

5-1-1987

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Recommended Citation

Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 BYU L. Rev. 627 (1987).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1987/iss2/11>

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The Role of Law and Lawyers in Japan and the United States*

Masanobu Kato**

I. INTRODUCTION

The differences between the law and legal professions of Japan and the United States has been one of the favorite topics in the comparative study of the two countries. Recently, American commentators have viewed the relatively small role of law and the legal profession in Japan as evidence of smooth social management. For many years after the surrender of Japan in World War II, however, the same phenomenon was often interpreted by Japanese commentators as evidence of Japan's under-development or pre-modernized condition. The limited role of law and lawyers was considered to be a weak point of Japanese society, especially in the past when the Japanese were not confident of the validity of their cultural system. Now, when Japan is enjoying prosperity, the limited role of law and lawyers is considered one of the merits of Japanese society.

As is seen in the above opinions, traditionally the differences have been considered as being culturally based.¹ Recently another approach has developed, wherein both Japanese and American commentators assert that the differences between the role of law and lawyers in the two societies is not a reflection of cultural differences, but rather a reflection of the relative ineffi-

* This article was originally presented as a paper at the Annual Meeting of the American Association for the Comparative Study of Law on October 17, 1986, in Salt Lake City, Utah.

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I am very grateful to Professor Michael K. Young at Columbia University for his highly valuable comments on many occasions, and to Professor W. Cole Durham at Brigham Young University for arranging for the presentation of this paper. I would like to express my deep appreciation to Kiyoshi Aoki, Lecturer at Chubu University, Japan, and Ms. Constance Hamilton at Columbia University School of Law for their generous gifts of time and advice. Particularly, I express special thanks to Ms. Diana Weaver at Columbia University School of Law for her very valuable research assistance.

1. See *infra* notes 24-27 and 52-56 and accompanying text.

ciency of the Japanese judiciary or the inconvenience of obtaining the legal services of practitioners in Japan.² According to this opinion, the different role of law and lawyers in the United States and Japan is a reflection of superficial differences in the legal institutional settings of the two societies and is not deeply rooted in their cultures. If an observer finds no difference in the level of development of the two societies in terms of industrialization, it is easy, in one sense, to assume that the social fabrics of the two societies are similar and that the few different social phenomena that do occur are superficial and capable of being interpreted through logical analysis. Considering the present situation—where the United States and Japan have both reached the most advanced level of industrialization—this view is apt to attract attention and be widely supported.

Concerning all of these opinions, any interpretation of the relative value of the differences in legal cultures is influenced by the observer's perception of the level of development of the two societies.³ Every analysis is a product of the times.

This article analyzes the different role of law and lawyers in the United States and Japan from a comprehensive perspective. Section II speculates on how this difference is related to other social factors. In section III, the differences in the role of law and lawyers in the two countries are reconsidered in light of statistical comparisons of the number of lawyers and litigation rates. In section IV, both the cultural-based and the inefficient judiciary interpretations, outlined above, are scrutinized. In section V, the author's personal view will be presented.

II. THE LEGAL PROFESSION AS ONE ASPECT OF INTERLOCKING ELEMENTS IN A SOCIETY

While the United States and Japan share many things in common as highly industrialized societies, they differ in many ways. Differences in the legal professions of the two countries, in most cases, are linked to differences in legal, political and cultural factors. For this reason, it is sometimes very misleading to compare the legal professions without considering their social context.

There are significant differences in the legal profession that

2. See *infra* notes 57-64 and accompanying text.

3. See Tanase, *Hōshiki Kenkyū no Moderu* [Models of Legal Consciousness Studies], 36 *HōSHAKAIGAKU* 14 (1984).

are closely related to differences in the type of legal education system in each country. For example, legal education takes place at the professional school level in the United States, while in Japan it occurs at the undergraduate level.⁴ When the field of

4. This article compares law school graduates in the United States to law department graduates in Japan. However, each year about 500 persons pass the national law examination and receive two more years of education at the Legal Training and Research Institute in Japan. The Institute gives trainees a very practical training during the first and last four months in its own classroom. For the rest of the time, the Institute sends trainees to a court (for at least eight months), a public prosecutor's office (for at least four months), and to a bar association—actually a law firm—for a least four months) to give them an apprentice-type training. *Shihō Shūshūsei ni kansuru Kisoku* [Rule on the Legal Training and Research Institute Trainees], 15 Sup. Ct. R. 16, § 5 (1948). Trainees are compensated like public servants.

Although these students receive a longer education than other law department graduates, they are not considered for comparative purposes in this article. The reasons are that the figure of approximately 500 who are accepted by the Legal Training and Research Institute is very small compared to the number of law department graduates, and that the nature of their training is different from that of law school students in the United States. Needless to say, graduates of the Legal Training and Research Institute are much more respected than ordinary law department graduates in Japan. Such respect is probably attributable to the fact that these people usually become professionals, such as judges, public prosecutors or practitioners, and that they are winners in the highly competitive national law exam (the passing rate is about 2%), rather than the mere fact that they received a longer education.

Japan has no professional schools in the same sense as in the United States. Education in various fields, including law and medical science, is done at the college level. College education is institutionalized for four years, with the exception of medical education, which is six years. This four year education is divided into two parts, general and specialized education. In most national universities, the general courses are completed during the first two years, and specialized education, including law, is done during the latter two years. However, a substantial number of private universities have adopted a policy of parallel education, giving general and specialized courses at the same time.

The curricula of law departments are not exactly the same, but the basic subjects recommended by the Department of Education are as follows:

Required Subjects:

Constitutional Law

Administrative Law

Civil Law

Commercial Law

Criminal Law

Criminal Procedural Law

Civil Procedural Law

International Law

Elective Subjects:

Labor or Social Law

Economic or Industrial Law*

Bankruptcy Law

Judicial Administration

Tax Law

Law of Intellectual Property

International Private Law

observation is widened, the United States and Canada are rather unique in that they offer legal education at the graduate level; legal education takes place at the undergraduate level in other major countries, including common law countries such as England and Australia.⁵

Higher education in many countries seems to be losing its philosophical character and instead is emphasizing more practical issues that are directly related to occupational life in society. If this impression is correct, there should be a relationship between higher education and success in society where graduates work in areas related to their training. Accordingly, American law school graduates, who receive a higher education than Japanese law department graduates, should enjoy higher social status than their Japanese counterparts.⁶ This logical assumption matches the author's impressions after observing the social role and status of lawyers in the two countries.

The content of legal education also influences the nature of the legal profession in the United States and Japan. In the United States, legal education is conducted through analysis of cases using the Socratic method.⁷ By contrast, in Japan the lec-

Foreign or Comparative Law
 Philosophy of Law
 Legal History
 Sociology of Law
 Criminology
 Political Science
 Science of Public Administration
 Political or Diplomatic History
 Economics

* Antitrust law is one of the most important areas in this subject.

MONBUSHŌ KŌTŌKYŌIKUKYOKU [The Bureau of Higher Education in the Department of Education], DAIGAKU SECCHI SHINSA YŌRAN [A Handbook for the Foundation of a University] (1985).

5. Concerning legal education systems in major countries, see Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, 1985 AM. B. FOUND. RES. J. 1. See also LEGAL TRADITIONS: AN INTERNATIONAL HANDBOOK (A. Katz ed. 1986) [hereinafter LEGAL TRADITIONS].

6. While the majority of United States law school graduates enter the legal profession, even though their job contents and social status may vary, Japanese law department graduates enter various, even non-professional occupations outside the field of law. Concerning one phase of this phenomenon, see *infra* Tables 21-23.

It is worth noting that American lawyers enjoyed a higher status even before professional school education began in the United States. See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 286, 288 (P. Bradley ed. 1945). Concerning the origins of American legal education, see *infra* note 74.

7. Concerning the development of the Socratic Method after Langdell began using it in 1870, see C. WARREN, *HISTORY OF THE AMERICAN BAR* (1911), and 2 C. WARREN, *HIS-*

ture method is used, placing emphasis on interpretation of legislative texts based on legal theories.⁸ These different modes of education have lead to different ways of thinking among law students and lawyers in the two countries. In America, students become more problem oriented, while in Japan they become more "theory-consistency" oriented.

The use of the jury system also influences the way lawyers think. In the United States, where the jury system has been adopted, it is important for lawyers to develop the skill of on-the-spot persuasive argument. In Japan, the jury system has not been adopted.⁹ Although a system for oral arguments has been adopted, it has been adopted in name only.¹⁰ In most civil litiga-

TORY OF THE HARVARD LAW SCHOOL (1908). As the lecture method in legal education is the norm in most major countries, the United States occupies a rather unique position concerning this methodology in legal education. For a comparison of legal education methods in major countries, see LEGAL TRADITIONS, *supra* note 5.

8. Although attempts to introduce the Socratic Method are sometimes made in Japan, they have not taken root in the Japanese legal education. Concerning a few attempts of about 20 years ago, see Zadankai, *Keisu Messodo no Taiken o Megutte* [A Discussion of Experiences Using the Case Method], 368 JURISUTO 76 (1967). The author has adopted the Socratic Method in the second half of the Civil Code class at Nagoya University.

9. The jury system was introduced in Japanese criminal cases in 1923 when the Jury Act was enacted. (It became effective in 1928.) The Act called for a jury composed of 12 citizens in criminal cases. Baishin Hō [Jury Act], §§ 29, 77 (1923). However, this jury system was very unpopular among Japanese people because of the lack of confidence in the jury system and the inconvenient and disadvantageous nature for the accused. For example, because a jury verdict was not binding on the court, the court could require another jury to be summoned repeatedly, whenever the prior verdict was not satisfactory to the court. *Id.* at § 95. When a verdict was accepted, appeal to an intermediate court was prohibited, although a direct appeal could be made to the Great Court of Judicature. *Id.* at §§ 101-02. The cost of the jury was considered part of the litigation costs borne completely or in part by the accused when he requested a jury and was adjudged guilty. *Id.* at §§ 106-07. As a result, defendants in most cases declined to have a jury, and the number of jury trials became very small. At the first stage, in 1928, there were 147 jury trials. In 1940, there were only six. In 1943, the jury system was suspended by the Act of Suspension of the Jury System of 1943 [Baishin no Teishi ni kansuru Horitsu]. Since then, the jury system has not been readopted in Japan, although the Judiciary Act of 1947 leaves room to introduce a jury system, providing that the provisions in this act will not prevent introduction of a jury system in criminal trials by other laws. Saibansho Hō [Judiciary Act], § 3(3). The author does not believe implementation of a jury system is or will be on the political agenda in the near future in Japan, although there is one movement which advocates reintroduction of the jury system. Concerning the political climate at the time of the introduction of the Japanese jury system in general, see T. MITANI, *KINDAI NIHONNO SHIHOKEN TO SEITŌ* [Judiciary and Parties in Modern Japan] (1980). For a legal analysis, see M. URABE, *WAGA KUNI NI OKERU BAISHIN SAIBAN NO KENKYŪ* [A Study on Jury Trials in Japan], SHIHŌKENSHŪJO CHŌSA SŌSHO, vol. 9.

10. Although the law provides that "parties must plead the case orally in court," MINJI SOSHŌ HŌ [Civil Procedure Code], § 125(1), actual argument in the court is some-

tion, on the date set for oral pleading, papers expressing the legal opinions are submitted in the place of oral arguments. Civil law proceedings are not concentrated in one continuous period. Dates for oral pleadings are set periodically, usually once a month. When one party submits his or her written opinion, the other party responds on the next court date, also by written opinion. Under such a system, it is crucial for the lawyer to develop an accurate and well prepared written argument that can stand up under close scrutiny by the opposite party, rather than to develop a strong and impressive oral argument on the spot.

The two elements mentioned above, legal education and the judicial proceedings system, affect the way of thinking of both law students and lawyers in both countries. The different ways of thinking in turn shape different roles for lawyers in the two countries.

The difference in teaching methods is also related to differences in the school systems. In order to understand the legal framework described in the law, a student must comprehend logic, social management, adjustment of different interests, etc. In order to understand cases, a student needs to understand the interested parties' strategies and emotions, in addition to the elements mentioned above. The more mature students are, the easier it is for them to understand cases. While the case method has been adopted in the United States, in England, another common law country, legal education takes place at the undergraduate level and the lecture method is used.¹¹ Although it should not be overstated as a logically necessary result of the difference in age or maturity, it would seem that the difference in teaching methods is not merely accidental.¹²

thing like, "[w]e plead as is described in the complaint or preliminary documents." The actual oral argument is only a citation of these documents. Concerning this issue, see Okagaki, *Kōtōbenron no Keigaika* [A Mere Shell of Oral Argument], 5 HŌGAKU KYŌSHITSU (DAINIKI) 65 (1974), and Ōno, *Usinawareta "Benron"* [Lost "Oral Argument"], 1 HŌGAKU KYŌSHITSU 47 (1980).

11. See Abel, *supra* note 5.

12. The Australian system may represent an interesting blend of the two approaches. There, legal education is done at the undergraduate level. About one-fifth or one-third of the legal education is done using the Socratic method and the rest is taught using the lecture method. The earliest stage of legal education, concerning what the law is, is taught through discussion, not necessarily based on cases. However, other major subjects taught in earlier years, such as contracts, torts, criminal and property law, are taught largely through lectures. The higher year the students reach, the greater the weight and ratio of education by case method become. Concerning legal education in Australia, see LEGAL EDUCATION IN AUSTRALIA, NATIONAL CONFERENCE ON LEGAL EDUCA-

The difference in case-oriented as opposed to legislation-oriented education is closely related to differences in law formation in case law systems as opposed to code law systems, although educational differences exist even among common law countries as described above. While the framework of the law is formed legislatively in civil law countries, it is formed judicially, case by case, in common law countries. It is natural for legal education in civil law countries to place greater importance on legislation than on cases, while the opposite is true in common law countries. Legislation in the form of codification fosters a coherent and systematic way of thinking. Thus, legal theory becomes more important in civil law countries like Japan, than in common law countries like the United States.

Different forms of legal education, emphasizing cases in America and legal theory in Japan, bring into prominence different types of historical figures. When asked the names of historically important legal figures in the United States, most people will name famous judges like Holmes or Cardozo. Faced with the same question, people in Japan will give names of legal theorists such as Wagatsuma, Hatoyama or Minobe.¹³

The difference in the legal systems is, more importantly, a reflection of the socially and politically different roles of the judiciary in Japan and the United States. The United States Supreme Court has held 1,091 legislative acts to be unconstitutional (134 Congressional Acts in the 195 years from 1789 to 1984; 863 state laws, and 94 municipal ordinances in the 191 years from 1789 to 1980).¹⁴ In Japan, in the forty years since the establishment of judicial review after World War II, only four or five provisions have been explicitly ruled unconstitutional.¹⁵

TION IN AUSTRALIA, 1978.

13. Wagatsuma (1897-1973) and Hatoyama (1884-1941) were civil code professors, and Minobe (1873-1948) was a constitutional law professor. They represented academicians of the time in their fields.

14. D. O'BRIEN, STORM CENTER, *THE SUPREME COURT IN AMERICAN POLITICS* 43 (1986).

15. There are four to six cases, involving four or five provisions, which conclude that these provisions are unconstitutional. The four Japanese Supreme Court cases, cited *infra* at notes 17-19.5 were explicit judgments of unconstitutionality. However, the two malapportionment cases concerning the same provision, cited *infra* at note 16, are borderline in that they nevertheless upheld the validity of the election while holding the election district provision in the Election Act to be unconstitutional.

In addition to these cases in which the Japanese Supreme Court declared some provisions of the law to be unconstitutional, the Court once adopted a technique called "restricted interpretation based on constitutionality." This technique was adopted when

None of these decisions attempted to exercise any political influence of the type represented by the United States Supreme Court judgments concerning the New Deal legislation or the segregation cases. The most politically heated judgments of unconstitutionality rendered in Japan were in the malapportionment

there was a wide range of possible interpretation or application of a provision of law, only a part of which could be considered unconstitutional. The Court restricted the range of interpretation or application of the law to the area where it could be found constitutional instead of holding the whole provision to be unconstitutional. Although on the surface these judgments merely hold the provisions to be constitutional, a partial holding of unconstitutionality lies hidden between the lines. The Japanese Supreme Court adopted this technique in a few cases in the late 1960's concerning labor disputes involving civil servants prohibited from going on strike and the like. See Judgment of Oct. 26, 1966, Saikōsai (Supreme Court), Japan, 20 KEISHŪ 901; Judgment of April 2, 1969, Saikōsai (Supreme Court) 23 KEISHŪ 305; Judgment of April 2, 1969, Saikōsai (Supreme Court) 23 KEISHŪ 685. (For an English translation of the first case, see GENERAL SECRETARIATE, SUPREME COURT OF JAPAN, JUDGMENT UPON CASE OF CRIMINAL IMMUNITY RELATED TO DISPUTE TACTICS OF EMPLOYEES OF PUBLIC CORPORATIONS, ETC., SERIES OF PROMINENT JUDGMENTS OF THE SUPREME COURT UPON THE QUESTION OF CONSTITUTIONALITY No. 9 (1967) [hereinafter SPJ]. The Court overruled these precedents and disallowed the use of this technique in a later case in 1973 concerning a similar kind of labor dispute. Judgment of April 25, 1973, Saikōsai (Supreme Court), 27 KEISHŪ 547. (For an English translation of the case, see GENERAL SECRETARIATE, SUPREME COURT OF JAPAN, JUDGMENT UPON CASE OF VIOLATION OF THE NATIONAL PUBLIC SERVICE LAW PROVIDING CRIME OF INCITING PUBLIC OFFICIALS TO ACT OF DISPUTE, SPJ Series No. 14 (1976).) Recently, however, the Court seems to have readopted substantially the same technique, not concerning labor laws, but concerning a prefectural bylaw which prohibited sexual or sexually related acts with juveniles under 18 years of age, and provided a penalty for offending adults of a maximum of two years imprisonment with labor or a fine of ¥ 100,000 or less. Judgment of Oct. 23, 1985, Saikōsai (Supreme Court), 39 KEISHŪ 413.

There have been many cases in which provisions of law or governmental acts were not held to be unconstitutional by citing the political question doctrine. Although there have also been some cases in which lower courts have held provisions of law or governmental acts to be unconstitutional, it is characteristic of Japan that all these decisions have been overruled by the Supreme Court. And in the four Supreme Court judgments of unconstitutionality referred to above, the lower courts had held them to be constitutional.

For books and articles on this subject, see N. ASHIBE, *KENPŌ SOSHŌ NO RIRON* [A Theory of Constitutional Litigation] (1973); N. ASHIBE, *GENDAI JINKEN RON* [Essays on Contemporary Human Rights] (1974); N. ASHIBE, *KENPŌ SOSHŌ NO GENDAITEKI TENKAI* [Contemporary Developments of Constitutional Litigation] (1981); and K. SATOŌ, *KENPŌ SOSHŌ TO SHIHŌKEN* [Constitutional Litigation and the Judiciary] (1984). For recent material providing a general introduction to cases in court, see Tomatsu, *Hanrei ni Miru Kenpōsoshōron* [Constitutional Litigation Theories Appearing in Precedents], 835 JURISUTO 45 (1985).

Apart from decisions concerning state laws, during its first forty years the United States Supreme Court declared only one Congressional Act unconstitutional. O'BRIEN, *supra* note 14, at 43. Thus, the difference from an historical perspective might not be as wide as it looks today. However, if one focuses on the present situation, the social function of the Supreme Courts in the two countries is quite different. This functional difference affects public perception in the two societies.

cases,¹⁶ and the only one with any degree of social impact was

16. The ruling on the unconstitutionality of malapportionment was first handed down by the Japanese Supreme Court in 1976. Judgment of Apr. 14, 1976, Saikōsai (Supreme Court), Japan, 30 MINSHŪ 223. In this case, the ratio of the number of electorate per Diet member in the largest and the smallest election districts was nearly 5 to 1. The Japanese Supreme Court held, on the one hand, that the election district provision in the Election Act that caused the malapportionment was unconstitutional as it violated equality under the law as required by the KENPŌ (Constitution) §§ 14(1), 15(1), (3), 44. On the other hand, however, the Court decided the election at issue was still valid based on its consideration of the circumstances in the case. In Japan, one law provides discretionary room for the court to save the validity of an illegal governmental act, based on consideration of the special circumstances involved. Gyōsei Jiken Soshō Hō [The Administrative Litigation Act] of 1962 § 31. In this case, the Supreme Court applied this technique by analogy to the unconstitutional election. Although unconstitutionality was found, no action for reapportionment was necessary in this particular case because the election district provision had already been amended before the Supreme Court reached its decision. When a case in which the election district provision at issue was still effective came before the Supreme Court, the Court held the provision to be constitutional because a reasonable period would be necessary for the legislature to correct the situation. (In the above case, the ratio was 1 to 2.92 at the time of amendment in 1975, and 1 to 3.94 at the time of the election in 1980). The Court also stated: "It is strongly hoped the apportionment will be revised as soon as possible because seven years have already passed since its amendment, although it is provided that it shall be the usual practice to revise the table [for the election districts] every five years based on the latest census." Judgment of Nov. 7, 1983, Saikōsai, 37 MINSHŪ 1243. At the end of 1983, however, the election was conducted without reapportionment. In the next case, the Supreme Court declared the provision unconstitutional, which continued the malapportionment even at the time of the adjudication, but maintained the validity of the election based on fundamentally the same logic as in the 1976 case. Judgment of July 17, 1985, Saikōsai, 39 MINSHŪ 1100. In this case, the ratio was 1 to 4.40.

As it was possible to interpret the reasoning of these cases as implying that a ratio of 3 to 1 was constitutional, the legislature enacted the reapportionment act with very little change in 1986, aiming to keep the ratio under 3 to 1. (Among 130 election districts with medium constituency in total, eight districts were granted one more Diet member, seven districts had one less Diet member, and there were three cases of borderline adjustments.) Political response was still not serious.

Compared to United States Supreme Court rulings in the 1960s, such as *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); or *Reynolds v. Sims*, 377 U.S. 533 (1964), the political impact of the judgments of the unconstitutionality of malapportionment is still limited, and the behavior of the Japanese Supreme Court is very, perhaps too, cautious.

For an English introduction to the first two of these cases, see *Recent Developments: Constitutional Law—Constitutionality of Electoral District Apportionment of Diet Representatives*. Kurokawa v. Chiba Prefecture Election Commission, 9 LAW IN JAPAN 150 (1976); Emi, *Summary of the Supreme Court Grand Bench Decision on the Number of Members in the House of Representatives*: Tōkyō Election Commission v. Koshiyama, 18 LAW IN JAPAN 144 (1986). See also Nonaka, *The Significance of the Grand Bench Decision Concerning Proportional Representation in the House of Representatives and Related Issues*, 18 LAW IN JAPAN 134 (1986).

The cases cited above all concern elections to the House of Representatives. Concerning elections to the House of Councillors, there is a precedent, the first Supreme Court malapportionment case in Japan, (holding constitutional an election based on a malapportion of a ratio of 4.09 to 1), which held that malapportionment was an issue to

the decision concerning the lineal ascendant homicide provision.¹⁷ The other judgments attracted much less attention, like

be left in the hands of the legislature as a policy-making matter. Judgment of Feb. 5, 1964, Saikōsai, 18 MINSHŪ 270. The reasoning was fairly similar to the opinion of Justice Frankfurter in the United States Supreme Court precedent of *Colegrove v. Green*, 328 U.S. 549 (1946). Even on other recent occasions, because special attention was still paid to the peculiar character of the elections for the House of Councillors, a malapportionment ratio of 5.26 to 1 was held to be constitutional. Judgment of Apr. 27, 1983, Saikōsai, 37 MINSHŪ 345, and Judgment of Mar. 27, 1986, Saikōsai, 640 HAN REI TAIMUZU 83. As it does not seem appropriate to examine the character of the House of Councillors in this paper, these decisions will not be treated in detail.

17. In the Japanese Criminal Code, where the crime is murder or bodily injury resulting in death, there is a distinction in the severity of penalty based on whether the victim is a lineal ascendant.

When this distinction in treatment was held to be unconstitutional in a lower court a few years after World War II, the Japanese Supreme Court reversed and confirmed the constitutionality of these provisions. Concerning injury resulting in death, see judgment of Oct. 11, 1950, Saikōsai, 4 KEISHŪ 2037; *see also* Judgment of Oct. 25, 1950, Saikōsai, 4 KEISHŪ 2126. Twenty-three years later the Supreme Court overruled its precedents and held the lineal homicide provision to be unconstitutional. Judgment of April 4, 1973, Saikōsai, 27 KEISHŪ 265. The incident involved in the case was an extreme one in which the accused had been sexually abused by her father for over ten years since she was 14 years old, resulting in five children between them. When the father not only obstructed her intended marriage but also physically attacked her, she murdered him. (Her action was held unjustifiable as self defense based on the particular facts of the case.) The penalty for lineal ascendant homicide in the Keiho (Criminal Code) § 200, is the death penalty or imprisonment for life with labor, while that for ordinary murder, § 199, is the death penalty or imprisonment for life or three to fifteen years with labor. Under the Japanese Criminal Code, §§ 25, 66-68, 71, the accused cannot be granted a stay of execution if only death or life imprisonment is applicable. Thus, for a person who has committed lineal ascendant homicide, the logically possible lightest sentence is three and one-half years imprisonment with labor, if the lineal ascendant homicide provision is constitutionally valid.

Although, in this case, 14 out of the 15 justices on the Japanese Supreme Court agreed that the provision was unconstitutional, their reasoning differed. The majority opinion of eight justices held that although the distinctive punishment itself was not unconstitutional, a differentiation of such a grave degree in the provision for lineal ascendant homicide was unconstitutional. By contrast, six justices held the distinction in punishments itself to be unconstitutional. This split in the reasoning was reflected in the later judgment of the Supreme Court concerning injury of a lineal ascendant resulting in death. One and a half years after the decision on the unconstitutionality of the lineal ascendant homicide provision, the Supreme Court held that the provision on injury of a lineal ascendant resulting in death was constitutional because its penalty was not unreasonably grave. (While the injury resulting in death clause in the Criminal Code, § 205(1), provides for 2 to 15 years of imprisonment with labor, that for lineal ascendants, § 205(2) provides for 3 to 15 years or life imprisonment with labor). Judgment of Sept. 24, 1974, Saikōsai, 28 KEISHŪ 329.

The split in reasoning in the former case also affected the subsequent amendment effort. Although the government tried to propose the deletion of the lineal ascendant homicide provision to the Diet, the majority party (L.D.P.) which was a strong advocate of filial piety, resisted the proposal, asserting technically that the amendment to lighten the punishment in the provision was sufficient. As a result of this deadlock, the amend-

the judgment declaring unconstitutional the regulation of drug-store locations,¹⁸ the one finding unconstitutional the Customs law provision which allowed for the taking of smuggled articles belonging to a third party without notice or hearing,¹⁹ or the one holding unconstitutional the forest law provisions which prohibited the partitioning of co-owned forest.^{19.1}

The Japanese Supreme Court has cautiously avoided handing down any judgment of unconstitutionality which might have great political significance. This difference between American judicial activism and Japanese judicial negativism leads to different images, both of the judiciary and of judges.²⁰

The difference in personnel policies for judges also leads to different images of judges in their respective societies. In Japan,

ment became politically impossible. Thus, the provision held unconstitutional by the Supreme Court has remained untouched in the Criminal Code. This outrageous situation has been actually solved by the practice of prosecutors indicting the accused under the provision for ordinary murder even when the accused has killed a lineal ascendant. (Concerning the political situation and the prosecuting practice, see *Asahi Shinbun* 1973.7.16 [July 16, 1973] (Morning Ed.) at 2, col. 5.)

For an English translation of this case, see GENERAL SECRETARIAT, SUPREME COURT OF JAPAN, JUDGMENT UPON CASE OF CONSTITUTIONALITY OF ARTICLE 200 OF THE PENAL CODE PROVIDING KILLING OF AN ASCENDANT, SPJ Series No. 13 (1975). Concerning the precedent of October 11, 1950, see GENERAL SECRETARIAT, SUPREME COURT OF JAPAN, JUDGMENT UPON CASE OF BODILY INJURY RESULTING IN DEATH TO LINEAL ASCENDANT UNDER ARTICLE 205-2 OF THE PENAL CODE, SPJ Series No. 3 (1959).

18. The Yakuji Hō (Drugs, Cosmetics and Medical Instruments Act) of 1960 regulates the opening of new pharmacies within a certain distance of one previously established. The Japanese Supreme Court held this regulation to be unconstitutional because it violated the right to freedom of choice of occupation, KENPŌ (Constitution) § 22. Judgment of April 30, 1975, Saikōsai, 29 MINSHŪ 572.

For an English translation of this case, see GENERAL SECRETARIAT, SUPREME COURT OF JAPAN, JUDGMENT UPON CASE OF CONSTITUTIONALITY OF THE ACT TO REGULATE LOCATION OF PHARMACIES, SPC Series No. 16 (1976).

19. Judgment of Nov. 28, 1962, Saikōsai, 16 KEISHŪ 1593. For an English translation of this case, see JUDGMENT UPON CASE OF VIOLATION OF PROPERTY RIGHTS AND DUE PROCESS OF THE LAW, SPC Series No. 7 (1964).

19.1 Judgment of April 22, 1987, Saikōsai, 1227 HANREI JIKO 21.

20. Concerning the social image of the judiciary among other socially influential institutions, the following has been said: "The judiciary overwhelmingly enjoys the highest evaluation as being fair and reliable organization compared to other organizations or institutions. However, it receives the lowest evaluation concerning its influence over policy formation or contribution to daily life." S. TANAKA, 37 HŌ SHAKAIGAKU 35 (1985).

the Supreme Court justices are appointed by the cabinet.²¹ The usual appointment practice keeps a ratio of 5:5:5 among the fifteen justices, with five from career judiciary, five from private practice, and five from other areas.²²

Aside from the appointment of Supreme Court justices, a career system like that of France and West Germany has been adopted in Japan to fill judicial posts in the lower courts. Immediately upon graduating from the Legal Training and Research Institute, roughly 60 to 80 persons are appointed as assistant judges. (See Table 2). After ten years of service as assistant judges, most are appointed as full judges. Unlike in the United States, these judges are ordinarily expected to rise through promotions up the judiciary ladder. In this context, the personnel system in the Japanese judiciary is similar to that of a bureaucracy.

TABLE 1

Evaluation of Organizations or Institutions Which Affect State Affairs

	The most useful organization or institution in daily life	The most influential organization or institution over policy formalities	The fairest and the most reliable organization or institution
Private Enterprises	12.8%	5.5%	0.9%
Agencies in the Central Gov't	3.5	4.4	3.6
Judiciary	3.4	2.1	46.0
Local Government	34.0	6.5	7.0
Diet	3.8	40.7	3.6
Mass Media	11.1	18.7	4.0
Don't Know	31.3	22.1	34.9

S. Tanaka, *Nihonjin no Hōshiki to sono Kenkyū no Genkyō ni tsuite* [The Present State of the Japanese Law-Consciousness and of its Studies], 37 *Hō SHAKAIGAKU* 35 (1985), and T. Tanaka, *SAIBAN O MEGURU Hō To SELI* [Law and Politics Surrounding Adjudication] 11 (1979). See also Chart 1.

21. The Chief Justice of the Supreme Court is appointed by the Emperor, based on the designation of the Cabinet, and the other Associate Justices are appointed by the Cabinet. *KENPŌ* (Constitution) arts. 6(2), 79.

22. For a list of past and present Supreme Court Justices and their former occupations, see 67 *HŌGAKU KYŌSHITSU* 36 (1986).

TABLE 2

Career Choices of Graduates from
the Legal Training and Research Institute

Year	No. of Grads.	Asst. Judges	Prosecutors	Practicing Lawyers	Other
1949	134	72	44	18	—
1950	240	106	54	78	2
1951	284	84	77	113	10
1952	246	57	79	97	13
1953	215	51	67	84	13
1954	226	45	48	131	2
1955	236	67	59	109	1
1956	216	73	50	89	4
1957	267	77	45	143	2
1958	256	65	45	144	2
1959	282	69	51	157	5
1960	291	81	44	166	—
1961	349	84	48	216	1
1962	319	75	42	202	—
1963	334	88	40	202	4
1964	365	57	45	261	2
1965	441	72	52	316	1
1966	478	66	47	359	6
1967	484	73	49	356	6
1968	511	85	49	369	8
1969	516	84	53	374	5
1970	512	64	38	405	5
1971	506	65	47	388	6
1972	495	58	59	370	8
1973	493	66	50	371	6
1974	506	85	47	367	7
1975	543	84	38	416	5
1976	537	79	74	376	8
1977	487	72	50	363	2
1978	463	78	58	325	2
1979	465	64	49	350	2
1980	454	64	50	336	4
1981	484	61	38	378	7
1982	499	62	53	383	1
1983	483	58	53	370	2

THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN, S. Ct. of Japan, 21 (1984).

The common education at the Legal Training and Research Institute, the bureaucratic character, and the lack of experience in occupations other than the judiciary contributes to similarities in the judges' thinking and judgments as compared to their American counterparts, all of whom have had other occupational experience before their appointment. In Japan the judiciary has an image of being reliable and not tainted by secular interests, but it is also seen as isolated from society. (See Chart 1). This isolation from the populace is probably aggravated by the lack of a jury system or of any other form of popular participation in the judiciary process.

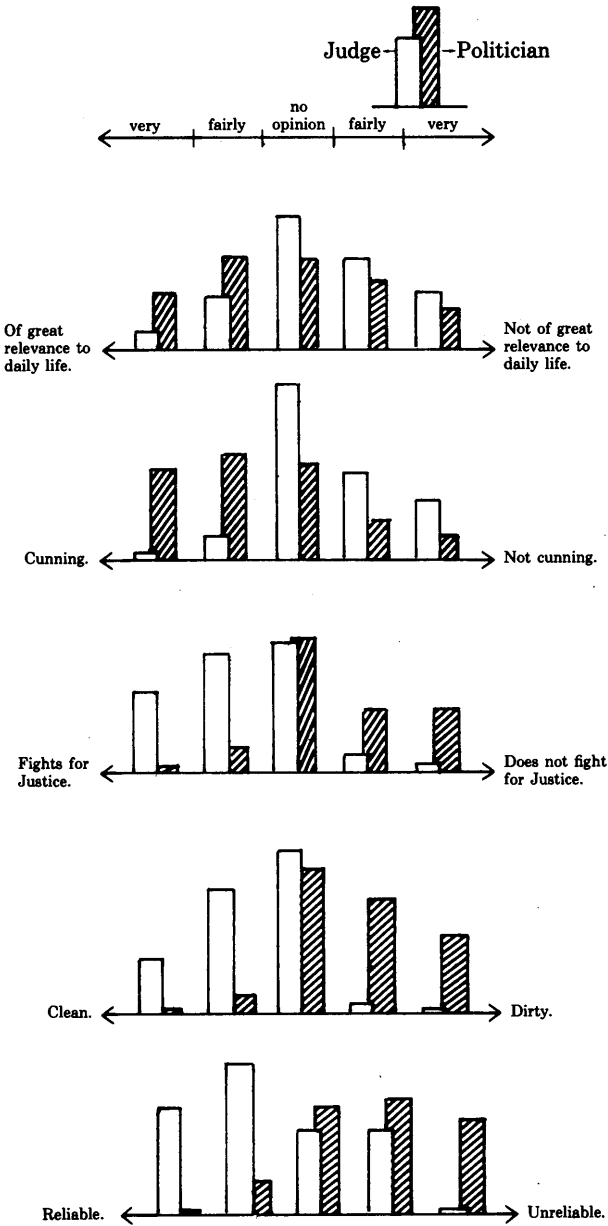
The differences between the law and lawyers in Japan and the United States cannot be separated from distinctions in factors such as legal education and patterns of legal thought. The different modes of legal education, professional school or undergraduate education, lead to different social status for lawyers in the two countries. The different teaching methods, the Socratic method and the lecture method, develop different ways of thinking about legal questions. These different ways of thinking are fostered even more by the different procedural systems, like the adoption of the jury system in the United States. The different teaching methods are also related to the school system, the Socratic method being more amenable to the older students found in professional schools, and to the legal system itself when it is based on case law. Different members of the profession, judges as opposed to theorists, are also spotlighted by the two systems. More importantly, the difference in the type of members who represent the profession is a reflection of the judicial activism or negativism of the two countries. In addition, the different image of judges and the judiciary is encouraged by the difference in personnel policies of the judiciaries of the two countries.

The differences in legal education, in the role of law and of lawyers, in the way of thinking, all interact with each other.

CHART 1

Public Image of Judges in Japan

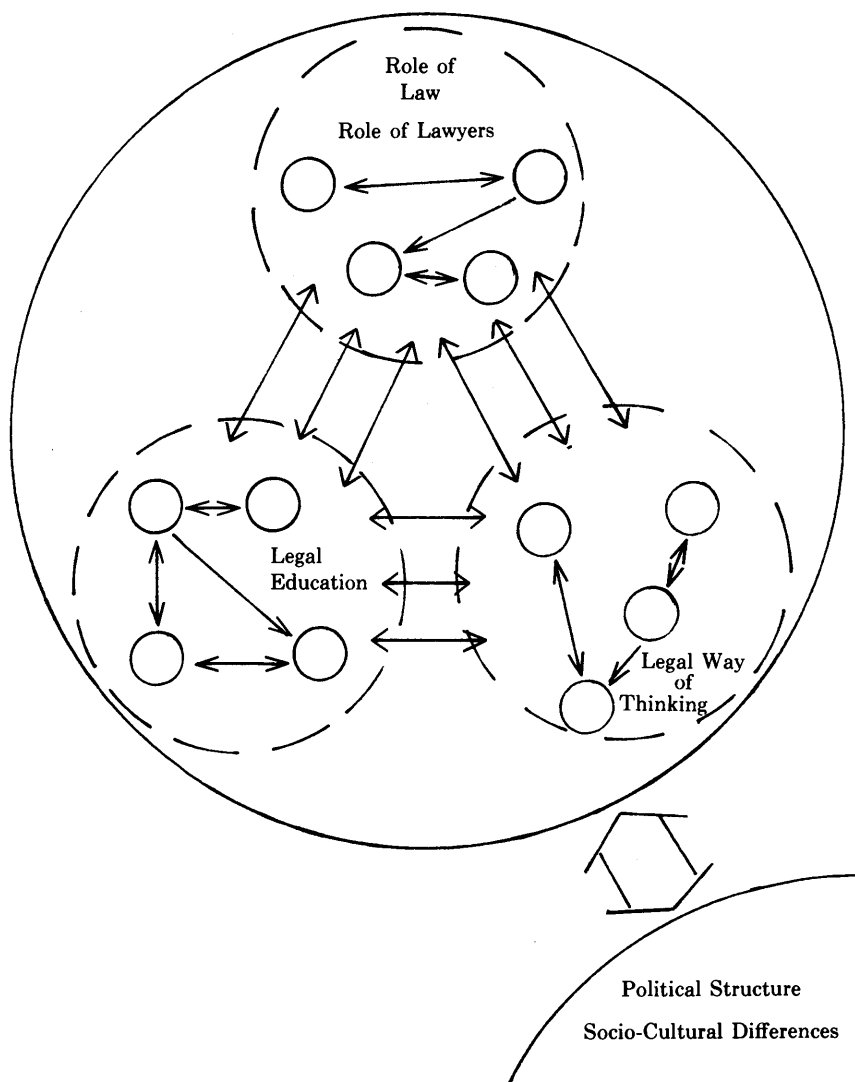
QUESTION: When you hear the word "judge" or "politician" what is your reaction?



A poll taken in Japan provided the figures from which the above comparison of the popular images of judges and politicians was made. NIHON BUNKA KAIGI [Japan Culture Conference] ed., NIHONJIN NO HOISHIKI [Legal Consciousness of the Japanese], 186-188 (1973). See also Table 1.

CHART 2

Interaction of Factors Which Form the Legal Culture



Besides the legal factors mentioned above, there are many social factors which influence the legal environment, including the role of law and lawyers. For example, different political schemes influence the legal environment. Where the balance of strength and the relationship between the legislative, judicial and administrative powers differs, the legal environment must also be dif-

ferent. Other cultural factors—for example the Japanese are less argumentative than Americans, and the Japanese place greater importance on harmony—also influence the legal environment. The interaction of these many factors within the different cultures cause different types of legal environments to develop. The differing roles of law and lawyers in the two countries is the main theme of this paper; however, it is only one aspect of the legal environment. In order to meaningfully compare the merits or demerits of the two legal cultures and their legal professions, other factors must be considered.

III. THE ROLE OF LAW AND LAWYERS IN THE TWO SOCIETIES

A. *A Comparison of the Number of Legal Professionals and Litigation Rates*

When the number of legal professionals qualified as judges, practitioners and public prosecutors in Japan is compared with the number in the United States, the figures are quite different.²³ Among advanced countries, the United States and Japan occupy the two extreme positions, as shown in table 6.²⁴ Table 7 shows that the ratio of people for each lawyer is 6,693:1 in Japan and 360:1 in the United States. Concerning this contrast, President Bok of Harvard University stated:

A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000

23. Numerical comparisons of lawyers and litigation per population have been the traditional method used in United States-Japan comparative studies of law. See, e.g., 2 D. HENDERSON, *CONCILIATION AND JAPANESE LAW—TOKUGAWA AND MODERN*, 195-200 (1965).

24. The small number of lawyers in Japan reflects the need for social structures for dispute solution in Japan. See *infra* section V. It is also a result of governmental policy. Because trainees at the Legal Training and Research Institute are compensated like public servants, any increase in the number of trainees would be a financial burden on the government. Accordingly, the government is reluctant to increase their number. Thus, the number accepted by the Legal Training and Research Institute is limited to approximately 500 every year. (See Table 4). However, in one sense, this government policy is a reflection of the lack of social need to increase the number. For private practitioners, who have passed the very competitive law exam, easing the competitiveness of the national law exam would mean greater competition for their jobs in the future. A survey of practitioners views indicate that 82% of them do not think that an increase in the number is currently necessary. Even as a future problem, only half of the practitioners think it is necessary. (See Table 3).

every year. It would be hard to claim that these differences have no practical consequences.

TABLE 3

Practitioners' Opinions of the Necessity to Increase the Number of Practitioners

What Do You Think About The Present Number of Practitioners?

Too Many	5%
Appropriate	23%
Appropriate if the Problem Of Concentration in Major Cities is Solved	54%
Too Small	13%
Don't Know	5%

What Do You Think About the Future Number of Practitioners?

Should Be Decreased	2%
Should Remain the Same As Present	49%
Should Be Gradually Increased	42%
Should Be Increased Dramatically	4%
Don't Know	3%

Nichibenren Henshū Inkai [Japan Federation of Bar Associations, Editing Committee], *Bengoshi no Shokuiki ni kansuru Ishiki Chōsa* [A Survey of Practitioners' Recognition of the Business Area] 28-5 JIVU TO SEIGI 19, at 22 (1977).

Although the judiciary and the public prosecutors have some interest in increasing their numbers, they are not politically active in attempting to increase the number of persons accepted by the Legal Training and Research Institute. There is no strong voice from potential users of judicial or legal services, such as business people or ordinary citizens, who advocate an increase in the number of judges or private practitioners. (See Tables 18 and 19). Although it is in the interest of the national law exam applicants to ease the severe competitiveness of the exam, their social influence as a group is very limited. Thus, there are no strong social interest groups who advocate an increase in the number accepted by the Institute. Consequently, the applicants for the national law exam suffer from the extreme severity of the exam. The average age of those who passed the law exam was 28.39 in 1985, and 27.79 in 1986. (*Nihon Keizai Shinbun*, Nov. 1, 1985, § 5 at 30. *Yomiuri Shinbun*, Nov. 1, 1986, § 1 (Satellite ed.) at 22). Since in Japan most students graduate from college at the age of twenty-two or twenty-three, the average person passing the law exam spends several years preparing for the exam.

The tables below compare the passing rate for bar exams in the two countries.

TABLE 4

Passing Rate for the National Law Exam in Japan

Year	Persons Taking	Persons Passing	Pass Rate
1949	2,514	265	10.5
1950	2,755	269	9.8
1951	3,648	272	7.5
1952	4,765	253	5.3
1953	5,141	224	4.4
1954	5,172	250	4.8
1955	6,306	264	4.2
1956	6,714	297	4.4
1957	6,920	286	4.1
1958	7,074	346	4.9
1959	7,819	319	4.1
1960	8,302	345	4.2
1961	10,921	380	3.5
1962	10,802	459	4.2
1963	11,725	456	3.9
1964	12,728	508	4.0
1965	13,681	528	3.9
1966	14,867	554	3.7
1967	16,460	537	3.3
1968	17,727	525	3.0
1969	18,453	501	2.7
1970	20,160	507	2.5
1971	22,336	533	2.4
1972	23,425	537	2.3
1973	25,259	537	2.1
1974	26,622	491	1.8
1975	27,791	472	1.7
1976	29,088	465	1.6
1977	29,214	465	1.6
1978	29,390	485	1.7
1979	28,622	503	1.8
1980	28,656	486	1.7
1981	27,816	446	1.6
1982	26,317	457	1.7
1983	25,138	448	1.8

THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN, Supreme Court of Japan, 19 (1984).

TABLE 5

Passing Rate for the 1985 Bar Exam in the U.S.

State	Persons Taking	Persons Passing	Pass Rate
Alabama	563	344	61.1
Alaska	277	194	70.0
Arizona	948	619	65.2
Arkansas	258	211	81.7
California	12,357	5,039	40.8
Colorado	957	776	81.1
Connecticut	1,254	935	74.6
Delaware	131	87	66.4
District of Columbia	748	367	47.8
Florida	3,060	2,217	72.5
Georgia	1,553	1,033	66.5
Guam	24	21	87.5
Hawaii	334	279	86.1
Idaho	183	160	87.4
Illinois	3,099	2,785	89.9
Indiana	656	535	81.6
Iowa	369	283	76.7
Kansas	366	318	86.9
Kentucky	443	357	80.6
Louisiana	906	643	71.0
Maine	238	205	86.1
Maryland	1,747	1,034	59.2
Massachusetts	2,463	1,915	77.8
Michigan	1,645	1,259	76.5
Minnesota	920	757	82.3
Mississippi	231	195	84.4
Missouri	929	781	84.0

State	Persons Taking	Persons Passing	Pass Rate
Montana	163	129	79.6
Nebraska	236	194	82.2
Nevada	237	184	77.6
New Hampshire	234	174	74.3
New Jersey	3,781	2,739	72.4
New Mexico	299	212	70.9
New York	8,912	5,687	63.8
North Carolina	843	486	57.7
North Dakota	101	85	84.1
Ohio	1,750	1,443	82.5
Oklahoma	659	542	82.2
Oregon	621	431	69.4
Pennsylvania	3,404	2,690	79.0
Puerto Rico	770	253	32.9
Rhode Island	191	158	82.7
Saipan	20	16	80.0
South Carolina	353	292	82.7
South Dakota	97	78	80.4
Tennessee	691	486	70.3
Texas	3,449	2,399	69.6
Utah	260	225	87.6
Vermont	146	77	52.7
Virginia	1,292	903	69.9
Washington	1,263	653	51.7
West Virginia	116	78	67.2
Wisconsin	227	193	85.0
Wyoming	87	69	79.3
Total	66,861	44,225	66.0

THE BAR EXAMINER, May 1986, at 16.

As the Japanese put it, "engineers make the pie grow larger; lawyers only decide how to carve it up."²⁵

Similar arguments were made by former Secretary of Commerce Baldrige.²⁶ TIME MAGAZINE reported that Japan was the "land without lawyers."²⁷

B. *A Revised Comparison of the Number of Legal Professionals*

Although Japanese society has managed with many less lawyers than has the United States, the ratio of lawyers in Japan to lawyers in the United States is much closer than it first appears.²⁸ The occupational range of practicing lawyers in the

25. Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 38 REC. A.B. CTRY N.Y. 12, 17 (1983) (emphasis in original).

26. New York Times, Mar. 11, 1984, § 3, at 2.

27. TIME, Aug. 1, 1983 (Special Issue: Japan, A Nation in Search of Itself) 85.

28. The figures in Table 6 were determined as follows:

Japan: The figures for judges and prosecutors indicate the legally prescribed numbers for fiscal year 1979. The figure for practitioners indicates the number as of April 26, 1979. The population figure indicates population estimated as of October 1, 1978 according to research by the Bureau of Statistics of the Prime Minister Office.

United States: As to the number of Judges in the parentheses (excluding Justice of the Peace), the figure for Federal court judge is the number of judges as of October 20, 1978 (the year when the Act to Increase the Number of Justices was passed), and the figure for the number of state judges indicates the number as of 1976. The number of Justice of the Peace was reported to be approximately 45,000 as of 1957. Although the exact figure is unclear, this table estimates the number to be less than 40,000 because most states have abrogated the system of Justice of the Peace in recent years.

The figure for Federal prosecutors indicates the number of prosecutors as of 1975 and includes 1,419 assistant prosecutors. The figure for state prosecutors indicates the number as of 1974. The number of practitioners includes all lawyers qualified as of December 1976. The population figure indicates population estimated as of April, 1978.

United Kingdom: The figure in the parentheses is the number of judges as of 1978. The figure excludes uncompensated Justices of the Peace and includes 53 compensated Justices of the Peace and 367 part-time judges.

The number of practitioners is the sum total of approximately 3,881 Barristers (figure as of 1976) and approximately 31,250 Solicitors (figure as of 1976).

The population figure is the estimated population as of the end of June, 1977.

West Germany: The figure for judges indicates the number of judges actually sitting in each judiciary. The number of practitioners includes concurrently acting as notary publics. (Both figures indicate the numbers as of January 1, 1977.)

The population figure indicates the population estimated as of 1977.

France: The figures for judges and prosecutors indicate the numbers as of 1977. The figure for practitioners indicates the number as of 1971 and includes 1,700 former avoués.

The population figure indicates the population estimated as of 1977.

Italy: The figures for judges and prosecutors indicate the numbers as of 1963 and the figure for practitioner indicates the number as of December 1960.

The population figure indicates the population estimated as of October 1961.

*This figure has been altered from the original figure noted in the table because the original figure was incorrectly calculated. It has been corrected in accordance with the other figures in the table.

TABLE 6
Ratio of Lawyers to Population in Several Countries

	POPULATION	JUDGES (Numbers in parentheses exclude Summary Court Judges & Justices of the Peace.)	PROSECUTING ATTORNEYS	LAWYERS	Ratio of Population to Members of Legal Profession			
					JUDGES	PROSECUTORS	LAWYERS	ENTIRE LEGAL PROFESSION
JAPAN	115,174,000	2,731 (1,940)	2,092 (1,173 excluding Ass't. Prosecutors)	11,552	42,173 (59,368)	55,054 (98,187)	9,970	7,034 (7,854)
U.S.	218,100,000	Approximately 45,000 (7,845)	Fed. 1,513 State 8,739	424,980	4,847 (27,801)	21,274	513	454
U.K.	49,119,000	24,802 (819)		35,131	1,980 (59,974)		1,398	820
WEST GERM.	61,400,000	14,765	3,233	31,167	4,158	18,992	1,970	1,249
FRANCE	53,080,000	3,590	1,062	8,475	14,786	49,981	6,263	4,044
ITALY	49,904,000	5,739	993	34,461	8,696	50,256	1,448	1,211*

This table was published in 700 JURISURTO 206, based on the materials of the Supreme Court of Japan.

United States and Japan differs widely.²⁹ In Japan, a private practitioner works mainly in litigation;³⁰ the scope of American

29. The figures in Table 7 are:

(1) Population of Japan, as of October 1, 1985, according to the census in 1985.

(2) Number of Judges, as of April 1, 1986. This is the number prescribed in Saiban-sho Shokuin Tein Hō [The fixed Judiciary Staff Number Act] of 1951 (Amendment of 1986). This figure of 2,749 includes 779 Summary Court judges.

(3) Number of Prosecutors: As of July 1, 1984. According to the Management and Coordination Agency Report on the Statistical Table of Personnel in the Central Government Regular Civil Service [Sōmuchō Chōsa: Ippanshoku Kokka Kōmuin Zaishoku Jōkyō Tōkei Hyō]. This figure includes assistant prosecutors.

(4) Number of Practitioners: As of July 1, 1986. According to the Japan Federation of the Bar Association Membership List. In addition to these 13,158 practitioners, there are 17 special members of the bar who are only qualified in Okinawa (see Table 16), and 19 foreign practitioners who are considered quasi-members of the bar (*id.*).

(5) Sum total of the former three figures.

(6) This figure is different from the 9,200 in Table 16 because this calculation rounds off population figures to the nearest 1000.

(7) Population of the U.S., as of July 1, 1984, Estimation of the Resident Population in the U.S., Bureau of the Census, Current Population Reports, Series P-25, No. 970, POPULATION ESTIMATES AND PROJECTIONS, STATE POPULATION ESTIMATES, BY AGE AND COMPONENTS OF CHANGE: 1980 TO 1984 7 (1985).

(8) Calculated from the data in B. CURRAN, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980's (1985). Therefore, concerning population per one judge ratio, there is a wider time-gap between the estimation times of population and judges than between the other ratio calculations.

(9)-(12) B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 3, 4 (1986).

30. Takamizawa, *Bengoshi no Jittai* [Actual Conditions of Private Practitioners], 20 HŌGAKU SEMINĀ ZOKAN, GENDAI NO BENGOSHI [Contemporary Practitioners] 141 (1982), describes the situation in general as follows:

The words litigation or court would immediately come to mind for anyone hearing the term "private practitioner." Actually, a survey in 1980 by the Japan Associations tells us that most (about 90%) of the approximately 42 cases which, on the average, are handled concurrently by a practitioner civil disputes, and that more than 80% of these are in court or in a quasi-judicial proceeding. Cases of a non-dispute character, which are solved through consultation or advice, comprise only 7%.

For a more detailed statistical analysis, see Rokumoto, *Bengoshi no Yakuwari to Gyomu Keitai* [Role of Practitioners and Types of Its Business Operation], 1 HŌKYŌ HYAKUNEN RONSHŪ 536 (1983), and Japan Federation of Bar Association, *Bengoshi Gyōmu no Keizaiteki Kiban ni Kansuru Jittai-chōsa Kihon Hōkokusho* [A Basic Report of an Investigation into the Actual Conditions of the Financial Underpinnings of the Lawyer's Business], 32-10 JYŪ TO SEIGI 72-93 (1981). This survey was conducted by the Japan Federation of Bar Association with the cooperation of Professor Rokumoto [hereinafter "JFBA Basic Report"].

Another survey tells us that the ratio of non-litigation work of the private practitioners, such as giving legal advice, drafting contracts, and negotiation, is only 17.4 percent in terms of income. Nichibenren henshu linkai [Japan Federation of the Bar Associations, Editing committee], *Bengoshi no Shokuiki ni Kansuru Ishiki Chōsa* [A Survey of the Practitioners' Recognition of Their Business Area], 28-5 JYŪ TO SEIGI 30 (1977).

Table 7
Updated Statistics on Ratio of Lawyers to Population in Japan and the U.S.

	Population	Judges	Prosecuting Attorneys	Practitioners	Lawyers in Total	Ratio of Population to Members of Legal Profession			
						Judges	Prosecutors	Practitioners	Entire Legal Profession
JAPAN	121,047,000 *1	2,749 *2	2,179 *3	13,158 *4	18,086 *5	44,033	55,552	9,199 *6	6,693
U.S.A.	236,158,000 *7	Approximately 13,900 *8	—	460,206 *9	655,191 *10	16,990	—	513 *11	3,60 *12

practitioners' work is much wider. In America, there are many lawyers in management, business and government. (See Table 8). There are also many lawyers among statesmen. Contracts and other legal documents are frequently drafted by lawyers in the United States, while Japanese practitioners, with the exception of international lawyers, seldom draft documents.

In a functional comparison, the counterpart of a practicing lawyer in Japan would be a litigation lawyer in the United States. About 49,000 American lawyers are members of the ABA Committee on Litigation,³¹ about 3.7 times the number of Japanese practitioners. The Japanese correlation to the number of American lawyers might have to include not only Japanese practicing lawyers, but also Japanese company employees in legal departments,³² Japanese who draft legal documents (called judicial scriveners and administrative scriveners), and Japanese patent

31. Figure provided by ABA Committee on Litigation, March 1987.

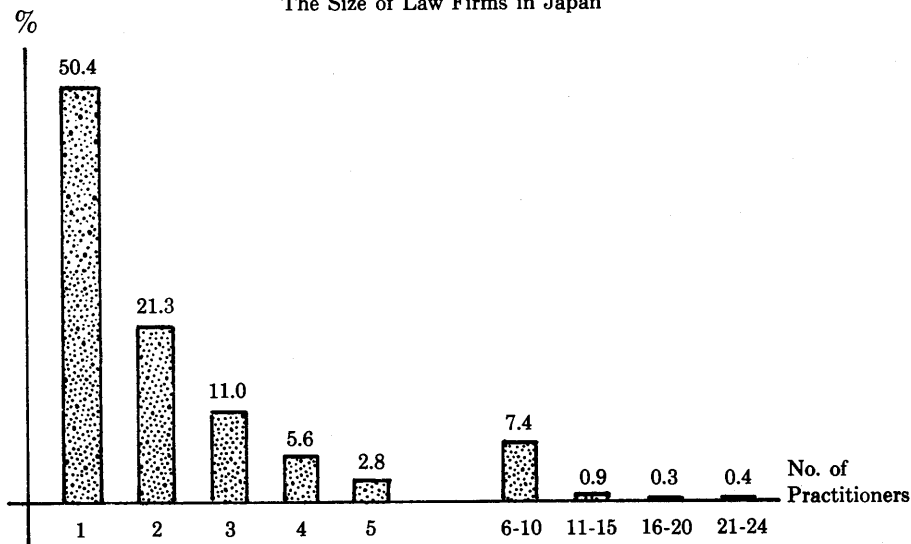
32. In Japan, in-house lawyers of the type known in America are exceptional. According to an article written in 1982, only 13 qualified lawyers were employed by private enterprises. This means only about 0.1% of the total number of practitioners work in private enterprises in Japan, while 10% of all American practitioners were in-house lawyers as of 1970. Hamazaki, *Kigyō to Bengoshi* [Private Enterprise and Practitioners], 20 HŌGAKU SEMINĀ ZŌAN, GENDAI NO BENGOSHI [Contemporary Practitioners] 255 (1982). While Japan IBM, a wholly owned subsidiary of the American IBM, had adopted the policy of maintaining a legal department with in-house lawyers (7 as of 1985), most Japanese enterprises do not hire qualified lawyers in their legal departments. However, there are several exceptions, company legal departments which have one or two qualified lawyers. Zadankai, *Bengoshi Gyō no Kadai to Shōrai* [Discussion of Problems and the Future of Legal Services], 842 JURISUTO 8, 12 (1985). By contrast, the largest number of legal staff members in American enterprises is AT&T and Exxon with over 400. In 1983 there were 34 United States companies which had 100 or more legal staff members. LAW AND BUSINESS, INC., THE LAWYER'S ALMANAC, 95-96 (1985).

Rather than hiring qualified lawyers, a substantial number of the major enterprises in Japan have legal departments composed of employees who have not passed the national law exam. However, the substantial part of these employees studied law in college. Additionally, these employees are well versed in the company's affairs and are accustomed to teamwork. Japanese law firms are very small on the average, and as a result, the development of legal departments in private enterprises is said to be becoming a menace to private practitioners. See NBL KAISHA HŌMUBU [Legal Departments in Corporations] (1982); NBL KAISHA HŌMUBU [Legal Departments in Corporations] (1976).

As of 1985 only forty Japanese law firms had ten or more lawyers. Twenty-nine of these firms are located in Tōkyō, four in Osaka, two in Nagoya and Yokohama, and one in Kyoto, Fukuoka and Saitama. Nitō, *Jimusho Kyōdōka no Asu o Tenbō Suru* [Looking over Tomorrow's Picture for Forming Partnerships in Law Firms], 58-4 HŌRITSU JIHŌ 43 (1986). The largest Japanese law firm has about thirty lawyers, about one-tenth the size of the largest United States firm. (The largest United States law firm had 376 lawyers in a single office as of Feb. 1, 1984. LAW AND BUSINESS, INC., THE LAWYER'S ALMANAC 3 (1985)). For comparison see charts 3 and 4 below.

CHART 3

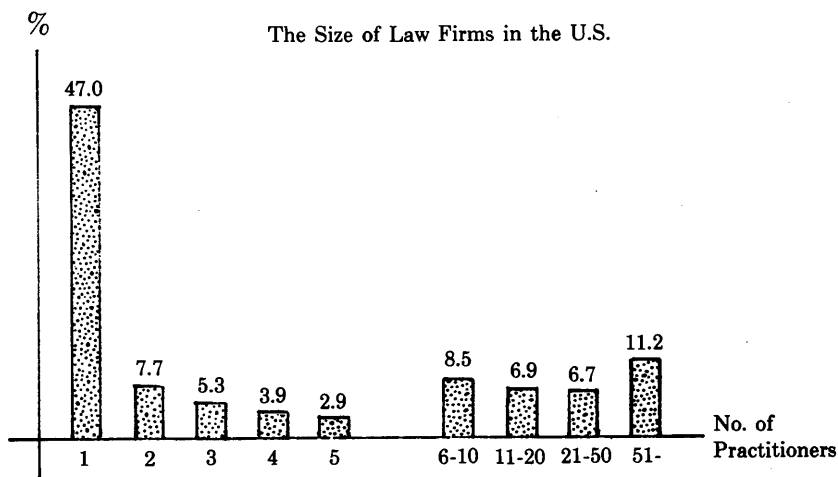
The Size of Law Firms in Japan



Source: JFBA Basic Report, 32-10 Jiyū To Seigi 54 (1981).

CHART 4

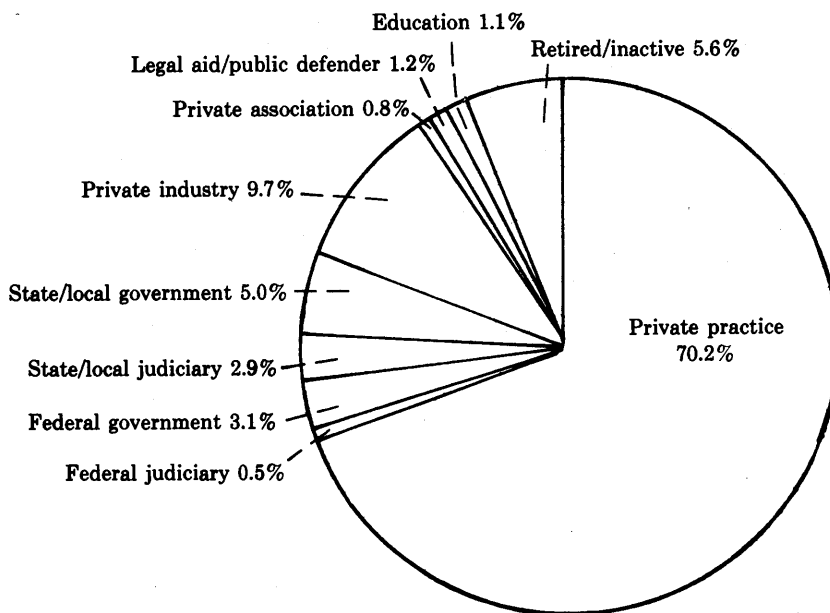
The Size of Law Firms in the U.S.



Made from B. CURREN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985, at 4 (1986).

attorneys and tax attorneys.³³ These classes of legal practitioners are not qualified as lawyers; they qualify through different—generally less competitive—national examinations.

TABLE 8
Lawyer Population by Employment, 1985 in the U.S.



Taken from B. CURREN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 at 3 (1986).

Comparing the ratio of legal workers to the general population in Japan (1 to 1,119) to the same ratio in the United States (1 to 505), the United States figure is approximately twice that of Japan. (See Table 9).

33. Concerning the nature of these quasi-lawyers, see generally 24 HŌGAKU SEMINĀ ZŌAN, SHIMIN NO TAME NO HŌRITSUKA [Citizen Lawyer] (1983). For a concise explanation in English, see, H. TANAKA, THE JAPANESE LEGAL SYSTEM 563 (1976).

TABLE 9
Persons Doing Legal Work in Japan (1982)

Judges	2,700
Public Prosecutors	1,173
Practicing Attorneys	12,233
Company Employees Doing Legal Work	1,320
Judicial Scriveners [Shihoo-Shoshi]	14,572
Administrative Scriveners [Gyoosei-Shoshi]	30,121
Patent Attorneys [Benrishi]	2,600
Tax Attorneys [Zeirishi]	40,860
Total Persons Doing Legal Work	105,579
Population of Japan (December 1981)	118,107,000
Population Per Person Doing Legal Work	1,119

Comparison of Population per Person Doing Legal Work in
Several Countries

	Population Per Legal Person
France (1965)	4,026
West Germany (1971)	1,561
Japan (1982)	1,119
United Kingdom (1971)	1,023
United States (1978)	505

I. Shapiro, M. Young & K. Fujikura, *THE ROLE OF LAW AND LAWYERS IN JAPAN AND THE UNITED STATES*, OCCASIONAL PAPER No. 16, EAST ASIA PROGRAM, THE WILSON CTR. 10 (1983).

These comparative ratios, however, have no absolute meaning because Japanese quasi-lawyers cannot be equated to American lawyers, who belong to a profession. The legal education and training which these quasi-lawyers receive is quite different from that of American lawyers. Many Americans have the impression that these quasi-lawyers have law degrees,³⁴ but this is incor-

34. "Much of the work done in the United States by attorneys is processed in Japan

rect.³⁵ Moreover, there is some debate as to what types of scriveners should be included in the category of quasi-lawyer.³⁶ In addition to those listed in table 9, the number of Japanese doing legal work in the government is substantial. Most Japanese legislation is drafted by such people, the majority of whom graduate from law departments or economics departments.

An argument can be made against the above functional comparison. Japanese people in legal departments of private enterprises and in the government are—in almost all cases in the government and in a substantial number of cases in private enterprise—placed in such positions temporarily, as one of a series of placements in various fields during their life-time employment. A persuasive argument can be made that people with such temporary specializations differ completely from legal professionals in the United States. It is also persuasive that, in view of the previous discussion on the differences in educational background, Japanese quasi-lawyers arguably should not be compared to American lawyers.

A functional approach, which focuses on similarity in job content, makes a wide comparison possible, but such a wide comparison must be made with reservations. As every society has a different social scheme, it is impossible to derive a meaningful and accurate comparison from figures alone. Thus, it is not surprising that there have been objections to a functional approach. However, even using a functional approach, in which many Japanese quasi-lawyers are counted, America has more lawyers than Japan.

by nearly 90,000 scriveners and other workers, many of whom have undergraduate law degrees." *TIME*, *supra* note 27, at 65. Although the first point of this description is correct, the second is completely wrong.

35. For example, 36% of judicial scriveners are college graduates, 9% are junior college graduates, 34% are high school graduates, and 19% are junior high school graduates under the pre-war educational scheme. Sasaki, *Shihōshoshi* [Judicial Scriveners], 24 *HŌGAKU SEMINĀ ZŌAN*, SHIMIN NO TAME NO HŌRITSUKA [Citizen Lawyer] 218 (1983). In addition, not all of the college graduates specialized in law.

In comparison, the ratio of non-college graduates among practicing lawyers in Japan is two percent. JFBA Basic Report, 32-10 *JIVŪ TO SEIGI* 40 (1981). For a history and statistical breakdown of educational requirements for United States lawyers, see Thorne, *Professional Education in Law*, *EDUCATION FOR THE PROFESSIONS OF MEDICINE, LAW, THEOLOGY AND SOCIAL WELFARE* 101-68 (1973).

36. Some people might widen the range of these quasi-lawyers to include social security scriveners [*shakai hoken rōmushi*], etc. See, e.g., Tamura, *Hōtsu Jitsumuka to Kōkyaku* [Legal Practitioners and their Clients], 8 *HŌSHAKAIGAKU KŌZA* 334 (1973).

C. *Civil Litigation Rate*

Not only is there a low ratio of legal workers to the general population in Japan, but there is also a low ratio of civil litigation cases to the population when compared with major Western countries. (See Table 10).

TABLE 10
Litigation Rate in Selected Countries

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

A. Sarat and J. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AMERICAN POLITICAL SCIENCE REVIEW 1208 (1975).

Table 10 does not have the figures for the United States, but tentatively using the California figures³⁷ instead of the whole of America,³⁸ there are about 4,834 cases per 100,000 people, somewhere between the rates of Denmark and New Zealand.

However, a reservation is also necessary concerning Table 10, as commentators have admitted.³⁹ The notion of civil litiga-

37. Haley, *The Myth of the Reluctant Litigant*, 4 JOURNAL OF JAPANESE STUDIES 362 (1978).

38. It is debatable whether the California figure is representative of the United States as a whole. Professor Ehrmann calculated the civil cases per 100,000 population in Massachusetts as 1,814 (1971), and New Hampshire as 345 (1971). Based on these figures, Ehrmann placed the former between West Germany and Japan, and the latter between Finland and Norway in this same table. H. EHRMANN, *COMPARATIVE LEGAL CULTURES* 84 (1976).

39. See Sarat and Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POL. SCI. REV. 1208 (1975). See also Haley, *supra* note 37, at 362, 364.

tion is not the same from country to country,⁴⁰ and differences in legal systems—for example, how divorce cases are dealt with—change the litigation rates. In addition, the same litigation rate does not necessarily mean the same degree of litigiousness because the meaning of litigation in the socio-cultural context differs from society to society. For example, in Japan, one filing a lawsuit is “open[ly] challeng[ing] the other party and means to raise a quarrel with him.”⁴¹ Ordinarily, a lawsuit is filed in Japan only after every possibility of more peaceful settlement has been examined and tried.⁴² In the United States, the social implication of filing a lawsuit seems a little less serious than in Japan. Although the filing of a lawsuit in the United States is a decisive manifestation of a strong will to fight, it is done at a much earlier stage—not necessarily after examining and trying all the other possible means of settlement. Thus, the hostility accompanying a lawsuit seems more serious in Japan than in the United States. Metaphorically speaking, the socio-cultural meaning of filing a lawsuit in Japan is a declaration of war, while in the United States it is an ultimatum. Consequently, once a lawsuit has been filed, the percentage of cases

40. Professor Tanaka has pointed out that the figure for Japan used in this table includes cases which cannot be considered to be civil disputes, and that the figure should be much smaller:

[The Japanese] figure in this article adds the numbers of non-contentious cases, compulsory execution and miscellaneous cases, etc., to the numbers of litigation, adjudgment cases [Shinpan—a different procedure from litigation] and mediation of civil disputes and domestic relations. Among cases in the former group, only bankruptcy cases (1,680), corporate reorganization (107), habeas corpus (32) and in one sense cases of summary procedure (204,556) can be included as civil disputes if we compare these to the judicial statistics, say, of Massachusetts. Including cases of summary procedure, the total number is 698,543, and 674 per 100,000 population. Excluding those cases, these figures are 494,017 as a whole, and 476 per 100,000 population. . . . In particular, it is a decisive mistake in the article of Sarat and Grossman to include cases of correctional fines [Karyō] (296,181).

Tanaka, *Nihon ni okeru Amerika Hō Kenkyū—Amerika ni okeru Nihon Hō Kenkyū* [American Law Study in Japan - Japanese Law Study in America], 42 *HIKAKU Hō KENKYU* 46, 61 (1980).

41. T. KAWASHIMA, *NIHONJIN NO HŌISHIKI* [Legal Consciousness of the Japanese] 140 (1967).

42. At what stage of a dispute a party decides to go to court is based on both cultural elements and on the legal institutional setting. In Japan, payment of a stamp tax is required to file a case. Although the amount of this stamp tax is decided according to detailed rules in the Civil Litigation Cost Act [Minji Sosōo Hiyo Tō ni kansuru Hōrits] of 1971, a very rough estimate of this amount is 1/200 of the value of the lawsuit object. This payment, at the time of filing, functions to depress the number of lawsuits to some extent.

that reach final court adjudication is higher in Japan than in the United States, although section 136 of the Japanese Civil Procedure Code provides for conciliation during proceedings and Japanese judges are generally eager to recommend a conciliation, even during the trial.⁴³ In the United States, 85 to 97 percent of all cases filed are dropped or settled before reaching final adjudication.⁴⁴ In Japan, excluding so-called default judgments (in order to provide statistical data analogous to the U.S. data), approximately 75 percent of cases are dropped or settled at the district court level. When the summary court cases are included, in which the number of default judgments is substantial, approximately 84 percent of cases are dropped or settled in the court of first instance.⁴⁵

Taking into consideration the differences in the socio-cultural meaning of filing in the two countries, the difference in the litigation rates of Japan and the United States becomes smaller than it first appears. Although such reservations are required, roughly speaking, one can assume that the Japanese litigation rate is lower than that of most major Western countries.

Statistically, the role of lawyers and the judiciary appears smaller in Japan than in the United States. The only statistics which might indicate that both countries stand on the same level are those comparing the number of law school graduates in the United States with the number of law department graduates

43. Concerning how the conciliation procedure during trial works, see *Gendai Chōtei Hōsei Kenkyū Kai* [A Study Group on contemporary Mediation Systems], *Kenkyū Kai Hōkoku: Wakai to Chōtei no Warifuri* [A Report: Assignment [by court] to Mediation and Conciliation Procedures], 57 Hō No SHIHAI 102 (1981). In a discussion in this report, two judges pointed out that the courts cannot deal with their huge volume of work without using conciliation procedures to some extent, and one other judge called the present situation of conciliation in the courts a "boom." *Id.* at 117, 125.

For a criticism of such conciliation practices during trial proceedings, see Akichi, Itane and Kajiwara, *Soshōshiki ni okeru Shomondai* [Various Problems in Proceedings Control [by the court]], 24-10 Jiyū TO SEIGI 16 (1973).

44. M. ROSENBERG & H. SMIT, *ELEMENTS OF CIVIL PROCEDURE* 685 (1985).

45. According to statistics from 1985, among all civil disputes in ordinary procedures settled at the first instance, the ratios for court decisions, including judgments, rulings and orders are: (see Table 11 on following page)

TABLE 11
Forms of Final Settlements at the First Instance in Japan

	No. of All Cases	Total No. of Judgments* [Hanketsu]	Default Judgments	No. of Rulings [Kettei]	No. of Orders [Meirei]	No. of Conciliations [Wakai]	No. of Abandonments [Hoki]	No. of Acknowledgements [Nindaku]	No. of Withdrawals [Torisage]	Others
The First Instance Total	345,511 (100%)	190,923 (55.2)	55,482 (16.1)	2,949 (0.9)	2,628 (0.8)	72,817 (21.1)	157 (0.0)	2,146 (0.6)	71,354 (20.7)	2,537 (0.7)
All District Court	113,452 (100%)	52,963 (46.7)	28,629 (25.2)	467 (0.4)	597 (0.5)	35,408 (31.2)	101 (0.1)	1,463 (1.3)	21,097 (18.6)	1,356 (1.2)
All Summary Court	232,059 (100%)	137,960 (59.4)	26,853 (11.6)	2,482 (1.1)	2,031 (0.9)	37,409 (16.1)	56 (0.0)	683 (0.3)	50,257 (21.7)	1,181 (0.5)

*Figures excluding default judgments.

Table made from information in SHIHŌ TŌKEI NENPŌ 1985 [Annual Report of Judicial Statistics for 1985], Vol. 1, 104, 126.

in Japan.⁴⁶ (See Chart 5 on following page). In Japan, however, not all law department education focuses on legal expertise. A substantial number of law department graduates accept work as salesmen, office workers or secretaries, and other jobs having nothing to do with law.⁴⁷ Thus, it is not necessary to consider all Japanese law department graduates as being the counterpart of all United States law school graduates.⁴⁸

D. Impressionistic Observation

Since all the statistics cited so far have been accompanied by reservations, it is helpful to examine the impressions and observations of foreign lawyers who work in Japan. The Japanese law journal *JURISUTO* published a discussion with four foreign lawyers, two from the United States, one from Germany, and one from France, all of whom had worked several years, some for

46. In 1985, the number of Japanese college graduates majoring in law was estimated to be about 30,000, while there were 36,687 United States law school graduates.

More accurately, the number of students graduating from Japanese law departments and legal courses in other departments in 1984 was 35,237. However, about 20% of this number are students of political science, which have been traditionally incorporated into the law department in many universities. Thus, the estimated figure of graduates majoring in law in 1984 was about 30,000. Saito, *Kawariyuku Hogakubu* [Changing Law Departments], 61 *HOGAKU KYOSHITSU* 43, 52 (1985). Concerning the U.S. figure, see *A Review of Legal Education in the United States, 1985* A.B.A. SEC. LEGAL EDUC. AND ADMISSION B. 66.

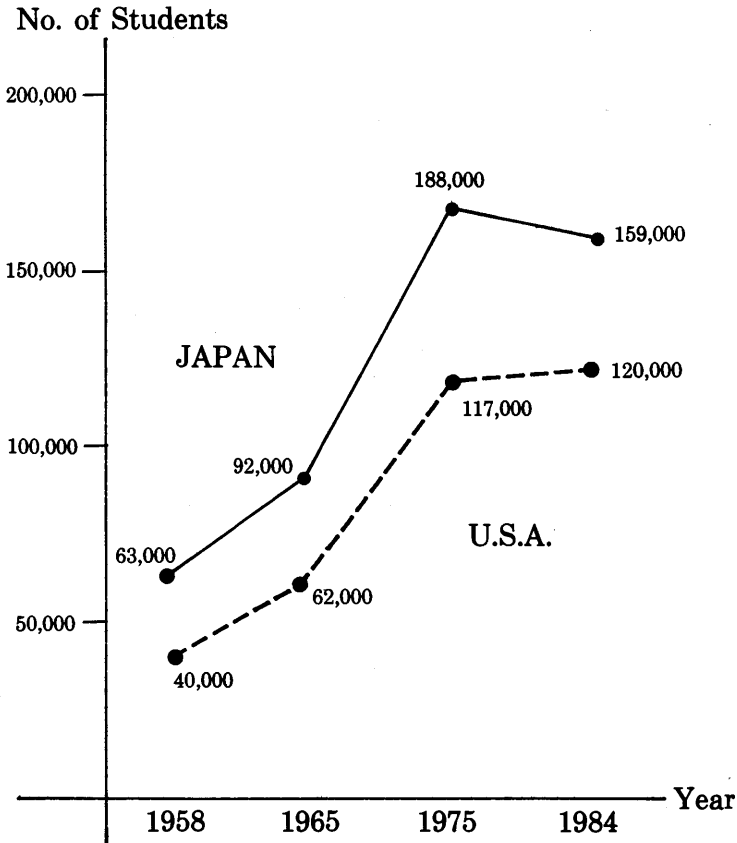
47. See *infra* tables 21-23.

48. It has been reported that Japanese students are harder workers than their American counterparts through high school, and the reverse in college. See Department of Education, *JAPANESE EDUCATION TODAY* (1987). The quality of college education has generally been a target of criticism in Japan.

The author completely agrees with the observation of the different degree of eagerness of students at the college level in the two countries, but also believes that the underlying attitudes of students in the two countries are basically the same in spite of the superficial difference. In Japan there is a pervasive belief that graduating from a particular university is one of the most important keys to success in society. As a result, students generally work hard until being accepted by a college. As their performance in college does not have a serious influence on their career or future, most college students do not work hard. In the United States, however, achievement in college and professional school, including law school, is very significant for a student's future in society. Thus, students in both countries work hard only when education has a socially selective function. The earlier difference reflects only the timing of social selection in the two countries. (Needless to say, the selection that takes place at the educational level is not final, and subsequent screening continues on an on-the-job basis in both countries). See K. KOIKE AND Y. WATANABE, *GAKUREKI SHAKAI NO KYOZO* [Skewed Image of the School Background Society] (1979).

CHART 5

A Comparison of the Number of Law Students in the U.S.
and Japan



The original graph concerning the Japanese figures is from T. Saitō, *Kawariyuku Hōgakubu* [Changing Law Departments] 61 HOGAKU KYOSHITSU 52 (1985). To the original graph, this paper adds the U.S. figures from AMERICAN BAR ASS'N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE U.S., Fall 1958, 1965, 1975, 1984. The Japanese figures include students in the law departments and legal and political subdivisions of other departments, and the U.S. figures include J.D. students in law schools. As U.S. law schools require three years of graduate study while Japanese colleges require four years of undergraduate studies, which include the law department, the average number of students in law school was roughly the same in 1984 in both countries.

over twenty years, in Japan.⁴⁹ All four agreed that the role of lawyers is much smaller in Japan than in their native countries. As to how to interpret this difference, their opinions split. Three asserted that the difference in roles was explained by cultural differences. The United States lawyer, however, asserted a "reasonable behavior" argument, which will be introduced in part IV.

IV. THEORIES ON THE LEGAL CONSCIOUSNESS OF THE JAPANESE⁵⁰

If it is true that Japan has managed its society with fewer lawyers and a lower litigation rate, the next question is how has this occurred? Theories like that of President Bok⁵¹ focus on the differences between the two countries, but not on the reason for the differences. Therefore, this paper will analyze other opinions in some detail.

A. *Cultural-Based Interpretation*

The traditional cultural-based interpretation, of which Dr. Kawashima is a representative advocate, is that the Japanese do not have, or are less conscious of, "rights" and "duties" because of their traditional, pre-modern type of legal consciousness. Among the many examples Dr. Kawashima has set forth to support his thesis, this paper examines only two: labor relations and landlord-tenant farm relations.

A characteristic of the traditional labor relations in our country is found most clearly in the following point, although it has been changing radically since the post war period, especially recently. That is, although the employer had "power" over his employees, the employer was not commonly considered to have a "right" to claim the employee's service. In accord with this notion, the employee did not think he had a "right" to claim wages, but that he received from his employer the favor of being allowed to work and collect a wage. There was no consciousness of "rights" between them⁵²

49. *Zadankai, Gaikokujin kara Mita Nihon no Hō to Jitsumu* [A Discussion: Foreigners' Observations of Law and Practice in Japan], 781 JURISUTO 132 (1983).

50. The legal consciousness of the Japanese is one of the favorite topics among Japanese legal academicians. It was a continuous theme at the symposiums of the Japan Association of the Sociology of Law during the three-year period of 1982-1985. (For the records of these symposiums, see 35-37 HOSHAKAIGAKU).

51. See *infra* note 25 and accompanying text.

52. T. KAWASHIMA, *NIHONJIN NO HŌSHIKI* [Legal Consciousness of the Japanese] 17

. . . The traditional relationship between tenant farmers and landlords before rural emancipation [after World War II] was of this sort. The tenant had a duty to pay rent to the landlord, but when there was a poor crop because of bad weather or a blight of insects, it was expected that he would entreat [*kon-gan*] the landlord for a reduction in the rent, and it was expected that when entreated the landlord would grant the plea and would acquiesce in some reduction. This was a way for the landlord to grant a paternalistic favor [*onjō*]. Therefore, tenant farming in which the rent could not be mitigated according to the situation and in which the rent was thought of as definite and fixed was differentiated from ordinary tenancy by the label "unmitigable tenancy" [*jōmen kosaku*]. [In the former type of "mitigable" tenancy] it was expected that when necessary the landlord could order the tenant, his wife or his daughter to do household work or farm labor on the landlord's land. The submission of the tenant to these orders was a way for the tenant to repay the favor [*onjō*] of the landlord, the landlord's *on* (the act of benevolence of the landlord) that consisted in having leased the land to the tenant and having reduced the rent at appropriate times. In this way there existed a relationship between the landlord and the tenant of indefinite and ill-defined duties on the part of the tenant that supported a relationship of power stemming from the superior upper-class status of the landlord and of submission stemming from the inferior lower-class status of the tenant—not a "rights" and "duties" relationship. This type of relationship originated in the so-called "hereditary" [*fudai*] landlord-tenant relationship, but it is significant that even the tenant farming relationships that arose as a result of sales of property after the Meiji Restoration took this form.⁵³

This type of traditional legal consciousness was once said to be the reason why Japanese people tend to not assert their rights, and especially why they do not turn to the courts to do so. According to this opinion, there is an assumption that this difference will disappear when Japan catches up with Western countries in terms of modernization.⁵⁴ However, even now that industrialization has been largely achieved in Japan, the litigation ratio and the ratio of lawyers to population still remain relatively low. Chart 6 shows one phase of this phenomenon. Indus-

(M. Kato Trans. 1967).

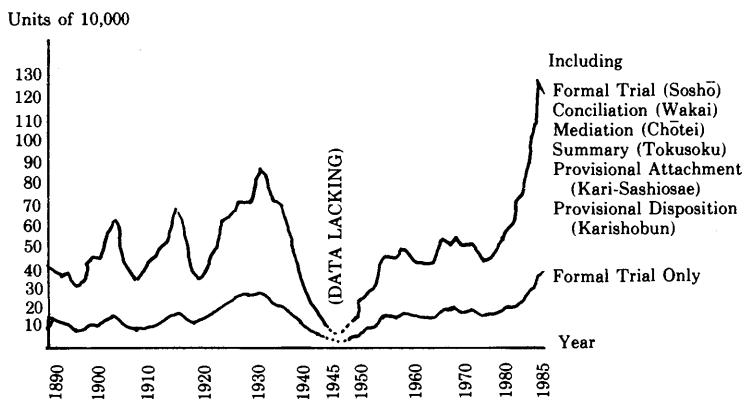
53. *Id.* at 100-01 (C.R. Stevens Trans.) (English Translation in Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 9 (1974)).

54. *Id.* at 202-03.

trialization has not caused a substantial increase in the amount of civil litigation, with the exception of litigation involving small scale loans and consumer credit which have become very popular recently (recent increases in the Japanese litigation rate are primarily attributable to these areas).⁵⁵ Although evaluation of the recent increase in litigation is problematic, the traditional interpretation based on legal consciousness seems to have lost some of its validity.⁵⁶

CHART 6

Number of New Civil Cases filed with the Court of First Instance for the Past 100 Years in Japan



This chart until 1972 was originally from Nichibenren [Japan Federation of Bar Associations], SHIHŌ HAKUSHO [White Paper on Judiciary] 19 (1972). The author has added the figures of 1973 to 1985 based on SHIHŌ TŌKEI NENPŌ [Annual Report of Judicial Statistics] for each year.

55. For a long period after World War II the Japanese financial market was generally tight. After the oil crisis, however, the situation reversed. Various types of consumer credit and small scale loans, including salaried-man-loans became very popular. The number of civil disputes concerning these cases is now skyrocketing. See *Zadankai, Nihon no Saiban* [Discussion: Judiciary in Japan], 27 HŌGAKU SEMINA ZŌAN, GENDAI NO SAIBAN [Contemporary Judiciary] 56 (1984).

56. Another advocate, Professor Noda, explains the small role of law in the Japanese society by cultural elements. He attributes differences in role of law to differences in national character. However, his analysis seems too intuitive and there are too many aspects with which this author disagrees, so this paper only scrutinizes Kawashima's opinion in detail. See Y. NODA, INTRODUCTION AU DROIT JAPONAIS 173 (1966). (For an English translation of this book, see Y. NODA, INTRODUCTION TO JAPANESE LAW (A. Angelo Trans. 1976).

B. *Inefficient Judiciary Interpretation*

Another perspective has since appeared⁵⁷ which proposes that the differences in law and the legal profession are reflections of rational behavior due to the inefficiency of the Japanese judiciary or to the circumstances surrounding the use of the judiciary system.⁵⁸

57. For the earliest opinion, see Y. SASAKI, MINJI CHŌTEI NO KENKYŪ [A Study on Civil Mediation] 113-123 (1967). For recent advocates, see Haley, *supra* note 37, and M. ŌKI, NIHONJIN NO HŌKANNEN [Notions of Law of the Japanese] 237-244 (1983).

58. The author reorganized various opinions in describing the argument in this article. However, this article does not address several aspects asserted by these opinions. In particular, Professor Ōki's detailed and interesting speculation on a historical comparison of the West and the Far East is not discussed because it is beyond the scope of this paper. The first point of Professor Tanaka's criticism of Professor Haley's analysis has already been mentioned. See *supra* note 40. Professor Tanaka's criticism continues as follows:

Second, this paper seems to rely on statistical figures, in fact, although the author himself gives the warning that one should not rely on statistics too much. When Japanese scholars discuss the legal consciousness [of the Japanese], they develop their arguments by using various examples besides statistics. The author believes that Mr. Haley needs to clarify how he evaluates these cases or phenomena like the dispute between Japanese and Australian parties over a long-term contract for the importation of sugar in 1976-77 (particularly reactions in the public opinion and of mass media).

Third, Mr. Haley has pointed out that the number of private practitioners increased rapidly from the mid 1920's and rapidly decreased during the second half of the 1930's. The fact that the number of litigation was high during this period when the number of private practitioners was also high is one of the grounds for his assertion. Although he describes the reasons for this rapid fluctuation in the number of practitioners as not at all clear, needless to say it is because Imperial University graduates who qualified as practitioners under the old law registered as practitioners during the time of depression and changed their jobs when the boom days came. In addition, although he points out that the amount of civil litigation increased during approximately the same period, we can find the influences of the depression over this phenomenon when we scrutinize what types of cases increased. Accordingly, it seems to be a more accurate interpretation that the depression caused an increase in the numbers of practitioners on the one hand, and in litigation on the other hand, than to interpret the increase in litigation numbers as caused by the increased number of practitioners.

Fourth, Mr. Haley exemplified the bond-posting requirement as one obstacle to filing a suit, citing sections 107 and 117 in the Civil Procedure Code. However, these articles are provisions applied only in cases where "the plaintiff does not have a domicile, office or place of business in Japan." Although there are some other occasions of bond-posting requirements in the Commercial Code and the like, it is completely impossible to prove the grand theory of Mr. Haley by referring to these provisions.

Fifth, Mr. Haley points out that the court has no way to enforce its decrees, such as specific performance, compensation, etc., because there is no notion of contempt of court. [He continues that] in cases where decrees are not complied with voluntarily, the court, not based on its own motion, is obliged to

In Japan, it is widely believed that lawyers' fees are unpredictable.⁵⁹ Although the Japan Federation of the Bar Association

rely on procurators to initiate criminal proceedings, citing section 96-2 in the Criminal Code [Illegal Evasion of Compulsory Enforcement]. I cannot help saying that this is nothing other than a mistake.

Tanaka, *supra* note 40.

Concerning Professor Tanaka's fifth point, § 414 of the MINPŌ (Civil Code) and §§ 169-78 of the Civil Execution Act (Sections 730-36 in the former Civil Procedure Act before its amendment in 1979) make execution of various types of judgments possible, and execution is actually performed based on these provisions.

59. Expressions by one judge and two private practitioners will illuminate this point. The judge stated:

Among ordinary citizens, lawyers and doctors are considered as in the top money-making businesses. The basis of this assumption is the feeling that lawyers claim extremely high compensation. For example, when I am asked for advice concerning a legal issue by my relatives or acquaintances, if I advise them to consult a private practitioner and say I will be happy to introduce them to any practitioner with whom I am acquainted, they always ask without exception how much they will be charged saying they have heard the charge is tremendous.

As I am not a practitioner myself, I did not have any idea how much a client is charged in a particular case. I asked many people and found the cost varies from one extreme to the other. While there is one who charges very reasonably, there is also another who will charge about half of the collected sum.

Mutō, *Zadankai, Gendai no Bengoshi* [Discussions: Contemporary Practitioners], 20 HŌGAKU SEMINĀ ZŌAN, GENDAI NO BENGOSHI [Contemporary Practitioners] 12 (1982).

A practitioner stated:

A long distance call reached me. It was from a friend in Tōkyō. He had a question. "My friend went to several practitioners to consult them about some inheritance matters, and he has found the installment fees to differ from lawyer to lawyer. The differences are substantial. What on earth is the proper sum?"

Lawyers' fees are just like the charge in a high class, traditional Japanese restaurant where the menu lists no prices. We ourselves are very anxious in a restaurant when there is no price list because we have no idea how much we will be charged.

When we decide to file a suit after listening for one or two hours to a client who has visited our office for the first time, they usually ask how much they will be charged with extreme anxiety. We can see clearly that the client feels relief or shock when he is told what it will cost.

Awa, *Bengoshi no Isshūkan—Hiroshima nite* [A Week of a Practitioner in Hiroshima], 20 HŌGAKU SEMINĀ ZŌAN, GENDAI NO BENGOSHI [Contemporary Practitioners] 242 (1982).

Another practitioner, a former Japanese Supreme Court associate justice, writes:

It still has not changed even now that lawyers' fees are a serious obstacle to the availability of practitioners. The anxiety clients feel that they cannot predict how much they will be charged is a main cause for their reluctance to avail themselves of a lawyer.

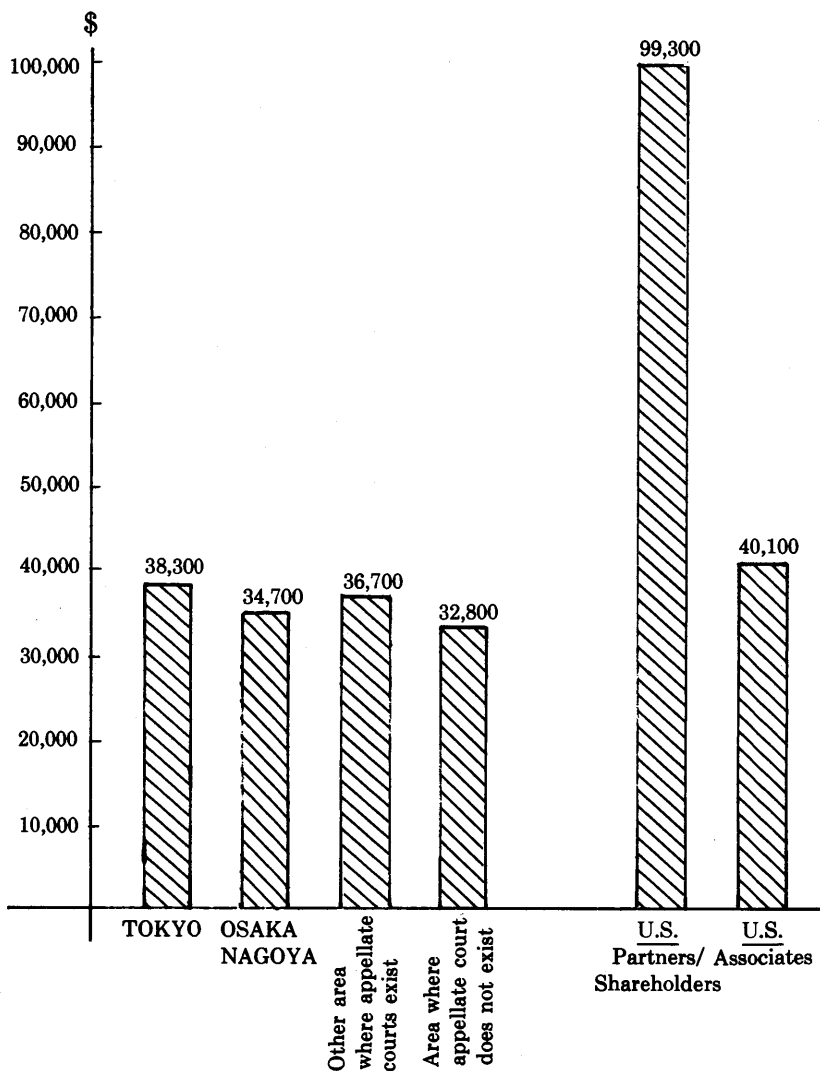
Irokawa, *Ima Bengoshi towa, Hikari ni Mensuru ka Yami ni Mensuruka* [How Practitioners Are Now: Facing Light or Facing Darkness], 20 HŌGAKU SEMINĀ ZŌAN, GENDAI NO BENGOSHI [Contemporary Practitioners] 69 (1982).

This unpredictability and vagueness about the price system does not necessarily

mean lawyers form a very wealthy class as a whole. Because taxation problems are involved, it is very difficult to estimate accurately the income of practitioners in Japan; thus, we should keep in mind that every statistic of this kind tends to be lower than the reality.

CHART 7

Comparison of Income of Median Practitioners in the U.S. and Japan



Constructed from the JFBA Basic Report, 32-10 Jiyū To Seigi 121 (1981) and THE LAWYER'S ALMANAC 1985, 119. Exchange Rate Oct. 15, 1986: \$1 = ¥154.

TABLE 12

Average Income of Japanese Practitioners

Age	TOKYO	OSAKA NAGOYA	Other area where appellate courts exist	Area where appellate court does not exist	Average in Total
20s	\$22,500 (¥ 3,470,000)	\$19,700 (¥ 3,030,000)	\$19,600 (¥ 3,020,000)	\$17,800 (¥ 2,740,000)	\$20,800 (¥ 3,200,000)
30s	\$35,600 (¥ 5,480,000)	\$32,500 (¥ 5,010,000)	\$37,200 (¥ 5,730,000)	\$31,200 (¥ 4,800,000)	\$33,800 (¥ 5,210,000)
40s	\$54,400 (¥ 8,380,000)	\$55,400 (¥ 8,530,000)	\$61,000 (¥ 9,400,000)	\$51,400 (¥ 7,910,000)	\$54,300 (¥ 8,360,000)
50s	\$73,600 (¥ 11,340,000)	\$52,100 (¥ 8,030,000)	\$61,400 (¥ 9,460,000)	\$57,000 (¥ 8,780,000)	\$65,300 (¥ 10,050,000)
60s	\$54,700 (¥ 8,420,000)	\$75,200 (¥ 11,580,000)	\$59,500 (¥ 9,160,000)	\$38,100 (¥ 5,860,000)	\$54,000 (¥ 8,320,000)
70s	\$34,400 (¥ 5,300,000)	\$38,400 (¥ 5,910,000)	\$24,400 (¥ 3,750,000)	\$24,900 (¥ 3,830,000)	\$30,500 (¥ 4,690,000)
Average in Total	\$49,400 (¥ 7,600,000)	\$44,400 (¥ 6,830,000)	\$46,200 (¥ 7,110,000)	\$39,900 (¥ 6,140,000)	\$45,600 (¥ 7,030,000)

K. ROKUMOTO, BENGOSHI NO YAKUWARI TO GYÔMU KEITAI [Role of Practitioners and Types of Its Business Operation], HÔKYÔ HYAKUNEN RONSHÛ, vol. 1, 546 (1983). Exchange Rate, Oct. 15, 1986: \$1 = ¥ 154.

TABLE 13
U.S. Associate Salary Ranges, by City

City	High	Low	Median
New York	\$53,000	\$32,000	\$46,000
Washington, D.C.	\$42,000	\$31,500	\$40,000
Los Angeles	\$42,000	\$36,000	\$40,000
Dallas	\$40,000	\$35,000	\$39,600
Boston	\$38,000	\$32,000	\$37,500
San Francisco	\$39,000	\$25,000	\$37,000
Houston	\$40,000	\$35,000	\$37,000
Chicago	\$39,000	\$27,500	\$36,500
Philadelphia	\$37,000	\$27,500	\$35,000
Atlanta	\$42,000	\$34,000	\$35,000
Baltimore	\$36,500	\$31,000	\$34,000
Kansas City	\$35,000	\$32,500	\$34,000
Pittsburgh	\$35,000	\$26,000	\$33,000
Minneapolis/St. Paul	\$34,000	\$30,000	\$33,000
New Orleans	\$35,000	\$32,000	\$33,000

Law and Business, Inc., THE LAWYER'S ALMANAC, 1985, at 108.

has issued a table of standard lawyers' fees,⁶⁰ it has not been obeyed by all practitioners.⁶¹

In addition, the Japanese trial procedure is time consuming. The average length of a civil law suit in a district court is about one year. The average length for civil law suits which go to the Supreme Court is about five and one-half years. (See Table 15).

60. The Japanese practice regarding legal fees is completely different from that in the United States. The time charge system is rarely adopted in Japan, with the exception of international lawyers. Because international lawyers are concentrated in Tokyo, 2.6% of the practitioners in Tokyo adopt the time charge system. The other Tokyo practitioners and all the lawyers in other areas use a charge system composed of an installment fee and a contingent fee. *The JFBA Basic Report*, 32-10 Jiyū To Seigi 124 (1981).

In order to give some concrete idea, the table below was based on the current "Standard Lawyers' Fee" issued by the Japan Federation of the Bar Association. Concerning the original standard, see ROPPŌ ZENSHO [The Statute Books].

TABLE 14
Standard Lawyers' Fees in Japan

VALUE OF TRIAL OBJECT	INSTALLMENT FEE	CONTINGENT FEE
¥ 100,000 (\$650)	¥ 15,000 (\$97)	¥ 15,000
¥ 1,000,000	¥ 135,000 (\$877)	¥ 135,000
¥ 10,000,000	¥ 845,000 (\$5,487)	¥ 845,000
¥ 100,000,000	¥ 4,845,000 (\$31,461)	¥ 4,845,000
¥ 10,000,000,000	¥ 31,845,000 (\$206,786)	¥ 31,845,000

Exchange rate 10/15/86: \$1.00 = ¥ 154.

For consultation, the fee is charged on a time basis. According to the standard, a one hour consultation costs ¥ 10,000 (\$65) or more. In reality, however, the overwhelming majority of practitioners bill less than ¥ 10,000 for consultation. *The JFBA Basic Report*, 32-10 Jiyū To Seigi 126 (1981).

In the United States, a 1984 survey found that the average hourly billing rate of partners practicing since 1974 is \$99 per hour, and that of associates admitted in 1974 is \$85 per hour. *Law and Business, Inc.*, *THE LAWYER'S ALMANAC* 117 (1985).

61. Less than 20 percent of practitioners charge based on the published Bar Association standard. *The JFBA Basic Report*, 32-10 Jiyū To Seigi 124. For a case study of actual legal fees, see 842 JURISUTO 54 (1985).

TABLE 15
Average Length of Court Proceedings in Ordinary Civil Trials
in Japan
Cases in Which a Summary Court is the Court of First
Instance

YEAR	Time (in months) from filing until final judgment		
	first instance	second instance	third instance
	SUMMARY COURTS	DISTRICT COURTS	APPELLATE COURTS
1960	4.9	22.4	42.9
1965	5.7	31.6	50.7
1970	4.8	36.2	54.4
1975	5.6	39.5	58.8
1980	4.1	40.7	60.5
1982	3.4	38.6	59.3

Cases in Which a District Court is Court of First Instance

YEAR	Time (in months) from filing until final judgment		
	first instance	second instance	third instance
	DISTRICT COURTS	APPELLATE COURTS	SUPREME COURT
1960	12.6	38.2	67.5
1965	12.1	40.4	67.7
1970	12.8	40.0	66.7
1975	16.3	47.8	75.6
1980	12.8	43.9	67.9
1982	11.5	42.7	67.5

SHIHO TOKAI NENPO 1982 [Annual Report of Judicial Statistics for 1982] vol. 1, p. 18. Figures have not been published for 1983 and thereafter.

As for the accessibility of legal advice, Japanese practitioners are not only few in number, but also densely concentrated in Japan's major cities. The populations of Tokyo and Osaka together comprise only about 17% of the entire nation's population, but approximately 60% of all practitioners work in these two cities.⁶² Eighty percent of all practitioners work in the ten

62. Tanase, *Bengoshi no Daitoshi Shūchū to Sono Kinōteki Igi* [The Concentration of Lawyers in Big Cities and Its Functional Meaning], 3 BESSATSU HANREI TAIMAZU: GENDAI SHAKAI TO BENGOSHI [Practitioners and Contemporary Society] 45 (1977); Tanase, *Bengoshi no Chiiki Bunpu to Honnin Soshōritsu, Jō, Ge* [Areal Distribution of Practitioners and the Ratio of Litigation without an Attorney 1, 2], 635 JURISUTO 80, 636 JURISUTO 120 (1977); Takamizawa, *Bengoshi no Jittai* [Actual Conditions of Private Practitioners], 20 HOGAKU SEMINĀ ZŌAN, GENDAI NO BENGOSHI [Contemporary Practitioner] 137 (1982).

TABLE 16
 Prefectures Ranked by Ratio on Population Per One
 Private Practitioner in Japan

	Prefecture	Practitioners	*Ratio
1.	Tokyo	5,968	1,968
2.	Osaka	1,793	4,834
3.	Okinawa	169 **(186)	6,977 **(6,339)
4.	Aichi	607	10,634
5.	Kyoto	240	10,777
6.	Fukuoka	410	11,510
7.	Hiroshima	217	12,992
8.	Kagawa	72	14,202
9.	Kochi	59	14,234
10.	Miyagi	152	14,318
11.	Kanagawa	485	15,323
12.	Okayama	125	15,335
13.	Hyogo	322	16,391
14.	Ishikawa	70	10,462
15.	Yamanashi	47	17,720
16.	Gunma	105	18,298
17.	Hokkaido	290	19,584
18.	Wakayama	54	20,133
19.	Shizuoka	176	20,311
20.	Kumamoto	90	20,419
21.	Oita	60	20,837
22.	Niigata	117	21,183
23.	Tokushima	37	22,565
24.	Tochigi	82	22,757
25.	Ehime	67	22,835
26.	Nagano	90	23,744
27.	Nagasaki	67	23,791
28.	Toyama	46	24,312
29.	Yamaguchi	64	25,025
30.	Fukui	32	25,551
31.	Saga	32	27,501
32.	Chiba	184	27,979
33.	Tottori	22	28,001
34.	Fukushima	73	28,497
35.	Gifu	69	29,397
36.	Akita	42	29,857
37.	Yamagata	42	30,040
38.	Mie	58	30,126
39.	Miyazaki	39	30,142
40.	Kagoshima	58	31,367
41.	Saitama	184	31,868
42.	Ibaragi	82	33,232
43.	Nara	39	33,461
44.	Shimane	23	34,547
45.	Shiga	29	39,857
46.	Aomori	38	40,117
47.	Iwate	31	46,245
	TOTAL	13,158	9,200

* Calculation based on 1985 census & Japan Federation of the Bar Assn. Membership List of 1986.

** At the time Okinawa was returned to Japan, most members of the Okinawa Bar became members of the Japan Federation of Bar Association. However, some practitioners did not change their status. Thus there are now 17 practitioners called "Special Members of the Japan Federation of Bar Association." These members can practice law only in Okinawa.

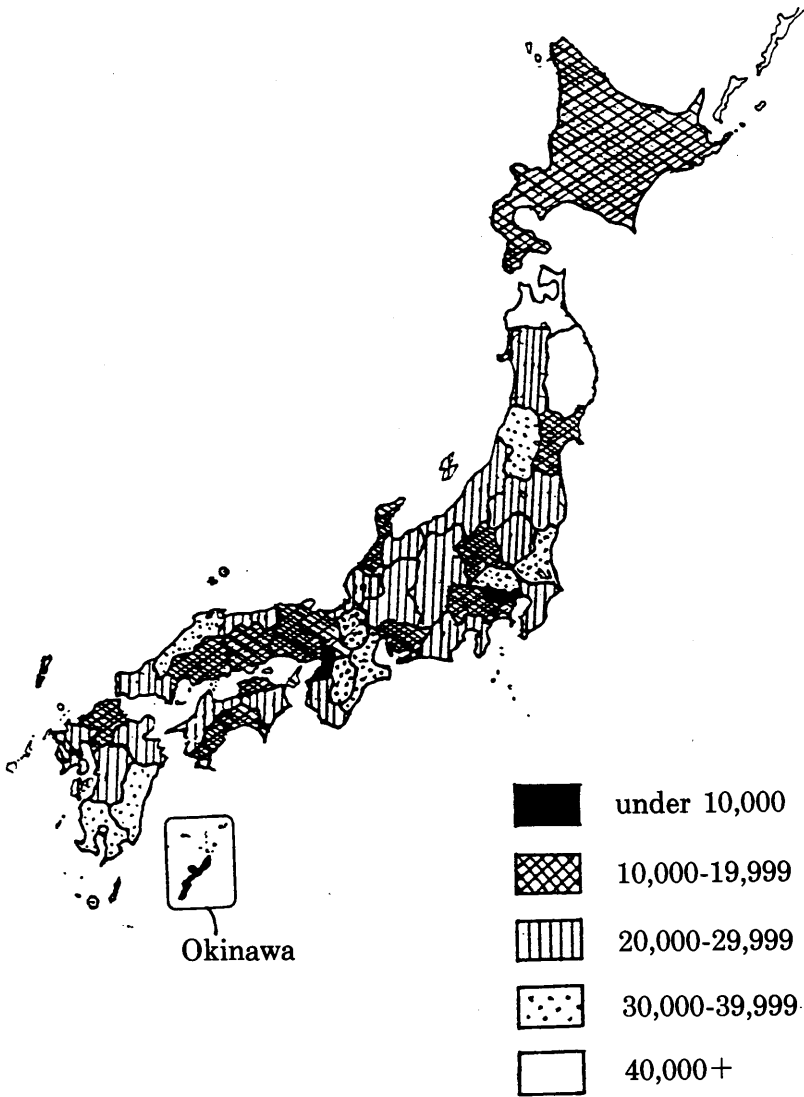
TABLE 17
States Ranked by Ratio of Population Per One Private Practitioner in U.S.

Rank	States	Private Practitioners	Ratio
1.	Washington, D.C.	12,617	49
2.	New York	52,130	340
3.	Massachusetts	16,579	350
4.	Colorado	7,991	398
5.	Alaska	1,191	420
6.	California	60,719	422
7.	Connecticut	7,342	430
8.	Illinois	26,463	435
9.	New Jersey	16,429	457
10.	Oregon	5,337	501
11.	Rhode Island	1,909	504
12.	Florida	21,709	506
13.	Hawaii	2,019	515
14.	Washington	8,411	517
15.	Maryland	8,405	517
16.	Minnesota	7,767	536
17.	Louisiana	8,272	539
18.	Vermont	979	541
19.	Oklahoma	5,923	557
20.	Nebraska	2,876	558
21.	Ohio	19,125	562
22.	Texas	28,184	567
23.	Montana	1,432	575
24.	Georgia	10,097	578
25.	Arizona	5,248	582
26.	Nevada	1,561	584
27.	Pennsylvania	20,393	584
28.	Missouri	8,531	587
29.	New Mexico	2,302	619
30.	New Hampshire	1,570	622
31.	Virginia	9,031	624
32.	Michigan	14,501	626
33.	Maine	1,848	626
34.	Kansas	3,828	637
35.	Utah	2,585	639
36.	Wisconsin	7,187	663
37.	Iowa	4,339	671
38.	Wyoming	755	677
39.	Delaware	896	684
40.	Idaho	1,370	731
41.	Kentucky	4,941	753
42.	Tennessee	6,206	760
43.	North Dakota	888	773
44.	Indiana	6,862	801
45.	South Dakota	880	802
46.	Mississippi	3,198	812
47.	Alabama	4,747	841
48.	South Carolina	3,755	879
49.	Arkansas	2,586	908
50.	North Carolina	6,520	946
51.	West Virginia	2,033	960
	Total	460,206	513

B. Curren, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985
4,167 (1986)

MAP 1

Population Per One Practitioner in Japan



prefectures which include the thirteen largest Japanese cities. Thus, in remote areas like the Aomori and Iwate Prefectures, ratios of population per practitioner are 40,000:1 and 46,000:1 respectively, both of which are more than twenty times the corresponding ratio in Tokyo.

In both the United States and Japan, there are generally more lawyers per population in industrialized areas than in non-industrialized areas. However, excluding the extreme cases of Washington, D.C. and Tokyo, in the United States the ratio of lawyers in industrialized areas to lawyers in non-industrialized areas is only about three to one, whereas in Japan the ratio is almost ten to one.

Those who explain the differences in the role of law and lawyers in Japan and the United States on the basis of the inefficiency of the judicial system think that the unpredictability of lawyers' fees, the time consuming nature of trial procedures, and the inaccessibility of practitioners keep the litigation rate low in Japan. In other words, the low litigation rate in Japan is not attributable to cultural factors, such as whether the Japanese are litigious or non-litigious or whether they have a weak consciousness of "rights." Rather, it is a reflection of the rational behavior of the Japanese based on a cost-benefit analysis.⁶³ Although the author does not agree with this theory in its entirety, at least the three points mentioned above define the core of the Japanese people's reluctance to go to court. Table 18 presents the results of polls conducted by the Japan Culture Conference. Part one of the table shows that half of the people who feel that their rights have been violated would not consider going to court except under extreme circumstances. Part two of this same survey shows that this result can be explained in terms of a cost/benefit analysis.

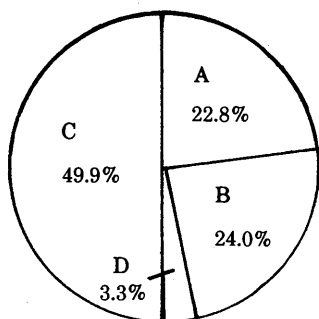
Another survey of the Osaka area shows that the number of people who would try to solve disputes through the judiciary is higher than that of those who are reluctant to turn to the courts. (See Table 19). When asked the reason for their reluctance, the most common reason given was, "[i]t is too costly" (64.6%). The second most common answer was, "[i]t is too time consuming" (54.0%). The third most common answer was the so-called cultural reason, "I do not like the win-or-lose solution of the judici-

63. Haley, *supra* note 37, at 389; M. Ōki, *supra* note 57, at 242.

TABLE 18

Japanese Citizens' Attitude concerning Litigation (1)

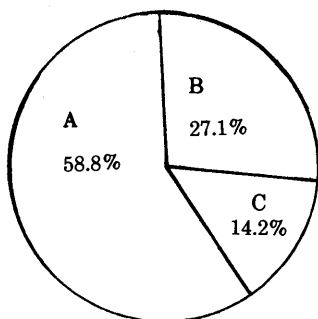
1. When you feel that your rights have been violated, would you consider bringing a law suit?



- A. I immediately consider it.
- B. I sometimes consider it.
- C. I would not consider it except under extreme circumstances.
- D. Don't know/No answer.

2. There are various opinions regarding law suits. Do you agree or disagree with the following opinion:

As it takes much time and money to bring a lawsuit, even if one wins, the cost is likely to be greater than the benefits.



- A. I agree.
- B. I disagree.
- C. Don't know/No Answer.

NIHON BUNKA KAIGI [Japan Culture Conference], ed. NIHONJIN NO HŌISHIKI [Legal Consciousness of the Japanese] 90 (1973). Five years after this survey, the same survey was conducted. The result was: answers to the first question, A, 11.1%, B, 23.7%, C, 60.6%, D, 4.5%; to the second question, A, 59.6%, B, 21.6%, C, 18.7%.

NIHON BUNKA KAIGI [Japan Culture Conference] ed., GENDAI NIHONJIN NO HŌISHIKI [Legal Consciousness of the Contemporary Japanese] 104 (1982).

ary" (26.3%).⁶⁴ (Because multiple answers were accepted, the total exceeds 100%.)

TABLE 19

Japanese Citizen's Attitude Concerning Litigation (2)

If faced with a dispute, would you resort to the judiciary?

	Ratio	No. of Persons
Yes	38.6%	289
No	26.5%	198
Don't Know	31.6%	236
No Answer	3.3%	25

ŌSAKA BENGOSHI KAI [The Bar Association of Osaka, ed.] HŌ: SAIBAN: BENGOSHI [Law: Judiciary: Practitioners] 79 (1977).

According to the author's experience, many businessmen in the legal departments of large companies believe that lawsuits do not pay and that a smart businessman does not go to court. Although somewhat dated, a 1972 survey (see Table 29) provides information on the behavior of private enterprises concerning legal disputes. (Samples are of private enterprises in Tokyo, Osaka, Nagoya, Yokohama and member enterprises of the Japan Commercial Arbitration Association.) According to these figures, litigation is extremely unpopular among businessmen, as is shown by the preference rate of 0.6% for litigation as a future method for dispute resolution. The polls mentioned above and the author's personal experience tend to support the reasonable behavior argument.

64. ŌSAKA BENGOSHI KAI [The Osaka Bar Association], HŌ: SAIBAN: BENGOSHI [Law: Trial: Practitioner] 81 (1977).

TABLE 20
Businessmen's Attitude Concerning
Dispute Resolution in Japan

(1) During the past five years, 56% of the enterprises surveyed had been involved in disputes concerning business transactions. The solution methods adopted were:

Negotiation between the involved parties	92%*
Mediation	4%
Arbitration	7%
Litigation	17%
Others	3%
No Answer	4%

(2) To which method do you plan to resort to solve disputes in the future?

Conciliation through Negotiation by the Involved Parties	51.0%*
Litigation	0.6%
Mediation	1.0%
Arbitration	13.0%
Depends on the Nature and Monetary Value of the Dispute	48.0%
Don't know	0.4%
No answer	1.0%

The original report is from *Kokusai Shōji Chūsai Kyōkai* [The Japan Commercial Arbitration Association], *Wagakuni Kigyō no Chūsai Ishiki ni kansuru Chōsa Hōkokusho* [A Report of the Study on Recognition of Arbitration in Private Enterprises in Japan] (1968), cited in *Daini Tōkyō Bengoshi Kai Funsō Shori Kikan Tō Taisaku Iinkai* [The Second Bar Association of Tokyo, Committee Considering Countermeasures to Dispute Resolution Organizations], *Funsō Shori Kikan no Kenkyū 1* [A Study of Dispute Solution Organizations 1] 359 HANREI TAIMUZU 55 (1978).

* As plural answers were accepted, the total exceeds 100%.

V. A THIRD APPROACH

In spite of the polls and personal experience previously described, further analysis is needed. This article, although not wholly in disagreement with either the cultural-based argument or the inefficient judiciary argument, takes a third position which sublates the former two into a dialectic synthesis.

Interpretation of differences based on particular cultural phenomena tends to serve some need for a sense of the exotic. It is not fruitful and probably not on point to think of the Japanese as curious beings who once worked for the family head or village leader in an agricultural economy, and who, since the rise of industrialization, work only for the company, neglecting individual happiness. Confident in their collectivism and in the spirit of harmony behind it, the Japanese do not assert their rights or go to court. This image is as unrevealing as thinking that Americans are quarrelsome people who once wore cowboy hats and were quick to draw a gun in a dispute, and who after the rise of industrialization are just as quick to run to court waving their documents when faced with a dispute. These views serve only to foster a Kipling type sense of "East is East and West is West, and never the twain shall meet," and limit the possibility for mutual understanding.

By comparison with the cultural difference approach, it is easier to appreciate the basic reasoning in the second argument, based on reasonable behavior. In highly industrialized societies, people generally—though not completely—behave in a rational way. Reasonable people in both the United States and Japan tend to evaluate the costs and benefits of a particular course of action in light of the existing institutions and conditions under which they live. Thus, the difference in the number of lawyers and in litigation rates is only the result of rational behavior of the actors in the two systems.

However, if the analysis stops here one important issue might be missed. That is, why don't the Japanese try to improve their inefficient legal institutions? Why are they satisfied with their inefficient judiciary, even though Japanese society as a whole is quite efficient?⁶⁵ This question is key.

Before moving to this question, a general discussion of litigiousness and non-litigiousness is appropriate. Although Japanese people are often said to be non-litigious, it can also be said that every group of people is basically non-litigious.⁶⁶

In order to solve social disputes using the judiciary, the human ability of experts like judges and lawyers must be used. The social cost of dispute solution using the judiciary system is

65. Professor Tanese has criticized the reasonable behavior theory for its failure to include this issue. See *Zadankai*, *supra* note 49, at 136; Tanase, *Hoishiki Kenkyū no Moderu* [Models of Legal Consciousness Studies], 36 *HOSHAKAIGAKU* 14 (1984).

66. See Haley, *supra* note 37, at 389.

very high. One study of compensation for tort injuries in Britain estimates that approximately 85% of the amount finally awarded must be expended in administrative and legal fees.⁶⁷ This high cost produces nothing new in the society as a whole; it merely reallocates existing resources from one place to another. In the operation of any society, the lower the number of disputes, the more efficient the society will be. Thus, every society tends to suppress social disputes through its moral codes.

Professor Haley began his article with two citations from the Bible: "And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also." And, "[n]ow therefore there is utterly a fault among you, because ye go to law one with another—Why do ye not rather take wrong? Why do ye not rather suffer yourselves to be defrauded?"⁶⁸ Buddhist teaching holds that liberation from attachment to the values of this world leads to emancipation from suffering. Because social disputes, including lawsuits, involve attachment to something, Buddhist teaching would prevent any dispute from arising. Buddhist Scripture teaches "forbearance and mildness," and "no altercation, no contention, no disunion, no quarrels."⁶⁹ Even the Koran, which does not oppose disputes with people of other religions, advises restraint among insiders and states: "We decreed for them a life for a life, an eye for an eye, . . . and for wounds punishment. But if a man charitably forbears from retaliation, his remission shall atone for him." And, "[h]ad you been cruel and hard-hearted, they would have surely deserted you. Therefore, pardon them and implore Allah to forgive them."⁷⁰

Of course, the extent to which these moral doctrines permeate the culture differs from society to society. Thus, simply distinguishing between litigious and non-litigious societies is misleading. A more accurate inquiry focuses on differences in degree of non-litigiousness.

Every moral code is a reflection of the wishes of society, or "what should be." In other words, what is expressed in the ethical code is never fully realized. In this sense, and based on empirical observations, no society has succeeded in avoiding all so-

67. P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW, 511-12 (3d ed. 1980).

68. *Matthew* 5:40 and *1 Corinthians* 6:7 (cited in Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978)).

69. *How Buddha Met a Schism Among His Disciples*, TEACHINGS OF THE COMPASSIONATE BUDDHA 43 (E.A. Burt ed. 1955).

70. KORAN, *The Table* 5:45, and *The Imrans* 3:159.

cial disputes. The issue then becomes through what channels can these disputes be solved? Three possibilities exist: the private level, administrative means, and the judiciary.

A. *The Private Level*

Dispute solution through private channels involves two types of cases. In the first, a solution is reached through direct negotiation between the disputants themselves. In the second, a solution is reached through the mediation of a third person. Negotiation between disputants becomes much easier when the parties can understand one another's interests, intentions, behavioral patterns and emotions. In the case of mediation by a third party, if the two disputants have a common, reliable and influential third party, a solution may come more easily. In both cases, when the two parties share common backgrounds, the possibility of reaching an agreement increases.

At this point, table 10 should be reconsidered, keeping in mind the reservations mentioned earlier.⁷¹ Inserting the American figures introduced by Professor Haley,⁷² the top four countries are Australia, Denmark, the United States and New Zealand. The United Kingdom, West Germany, Japan, Sweden, Finland, Norway and Korea follow. With the exception of Denmark, the top countries, Australia, the United States and New Zealand, came into existence through immigration. (The author is unable to explain why Denmark falls in the top group.) In these countries, because people do not share a common background which facilitates private level solutions, the rate of disputes which must be solved through other channels becomes higher. This may be the reason why these three countries have higher litigation rates than the others, although at this stage this is mere conjecture.⁷³ Multi-national research on the correlation between mobility and litigation rates among various regions within the same culture would be helpful in testing this hypoth-

71. See *supra* note 39 and accompanying text.

72. See *supra* note 37.

73. The more similar the background the immigrants have, the more easily they can solve potential disputes among themselves, and the lower dispute ratio they should have. However, even a country of immigrants from fundamentally the same origin, like New Zealand, should have a dispute ratio higher than that in a naturally developed country (unless whole communities immigrated to the new country). Although the national and cultural backgrounds might be the same, there would be an absence of community ties among new-comers.

esis. Although not proved at this stage, lack of common background appears to be one of the main reasons why the litigation rate in the United States is higher than in Japan.

B. Administrative Means

Administrative means is another channel for dispute resolution. The social function and political influence of the governmental administrative bodies is much wider in Japan than in the United States. Academic legal education in the United States began as a replacement for the apprentice-type training that had taken place in law offices.⁷⁴ By contrast, in Japan the legal education at the law college of the Imperial University (presently the law department of Tokyo University) was organized in the late nineteenth century to train high level administrators for the government.⁷⁵ Due to this tradition, and because of the attrac-

74. In colonial times, lawyers in the United States usually received their training by serving in a law office. Thorne, *Professional Education in Law*, EDUCATION FOR THE PROFESSIONS OF MEDICINE, LAW, THEOLOGY, AND SOCIAL WELFARE (1973). In the 1780s, a course of lectures was established by a lawyer in Connecticut, but was intended only to supplement the law office experience. Undergraduate classes in law were offered as early as 1779 at the College of William and Mary. However, in 1816, the first law professor appointed at Harvard University, Chief Justice Isaac Parker, still argued that "the practical knowledge of business may always be better learned in the office of a distinguished counsellor." *Id.* at 103. At Harvard, law courses were isolated from the undergraduate curriculum from the beginning.

In 1858, Theodore W. Dwight began "a two-year program of lectures and drills in legal principles, supplemented with moot courts for students" at Columbia Law School. "Dwight insisted that his graduates be admitted to practice on the basis of their diplomas; he believed that training in law school was not just a substitute, but was fully preferable to apprenticing in a law office." *Id.* at 103. In 1870, Christopher Langdell, dean of Harvard Law School, introduced the case method of instruction, the requirement that entering students have at least three years of college, and three years as the term of study.

75. The Imperial University (the predecessor of the present Tokyo University) was founded in 1886. After that, legal education was regarded as important and the number of law students increased. During the first ten years after its foundation in 1886, the total of 555 law college graduates comprised 41% of the 1,353 graduates from the whole university. (As the agricultural college was integrated into the Imperial University for only six years during this period, beginning in 1890, the 263 agricultural college graduates are excluded from this calculation.)

This rapid increase in the number of LLB's was induced as a policy. The unification or reorganization of various institutions of higher education into the Imperial University was performed as one phase of the extensive reformation of administrative organization accompanied by the establishment of the cabinet system. At that time the government introduced a qualification-appointment system for government officers, for whose appointment there had previously been no regular rules. The government planned that high level administrators in the central bureaucracy would be supplied from the law college.

TABLE 21
Occupations of Graduates From Tokyo University Faculty of
Law

	1888-1897	1933-1937	1981-1985
Administrative Officials	248 (35.6%)	462 (15.3%)	752 (28.1%) *
Military Officers	11 (1.6)	175 (5.8)	
Judges and Prosecutors	199 (28.6)	145 (4.8)	165 (6.2) **
Practitioners	18 (2.6)	14 (0.5)	
Grad. Students Students Abroad Teachers	53 (7.6)	184 (6.1)	127 (4.7) ***
Subtotal	529 (75.9)	980 (32.5)	1044 (39.0)
Private Enterprise	52 (7.5)	1388 (46.1)	1636 (61.0)
Unidentified	112 (16.1)	640 (21.2)	
Deceased	4 (0.6)	6 (0.2)	
Grand Total	697 (100)	3014 (100)	2680 (100)

* Government agencies and corporations.

** Legal Training and Research Institute.

*** Continuing education at advanced level.

T. Saitō, *Kawariyuku Hōgakubu* [Changing Law Departments], 61 HŌGAKU KYŌSHITSU 45 (1985).

TABLE 22
Occupations of Graduates from Kyoto University Faculty of
Law

Administrative Officials in the Central Govt.	6.6%
Administrative Officials in the Local Govt.	10.5%
Legal Training & Research Institute	6.3%
Graduate Students, Research Assistants	3.9%
Private Enterprise	61.0%
Other	11.7%

Data based on graduates of academic years 1970, 1973, 1976 and 1977. Z. Kitagawa, *Hōgaku Kyōiku no Genkyō to Mondaiten* [Present Situation and Problems in Legal Education] 23-10 HŌGAKU SEMINA 8 (1979).

tiveness of the power and prestige of some agencies in the government, numerous graduates go into administration. Table 21 illustrates that the number of the Tokyo University law department graduates who go into administration is 4.5 times the number who go into law. The case of Tokyo University might be extreme; however, for Kyoto University this ratio is three times as many administrators as lawyers. (See Table 22). In almost all of the law departments in Japan, the number of graduates who go to work in administration is much larger than the number of those who become lawyers. For example, at Chūō University, the cumulatively largest supplier of lawyers,⁷⁶ less than half the number of graduates who become public servants become lawyers.⁷⁷

TABLE 23

Occupations of Graduates from
Chūō University Faculty of Law for
Academic Year 1984

	persons	percentage
Public Service, Legal Training & Research Institute, Other Public Affairs Occupations	260	24.6
Education	17	1.6
Media, Publications, Communications	59	5.6
Private Enterprise	639	59.9
Other	89	8.4

T. Saitō, *Kawariyuku Hōgakubu* [Changing Law Departments] 61 HŌGAKU KYŌSHITSU 45 (1985).

1 TŌKYŌ DAIGAKU HYAKUNENSHI TSŪSHI [100 Year History of Tōkyō University: General History, part I] 1053-54 (1986).

76. See generally, *The JFBA Basic Report*, 32-10 JIVŪ TO SEIGI 46-47 (1981).

77. Table 23 makes no distinction between public servants and those accepted by the Legal Training and Research Institute. However, during the previous five years (1979 to 1983) an average of 81.4 Chūō University graduates were accepted by the Institute. SUPREME COURT OF JAPAN, THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN 20 (1984). Assuming this figure is applicable to 1984 graduates, the ratio of other public servants and potential lawyers will be 2.2:1. (The number to be accepted by the Institute among 1984 graduates cannot be finalized more accurately at this stage because it sometimes takes several years for students to pass the national law exam after graduation. See *supra* note 24).

Because dispute resolution through the judiciary is considered to be time-consuming and costly, some categories of disputes that occur repeatedly in similar form, particularly in the area of compensation, are treated by administrative bodies or public corporations.⁷⁸ Workers' Compensation,⁷⁹ inoculation victims' compensation,⁸⁰ pollution victims' compensation,⁸¹ compensation for side effects from medicines,⁸² product liability compensation for particular consumer goods where the amount of compensation is subject to certain limitations,⁸³ and school accident compensation⁸⁴ are such examples. While the first two might also be governed by administrative bodies in many countries, the other administrative compensation schemes are peculiar to Japan.

These legally established schemes aside, the function of the Japanese administrative bodies still looks quite different from administrative functions in the United States. Although administrative bodies in Japan are not designed to settle disputes as a matter of course, they sometimes exercise their authority to settle disputes in embryo.⁸⁵ (Of course, explicit civil-dispute-type confrontations are not within the authority of administrative bodies and are seldom dealt with by them, especially when the confrontations are heated.) For example, confirmation from the local government is required to construct a building over a certain size in Japan.⁸⁶ When nuisance or "right to enjoy sunshine" type debates are involved in the construction, it has been a widespread practice among local governments to advise settlement of the debates by the interested parties, suspending the confirmation until a settlement is reached. (As the local agency

78. For an overview and analysis of the various administrative compensation schemes described in the main text, see Katō, *Genkō no Fuhōkōi Higaisha Kyūsai Sisutemu to sono Mondai—Fuhōkōi Hō no Shōrai Kōsō no Tameni* [Present Tort Victim Relief Schemes and Their Problems—A Proposal for a New Compensation Scheme], 691 JURISUTO 52 (1979).

79. Rōdōsha Saigai Hoshō Hoken Hō [Workers' Compensation Insurance Act] of 1947.

80. Yobō Sesshu Hō [Inoculation Act] of 1948 §§ 16-25.

81. Kōgai Kenkō Higai Hoshō Hō [Pollution Related Health Damage Act] of 1973.

82. Iyakuhin Fukusayō Higai Kyūsai Kikin Hō [Relief Fund for Side Effects from Medicines Act] of 1979.

83. Shōhi Seikatsuyō Seihin Anzen Hō [Consumer Goods Safety Act] of 1973.

84. Nihon Gakkō Kenkō Kai Hō [Japan Schools' Corporation for Health Act] of 1982 §§ 19-25.

85. See Sonobe, *Minji Funsō no Gyōseiteki Kyūsai* [Administrative Remedies on Civil Disputes], JURISUTO ZŌAN, MINJI SOSYŌHŌ No SŌTEN [Legal Issues in Civil Procedure Law] 16 (1979).

86. Kenchiku Kijun Hō [Construction Standard Act] of 1950 § 6.

does not have any authority to decide or enforce a settlement of this kind, this should be described as an administrative guidance type of settlement.)⁸⁷ Although the legitimacy of these practices by which unauthorized administrative pressure is used for a settlement is questionable from a legal viewpoint,⁸⁸ these practices have functioned to prevent an increase in civil disputes.

Another good example is consumer claims. A public corporation named Kokumin Seikatsu Senta (the Center for Citizens' Life) has done consultation activities concerning consumer claims. As these types of activities do not fall within its explicitly designated authority,⁸⁹ they are considered business related to its primary authority. In the process of consultation, consumer claims are often transmitted to the involved private enterprises and legal problems are dealt with by private practitioners retained by the corporation.⁹⁰ Many potential civil disputes are solved in this manner before they reach the courts. In addition, many local governments have established committees or other types of organizations to deal with consumer claims. The authority of these local organizations sometimes includes conciliation and mediation.⁹¹ These kinds of activities tend to nip potential civil litigation in the bud.

In addition to these particular organizations whose authority is related to dispute settlement, other administrative bodies have sometimes served a substitutional function in dispute settlement, because these bodies sometimes contact those who have caused the claim and advise them to settle. In this regard, con-

87. An administrative law specialist has stated that reconciliatory guidance in disputes is one phase of administrative guidance. Harada, *Gyōsei Shidō—Hō no shihai to Nihonteki Gyōsei Taishitsu* [Administrative Guidance—Rule of Law and Japanese Characteristics of Administration] JURISUTO ZŌAN, GYŌSEI NO TENKANKI [A Transition Stage of Administration] 51 (1983).

88. One city had a guideline that it would not supply water in cases where the constructor had not obtained consent to construction from neighbors whose sunlight was affected. The city lost its case when the legitimacy of the guideline became an issue in court. Judgment of Dec. 8, 1975, Tōkyō Chisai (District Court), 803 Hanji 18. See Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

89. Kokumin Seikatsu Senta Hō [Act on the Center for Citizen Life] of 1970 § 18.

90. Daini Tōkyō Bengoshikai Funsō Shori Kikan Tō Taisaku Iinkai [The Daini-Tōkyō Bar Association, Committee for Counterplans Considering Dispute Solution Organizations] *Funsō Shori Kikan Tō no Kenkyū* 2 [A Study on Dispute Solution Organizations, etc. 2], 360 HANREI TAIMUZU 50, 53 (1978).

91. For example, Tokyo, Hyogo Prefecture, and Kobe City have committees with such authority. *Id.* at 50-52.

sultation activities by local governments often serve as a substitute for the services of a private attorney.

Table 24 shows the nature of these consultations in the Tokyo Metropolitan government. The bottom five items relate to legal affairs. Thus, in close to 30% of the consultations, the administration supplied legal services that could have been provided by lawyers or the judiciary.⁹² Even the police have provided consultation activities,⁹³ as well as other organizations.⁹⁴

92. Concerning the substitutability of the judiciary and administration, the following expression of an administrative body engaged in this kind of activity is interesting:

Consultation in matters of daily life is an activity involving the giving of advice or guidance concerning civil disputes, like leases, etc. In one type of activity, the following two points have become serious problems. One is an increase in the number of cases that fall between the authority of the judiciary and the administration. The other is where the borderline falls for the principle of no administrative intervention in civil disputes.

It is possible to request a judgment or decision of the judiciary without exception in cases where the contents of the dispute among private parties can be reduced to right-and-duty or credit-and-obligation relationships. This is a fundamental principle in any country governed by law.

However, the function of the judiciary, as an organization to solve disputes for the parties involved, is not really enough in cases of small claims, or where impropriety but not illegality is involved, because of the peculiarity of the litigation procedure and the considerable length of time necessary to get an adjudication. In addition, the national character cannot be ignored, the fact that people are reluctant to bring a suit. As cases of this kind [where people come for consultation instead of going to court], good examples are real estate related disputes, such as the cancellation of a real estate sales contract, rent, adjoining real estate relations [sorinkankei], private paths and the construction of sewage facilities.

Next, concerning the principle of no administrative intervention in civil disputes, this principle is generally considered to be very important among insiders in administrative bodies, especially in police organizations, under the slogan of private autonomy in a free society.

This principle is only a matter of course in the field of directive or regulatory administration. In the field of consultation, however, this principle has only a negative effect.

Tōkyōto Tominseikatsukyoku Tominsōdanbu [Tokyo Metropolitan Government, Bureau for Citizens' Daily Life, Division of Consultation for Citizens], *Tōkyōto ni okeru Sōdangyōmu* [Consultation Activities in Tokyo Metropolitan Government], 624 JURISUTO 54 (1976).

93. For a discussion of consultation activities by police organizations from 1953 to 1968, see T. HIRONAKA, HŌ TO SAIBA [Law and Justice], 107-109, 125 (1971). See also Iwase, *Komarigoto Sōdan wa Dono Yōni Shite Kaiketsu Sareruka* [How Trouble Consultations Are Solved], 359 JURISUTO 30 (1966).

Other than the activities mentioned above, police involvement is generally restrained by the principle of no police intervention in civil disputes. As a result, organized crime frequently operates in the form of civil disputes. See *Minji Kainyū Bōryoku to Sono Taisaku* 1, 2 [Civil Case Related Organized Crime and Its Counter-Measures 1-2] 31-9, 33-4 JIYŪ TO SEIGI; K. MIYAZAKI, KYŌSEI YŪSHI NO JITTAI TO TAISAKU [The Reality

TABLE 24

Number of Consultations by Category
(Tokyo Metropolitan Government, 1975).

	Cases	Ratio
Consultation on General Affairs	55,857	68.1%
Consultation on Specialized Issues		
Personal Affairs	578	0.7
Education	8	—
Juvenile Affairs	6	—
Legal Matters	9,082	11.1
Tax	124	0.2
Family Registration	82	0.1
Registration of Real Estate, Etc.	34	—
Access to Sunlight	1,868	2.3
Traffic Accidents	14,403	17.6
TOTAL	82,042	100.0%

Tōkyōto Tominseikatsukyoku Tominsōdanbu [Tokyo Metropolitan Government, Bureau for Citizens' Daily Life, Division of Consultation for Citizens], *Tōkyōto ni okeru Sōdangyōmu* [Consultation Activities in the Tokyo Metropolitan Government] 624 JURISUTO 53 (1976).

A practitioner who has participated in general consultation activity for citizens sponsored by a municipal government described his impression as follows:

The participant institutions were the bureau of legal affairs, the police, tax authorities and lawyers. Most cases for consultation seemed to be the kind that should go to lawyers. However, . . . the ratio of cases that went to lawyers for consultation was just 4.7%. This figure reveals directly the citizens' evaluation of lawyers. From their viewpoint, lawyers are

of Enforced Finance and Its Counter-Measures] (1981).

For an empirical study of the police function in civil disputes involving traffic accidents and real estate disputes, see K. ROKUMOTO, MINJI FUNSŌ NO HŌTEKI KAIKETSU [Legal Solution of Civil Disputes] 101 (1971).

94. For a wide survey of the consultation activities in legal matters, not only by administrative bodies but also private organizations, see *Nihon Bengoshi Rengō Kai Chōsa Shitsu* [Japan Federation of the Bar Association, the Research Office], HŌRITSU SODAN NO JITTAI [The Actual Conditions of Consultation Activities in Legal Matters] (1975).

important for the solution of disputes and problems that come up in daily life only 4.7% of the time when they have disputes. Citizens ask solutions of the administration in 95.3% of the cases.⁹⁵

Of course, because these figures reflect only one example in a particular city, one should not generalize too much from them. However, many practitioners in Japan feel that they do not meet the citizens' needs. A Japan Federation of the Bar Association poll indicates that 72.5% of the practitioners feel that they do not meet the citizens' needs.⁹⁶ Another poll indicates that only 1.3% of the practitioners are confident that citizens' needs are being met by their work.⁹⁷

C. The Judiciary

Among the three dispute resolution channels—private, administrative and judicial—the judiciary is less influential in Japan than in the United States. During the early stages of a dispute, negotiations between the involved parties, mediation through a third party, reconciliatory administrative guidance or consultation with administrative bodies might be used to reach a settlement. However, if the dispute goes further and is accompanied by stronger antagonism between the parties, a more formal procedure is required where both parties will be assured the opportunity to make their assertions and where the rigid neutrality of the third party who passes judgment is certain. This should be the area where the judiciary most often exercises its function.

In Japan, however, quasi-judicial administrative organizations have been established.⁹⁸ Concerning pollution related dis-

95. Awa, *Bengoshi no Isshūkan—Hiroshima nite* [A Week of a Practitioner in Hiroshima], 20 HŌGAKU SEMINĀ ZŌAN, GENDAI NO BENGOSHI [Contemporary Practitioners] 240 (1982).

96. Nichibenren Henshū Iinkai (Japan Federation of the Bar Association, Editing Committee), *Bengoshi no Shokuiki ni kansuru Ishiki Chōsa* [A Survey of Practitioners' Recognition about their Business Area], 28-5 JIYŪ TO SEIGI 21 (1977).

97. Tōkyō Bengoshi Kai [Tokyo Bar Association], BENGOSHI JITTAI CHŌSA HŌKOKUSHO [Report of the Survey on the Actual Situation of Practitioners] (1981) (cited in Takamizawa, *supra* note 30, at 142).

98. For a general introduction to these organizations, see Daini Tōkyō Bengoshikai Funsō Shori Kikan Tō Taisaku Iinkai [The Daini-Tōkyō Bar Association, Committee Considering Countermeasures to Dispute Solution Organizations, etc.], *Funsō Shori Kikan no Kenkyū*, 1-4 [A Study of Dispute Solution Organizations 1-4], 359 HANTA 49 (1978); 360 HANTA 50 (1978); 361 HANTA 51 (1978); 362 HANTA 22 (1978). See also FUNSŌ SHORI KIKAN 1, 2 [Dispute Solution Organization 1, 2] 32-9 and 13 JIYŪ TO SEIGI (1981).

putes⁹⁹ and construction work related disputes,¹⁰⁰ special resolution committees have been established, both in the central and local governments. Concerning atomic power plant accident compensation, a special committee has also been established by the central government.¹⁰¹ For disputes in mining related damage compensation, a special procedure of conciliation has been established in a central government agency.¹⁰² Some local governments have established special committees for mediation in consumer disputes.¹⁰³ For example, the Tokyo Metropolitan government has a Committee for Relief of Consumer Damages.¹⁰⁴ In all these cases, quasi-judicial institutions have been established within administrative bodies. These institutions handle disputes that would be handled by the judiciary in the United States.

Similarly, quasi-judicial private organizations have also been founded to take care of traffic accidents, medical disputes and the like. The Insurance (non-life) Companies' Association has established endowments and the Center for Traffic Accident Disputes has been founded.¹⁰⁵ The Japan Medical Doctors' Association has also established the Committee for Review of Liability Compensation of Medical Doctors.¹⁰⁶

99. The central government committees are named *KōgaioTō Chōsei Iinkai* [The Committee for Solution of Pollution Disputes, etc.] and the local government committees are named *Kōgai Shinsakai* [The Committee for Pollution Investigation]. See *Kōgai Funsō Shori Hō* [Pollution Dispute Resolution Act] of 1970, and *Kōgai To Chōsei Iinkai Secchi Hō* [Pollution Dispute Coordination Committee Foundation Act] of 1972.

Concerning the organizations and functions of these committees, see 359 HANTA 56 (1978); Aoyama, *Saibangai Funsō Shori Kikan no Genjō to Tenbō* 1 [Present Situation and Future View of Dispute Solution Organization outside Judiciary 1], 32-9 JYŪ To SEIGI 34 (1981); Takashima, *Kōgai To Chōsei Iinkai* [The Committee for Resolution of Pollution Disputes, etc.], 54-8 HŌRITSU JIHŌ 98 (1982).

100. The Central and the Local Committee for Review of Construction-Work Related Disputes, *Kensetsugyō Hō* [Construction Industry Act] of 1949 § 25. Concerning these committees, see 360 HANTA 55 (1978); Aoyama, *Saibangai Funsō Shori Kikan no Genjō to Tenbō* 1 [Present Situation and Future View of Dispute Solution Organization outside Judiciary 1], 32-9 JYŪ To SEIGI 39 (1981); Nakano, *Kensetsu Kōji Funsō Shinsa Kai* [The Committee for Review of Construction-Work Related Disputes], 54-8 HŌRITSU JIHŌ 95 (1982).

101. The Committee for Review of Atomic Energy Related Damage Compensation, *Genshiryōku Songai no Baishō ni Kansuru Hōritsu* [Atomic Energy Relation Compensation Act] of 1961, § 18.

102. *Kōgyō Hō* [Mining Industry Act] of 1950, §§ 122-125.

103. See 360 HANTA 350 (1978).

104. *Id.*

105. See 360 HANTA 60; Ninomiya, *Kōtsujiko Funsō Shori Sentā* [Center for Settlement of Traffic Accident Disputes], 54-8 HŌRITSU JIHŌ 100 (1982).

106. Concerning medical disputes, there are two different kinds of private institutions in Japan. One is the *Iji Funsō Shori Iinkai* [Committee for Resolution of Medical

To summarize, in Japan, instead of improving the inefficient judiciary, alternative institutions are established outside the judiciary. Of course, because these alternative institutions cannot take authority away from the judiciary, the jurisdiction of the judiciary is not influenced in a legal sense. However, in a sociological sense, these institutions narrow the function of the judiciary.

There appear to be two reasons for this phenomenon. First, as shown in Table 25, Japanese people do not like rigid solutions that adhere to legal standards; they prefer flexibility. However, the judiciary, by its very nature, cannot depart from rigid legal standards.

Second, the adversary system, in which a direct assertion of rights is inevitable, is not preferred by ordinary citizens who usually try to avoid making such a strong assertion.¹⁰⁷ Because formal procedure requiring a direct assertion of one's rights is disliked by the Japanese, more informal procedures, such as mediation, are well developed, even within the judiciary. In 1985, there were 360,965 formal litigation filings versus 89,181 media-

Disputes] which is established within every prefectural medical association. A report pointed out that this committee deals with claims on behalf of medical doctors, and is not a neutral disputes resolution organization. The other is the Baishō Sekinin Shinsa Kai [Committee for Reviews of Liability Compensation] of medical doctors, which is referred to in the main text. Although this committee is related to liability insurance contracted by the Japan Medical Association, the Committee is designed to be separate from both the Japan Medical Association and from insurance companies in order to be a third party organization. See 362 HANTA 28, 127. See also Kuroyanagi, *Ishi Baishō Sekinin Hoken* [Medical Doctor's Liability Insurance], 691 JURISUTO 110 (1979).

107. The distinction in preferences for dispute resolution methods is related to different assumptions with regard to morals or behavioral codes in Japan and the West. While the assertion of a right which causes a confrontation tends to be considered a symptom of immaturity in Japan, non-assertion of rights tends to be considered a symptom of weakness in the West.

A French attorney who worked in Japan was asked about the French situation after being told that a Japanese person who brings a lawsuit concerning small issues becomes the object of general aversion. She said:

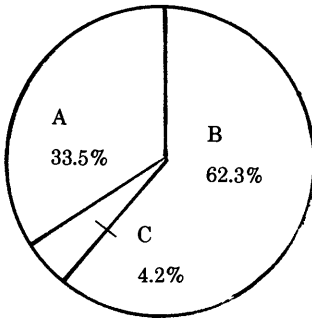
I believe [in France] it would be the opposite. If a person did not state his claim, he would be considered a "weak guy." The perception itself is quite different. It might be the custom of the Japanese to keep good relations verbally without reaching an agreement in reality. Even if there is a dispute, people must solve it amicably [in Japan]. Otherwise they fail to earn the respect of others. This is not the case in France.

Vittoz, *Zadankai, Gaikokujin kara Mita Nihon no Hō to Jitsumu* [A Discussion: Foreigners' Observation of Law and Practice in Japan], 781 JURISUTO 136 (1983).

TABLE 25

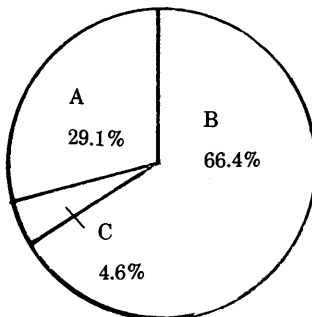
Citizens' Attitude Towards Law in Japan

Below are two opinions concerning the law. Which opinion do you support?



- A. The law should always be observed. If sanctions are not always imposed whenever people fail to observe the law, the law loses its meaning.
- B. Whether or not the law should be applied depends upon whether the sanction is appropriate in the particular instance. The law does not always have to be applied to the letter.
- C. Don't know/No Answer.

There are two types of administrative personnel. Which do you prefer?

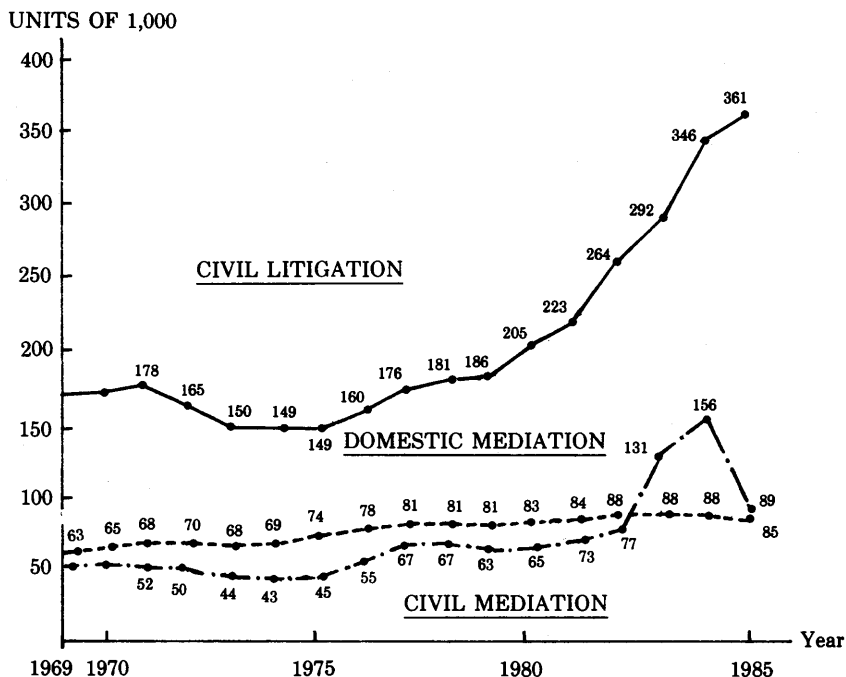


- A. A person who always applies the letter of the law and never makes exceptions.
- B. A person who tries to understand the aim of the law, and then to apply the law on a case by case basis.
- C. Don't know/No Answer.

NIHON BUNKA KAIGI [Japan Culture Conference], ed., NIHONJIN NO HŌISHIKI [Legal Consciousness of the Japanese] 83 (1973). Five years after of this survey, the same survey was conducted. The result was: Answer to the first question, A, 26.3%, B, 65.7%, C, 8.0%; to the second questions, A, 19.6%, B, 73.4%, C, 7.0%. NIHON BUNKA KAIGI [Japan Culture Conference] ed. GENDAI NIHONJIN NO HŌISHIKI [Legal Consciousness of the Contemporary Japanese] 20 (1982).

CHART 8

Number of Civil Litigation Cases of the First Instance and
Mediations of Civil and Domestic Disputes in Japan



Constructed from the statistics in SHIHŌ TŌKEI NENPŌ [Annual Report of Judicial Statistics] of each year.

tions in civil disputes at the first instance.¹⁰⁸ In other words, the ratio of litigation filings to mediation in civil disputes is approximately 4 to 1. In addition to the 89,181 civil dispute mediations in ordinary courts, there were 85,035 domestic relation mediations handled by family courts in 1985.¹⁰⁹ In this respect, the role of mediation is fairly large even in the judiciary.¹¹⁰ (See

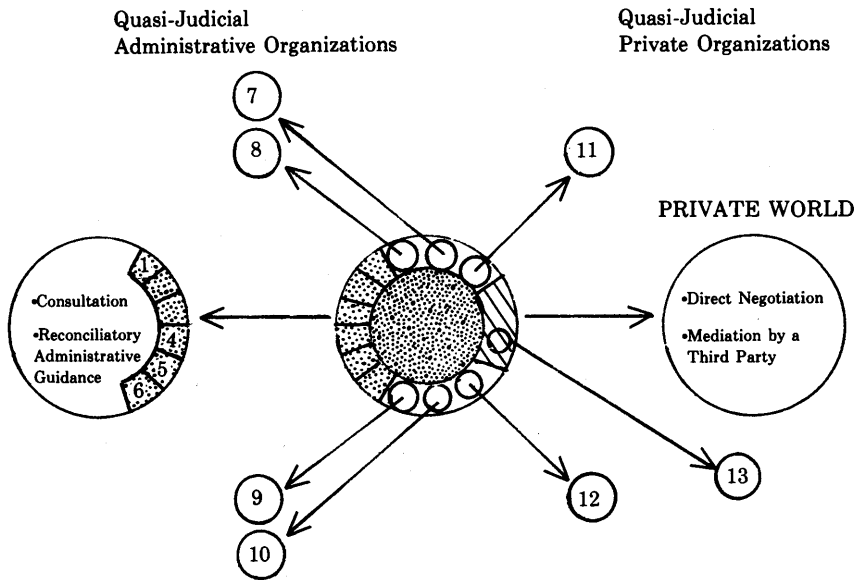
108. 1 SHIHŌ TŌKEI NENPŌ [Annual Report of Judicial Statistics for 1985], 12, 52 (1985).

109. 3 *Id.* at 18.

110. As valuable overall analyses of mediation in Japan, see 1 D. HENDERSON, CON-

Chart 8). Even in quasi-judiciary organizations, whenever these institutions have authority both for consultation and mediation,

CHART 9
Dispute Resolution Channels in Japan



- 1) Worker's Compensation
- 2) Inoculation Victim's Compensation
- 3) Pollution Victim's Compensation
- 4) Compensation for Side Effects from Medicines
- 5) Product Liability Compensation
- 6) School Accident Compensation
- 7) The Committee for Resolution of Pollution Dispute
- 8) The Committee for Review of Construction-Work Related Disputes
- 9) The Committee for Review of Atomic Energy Related Damage Compensation
- 10) The Committee for Relief of Consumer Damages in Local Government
- 11) The Center for Traffic Accident Disputes
- 12) The Committee for Review of Liability Compensation of Medical Doctors
- 13) Mediation in Judiciary

the more informal procedure of consultation, which does not require a direct assertion of one's rights, is preferred by the Japanese. One survey pointed out that this was a common phenomenon in almost all quasi-judicial institutions.¹¹¹

Because of these procedural and substantive options, Japanese people tend not to resort to the judiciary. As a result, the societal function of the judiciary in Japan tends to be narrower than in other countries. (See Chart 9).

VI. CONCLUSION

This article agrees with the opinion that Japanese people often do not resort to the courts because their courts are inefficient. However, a social institution is not a "given." Social necessity fosters particular social institutions. If it is true that the United States has a sophisticated and well-developed judiciary, while Japan has an inefficient judiciary, one can assume that the social need to develop the judiciary is stronger in the United States than in Japan. As has been stated before, no society has succeeded in avoiding social disputes completely. If it is true that the Japanese have an inefficient judiciary, one can assume that the need of the society to solve disputes has been absorbed by other channels.

In this sense, in the institutional setting of the whole society, one again finds that a cultural element exists which affects people's behavioral patterns, while simultaneously providing a basis for social institutions. At their root, the different roles of law and lawyers in Japan and the United States are influenced by these cultural differences. To go into more detail, one can imagine three different levels of social structure. At the root, or

111. In a general overview of various quasi-judicial organizations, the Second Bar Association of Tokyo reports:

It is a common characteristic throughout almost all dispute resolution organizations that although there are many complaints and cases of consultation and the number of filings found for mediation and arbitration is extremely small. 359 HANTA 51 (1978).

For example, at the Japan Center for Settlement of Traffic Accident Disputes, the cumulative number of consultations cases for the eight years from 1974 to 1981 is 13,980. Among these, approximately 21% (2,965) reached reconciliation. (If cases are excluded where damages could not be finally decided because conditions of the victim patient were still changing, the ratio for reaching reconciliation is approximately 70%). However, the number of cases where the involved parties came to formal procedures of adjudication in the Center was only 337. This is 2.4% of the consultation cases and 11.4% of the cases which reached reconciliation. See Ninomiya, *Kōtsūjiko Funsō Shori Sentā* [Japan Center for Settlement of Traffic Accident Disputes], 54-8 HÖRITSU JIHŌ 102 (1982).

first level, there are cultural or socio-cultural elements of a particular society. At the second level there are superstructural institutional settings of the society which reflect their own culture. The swollen Japanese administration, inefficient judiciary and other various institutional elements exist on this second level. At the third level, or surface, some phenomenal differences appear, including the low litigation rate and the small number of lawyers, reflecting the institutional setting. However, this phenomenon is also influenced by the cultural elements at the root, both indirectly through the superstructural institutional setting, and directly through the behavior of people in the society.¹¹²

112. In the main text, the author has described only the one-way influence moving from the cultural elements to the superstructural institutional setting at the second level, and finally to the surface phenomenon. However, a counterstream can exist in some cases. An artificial societal institutional setting designed with the aim of a particular purpose, sometimes changes, to some extent, the culture of the society in the long run. Moreover, distinctions among cultural, institutional and phenomenal elements are not always fully clear and can be further differentiated for the purpose of analysis of other issues. The distinctions in this paper are made for the convenience of explaining the theme of this paper.

TABLE 1	Evaluation of Organizations or Institutions Which Affect State Affairs	p. 638
TABLE 2	Career Choices of Graduates from the Legal Training and Research Institute	p. 639
TABLE 3	Practitioners' Opinions of the Necessity to Increase the Number of Practitioners	p. 644
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TABLE 5	Passing Rate for the 1985 Bar Exam in the U.S.	p. 646
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TABLE 16	Prefectures Ranked by Ratio of Population per One Private Practitioner in Japan	p. 672
TABLE 17	States Ranked by Ratio of Population per One Private Practitioner in U.S.	p. 673
TABLE 18	Japanese Citizens' Attitude Concerning Litigation (1)	p. 677
TABLE 19	Japanese Citizens' Attitude Concerning Litigation (2)	p. 678
TABLE 20	Businessmen's Attitude Concerning Dispute Resolution in Japan	p. 679
TABLE 21	Occupations of Graduates from Tokyo University Faculty of Law	p. 684
TABLE 22	Occupations of Graduates from Kyoto University Faculty of Law	p. 684

The theme of this article is that the relatively small role of law and lawyers in Japan compared to that of the United States is a societal phenomenon which directly reflects the societal institutional setting and is influenced by cultural elements at the root. In this aspect, the traditional theory of the cultural differences argument and the relatively new theory of the reasonable behavior argument, respectively, have grasped one side of the truth and do not conflict with each other. From a more comprehensive perspective, both theories should be integrated into a dialectic synthesis, composed of the various elements described herein.

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