INTRODUCTION

The June 2001 Final Recommendations to the Japanese Prime Minister from the Justice System Reform Council (“JSRC”) (shihōkaikaku iinkai) aimed to bring the legal system closer to the people. One aspect involved expanding opportunities for participation in the judicial process on the part of laypersons, experts in non-legal fields, and legal professionals other than the elite career judges, lawyers (bengoshi) and...
public prosecutors who qualified as such after passing the extremely difficult National Legal Examination (shihōshiken).\(^1\) This was thought to offer both enhanced efficiencies (especially for layperson involvement – greater democratic legitimacy) – a related goal thought to offer even greater efficiencies, tied in to a broader program of economic deregulation that accelerated over Japan’s “lost decade” of economic stagnation during the 1990s. The JSRC recommended various reforms to the legal system aimed at moving Japan from direct ex ante regulation by public authorities.\(^2\) The aim was to substitute more indirect socio-economic ordering via incentives on corporations and other socio-economic actors achieved through ex post relief offered by the judicial system, in the event of something going badly wrong in a brave new deregulated world. This plan implied increased human and financial resources for the justice system, for example, establishing postgraduate law school programs to increase the numbers allowed to pass a revamped national bar examination (shin shihōshiken).

Although the JSRC had ambitious intentions, various difficulties emerged when it came to implementing the JSRC’s Final Recommendations. One of the most far-reaching has been a backlash against the suggestion that seventy to eighty percent of law school graduates should pass the new shihōshiken, which was developed by representatives from the universities as well as the Supreme Court of Japan (which administers the judiciary)\(^3\) the Ministry of Justice (“MoJ”), which is in charge of prosecutors, and the Japan Federation of Bar Associations (“JFBA”), the peak association for bengoshi. The pass rate has dropped from 48.25 percent in 2006 to 23.54 percent in 2011 and the JFBA, in particular, pressed to significantly reduce the numbers of those allowed to pass the new shihōshiken (to well below the 3000 per annum by 2010, as recommended by the JSRC).\(^4\) In turn, this reduced rate of

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3. Hereinafter, a reference to the “Supreme Court” is a reference to the Supreme Court of Japan.
passage will likely lead to the closure of many law schools. The “main gatekeepers” to Japan’s legal profession are likely to remain the profession itself and the government, rather than the universities (as has been the case in the Anglo-Australian system since the 1960s) or the marketplace of potential employers (as in the United States).

More disconcerting were major gaps in the original JSRC Report and Final Recommendations involving the role of legal professionals. These omissions undercut the push towards greater variety in, and accessibility of, the Japanese legal process, and more generally, make it less likely for reforms to the “law in books” to achieve lasting change in the “law in action.” In criminal justice, for example, much attention is paid to the introduction of a quasi-jury (saiban’in) system, involving randomly selected laypersons ruling with career judges on both guilt and sentencing in trials of serious criminal offences at first instance.

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8 Makoto Ibusuki, Quo Vadis? First Year Inspection of Japan’s Mixed Jury
Prosecutors have maintained their very high conviction rates in the first year after the new system came into effect. But one reason this is unsurprising is the important roles played by the police before trial – yet the JSRC did not review or recommend changes to policing in Japan.

In addition, the JSRC said nothing about notaries (kōshōnin), a small and well-remunerated group accredited by the Ministry of Justice who are often former officials or prosecutors. The JSRC was also silent as to court bailiffs (shikkōkan), who were already partly deregulated in the sense that their primary income is from commissions earned when assisting in executing judgments, but brought more within the court system from 1966. Such omissions are surprising given that both groups are very important for enforcing judgments, and various reforms were made to the Civil Execution Law in the wake of other JSRC recommendations.

On the other hand, Japan’s recent civil justice reforms have expanded the scope for lay participation in various ways. For example, further amendments to the Code of Civil Procedure (“CCP”) in 2005 provided for appointment of expert commissioners to assist in complex litigation, such as intellectual property disputes. The separate law on the Expediting of Trials correlates with declining delays in civil proceedings generally. In addition, a new Arbitration Law aims to activate


9 Id.


12 Minji shikkō ho, Law No. 4 of 1979 (Japan). On the reforms to or related to this Law, see Hiromasa Nakajima, Kenri Jitsugen no Jikkōsei Kakuho to Minji Tetsuzukihō no Kaisei [Civil Procedure Law Reform and Securing the Effectiveness of Rights Enforcement], 1317 JURISUTO 174 (2006).

13 Minji soshō hō, Law No. 109 of 1996 (Japan).

14 Saiban no jinsokuka ni kansuru hōritsu, Law No. 107 of 2003 (Japan). See generally Luke Nottage, Civil Procedure Reforms in Japan: The Latest Round, 22 RITSUMEIKAN L. REV. 81 (2005). The average time to obtain a first-instance ordinary civil judgment (tsūjō minji soshō, excluding, for example, simpler debt collection cases) which involved contested hearings (taiseki hanketsu) has declined from twenty months in 1989 to around thirteen months over 2001-2006, and had declined further to 11.5 months by 2008. More importantly, given the Law’s aim to reduce numbers of cases taking more than two years to resolve, such cases declined steadily from 1994 (20,085) to 2007 (6078). See SAIKÔ SAIBANSHO [Supreme Court of Japan], SAIBANSHO DETABUKKU [COURT DATA BOOK] (2009) 71-72. For translations of this Law, the CCP and many other statutes, see Ministry of Justice, Japanese Law Translation, available at
domestic as well as international arbitration,\(^{16}\) although so far it has had limited impact. The 2004 “Basic Law” to promote Alternative Dispute Resolution (“ADR”), which excludes arbitration from its scope, has also recently resulted in the MoJ accrediting more organizations to provide mediation and similar ADR services.\(^{17}\) Such accreditation allows clients, for example, a suspension of the court claim limitation period while using the services of a certified dispute resolution provider.\(^{18}\) Many patent attorneys (benrishi) and judicial scriveners (shihōshoshi, traditionally limited to registration and drafting work) have registered to be able to represent clients in certain court proceedings – with the latter in particular now involved in large-scale consumer credit litigation\(^ {19}\) – following JSRC-recommended reforms to their respective regulatory regimes.

Despite these various changes, the issue of how the Japanese government organizes its litigation services represents another significant gap in the JSRC’s reform package. On the one hand, the JSRC indicated the need to reform aspects of judicial review and other means to control the exercise of public authority. In discussing generally the “Role of the Justice System,” its Final Report noted:

The administrative litigation system needs to be reviewed from the standpoint of reinforcing the judicial-check function vis-à-vis the administration and securing the rights and freedoms of the people more effectively. This is also important to enable the effective exercise of the essential functions of the administrative branch, namely, that the Cabinet actively tackles various domestic and foreign issues strategically, in an integrated manner and with mobility, while blocking improper political pressure on the individual administrative processes and securing strict enforcement of the law.\(^ {20}\)


\(^{15}\) Chusai hō, Law No. 138 of 2003 (Japan).


\(^{17}\) Saibangai fansō kaiketsu tetsuzuki no riyō no sokushin ni kansuru hōritsu, Law No. 151 of 2004 (Japan). See Nottage, supra note 6, at Part 11.

\(^{18}\) Aya Yamada, ADR in Japan: Does the New Law Liberalize ADR from Historical Shackles or Legalize It?, 2 CONTEMP. ASIA ARB. J. 1 (2009).


Having acknowledged the need to reinforce the ‘judicial-check’ function of the administrative litigation system, the JSRC Final Report highlighted that:

individual problems relating to the current Administrative Case Litigation Law include plaintiff capacity, existence of a reviewable disposition, standing, time limitations on filing suits, jurisdiction, and the non-suspension of execution principle, and also include whether or not to introduce new types of actions such as actions to impose duties, preventive actions against omissions, and suits for revocation of administrative legislation.\(^{21}\)

The JSRC stated that consideration should be given to the need for “a proper ‘Administrative Litigation Law’ (tentative name), which is distinctly separated from a model based on civil procedure” law.\(^{22}\) Further, the Council stated that it would “be necessary to identify and study problems of individual laws (the principle of exhaustion of remedies, the disposition requirement, plaintiff capacity, etc.).”\(^{23}\)

The JSRC identified a number of other matters that it considered were important in addressing the problems of establishing a solid framework for administrative litigation, including the need to:

establish specialized adjudicative organizations (administrative courts or administrative case special sections, circuit courts, etc.) and to strengthen the specialized ability of members of the legal profession (judges and lawyers) who handle administrative cases. Improvement of education of administrative law at law schools is also called for.\(^{24}\)

The JSRC went on to recommend that, “[t]he government should promptly start a full-scale study on measures concerning the judicial review of the administration, including a review of the Administrative Case Litigation Law.”\(^{25}\) A Study Group was duly established in 2001 within the Cabinet Office’s Judicial System Reform Headquarters, resulting in some significant reforms to the Administrative Case Litigation Law (“ACLL”)\(^{26}\) being enacted in 2004,\(^{27}\) outlined in Part I.B.


\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Id.


\(^{26}\) Gyōsei jiken soshō hōhō, Law No. 139 of 1962 (Japan).
Although administrative law was added to the new shihōshiken and taught in the law schools, no legislative changes resulted that were targeted at increased specialization within administrative courts, or within the legal profession. In particular, the system through which the Japanese government manages its own litigation has not been subject to significant scrutiny or specific reform. This article examines that system as another important area that the JSRC and other policymakers have neglected when planning or assessing fundamental justice system reforms. Our article also helps fill a large gap in Japanese and Western scholarship on the legal profession in Japan.

A first initial hypothesis was that the number of claims brought against the government (national and local) and success rates of such claims would increase as a result of the JSRC’s grand plan and the amendments to the ACLL as well as the CCP (which applies mutatis mutandis to the ACLL under Article 7, if the ACLL contains no other provisions). Secondly, and relatedly, we expected to find an increase in the number of government lawyers and more specialization among them.

Instead, our research first found little significant change in aggregate litigation patterns. Claims for revocation or other challenges to administrative actions under the ACLL have not increased significantly. It is harder to find data on civil damages and injunction claims against the government under the State Compensation Law29 and the CCP, but our interviews suggest no great changes in these areas. Nor have we identified increases regarding those cases – usually much more straightforward – where the government is the plaintiff, such as suits to evict tenants from public housing or for debt collection.

Overall the total number of lawsuits against the state or administrative agencies handled by the MoJ remains close to 20,000 per


29 Kokka baishō hō, Law No. 125 of 1947 (Japan).
The MoJ has five litigation divisions dealing with civil and administrative suits in which the state is a party. These divisions are also responsible for dealing with matters concerning other civil and administrative suits involving local public entities, independent administrative institutions, and other public juristic persons as prescribed by Cabinet orders, where such suits are determined to be relevant to the interests of the state. These interests include a small minority of cases brought against local governments if the local government requests assistance from the MoJ and the latter decides that an issue of national interest is at stake.

Table 1: Suits involving the state or administrative agencies (as of January 1, 2011 for each previous calendar year)

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</tr>
</thead>
<tbody>
<tr>
<td>New</td>
<td>8015</td>
<td>8131</td>
<td>8143</td>
<td>8203</td>
<td>8222</td>
<td>8231</td>
<td>8248</td>
<td>8424</td>
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</tr>
<tr>
<td>Pending</td>
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<td>12,962</td>
<td>12,835</td>
<td>12,912</td>
<td>12,932</td>
<td>12,784</td>
<td>12,601</td>
<td>12,174</td>
<td>11,971</td>
</tr>
<tr>
<td>TOTAL</td>
<td><strong>20,782</strong></td>
<td><strong>21,093</strong></td>
<td><strong>20,978</strong></td>
<td><strong>21,115</strong></td>
<td><strong>21,154</strong></td>
<td><strong>20,849</strong></td>
<td><strong>20,598</strong></td>
<td><strong>20,444</strong></td>
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<tr>
<td>Completed</td>
<td>7820</td>
<td>8258</td>
<td>8066</td>
<td>8183</td>
<td>8370</td>
<td>8414</td>
<td>8675</td>
<td>8627</td>
<td>8791</td>
</tr>
</tbody>
</table>

31 Id.
32 MoJ involvement is determined primarily by the Law on the Authority of the Minister of Justice over Suits Affecting the Interests of State (Kuni no rigai ni kankei no aru soshō ni tsuite no hōmu daijin no kengen tō ni kansuru hōritsu, Law No. 194 of 1947 (Japan)). A prominent case where the MoJ was involved in local government litigation, pursuant to Article 7 of this Law, was the decision of the Shinagawa Ward government not to register the U.S. birth certificates of twins that named their parents as Japanese, but who were born to a U.S. surrogate mother. The U.S. birth certificates were issued after a Nevada court proclaimed the Japanese husband and wife as the twins’ legal parents, but the Ward office refused to accept them. After the Minister of Justice announced that the request for registration had been denied, the only way for the parents to register the birth certificates was through a court order (Saikō Saibansho [Sup. Ct.] Mar. 23, 2007, 61(2) Saikō Saibansho Minji Hanreishū [Minshū] 619 (Japan)). See infra note 99 and accompanying text.
33 Ministry of Justice, supra note 30, at 24; Hōmusho [Ministry of Justice], Kekka no Gaiyō [Summary of Outcomes] (2009), available at http://www.moj.go.jp/content/000049273.pdf. These cases include litigation in which the government is plaintiff (such as some tax collection matters or suits seeking evictions from government-owned premises), as well as settled or discontinued cases.
<table>
<thead>
<tr>
<th>Cases:</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
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<tr>
<td>New</td>
<td>8421</td>
<td>8431</td>
<td>8507</td>
<td>8514</td>
</tr>
<tr>
<td>Pending</td>
<td>11,653</td>
<td>11,260</td>
<td>10,853</td>
<td>10,212</td>
</tr>
<tr>
<td>TOTAL</td>
<td>20,074</td>
<td>19,691</td>
<td>19,360</td>
<td>18,726</td>
</tr>
<tr>
<td>Completed</td>
<td>8814</td>
<td>8838</td>
<td>9148</td>
<td>8353</td>
</tr>
</tbody>
</table>

However, the MoJ acknowledges that there have been increases in certain types of disputes and that overall, “[t]he number of lawsuits has been increasing gradually in line with social changes due to a recent relaxation of regulations through administrative reform and prior regulations by the government [being replaced by] ex post facto remedy.” Nonetheless, the Ministry adds that “efforts have been made to handle these lawsuits in a prompt and valid manner.”

Table 1 shows that the number of pending cases has declined since 2001.

Less surprisingly, therefore, and contrary to our second initial hypothesis, we also find and explain in detail below that there have been few major changes so far regarding the Japanese government’s management of its large litigation caseload. The core of the system remains a small group of prosecutors within the MoJ handling non-criminal cases, known as shōmu kenji (sometimes translated as “state attorneys”). As of December 5, 2008, there were only fifty-two shōmu kenji. They were spread across the eight largest Legal Affairs Bureaus, in those major cities having High Courts, as well as within the Ministry in Tokyo itself. Furthermore, despite many changes to the judicial system resulting from the JSRC’s recommendations, many shōmu kenji remain judges seconded to the MoJ by the Supreme Court – typically for two or three-year terms. This phenomenon of “judge-prosecutor exchange” (han-ken kōryū) is unusual even compared to continental Europe. The small number of government lawyers dealing with such a high caseload in Japan is certainly remarkable compared to a common law country like Australia, with fewer barriers to entry into the legal profession.

34 Ministry of Justice, supra note 30, at 24.


37 See generally Nottage, supra note 6. For example, the Australian Government
However, as with other comparisons of litigation patterns and legal professionals in Japan, it is important to investigate further (see Part II). There have already been some changes, including the hiring of five shōmu kenji from among bengoshi on contracts of up to five years – pursuant to a broader JSRC-inspired legislative reform in 2004 to make it easier for all government departments and the courts to hire bengoshi. We also find that much of the MoJ’s caseload involves simpler cases that can be run by paralegal staff under the supervision of shōmu kenji, just as criminal prosecutors can manage higher numbers of criminal cases using paralegal staff.

The MoJ leaves litigation regarding the validity of patents to officials of the Japan Patent Office (“JPO”); competition law to the Japan Fair Trade Commission (“JFTC”); and some health law matters predominantly to the Ministry of Health, Labour and Welfare (“MHLW”). Shōmu kenji also coordinate tax litigation with officials of the National Tax Agency (“NTA”) (who appear as co-counsel with shōmu kenji); and some lawsuits that also involve local governments, with the latter’s own in-house staff (who are still almost never qualified as bengoshi) or even some outside bengoshi. The Minister of Justice has statutory authority to engage bengoshi as outside counsel but rarely does so, while often appointing NTA officials and now MHLW staff as “designated representatives” (shitei dairinin) in some types of government litigation, notably now for claims related to Hepatitis C infections from blood transfusions.

Nonetheless, Japan maintains a distinctive and seemingly quite robust approach to organizing the government’s litigation services. This is demonstrated by a fairly stable pattern of administrative and other lawsuits involving the government, and high success rates, despite legislative reforms prompted by the JSRC. Our main conclusion is that, in this field of litigation involving the government and more generally for judicial reform in Japan, so far there has only been a “quiet transformation.”

A similar “gradual transformation” is also evident even in corporate

Solicitor employed around 175 lawyers in its national Litigation and Dispute Management practice as at March 2010 (out of a total of 342 lawyers as of June 30, 2010) (Australian Government Solicitor, AGS ANNUAL REPORT 2009–2010 (2010)). This is despite the large-scale decentralization and deregulation of government legal services in that country since 1999. See, AGS Forced To Soon Compete For Work, THE CANBERRA TIMES, July 30, 1999.


39 Johnson, supra note 10.

governance,\textsuperscript{41} where private sector incentives might be expected to imply greater change than in public sector law and practice. From the hermeneutical perspective developed by Tanase,\textsuperscript{42} this sort of transformation may also be seen as Japan’s community and social “blueprint” absorbing the latest attempts to enforce the rather different logic of the law – while that blueprint itself partly accommodates or adjusts to new legal developments.

This partial and slow transformation may persist, especially if the government has already considerably improved its performance, making administrative law and other public law claims less likely or at least less successful. However, that perspective seems too Panglossian given the many administrative failures in Japan highlighted by the media over recent years and some related major recent or ongoing litigation (outlined in Part I.C and I.D).

Even if the number of lawsuits increases more significantly or other aspects of Japan’s external environment change, internal public sector organizational changes are likely to lag. However, we conclude in Part III that various pressures may continue to build over the long term, resulting in more far-reaching reconfigurations that could benefit from a closer comparison with developments in other countries.

I. Administrative Law and Litigation in Japan

A. Resolving Disputes with the Government: Overall Patterns

To put government litigation in context, it is helpful to explore further the complete “dispute resolution pyramid” in Japan. Examining disputing behavior “from the bottom up” in this way helps to determine, for example, whether low levels of litigation against the government mainly reflect low levels of disputes, in turn related to few problems being experienced by citizens in their dealings with the state. If this is true, then even major legislative reforms may well not lead to large changes in litigation patterns or the government’s approach to managing claims.

Leading sociologists in Japan carried out a large-scale disputing behavior survey in 2005 as part of a Civil Justice Research Project, funded by the Ministry of Education. Out of 25,014 randomly selected persons nation-wide, 12,408 (49.6 percent) completed interviews and a written questionnaire. Only 123 of them (one percent) reported problems with public authorities over the previous five years; the combined number of problems these 123 individuals reported was 134, out of 4144 total

\textsuperscript{41} Corporate Governance in the 21st Century: Japan’s Gradual Transformation (Luke Nottage, Leon Wolff, & Kent Anderson eds., 2008).

problems reported across all categories of disputes (3.2 percent). Only fifty-five out of 12,408 respondents experienced these incidents as their “most serious problems” over the five-year period. These proportions were the lowest for any category of disputes. The (in)frequency of any problem will depend on how many dealings people have with the government, as well as caution about disclosing private or morally impugnable information, as well as readiness to perceive incidents as constituting “problems.” Nonetheless, given the extent still of Japan’s welfare state in its broad sense and the respondents’ readiness to disclose problems even regarding family or credit relationships, the survey data provides some evidence that citizens do experience relatively few problems in dealing with their government.

However, reports that asked whether it was “difficult to say” whether the individual had been harmed or had caused harm (twenty-two percent); and when books were consulted as opposed to websites (eleven versus two percent) revealed above-average levels of problems involving public authorities (across all types of disputes). Respondents reported contacting the public authorities regarding their serious problems at average levels (around seventy-three percent) but spent only United States (“U.S.”) $420 on consultations or court procedures, compared to U.S. $3490 spent on average across all dispute categories (for example, compared to U.S. $2500 for “accidents,” and U.S. $6800 for family disputes). Although the proportion of disputes resolved with public authorities was average (sixty-five versus sixty percent), only eleven of those thirty-six cases involved the individuals’ arguments being completely or mostly accepted (thirty versus sixty percent averaged across all dispute categories).

In comparing presumed case progression with the overall dispute resolution pyramid in Japan, for every 1000 reported problems involving public authorities there was a similar level of “contact with the other party” (727 compared to 733 cases, averaged across all dispute categories). Further, there was more ongoing “disagreement” (527 compared to 398 cases), yet less resort to lawyers (fifty-five compared to eighty-seven) leading to no court procedures (compared to twenty-one court cases, averaged across all dispute categories). However, when no such progression is presumed after initial contact with the other side, only

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43 See, Masayuki Murayama, Experiences of Problems and Disputing Behavior in Japan, 14 Mei L.J. 1, 7-8 (2007). Probably reflecting more contacts, in our view, the disputes involved local governments (2.8 percent) more than the national government or other public agencies (about one percent each – multiple answers possible). Id. at 11. In contrast, high-ranking categories of (general and serious) disputes were “accidents” and problems with “neighbors”; mid-ranking categories included problems with “relatives” and “credit.”

eighteen out of the fifty-five serious disputes reported regarding public authorities resulted in court procedures. This represents quite a high ratio of litigation compared to disputes experienced.\footnote{See Murayama, \textit{supra} note 43, at 10-34. Other high ratios of litigation are evident in disputes involving private insurance and especially leases, real property, credit or family disputes; low ratios are found for (more frequent) disputes involving employment, goods and services, neighbors and accidents. For example, there were 679 accident disputes versus only twenty-four court procedures. For some institutional background where traffic accidents are involved, see T. Tanase, \textit{The Management of Automobile Disputes: Automobile Accident Compensation in Japan}, 24 LAW & SOC’Y REV 651 (1990).}

Overall, the data therefore suggests that relatively few serious disputes involving public authorities arise, but they end up in court with outcomes quite unfavorable to the individuals concerned, related to less access to lawyers. This largely squares with more “top-down” analyses of administrative law and litigation centered on the Administrative Case Litigation Law (“ACLL”), focusing on those cases that do end up in court. There were only around 1000 new suits filed at the District or High Court from the 1950s, until the numbers began increasing steadily from around 1990, exceeding 2400 per annum by 2004. Yet plaintiffs have persistently failed on the merits (\textit{kiyaku}) in about fifty-five to seventy percent of cases since the mid-1950s.\footnote{Kadomatsu, \textit{supra} note 27, at 148, Chart 1. Generally, for example, of 2728 new first-instance filings in 2007 (4304 new filings including appeals), the most important subject-matter involved the police, with 558 cases (913 cases including appeals); intellectual property, with 443 (586 cases including appeals); local governments, with 391 (740 cases including appeals); tax, with 322 (566 cases including appeals); public services and facilities, with 145 (188 cases including appeals); civil servants, with 140 (225 cases including appeals); and claims for reimbursements for public services provided for private purposes (\textit{kōyō futan}), with 118 (177 cases including appeals). There were also thirty-six cases involving electoral law issues (fifty-three including appeals), nine involving agricultural land (thirteen cases including appeals, and 566 “other” (843 cases including appeals, including, for example, cases involving official information disclosure requests, the JFTC or other parts of the government such as the MHLW). The largest increases since 1990 are for cases involving the police (only 130 filings including appeals in that year), local authorities (only 213 cases including appeals, compared to 740 in 2007); average overall increases are found for example in the fields of tax law (336 total filings in 1990, rising to 566 in 2007) and intellectual property (315 filings, rising to 586). See 60(9) Hōsō Jihō (2008) 120 and 123 (for data provided by the Supreme Court).}

B. \textit{The Framework for Administrative Case Law Litigation}

The ACLL (Article 30) allows the courts some scope to review administrative discretion but the Supreme Court has long held that they should interfere only where the administrative action “totally lacked a factual basis or it is evident that it significantly lacks appropriateness in the light of socially accepted views.”\footnote{Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, 32 Saikō Saibansho Minji Hanreishū [Minshū] 1222 (Japan).} More disturbingly, their claims
were dismissed (kyakka) in about fifteen to twenty percent of cases.\textsuperscript{48} Primarily, this occurs because plaintiffs fail to establish two of the basic jurisdictional requirements in the important category of “complaint litigation” (kōoku appeals) seeking revocation of administrative action: (1) that the government has issued an ‘administrative disposition’ (gyōsei shobun: Article 3(2)), or (2) that the plaintiff has standing (genkoku tekikaku: Article 9(1)). Soon after the ACLL was enacted in 1962, the Supreme Court held that administrative dispositions were restricted to administrative actions having “direct and particular legal effects on the rights and duties of individuals.”\textsuperscript{49} Subsequent case law excluded general city planning zoning decisions, a new local tax ordinance (based on the rationale that concrete rights were not involved), shooting exercises at a military base (a factual rather than a legal act), family registry recording as an extramarital child (having practical rather than legal effect), and administrative circulars (directions governing internal governmental practice, without external legal effect).

However, in the beginning of 2002 – in the shadow of the JSRC’s deliberations – the courts began to interpret the test more liberally, finding the following to constitute actionable administrative dispositions: general designation of a road, funding for worker accident compensation insurance, “notifications” made under the Food Sanitation Law,\textsuperscript{50} “recommendations” under the Medical Services Law,\textsuperscript{51} and then even a project plan for a land readjustment project.\textsuperscript{52} This trend significantly expands the judicial scope of review to more diffuse and traditionally pervasive “administrative guidance” – informal attempts by regulators to obtain “voluntary” compliance or risk jeopardizing a smooth relationship and long-term benefits.\textsuperscript{53} Yet such judicial guidance itself came in various forms, hemmed in by various other case law and legislative developments as well as broader deregulatory initiatives from the mid-1980s.\textsuperscript{54}


\textsuperscript{50} Shokuhin eisei hō, Law No. 233 of 1947 (Japan).

\textsuperscript{51} Iryō hō, Law No. 205 of 1948 (Japan).


\textsuperscript{53} Michael Young, Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan, 84 Colum. L. Rev. 924 (1984).

\textsuperscript{54} Takehisa Nakagawa, Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization, 52 Admin. L. Rev. 175 (2000).
The ACLL also limited standing to those holding “legal interests.” The courts interpreted this to mean specific interests (not the general public interest) affected by administrative dispositions, and within their protective scope. The amended Article 9(2) attempted to liberalize the standing requirement by codifying Supreme Court case law that directed courts to rely not only on the language used in the relevant legal provisions, but also its overall purpose as well as the contents and nature of the interest (including who and to what extent the interest was likely to be harmed). The Court then interpreted this provision to overturn its own precedent and affirm standing of residents near Odakyu’s railway line, which was being redeveloped with approval of the Construction Minister as part of a Tokyo Metropolitan Government project.55

The ACLL was also amended in various other ways, along the lines recommended by the JSRC and then the Cabinet Headquarters in order to expand the “judicial check” function over the Japanese government (as outlined in the Introduction). The ACLL moved away from the underlying theory that the separation of powers required courts to respect the government’s decision-making competence, and thus to only restore the status quo ante when faced with illegal conduct or excessive discretion. The Law added the possibility of “mandatory injunctions” (to force officials to act in specified ways in accordance with Articles 37-2 to 37-3) and “prohibitory injunctions” (to prevent specified actions in accordance with Article 37-4). Preliminary injunction relief was also provided (Article 37-5). Both preliminary and final mandatory injunctions have been issued in a few subsequent cases, notably by the Tokyo District Court to require a municipal nursery school to admit a five-year old girl with a throat disease.56

The ACLL also added “confirmation litigation” to Article 4 as an example of “party litigation” to establish “legal relationships under public law,” not premised on revocation or review of a specific “administrative disposition.” In practice, confirmation litigation has been invoked notably in two Supreme Court cases that found unconstitutional the legislation relating to electoral rights for Japanese citizens living abroad,57 and extramarital children born to a Japanese father and foreign mother.58

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58 Saikō Saibansho [Sup. Ct.] June 8, 2007, 62 Saikō Saibansho Minji Hanreishū [Minshū] 1367 (Japan). These judgments were also widely reported (for example, Yasuhiro Okuda & Hitoshi Nasu, Constitutionality of the Japanese Nationality Act: A Commentary on the Supreme Court’s Decision on 4 June 2008, 26 J. JAPANESE L. 101 (2009)). The Supreme Court has only struck down legislation in eight cases since
Professor Narufumi Kadomatsu views all these developments as countering some strong initial criticisms of the 2004 amendments to the ACLL. For example, Professor Yasutaka Abe had argued that allowing judges to participate in JSRC and Cabinet Headquarters deliberations on administrative law reform was like letting thieves draft criminal law. Yet Kadomatsu concedes that the ACLL amendments, on their face, were quite “lukewarm.”

A recent empirical study suggests that subsequent developments in administrative litigation have remained quite tepid overall. The Supreme Court’s online database of case law uncovered seventy judgments rendered by various courts between April 1, 2005 (when the revised ACLL came into effect), and September 30, 2009, where the new types of relief were contested. The relief was only granted in twenty percent of first-instance judgments (twenty-eight percent of appeals). Applications for preliminary mandatory injunctions (in five out of six cases), particularly those involving access to childcare, were especially successful. Overall, the study found high success rates in cases involving public services or facilities, with new forms of relief being granted in seven out of ten cases in comparison with more typical cases of government-citizen interaction involving permits or taxes. In other words, the ACLL amendments were associated with significant developments only in limited categories of reported judgments.

Likewise, the Supreme Court’s online Judicial Statistics Yearbooks revealed little discernable macro-effects from the 2004 amendments. For example, the annual growth rate of first-instance filings was 4.2 percent over 2002-2004 and 5.4 percent over 2005-2008, but successful claims have decreased. Appeals increased from 650 in 2004 to 739 in 2007 and 787 in 2008, but the number of successful claims declined from 112 in 2004 (17.2 percent success rate) to ninety-nine in 2008 (12.6 percent).

Nevertheless, caseloads are still rising, taking up more time and resources of the government and these have significant individual outcomes. Kadomatsu has also identified a significant overall trend that persists even at the Supreme Court level, including longer-term relaxation of the ‘administrative disposition’ requirement, despite Japan constitutional review was established by the 1946 Constitution during the U.S.-led Occupation. See Jun-Ichi Satoh, Judicial Review in Japan, 41 LOY. L.A. L. REV. 603 (2008).

59 Kadomatsu, supra note 18, at 156-58.

60 Adrian Wong, Continuity and Change: Judicial Review of Administrative Action in Japan in Light of the 2004 Amendments to the Administrative Case Litigation Act, (ANU COLLEGE OF LAW LLB HONORS PAPERS 2009) (on file with the authors).

61 Wong, supra note 56

62 Kadomatsu, supra note 18.
having a de facto rather than de jure system of precedent. He also points out that the Japanese judiciary was “definitely not powerless” even before the amendments – specifically mentioning “confirmation litigation,” administrative dispositions that sometimes were revoked through “incidental review.” The relevant legislation could be found unconstitutional, or beyond the scope of the primary legislation.

C. Other Causes of Action Against the Government

Under the CCP, Japanese courts have also issued civil injunctions in cases where management of public facilities was held not to involve the exercise of public authority and, therefore, not to constitute administrative dispositions under the ACLL. The success rate in such claims was low, as exemplified by the Supreme Court’s Osaka Airport judgment. But even where an injunction has not been forthcoming, damages have been awarded under the State Compensation Law, as in the Osaka-Kobe Highway judgment. In addition, judgments have limited the scope of administrative guidance.

Kadomatsu also points to considerable “judicial activism in private law disputes,” where courts readily apply “general clauses.” These

64 Kadomatsu, supra note 27, at 152-55.
69 See, e.g., Saikō Saibansho [Sup. Ct.] July 16, 1985, 39 Saikō Saibansho Minji Hanreishū [Minshū] 989 (Japan). This judgment also influenced the Administrative Procedures Law (Gyōsei hetsuzuki hō, Law No. 88 of 1993 (Japan)). See Katsuya Uga, Development of the Concepts of Transparency and Accountability in Japanese Administrative Law, LAW IN JAPAN: A TURNING POINT 276 (Daniel Foote ed., 2007). However, compensation claims are usually more successful against local governments. One explanation may be less capacity to defend claims, or indeed to develop and implement defensible policy. But it has been suggested that the different success rate stems from the central government changing much less frequently in elections, so the judiciary respects their decisions more. See MARK J RAMSEYER & MINORU NAKAZOTO, JAPANESE LAW: AN ECONOMIC APPROACH 217-18 (1999).
70 Kadomatsu, supra note 18.
disputes can include cases with major public policy dimensions, such as industrial pollution (especially over the 1970s) and gender discrimination (the 1980s). More recent examples concern product liability ("PL"), medical malpractice, and shareholder derivative actions. The first two often implicate the state, especially in mass tort PL claims in which a local or the central government are sued under the State Compensation Law, as well as product suppliers. In all three areas, courts have tended to take legislative reform—often itself based partly on case law developments—as a signal to maintain a more activist trajectory. By contrast, courts over the 1970s and 1980s had adopted a lower profile in industrial pollution cases, in response to various statutes enacted in the early 1970s. In other words, at least in some areas, contemporary judicial attitudes appear to be changing.

Kadomatsu identifies suits brought by local residents as a final category of cases that represent a significant impact from the Japanese judiciary nowadays. Standing is based on residence and, therefore, is


73 See Luke Nottage, Comparing Product Safety and Liability Law in Japan, in EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW 159 (Harry N. Scheiber & Laurent Mayali, eds., 2007), Eric Feldman, Law, Society, and Medical Malpractice Litigation in Japan, 8 Wash. U. Global Stud. L. Rev. 257 (2009), and Dan Puchniak & Masafumi Nakahigashi, Japan's Love for Derivative Actions: Revisiting Irrationality as a Rational Explanation for Shareholder Litigation, 45 Vanderbilt J. Transnational L. (forthcoming 2012). More generally comparing private law and judicial reasoning in Japan, see Nottage, supra note 71. Kadomatsu, supra note 27 at 152, remarks that Japanese judges seem more restrained and positivist about using general clauses in public law. But he also acknowledges the argument of Professor Hiroyuki Hashimoto that they reach decisions based on a "balancing of interests" approach, with statutory interpretation then serving as ex post rationalization. That is indeed a typically "civil law way of thinking" in Japan. This more instrumental approach to judicial reasoning also fits with the way the courts—even the High Courts—have used sometimes formalist interpretations of regulatory instruments to provide relief for consumers in credit cases particularly over the last decade, but also sometimes quite substantive or purposive interpretations. See, Kozuka & Nottage, supra note 19; Souichirou Kozuka, Judicial Activism of the Supreme Court in Consumer Law: Juridification of Society Through Case Law?, 27 J. Japanese L. 81 (2009).

74 LUKE NOTTAGE, PRODUCT SAFETY AND LIABILITY LAW IN JAPAN: FROM MINAMATA TO MAD COWS 23-69 (2004).

75 Consumer credit litigation in recent years also demonstrates the judiciary's tendency to interpret legislation as an incitement to renewed judicial activism. See Kozuka & Nottage, supra note 19.

76 JULIAN GRESSER, KOICHIRO FUJIKURA & AKIO MORISHIMA, ENVIRONMENTAL LAW IN JAPAN (1981).

77 Kadomatsu, supra note 18.
much easier to establish under the Official Information Disclosure Law enacted by the central government. This Law builds on local government ordinances that had burgeoned from the 1980s to allow requests for information held by municipalities. Such requests also led to a surge in "taxpayer suits" brought by residents for reimbursement of misused public funds, under the Local Government Law. Judgments in official information disclosure cases, in particular, seem favorable to residents thanks to fixed filing fees and the government’s burden of proving grounds for non-disclosure.

Professor Masaki Abe argues that increases in citizen suits have been enhanced by the proliferation of "Citizens’ Ombudsman" NGOs in the mid-1990s, along with expanded media coverage of these developments and issues related to ‘transparency’ in public affairs. These patterns continue a long tradition in Japan of litigation aimed at attracting media attention as part of forcing policy change, epitomized by the pollution cases in the 1960s. Pursuit of the public interest is clearly a driving force. Nowadays, the media and civil society backdrop seems to be creating a positive feedback loop with judicial and legislative developments; the courts and legislature have been responsive to issues that obtain public interest and media attention. These patterns parallel the

78 Dokuritsu gyōseihojin tō no hoyū suru jōhō no kōkai ni kansuru hōritsu, Law No. 140 of 2001 (Japan).


The number of official information disclosure cases concluded at the District Court level rose from five in 1990 to 102 in 2000, with almost all of the increase occurring after 1997. Over the same period, the number of taxpayer suits rose from 109 to 286. The total number of administrative cases concluded each year, however, only increased from 963 to 1479. As a result, these two kinds of suits made up nearly thirty percent of the administrative case load for district courts in Japan in 2000, up from twelve percent a decade earlier.

80 Marshall, supra note 7, at 155.

81 Because of the very diffuse and limited financial benefits involved, especially for the lawyers, there are strong parallels with shareholder derivative litigation, which also ballooned from the early 1990s off a very low base. See Puchniak & Nakahigashi, supra note 73. Their evidence, and more broadly examples such as taxpayers’ suits, counters arguments that litigation in Japan is driven primarily by financial incentives – for plaintiff lawyers, if not necessarily for the plaintiffs themselves. Compare with CURTIS J. MILHAUPT & MARK D. WEST, ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN (2004).
reproduction of cause-lawyering in metropolitan areas over the 1970s noted by Takao Tanase.\textsuperscript{82}

Unfortunately, there is little data available regarding litigation under the State Compensation Law, even in the Supreme Court’s statistical yearbooks. Materials prepared for the Forty-Second session of the JSRC uncovered 1879 new filings in 1995, dropping to between 1753 and 1766 over each of 1996-1999, handled by the MoJ in which the central government was a party or local authorities had requested its help. It was estimated that the MoJ won outright in approximately ninety percent of these cases.\textsuperscript{83} MoJ officials in 2008 indicated that there have not been great changes in these patterns over the last decade.\textsuperscript{84}

However, at a more disaggregated level, the Japanese government has lost or settled several landmark claims. Even when it has ended up winning, this litigation has been time-consuming and consumed resources. Disputes over Minamata Bay mercury poisoning dating back to the 1950s, for example, persist.\textsuperscript{85} And the courts have rendered significant judgments against the government over the last decade in new mass claims, after a hiatus following the large pollution and PL cases that peaked in the early 1970s. On April 27, 2004, for example, the Supreme Court found in favor of coal miners who had claimed from the 1980s that the state had failed to ensure that mining companies took adequate measures against contracting “black lung disease” – despite the Pneumoconiosis Law\textsuperscript{86} that came into effect in 1979.

Over 2006 to 2007, most District Courts held the government jointly responsible alongside firms that had infected millions with Hepatitis C from unheated coagulants in inoculations, transfusions, and other blood products over the 1970s and 1980s; this finding resulted in

\textsuperscript{82} Masaki Abe, Mobilizing Law against Local Governments: A Recent Trend in Public Law Litigation in Japan, EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW 119 (Harry N. Scheiber & Laurent Mayali, eds., 2007).


\textsuperscript{84} Interview with MoJ officials, in Tokyo, Japan (Dec. 5, 2008).

\textsuperscript{85} See Koichiro Fujikura, Litigation, Administrative Relief and Political Settlement for Pollution Victim Compensation, in LAW IN JAPAN: A TURNING POINT 384 (Daniel Foote, ed. 2007); and Minamata Disease Victims Approve Settlement, JAPAN TIMES, Mar. 30, 2010, available at http://search.japantimes.co.jp/cgi-bin/nn20100330a7.html.

\textsuperscript{86} Jinpai hō, Law No. 30 of 1960 (Japan).
legislation establishing a joint compensation fund in 2008.\textsuperscript{87} During 2007 and 2008, the Supreme Court gave three rulings in favor of Korean and Brazilian residents harmed by atomic bomb blasts in Japan (hibakusha), who had been denied payouts under the Atomic Bomb Survivors Relief Law.\textsuperscript{88}

On July 6, 2009, the Yokohama District Court awarded compensation to the family of a worker who contracted mesothelioma from asbestos at the U.S. naval base at Yokosuka, after the government had settled with twenty-one workers in 2004. And in May 2008, another 178 plaintiffs claimed against the government and forty-six companies that had manufactured construction materials containing asbestos, despite the enactment of the Asbestos Relief Law.\textsuperscript{89}

D. Recent High-Profile Claims Against Local Governments

Local authorities have also become embroiled in major litigation, putting some pressure on traditional ways of handling claims. In 2007, for example, the Tokyo Metropolitan Government (“TMG”) settled a long-running and major air pollution case.\textsuperscript{90} Tokyo residents and commuters suffering from respiratory problems, as well as their bereaved family members, filed six suits from 1996 to 2006. In its ruling on the first suit,\textsuperscript{91} the Tokyo District Court ordered the defendants, other than the vehicle manufacturers, to pay seven of the ninety-nine plaintiffs a combined 79.2 million yen in compensation for failing to prevent vehicle pollution


\textsuperscript{88} Genshi bakudan higaisha ni taisuru enjo ni kansuru hōritsu, Law No. 117 of 1994 (Japan).


\textsuperscript{90} The defendants were the TMG, the Japanese government, the state-affiliated Metropolitan Expressway Public Corporation, and seven diesel vehicle manufacturers. See Automakers Offer to Settle Pollution Suit, The Daily Yomiuri, June 5, 2007; and Government, Tollway Firm OK Air Pollution Settlement, JAPAN TIMES (June 27, 2007), http://search.japantimes.co.jp/cgi-bin/nn20070627a4.html.

\textsuperscript{91} Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Oct. 29, 2002, 1885 Hanrei Jihō 23 (Japan).
causing health problems. However, the Court did not grant an injunction against emissions of pollutants. The plaintiffs, the Japanese government, and the Metropolitan Expressway Public Corporation appealed to the Tokyo High Court. The matter was settled in July 2007 on terms that required the TMG to establish a healthcare subsidy program for air pollution victims with the financial support of all defendants.

In 2003, the TMG settled another high profile case brought by twenty-one major banks, which challenged the legality of a TMG tax ordinance. The Tokyo Metropolitan Assembly introduced a standard corporate tax formula for levying an enterprise tax on major financial institutions in Tokyo, which came into force on April 1, 2000. The tax was levied on banks with funds of more than five trillion yen at the rate of two to three percent of gross operating revenues which was supposed to apply for five years. On March 26, 2002, the Tokyo District Court ruled that the tax violated the Local Tax Law, and ordered the TMG to refund 72.4 billion yen in tax payments to eighteen major banks and pay compensation of 1.8 billion yen.

The TMG immediately appealed. On January 30, 2003, the Tokyo High Court also ruled against the new tax and ordered the TMG to refund the tax payments (the difference between tax payable under the previous ordinance and the illegal ordinance) that the banks had paid over the previous two years. However, the Court reversed the lower court on the issue of compensation. The TMG appealed this decision to the Supreme Court on February 10, 2003. On October 8, 2003, the TMG and fifteen major banks reached a settlement and the TMG refunded a total of 234.4 billion yen to the fifteen banks as well as to fifteen other banks which had not participated in the litigation. The settlement included a reduction of the tax rate retroactive to April 1, 2000, and a refund of the difference between the amount paid by the banks and the amount based on the lower rate, with interest.

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92 The TMG did not appeal, citing the central government’s failure to regulate vehicle emissions as the chief cause of the plaintiffs’ problems, and stated that the Japanese government should take responsibility. See Policy Speech by Governor of Tokyo, Shintaro Ishihara, at the Fourth Regular Session of the Metropolitan Assembly (2002), available at http://www.metro.tokyo.jp/ENGLISH/GOVERNOR/SPEECH/2002/0204/1.htm.

93 For details of the settlement, see Eri Osaka, *Reevaluating the Role of the Tort Liability System in Japan*, 26(2) ARIZONA J. INT’L & COMP. L. 393, 420 (2009).


95 *Chihō zei hō*, Law No. 226 of 1950 (Japan).

96 See *Tokyo Govt Proposes Talks on Bank Tax*, THE DAILY YOMIURI, Aug. 16, 2003; and *Tokyo Govt, Banks Agree On Settlement Terms For Tax Case*, NIKKEI REPORT,
A final example of high-profile large-scale litigation involving local authorities, putting pressure on government lawyers, arises from the introduction of the Basic Resident Registration Network System, commonly referred to as the “Juki Net.” Each municipality already maintained a paper-based Basic Resident Register in accordance with the Basic Resident Register Act.⁹⁷ Only the municipality used information in the register. In 1999, the Basic Resident Register Act was amended and the Juki Net came into full-scale operation from 2003. Its purpose was to allow specific items of personal information recorded in basic resident registers to be shared by participating municipal, prefectural and national government authorities. Citizens across Japan filed lawsuits challenging the Juki Net system on the basis that it violated citizens’ constitutional right to privacy.⁹⁸ The MoJ also became involved in the litigation, pursuant to Article 7 of the Law on the Authority of the Minister of Justice over Suits Affecting the Interests of State.⁹⁹

The Supreme Court decided four separate lawsuits on the constitutionality of the system. One of the four cases was an appeal against a decision of the Osaka High Court, rendered in 2006 in favor of the plaintiffs, which had ruled that including the personal information of people who were opposed to the system without their consent was unconstitutional.¹⁰⁰ The Osaka High Court ordered the governments of three cities in Osaka Prefecture to delete resident registry codes and data on four of sixteen plaintiffs in the suits. The three other cases heard by the Supreme Court were appeals against high court decisions that ruled in favor of municipalities in three prefectures where citizens had demanded their data be deleted from the network.¹⁰¹ The Supreme Court ruled in favor of the municipal governments in all four lawsuits holding that the collection, management, or use of personal information of citizens by an administrative agency did not infringe citizens’ rights under Article 13 of the Constitution.¹⁰²


⁹⁷ Jūmin kihon daichō hō, Law No. 81 of 1967 (Japan).


⁹⁹ See supra note 32 and accompanying text.


¹⁰¹ Id.

E. Persistent Difficulties for Claimants Suing the State

Despite the experiences in recent high-profile cases against both local and central governments, however, Japanese administrative lawsuits and especially the success rates for claimants remain low as compared to continental European standards. Some well-known commentators argue that this is not explained merely by Japanese officials hewing more closely to the law. They agree with the general view that the judicial check function has not been working sufficiently.  

One substantive reason advanced for this is an informational imbalance. Citizens usually do not know how public authority is properly exercised – although amendments to the ACLL allow claimants seeking revocation to obtain reasons and other information regarding administrative decisions (Article 23-2). The problem of public access to administrative legal knowledge is not helped by the fact that few bengoshi are familiar with administrative litigation, whereas shōmu kenji specialize in representing the government.

Professor Ichikawa and his co-authors suggest a second set of reasons that concern problems within the court system itself. Only the Tokyo District Court has a specialist Division, although the Osaka District Court tries to deal with most administrative cases in its Seventh Division. In addition, a specific and traditional view of the separation of powers, respecting the executive’s discretion in policymaking and implementation, has generally remained well-entrenched. This judicial deference to both higher courts and other branches has been reinforced through dissemination of Supreme Court views throughout lower courts by means of judicial conferences (saibankan kaigō or kyōgikai) attended by judges from throughout Japan as well as through study groups (kenkyūkai) held within the High Courts. The han-ken kōryū practice has also raised doubts on the ground that judges seconded as shōmu kenji will find it difficult to remain impartial when reverting after a few years to their judicial roles.

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103 Ichikawa et al., supra note 48, at 202-04.
104 Supra note 48.
106 Our interviews suggest, however, that the courts are quite conscious of at least an appearance of bias and do not typically assign former shōmu kenji to the relevant more specialized divisions within the Tokyo and Osaka Courts. However, they are quite likely to hear some administrative cases in other courts (even larger courts) because they have diverse and heavy caseloads. On the other hand, most complex cases in Japan are heard before three judges, not a single judge.
II. JAPAN’S GOVERNMENT LAWYERS

Has the Japanese government’s management of its litigation services changed much in the wake of such criticisms, the revised ACLL, the broader legislative changes as well as the overall policy shift proposed by the JSRC in 2001, and longer-term socio-economic transformations in Japan? Not really. Just as changes in public law statutes – and especially in related judicial practice – have not been dramatic, as outlined in Part I, this Part uncovers only a gradual transformation in the organization of Japanese government litigation services.

A. Shōmu kenji in the Ministry of Justice

The core of the government’s litigation system, and therefore an essential starting point for the analysis, remains a small group of shōmu kenji prosecutors who represent the state in civil and administrative lawsuits within the MoJ. Government legal services were basically centralized beginning in 1947 under the influence of U.S. law.107 In 1947, the legislature enacted the State Compensation Law to allow claims for vicarious liability through the regular courts if public servants acted illegally. Under the pre-war system of public law, which was heavily influenced by continental European models, there was limited scope to sue public authorities and a separate administrative court with narrow jurisdiction, with each government department managing its own litigation.108

Over the last decade there have not been major changes in the numbers of shōmu kenji, who are broadly responsible for managing litigation involving the government, but their composition is slowly changing.

There were a total of fifty-two shōmu kenji as of December 2008, working either in the MoJ head office in Tokyo (nineteen shōmu kenji) or in the eighth largest Legal Affairs Bureaus nationwide (with thirty-three shōmu kenji). Just over half of shōmu kenji comprise career prosecutors rotated for three-year terms from prosecutors’ offices conducting criminal

107 ALFRED C. OPPER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK (1976).

108 See generally Roehl, supra note 36, Kawagishi, supra note 105, and Hōmusho [Ministry of Justice], Shōmu hōmu no enkaku [The History of Government Legal Services], available at http://www.moj.go.jp/shoumu/shoumukouhou/kanbou_shomu_shomu02.html (last visited Oct. 23 2011). It is beyond the scope of this article to compare pre-War and/or continental European similarities and contrasts in any detail, although the analysis would likely prove illuminating.
cases or from other parts of the MoJ. Prosecutors mainly chose their profession out of an interest in criminal work, studying hard particularly in related classes in the Legal Training and Research Institute (“LTRI”) after passing the shihōshiken examination. Few apparently wish or get given longer periods working as shōmu kenji. Some kenji eventually tire of criminal work, and rather than specializing as shōmu kenji, are more likely to retire early and possibly develop a criminal defense practice (the still relatively rare phenomenon of yame-ken).

Employment in fields advising on law reform, notably for the MoJ’s hōsei shingikai deliberative council, seems to have become a more high-profile career step, thanks to a busy policy-making agenda since the 1990s.

In addition, the han-ken kōryū phenomenon persists, with judges still getting seconded by the Supreme Court. This phenomenon is generally only for a three-year stint to the MoJ head office in Tokyo or to provincial Legal Affairs Bureaus. Occasionally, a judge may have multiple secondments, and section heads or more senior positions – involving more administrative work – are still quite likely to be staffed by judges. There is a parallel here with the way in which a judge’s career is generally advanced by periods doing mainly administrative tasks within the courts themselves.

However, the numbers and proportions of judges seconded as shōmu kenji seem to be declining. There was an upsurge in the wake of large-scale litigation against the government from the 1960s, and in 1999 there were still thirty-nine judges seconded to the MoJ (including seven in senior positions) out of 143 dispatched throughout all branches of government. On October 14, 2005, however, testimony before the House of Representatives’ Legal Affairs Committee revealed that seventeen were dispatched to MoJ as shōmu kenji, with fifteen returning to the courts. Criticisms had been raised in that Committee about han-ken kōryū, in hearings held on April 28, 2004, with parliamentarian Makoto Matsuno arguing that the practice at least creates a reasonable perception of bias. Matsuno emphasized that if the aim was to expose seconded judges to public administration functions, so they can exercise more supervision

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109 Johnson, supra note 28.


when reverting to judging administrative litigation after time spent working as shōmu kenji, then the Supreme Court also had the option of seconding judges to various other parts of the government. This comment was made in response to testimony by seifu sankōnin Akira Yamazaki (a judge who had served as MoJ shōmu kyokucho for two and half years) stating not only that judges are professionals capable of distinguishing their roles, but that some consider judges who have been seconded to work as shōmu kenji to be even tougher when later judging government actions because they are more aware of what good public administration demands. The latter view was also expressed by a different sankōnin when han-ken kōryū was debated in the House of Councillors Legal Affairs Committee on May 18, 1999 regarding the Bill to establish the JSRC.

By 2010, the Supreme Court was seeking expressions of interest from ten judges to work in the MoJ as shōmu kenji from 2011 (and for another ten to work there on law reform projects). If ten are seconded per annum for two to three years, and overall there remain somewhat over fifty shōmu kenji working throughout the MoJ, then at any one time there will be around twenty-five seconded judges. This still represents around forty-five percent of all shōmu kenji, and it would be interesting to track how many seconded judges serve in MoJ positions of higher authority.

However, the Court also continues to second judges to other government departments. One is the Cabinet Office’s Legislative Affairs Bureau (naikaku hōseikyoku), which plays a very important role in advising on the constitutionality of proposed legislation. The Supreme Court even now dispatches judges to think-tanks, and increasingly to private law firms (ten envisaged for 2010, compared to one per annum for the first four years after this practice began in 1987). Assistant judges (hanji-ho, as well as career prosecutors) have been allowed to work up to two years as bengoshi since legislation was enacted in 2004 pursuant to the JSRC’s recommendations. There are also many judges working part-time in the graduate law school programs. The aim, especially for these

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113 See TOSHIO HATAKE, BUNKA TO SHITE NO HÔ TO NINGEN [PEOPLE AND LAW AS CULTURE] 175 (2004). It would be interesting to test systematically whether judges who were seconded to work as shōmu kenji in fact rule more often against the government. However, many judgments are rendered by three-member tribunals with no dissenting opinions (except in the Supreme Court) or an indication that the judgment was not unanimous and therefore such an analysis should involve qualitative rather than quantitative research.

114 Hôka daigakuin e no saibankan oyobi kensatsukan sono ta no ippanshoku no kokkômûin no haken ni kansuru hôritsu, Law No. 40 of 2003 (Japan).
newer programs, is to broaden the judges’ horizons at an early career stage, and help them to be more adaptable and interactive. These traits increasingly are expected and seen as valuable for judges in the post-JSRC context of greater specialization, diversity, and popular participation in the judicial system.\footnote{115}

At the same time, the MoJ has begun to employ bengoshi as shōmu kenji. Following another JSRC recommendation, Article 30 of the Lawyers Law\footnote{116} was amended from 2005 to completely remove restrictions on bengoshi retaining their status while working as a civil servant. There had already been an amendment in 2000, in parallel with enactment of the “Law on Special Measures of Employment and Remuneration of Officials with Fixed Term of Office in the Regular Service,”\footnote{117} which had allowed this for bengoshi employed as civil servants on fixed-term contracts.

In March 2004, one survey found forty bengoshi working for the central government (including six for the MoJ, four for the JFTC and one for the JPO), compared to sixty-nine (nine, eight, and one respectively) in October 2006.\footnote{118} In December 2008, we found five bengoshi employed specifically as shōmu kenji, with three working in the head office while two worked in the (busiest and largest) Tokyo Legal Affairs Bureau. To assist in managing upwards of 20,000 cases involving the government, the shōmu kenji were assisted by many jimukan: forty-two in the MoJ itself and 330 in Legal Affairs Bureaus. Numbers have not increased much over the last decade, although sixteen were added in 2004 to deal with expected workload from ACLL amendments. In addition, two senior sanjikan positions to indirectly increase shōmu kenji numbers, and ten staff with legal expertise were added from 2007.\footnote{119} Small increases in personnel


\footnote{116}Bengoshi hō, Law No. 205 of 1949 (Japan).

\footnote{117}Ippanshoku no ninkitsu shokuin no saiyō oyobi kyūyō no tokurei ni kansuru hōritsu, Law No. 125 of 2000 (Japan).

\footnote{118}See Reports of the Japan In-House Lawyers Association (2004 and 2006) available at http://jila.jimdo.com/. The largest employer was the Financial Services Agency (employing fourteen in 2004 and twenty-two in 2006). See also Bruce Aronson, Changes in the Role of Lawyers and Corporate Governance in Japan - How Do We Measure Whether Legal Reform Leads to Real Chance?, 8 WASH. U. GLOBAL STUD. L. REV. 223, 231-32 (2009). This probably reflects a clearer perception already, in a more rapidly changing and more lucrative field of law, about the value to corporate lawyers of spending a period developing an insider’s view of law reform or enforcement activity. A similar rise is apparent through annual Bengoshi Hakusho statistics published by the JFBA, although it is less dramatic (forty-nine bengoshi working across central and local government in August 2004, and sixty-one working in June 2008) – perhaps because of under-reporting.

\footnote{119}Interview with MoJ officials in Tokyo, Japan (Dec. 5, 2008).
have been prompted mainly by difficulties in the large-scale hepatitis litigation outlined in Part I.C and discussed further below.\textsuperscript{120}

Some \textit{jimukan} will be law faculty graduates, although proportions are difficult to determine because the custom regarding educational background among central government civil servants is (at least in theory): “don’t ask, don’t tell.” It is fair to assume that none will have passed the \textit{shihōshiken}, entitling them to qualify for a more lucrative and high-status career at least as \textit{bengoshi}, and perhaps as a prosecutor or judge. Very probably, no \textit{jimukan} so far will have graduated from the new professional law school programs, despite the lower than expected \textit{shihōshiken} pass rates for those undertaking the programs; other law-related careers, for example in corporate legal departments, are likely to prove more attractive in the short- to medium-term. Like administrative staff in other parts of the government, moreover, \textit{jimukan} tend to be rotated around the MoJ, although they may well have multiple terms in this role compared to those career \textit{kenji} who spend just one stint (or perhaps two) handling litigation work as \textit{shōmu kenji}.

The \textit{jimukan} mostly undertake the more mundane aspects involved in preparing litigation documents: checking for citations, typos and formal requirements. The more substantive and complex work is usually carried out by officials in the other government department(s) involved in the case and by the \textit{shōmu kenji}. They help with scheduling court appearances and such like, however, and sometimes \textit{jimukan} conduct some basic legal research (including database searches and copying legal materials) – albeit under close supervision by \textit{shōmu kenji}. One exception involves tax litigation, where \textit{jimukan} seconded from the National Tax Agency (“NTA”) to the MoJ undertake more substantive legal research. \textit{Jimukan} are also accorded a substantive role in most straightforward cases, such as routine tax-collection suits and defending clearly over-ambitious damages claims for state compensation (usually brought by unrepresented litigants). \textit{Jimukan} appear in court as \textit{shitei dairinin} in such cases and draft the litigation documents. For all their work, \textit{jimukan} are assisted by in-house manuals that contain operational guidelines and summaries of statutes, case law and legal doctrines. Overall, the work of \textit{jimukan} resembles that of \textit{fuku kenji} (deputy prosecutors)\textsuperscript{121} in straightforward criminal cases, or perhaps paralegals or very junior solicitors in (especially larger) Australian law firms.

For large-scale litigation, especially complex cases that may continue for many years (such as those referred to in Part I), \textit{shōmu kenji}

\textsuperscript{120} Kuni no Soshō Taisei o Kyōka e - Senmonka Stafu Zōin nado: Aitsugu Haisō-uke Taaisaku – Hōmusho [Strengthening the Government’s Litigation Resources by Increasing the Number of Experts, etc.: The MoJ’s Response to Consecutive Defeats], THE YOMIURI SHIMBUN (Japan), Aug. 27, 2006, at 1.

\textsuperscript{121} Johnson, supra note 28.
occasionally also work with outside *bengoshi* counsel. Local Legal Affairs Bureaus may also retain *bengoshi* for more mundane matters. These *bengoshi* tend to be former prosecutors and ex-judges because they tend to be more familiar with the bureaucratic approach to legal work involving the government, especially when compared with the small scale of private law firms in Japan (until very recently). Another possible reason may be the (at least perceived) difficulty of assessing the quality of *bengoshi*. Whatever the reasons, despite more than doubling from 2006 to 2007, outside retainers still comprise only a very small part of the overall MoJ budget for representing cases involving the state.¹²²

Why does the MoJ not seek to build up more continuity and expertise among *shōmu kenji*, as we find for example among Australia’s government lawyers?¹²³ This would help *shōmu kenji* to address better some of the difficult large-scale litigation they have been exposed to in recent years.

Part of the answer to this question is a post-war tradition in large organizations of training generalists through frequent job rotations, better integrated within the organization as a whole yet who nonetheless can develop some specialist skills by virtue of de facto “life-long employment.” A large proportion of life-long employees remain a feature of government agencies in Japan (as indeed in many other countries), but life-long employment also became significant within the private sector, particularly from the 1950s. Nonetheless, lifelong employees within firms were always in the minority and constitute a shrinking core since the 1990s, although they remain a powerful force and somewhat of an ideal even within the private sector.¹²⁵ Lifelong employment also remains much more entrenched in the public sector, especially among general staff such as *jimukan*, despite reductions in civil servant numbers from the late 1990s.

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¹²³ On June 30, 2010, the average service period of Australian Government Solicitor (“AGS”) employees (legal and non-legal) was almost nine years, and more than ninety-seven percent of the Senior Executive Lawyer group (the most experienced lawyers) had been with the AGS for three or more years (Australian Government Solicitor, supra note 37).


Yet specialization is being encouraged in other parts of the government.\textsuperscript{126}
It is also already emerging within the corporate legal departments of private firms.\textsuperscript{127}

One obvious difference lies in the fact that shōmu kenji are not generalists; they are already highly trained legal professionals who have completed the difficult shihōshiken and the LTRI courses in civil as well as criminal law. Further training and specialization after joining the MoJ will only really become necessary if the numbers permitted to pass the shihōshiken increase much more than at present – which seems very unlikely (see Part II). Increasing the pass rate will also be necessary to bring down income expected by bengoshi in private practice, thus making it more attractive to work on a fixed salary for a government department for longer periods. This also brings the added possibility of working subsequently as bengoshi (or even in-house counsel) representing private firms, as well as acting for private citizens in dealing with the government. For now, the MoJ and other government departments seem quite interested in the theoretical possibility of hiring more bengoshi to build up in-house expertise. In practice, however, they remain concerned about budgetary implications, particularly given the general cost-cutting initiated from the late 1990s – intensified since 2008 due to the Global Financial Crisis (“GFC”). The need is not felt strongly anyway given the quite favorable aggregate litigation trends outlined in Part I and more specifically in Part II.B.

There may also be a more fundamental reason why the MoJ still seems relatively unconcerned about the relatively short tenure of shōmu kenji. Particularly given the persistence of han-ken kōryū, there may be a parallel to the attitude attributed to Japan’s “nameless, faceless judiciary” by Professor Daniel Foote.\textsuperscript{128} Judges seek public trust in themselves and the rule of law by emphasizing that personal identity does not matter, but rather uniformity in applying the law. This leads to judges quite often


\textsuperscript{127} Kitagawa & Nottage, \textit{supra} note 28.

changing during a trial, because of the still-customary three-year job rotation cycle, despite the achievements in expediting proceedings mentioned in Part I. Likewise, shōmu kenji quite often do not see cases reach their conclusion. But one idea seems to be that the law is predictable, so it should not matter much if a newcomer has to take over the case mid-way through.

Perhaps this is a somewhat unrealistic view, given the open-textured nature of much legal reasoning and supporting institutions in Japan. There are also growing uncertainties in Japanese law created by the many law reforms underway since the 1990s. Yet, the JSRC project was aimed largely at making the law more transparent and therefore often more predictable. And the government continues to win a very large proportion of administrative litigation (Part I), while regular kenji have managed to retain very high conviction rates in serious criminal trials even under the quasi-jury system.

As with criminal trials, moreover, those representing the government in litigation see their role as only pursuing those cases which are clear-cut and cannot be resolved at an early stage. Thus, the police know that prosecutors will not indict except after exhaustive review by kenji within the Prosecutors’ Offices, encouraging them to take care before escalating the case. Rather similarly, except that there are far fewer shōmu kenji, government departments are expected to bring forth the more clear-cut disputes that cannot be resolved through direct negotiations. The job rotation process in the MoJ and other parts of the government itself encourages caution in proceeding with litigation (taking short-term risks) in the hope of long-term victory (which often comes too late for career advancement, namely after the official has moved to a new position). The emerging challenge now for shōmu kenji, however, comes from deregulation combined with a long-term decline in public trust in government and consequent declining deference to the bureaucracy.

Considerable risk aversion generated by the job rotation tradition, combined with persistently high success rates for the government and an emphasis on uniform treatment in advancing the rule of law, also undercuts the promotion of ADR. Government lawyers, including shōmu kenji, have not adopted a new approach despite the JSRC-inspired reforms in that field since 2001. State Compensation Law cases sometimes settle, including large-scale litigation like that outlined in Part I, but that has a long tradition – sometimes prompted by changes in political leaders, or

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129 Nottage, supra note 6.
130 Ibusuki, supra note 8.
131 Johnson, supra note 10.
132 See generally Markus & Markus, supra note 126, at 11.
133 Feldman, supra note 73.
simply a sense that victims have suffered too long as cases wend their way through multiple courts.

However, where the disputes are not quantified in money terms—as with cases under the ACLL—there still seems to be a strong resistance to settling after formal proceedings have commenced. This is partly because the administrative action and therefore the remedy are perceived as an all-or-nothing matter: either the license allowing the business to operate was validly withheld or withdrawn by the officials, or it was not. Once it gets to the shōmu kenji, let alone the court, abandoning that decision or even adapting it as part of a settlement (for example, by issuing a partial license) can be seen as unprincipled backtracking that might even lead to claims of corruption. Yet other countries have gradually reconceptualized such arguments over recent decades. One example is Australia, albeit in the specific context of burgeoning litigation expenses incurred by the government (and therefore taxpayers), as well as higher filings and success rates for claimants.

B. Other Government Lawyers in Japan

Another reason why the shōmu kenji system remains largely unchanged, although for example with fewer seconded judges and some more bengoshi on longer-term contracts, is that more specialist disputes have long been dealt with either exclusively by other parts of the government (the JFTC and JPO) or partly so (the NTA, the MHLW in recent years, and local authorities).

1. Government Lawyers Independent of Shōmu Kenji

One example of the delegation of litigation to specialists concerns the JFTC’s overall staff, investigators and budget have increased steadily—especially in 2003—after enforcement issues became a source of trade friction identified in the Structural Impediments Initiative led by the U.S. in 1989-1990.134 In particular, the number of personnel dedicated to

134 For example, a study of judicial review actions from 1984 to 1994 against Australian Government administrative decisions found that of 714 cases that went to a final hearing 40.9 percent resulted in a ruling setting aside the decision under review, and the eventual outcome for applicants was favorable in a majority (possibly as high as seventy-eight percent) of such cases. See Robin Creyke & John McMillan, Judicial Review Outcomes – An Empirical Study, 11 AUSTRALIAN J. ADMIN. L. 82 (2004). See, e.g., Bureaucracy Legal Fees $572m a Year, PUBLIC SERVICE REPORTER, Dec. 24, 2010; Lack of Tenders Costs $1b, THE CANBERRA TIMES, Jan. 30, 2011 (discussing the recent debate about burgeoning costs in legal services to the Australian federal government).

“advocacy” work rose from fifteen in 1991 to thirty-seven in 2005, but comprised thirty-five in 2008.\textsuperscript{136} There have been minor changes in the number of bengoshi at the JFTC dealing with internal review of decisions, and court litigation work: four in March 2004; eight in October 2006; ten in December 2008; fifteen in December 2009; and fourteen at the end of October 2010. However, the number of prosecutors and judges involved in the same work has remained constant for the last three years, at three and two respectively. The two judges were sent by the Supreme Court on secondment to the JFTC to work as JFTC referees (shinpankan, deciding internal review cases).

“Legal measures” taken by the JFTC (cease and desist orders, plus burgeoning surcharges – mostly involving price-fixing cartels and especially bid-rigging) increased from less than ten per annum in the 1980s to seventeen in 1990, thirty-seven in 1992 and thirty-eight in 2001, but decreased to seventeen in 2008.\textsuperscript{137} There were fewer than ten new internal “adjudicative procedures” each year, whereby firms contested the JFTC’s measures, until twenty-six were filed in 1998, peaking at seventy-seven in 2003 but dropping back to fourteen in 2008.\textsuperscript{138} The build-up of cases was significantly reduced from 2006, when 102 decisions were rendered by the shinpankan; in the 2008 fiscal year, fifty-eight decisions were rendered and 102 cases were heard (mostly involving surcharge payment orders).\textsuperscript{139} Of those fifty-eight decisions, it is difficult to conclude from publically available sources how many effectively upheld the JFTC’s legal measures, or precisely what happens to the rest – including appeals to the Tokyo High Court.\textsuperscript{140} What is clear is that only

\textsuperscript{136} See JFTC’s Annual Reports to the OECD at 11 (2000) and 15 (2008), available at http://www.jftc.go.jp/e-page/reports/annual/index.html. The latter refers to “fifty lawyers” being among the 795 officials in the JFTC, meaning that around twenty others were not involved in advocacy work but rather policymaking.

\textsuperscript{137} Kozuka, supra note 79.

\textsuperscript{138} Kozuka, supra note 79.

\textsuperscript{139} See JFTC Annual Report of FY 2008, 10 (Outline), available at http://www.jftc.go.jp/en/about_jftc/annual_reports/index.html. The fifty-eight decisions included those given by consent, but procedures remained in place for other parties involved in those cases.

\textsuperscript{140} The more detailed Annual Reports in Japanese indicate that often the JFTC’s original measures were partly affirmed and partly reversed, available at http://www.jftc.go.jp/info/nenpou.html. For example, in the cartel case involving Ebara Seisakujo and nine others, the JFTC shinpankan decided that three of the defendants should not be subject to the cease and desist order because the relevant part had already been stripped off from the relevant companies; but by then past involvement in the cartel was not denied. In the thirty-four cases in which the surcharge orders with regard to a series of cartels were disputed by the addressees (in the case of surcharge, each disputing addressee constitutes one case), seven out of thirty-eight bids for which JFTC inspectors
JFTC legal staff (often including some of the shinpankan who originally dealt with the internal review) appear in subsequent judicial proceedings, never shōmu kenji or MoJ jimukan, because Article 88 of the Anti-Monopoly Law (“AML”)\(^\text{141}\) excludes application of Article 6 of the Law on the Authority of the Minister of Justice.

Since 1991, the JFTC has occasionally initiated a few criminal prosecutions as well, and those proceedings are then run by regular kenji. A significant development since the mid-1990s is the increase in injunction claims, and especially private damages claims – including taxpayer suits – premised on AML violations established by the JFTC. Some taxpayer claimants also sued the JFTC and the Supreme Court upheld their standing to obtain JFTC case documentation,\(^\text{142}\) but private actions generally do not engage JFTC resources. Admittedly, in the shadow of recent potential taxpayer suits – and even suits brought by local governments against AML infringers – accused firms have started to contest JFTC measures more vigorously, resulting in increased delays in adjudicative procedures.\(^\text{143}\)

Nonetheless, the officials we interviewed seemed confident about managing their advocacy workload through further steady improvements in personnel management along the lines outlined above. Indeed, greater enforcement activity by public-minded citizens logically can help reduce financial pressures on the JFTC, which anyway (like its German counterpart) has long activated media publicity and reputational effects to enforce competition law.\(^\text{144}\) Private litigation through the court system, which is heavily subsidized by the state (as in most countries), does imply a cost to another part of the government; but that is less visible and seems to be a price that Japan is prepared to pay as part of the JSRC’s grand plan.

Specialized disputes over patents (and other industrial property rights) provide a second example where shōmu kenji are not involved, and where the role of in-house JPO lawyers has again experienced some – but not major – changes over the last decade. This is despite Japan’s renewed emphasis on IP rights exemplified by enactment of the IP “Basic Law”\(^\text{145}\) and the establishment of an IP Strategy Headquarters within the Cabinet.

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\(^{141}\) Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu, Law No. 54 of 1947 (Japan).


\(^{143}\) Kozuka, supra note 79. Part 2.4 and Table 2.


\(^{145}\) Chitekizaisan kihon hō, Law No. 122 of 2002 (Japan).

These initiatives led to the launch of a new “IP High Court” from April 2005, for example, centralizing appeals from the Osaka and Tokyo District Courts. The latter had already developed specialist divisions and gained wider jurisdiction in IP matters from 1998, when a first round of CCP reforms came into effect. The IP High Court is semi-independent, with its own administrative power and secretariat, although still a branch of the Tokyo High Court. It has a unique en banc appeals system for complex and important cases (involving its President and four chief judges from the four specialist IP divisions, rather than the usual three judges), and judges in these three Courts are exempted from the Supreme Court’s usual three-year job rotation system – they stay for longer or return to IP specialist divisions.

The “Kilby case” decided by the Supreme Court in 2000 had already clarified the courts’ power in infringement cases to refuse to enforce a patent’s validity if found obviously invalid, rather than the objector (typically, a defendant in an infringement action brought by the patent holder) having to bring an internal appeal for invalidation within the JPO. The Patent Law codified this as Article 104-3(1) but did not add in such proceedings a presumption of validity (as in the U.S., for example), which resulted in high rates of invalidity found by the courts.

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146 The Tokyo and Osaka District Courts have exclusive subject-matter jurisdiction over patent rights and utility model rights litigation (CCP Article 6).

147 Nottage, supra note 14.

148 The IP High Court has exclusive jurisdiction over appeals from the Tokyo and Osaka District Courts on patent rights and utility model rights decisions, and JPO decisions (CCP Article 6).


151 However, the court’s finding of invalidity binds only the parties to the case and the issue must still eventually be determined by an administrative decision of the JPO (Patent Law arts. 123 and 125), see JUNICHI KITAHARA & HIROKAZU HONDA, Substantive Issues of a Patent Infringement Case, in JAPANESE PATENT LITIGATION 23, 26 (Abe, Ikubo, & Katayama [Law Office], eds., 2009).

152 Tokkyo hō, Law No. 121 of 1959 (Japan).

153 Since 2001 more than forty percent of all District Court decisions have held the asserted patent to be invalid. See MAMI HINO & NAHO EBATA, Patent Litigation, in JAPANESE PATENT LITIGATION 79, 95 n.3 (Abe, Ikubo, & Katayama [Law Office], eds., 2009).
in turn influencing JPO internal appeals practice. The courts initially awarded some large amounts after 1998 amendments to the Patent Law reflecting U.S. case law for establishing lost profits, prompting an upsurge in filings. However, average amounts awarded dropped from seventy percent in 2000 to twenty percent in 2003, and although damages have settled at about double their former levels they are still comparatively low. Relatedly, the chances of Japanese courts finding infringement also remains the lowest among major industrialized countries. This has led to significant declines in patent infringement cases filed in recent years, despite other reforms and initiatives to increase numbers and capacity of patent attorneys and the teaching of IP law in law schools as a new shihōshiken elective.

It is also quite difficult for patent holders to win if the patent is contested first through the JPO’s internal appeals process. In such inter partes hearings in 2008, 182 appeals were accepted (so the patent was invalidated and the defendant could resist the plaintiff’s underlying infringement claim) whereas ninety-two appeals were denied. Further, of the ninety-nine cases decided on further appeal to the IP High Court in 2008, the JPO’s internal appeals ruling was overturned in only twenty-seven cases. The JPO’s record has also improved over the last decade in ex parte appeals, where the frustrated applicant for a patent first brings an internal appeal. In 2008, 8482 were denied by the JPO whereas 6511 were accepted (with a patent thereby made available after all). Frustrated applicants appealed to the IP High Court in 188 cases, but of 171 judgments rendered in 2008, 141 appeals were denied (82.5 percent). In 1999, frustrated applicants were more likely to end up getting a patent after all: then, the JPO only denied twenty-five percent of internal appeals, with sixty-four percent of subsequent appeals being denied by the courts.

Our interviews indicate that a priority for the JPO has been to undertake better patent examinations, with more patent attorneys employed to assess applications, but also greater accuracy in the internal appeals brought before the three or five shinpankan referees (provided by Article 136(1) of the Patent Law). These are regular employees of the JPO, although occasionally they may have a judge on short-term secondment organized through the Supreme Court. A typical career

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154 On these initial trends and related expectations and based on a volume from a conference held in 2002, see also Naoki Koizumi & Toshiko Takenaka, The Changing Roles of the Patent Office and the Courts after Fujitsu/TI, in LAW IN JAPAN: A TURNING POINT 555 (Daniel Foote, ed., 2007).

155 Takenaka, supra note 149 at 392-95.

pattern would involve working initially as *shinsakan-ho* (assistant patent examiner), then after at least four years being promoted to *shinsakan* (examiner, with more responsibility), then after at least five years (Article 13 of the Patent Regulations under the Patent Law) applying to be appointed *shinpankan* in the *shinpan-bu* division. However, the referee would usually then return to the *shinsa-bu* division to resume duties examining patent applications or to other parts of the JPO, before a more senior position as *shinpankan* (chairing the three-person tribunal, and so on) usually until retirement.

One recent development has involved contracting Appeal Advisors, *shinpan sanyō* to assist with general advice on managing appeals. These Appeals Advisors are employed on regular and fixed retainer for work up to agreed limits, rather like *komon bengoshi* in private practice. But the payments are not high and so far these *shinpan sanyō* have been former judges – although there is no policy against engaging lawyers. Although *bengoshi* have worked in other parts of the JPO they have not been employed in the *shinpan-bu* for appeals adjudication.

If the internal appeal is denied and the frustrated applicant appeals to the IP High Court to have a patent application approved, all three *shinpankan* from the relevant appeals tribunal are appointed *shitei dairinin* (designated representatives) by the JPO Commissioner to represent the Office in the judicial proceedings. In practice, the JPO tries to ensure that at least one of these *shinpankan* has had some prior experience in litigation. Small *shōmu shitsu* (legal affairs section) support their advocacy work within the *shinpan-bu*. Some of these officials have also served terms on secondment as *chōsakan*, advising the specialist IP courts particularly on more technical aspects of IP disputes (rather like *semmon’in* more generally under the revised CCP). They thus gain further knowledge of court procedures and advocacy without having completed the *shihōshiken* or LTRI training, and which they may share after they return to the JPO. This system represents the opposite of *han-ken kōryū*, with officials going to the courts instead of vice versa, except that the JPO-seconded *chōsakan* do not finally decide cases in court. The extra link to the court system helps improve the capacity of the JPO to manage patent dispute resolution.

Overall, the JPO appears to have a well-established system for managing litigation that again does not seem to be changing substantially. In fact, even more so than the JFTC in the wake of growing private actions

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157 Invalidation trial examiners usually have more than ten years of experience in a Patent Examination Department (Hiroshi Kobayashi, Patent Invalidation Trial Before the JPO, *in Japanese Patent Litigation* 127, 133 (Abe, Ikubo, & Katayama [Law Office], eds., 2009)).


(still premised on JFTC investigation), the JPO logically stands to benefit financially from the greater scope created in 2000 by the Supreme Court, for inter-parties invalidation suits to be resolved exclusively through the courts. This is because the JPO does not need to devote as many resources directly to the internal appeals process, so more effort can be directed at improving the patent examination process.\textsuperscript{160}

2. Government Lawyers Collaborating with Shōmu Kenji

Beyond the above-mentioned two specialized fields involving formal internal appeals, namely anti-monopoly law and patent law, there are areas where shōmu kenji represent the government jointly with other officials. A longstanding example comes from tax law, an increasingly important area of legal practice.\textsuperscript{161} Lawsuits have increased from 219 filings in 1990 (336 including appeals) to 322 (566 including appeals) in 2007, and there have also been some large-scale or complex disputes involving tax imposed on firms in Japan.\textsuperscript{162} Yet the government has so far managed to deal with this litigation in the traditional way. Shōmu kenji appear as counsel but concentrate on matters of pleading, proof and advocacy. NTA officials involved in the initial tax assessments contested in court, appear on the record as co-counsel, but rarely make oral submissions.\textsuperscript{163} Their primary role is to assist the shōmu kenji in preparing evidence, court documents and managing the case – rather like solicitors or perhaps junior barristers in Australian court proceedings. They are assisted by in-house legal sections within the NTA headquarters and the eleven regional Bureaus (Kokuzeikyoku). Each has a Shōmukan-

\textsuperscript{160} In terms of overall workload, however, the JPO’s workload for patent invalidation trials does not seem to have declined significantly over the last decade. See 28th session of METI’s Industrial Structure Council 3-4, (Intellectual Property Policy Division, Patent System Subcommittee 2010), available at http://www.jpo.go.jp/shiryou/toushin/shingikai/pdf/tokkyo_shiryou028/01.pdf.


\textsuperscript{162} See the data previously cited from Hōsō Jihō (2008) and the Tokyo Metropolitan Government bank tax litigation cited above in Part I.D. A further indication of pressure building up on the central government is a steady increase in complaints lodged by taxpayers in Japan under its various Double Tax Avoidance Treaties, requesting the NTA to negotiate with counterpart tax authorities abroad to resolve situations where both countries are imposing taxes. See Micah Burch & Luke Nottage, Novel Treaty-Based Approaches to Resolving International Investment and Tax Disputes in the Asia-Pacific Region (SYDNEY LAW SCHOOL RESEARCH PAPER, NO. 10/74, 2011), available at http://ssrn.com/abstract=1938758.

\textsuperscript{163} NTA officials may appear in court, for example on more technical issues of substantive tax law or policy.
shitsu located within the Kazei-bu, comprising a total of about 150 officials providing support services for litigation where taxpayers contest assessments.\footnote{The largest groups are in the Tokyo and Osaka Regional Tax Bureaus (around sixty-five and forty, respectively), with around twenty-five spread around the nine other Bureaus and the rest providing strategic coordination and management from within the NTA headquarters. Some litigation support staff (in similar proportions) are also found within the Chōshū-bu (Collections Divisions), mainly involved in initiating tax collection related suits or sometimes defending cases where taxpayers contest the procedures by which tax is levied. Tax assessments can also be appealed internally through a tribunal which is nominally separate from the NTA, but under the aegis of the Ministry of Finance and which has officials (477 in 2010 – including administrative and other staff) seconded from the NTA or other parts of the tax bureaucracy (which employed 56,261 staff in total). See generally National Tax Agency Report (2010), 8, available at http://www.nta.go.jp/foreign_language/index.htm.}

These officials are generally law faculty graduates (with most management-track NTA officials anyway having passed several examinations in law subjects to be hired as civil servants). However, they are not qualified as bengoshi, and there is no example yet of the NTA having engaged outside bengoshi to assist in this litigation work, although some within the JFBA have informally pressed for some outsourcing to their bengoshi members. Further, these officials usually rotate out of the Shōmukan-shitsu after three years – maintaining the usual generalist skills training pattern in large (public) organizations in Japan. As in the case of the MoJ, our interviews uncover little sense that the NTA’s system for managing tax litigation may need to change significantly, despite Japan’s brave new world of judicial and administrative reforms. Indeed, the NTA remains keen to contest cases and reluctant to pursue ADR or settlements, a legacy perhaps of their traditionally high aggregate success rates in litigation.\footnote{See J. Mark Ramseyer & Eric Rasmussen, Why the Japanese Taxpayer Always Loses, 72 S. CAL. L. REV. 571 (1999).}

A notable new example of shōmu kenji working with officials from other government departments arises from the Hepatitis C litigation mentioned in Part I.C. Large-scale litigation, conducted by shōmu kenji, resulted in several adverse rulings against the government over 2006-2007. A new Prime Minister (Fukuda) agreed in December 2007 to enact legislation to resolve the matter. Under the Hepatitis C Redress Law,\footnote{Tokutei feburinogen senzai oyobi tokutei ketsueki gyōko dai yon inshi seizai ni yoru C-gata kanen kansen higaisha o kyūsai suru tame no kyūfukin no shikyū ni kansuru tokubetsusoochi hō, Law No. 2 of 2008 (Japan).} a state fund was established to provide compensation within specified limits.\footnote{In April 2009, manufacturers of the infected blood products agreed to contribute one-third of the funding. See, State to Fund Third of Hep C Relief, JAPAN TIMES, Apr. 11, 2009, http://search.japantimes.co.jp/cgi-bin/nn20090411a7.html.} This was similar to earlier co-funded compensation schemes.
involving defective drugs such as thalidomide, established in the 1970s.\textsuperscript{168} But the judicial process determines compensation premised on victims providing evidence of specified symptoms, blood transfusions or such like, and a causal relationship. Expedited proceedings under the Redress Law are defended by both \textit{shōmu kenji} and MHLW officials appearing as \textit{shitei dairinin}. Sometimes only MHLW officials actually appear in court. In this case, and more generally under the Redress Law, \textit{shōmu kenji} are now less involved. However, they still provide oversight for ongoing litigation as well as providing more general advice to the MHLW.\textsuperscript{169}

A final category of litigation in which \textit{shōmu kenji} can share responsibility pursuant to Article 7 of the Law on the Authority of the Minister of Justice, but mostly do not in practice, involves local authorities.\textsuperscript{170} In large-scale litigation, where both the central and local government are sued under the State Compensation Law (for example, in large product liability or pollution cases), \textit{shōmu kenji} will coordinate efforts with local governments – but those may be precisely situations where the MoJ exceptionally engages some outside \textit{bengoshi} anyway, as mentioned in Part II.A. Generally, each local authority manages its own litigation, often by engaging outside \textit{bengoshi}. Only the largest local authorities have in-house lawyers. Outside counsel generally come from a few, regularly retained law firms and municipalities can drive a hard bargain because of the possibility of frequent retainers. This work has traditionally not been seen as very lucrative or high-status, and there are no detailed requirements on the authorities relating to public tenders for such work - unlike other countries, such as Australia.\textsuperscript{171}

Part of the reason is simply that there is still not very much litigation at stake. For example, the Tokyo Metropolitan Government (“TMG”) serves a population of around thirteen million, yet dealt with only 210 new lawsuits as of March 2009. The 100 administrative law cases included town planning (with twenty-eight cases), local taxes (fifteen cases) and taxpayer suits (thirteen cases, such as the Yamba Dam case). The 110 civil law cases included claims for damages (with eighty-three cases, typically under the State Compensation Law), land registration or boundary determination (four cases), cases where the TMG brought suit (eleven cases, against illegal occupation, etc.).\textsuperscript{172} Officials

\begin{itemize}
  \item \textsuperscript{168} Nottage, \textit{supra} note 74, Ch 2.
  \item \textsuperscript{170} See \textit{supra} note 32.
  \item \textsuperscript{171} See \textit{supra} note 134; and \textit{Tender Changes to Benefit Small Firms}, \textit{Australian Financial Review}, Mar. 11, 2011.
  \item \textsuperscript{172} There were also 653 new internal appeals and inquiry requests, mostly
\end{itemize}
interviewed estimated that they usually won over ninety percent of these cases overall.

In February 2010, there were thirty-nine legal staff in the TMG’s Legal Section (hōmuka) within the General Affairs Division (sōmubu), a decrease from forty-six in early 2007. Some legal experts had then been reassigned to the Documentation Section (bunshoka) to provide legal opinions in non-litigious but complex matters related to over 500 ordinances and regulations enacted and administered by the TMG. Those reassigned staff deal with seisaku hōmu (strategic legal affairs), rather than drafting per se (hōki), against the background of growing legal complexity and some concerns about possibly more claims in the wake of ACLL amendments.173 That more proactive “preventative lawyering” (yobō hōgaku) approach seems to have had some success, as in fact no large increases in litigation (or claimant success rates) have eventuated in recent years.

However, the Legal Section itself has also increased its use of outside bengoshi, especially for major pollution litigation and the bank tax suit (outlined in Part I.D). This has resulted in a somewhat higher overall budget compared to 2007. The Legal Section also seems open to the possibility of bringing more bengoshi in-house, and the TMG is already unusual in having employed qualified lawyers as advocates for many decades (by contrast, the Osaka City Government still has none). In February 2010, the Legal Section’s thirty-nine staff included six qualified as bengoshi.174

Overall, therefore, we see some interesting but quite small and gradual changes among these categories of government lawyers. It may still be true that Japan’s big corporate law firm bengoshi “consistently claim that there has been a real change in the Japanese style of administration – businesses now consult lawyers on legal rules and procedures rather than consulting informally with government bureaucrats.”175 This theoretically reduces the role of “government as a substitute dispute resolver,” and implies more scope for ex post


174 Of the six bengoshi employed by the Tokyo Metropolitan Government, three were on a fixed term contract, and three were permanent civil servants.

175 Aronson, supra note 118, at 229.
litigation. But even if this is a broader trend, it does not seem to be flowing into significantly more disputes with officials that result in litigation.

It is possible that more claims are being made but settled before they reach the government lawyers. However, those we interviewed did not suggest that possibility, and believed instead that they could cope with changes by retaining their core modus operandi with some modifications, including more use of external counsel or advisors and (in the MoJ and JFTC) some short-term hiring of bengoshi. These slow changes in numbers and roles of legal staff parallel a gradual transformation in the legal departments of Japanese corporations, and in the overall system for judicial appointments and promotions since the 1990s.

CONCLUSION

Generally, the picture is therefore one of many continuities in Japan, despite the broader judicial system reforms introduced from 2001, but also some significant changes and emerging challenges. Litigation involving the government has increased overall but more so in some areas, with disposition times and success rates remaining very high. Public authorities have not made major changes to the ways in which they manage litigation, and interviewees displayed no sense of actual or impending crisis. Yet some changes have been made, including more hiring of bengoshi on fixed contracts within the MoJ and the JFTC.

If these lawyers return to specialist private practice, especially by representing corporate clients, more pressure may build on the government. But former criminal prosecutors (yame-ken) have quite often ended up defending clients in criminal trials, yet the overall conviction rate remains high. Therefore, it will probably require many former shōmu kenji to return to bengoshi practice before we see much impact on administrative lawsuit patterns – let alone personnel practices within the MoJ or other parts of the Japanese government involved in managing litigation services. In turn, that implies the need for many graduates to emerge from the law schools and shihōshiken – having gained some exposure to administrative law – and to seek alternative career pathways, including a stint as a shōmu kenji. These graduates, the law schools, and the JFBA may even build pressure for government agencies to retain more bengoshi as outside

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177 Kitagawa & Nottage, supra note 28.

counsel. The government may increasingly find that bengoshi offer valuable specialist expertise in substantive law, not just court procedures and advocacy skills. But this is long-term speculation, especially given the recent slowdown in the numbers of students permitted to pass the shihōshiken and thus end up as bengoshi, as well as the budgetary constraints on the government exacerbated by the GFC.

Generally, it seems more likely that changes will continue to come in the form of hiring more bengoshi in-house, rather than as external counsel. One reason is financial. If privately employed bengoshi develop more specialist expertise, their services are unlikely to come cheap. Bringing them in-house on fixed salaries is likely to be more cost-effective if government departments (like Japanese companies) can retain a workplace ethos that treats long hours and dedication as the norm. A more fundamental reason for hiring more in-house lawyers than engaging external counsel is that shōmu kenji – and perhaps Japan’s other government lawyers – continue to place great value on consistency and predictability in managing cases, like prosecutors in criminal proceedings. Indeed, the attitude of shōmu kenji arguably fits with the broad thrust of the JSRC’s reform program, which also emphasizes transparency and a more formal-reasoning oriented vision for the rule of law in Japanese society. Yet this entrenched attitude undermines more pro-active use of ADR, for example, which is also promoted by the JSRC and other parts of the government. It will probably take considerable increases in aggregate administrative law litigation (and costs) as well as in plaintiff success rates – as happened from the 1980s in Australian law, for example – for very different attitudes and practices to emerge at the organizational level in Japan.

Nevertheless, the Japanese government could already begin drawing lessons from the “model litigant policy” self-regulation by the Australian government particularly when defending itself against claims brought by its citizens. One recent aspect of that policy, applied to in-house lawyers and external counsel, involves seeking to reduce costs and achieve more satisfactory outcomes through ADR. The policy also stems from a longstanding awareness that the government is a “repeat player” – usually with much more experience and better resources than its adversaries – and that democratic legitimacy requires the government not to abuse that advantage. This is a point that may help guide further

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179 Johnson, supra note 10.


181 The LSDs require Australian Government agencies to: avoid litigation where possible; and consider the use of ADR before commencing litigation, and during the course of proceedings; see LSDs para. 4.2 and the “Model Litigant Policy” at Appendix B of the LSDs.
developments in the organization of government litigation services in Japan.

Conversely, at a time when the Australian government is aiming to control burgeoning legal expenses and major reviews of access to justice, its policymakers and lawyers should be able to learn much from the emphasis placed by their Japanese counterparts on consistency and efficiency in managing litigation involving their citizens. So may other countries in the Asia-Pacific regions facing similar challenges in managing government litigation.