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Ichiro Kitamura

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The Judiciary in Contemporary Society: Japan

Ichiro Kitamura*

I. INTRODUCTION

The judicial system in modern Japan was founded one hundred years ago under the terms of an Act of February 10, 1890.¹ In fact, after the fall of the shogunate in 1867, the Meiji government began appointing judges for criminal matters, establishing the French-type professions of lawyer and of public prosecutor in 1872. In 1875, a Supreme Court of Justice was established, faithfully copied from the French Court of Cassation. With the advice of a French professor, Gustave Boissonade de Fontarabie, during a twenty-year residency, the court system and a Code of Criminal Investigation were established in 1880. This was a faithful, literal reproduction of the system existing in France and comprised magistrates' courts, courts of first instance, appellate courts, and the Supreme Court of Justice.

Following the promulgation of the 1889 Constitution, the judicial institution's form was finally established in 1890 with district courts, local courts, appellate courts, and the Supreme Court of Justice. At the same time, the Administrative Court was created at the suggestion of a Prussian publicist, Rudolf von Gneist, to ensure the independence of the administration vis-à-vis the judicial authorities. The Code of Criminal Investigation was recast to become the Code of Criminal Procedure of 1890, while civil procedure came to be governed by a code drawn up at the initiative of another Prussian named Techow. Initially established along essentially French lines in the early years of the Meiji era, the judicial system was then fashioned under the predominant influence of German doctrine for more than half a century.

At the end of the Second World War, however, the Americans called on Japanese leaders to radically change the Constitution (1946), family legislation (1947), labor legislation (1946, 1947, and 1949), the Code of Criminal Procedure (1948), and, especially, the organization of

* Professor of French Law, University of Tokyo; Visiting Professor (*professeur invité*), Panthéon-Assas University of Paris II (1992-93). This article is translated from French.

¹ Cf. HÔGAKU KYÔSHITSU, No. 121, October 1990, (special issue on the hundredth anniversary of the judicial institution). See generally YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW (A.H. Angelo trans., 1976); HEDEO TANAKA, THE JAPANESE LEGAL SYSTEM (1976); HIROSHI ODA, JAPANESE LAW (1992).

the courts. Accordingly, a new Supreme Court was established with the power to monitor the constitutionality of laws and exercise independent administrative control over the courts. The public prosecutor's office, organized separately under the authority of the Minister of Legal Affairs, held the main responsibility for investigation and exclusively supervised prosecution and pre-trial proceedings. The *action civile* (action of a plaintiff claiming damages caused by an agent of the crime, which can be examined jointly in his criminal case) was abolished. Criticized in the pre-war years as over-protective toward administrative authorities, the Administrative Court was also abolished. On the other hand, family courts were introduced as the only courts of special jurisdiction, with competence over family and juvenile matters.

This brief outline of one-hundred years of judicial history might well inspire two comments on the part of scholars versed in comparative law.² First, from the outset, Western institutions were not copied faithfully: the Meiji leaders singled out the hierarchic and bureaucratic features (not counting the courts of special jurisdiction typical of the French system) and established the Supreme Court purely and simply as a court of third instance.

Furthermore, all the gaps in this positive mechanism were filled solely by Japanese inputs as the complex process of incorporating Franco-Germano-American ingredients took place. Thus, the public prosecutor's office, founded *ex nihilo* in 1872, was hailed as the cornerstone of an inquisitorial system of law enforcement. Today's lawyer (*Bengoshi*) is not always free from the effects of the reputation earned by his early predecessor, the *Daigen-nin*, who was then regarded as a sophist. The scrivener (*Daisho-nin*) has disappeared from the courts, and has become a kind of neighborhood legal adviser, known since 1935 as the *Shihô-shoshi* (judicial scriveners). The "characteristic features of Japan" regarding procedural operations are also noted by commentators on the occasion of institutional anniversaries, discussions with a view to reforms or international exchanges, and the rise of Japanese studies.³

² Akira Mikazuki, *The Value of Research into French Civil Procedure* (in Japanese), 78 HÔGAKU-KYÔKAI-ZASSHI 315 (1961), reprinted in 2 MINJI-SOSHÔ-HÔ-KENKYÛ 287.

³ For civil procedure, see *id.* For criminal procedure, see FUMIO AOYAGI, JAPANESE CRIMINAL PROCEDURE FROM THE STANDPOINT OF THE NATIONAL CHARACTER (in Japanese) (1970); CRIMES AND PUNISHMENTS OF THE JAPANESE (in Japanese) (1980); Yoshifusa Nakayama et al., *The Characteristics of Japanese Criminal Justice From the Point of View of the Practitioners* (in Japanese), in CRIMINAL PROCEDURE (in Japanese) 1-37 (1988). Ryûichi Hirano, *Analysis of the Present Criminal Procedure* (in Japanese), 4 MÉLANGES SHIGEMITSU DANDO 407-423 (1985); Kôya Matsuo, *Criminal Procedure* (in Japanese), 15 KÔBUNDÔ (1979); Makoto Mitsui, *The Thirtieth Anniversary of the Code of Criminal Procedure and Justice Handed Down by the Public Prosecutor* (in Japanese), 7 HANTA 37-40 *Theory and Practice of Criminal Procedure*; (1980)

In view of the complexity of the material suggested by the reporter general for the theme "Contemporary Problems of the Judiciary," focus will center on doctrinal aspects rather than organizational aspects of the judiciary and shall review judicial practice features in this changing society over the past thirty to forty years. Major trends will be highlighted in the present-day Japanese legal system with reference to court practice.

Viewed from this perspective, even if it is largely true that the Japanese try to avoid resorting to legal proceedings (even judges share this tendency to some extent, which is sometimes worrying and regrettable), it should not be forgotten that they evince another tendency, opposite in appearance, namely, extreme subtlety in legal reasoning. This has led to what has been described by some as "precision justice" (*seimitsu-shihô*).⁴ After considering this aspect, the Japanese tendency for abstention will be reviewed, which could be termed "non-justice," to borrow from Carbonnier and his expression of "non-law."⁵

II. PRECISION JUSTICE

The term "precision justice" has been used with reference to criminal cases to denote prosecutor tendency to actively investigate. Proceedings are instituted on a precise and strict basis, resulting in a conviction rate of 99.9%. However, these strictness requirements also apply to judges in civil cases with regard to the distribution of the burden of proof between the parties.

A. Precision Justice in Criminal Cases

It is a well-known fact that security is highly assured in Japan. According to an estimate made by one official of the central administration of justice, four or five times fewer offenses are committed in Japan than in Western countries (in 1985, per 100,000 persons, there were 1,328 cases in Japan as against 6,909 in former West Germany, 6,885 in the United Kingdom, 6,500 in France, and 5,207 in the United States). The percentage of arrests is 64.2% as against 47.2% in Germany, 40.1% in France, 35.4% in England, and 20.9% in the United States. Out of 3,371,519 suspects in 1986, 73.4% were referred to trial courts, 17.5% to family courts, and 9.1% were exempted from prosecution by the

Hiroshi Tamiya, *The Characteristic Japanese Features of Criminal Procedure* (in Japanese), 7 HANTA 8-11 *Theory and Practice of Criminal Procedure* (in Japanese) (special issue) (1980). See also the special issues published on the occasion of the fortieth anniversary of the Code of Criminal Procedure, JURISUTO, No. 930 (1989); 61 HÔRITSU-JIHÔ, No. 10 (1989).

⁴ Matsuo, *supra* note 3.

⁵ Jean Carbonnier, *L'hypothèse du Non-droit*, in FLEXIBLE DROIT 24 (5th ed. 1983).

measure called "suspension of prosecution" taken by public prosecutors. Before district courts (ordinary first instance), 92.4% of the 65,553 persons accused were tried within six months in 1985. Finally, in the same year, the percentage of total acquittals was but 0.14% out of 81,093 accused persons tried by courts of first instance.⁶

Thus, in 1985, out of 2,493,721 accused persons brought to trial on miscellaneous charges, the conviction rate was 99.88%, leaving only 117 substantive acquittals and 2,788 acquittals on various procedural grounds (inadmissibility, dismissal, etc.), while in 1989 the rate was even higher, rising to 99.91% (out of 1,265,998 accused persons, of whom 131 were declared not guilty and 1,063 were acquitted on procedural grounds)!⁷ The numbers evidence "precision justice" or "justice ensured or virtually handed down by the public prosecutor," who is no longer simply a favored party, but "king" in the matters of criminal proceedings.⁸

Japanese criminal proceedings center on the investigation phase, a true inquisitorial procedure left to public prosecutor and police initiative. The substance of criminal proceedings depends on the "satisfactory" outcome of their investigations.

As the basic instrument of criminal investigation, the investigating police have considerable and wide-ranging powers of coercion and examination, while being subject to strict legal and judicial control. Although in principle the police do not have the power to constrain suspects whom they are investigating, they can question them subject to the suspects' right to remain silent, and the statements thus taken may be used as evidence.⁹ Once arrested, the period of detention is three days under the authority of the police and then, with judicial authorization, a maximum of twenty days under prosecutor authority.¹⁰ Most of the time suspects are held during this period in a place of detention at the police station, known as a "substitute prison" (*Daiyô-kangoku*). Suspects in detention cannot refuse the summons to present themselves for questioning by an officer of the investigating police or by a public prosecutor.¹¹ Often the questioning is repeated day and night for twenty-three days. Many police procedures are used without definite foundation in statutory law or specific agreement by those concerned, but "lawfulness"

⁶ *White Paper on Criminality* (in Japanese) 22-25 (National Institute of Legal Affairs, 1990).

⁷ *Id.* at 117.

⁸ As described by a Philippino public prosecutor quoted in Kunihiro Horiuchi, *Report of an International Course at the Asian Institute of Economics* (in Japanese), KENSHÔ, No. 301, at 25 (1973).

⁹ KEISOHÔ (Code of Criminal Procedure) arts. 197, 198.

¹⁰ *Id.* arts. 205, 208.

¹¹ *Id.* art. 198.

is generally admitted by case law.¹²

The public prosecutor, actively involved in the investigation "in case of need," can conduct it independently without the police.¹³ By making the most of his discretionary power as to the desirability of proceedings,¹⁴ the prosecutor nearly always anticipates the decision that would be rendered by the court. This is because the charges against the suspect must be sufficiently certain for actual conviction. Moreover, suspects consider it more serious and damaging to be accused before a court than to be questioned and even held by the police; they regard a verdict of acquittal to be an admission of the investigators' fault. Indeed, cases sometimes arise in which a person convicted at first instance, but acquitted on appeal or on judicial review, obtains compensation for "wrongful" prosecution.¹⁵

A further basic principle of criminal proceedings concerns the paramount importance assigned to a confession. A detailed account with an explanation of the motives for the act in question must be included, along with personal relations between the antagonists and underlying facts to eliminate any chance of contradiction by the defendants during the public hearing, where the deposition has the value of evidence. Police officers deploy all their skills to obtain every relevant fact from the suspects. Their main goal is to instill a kind of psychological attachment, through a series of concentrated contacts and questionings that may include the use of violent methods.¹⁶

¹² 23 Keishû (Criminal Law Reports), No. 12, at 1625 (Supreme Court, December 24, 1969) (concerning the taking of individual photos of demonstrators in the street); 32 Keishû (Crim. Bull.), No. 4, at 670 (June 20, 1978) (body search); 34 Keishû (Crim. Bull.), No. 5, at 272 (September 22, 1980) (car search); HANJI, No. 1051, at 162 (Matsue Court, February 2, 1982) (clandestine recording). Cf. 37 Kôsai-keishû (Criminal Law Reports of High Court Cases), No. 1, at 98, (Osaka High Court, April 19, 1984) (concerning the arrest of suspects for very minor offenses in order to question them regarding major offenses).

¹³ KEISOHÔ art. 191; this occurs in practice in cases of corruption, economic offenses, violations of electoral law, etc. Noboru Matsuda & Wazaaki Ishikawa, *Talking About the Special Investigation Division of the Tokyo District Public Prosecutor's Office* (in Japanese), HÔGAKU-KYÔSHITSU, No. 110, at 6-18 (November 1989). According to Mr. Matsuda, director of that division at the time, it handles more than 1,500 cases a year, approximately 10 percent of which lead to legal proceedings.

¹⁴ KEISOHÔ art. 248. It should be noted that there is no longer any procedure for initiating public action through a civil action. At most, there exists a board responsible for reviewing public prosecutor's office activities (*kensatsu-shinsakai* or Committee for the Inquest of Prosecution) under district court jurisdiction. Citizens, chosen by drawing lots, review the merits of the decision to close a case taken by the public prosecutor and communicate to him their findings (but without mandatory powers).

¹⁵ Hirano, *supra* note 3, at 408-409.

¹⁶ See Ichiro Kitamura, *Une Esquisse Psychanalytique de l'Homme Juridique au Japon*, REV. INT. DR. COMP. 805 (1987) reprinted in *ÉTUDES DE DROIT JAPONAIS* 39 (Société de Législation

It is rare for judges to refuse to deliver arrest warrants (rate of refusal: 0.45% in 1984); similarly, they are reluctant to order the release of suspects in cases where no confession is made or complete silence is observed (release rate: 27.3%). The amount of bail demanded is considerable (over 1,000,000 yen: 62.2%; under 500,000 yen: 14.3%).¹⁷

In the face of this investigator "perfectionism," backed by judges, it is not surprising that many commentators criticize the insufficient guarantee of due process and the risk of violations of the rights and freedoms of suspects. What is a matter of particular concern is that lawyer's assistance is very limited or indeed almost precluded during the phase of investigations by the police and the prosecutor's office. Defense counsel is in fact officially assigned only after legal proceedings are instituted and not during the suspect's detention; even if he has already appointed his lawyer, the public prosecutor (so it is claimed by lawyers) normally will agree to two attorney visits only twice for every ten days of detention, with one further visit in the event of a ten-day extension, and only fifteen minutes are allowed each time.¹⁸

Another major problem lies in the practice of "justice based on written statement" (*Chôshosaiban*). Such statements, taken during the investigation, are read during trial with the consent of the defendant, who otherwise would have difficulty gaining access to the prosecutor's evidence. The judge examines these statements in his office, noting facts and reaching conclusions. Without being held on a continual, sustained basis, trials become in fact a ritual for presenting evidence and verifying the contents of the file: the trial is not considered to be a suitable place for discovering the truth.¹⁹

The conviction rate of 99.9% suggests that judicial review does no

Comparée, 1989).

¹⁷ Masao Ohkawa, *Overview of Criminal Justice in Dire Straits* (in Japanese), 38 J. JAPAN B. ASS'N (in Japanese) 41, tbls. 11-13 (1987).

¹⁸ Masao Ohno, *Round Table: The Real Situation Regarding Criminal Justice* (in Japanese), 38 J. JAPAN B. ASS'N 10-11. Compare the curious logic in a judgment of the High Court:

Although it should be said to be illegal for an official from the department responsible for the investigation not to have promptly given a date and hour in response to a request for a visit by the counsel of the suspect (prisoner), while forbidding visits as a matter of principle and making them subject to authorization, it cannot be said to be illegal for an officer to refuse the request for a visit on the grounds that the official has not reached a decision, considering that the officer was in the process of questioning the suspect and that he was not personally in a position to decide on the visit.

32 Minshû (Civil Law Reports), No. 5, at 820 (July 10, 1978).

¹⁹ Hirano, *supra* note 3, at 422.

more than verify investigative results. This situation is especially paradoxical because the system of prosecution was introduced under the present 1948 Code, with the very object of remedying the shortcomings of "justice handed down by the public prosecutor," a situation more characteristic before the reform.

Actually, a series of appeals for judicial review have recently evidenced abuses and errors sometimes resulting from the humiliating methods employed by investigators and the small degree of control exercised by judges. Following a major change in judicial practice, and in contrast to the previous negative attitude toward appeals,²⁰ a certain number of convicted persons were allowed to benefit from judicial review; four were finally found innocent after suffering for years under death sentences.²¹ Hence commentators are now consumed with discussions on the prevention of judicial errors, and the system for obtaining and using confessions.

In the final analysis, this "precision justice" fueled by the perfectionistic zeal of investigators means that "courts in Japan are places where judges check that the defendant is truly guilty" and that "indeed courts of first instance are really no more than appeals courts giving a judgment on the decisions of the public prosecutor."²² For this reason, since the role of the judge is thus nearly eclipsed, a shared concern was expressed by an eminent specialist in criminal law, Mr. Hirano, who states that "the present law of criminal procedure seems rather abnormal and indeed pathological in comparison with what exists in Europe and the United States," concluding that "our criminal justice is quite hopeless."²³

Then again, there is another twofold phenomenon, which is probably a symptom of a critical attitude of the same kind. Lawyers are no longer interested in criminal cases and young people no longer aspire to work in the public prosecutor's office. Among the graduates of the Legal Training Institute (national center which provides training for judges, public prosecutors, and lawyers), only 28 out of approximately 500 went into the public prosecutor's office in 1990.²⁴

Additionally, deep cultural roots perpetuate the naive outlook that Japanese citizens are "subjects of a police state." In everyday life, the

²⁰ *In re Shiratori*, 29 Keishû (Crim. Bull.) No. 5, at 177 (High Court, May 20, 1975).

²¹ Case of Menda (accused in 1948 and set aside on review in 1983); Case of Zaitagawa (1950-1984); Case of Matsuyama (1950-1984); Case of Shimada (1954-1989).

²² Hirano, *supra* note 3, at 407, 409.

²³ *Id.* at 407, 423.

²⁴ Hiroshi Tamiya, *Problems of Criminal Justice* (in Japanese), HÔGAKU-KYÔSHITSU, No. 121, at 99-100 (1990).

Japanese are surrounded by a network of police stations which ensure the permanent policing of each city district (called *hashutsujo* or *kôban*) and each village settlement (*chûzaisho*), in addition to the offices of police commissioners.²⁵ Each police officer assigned to these stations has a regular "beat" and occasionally goes from door-to-door for the purpose of taking census. This practice, known as *junkai-renraku* (communication patrol), is well-established, but not exactly founded in law, except perhaps in some ancient circular, and is not challenged, even though it is questionable whether it conforms with individual freedoms.

In addition, the immemorial custom by which old village folk faithfully submitted to the authorities and their gentle authoritarianism, as well as distrust toward "outsiders,"²⁶ is kept alive by lifelong education provided through television. Every day, programs are broadcast on a number of channels; policemen are depicted as heroes, whether contemporary, samurai, or cowboy.²⁷ Also, the mass media, in the name of freedom of information and under the title of "A Leader of Society" (*shakai no bokutaku*), sometimes concern themselves excessively with "pre-preliminary" investigation into secret offenses, inciting the police to action. Furthermore, the two last-mentioned phenomena occasionally combine into a sensational event when, for example, television covers a scene in which the police are about to arrest burglars holding hostages and, immediately after the arrest, interviews the police commissioner who takes on the air of a victorious general. The fear of evil prevails over the noble demands of freedom, on the side of both the public prosecutor's office and ordinary people. Finally, although somewhat overshadowed for criminal matters by the above-mentioned phenomena, judges attempt to act as proponents of legal theory in civil matters.

B. Precision Justice in Civil Cases

For some thirty years, the faculty of the Legal Training Institute have been expressly proposing a new method for interpreting the Civil Code. These proposals have recently become the subject of a lively debate among commentators.

Referred to as the "theory of presupposed ultimate facts" (*Yôken-*

²⁵ DAVID H. BAYLEY, *FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES* (1976); WALTER L. AMES, *POLICE AND COMMUNITY IN JAPAN* (1981); MASAYUKI MURAYAMA, *RESEARCH ON THE PATROL POLICE* (in Japanese) (1990).

²⁶ See Kitamura, *supra* note 16.

²⁷ However, as programs like *Kojak* or *The Special Brigade* are in greater demand than *The Adventures of Sherlock Holmes*, television viewers seem less interested in the typically English fascination with discovering the tricks used by a wrongdoer than in the actual fact "of helping good citizens and frightening off crooks" (*Kanzen-chôaku*).

jijitsu-ron),²⁸ it is based essentially on a procedural approach to the burden of persuasion. Civil judges should know which facts must be proved, by which party and what to do in case of failure to prove. Accordingly, advocates of this method propose to distinguish, from among the legal events prescribed as being the cause of a given effect, those facts that the plaintiff or defendant must rely on and establish. They call these facts *Yōken-jijitsu* (presupposed ultimate facts). However, these two burdens of allegation and of proof are similar in their view, since in every case a party, without alleging and proving the presupposed ultimate facts that are required, does not obtain the legal effect that he seeks. Hence, in each text stipulated in the Civil Code, facts of positive presupposition relied on by the plaintiff and facts of negative presupposition raised in the defendant's rebuttal must be distinguished precisely, while reconsidering the eventualities designed to produce a legal effect. Judges are unhappy with scholarly treatises on civil law which neglect to draw this strict distinction. As a result, the judges give a systematic character to their analysis by adding this new element of interpretation to the traditional method in order to extract a code of "judicial norms" from the Civil Code.²⁹

The point is, that, in connection with a particular fact referred to in provisions of the law, sometimes doubt inheres as to whether it should be interpreted literally as a positive presupposition generating the effect specified by the legislature. If not, judges should take into consideration the non-existence of the fact in question or the existence of a fact adverse to it, which should be considered as a negative presupposition preventing the effect concerned from being produced. Similarly, there are cases where it is necessary to read into the text a presupposition not expressly stipulated or where there is no provision made by law.

In practice, judges assert that in the example of an action for delivery of an object that has been sold, the purchaser is not required to establish the non-existence of a mistake committed by the seller, since the mistake, if there is a mistake, must be proven by the latter for the very purpose of rejecting the claim. They, accordingly, assume as a

²⁸ PRESUPPOSED ULTIMATE FACTS IN CIVIL PROCEEDINGS (in Japanese) (Legal Training Institute, 1985; enlarged ed. 1989). THE BURDEN OF PROOF FOR PRESUPPOSED ULTIMATE FACTS IN THE FIELD OF LAW OF OBLIGATIONS IN GENERAL (in Japanese) 385 (Takuji Kurata ed., 1986). See also Shigeo Itoh, *Presupposed Ultimate Facts and Substantive Law* (in Japanese), JURISUTO, No. 869, at 14-30 (1986); JURISUTO, No. 881, at 86-97 (1987); JURISUTO, No. 882, at 56 (1987). Shigeo Itoh & Yūji Hirate, *Some Practical Reviews Conducted by the Way of Theory of Presupposed Ultimate Facts* (in Japanese), JURISUTO, No. 869, at 31-39.

²⁹ PRESUPPOSED ULTIMATE FACTS IN CIVIL PROCEEDINGS, *supra* note 28, at 1. See also Itoh & Hirate, *supra* note 28, at 14. The expression "judicial norms" is conceived in contrast with the textual norms and means "those to be effectively referred in justice."

judicial norm a text stating broadly that "the purchaser of an object may ask the seller to deliver it to him, unless it has already been delivered or the seller has made a mistake, etc."

Likewise, according to the judges' reasoning, it is enough for a landlord in an ejectment action to allege and prove his ownership of the property in question and its occupation by the defendant. He does not have to prove that the defendant has no entitlement to occupy that property. The defendant must produce his lease as an adverse ultimate fact that may serve as a ground for dismissing the claim.

Also, regarding contractual liability, even if, in accordance with the second sentence of Article 415 of the Civil Code, a creditor may sue for damages "when the debtor is no longer able to perform his obligation through a cause imputable to him," it follows from the intention of the legislator as well as from other interpretive elements that the "cause imputable to him" does not constitute a presupposed ultimate fact to be established by the creditor. The debtor must prove the existence of a contrary cause not imputable to him (i.e. Act of God).³⁰ So, the new theory points out that terms of the texts do not always constitute an immediate guide for judges.

As for extinctive prescription, Article 167, section 1, provides that "an obligation shall be extinguished if not exercised for ten years." This may suggest the creditor has not exercised his right for ten years. This would constitute a presupposed ultimate fact producing the extinctive prescription of the obligation. Consequently, it would be incumbent on the debtor to prove that the opposing party has not exercised his right for ten years. However, it is more reasonable to have the creditor establish a contrary fact, namely, exercise of his right impeding prescription as an adverse ultimate fact, since the fact of exercising a right, such as a judicial claim, constitutes a ground for interruption of prescription.³¹ Here, the text is not clear for judges.

Lastly, regarding apparent agency, although Article 109 provides that "he who has stated to a third party that he has given an authority to another person, [that person] shall be required to perform within the limits of the authority the act concluded between the third party and that other person." Judges assert that even if in reality the latter was not vested with authority, he who invokes the apparent authority is not required to prove the non-existence of the authority despite its being described in legal literature as presupposed ultimate facts: the declaration of apparent authority is a sufficient ground for filing against him.³² Al-

³⁰ PRESUPPOSED ULTIMATE FACTS IN CIVIL PROCEEDINGS, *supra* note 28, at 8.

³¹ MINPŌ (Civil Code) art. 147; PRESUPPOSED ULTIMATE FACTS IN CIVIL PROCEEDINGS, *supra* note 28, at 8.

³² PRESUPPOSED ULTIMATE FACTS IN CIVIL PROCEEDINGS, *supra* note 28, at 86. *See also*

so, in a related hypothesis, Article 117 provides that "when he who has concluded a contract as an agent of another person [and that person] cannot prove that he has been so authorized nor obtain ratification thereof, he shall be required, at the choice of his opponent, to execute the contract or pay him damages." Commentators usually explain, repeating its content without regard to the distribution of the burdens of proof, that this article concerns the legal obligation of the unauthorized agent. It must be proved that the opposing party has concluded a contract with him, that he has claimed to act as an agent of a particular person, that such represented person has refused to ratify his act, that the opposing party has therefore opted for execution of the contract and, in some cases, that the plaintiff acted in good faith as to the non-existence of the authority. Should the opposing party really prove all of these elements? No, it is enough if the opposing party can establish that he concluded the contract with that alleged agent, since it is a matter of principle that he who has concluded an act must execute it and the action instituted in this hypothesis by the plaintiff is in no way special. Hence, Article 117 is useless for the judge.³³

In response to this new theory, it appears that, with the exception of a number of procedure specialists who actively participated in the technical discussions, commentators, while considering it important, have not yet adopted a definitive view regarding this proposed interpretation method. They currently leave it to judges with teaching responsibilities to create a kind of technical system of civil law for the profession. Nevertheless, two series of remarks can be made.

First, the reasoning adopted by the judges in their analyses is basically quite functionalistic.³⁴ The establishment of a code of judicial norms consists of an operation to recompose Civil Code provisions without making any substantive changes, highlighting the presupposed ultimate facts necessitated by distribution of the burden of proof between the parties. The judge would thereby easily understand the minimal facts necessary for the plaintiff's allegations to be recognized under substantive law, in the absence of which the claim would be automatically dismissed: he could dispense with interpreting the present text and determine how to resolve a case where proof is impossible. The "new technical code" expected will clearly guide him, and he will not feel that he

Itoh & Hirate, *supra* note 28; JURISUTO, No. 881, at 93.

³³ PRESUPPOSED ULTIMATE FACTS IN CIVIL PROCEEDINGS, *supra* note 28, at 105. See also Shunkô Mutoh *Round Table: Doctrine and Practice in Civil Law*, JURISUTO, No. 756, at 42 (1982).

³⁴ Hiroshi Takahashi, *Presupposed Ultimate Facts and the Science of Procedural Law* (in Japanese), JURISUTO, No. 881, at 98 (1987).

is artificially interpreting in a manner contrary to the explicit terms of a contemporary positive enactment, as in the case of Article 415.³⁵ In addition, it is unquestionably desirable for authors to account for the burden of proof in their civil law treatises.

However, questions will be raised. First, whether, technically, the power of the rule of presupposed ultimate facts does not result in underestimating the original procedural role of the allegation burden and the evidentiary facts, and second, whether the effect of economy of reasoning will not prove illusory in case of diverging text interpretations and of new rights. This calls for a substantive discussion on the rule actually governing them, since the burden of proof distribution supposes that substantive law is relatively stable. Also, doubt remains as to the advisability of establishing a code of judicial norms, and as to whether, in the event of a deadlock, those norms present similar disadvantages to the system of *legis actio*: even the most standard provisions would require various lines of theoretical research and substantive questioning, according to civil law experts.³⁶

The second set of remarks concerns relations among the three main protagonists of law: the legislator, the judge, and the commentator. The theory of presupposed ultimate facts criticizes present-day codification and legal science. In other words, it savors vindication if not a contestation against *Professorenrecht* (professor-made law).

Because the present Civil Code contains ambiguous and imprecise provisions with regard to evidence, judges seek to recompose and unify them in a simple form of principles and exceptions: "if such facts exist, such a right shall be recognized, except when. . . ." It is likely that, rather than scrupulously reflecting the distribution of the burden of proof in terminology, the drafters of the Code (whether Boissonade and his former students, or the three young professors recently returned from their studies abroad and commissioned to recast the draft of their predecessors) did not have enough time to account for the opinions of judges who only recently had taken up their duties. In codification conducted essentially along the lines of the French and German Codes,³⁷ one of the drafters, Kenjiro Ume, has said that "hitherto the text of the Code was written purely in the interests of intelligibility."³⁸

Although contemporary positivist judges do not directly criticize the

³⁵ Itoh & Hirate, *supra* note 28; JURISUTO, No. 869, at 24.

³⁶ Takahashi, *supra* note 34.

³⁷ NODA, *supra* note 1, at 41-62. Ichiro Kitamura, *Les Problèmes de la Traduction Juridique: Un Point de Vue Japonais*, 4 LES CAHIERS DE DROIT, No. 4, at 754-755 (Université Laval, 1987).

³⁸ Kenjiro Ume, *quoted in* Itoh and Hirate, *supra* note 28; JURISUTO, No. 869, at 27, n.18.

Civil Code, academics whose main activity consists of research on theory and comparative law are often targeted. In most cases these academics are unaware of crucial practical considerations owing to the nature of their training and career, separate from that of other jurists. Now that judicial structure is well-established and the provisional reign of the "borrowed plumes" (from Europeans) of the *Professorenrecht* has ended, one might see magistrates' confidence adumbrated in new ideas regarding interpretation of positive law.

However, whether it relates to investigative perfectionism in criminal matters or to attachment of presupposed ultimate facts in civil matters, precision justice always concerns the precision of facts. It is essentially case facts that seem to occupy a large place in judicial thinking. These elements of "factualism"³⁹ sometimes prevail over the major principles of rights and justice in their juridical evaluations. This is probably connected to the phenomena of "non-justice," which will now be considered.

III. "NON-JUSTICE"

"Non-justice" does not mean injustice, of course. In some spheres there is a form of withdrawal or abstention from justice: judges refrain from formally or substantively ruling on cases in order to allow settlement by other means, where normally a decision would be rendered at least from the European point of view of justice in the courts.⁴⁰

The same phenomenon might exist in other legal systems, but it is particularly characteristic of Japanese law. In the matter of supposed exceptions, once a certain limit has been attained, that which was quantitative becomes qualitative.

The question is: what is it that causes Japanese judges to give way? Apparently, the answer must include political or administrative discretion in public matters, and custom in private matters.

A. "Non-Justice" in Public Law

With regard to control of the constitutional character of laws, reference is often made to the American distinction between "activism" and "passivism"; the latter term serves to highlight maximum self-effacement and deference to political decision-makers in contrast with the active interventionism suggested by the former term.⁴¹ Most constitutional law

³⁹ Kitamura, *supra* note 16.

⁴⁰ Cf. Carbonnier, *supra* note 5.

⁴¹ NOBUYOSHI ASHIBE, *THEORY OF CONSTITUTIONAL LITIGATION* (in Japanese) (1973); NOBUYOSHI ASHIBE, *MODES OF JUSTICE AND PUBLIC FREEDOMS* (in Japanese) 91 (1983).

experts claim (with some criticism) that the Japanese Supreme Court is excessively and intransigently "passivist" (*shôkyoku-shugi*); so much so that the term might well be seen as a synonym of "negativism," namely, a reluctance to state that a particular act is unconstitutional.⁴² However, this is a common tendency in constitutional and administrative matters.

Introduced in 1947, the Japanese system for constitutionality control is of the American type. "The Supreme Court is a court of final appeal having the power to decide whether or not any law, regulation, or administrative act is in conformity with the Constitution."⁴³ Moreover, all courts have this power, which is exercised in the normal course of their handling of "legal disputes."⁴⁴

Statistically, however, though the plea of unconstitutionality may be seen as a rhetorical device because of its frequent invocation by parties, it is seldom admitted in reality. Out of 54,376 judgments handed down in civil and administrative cases between 1950 and 1987 by the Supreme Court, only 286 examined this plea and only forty-seven of these pleas were found to be justified (forty-four of which concerned the same problem of election). Out of 119,279 judgments in criminal cases, 1,620 took up this plea and 256 admitted it. (Since 1974 there has been no judgment of unconstitutionality, after the record years of 1954 and 1955, with sixty-nine and 154 cases respectively.)⁴⁵ It is clear that the "fifteen wise men" seek to abide by and maintain measures adopted by the legislature and government.

This tendency is apparent in regard to issues both of procedure and substantive law. First, since control over constitutionality issues is exercised within the framework of civil, administrative, or criminal suits, "a specific legal dispute must be brought before the court," without which the court will not decide in abstract terms on a statute's constitutionality.⁴⁶ This requirement of a specific point of law tends to be strictly interpreted. Especially in the sphere of administrative litigation, which is preeminently the form assumed by constitutional litigation, strict inter-

⁴² See TADAKAZU FUKASE AND YÔICHI HIGUCHI, *LE CONSTITUTIONALISME ET SES PROBLÈMES AU JAPON* 289 (1984); Tadakazu Fukase, *Les Juges et les Grands Choix Politiques de l'État: Droit Constitutionnel Japonais*, in *ÉTUDES DE DROIT JAPONAIS* 333 (1989) [hereinafter Fukase, *Les Juges*]. See also ASHIBE, *supra* note 41; YÔICHI HIGUCHI & HISAO KURIKI, *THE CONSTITUTION AND JUSTICE* (in Japanese) 221 (1988). Toshihiko Nonaka, *The Problems of Constitutional Litigation* (in Japanese), *HÔGAKU-KYÔSHITSU*, No. 121, at 86-89 (1990).

⁴³ KENPÔ (Constitution) art. 81.

⁴⁴ Courts Organization Law of April 16, 1947, art. 3.

⁴⁵ Fukase, *Les Juges*, *supra* note 42, at 470.

⁴⁶ 6 Minshû (Civ. Bull.), No. 9, at 783 (Supreme Court, October 8, 1952), (inadmissibility of an application for annulment of the acts of the Police Reserve Battalion, formerly the Defence Forces, application lodged by a president of the socialist party).

pretation of admissibility conditions leaves little scope for challenge. This was true of the Naganuma case, in which an application for annulment of an act to abrogate a forest reserve classification in order to establish an army base was dismissed on the grounds that a replacement structure against flooding or drought had been installed.⁴⁷

It follows that judicial review is carried out only for the settlement of the dispute in question. Without exercising any further jurisdiction over an issue of constitutionality, the judge does no more than rule on the basis of an interpretation of ordinary law, at least whenever possible (the so-called necessity principle of avoiding a judgment on constitutionality). Thus, in the Eniwa case, in which a peasant, without having been notified beforehand, cut a telephone wire strung over a drill ground being used for shooting practice by defence force soldiers, was charged with the offense of "destroying materials serving for the purposes of defence."⁴⁸ The court, after considering at length the defense of unconstitutionality, acquitted on the simple and somewhat artificial ground that the telephone wire was not a material serving the purpose of defense.⁴⁹

If a ruling of unconstitutionality seems unavoidable, the judge tends to limit its scope as much as possible, relying on methods such as restrictive interpretation of the law so that it remains constitutional;⁵⁰ the unconstitutionality lying solely in its application.⁵¹

Finally, the last consequence of the "specific point of law" requirement, a judgment of unconstitutionality affects only the parties involved since the context is one of civil proceedings and "subjective litigation" (as will be seen).⁵²

With regard to substance, the Supreme Court voluntarily accepts a

⁴⁷ *In re Naganuma*, 36 MINSHŪ, No. 9, at 1679 (Supreme Court, September 29, 1967). Compare the famous first instance judgment recognizing the "Right to Live in Peace", HANJI, No. 712, at 24 (Sapporo District Court, September 7, 1973); HANTA, No. 298, at 140.

⁴⁸ Self-Defence Forces Act of June 9, 1954, art. 121.

⁴⁹ *In re Eniwa*, 9 KAKYŪ-KEISHŪ (Criminal Law Reports of Lower Court Cases), No. 3, at 359 (Sapporo District Court, March 29, 1967).

⁵⁰ Among other examples, two judgments of the same date enshrining a restrictive interpretation of legal provisions prohibiting acts of contestation by public officials and punishing acts calculated to incite them thereto. *In re Teachers' Union of the City of Tokyo*, 9 Keishū, No. 3, at 359 (Supreme Court, April 2, 1969).

⁵¹ *In re Sarufutsu*, 10 Kakyū-keishū, No. 3, at 293 (Asahikawa District Court, March 25, 1968); *In re Zentei-purakādo*, No. 715, at 3 (Tokyo High Court, September 19, 1973) (regarding the prohibition of political acts by public officials).

⁵² For example, Article 200 of the Criminal Code which provided for very severe punishment (death or life imprisonment) for patricide was declared unconstitutional. 27 Keishū, No. 3, at 2569 (Supreme Court, April 4, 1973). However, the legislature has been loath to make any change, as such sentences can already be handed down for ordinary homicide by virtue of a circular from the Prosecutor-General.

number of restrictions on the exercise of its judicial control. First, governmental acts or political questions (i.e. regarding the House of Representatives) are reflected in the words of one judgment, "so acts of State of a highly political character concerning the essential aspects of the government of the State . . . remain outside the jurisdiction of the courts and are left to the judgment of the government, the Parliament and, ultimately, the nation." This constitutes one of the "limitations inherent in the constitutional essence of judicial power."⁵³ The autonomy of parliament is also placed outside of court jurisdiction, even in the case of laws passed by an "embattled Parliament" in violation of its Rules of Procedure.⁵⁴

Another rule concerns discretionary acts of the legislature or government. This applies to apportionment issues which, according to High Court judges, constitute "a question of legislative policy subject to the powers of Parliament . . . unless the distribution considered produces an excessive inequality as to the electors' exercise of their voting rights."⁵⁵

Sometimes an overlapping of approaches is employed, resulting in the ambiguous concept of a "highly political or discretionary judgment." Therefore, with regard to the Security Treaty between Japan and the United States, which has "a highly political character very seriously related to the basis of our country's existence," the judgment on its constitutionality "forms in many respects an integral part of the highly political or discretionary judgment" of the government and Parliament and hence, "is in principle outside the jurisdiction of the courts, . . . considering that it is not *prima facie* very clearly unconstitutional and void."⁵⁶ This maximum regard for legislative or governmental discretion has the very serious consequence of giving wide latitude to limitations on the exercise of fundamental human rights, particularly the rights of moral freedom.

In this connection, the Supreme Court initially relied on the concept of "public well-being" (*Kôkyô no fukushi*) as a *ratio ultima* for such

⁵³ *In re Tomabe*, 14 Minshû, No. 7, at 1206 (Supreme Court, June 8, 1960).

⁵⁴ *In re Nullity of Amendments to the Police Act*, 16 Minshû, No. 3, at 445 (Supreme Court, March 7, 1962).

⁵⁵ 18 Minshû, No. 2, at 270 (Supreme Court, February 5, 1964). Compare the declaration of unconstitutionality in the case of inequality in a proportion of five to one between wards, 30 Minshû, No. 3, at 223 (Supreme Court, April 14, 1976). In the case of inequality to which no change was made within a reasonable time, 39 Minshû, No. 5, at 1100 (Supreme Court, July 17, 1985).

⁵⁶ *In re Sunagawa*, 13 Keishû, No. 13, at 3225 (Supreme Court, December 16, 1959), (quashing judgment declaring the innocence of a demonstrator who entered a U.S. military base on the ground that the very presence of the U.S. forces is contrary to Article 9 of the Constitution).

limitations.⁵⁷ In reaction to this somewhat simplistic line of reasoning, commentators sought to define its content by studying American theories, developing a double-standard theory to the effect that judicial control must be exercised more strictly in cases of moral freedoms than in cases of economic freedoms, stressing that a distinction must be drawn between limitations inherent in all freedoms, and those that are imposed from the outside in the sphere of economic activities. On the basis of this fundamental distinction between two kinds of freedoms, a certain number of judicial control methods were proposed to the judges. For moral freedoms, a technical judgment, "void on its face" was designed to end the prior wide-ranging prohibition. A criterion of "clear and present danger" was developed to justify regulation of expression content. The measure taken must be declared unconstitutional if a "less restrictive alternative" exists in the regulation of external forms of expression. Furthermore, as to whether a regulation of economic freedoms is constitutionally admissible, a criterion of reasonableness suffices, with the reservation that negative law enforcement measures must be monitored more strictly than those designed to serve socio-political policy. These are to be censored only in the event of manifest abuse.⁵⁸

However, in 1966 the courts accepted the inherent limitation of the "public well-being," stating in particular that limitations of labor rights should be kept to a reasonable minimum so that a proper balance is maintained between the need to respect those rights and to safeguard national life interests as a whole.⁵⁹ Since that time, however, while adopting the criteria proposed in respect to economic freedoms,⁶⁰ the Supreme Court has confined itself to applying less strict, rather superficial or formalistic control, known as the verification of a "reasonable relationship" with respect to moral freedoms.

In the Sarufutsu case, a postman who had pasted up electoral post-

⁵⁷ KENPŌ arts. 12, 13, 22, 29.

⁵⁸ NOBYUSHI ASHIBE, *READING CONSTITUTIONAL CASE LAW* (in Japanese) 87 (1987). See also Nonaka, *supra* note 42, at 88.

⁵⁹ *In re Zentei-Tokyo-Chūyū*, Keishū, 20, No. 8, at 901 (Supreme Court, October 26, 1966) (quashing a decision annulling a first judgment refusing to censure an act of inciting to leave the place of work at the Tokyo Central Post Office). This decision was highly esteemed as a "watershed" in the history of Japanese case law, ASHIBE, *supra* note 58, at 93, but was subsequently revoked. *In re Zen'nōrin-keishokuhō*, 27 Keishū, No. 4, at 547 (Supreme Court, April 25, 1973) (conviction of trade union leaders who incited officials of the Ministry of Agriculture to take part in a demonstration against draft legislation on activities of the police).

⁶⁰ Keishū, No. 9, at 586 (Supreme Court, November 22, 1972) (convicting a person who opened a retail sales market without the Prefect's permission); 29 Minshū, No. 4, at 572 (Supreme Court, April 30, 1975) (declaring anti-constitutional the rule of subjecting permission to open a pharmacist to a condition of distance (approximately 100 m.) from a neighboring, pre-existing pharmacist).

ers outside his place of work on a Sunday was charged with an offense under the prohibition against public officials engaging in political acts.⁶¹ The Supreme Court, affirmed the prohibition's purpose, that political acts by public officials "are liable to impair their neutrality, the prohibition against them is tolerated by the Constitution so long as it remains within the bounds of reasonable necessity." It concluded, after considering the reasonable relationship between the means and the end, that the prohibition in question tended to guard against the disadvantages resulting from external acts without affecting the actual expression of opinions, which could no doubt be restricted simply, indirectly, and incidentally.⁶²

The Supreme Court has extended this case law to other hypotheses concerning freedom of speech. Regarding the prohibition against door-to-door electoral canvassing,⁶³ long accepted in keeping with the Constitution, the Court added a further justification. It stated that the legitimate purpose of those provisions is to avert disadvantages resulting from door-to-door canvassing, namely, corruption, money incentives, disturbance of domestic peace, huge expense, personal harassment, and so on. A reasonable relationship exists between the categorical prohibition against door-to-door canvassing and its purpose, because even if freedom of speech is curtailed by this prohibition, the restriction is but indirect and incidental, whereas the interest in freedom and fair elections ensured by the prohibition is greater. Consequently, the limitation provided for in the article does not exceed the bounds of reasonable necessity.⁶⁴

This line of reasoning produced the same result as in cases of positive economic measures. In both cases, the court respects in principle legislative discretion except in the event of abuse or misuse of power. However, in the economic sphere, in most cases the legislature takes negative measures with the paradoxical result that economic freedoms are better protected than moral freedoms.⁶⁵ Thus a certain paralysis exists concerning constitutional case law that manifests itself in the maximum approval of legislative and governmental decisions.

Equally worrisome, the "fifteen wise men" (with the exception of the former university professors) rarely express a dissenting or additional individual opinion. Moreover, lower courts rarely rule on constitutional

⁶¹ National Public Service Law of October 21, 1947, art. 102, para. 2, and art. 110, paras. 1, 19.

⁶² 28 Keishū, No. 9, at 393 (Supreme Court, November 6, 1974).

⁶³ Public Offices Election Law, art. 138.

⁶⁴ 35 Keishū, No. 4, at 205, (Supreme Court, June 15, 1981).

⁶⁵ ASHIBE, *supra* note 58, at 122. Compare in respect of the right of association, 19 Minshū, No. 5, at 1198 (Supreme Court, July 14, 1965).

matters.

Many commentators have expressed doubt, criticism, or concern regarding this state of affairs. The attitudes of high court judges appointed by the conservative government, as well as the bureaucratic and monolithic climate in which professional magistrates advance their careers, have been subject to austere policy pursued by the Supreme Court over the past twenty years in staff administration practice.⁶⁶ However, this phenomenon of the decline of judicial control is part of the same trend observed in administrative litigation.

Anyone examining the situation regarding Japanese administrative litigation will find virtually unanimous agreement as to the malfunctioning of the system, described gingerly as being "in the final analysis not always conducive to the use of the judicial process for contemporary conflicts, seen from a comparative perspective,"⁶⁷ or more frankly as "wretched,"⁶⁸ or "well-nigh appalling."⁶⁹

As early as 1925, an eminent scholar, Tatsukichi Minobe, noted the following three unfortunate tendencies in Administrative Tribunal case law at that time: over-literal textual interpretation, failure to understand fundamental administrative law principles, and an excessive idea of the predominance of authority and the administration.⁷⁰ The present system is not immune to such criticism after a generation of experiences under the Administrative Procedure Act of May 16, 1962, which replaced the transitional system established by a 1948 Act. This followed the abolition of dual jurisdiction and merely adds certain features centering mainly on annulment claims to civil procedure law.

A review of statistics is in order. The number of cases referred to courts of first instance has continued to be about 800 a year for some twenty years (except at certain particularly turbulent moments in the 1970s: 3,211 in 1972, 1,836 in 1976), which would suggest an admira-

⁶⁶ E.g. Fukase, *Les Judges*, *supra* note 42, at 334-339. Nonaka, *supra* note 42, at 89. Shigeo Kisa, *Administrative Litigation and the Judge* (in Japanese), KÔHÔ-KENKYÛ, No. 52, at 187 (1990).

⁶⁷ NAOHIKO HARADA, *THE ROLE OF ADMINISTRATIVE CASE LAW* (in Japanese) (1991). Hiroshi Shiono, *Problems of Administrative Litigation* (in Japanese), JURISUTO, No. 121, at 94 (1990). For an Overview, see Masashi Kaneko, *Les Juges et les Grands Choix Politiques et Administratifs de l'État en Droit Administratif Japonais*, in JOURNÉES DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE, 503 (1988); Hiroshi Shiono et al., *Perspective on the Japanese*, JURISUTO, No. 925, (1989).

⁶⁸ Kisa, *supra* note 66, at 187.

⁶⁹ Hidekazu Hama, *Problems of Administrative Litigation From a Practical Viewpoint* (in Japanese), KÔHÔ-KENKYÛ, No. 52, at 166.

⁷⁰ Tatsukichi Minobe, *Preface to Gyôsei-hanrei (Administrative Case Law)*, in HARADA, *supra* note 67.

ble lack of conflict at a time when the number of proceedings concerning administrative permission or approval rose to more than 15,000, and when more than 120,000 ordinary civil cases were brought before the local courts. As for the average length of proceedings, administrative cases, despite a slightly descending curve, necessitate two to four times more time than civil cases: 39.3 months in 1978, 27.9 months in 1987, but rising to 57.8 months in 1983 (as against about twelve months in civil cases). As to outcome, nearly two-thirds of claims fail, the rate of well-founded claims remaining at around fifteen percent, with the rate of inadmissibility also at about 15 percent (cf. in civil cases, well-founded: 3/4, dismissed: 1/4, inadmissible: under one percent).⁷¹

Why this apparent lack of conflict? According to one practitioner, many potential disputes are either settled by other means or give way to various difficulties. First, to avoid being sued, the administration seeks to dissipate claims by various factual arguments or means of pressure, especially by the famous *gyōsei-shidō* (administrative incitement or dissuasion). Secondly, individuals are quite willing to appeal to politicians who consider providing services to be helpful in election campaigns. Furthermore, many lawyers, not used to administrative litigation or familiar with its difficulties, hesitate to accept cases. Lastly, plaintiffs are afraid either of long, complicated, and costly proceedings, or that filing a claim will cause him an eventual disadvantage imposed by the administration in other respects.⁷² Thus, at the end of a strict selection process, it is often only quintessential disputes, either particularly complicated scientifically or technically, or colored by hatreds and tales of woe, that are finally brought before the courts.

Apart from hatreds and tales of woe, which have long been bedfellows of justice (although here they carry a significant connotation of hatred of the evil of power), mention must be made of the importance of problems caused by the bothersome repercussions of contemporary civilization: environmental pollution, public transport noise, nuclear, or high-technology plant dangers, nuisance caused by establishments that process waste matter, excessive development, or urbanization, large-scale natural or human calamities, manufacturing defects affecting a large number of consumers, etc. When the administration or the firms concerned are slow in helping the victims, or when help or reactions are inadequate or insufficient, a social scandal is created and the victims often become involved politically. In the 1970s, this gave rise to a new category of litigation known as "cases of a contemporary type" or "po-

⁷¹ Hama, *supra* note 69, at 168; Itsuo Sonobe, *Contemporary Administration and Administrative Litigation* (in Japanese), KÔHÔ-KENKYÛ No. 45, at 150 (1983).

⁷² Hama, *supra* note 69, at 169-170.

litical claims proceedings," formulated in the form of civil actions, administrative litigation, or a plea of unconstitutionality.

In this type of half-juridical, half-political contestation, a large number of claimants seek protection of a collective interest, aiming to ensure systematic prevention of future damage more than to receive one-off compensation for damage already sustained. Moreover, litigants attempt to secure political approval for new and vaguely defined rights, such as an environmental right, or a right to be spared exposure to tobacco smoke, rather than to obtain a legal guarantee for clearly specified rights. The dispute does not necessarily end when judgment is pronounced but begins again under what is now an officially recognized banner for combat. In relation to the administration, instead of requesting the annulment of specific illegal operations in order to defend their civil rights, they seek to induce the administration to eliminate or regulate a social danger by protesting against a series of administrative measures.⁷³

However, judicial proceedings provided for by the 1962 Act are not designed to alleviate difficulties for these new claimants, especially since they are the curious fruit of the German-Japanese idea of protecting administration privileges and of the American-Japanese judicial court system based essentially on civil procedure. Though judges had not been unconcerned with protecting the interests of ordinary people in the traditional litigation context, they generally were tempted to turn against these combative claimants, which, in spite of appearing too abstract, abusive, or crude, should generally be considered serious.⁷⁴

Admittedly, a positive development has occurred in case law concerning State compensation. Some judgments have recognized State responsibility in cases where the administration has failed to exercise its supervisory power, when dangerous substances, harmful pharmaceutical products, or defective food products were found likely to represent a serious and imminent risk to the life or health of ordinary people.⁷⁵ A series of lower court judgments have also attempted to extend the obligation to maintain public establishments in order to assert State responsibility, particularly in the case of flooding.⁷⁶ However, the Supreme

⁷³ HARADA, *supra* note 67, at 14.

⁷⁴ *Id.*

⁷⁵ *E.g.*, *In re* Subacute-myelo-optico-neuropathy (SMON), HANJI, No. 879, at 26, (Kanazawa District Court, March 2, 1978); *In re* Sickness Caused by Kanemi oil, HANJI, No.881, at 17, (Fukuoka District Court, Kokura Annex, March 10, 1978); *In re* Shells Left in Niijima, Minshû, 23, No. 5, at 476 (Supreme Court, March 23, 1984).

⁷⁶ *In re* Flooding of the River Kaji-gawa, HANJI, No. 783, at 3 (Niigata District Court, July 12, 1975); *In re* Flooding of Daitô, HANJI, No. 876, at 16 (Osaka District Court, December 20, 1977); *In re* Flooding of the River Tama-gawa, HANJI, No. 913, at 3 (Tokyo District Court, January 25, 1979). *In re* Flooding of the River Shitomo, HANJI, No. 1026, at 43 (Tsu District

Court has recently moderated this trend.⁷⁷

In contrast, where annulment claims are concerned, (especially the purpose of the claim and the claimant's interest in the proceedings), admissibility conditions are interpreted very restrictively. Conditions are considered to have the character of subjective litigation and a specific point of law must always be involved. There must be a measure (or action, *shobun*) taken by the administration that is susceptible of annulment.⁷⁸ According to the Supreme Court, the measure must be assimilated into an administrative act in the strict sense, exclusive of regulations or general administrative acts. "According to the case law of our Court, a measure taken by the administration . . . does not mean any act done by it by virtue of a law or regulation, but those acts performed by the State or public authorities, vested with public power, whereby they are legally empowered to establish the rights and obligations of citizens or to determine their scope."⁷⁹

It follows, for instance, that such a measure is not constituted by zoning (residential zones, commercial zones, etc.), by the Minister of Construction by virtue of the Town Planning Act, because it is a general and abstract measure whose effects are similar to a law or a regulation;⁸⁰ nor by the Minister of Transport's approval of a project prepared by the Railways Construction Authority, because it is an internal act of the administrative organization;⁸¹ nor, lastly, by an unofficial decision (taken within a ministry subject to official appointment) to recruit a civil servant.⁸²

However, in a famous application to prohibit night flights at Osaka airport, lodged as a civil action, the Supreme Court reversed its position, stating that since the running of an airport is an activity consisting essentially in the exercise of public power (namely the power to adminis-

Court, November 5, 1981).

⁷⁷ *In re Daitô*, 38 Minshû, No. 2, at 53 (Supreme Court, January 26, 1984); *In re Kajigawa*, 39 Minshû, No. 2, at 333 (March 28, 1985); HANJÏ, No. 1158, at 197 (Supreme Court, March 12, 1985) (child falling into a water reservoir was due to an abnormal action by the victim); 40 Minshû, No. 2, at 472 (Supreme Court, March 26, 1986) (no defect of maintenance if safety measures for the blind have not been taken on the national railway station platform).

⁷⁸ 1948 Act, art. 1; 1962 Act, art. 3, para. 2.

⁷⁹ 18 Minshû, at 1809 (Supreme Court, October 29, 1964) (confirmation of a judgment of inadmissibility of an appeal for annulment of the decision of the Prefect of Tokyo concerning the installation of a refuse incineration plant). Regarding the negation of the courts' power to monitor the lawfulness of regulations by reason of the requirement of "a specific legal dispute," Supreme Court, October 8, 1952.

⁸⁰ 36 Minshû, No. 4, at 705 (Supreme Court, April 22, 1982).

⁸¹ *In re Narita High Speed Train*, 32 Minshû, No. 9, at 1617 (Supreme Court, December 8, 1978).

⁸² 36 Minshû, No. 5, at 777 (Supreme Court, May 27, 1982).

ter air space, by the Minister of Transport) a request to have such an activity prohibited cannot be made in the form of a civil action, "except for the purpose of ascertaining whether such an application might be made in the form of administrative proceedings."⁸³ Yet despite the enigmatic suggestion kindly made in the judgment twelve years after filing the application, most commentators doubt the possibility of such proceedings. This decision appears to be a simple denial of justice, symbolized by the seals of "public authority." However (and this is the reason for our speaking of "non-justice"), the authorities concerned had in principle halted night flights before the judgment and deliberately promised to maintain that measure, which consequently represented an "exercise of public authority" (subject to the question as to whether such a measure would have been taken without an application to the courts).

Case law is also demanding in respect to the interest requirement or standing. Annulment proceedings can be instituted only by a person who has a "legitimate interest" in requesting the annulment of a particular measure or decision.⁸⁴ According to case law, this right or interest must be what is individually protected by the law. Thus, consumers (a housewives' association) have no legitimate interest in filing a claim against a decision of the Fair Trade Commission regarding the labeling of fruit juices, having only an "indirect interest";⁸⁵ regular passengers of a railway line are not entitled to present a claim against approval of increased fares;⁸⁶ university researchers are barred from contesting the withdrawal of the classification of excavated ruins as protected cultural property.⁸⁷

Generally speaking, submitting such matters to civil procedure under the present system has offered cause for hope; it could soften the image of the public authority's privileges to which the old Administrative Court all too easily yielded. However, the automatic application of the accusatory principle seems to complicate procedural techniques, allowing the profound inequality between the parties to persist, without either judges or lawyers having specialized knowledge. Disadvantages inhere in many respects: the actual choice of litigation forms falls to the claimant; evidentiary examination proceedings are rarely ordered by virtue of judicial order, although such a possibility is provided for by law;⁸⁸ the option of an interlocutory remedy is prohibited. Lastly, as to

⁸³ 35 Minshū, No. 10, at 1369 (Supreme Court, December 16, 1981).

⁸⁴ Administrative Litigation Procedure Law, art. 9.

⁸⁵ 32 Minshū, No. 2, at 211 (Supreme Court, March 14, 1978).

⁸⁶ *In re Kintetsu-Expresse*, HANJII, No. 1313, at 121 (Supreme Court, April 13, 1989).

⁸⁷ *In re Iba Ruins*, HANJII, No. 1334, at 201 (Supreme Court, June 20, 1989).

⁸⁸ Administrative Litigation Procedure Law, art. 24.

substance, administrative discretion is largely allowed.⁸⁹

Furthermore, there is a special mode of judgment proper to administrative cases. It is possible for judges to dismiss a claim, while declaring at the same time the illegality of the very measure whose annulment the claimant demands:

[i]n the matter of annulment proceedings, where the measure or decision impugned is unlawful but its annulment would cause considerable harm to the public interest, the court may dismiss the claim if it holds that such annulment would be contrary to the public interest, after considering the extent of any damage sustained by the claimant and any compensation or means of prevention he may have obtained as well as any other circumstances. In such cases, it must declare the illegality of the measure or decision in the operative part of the judgment.⁹⁰

This "circumstantial judgment" (*jijô-hanketsu*) is quite often a feature of cases concerning town-planning, expropriation, and even reapportionment. It is true that this economizes the cost of repeating an entire operation, while sounding a future alarm, but does it not simply represent judicial economy?⁹¹

However, when the judge substantially declares that it is "legally contrary to the law or the Constitution, but politically permitted," he places political or administrative expediency over legality or, in other words, it is clearly the former and never the latter which is *for him* the very content of the notion of legality or constitutionality.

A certain "non-justice" thus results from the considerable respect accorded to legislative or administrative discretion, combined with characteristic legalistic positivism in interpretation, the subtlety of which tends merely to limit individual rights. For judges concerned with exegesis, the law is everything, "literally the supreme precept";⁹² the judges

⁸⁹ 32 Minshû, No. 7, at 1223 (Supreme Court October 4, 1978) (renewal of aliens' period of residence); HANJII, No. 1171, at 62 (September 12, 1985) (granting a retirement allowance to a member of personnel charged with corruption does not constitute an illegal disbursement of the public authority's money); 39 Minshu, No. 8, at 1779 (December 13, 1985) (director of a prison can forbid a person who is not in a defined relationship with a prisoner to transmit anything to him); 40 Minshû, No. 2, at 258 (March 13, 1986) (a disciplinary judgment handed down to a teacher without having legally consulted a report of a lower body, when that body was opposed to such a judgment).

⁹⁰ Administrative Litigation Procedure Law, art. 310.

⁹¹ In the same vein of thought, giving a lesson on the grounds, while dismissing the appeal in the operative part see 43 Minshû, No. 2, at 89 (Supreme Court, March 8, 1989), concerning the court's prohibition against those present, with the exception of journalists, taking personal notes during the trial.

⁹² Sonobe, *supra* note 71, at 147.

wait for intervention by the legislature, which is largely inactive, waiting on its part, for an accumulation of case law.⁹³ The administration dares not move out of this comfortable situation. Public opinion, on the whole, accepts it. It is foreseeable that no actions will be taken to change this curious balance.

B. "Non-Justice" in Private Law

In civil matters, the Japanese avoid litigation as much as possible. As a result, diverse phenomena and institutions have developed concerning amicable dispute settlement.⁹⁴

The typical "non-justice" case concerns compensation for traffic accidents. In more than ninety percent of the cases, an amicable solution is brought about by the parties' insurers who, against an additional premium, accommodate the necessary measures. In the event of difficulties, mediation or conciliation is provided by two specialized centers. These foundations were established by insurance companies and the Japan Federation of Bar Associations. Extra-judicial conciliation is not uncommon in other sectors, for instance in trade unions and consumers' associations. Divorce too, in most cases, is effected by mutual consent or, namely, direct declaration at the town hall without judicial intervention. On a more official level, various administrative commissions established by law play a quasi-judicial role with regard to construction disputes, public nuisance, consumer litigation, and collective labor conflicts.

Lastly, conciliation is also integrated into the activities of the state judiciary. Alongside traditional judicial conciliation (*wakai*), another method of conciliation distinct from that offered by court proceedings, which might be termed infra-judicial conciliation, *chôtei*, is employed. Normally brought before a commission composed of a professional judge and two lay judges or, on occasion before a single judge, the "civil *chôtei*" (before courts of general jurisdiction) or "family *chôtei*" procedure (before family courts) is designed "to ensure through reciprocal concessions (*gojô*) by the parties, a solution in accordance with reason (or equity, *jôri*) and in keeping with their actual situation (*jitsujô*)."⁹⁵

Wakai and *chôtei* are of such importance that they must be considered at greater length. *Wakai* takes place prior to or during judicial pro-

⁹³ Kitamura, *supra* note 16, at 818.

⁹⁴ ÉTUDES DE DROIT JAPONAIS 225-305 (1989). Noboru Koyama & Ichiro Kitamura, *La Conciliation en Matière Civile et Commerciale au Japon*, in JOURNÉES DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 255-335 (1988).

⁹⁵ Law for Conciliation of Civil Affairs of June 9, 1951, art. 1.

ceedings and is a procedure of Western origin. *Chôtei* has an older internal origin: it arose spontaneously in 1922 in the modern judicial system dealing with residential leases, and then was extended to all civil matters in 1951. Somewhat similar in procedural terms to France's amicable arrangement (*amicable composition*), *chôtei* is usually arranged between the parties with the primary help of two lay judges under a professional judge's supervision, without applying procedural or substantive law. Furthermore, an attempt is made to settle both the legal relationship between the parties and the more private, person-to-person relationship which is strained and in reality constitutes the actual source of the legal problem. Accordingly, reference is made less to the law than to custom. This procedure is frequently used in divorce cases, house or land leases, and money loans, all matters in the course of everyday life wherein the parties wish to maintain good relations. This parallel but infra-judicial form of justice, *chôtei*, thus constitutes a sort of simplified sub-jurisdiction of custom or of personal relations.⁹⁶

Statistically, one application for *chôtei* is filed for every two first instance proceedings (174,216 out of 343,688 in 1985). Nearly one trial in four ends with *wakaï* (judicial conciliation) or *chôtei* (infra-judicial conciliation) (81,582 out of 361,338). In *chôtei*, half the cases submitted are definitively settled (54.4% in civil matters and 43.1% in family matters), and in an average of 4.8 months; eighty percent of cases are concluded in six months after three to five sittings.⁹⁷

As for judicial conciliation, *wakaï*, the judge almost systematically attempts to reconcile the parties, either at the beginning of the judicial proceeding or after he reaches a definitive view of the case. *Wakaï* is also sometimes attempted by the Supreme Court. Although this is a judge's suggested solution, the parties may settle the dispute in a kinder, more amicable way than through a judgment. Also, the judge saves time by avoiding case examination, or drafting a judgment. Japanese judges are consumed by investigations which they normally follow and supervise. Judicial recourse to experts is unusual, under the rule of personal conviction in all respects including documentary evidence, and where judgments contain a very detailed account of the facts. However, only 3,000 judges, distributed roughly equally between civil and criminal matters, serve more than 120 million potential litigants.

A great temptation exists in view of the widespread spirit and practice of conciliation to rationalize court procedures accordingly: experiments are carried out in some district courts, especially in Tokyo, consisting of holding hearings for the dual purpose of trial and conciliation.

⁹⁶ Koyama & Kitamura, *supra* note 94, at nos. 5ff., 28ff.

⁹⁷ *Id.* at no. 32ff.

With the parties' agreement, all those concerned, including witnesses, are summoned to a conciliation chamber in order to be heard, often individually, to consider the evidence and reconcile the parties without formality or publicity. Even if conciliation is unsuccessful, the meeting serves as a hearing, enabling the court to recognize the problem's substance, unlike normal hearings which are basically an occasion for document exchange. However, as an adversarial hearing, this procedure is problematic from the point of view of the principles of publicity and the adversary method, with the result that the judges insure that adversary proceedings take place subsequently.

How did the amicable settlement process develop? Is it evidence of the reality of the conciliation spirit forming a more or less inherent part of the national character? Or is it simply a result of the institutional inadequacy and governmental and judicial policy to repress civil litigation? Perhaps the two are like the chicken and the egg. It is true that Japanese attitudes are slowly changing.⁹⁸

In villages of former times there was often talk of mediation by a prominent person, whereas for today's city-dwellers everything is becoming businesslike and legalistic. Gone are the traditional communities with their close network of interpersonal relations. But it should not be forgotten that traditional practices and standards are maintained and indeed refined within various social groups - family, firm, administration. There is sometimes an excessive tendency to praise the "Japanese methods" of operation and administration.⁹⁹

Furthermore, it is evidently necessary to improve the legal system, especially in order to add to "ordinary justice."¹⁰⁰ In this connection, a reform commission has recently started working at the Ministry of Justice, in regard to both lawyer training and civil procedure as a whole, which gives rise to a rare opportunity to improve the situation.

IV. CONCLUSION

From the foregoing overview, it is evident that the judge plays a relatively modest role in Japan. While, in civil matters, judges are overworked in their threefold role as supervisors of proceedings, experts on case facts, and government attorneys in respect to judicial policy consid-

⁹⁸ ÉTUDES DE DROIT JAPONAIS 9. Takehisa Awaji, *Les Japonais et le Droit*, REV. INT. DR. COMP. 235 (1976). See also KAHEI ROKUMOTO, LEGAL SOCIOLOGY (in Japanese) 248 (1986) (regarding the "judicialization" of the social order in Japan).

⁹⁹ Cf. ESHUN HAMAGUCHI, REDISCOVER WHAT IS JAPANESE (in Japanese) (1977); YOSHIRO MIWA, JAPANESE PRACTICE OF TRANSACTIONS (in Japanese) (1991); KEIICHIRO NAKAGAWA, MANAGEMENT JAPANESE-STYLE (in Japanese) (1977).

¹⁰⁰ Hiroshi Sumiyoshi, *Problems of Civil Litigation* (in Japanese), JURISUTO, No. 121, at 95.

erations, in public and criminal matters their role is diminishing significantly. Despite some accumulation of judicial precedents creating new law, an exegistic approach is adopted in interpretation of positive law and judges are extremely prudent or timid in their role as monitors of decisions for the legislature, the government, and the administration. In this sense, a jurisprudence writer rightly speaks of a twofold tendency toward "excessive legalism" and "naive instrumentalism," treating the law and justice as means of achieving a number of political or socioeconomic ends.¹⁰¹

However, this tendency reflects the very core of the concept of "law" in Japan. As shown elsewhere,¹⁰² the traditional concept of "law" (*hō*), an essentially public (repressive and administrative) law and a flexible means of government, continues to operate among the Japanese, including jurists, behind the apparent equivalence to the Western concept of law. Consequently, it is fairly natural that, as the judicial role increases, the political substance of the "law" becomes more apparent. The more honest and punctilious judges are, the more they are viewed as conformist judicial bureaucrats. Opponents are also more in favor of a political radicalization on their part and do not find a sound basis for legally defending their rights.

Perhaps judges reason in the following way: "Public officials, generally excellent and honest, do their best for the public good under various material constraints. How could they be easily criticized for inadequacy of effort on the grounds of illegality or indeed of unconstitutionality, unless they have clearly acted in bad faith?"

However, it should never be forgotten that it is only the law that can counterbalance the possible abuses of power which have become increasingly far-reaching in this contemporary society and that justice is well and truly *the* guardian of individual rights and freedoms. Did not Victor Hugo write: "Even if you have power, we have the law?"¹⁰³ And could not the legendary miller of Sanssouci answer to King Frederic when asked if he knew that the king had power to appropriate his mill without any compensation: "Yes, if only the Supreme Court didn't exist in Berlin!"¹⁰⁴

Otherwise, man would truly be no more than a feeble reed and the law would end up becoming a simple device for the approval of politi-

¹⁰¹ Shigeaki Tanaka, *The Increase in the Role of Jurists and the Subsequent Dilemmas* (in Japanese), JURISUTO, No. 700, at 251 (1979).

¹⁰² Kitamura, *supra* note 16.

¹⁰³ VICTOR HUGO, CROMWELL, act 4, sc. 8.

¹⁰⁴ GUSTAV RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 159 (12 Aufl. von Konrad Zweigert, 1969).

cal arbitrariness in Japan.

