympathy payment (*mimaikin*) rather than compensation (*hoshōkin*). The fishermen reacted by storming the factory, and when a subsequent meeting brought only an increase in the total offer from ¥3 million (approximately $8,300) to ¥13 million ($36,000), they stormed it again, this time taking the plant manager hostage overnight. This act apparently impressed Chisso sufficiently for it to agree to mediation by a committee consisting of Minamata City's mayor and local delegates to the Kumamoto prefectural assembly.

The mediation committee took only ten days to propose an acceptable settlement whereby Chisso agreed to pay union members a total of ¥35 million ($97,000) immediately and ¥2 million ($5,500) annually thereafter. But adjacent fishermen's unions and the disease sufferers were specifically excluded. When in October and November 1959 Chisso refused to negotiate with the other unions, riots and plant occupations ensued, causing extensive property damage. The response was a second mediation committee, this time appointed by the prefectural governor. The committee's initial charge was only to address the unions' demands, but a widely publicized sit-in at the factory gates resulted in the consideration of the patients' demand for ¥230 million ($640,000, or ¥3 million [$8,300] for each disease victim) as well.

On December 16 the committee announced its recommendation: payment of ¥35 million ($97,000) to the fishermen and ¥74 million ($205,500) to the disease victims. The unions quickly agreed, but the Mutual Assistance Society initially rejected the recommendation as grossly insufficient. Persistent pressure from the mayor and city councilmen, the Japanese tradition of clearing the slate at the end of each year, and the threatened dissolution of the mediation committee were, however, too much for the victims, most of whom were unable to work and faced steadily rising debt, and on December 30 representatives of Chisso and the Society signed the proposed agreement and social peace was declared. As in the previous agreements with the fishermen, this agreement provided for sympathy payments or *mimaikin* rather than compensation. The amounts—¥300,000 ($830) for deaths, annual payments of ¥100,000 ($280) for adults and ¥30,000 ($83) for minors, and ¥20,000 ($55) for funeral expenses—were small even in the context of 1960 Minamata, but the true genius of the agreement from Chisso's point of view was its legal character.

Although the victims' reactions and the government mediation are consistent with the accepted perceptions of traditional Japanese methods of resolving disputes, the content of the agreement resembles the result of legal practice present in most societies. One searches in vain for the paternalism, communal sense of responsibility, and preference for legal ambiguity that stereotypes about Japanese law would lead one to expect. Clauses 4 and 5 clarify respective rights and duties under the agreement beyond peradventure:

> CLAUSE 4: In the future, if Chisso's factory effluents are determined not to be the cause of Minamata disease, the solarium agreement will be dissolved immediately.
> CLAUSE 5: In the future, even if factory effluents are shown to be the cause of the disease, no further demands for compensation will be made. . . .

Although it was not until 1968 that the government formally agreed that organic mercury was the causative agent, few outside of Chisso and the government disputed the role of mercury after 1959. There remained, however, the need both to demonstrate scientifically the precise process of poisoning and to trace the mercury to the Chisso plant. . . . In fact, the government was no more in the dark than anyone else. Secret documents made public in court proceedings more than a decade later revealed that as early as July 1958, the Ministry of Health and Welfare had notified, inter alia, MITI and the Governor of Kumamoto Prefecture that research indicated that Minamata disease was caused by eating fish and shellfish contaminated by Chisso effluents.

Despite this warning from the MHW, the Chief of the Public Procurator's Office for Kumamoto Prefecture repeatedly refused to investigate Chisso. . . . Even after a Kumamoto professor finally isolated organic mercury in samples of Chisso waste water and published his findings at a meeting of the Japanese Association of Hygienists in 1962, the Procurator's Office responded: "We cannot yet decide what to do. We have not been able to do anything so far because we did not know the precise medical cause, but when the medical researchers reach a conclusion, we will have to be very concerned with it, depending on the nature of the results." . . . [F]inally, in June 1969, [a court judgment was entered] against Chisso [in favor of] one faction of the Minamata disease patients.

By 1969 it had been sixteen years since the disease first appeared, thirteen years since its discovery as a discrete set of symptoms, eleven years since the MHW had first secretly identified Chisso as the probable cause, ten years since organic mercury's scientific identification as the causative agent, and seven years since the Kumamoto professors' conclusive demonstration of Chisso as its source. The reasons for this delay are complex; they include the socioeconomic status of the victims, their dispersal in several separate fishing villages along the Minamata coast, the economic and political domination of the area by Chisso, lack of access to legal resources, and a disinclination on the part of many victims to challenge authority, particularly through a lawsuit. . . . I want to note two less obvious factors of particular importance to this inquiry.

The first is legal doctrine. Clauses 4 and 5 of the [earlier] agreement were carefully drafted to discourage legal action by potential plaintiffs and undoubtedly played a role in the delay. Not only Chisso but also the government often referred to the Minamata problem as being settled privately by this agreement. Equally important were the doctrines of tort law—or at least the actors' perceptions of those doctrines—that would cover any litigation. . . . [T]he victims' opponents were quick to discount the possibility of winning a tort suit on the merits because of a lack of what was referred to as "scientific" proof of causation. . . . A second factor in the delay was the legal nature of the settlement process. Central to the creation of the 1959 agreement and its later maintenance was the manipulation of information made possible by the informality of mediation. Both Chisso and the central and prefectural authorities regularly suppressed information whenever it suited their interests. Not only did Chisso deny information requested by researchers, but it was revealed later in the course of the civil litigation that the plant had also ordered the halt of experiments conducted in 1959 by Chisso personnel who had recreated Minamata disease symptoms in cats fed Chisso waste water. The suppression of vital data was greatly facilitated by the informal methods of protest and dispute settlement used by the victims. Had the fisherman and patients relied on more formal channels, the total manipulation of information would have been much more difficult. . . .

Even after the government's formal acknowledgement of Chisso's culpability . . . , most victims remained reluctant [to sue] and when the Ministry of Health and Welfare offered in late 1968 to mediate demands for additional compensation, the majority of patients' families accepted. For some victims, however, the Ministry's conditions—complete discretion in the choice of mediation committee members, little role in the mediation process itself, and a prior agreement to abide by committee recommendations—and bitter memories of the 1959 agreement ruled out further reliance on the government. Of these victims, 138 individuals from 30 families filed suit on June 14, 1969. A third group, many of whom were newly discovered victims or less severely afflicted, rejected both mediation and litigation in favor of direct negotiations with Chisso officials.

The split among the patients was extremely bitter and continues today. The litigation and direct-negotiation groups contemptuously refer to the mediation group, who accepted in 1970 a settlement with maximum awards of ¥2 million ($5,555) with a ¥50,000 ($140) annuity, as the "leave it to others" or "entrustment" group and are in turn condemned for their "selfish" willingness to pursue their own ends without deference to the greater good of other victims and residents of the Minamata area generally. Between the two nonmediation factions, the split concerned both tactics and political affiliations. Lawyers associated with the Japan Communist Party (JCP) dominated the team conducting the litigation, while the direct-

negotiation faction was led by unaffiliated leftist lawyers and activists. The latter were highly critical of the JCP lawyers and the JCP itself for what they saw as the manipulation and exploitation of the victims for partisan political gain. They also were critical of litigation as a tactic, arguing that the court's only remedy—money—was both inadequate to compensate for the physical harm and inappropriate to achieve a psychological and moral resolution to the tragedy. Instead they turned to direct confrontation. The JCP lawyers countered that the perceived extremism and violence of the direct-negotiation group's tactics would discredit the antipollution movement and hurt the litigation. . . .

It seems likely that none of the plaintiffs in any of the Big Four cases sued solely for the money. Nor did they sue to vindicate legal rights; the prevailing notion at the time of suit was that the plaintiffs faced insurmountable doctrinal obstacles . . . . Instead, the suits are better interpreted as desperate, last-ditch efforts to preserve family and community. In the words of one plaintiff: "In general the first problem we had in relation to filing suit was the feeling that 'our lives are already past—we should just endure it.' But when it began to look like the precious land left by our ancestors might be encroached upon and our grandchildren's generation affected, we could no longer endure. 'Now, we must sacrifice ourselves!' became our cry. I think this trial was motivated by that attitude." . . .

Moral indignation is not a uniquely Japanese trait, and the desire for moral justification and retribution is deeply rooted in Western tort law. What is remarkable in this situation is the plaintiffs' innocent faith in the legal system's ability to function as an instrument of moral justice, the apocalyptic and communal vision of litigation, and the total absence of the language of either legal rights or monetary compensation. The concept of a right to compensation or of the defendant's duty to pay does not appear in published discussions of the plaintiffs, and their disavowal of money itself as even a secondary motivation, at least at the time of filing, seems absolutely convincing. As the litigation proceeded and the plaintiffs realized that victory was possible, the amount of the award and how it should be allocated became a divisive issue among the victims, and their motivations grew more complex. Even so, the dominant theme of the post-judgment negotiations over the amount and form of compensation remained moral retribution, and it is hard to interpret the victims' initial motivation as either individual or pecuniary.

To a large extent the lawyers involved shared these views. Although their moral outrage was secondhand and their concern with broad social issues stronger than that of their clients, the lawyers certainly saw themselves as something more than detached legal advocates. To the extent possible, they became one with the victims, sharing their pain and experiencing their humiliation and shame. That personal involvement in the victims' life was necessary because the trial was to be the forum for the baring of the victims' suffering and for the moral condemnation of the defendants. Without experiencing that suffering the lawyers could not impart it to the court, and without the public drama of that presentation the litigation would degenerate into legal formalities and fail in one of its main missions, facilitating and strengthening the antipollution movement. . . .

The [Minamata] plaintiffs' total victory [in Kumamoto District Court] broke the impasse. On the same day, members of the litigation faction traveled to Tokyo to join Kawamoto's followers in pressing Chisso for compensation beyond that given by the District Court and a personal apology by [Chisso President] Shimada. The judicial award was the largest in Japanese history, with individual awards of up to ¥18 million (approximately $60,000), but for the patients it was not enough. With the legal victory behind them, they pressed for annuities, medical expenses, and the guarantee that all patients, whenever certified and of whatever faction, would receive equal treatment. After five hours of negotiations on March 22, Shimada pledged that all damages would be compensated in good faith. But it was not until he had knelt before the victims and apologized that they accepted his promise.

Thereafter detailed and vigorous negotiations continued until July 9, when a final agreement was reached and signed by all factions of the victims. It went well beyond the tort award in providing for lifetime annuities to be adjusted biannually to the cost of living, a ¥300-million fund (approximately $1 million) to provide medical and economic assistance to victims, and promises by Chisso to search for and compensate unidentified victims and to cooperate with local officials in the cleanup of Minamata Bay. The agreement also went beyond the judicial settlement by including a full and public apology by Chisso. . . .

Three days later the tents pitched by victims outside both Chisso's Minamata plant and its Tokyo headquarters came down. After 18 months this chapter in the history of Minamata disease was over.

B. *Competing Explanations*

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. . . There are several possible explanations of [the] relative lack of litigation [in Japan]. On the one hand, litigation takes time . . . and is expensive but this seems to be true in almost all countries having modern judicial systems and can hardly account for the specifically strong inclination of the Japanese public to avoid judicial procedures. Or one might point out that monetary compensation awarded by the courts for damage due to personal injury or death in tragic accidents is usually extremely small. . . . A more decisive factor is to be found in the social-cultural background of the problem. Traditionally, the Japanese people prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants. Furthermore, judicial decisions emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solutions.

This attitude is presumably related to the nature of the traditional social groups in Japan, which may be epitomized by two characteristics. First, they are hierarchical in the sense that social status is differentiated in terms of deference and authority. Not only the village community and the family, but even contractual relationships have customarily been hierarchical. 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). At the same time, however, the status of the master or employer is patriarchal and not despotic; in other words, he is supposed not only to dominate but also to patronize and therefore partially to consent to the requests of his servant or employee. Consequently, even though their social roles are defined in one way or other, the role definition is precarious and each man's role is contingent on that of the other. Obvi-

ously this characteristic is incompatible with judicial decisions based on fixed universalistic standards.

Second, in traditional social groups relationships between people of equal status have also been to a great extent "particularistic" and at the same time "functionally diffuse." For instance, the relationship between members of the same village community who are equal in social status is supposed to be "intimate"; their social roles are defined in general and very flexible terms so that they can be modified whenever circumstances dictate. In direct proportion with the degree to which they are dependent on or intimate with each other, the role definition of each is contingent upon that of the other. Once again, role definition with fixed universalistic standards does not fit such a relationship.

In short, this definition of social roles can be, and commonly is, characterized by the term "harmony." There is a strong expectation that a dispute should not and will not arise; even when one does occur, it is to be solved by mutual understanding. Thus there is no *raison d'être* for the majority rule that is so widespread in other modern societies; instead the principle of rule by consensus prevails.

It is obvious that a judicial decision does not fit and even endangers relationships. When people are socially organized in small groups and when subordination of individual desires in favor of group agreement is idealized, the group's stability and the security of individual members are threatened by attempts to regulate conduct by universalistic standards. . . . Furthermore, the litigious process, in which both parties seek to justify their position by objective standards, and the emergence of a judicial decision based thereon tend to convert situational interests into firmly consolidated and independent ones. Because of the resulting disorganization of traditional social groups, resort to litigation has been condemned as morally wrong, subversive, and rebellious.

On the other hand, there were, even in the traditional culture, disputes in which no such social relationship was involved. First, disputes arising outside of harmonious social groups, namely between such social groups, have a completely different background. Such disputes arise, so to speak, in a social vacuum. . . .

A second class of disputes, those between a usurer and his debtor, lacks from the very beginning a harmonious relationship comparable to that normally found between lessor and lessee or master and servant. Usurers never fail to be armed not only with nonlegal means with which to enforce the factual power situation but also with means founded upon law that enable them to resort to the courts. Since the Meiji era (1867–1912), long before industrialization was under way, official statistics have shown a surprisingly large number of cases involving claims of this sort. . . .

In short, a wide discrepancy has existed between state law and the judicial system, on the one hand, and operative social behavior, on the other. Bearing this in mind, we can understand the popularity and function of mediation procedure as an extra-judicial informal means of dispute resolution in Japan.

This attitude is also reflected in the customary characteristics of contracts. Parties to a contractual agreement are not expected to become involved in any serious differences in the future. Whenever they enter such a relationship, they are supposed to be friendly enough not to consider eventual disputes, much less preparation for a lawsuit. Parties do not, or at least pretend that they do not, care about an instrument or other kinds of written evidence and rather hesitate to ask for any kind of written document, fearing that such a request might impair the amicable inclination of the other party. Even when written documents are drawn up, they do not provide machinery for settling disputes. The contracting parties occasionally insert clauses providing that in case of dispute the parties "may" (instead of "must") negotiate with each other.

. . . The contractual relationship in Japan is by nature quite precarious and cannot be sustained by legal sanctions. If the disputants seek to continue their relationship, some agreement is worked out, even if this means, in rare cases, that one party accepts the status quo imposed by the other. This rarely happens, however, because business and social custom forbids one to terminate a harmonious social tie by selfishly insisting on one's own interests. Usually it is clear that the unilaterally imposed solution is totally inadmissible when no agreement can be reached, and the wronged party is

then supported by the moral opinion of the community, leaving the contract breaker in an untenable position. Thus what seems at first glance to be an absurd and serious deficiency in the contractual concept is in actuality only a reflection of the normal way of conducting business transactions. . . .

Finally, the specific social attitudes toward disputes are reflected in the judicial process. Japanese not only hesitate to resort to a lawsuit but are also quite ready to settle an action already instituted through conciliatory processes during the course of litigation. With this inclination in the background, judges also are likely to hesitate, or at least not seek, to expedite judicial decision, preferring instead to reconcile the litigant parties . . . .

The prevailing forms of settling disputes in Japan are the extra-judicial means of reconcilement and conciliation. By *reconcilement* is meant 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. As stated above, social groups or contractual relationships of the traditional nature presuppose situational changes depending on their members' needs and demands and on the existing power balance; the process of conferring with each other permits this adjustment. Particularly in a patriarchal relationship the superior (*oyabun*) who has the status of a patriarch is expected to exercise his power for the best interests of his inferior (*kobun*), and consequently his decision is, in principle, more or less accepted as the basis for reconcilement even though the decision might in reality be imposed on the inferior. Reconcilement is the basic form of dispute resolution in the traditional culture of Japan. Conciliation, a modified form of reconcilement, is reconcilement through a third person.

In the legal systems of Western countries as well as of Japan, dispute resolution through a third person as intermediary includes two categories: mediation and arbitration. In mediation a third party offers his good offices to help the others reach an agreement; the mediator offers suggestions which have no binding force. In contrast, a third party acting as arbitrator renders a decision on the merits of the dispute. In the traditional culture of Japan, however, mediation and arbitration have not been differentiated; in principle, the third person who intervenes to settle a dispute, the go-between, is supposed to be a man of higher status than the disputants. When such a person suggests conditions for reconcilement, his prestige and authority ordinarily are sufficient to persuade the two parties to accept the settlement. Consequently, in the case of mediation also, the conditions for reconcilement which he suggests are in a sense imposed, and the difference between mediation and arbitration is nothing but a question of the degree of the go-between's power. Generally speaking, the higher the prestige and the authority of the go-between, the stronger is the actual influence on the parties in dispute, and in the same proportion conciliation takes on the coloration of arbitration or of mediation. The settlement of a dispute aims to maintain, restore, or create a harmonious "particularistic" relationship, and for that purpose not only mediation but also arbitration must avoid the principles implicit in a judicial settlement: the go-between should not make any clear-cut decision on who is right or wrong or inquire into the existence and scope of the rights of the parties. Consequently the principle of *kenka ryō-seibai* (both disputants are to be punished) is applied in both mediation and arbitration.