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The Unreluctant Litigant? An Empirical  
Analysis of Japan's Turn to Litigation

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## Abstract

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# **The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation**

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**THE UNRELUCTANT LITIGANT?**

**AN EMPIRICAL ANALYSIS OF JAPAN'S TURN TO LITIGATION**

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## **THE UNRELUCTANT LITIGANT?:**

### **AN EMPIRICAL ANALYSIS OF JAPAN'S TURN TO LITIGATION**

#### **ABSTRACT**

This paper describes and analyzes the rapid increase in civil litigation in Japan during the 1990s in light of existing theories of Japanese litigiousness. Using a unique dataset of prefecture-level data, it demonstrates that the 1990s increase in litigation is best attributed to two main factors: the expansion in institutional capacity for litigation traced to procedural reforms and an expansion in the formerly miniscule bar; and structural changes in the Japanese economy related to the post-bubble slowdown in growth. The paper contributes to three literatures. First, it builds on earlier institutionally-oriented research on civil litigation in Japan by Haley and Ramseyer by providing new data and detail about the institutional barriers to litigation. Second, it contributes to the literature on the relationship between economic change and litigation more generally. Finally, it contributes to the empirical and comparative literature on litigation rates by providing evidence about the determinants of litigation in one country.

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## Introduction

It is a commonplace in comparative law that, when compared to Americans, Japanese do not litigate much.<sup>1</sup> This fact has been seized on by American critics of lawyers and the litigation system,<sup>2</sup> by Japanese who argue that it demonstrates the superiority of the Japanese political and social system, and by reformers who argue for an expanded role for law and litigation in Japan.

While there is little dispute about the lower levels of litigation, the question of *why* Japanese litigate less is the subject of great dispute. A traditional explanation, offered by many Japanese academics, was that Japanese had a basic preference for consensus and harmony.<sup>3</sup> In a classic paper published in 1978, John Haley argued that cultural accounts were overblown, and that institutional factors, such as the relative dearth of judges and lawyer in Japan, explained the alleged difference in propensities to litigate.<sup>4</sup> Later, Mark Ramseyer used economic analysis to develop a different institutional account of the sources of litigation, focusing less on institutional barriers and more on institutional quality.<sup>5</sup>

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<sup>1</sup> The most comprehensive study is that by Christian Wollschlager, *Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics*, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 89 (HARALD BAUM ED., 1997).

<sup>2</sup> Derek Bok, *The President's Report to the Board of Overseers of Harvard University for 1981-1982*, reprinted in 33 J. LEGAL EDUC. 570, 574 (1983) (stating that "Engineers make the pie grow larger; lawyers only decide how to carve it up.").

<sup>3</sup> Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan" in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41-72 (Arthur von Mehren, ed., 1963); YOSIYUKI NODA. AN INTRODUCTION TO JAPANESE LAW 165-66 (1976) ("The Japanese in particular. . .feel an aversion to law.")

<sup>4</sup> John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUDIES 359 (1978).

<sup>5</sup> J. Mark Ramseyer and Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEG. STUD. 263 (1989); also J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAP. STUD. 111 (1988).

This paper returns to this classic debate in the light of the changes experienced by Japan's legal system in the last decade. Litigation in Japan has increased significantly since 1990, when most of the theorizing was complete. This increase has been accompanied by an expansion in the size of the bar, the reform of substantive law in a number of areas, and significant procedural changes to make litigation more attractive. These dramatic reforms of the legal system, as well as economic disruptions experienced by Japan in the 1990s, provide an opportunity to test the various assertions in the debate over litigation in Japan, and to refine theory accordingly.

We use a unique dataset of prefectural-level data for the 1990s to evaluate the various theories of Japanese litigation behavior. Our approach is longitudinal. Rather than enter the thicket of cross-national comparisons, which typically involve apples and oranges, comparing litigation in Japan over time will allow us to isolate which factors have the greatest impact in encouraging litigation.<sup>6</sup>

This examination contributes to a number of literatures. First, it furthers institutionally-oriented research on civil litigation in Japan, building on earlier work by Haley and Ramseyer, among others. It also touches on broader questions of the role of law in economic growth and the reciprocal relationship between growth and litigation. Finally, it contributes to the empirical and comparative literature on litigation rates by providing evidence about the determinants of litigation in one country.

The paper proceeds as follows. Part I reviews the four-decade old theoretical debate on litigation in Japan. Part II describes the increase in litigation during the 1990s along with other reforms of the legal system that might be thought to contribute to this

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<sup>6</sup> As suggested by John Haley, *Litigation in Japan: A New Look at Old Problems*, WILLAMETTE JOURNAL OF INTERNATIONAL LAW AND DISPUTE RESOLUTION 121, 125 (2002).

phenomena. Part III presents the model and empirical analysis. Part IV analyzes the implications of the analysis for the theoretical debate. Part V concludes.

## **I. Theories of Litigation in Japan**

It is customary in any discussion of Japanese litigation to begin with the idea that Japanese are simply non-litigious as a result of a cultural preference. The fact that Japanese litigate less frequently than citizens of other advanced industrial societies has been explained as cultural in origin. Unlike conflict-laden Western societies, we were told, culturally homogenous Japan valued peace, harmony, and getting along over rights and litigation.

The most sophisticated variant of this argument was offered by Takeyoshi Kawashima.<sup>7</sup> In keeping with the dominant paradigm of his time, Kawashima saw Japan as a society whose modernization was incomplete. Invoking Japanese history going back to Shotoku Taishi (573-622 C.E.), he asserted that Japanese held a cultural preference for informal mechanisms of dispute resolution. This was rooted, in his view, in a comfort with particularistic, hierarchically defined roles and relationships, and was incompatible with judicial decisions based on universal standards of behavior.<sup>8</sup> Kawashima also noted that Japanese society was changing and becoming more urban. The implication was that as modernization proceeded, Japanese would become more litigious.

This culturalist argument was attacked in a classic article by John Haley.<sup>9</sup> Haley first observed that litigation in most countries is an expensive and time-consuming

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<sup>7</sup> Kawashima, *supra* note 3.

<sup>8</sup> *Id* at 43.

<sup>9</sup> Haley, *supra* note 4

process. An assertion that Japanese have a cultural *preference* for alternative dispute resolution implies that Japanese would be willing to pay rather than to go to court, that is accept an outcome that is less favorable than would be reached in court.<sup>10</sup> He noted that at certain times in Japanese history, such as the Taisho period, litigation rates had been high, suggesting that there was more to the story than a unidirectional modernization process or a permanent cultural aversion to litigation. A better explanation for the observed low litigation rates, argued Haley, was the lack of institutional capacity in the legal system. Compared with the United States, Japan had relatively few lawyers per capita.<sup>11</sup> It also had few judges, with correspondingly high caseloads and delays. Furthermore, Japanese courts had inadequate remedies available, with no contempt power.<sup>12</sup> Thus there was little incentive to bring cases to court.

Another answer to the puzzle of low litigation rates was provided by Mark Ramseyer in a pair of articles revisiting Haley's thesis.<sup>13</sup> Ramseyer argued that it was not the weakness of the Japanese legal system that accounted for low litigation rates, but rather its strength. Litigation occurs only when parties either cannot or do not predict what the court will do. If courts are predictable and the result can be accurately determined in advance, rational parties will settle. Greater predictability makes it more

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<sup>10</sup> Haley, *supra* note 6, at 127 provides survey data from the Justice System Reform Council that shows that Japanese, by and large, seek to advance interests in court. See also Kahei Rokumoto, Higaisha-gawa tojisha no hokodo [The legal process from the perspective of the victim as a party], in Jidosha jiko o meguru funso shori to ho [Law and resolution of automobile accident disputes] 33-82 (Kawashima Takeyoshi & Hirano Ryuichi eds., 1978), cited in Haley at 128 n.16.

<sup>11</sup> In contrast Kawashima had attributed the lack of lawyers to the low demand for litigation. Kawashima, *supra* note 3, at 42 ("The fairly small number of lawyers in Japan relative to the population and the degree of industrialization suggests that people do not go to court so frequently as in Western countries and that the demand for lawyers' services is not great.")

<sup>12</sup> This is the theme of his book *AUTHORITY WITHOUT POWER* (1991). Ramseyer and Nakazato effectively rebut this claim in *JAPANESE LAW: AN ECONOMIC APPROACH* 147-50 (2002).

<sup>13</sup> J. Mark Ramseyer, *supra* note 5.

likely that the estimated outcomes of the parties will converge, thus making it easier to reach agreement. There are many features of the Japanese court system that render it more predictable than America's court system. For example, Japanese judges all receive common training and socialization at the Judicial Training and Research Institute, reducing variance among judicial decisions compared with the diverse United States, where judges are appointed later in life in an explicitly political process. In addition, Japan has no juries to add unpredictability. Japan's legal system provides public formula to standardize judicial decisions on damages, further leading to uniformity. Finally, Ramseyer noted that the trial structure involved discontinuous proceedings, giving judges many chances to signal their views to the parties, and the parties more opportunities to settle. He provided data from traffic accidents to show that out of court settlements closely approximate the amount litigants would gain in court, providing little incentive to litigate. He argued for the superiority of the predictability theory, noting that if cost was the only factor, litigants should be willing to settle for lesser amounts.

Takao Tanase's 1990 contribution to the debate sought to combine institutional and cultural accounts with a perspective he called "management."<sup>14</sup> Tanase argued that the Japanese elite had an interest in low levels of litigation, to insulate government policies from challenge. But they also needed to provide alternative fora in which disputes could be resolved away from the courts. This account echoed that of Frank

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<sup>14</sup> Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 L. SOC. REV. 651 (1990).; Takao Tanase, Soshō riyo to kindaikahan-setsu [Theory of litigation as a reflection of modernization], Shindo Koji sensei koki shukuga: Minji soshō hō riron no arata na kochiku [Essays in honor of the 70th birthday of Professor Koji Shindo: New constructions in civil procedure law theory] Vol. 1, 289 (2001). See also Luke Nottage, The Present and Past of Product Liability Dispute Resolution in Japan, 27 Wm. Mitchell L. Rev. 215 (2000) for a review of various theories of litigation.

Upham, who had argued that the bureaucracy encouraged informalism.<sup>15</sup> Tanase also focuses on availability of lawyers as the key barrier to pursuing justice in courts.<sup>16</sup> But the management perspective, besides having political overtones, is distinctive for emphasizing the availability of alternatives to litigation.

We thus have at least four differing explanations for the observed low litigation rates: one cultural (Kawashima), two institutional (Haley and Ramseyer) and one that combines the two in a perspective that might be called political (Tanase). Each of these theories has a prediction about what might be necessary to observe a greater level of litigation among the Japanese. Kawashima might expect such an increase as a result of socio-economic modernization. Haley and Ramseyer would look to institutional changes in the costs and benefits of litigation, with Ramseyer focusing on the issue of predictability and Haley on the issue of capacity. Tanase would not expect much increase in litigation without a breakdown in the systems of elite management of disputes, and the substitution of alternative dispute fora.

One should not overstate the degree to which these various theories are mutually exclusive. It is perfectly possible that the function explaining litigation would include elements of culture, institutional barriers, predictability and alternatives. Nevertheless, they do have different empirical implications. This provides us with an opportunity to use recent data to try to sort out the various explanatory strands.

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<sup>15</sup> Frank Upham, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1986).

<sup>16</sup> Tanase, *supra* note 14 at 658-59.

## II. The Japanese turn to litigation

Coinciding roughly with the beginning of the Heisei era around 1990, Japan's great economic bubble began to pop. As the economy bounced in and out of recession for the next decade, pressure began to build for legal change. A wave of reforms to fundamental legislation and legal institutions followed, including *inter alia*, reforms of civil procedure and corporate law; an overhaul of financial law; passage for the first time of legislation on administrative procedures, information disclosure, and products liability; and, most recently, efforts to overhaul the system of legal education and professional training. Because of the range and scale of these reforms, some have compared the current period with the systemic transformations of the Meiji and U.S. Occupation era,<sup>17</sup> and the reformers themselves have invoked the parallels.<sup>18</sup>

As legal reform was proceeding, Japanese began to litigate more frequently. Table 1 provides an indicator of the number of suits filed in district courts since 1986. During this period there was a stark increase in litigation beginning in 1992 and steadier increases from 1993 onward, along with a slight decline in the last two years.<sup>19</sup>

\*\*\* Put Table 1 about here \*\*\*

This section considers three recent institutional reforms and their potential impact on civil litigation, along with other factors that might conceivably lead to greater litigation rates. The three reforms that we focus on are expansion of the bar, changes to

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<sup>17</sup> Kahei Rokumoto, *Law and Culture in Transition*, 49 AMERICAN JOURNAL OF COMPARATIVE LAW 49, 545-60 (2001).

<sup>18</sup> The Points at Issue in Justice System Reform, Dec. 21, 1999, English translation at [www.kantei.co.jp/foreign/policy/sihou/singijai/991221\\_e.htm](http://www.kantei.co.jp/foreign/policy/sihou/singijai/991221_e.htm)

<sup>19</sup> We offer no specific theory here for the decline over 1989-1990, but we note that it corresponded with the peak of the real estate bubble and the illness and death of Emperor Hirohito. See NORMA FIELD, *IN THE REALM OF A DYING EMPEROR* (1991).

civil procedural code, and substantive legal reform that gives expanded opportunities to litigate. We also consider the role of judges and of economic change. We do not, in this section, consider the availability of alternatives, the factor focused on by Tanase in his analysis but return to that issue in Part IV. For each set of reforms, we consider the predictions of the various theories.

A. Expansion of the bar

Japan is famous, or infamous, for having a small number of lawyers, leading prominent observers such as Derek Bok to call for the United States to become more like Japan in encouraging smart students to go into engineering rather than law.<sup>20</sup> Legal education developed out of a continental model and saw as its goal the training of generalist state officials. Bar passage was seen as a separate goal, reserved for an elite group. Some early observers, such as Kawashima, attributed the small number of lawyers to a lack of demand for legal services from the Japanese public, ignoring the role of regulation in determining the availability of legal services.

Successful entrants into the legal profession have completed a university education in law; passed a very competitive exam (*shiho shiken*) to pass the bar; and then undertaken an 18-month training course at the Legal Training and Research Institute (LTRI). Exam passage was traditionally limited to 500 persons annually (out of some 20,000 applicants in a typical year), nominally because of limitations on the capacity of the LTRI building. The exam to enter the LTRI was administered by a committee consisting of a Justice Ministry official, Secretary General of the Supreme Court and a practicing attorney recommended by the federation of bar associations (*Nichibenren*).

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<sup>20</sup> Bok, *supra* note 2.

This “iron triangle” acted as the exclusive set of policymakers when it came to regulation of the legal profession for most of the postwar period.<sup>21</sup>

In 1991, an agreement among the three main actors led to a revision of the National Bar Examination Act and a gradual expansion in the size of the bar passage group, combined with a reduction in the term needed to complete the LTRI course. The exam control committee adopted a quota reserving 30% of passage “slots” for those who take the exam three times or less, beginning in 1996. By 1999, the period of training was shortened for two years to 18 months, and the LTRI graduated 1000 persons in 2000, a 100% increase over the 500 graduates in 1991. This expansion will continue, according to the final report of the Justice System Reform Council, released on June 12, 2001.<sup>22</sup>

The report calls for expanding the bar to an expected number of 50,000 lawyers by 2018, roughly tripling in 18 years. The goal is stated in terms of expected number of graduates of the LTRI, and thus continues the tradition of managing the growth of the profession rather than setting a standard and relying on market processes to control entry.

Nevertheless, the expected substantial increase in lawyers is an important step.

Other things being equal, greater availability of lawyers should make litigation cheaper and more accessible, and hence we would expect litigation rates to increase.

This is consistent with all of the theories, save that of Kawashima, who would say that both litigation rates and lawyers were caused by the shared independent factor of socio-economic modernization.

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<sup>21</sup> Rokumoto, *supra* note 17, at 553.

<sup>22</sup> *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21<sup>st</sup> Century* (June 12, 2001).

One of the articulated rationales for expanding the bar was to increase the availability of lawyers in rural prefectures.<sup>23</sup> We obtained prefecture level data on the number of attorneys and learned that the increase in lawyers has not been uniform around the country. Figure 1, below, presents a map showing which prefectures increased and decreased the number lawyers. White prefectures lost lawyers, while grey prefectures gained. The intensity of the grey scale captures the extent of the increase. Note that growth is very uneven. Most of the increase in the number of lawyers occurred in the urban prefectures, where lawyers had been previously concentrated. Urban prefectures uniformly added above-average percentages of lawyers, and of course in absolute terms the effect is even stronger because of high base rates there. Tokyo, for example, added 2545 lawyers during the period, a 37% absolute increase. This represented 54% of the increase for all of Japan.

\*\*\* Put Figure 1 about here \*\*\*

#### B. Procedural reform

After long discussions, the Civil Procedure Code was amended in 1996, effective January 1, 1998, to make litigation more attractive.<sup>24</sup> A major factor behind the reform was perceived disincentive for business to use the courts.<sup>25</sup> As mentioned above, prior to the reforms, Japanese civil procedure had a discontinuous trial structure, wherein most appearances by counsel consisted of a single motion. Reforms included a shift toward more concentrated trial procedure; expanded power of judges to order production of

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<sup>23</sup> Id.

<sup>24</sup> See generally Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AMERICAN JOURNAL OF COMPARATIVE LAW 561-83 (2001).

<sup>25</sup> Ota, *id.* at 565.

documents (which might encourage litigation by making proof easier to obtain); the introduction of small claims procedure; and the introduction of a discretionary appeal to the Supreme Court. Many of the changes introduced reflect expanded American influence, but the reforms do not include sanctions on violators, apparently because practicing attorneys in the Diet resisted them.<sup>26</sup>

Taniguchi traces three forces behind the civil procedure reforms.<sup>27</sup> First was German influence, specifically the reform of German civil procedure in the 1970s. Second was the support of some elements of the bar, in the context of more cooperative relations between the bar and the judiciary. Third was pressure by Keidanren and Keizai Doyukai, the peak business associations in Japan, which became interested for the first time in facilitating litigation. Against these interests were certain elements of the bar that preferred slower procedures: a concentrated trial, while easier on the judge, requires more preparation by the lawyer. Furthermore, some lawyers had been charging by the appearance, so concentrating the trial deprived them of income. But the bar ultimately was unable to resist reforms.

What empirical predictions would be associated with the reforms of civil procedure? The issue is complicated. To the extent that the reforms reduce disposition times, we would expect that filings might increase following the introduction of reforms. However, the increased workload from new filings would put new pressure on disposition times, so it is hard to say whether disposition times would actually improve. Barring an increase in the size of the judiciary, streamlined procedures could actually

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<sup>26</sup> Ota, *id.* at 564 notes that this is consistent with the lack of contempt power of Japanese judges.

<sup>27</sup> Taniguchi at 11. See also Yasuhei Taniguchi, *The 1996 Code of Civil Procedure in Japan: A Procedure for the Coming Century?* 45 AMERICAN JOURNAL OF COMPARATIVE LAW 767 (1997).

lead to longer backlogs, as filings increase to fill “unused” judicial capacity. In our analyses that follow, we code for an effect to see if there was any increase in filings associated with the civil procedure reforms effective January 1, 1998, although we do not consider disposition times directly.

Ramseyer has argued that discontinuous trial procedures might actually discourage judicial resolution because the various gaps in the procedure allow time for settlement discussions between hearings. Of course, the effect this would have on *filings* would be different than it would on cases ultimately resolved. Ramseyer’s theory implies that settlement rates would be higher under discontinuous procedures than under continuous procedures because of iterated periods of negotiation during which the judge could signal information to the parties about his ultimate decision. This implies that the ratio of filings to completed cases might decrease with streamlining procedural reforms.

To be certain, even after the reforms, institutional barriers to litigation are many. Compared with the United States, the unavailability of punitive damages for many kinds of civil disputes means that attorneys have no positive incentive to seek out plaintiffs. Furthermore, plaintiffs have relatively less incentive to litigate when at best they will be made whole, without the “tort lottery” that allows them to get a share of punitive damages. Certain other features of the American system, such as contingency fee arrangements, have analogues in Japan but are less easily available.<sup>28</sup> Litigants typically pay up front in Japan, raising the cost of the suit. A related expense is the need to

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<sup>28</sup> Mark West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1459 (1994) (describing fee system in which Japanese lawyers charge an initiation fee as a percentage of the amount sought, and then an additional payment based on a successful outcome.)

purchase revenue stamps (inshi) as a portion of the amount claimed.<sup>29</sup> Finally, the lack of discovery prevents “fishing expeditions” whereby lawyers can pursue low probability claims in the hope that the discovery process will produce some information increasing the probability of a victory. All of these factors mean that there are still procedural and institutional barriers to litigation, at least as compared with the United States.

### C. Legal reforms

Another factor that may give rise to changes in litigation behavior is substantive legal change that makes suits easier or more difficult. For example, lowering the fees of shareholders derivative actions in 1993 no doubt encouraged such filings.<sup>30</sup> Corporate law reforms were staggered throughout the period, and a 1993 Products Liability Law led to more lawsuits in that area, albeit from a low base.<sup>31</sup> Legislative changes in the financial sector associated with the Big Bang were no doubt a factor too. For example, Zaloom and Nagashima note that as foreign “vulture funds” took over the nonperforming loan portfolios of certain Japanese banks, they became more aggressive in collecting on the loans than did the Japanese banks.<sup>32</sup> Our data do indicate an increase in loan collection litigation throughout the period, though the rate of increase is no greater than the overall litigation increase.<sup>33</sup>

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<sup>29</sup> West notes that in 1993, the Tokyo High Court held that a set fee was acceptable for indeterminate cases, significantly reducing this expense. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See LUKE NOTTAGE, *PRODUCT SAFETY AND LIABILITY LAW IN JAPAN* (2003).

<sup>32</sup> Yasuharu Nagashima and E. Anthony Zaloom, *The Rise of the Large Japanese Business Law Firm and its Prospects for the Future*, forthcoming in *LAW IN JAPAN: A TURNING POINT* (D. Foote and V. Taylor, eds.) at 6.

<sup>33</sup> Tanase (2000) argues that loan and debt collection constitutes the bulk of the increase in litigation in Japan, beginning in the 1970s. In absolute terms this is true. But most categories of litigation are increasing, so it would be a mistake to focus only on loan collection as the source of the increase. We

Overall, however, there was little legal change likely to affect Japanese litigation broadly. While substantive change may have effected the litigation incentives of particular groups, there was no major legal change akin to the waves of massive structural reform that Japan experienced in the Meiji and Occupation eras. The Civil Code remained stable. There were no new causes of action introduced, save the shareholders derivative mentioned above. Thus the effect of legal change is likely to be small.

#### D. Judges

Judicial capacity formed a significant constraint on litigation in Haley's analysis. He notes that the number of judges in Japan has historically been very small, and the size of the judiciary remained relatively constant during the 1990s. Data from the Japanese Supreme Court indicates that there were 3050 judges nationwide at the end of 2003. The comparable figure from 1994 was 2808.

We also have no reason to think that judicial quality declined during the period under review. The training mechanism remained constant, albeit with a shortening of the formal training period by six months. The mechanisms of hierarchical control and supervision, so well documented by Ramseyer and Rasmusen, remained intact.<sup>34</sup> And there is no reason to think that judges were able to exercise more independence at the end of the period rather than the beginning, as there were no major political shifts in the period. In any case, it is arguable that the cases we analyze, civil disputes, are those

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analyzed three subcategories of cases: loan collection, damage claims, and contract disputes, and found that the rates of litigation were all correlated at a level of 70% or higher.

<sup>34</sup> J. MARK RAMSEYER AND ERIC RASMUSEN, MEASURING JUDICIAL INDEPENDENCE (2003).

wherein the ruling Liberal Democratic Party (LDP) would have little interest, relative to tax cases and suits against the government.

E. Structural changes in the economy

A final variable we will consider is the effect of secular economic change on litigation behavior. It is something of an axiom in socio-legal studies that litigation breaks relationships. Hence one is less likely to litigate when one is engaged in long-term commercial relationships with suppliers, partners or consumers. This factor was noted by Kawashima to explain why Japanese litigiousness could be expected to increase with urbanization and modernization.

Other things equal, sustained economic downturns are likely to lead to the breaking of at least some long-term relationships. While “forgiving” behavior and economic adjustment to the temporarily strained circumstances of a partner might be acceptable when the pie is expanding, firms and individuals have less capacity to make such adjustments when the pie is no longer growing or even shrinking. We thus predict that economic circumstances will have an inverse relationship with litigation behavior, other things constant.

### **III. Empirical investigation**

A. Data & variables

To investigate which of the predicted factors had an effect on the amount of litigation, we analyze litigation in each of Japan’s 47 prefectures from the period 1986-2001.<sup>35</sup> Our dependent variable is the amount of litigation per 1,000 persons. We obtained

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<sup>35</sup> We selected the 1986 date because of the availability of data on lawyers per prefecture, one of our independent variables.

information on the number and type of litigation in each year in each prefecture from the *Shihou tokei nenpo* (*Annual report of judicial statistics*) published by the Supreme Court of Japan. We counted litigation at the level of the District and Summary Courts, which handle the first instance of most types of civil cases. Following Haley's classic article, we focused on new common civil actions (*tsujo sosho jike*), calculating the number of actions per 1000 persons. This category includes many types of "ordinary" civil cases, such as tort suits, loan collections and commercial cases.

Turning to our explanatory variables, we obtained annual data on the number of lawyers in each prefecture from the Japan Federation of Bar Associations (*Nihon Bengoshi Rengokai* or *Nichibenren*). The Federation, in conjunction with the local bar associations, is an autonomous body for the regulation of attorneys, independent of the Diet, the courts and government agencies. All attorneys in Japan become members of the Federation upon obtaining membership in their local bar association, and the Federation tracks attorneys per judicial district.

There are 50 District Courts in Japan having territorial jurisdiction over their respective judicial districts, and 478 Summary Courts within these districts.<sup>36</sup> Except in Hokkaido, which is divided into four judicial districts, the area of each judicial district is identical with that of each prefecture. (We treat the four Hokkaido districts as a single unit for purpose of our analysis, since economic and demographic data is available only at the level of the entire prefecture.) There is a local bar association for each district, with the exception of Tokyo, which has three local bar associations, mainly for historical and

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<sup>36</sup> Henderson reports that fifty summary court districts do not have a single lawyers office. Dan Fenno Henderson, *The Role of Lawyers in Japan*, in *JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM* 1, 59 (HARALD BAUM ED., 1997).

political reasons. To obtain the number of lawyers in Tokyo, we summed the total number of reported attorneys in all three bar associations.

Data on the number of judges at the summary court level in each prefecture came from the *Zen Saibankan Keireki Soran (Biographical Guide to Judges)*, which was published in 1987, 1990 and 1998. We used those data points to interpolate values for the other years. The resulting estimates of growth in the judiciary are consistent with the statistics on all judges provided by the Japanese Supreme Court.

We captured the effects of the 1998 civil procedure reforms in two alternative ways. On the assumption that their full effect was felt immediately, we generated an indicator variable set to 1 in years during which the reforms were in effect (1998 and later). To allow for the possibility that their effect was more gradual, we generated a variable measuring the number of years in which the reforms had been in effect.<sup>37</sup>

We also gathered annual demographic and economic data for each prefecture from the *Kenmin keizai keisan nenpo (Annual report on prefectural accounts)*, compiled by the Economic and Social Research Institute, Cabinet Office, Government of Japan. In order to investigate the effect of economic conditions on litigation rates we included both prefectural income and annual change in prefectural income. The former captures absolute wealth, while the latter indicates growth or decline, which will allow us to assess the degree to which economic growth or downturn influences litigation rates.<sup>38</sup> Lastly, to allow for the possibility that litigation is more common in urban settings, where

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<sup>37</sup> As explained *infra* in note 42, these alternative specifications generated substantially similar results.

<sup>38</sup> One might use an alternative indicator, such as the number of bankruptcies in a prefecture, to capture economic stress at the firm level. We use the change of income measure for two reasons. First, it allows us to measure the level and change of economic activity in the same units, allowing us to calculate the net impact of changes over time. Second, we are concerned in our setting that the decision to declare bankruptcy may be influenced by the legal cost and difficulty of doing so, introducing problems of endogeneity.

interpersonal relationships may be less strong on average, we generated a dummy variable set to one for the most urban prefectures. In the reported results, we defined the most urban prefecture as the specially designated “fu” (“urban prefectures”) and “to” (“metropolis”): Kyoto-fu, Osaka-fu , and Tokyo-to. In robustness checks, we used several other definitions, by including prefectures containing three, four, five or six of Japan’s four largest cities as of 2000.

Table 2 provides descriptive statistics and correlations for our data. There is no evidence of multicollinearity problems.

\*\*\* Put Table 2 about here \*\*\*

## B. Model

Our data are a balanced panel with 16 annual observations for each of the 47 prefectures. If we performed ordinary least squares without controlling for the panel nature of our data, we would risk obtaining inflated standard errors. Therefore, we estimate a random effect model, which accounts for potential heterogeneity across prefectures and yields accurate standard errors.<sup>39</sup>

## C. Findings

First, we note that the increase in litigation in Japan, like the increase in the number of lawyers, has not been uniform during the period under review. 24 prefectures experienced gains in per capita litigation while 23 prefectures experienced losses. Urban prefectures tended to gain. Rural prefectures were more variant. For example, Aomori

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<sup>39</sup> CHENG HSIAO, ANALYSIS OF PANEL DATA (2003). We also estimated a fixed effects regression, which does not allow us to include time-invariant variables. Thus, we could not model the effect of being a large urban prefecture. The remaining estimates were, however, substantively unchanged from those we report based on the random effects model.

suffered a net loss of one lawyer during the ten-year period, resulting in a 38 % decline in litigation. (Apparently, he was a litigious fellow.) Figure 2 presents a map showing which prefectures increased and decreased litigation.

\*\*\* Put Figure 2 about here \*\*\*

Table 3 presents the results of our regression with the number of new ordinary civil cases per capita as the dependent variable. The data covers 1986 to 2001.

\*\*\* Put Table 3 about here \*\*\*

As indicated by an  $R^2$  of .66, our model fits fairly well. Each of our theoretical variables, with the exception of urban prefectures, is statistically significant at the .10 level or better. Our results are consistent with the view that institutional constraints, rather than an innate cultural aversion to litigation, explain the relatively low rate of Japanese litigation. We turn now to the results for each of the three primary institutional constraints, a shortage of lawyers, a shortage of judges, and procedural barriers.

We find that an increase in the number of attorneys per capita does lead to an increase in the amount of litigation per capita. However, the increase per attorney is fairly small increase, just over four additional cases per year.<sup>40</sup> However, it does add up. Focusing on the period affected by the 1991 revision of the National Bar Examination Act and related measures to expand the bar, Japan added 4,030 lawyers between 1993 and 2001. Based on the 2001 Japanese population, these lawyers were responsible for approximately 16,816 more new common actions in 2001 (out of a total of 146,113 new common actions that year) than would have occurred if the number of lawyers had stayed

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<sup>40</sup> Since both the number of attorneys and the number of new cases are in per capita terms, the coefficient represents the number of new cases associated with each additional attorney in a prefecture.

at the 1993 figure.<sup>41</sup> The prefectures where it made the largest difference were of course the ones that gained the most lawyers.

Turning to judges, we find that the addition of a judge has a larger effect than the addition of an additional attorney, with each additional judge in a prefecture increasing the number of new common cases by slightly over ten a year. However, since the expansion of the judiciary was less than the expansion of the bar during the 1990s, the total effect of judicial expansion was smaller. Estimating that Japan added approximately 124 judges at the summary court level between 1993 and 2001, this translates to 1328 additional cases in 2001.

The civil procedure reforms also had a significant impact. We estimate that it led to approximately 8,147 more new common actions nationwide in 2001 than would have occurred without the reform.<sup>42</sup> In other words, the 1998 procedural reforms have had approximately one-half the effect of all the lawyers that have entered the field since 1993.<sup>43</sup>

In sum, therefore, Japan's institutional reforms appear to be having the desired effect of encouraging greater use of the legal system. Taken together, civil procedure reform and the expansion of the bar and judiciary account for over 26,000 additional cases per year an almost 22 percent increase over the number of cases that would

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<sup>41</sup> With regard to lawyers, we need to consider the possibility of reverse causality, namely that the number of attorneys would rise in a prefecture in response to increased litigation or to a third factor that simultaneously influences both lawyers and litigation. If the number of lawyers and the amount of litigation in a prefecture were simultaneously determined, our estimates would be biased. However, application of Davidson and McKinnon's augmented regression test indicate that this is not the case in our data. R. Davidson and J. D. MacKinnon, *ESTIMATION AND INFERENCE IN ECONOMETRICS* 236-242 (1993)

<sup>42</sup> Using the alternative, dichotomous measure for effect of civil procedure reform yields substantively identical results.

<sup>43</sup> Figures derived by varying the YEARS SINCE CIVIL PROCEDURE REFORM variable for 0 (pre-reform) to 4 (value of the variable in 2001) time .00016 additional cases per capita times the 2001 Japanese population of 127,290,000.

otherwise have been predicted. While the increase in the bar has been the dominant driver of this increase, the result of the other reforms has been substantial.<sup>44</sup>

The non-institutional results are also interesting. The impact of the economy on litigation is two-fold. As one would expect, where there is more economic activity in absolute terms, there is also more litigation per capita. More economic activity means more transactions, and hence one would expect more litigation even if the rate of litigation per transaction remained constant. However, we also find that change in economic activity over time affects litigation. During downturns in which the prefectural income has declined since the previous year, litigation increases.<sup>45</sup> This is consistent with the literature that finds litigation is counter-cyclical, as bad times mean more broken contracts and a willingness to break relationships.<sup>46</sup>

Lastly, we note that, controlling for population and economic activity, there is no evidence that urban prefectures (Tokyo-to, Osaka-fu, Kyoto-fu) are more litigious than non-urban prefectures.<sup>47</sup> The sign in our analysis is negative, but the coefficient is far

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<sup>44</sup> Indeed, there may be a synergistic impact of the civil procedure reform and increase in the bar or judiciary that we do not capture. For example, without the easier access to the courts provided by the civil procedure reform, it is possible that each additional attorney would have been less able to bring new cases, reducing their impact. These counter-factual circumstances cannot be tested, but leave open the possibility that other reforms may have had a greater impact than we have captured here.

<sup>45</sup> Nottage and Wollschlaeger have a similar finding. Luke Nottage and Christian Wollschlaeger, *What Do Courts Do?* 1996 NEW ZEALAND LAW JOURNAL 369 (1996).

<sup>46</sup> As the magnitude of the coefficient for changes in per capita income is larger than the coefficient for per capita income, a decrease in per capita income from year  $t$  to  $t+1$  will mean a temporary increase in per capita litigation, as the impact of economic stress overwhelms the drop caused by reduced economic activity. Assuming no further change in income, litigation in years  $t+2$  and after will be lower than that in year  $t$ , reflecting the smaller base of economic activity. Conversely, an increase in income from year  $t$  to  $t+1$  will result in a temporary drop in litigation due to the benefits of an “expanding pie”. Thereafter, however, the rate of litigation will be higher, reflecting greater economic activity.

<sup>47</sup> We conducted a variety of robustness checks, two related to model specification and one to the definition of “urban prefecture”. We first used a fixed effect model to control for the panel nature of our data, rather than the random effects model used in the reported model. It is impossible to estimate via fixed effects the impact of variables that do not change over time, meaning that we cannot estimate the effect of being an urban prefecture. The estimates of the other coefficients change very little. Next, we control for the possibility of autocorrelation, that is, the error terms for each prefecture being correlated across time. The estimates of the institution variables remain significant and of approximately the same relative magnitude,

from significant ( $p \approx .2$ ). This is an important finding for considering cultural and sociological theories of litigation, which often assume that urbanization increases litigation in and of itself.<sup>48</sup>

#### **IV. Discussion**

These results allow us to reflect on the theoretical debate on the sources of litigation in Japan. To recap, Haley's theory focused on the lack of institutional capacity in the legal system, in particular the difficulty of finding judges and lawyers and the lack of enforcement power of the court.<sup>49</sup> Of these three factors, the one that has seen the greatest change has been the number of lawyers, which saw an early expansion that was significant in percentage terms. The number of judges has remained more or less constant in the period in question, increasing by less than 10% while overall number of cases increased by over 30%. Our empirical analysis supports Haley's arguments about capacity. Judicial capacity appears to be a bigger constraint than the number of lawyers, as each additional judge accounts for a greater amount of litigation than an additional lawyer. Another factor identified by Haley, the use of discontinuous trials through 1998, also appears to have had a major effect in discouraging litigation.

Ramseyer's theory focuses on predictability. Japanese sue less than Americans because their courts are more predictable and stable. This theory, however, does not directly predict a change in litigation behavior within Japan. Japan's legal system

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although their absolute magnitude is slightly reduced. However, both the absolute income and change of income variables lose significance. Lastly, we estimate models redefining urban prefectures as those containing Japan's three, four, five or six largest cities. The impact of being an urban prefecture is actually negative and significant under several definitions. Estimates of the other variables remain substantively unchanged under all definitions. In summary, our findings for the effects of institutions (judges, attorneys, and civil procedure reform) are extremely robust. Our findings for the impact of economic factors are generally robust, although they lose significance under one specification.

<sup>48</sup> See Kawashima, *supra* note 3.

<sup>49</sup> But see Ramseyer and Nakazato, *supra* note 12.

remained fairly stable in the period under review. There were no major changes in the way judges were selected or trained and no influx of new judges who might apply the law less predictably than their forebears. Nor were there dramatic changes to the core statutes interpreted by judges, such as the Civil Code. While there were some changes in Japanese substantive law in the 1990s, these were concentrated in the financial and securities area, and hardly fundamental to the types of cases that might be litigated in Aomori.<sup>50</sup> Predictability, then, remained relatively constant, but there was still a dramatic increase in litigation.

Another theory of Japanese nonlitigiousness, articulated by Tanase and Upham, is that litigation rates are low because of elite “management” of dispute resolution. The availability of alternative dispute resolution, it is argued, channels conflict resolution away from courts in a manner that does not threaten elite rule. The paradigm case was the interwar land tenancy mediation system, which scholars have argued was designed to extend government control but also to reduce pressure for widespread social challenge.<sup>51</sup> The suggestion, then, is that informal alternatives are a substitute for, rather than a complement to, formal litigation in the courts. Following this theory, one might expect that the shift toward litigation was produced by or related to a corresponding move *away* from the informal alternatives. That is, one might expect that the increase in litigation resulted from either a decline in the availability or quality of informal alternatives, reflecting a loss of political control by elites.

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<sup>50</sup> Note that we do observe the increase in loan collection litigation, but there is no indication that there was legal change facilitating this so much as the indirect factor of allowing foreigners to enter the market.

<sup>51</sup> Dimitri Vanoverbeke, *COMMUNITY AND STATE IN THE JAPANESE FARM VILLAGE, FARM TENANCY CONCILIATION (1924-1938)* (2003).

We reject the hypothesis that the availability of alternatives are the key factor suppressing litigation in contemporary Japan, as argued by Tanase and Upham. Japan does have a distinctive set of informal alternatives to litigation, to be sure. We list the major institutions in Table 4, along with the number of cases handled by each. We use a generous definition of “case” here, summing what are categorized as resulting in referrals, mediation and arbitration, although a “referral” can simply consist of a suggestion to go elsewhere. Most of these centers have experienced *increasing* demand over time. Thus it does not seem likely that disputes are being channeled away from informal alternatives to the formal court system. The only dispute resolution center listed below with decreasing usage was the pollution dispute resolution center, which even at its most active heard a small number of disputes. The total figure of all cases handled by these centers, taking their historic high numbers of cases, is less than 10% of the overall civil litigation rate.

The increases in ADR use and litigation are themselves highly correlated. Table 5 below traces the number of traffic accident cases filed in summary courts from 1989-2002 as compared with the total number of cases handled by the Traffic Accident Dispute Resolution Center and two similar centers operated by the Japanese bar.<sup>52</sup> All centers report cases as referrals, mediation and arbitration, and these figures are combined in the table below. The annual numbers are correlated at a rate of .91. (Note that it is to hardly surprising that the absolute number of cases handled by the informal alternative is greater, given the cost and time involved in formal litigation.)

\*\*\* Put Table 5 about here \*\*\*

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<sup>52</sup> Nichibenren Kotsu Jiko Soodan Senta and the Tokyo Begoshikai Jiko Soodan Senta. These two were merged in April 2004.

The positive correlation between ADR and litigation is consistent with what we know from Japanese history. During the previous high-litigation era in Japan, the 1920s and 1930, use of ADR mechanisms also increased.<sup>53</sup> The elite management theory, whatever its explanatory power into the reasons ADR systems are established, does not provide insight into the changing demand for formal litigation. Japan's elite iron triangle of bureaucracy, business and LDP has remained largely intact, despite a decade of economic stagnation. With the elite a constant, other factors must explain the increase in litigation.

Kawashima's culturalist theory has been widely criticized by most of the authors under consideration. Our results on urbanization are consistent with these criticisms, suggesting that, controlling for levels of economic activity and population, urban residents are not statistically more likely to sue.

We also hypothesized that economic decline might be associated with increased litigation. The data suggest that absolute levels of wealth increase litigation, but economic decline also increases it. More transactions should mean more litigation, but relative growth or decline is also an important factor in the decision by firms to go to court. This result also suggests something about the earlier debate. Ramseyer, Haley and others focused on the cross-national comparison with the US, and offered explanations for relatively low Japanese litigation rates. Our results suggest that another unexplored factor during the classical period may have been the rapid growth of the economy.

*Within* Japan, we suggest, litigation is countercyclical. Thus the bursting of the bubble,

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<sup>53</sup> Luke Nottage and Christian Wollschlager, *What Do Courts Do?* [1996] *New Zealand Law Journal* 369-373

by breaking social and economic relationships, might have encouraged litigation in the 1990s.

The following graphic presents the data on growth and litigation, showing that they had an inverse relationship in the period under study.

\*\*\* Put Figure 3 about here \*\*\*

This result suggests that the core insights of sociolgal literature on litigation apply to Japan, just as to other societies. We thus expect, in Japan as elsewhere, that economic stress breaks relationships, leading to more disputes that become salient enough to resolve through courts. Expanded access to lawyers and a friendlier civil procedure had predicted effects, with the former having a larger influence. In short, Japanese appear to respond to incentives to litigate just as do citizens of other advanced industrial democracies.

## **V. Conclusion**

This paper has explored Japan's turn to litigation in the 1990s. From 1986 to 2001, the Japanese civil litigation rate increased by 24%. Most of this increase was concentrated in urban prefectures, but can be explained as primarily resulting from economic decline, the expansion in the bar, and the streamlining of civil procedure, rather than cultural factors. Among legal reforms, the expansion in the bar had the largest impact, followed by civil procedure reform. The slight increase in the judiciary also accounted for increased litigation.

While our results are limited to Japan, they have implications for the comparative study of law and legal institutions. Litigation rates provide a notoriously difficult field

for cross-national study because institutional environments vary so widely.<sup>54</sup> *Within* a single legal system, however, we can try to isolate the factors that lead to more or less litigation and the impact of particular reforms. Our analysis suggests that both procedural incentives to litigate and attorney availability matter, and matter a good deal, relative to other institutional factors. Perhaps more important, however, are under-explored relationships between the economy and litigation.

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<sup>54</sup> But see Wollschlager, *supra* note 1.

**Table 1: New common actions per year**

<b>Year</b>	<b>New common actions</b>	<b>New common actions per 1000 persons</b>
1986	111,937	0.9200
1987	113,804	0.9309
1988	112,557	0.9168
1989	104,469	0.8478
1990	100,212	0.8107
1991	105,161	0.8474
1992	122,670	0.9848
1993	136,326	1.0912
1994	139,130	1.1107
1995	136,806	1.0895
1996	135,455	1.0762
1997	139,652	1.1070
1998	144,809	1.1450
1999	142,272	1.1232
2000	147,759	1.1641
2001	146,113	1.1479
2002	143,859	1.1289

**Table 2: Descriptive statistics and product-moment correlations**

		Mean	S.D.	Min	Max	(1)	(2)	(3)	(4)	(5)	(6)	(7)
(1)	<b>New common actions per capita</b>	0.000840	0.000343	0.000393	0.002883	1.00						
(2)	<b>Lawyers per capita</b>	0.000069	0.000086	0.000022	0.000740	0.82	1.00					
(3)	<b>Judges per capita</b>	0.000015	0.000006	0.000005	0.000032	0.32	0.29	1.00				
(4)	<b>Years civil procedure reform has been in effect</b>	0.625000	1.219160	0.000000	4.000000	0.12	0.05	0.01	1.00			
(5)	<b>Per capita income (10,000 yen)</b>	0.000296	0.000194	0.000062	0.001427	-0.06	-0.03	-0.13	0.03	1.00		
(6)	<b>Annual change in per capita income (10,000)</b>	0.000005	0.000081	-0.001041	0.001018	-0.03	0.00	-0.00	-0.17	0.19	1.00	
(7)	<b>Largest urban prefectures</b>	0.063830	0.244612	0.000000	1.000000	0.72	0.74	0.25	0.00	0.00	0.00	1.00

**Table 3: Regression results (new common actions per capita)**

<b>Lawyers per capita</b>	4.17318***
	(0.000)
<b>Judges per capita</b>	10.71093***
	(0.000)
<b>Years civil procedure reform has been in effect</b>	0.00002***
	(0.000)
<b>Per capita income (10,000 yen)</b>	0.07087**
	(0.034)
<b>Annual change in per capita income (10,000)</b>	-0.10204**
	(0.036)
<b>Largest urban prefectures</b>	-0.00016
	(0.197)
<b>Constant</b>	0.00037***
	(0.000)
<b>Observations</b>	752
<b>Overall R-sq</b>	0.660

*p values in parentheses*

*\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%*

**Table 4: Alternative Dispute Resolution (ADR) Institutions in Japan (includes referrals, conciliation and arbitration)**

	Years data available	Low # cases	High # cases
Japan Real Estate Dispute Resolution Center	1995-98	2646	5086
Product Liability Dispute Resolution Center	1995-2000	223	1083
Pollution Dispute Resolution Center	1980-2003	1	48
Tokyo Consumer Dispute Resolution Center	1995-98	28618	31987
Construction Industry Centers	1981-2003	206	302
Equal Employment Opportunity Disputes	1999-2003	22885	37346
Auto accident centers total	1989-2003	22359	40218
<b>TOTAL</b>			<b>116070</b>

**Table 5: Traffic Accident Dispute Resolution 1989-2002**

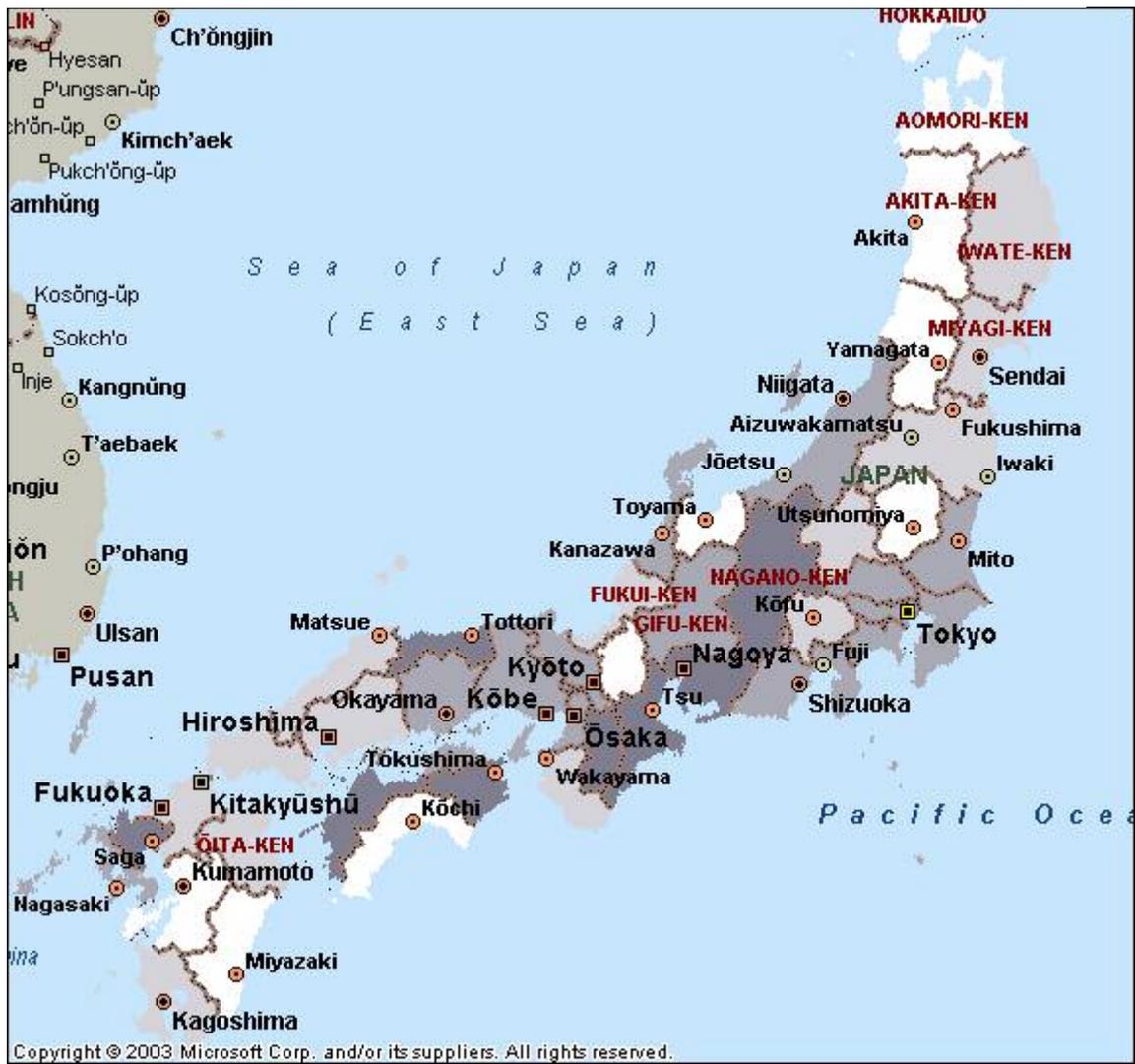
Year	ADR Total	Litigation Total	Ratio
1989	22359	4260	5.25
1990	22939	4056	5.66
1991	23532	3970	5.93
1992	26443	4224	6.26
1993	28552	4416	6.47
1994	27530	4400	6.26
1995	28439	4408	6.45
1996	30469	4795	6.35
1997	33067	4484	7.37
1998	33150	4719	7.02
1999	35236	5549	6.35
2000	36860	6090	6.05
2001	38571	6249	6.17
2002	40218	6712	5.99

Figure 1: Increase in lawyers per capita, 1993-2002



Key: White is a net loss. Darker grey is a larger increase, with a maximum of a 60% growth.

Figure 2: Litigation gains/declines 1993-2002 (per capita)



**Figure 3: Growth and Litigation**

