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By MARK A. LEVIN *

This article presents a body of published judicial decisions relating to judicial challenge where the statutory law explicitly requires judges to weigh the fairness of the justice process in the particular circumstances of concrete facts in cases before them.

These cases reveal a history where, despite facing the question in the matters before them, the meaning of fairness has barely earned any explanation from Japan's judges in their formal jurisprudential voice.

Although fairness is "entrusted to the judgment of the courts,"¹ it seems as if Japan's judges have seen themselves as inherently fair. Early decisions, in particular, demonstrated a narrow acknowledgement of the potential for bias and were resolved via a formalistic reasoning that paid no apparent regard for the public's perceptions. In short, fairness appeared to be presumed as ubiquitous in judges' professional capacities. Case closed.

A few years back, I criticized the fairness of Japan's civil justice

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system owing to a set of dynamics in the operation of the courts which I labeled *instrumental judicial administration*. Granted, fairness is just one value in potential competition with other values; individuals can surely differ in how to prioritize it. Moreover, there are diverse notions of the meaning of fairness itself. Nonetheless, my critique then intentionally glossed over these differences by drawing primarily from *my* normative judgment of a properly functioning, i.e. fair, civil justice system.

In that writing, Civil Justice and the Constitution, although I did not imagine that my normative judgment represented any universal truth, I nonetheless aimed to establish that my views were shared with insider academics and participants in Japan’s legal system. To better situate my views into Japan’s domestic setting, I introduced the language in the Japanese constitution and legislation enacted by the Japanese parliament that might be considered most analogous to the U.S. Constitution’s due process clauses and I briefly noted the treatment of this issue by Japan’s courts. Still, all of these presentations begged the question as to whose understanding of fairness should frame the discussion.

Hoping now to pull away from my views as the basis for judgment on the meaning of fairness, this article aims to explore how fairness is formally expressed within Japanese legal discourse. After a brief recapitulation of the constitutional and legislative

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2. Mark A. Levin, *Civil Justice and the Constitution: Limits on Instrumental Judicial Administration in Japan*, 20 PAC. RIM L. & POL’Y J. 265 (2011). Instrumental Judicial Administration is defined as “mechanisms or actions employed by judicial administrators to intentionally bias adjudicatory processes in favor of a particular party or result despite lacking authority as to the disposition of the subject case or class of cases.” Id. at 267. Moreover, as my criticism was limited to a discrete set of cases and circumstances, I made my view clear there that the broader context is of an admirably functioning judicial system with outstandingly competent and trustworthy judges. Id. at 268. I emphatically repeat the same view here.


4. U.S. CONST. amends. V & XIV. These notions are not directly analogous to due process in the U.S. constitutional setting, but merely its closest counterparts. Due process in the U.S. has a long history that carries very heavy freight in a way that is hardly matched in Japan’s much newer constitutional setting. (Thanks to Meiji University Faculty of Law Professor Lawrence Repeta for the apt phrasing used here.)
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In that last regard, this article concludes with the contemplations called for by the organizers of this symposium issue: “Successes, Failures, and Remaining Issues of the Justice System Reform in Japan.” In my opinion, the record of judicial challenge cases shows a set of questionable determinations in the early post-war years in Japan. More recent decisions emerging in the context of the massive changes to Japan’s justice system launched by the Justice System Reform Council’s groundbreaking 2001 Report suggest that judicial system reform has had a positive impact with regards to the quality of fairness in Japanese civil justice. An April 2011 decision by the Japanese Supreme Court’s 2nd Petty Bench, which clearly denotes a requirement of due process in civil procedure, will be discussed to justify optimism for further improvement in the years ahead.

I. Context: Terms Regarding Procedural Fairness in Japanese Constitutional and Statutory Texts

Procedural fairness, what Americans might call “due process,” is explicitly incorporated into central Japanese legal texts, including the nation’s Constitution, its Code of Civil Procedure, and various

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5. The constitutional and legislative framing of civil procedural fairness were amply presented in Civil Justice and the Constitution. Levin, supra note 2, Part III.


7. As discussed supra note 4, the historic and judicially acknowledged significance of the U.S. notion of due process sets it entirely apart from its Japanese counterpart language.
treaties. Given that Japanese judges are obligated to accept these texts as binding sources of law, these provisions are surely an essential background setting for cases concerning fairness, regardless of whether the sources are explicitly addressed in their decisions. These provisions may also be seen as contextual hooks for expecting fairness in Japanese civil justice.

Explained in greater detail in my earlier article, these texts are only briefly introduced here. Moreover, I will give away the punch line in advance: although scholarly understandings plainly situate these provisions into discussions concerning civil due process and fairness, these textual provisions have generated virtually nothing by way of judicial pronouncements in judicial decisions. We will remain hungry in our search for guidance as to the meaning of fairness in Japanese jurisprudence that might be revealed through these sources.

A. Constitutional and Treaty Language

Article 32 of the Japanese Constitution appears to declare for all people in Japan a right to obtain justice in the courts. Interestingly, the historical record suggests that the U.S.-led Allied Occupation and Japanese constitutional drafters were aiming to address due process and fairness, these textual provisions have generated virtually nothing by way of judicial pronouncements in judicial decisions. We will remain hungry in our search for guidance as to the meaning of fairness in Japanese jurisprudence that might be revealed through these sources.

8. As a member of the civil law tradition in legal systems, the prevailing notion of law in Japan incorporates only the Constitution and enacted laws and regulations. Judicial decisions in the civil law tradition serve as essential source for understanding the meaning of enacted law, but formally speaking, these are not law per se. For this reason, this article references synonymously judicial decisions and jurisprudence, and explicitly avoids the term "case law" with regards to Japan. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 23 (3d ed. 2007) (judicial decisions are not law in the civil law tradition), but see J. Mark Ramseyer, Mixing-and-Matching Across (Legal) Family Lines, 6 BYU L. REV. 1701 (2009) (presenting Japan as a mix of multiple legal traditions).

9. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 32 (Japan). It is important to note that the English phrasing for Article 32 given here as a "right to obtain justice in the courts" is idiosyncratic. The official Japanese, 人にも、裁判所において裁判を受ける権利を奪われます, has no official translation. A standardized translation is the English version born in the original 1946 drafts exchanged between U.S. occupation officials and Japanese negotiators: "No person shall be denied the right of access to the courts." It can be argued that this narrower reading accurately reflects Japanese constitutional jurisprudence, as is presented in Saikō Saibansho [Sup. Ct.] Sept. 29, 1970, Shō 45 (ku) no. 191, 100 SAIKO SAIBANSHO MINJI HANREISHÔ [MINSHO] 499, discussed infra note 64. On the other hand, this inadequately conveys the richer interpretation of Article 32 that is persistently articulated by Japan's leading constitutional law scholars. See Levin, supra note 2, at 290, 295-99.
process only in criminal matters. Nonetheless, the meaning of Article 32 has since morphed into a broader construction that includes both civil and criminal justice.

Other constitutional provisions support Article 32's prescription for a right to obtain justice. These include Article 14's declaration for equality under law, Article 76 (3)'s command for judicial independence, and Article 82's requirement for open trials in the courts.

Treaty language to which Japan has committed itself similarly addresses fairness in judicial proceedings as a fundamental human right. Article 10 of the Universal Declaration of Human Rights provides "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." The International Covenant on Civil and Political Rights elucidates upon the UDHR's aspiration text through its Articles 14 and 26.

However, Article 32, its constitutional kin provisions, and the UDHR and ICCPR treaty language have generated scant consideration in Japanese judicial decisions. They are of little help in a search for the meaning of fairness expressed in Japanese jurisprudence.

B. An Aspiration for Fairness: Code of Civil Procedure Article 2

Although procedural fairness was arguably implied in the above constitutional and treaty texts, the concept did not earn

10. Levin, supra note 2, at 291-93.
11. Id. at 293-99.
12. Id. at 299-301.
explicit reference in civil procedure law enacted in Japan until just recently. In the context of a major overhaul of the entire Code of Civil Procedure, modernization included the addition of a new Article 2 with an expressed aspiration for fairness in 1996.16

Civil procedure law in Japan is codified in a unitary statute, the Code of Civil Procedure, applicable to virtually all civil suits nationwide. First enacted in 1890, Japan's Code of Civil Procedure was based primarily upon the corresponding German text of the time.17 Fairness may have been understood as essential to a properly functioning civil justice system, but this understanding was unstated for over one-hundred years.

In the 1996 revision, fairness was incorporated into a new Article 2 which reads: "Courts shall endeavor to ensure that civil suits are carried out fairly and expeditiously, and parties shall conduct civil suits in good faith."18

However, as I have previously noted, "there is less here than might meet the eye."19 First, one observes that a court's task is merely to endeavor towards the goals of fairness and expeditiousness, in contrast to parties' obligation to carry out litigation in good faith. Second, even this aspiration for fairness in Article 2 rests in a confusing balance with an equally compelling call for expeditiousness. There is no advice as to how judges ought to address circumstances where these two vital goals might conflict.20

C. Case Decisions Regarding These Textual Sources

1. The Vacuum Surrounding Constitutional and Treaty Sources

Constitutional and treaty sources have generated essentially no relevant discussion in judicial decisions with regards to the meaning of fairness in Japanese civil justice. Thus, for example, one finds


18. MINSOHO (C. Civ. PRO.), art. 2 (emphasis added). In Japanese: "裁判所は、民事訴訟が公正かつ迅速に行われるように努め、当事者は、信義に従い誠実に民事訴訟を追行しなければならない."

19. Levin, supra note 2, at 302.
20. Id. at 302-03.
nothing meaningful in decisions cited in this regard in a leading compendium of statutes, the modern Roppō Zensho, in conjunction with Article 32, the other constitutional provisions noted, or the treaty sources.21 Similarly, review of a leading constitutional law treatise cites only to a criminal law decision in its discussion of fairness implied in the Constitution’s Article 32.22 Accordingly, these provisions represent a virtually dead-end path in searching for the meaning of fairness in Japanese jurisprudence.23

2. CCP Article 2 Gets a Nod: Supreme Court of Japan 2nd Petty Bench, April 13, 2011

The Code of Civil Procedure’s Article 2’s statutory contemplation of fairness also presented an essentially empty set of Japanese jurisprudence for its first fifteen years.24 However, these

21. For example, Article 32 gains bare mention in a 1970 decision by the Supreme Court’s 1st Petty Bench. On appeal from the Tokyo High Court decision discussed infra Part II.B.4, the Court refused to acknowledge that constitutional rights might be implicated in a judicial challenge petition: “the point of Article 32 is that all citizens have a right to receive adjudication in a court established pursuant to the laws and the Constitution, and are guaranteed not to be subject to adjudication in any other institution but the courts.” Saikō Saibansho [Sup. Ct.] Sept. 29, 1970, Shō 45 (ku) no. 191, 100 SAIKO SAIBANSHO MINJI HANREISHŌ [MINSHU] 499.


23. See also Levin, supra note 2, at 296-99 (paucity of judicial precedent concerning Article 32) and 299-302 (ditto re. other constitutional and treaty provisions). While a 2008 decision by the 3rd Petty Bench of the Supreme Court deftly avoided consideration of Article 32, there was some attention to its “spirit” in the concurrence by Justice Tahara and a dissent by Justice Nasu. Saikō Saibansho [Sup. Ct.] May 8, 2008, Hei 19 (ku) no. 1128, 60 MINSHU NO. 8 51, 1459 SAIBANSHO JIHÔ 1, 2011 HANJI 116, 1273 HANTA 125. Drawing on precedents in analogous cases, the Court had upheld a failure to give notice of appeal from family court proceedings as being without connection to Article 32 owing to the non-contentious setting of the applicable family court processes. Justice Tahara expressed strong sentiments regarding Article 32’s import for procedural due process, but concurred in the result. Justice Nasu would have extended Article 32’s coverage to proceedings which are functionally contentious, even if based upon procedures formally established by law to be noncontentious. Id.

24. Levin, supra note 2, at 303. The provision did garner a minor mention in a 2001 Tokyo District Court decision, but this was in rejecting a litigant’s claims by casting the provision as an indication that fair civil process is an important judicial capacity which ought not be used abusively. Tôkyō Chihō Saibansho, Mar. 27, 2001, Hei 10 (wa) no. 3488, 1777 HANJI 80, 1071 HANTA 248.
circumstances changed significantly on April 13, 2011, in a decision of the 2nd Petty Bench of Japan’s Supreme Court. The Court’s reversal of a Tokyo High Court decision based upon proceedings carried out without notice to the losing side was acknowledged to be “clearly contrary to the requirements of procedural justice in civil procedure.” Although the ruling did not share detail into the justices’ rationale, CCP Article 2 (though not the Constitution’s Article 32 or any other constitutional provisions) is listed in the Court’s references to authority. Thus, Article 2’s call for procedural fairness should be understood as the controlling law here.

This case represents an important development in the Japanese jurisprudence, but there are major limitations to the insights that can be drawn from the ruling. As a recent change in the landscape, this case will get further explanation and attention in the concluding section of this article.

II. Judicial Disqualification and Challenge Cases as a Window for Insight into the Meaning of Fairness

Despite the limitations of the sources described above, one area of the law compels Japanese judges to confront and demonstrate their understanding of fairness in civil litigation: petitions for judicial disqualification and challenge under Articles 23 and 24 of the Code of Civil Procedure. More particularly, the statutory standard of Article 24 calls upon judges to assess whether “circumstances with regard to a judge that would prejudice the impartiality of a judicial decision” warrants granting a petition for judicial challenge.


26. Here again, I am aiming to provide English language readers with a translation that can be naturally understood in closest approximation to the original meaning for Japanese readers, notwithstanding what might be available from the Japanese government’s unofficial translations. The variation here is explained infra note 134.

27. Id. (References section).

28. See discussion infra Part III.A.

29. Minsohō (C. Civ. Pro.) arts. 23-24. In numeration prior to 1996, these were Articles 35 - 37. For reading clarity, article numbers 23 and 24 are used throughout, but I have inserted brackets where the numbers were originally 35-37.

30. Minsohō (C. Civ. Pro.) art. 24 (裁判官について裁判の公正を妨げるべき事
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Thus, these cases essentially call for determinations of what is or is not fair under the particular circumstances of concrete cases. Accordingly, these cases provide a perfect window for insight into Japanese judicial understanding of fairness.

Fortunately, this body of jurisprudence is compact. My research has uncovered ten published case decisions under the current Constitution and Code of Civil Procedure that address the substantive standards here. Five are reported from the Supreme Court, three from High Courts, and two from District Courts. Of these, one finds seven varieties of fact scenarios for contested disqualification or challenge.

In all but one of these recorded decisions, the results were denials of the petitions and refusals by the court to remove the

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31. A better translation would use "fairness" instead of "impartiality" for 公正. "Fairness" is more common, less jargoned, and consistent with the Ministry of Justice's official translation of Article 2. See supra note 16 (Kenkyusha's translation: "justice; fairness; rectitude; equity; impartiality."). Moreover, the drafters of the Code opted not to use an alternative word choice 公平 / kôhei, which much more directly connotes "impartiality" (as in equality of treatment) in comparison to the notions of correctitude (from 正) explicit in 公正. TSUKAIKATA NO WAKARU RUGOKEIKAI JITEN (EASY TO UNDERSTAND DICTIONARY OF USAGE) (Shogakukan 2003, electronic edition) 公平.

32. This contrasts with the United States. The table of cases in a 2007 treatise on judicial disqualification in the United States lists approximately 4,500 cases. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (2d ed. 2007). Admittedly, if one divides 4,500 by 51 (the number of U.S. states and federal systems), the ratio is only nine-to-one. Nonetheless, the numbers suggest differing treatments in the two nations.

33. An initial search was carried out using the case notes provided under Articles 23 and 24 in a leading annotated Roppô Zensho edition. Further research was carried out using the Dai-ichi Hôki Hô Jôhô Sôgô Database service by searching for all cases listing either of the two provisions under the "Laws Cited" (参照法令) metadata element. Cases which pertained only to the process of petitioning and those addressing abusive and incessant judicial challenges were then excluded.

34. Academic attention to judicial disqualification is also disparate between the U.S. and Japan. In contrast with 1,200 pages of text in FLAMM, supra note 32, see also JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS (4th ed. 2007) ch. 4 (disqualification), ARTHUR GARWIN ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (2d ed. 2011) canons 2 and 3, searching the Hokkaidô and Tôkyô University Law Libraries online catalogs found no monographs on judicial disqualification or judicial ethics more generally. The most expansive scholarly treatment on the subject in Japan appears to be Noriko Hatano, Saibankan kôshi seidô saikô: soshô tôjisha no kanten ni yoru ietsuzuki teki kôsei (A Reconsideration of the Judicial Disqualification System: Procedural fairness from the litigants' perspective), 19 SAPPORO GAKUIN HÔGAKU No. 1 1 (2002). Brief treatments of the subject appear in any number of journals and leading treatises on Japanese Civil Procedure.
judge. After a brief review of the statutory provisions, this section introduces all of the published cases, running in rough chronological order from the earliest decision in 1953 through the latest in 2002.

A. CCP Articles 23 and 24 in statutory text

Japan's civil procedure system includes two statutory provisions giving substantive standards for judicial challenge, and a third provision, in the civil procedural rules, for a judge's self-initiated recusal. These are Article 23 - standards for disqualification (除斥, jyoseki), Article 24 - judicial challenge (忌避, kihi), and Rules of Civil Procedure Article 12 - recusal (回避, kaihi).35

Each is presented, in substantial part, below:

CCP Art. 23: Disqualification of Judge (除斥)

(1) In the following cases, a judge shall be disqualified from performing his/her duties...

(i) Where a judge or his/her spouse or person who was his/her spouse is a party to the case, or is related to a party in the case as a joint obligee, joint obligor or obligor for redemption.

(ii) Where a judge is or was a party's relative by blood within the fourth degree, relative through marriage within the third degree or relative living together.

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35. Articles 25 and 26 provide for the judicial process in addressing disqualification and challenge petitions.

Article 25: (1) A judicial decision of the disqualification of or a challenge to a judge who is a member of a panel or a single judge of a district court shall be made by an order of the court to which the judge belongs, and a judicial decision of the disqualification of or a challenge to a judge of a summary court shall be made by an order of the district court that has jurisdiction over the location of the summary court.

(2) In a district court, the judicial decision set forth in the preceding paragraph shall be made by a panel.

(3) A judge may not participate in making a judicial decision on the disqualification of or a challenge to him/herself.

(4) No appeal may be entered against an order finding that the disqualification or challenge is well-grounded.

(5) An immediate appeal may be filed against an order finding that the disqualification or challenge is groundless.

Article 26: When a petition for disqualification or challenge is filed, court proceedings shall be stayed until an order on the petition becomes final and binding; provided, however, that this shall not apply to any urgent act.

MINSOHO (C. CIV. PRO.) arts. 25 & 26.
(iii) Where a judge is, in relation to a party, a guardian, supervisor of a guardian, curator, supervisor of a curator, assistant or a supervisor of an assistant.

(iv) Where a judge has served as a witness or expert witness in the case.

(v) Where a judge is or was a party’s agent or assistant in court in the case.

(vi) Where a judge has participated in making an arbitral award in the case or participated in making a judicial decision in the prior instance against which an appeal is entered.

(2) If any of the grounds for disqualification prescribed in the preceding paragraph exist, the court, upon petition or by its own authority, shall make a judicial decision of disqualification.36

CCP Article 24: Challenge to Judge (動員)

(1) If there are circumstances with regard to a judge that would prejudice the impartiality of a judicial decision, a party may challenge such judge.

(2) A party, if he/she, in the presence of a judge, has presented oral arguments or made statements in preparatory proceedings, may not challenge the judge; provided, however, that this shall not apply where the party did not know of the existence of any grounds for challenge or where any grounds for challenge occurred thereafter.37


A judge may, in the cases prescribed in paragraph (1) of Article 23 (Disqualification of Judge) or paragraph (1) of Article 24 (Challenge to Judge) of the Code, withdraw by obtaining the permission of the court that has the power of supervision.38

These provisions are not new inclusions in Japanese law. At least as to Articles 23 and 24, their substantive terms have been

36. MINSOHŌ (C. CIV. PRo.) art. 23.

37. Emphasis added. MINSOHŌ (C. CIV. PRo.) art. 24. But see supra note 31 (suggesting “fairness” as a better English translation than “impartiality.”)

essentially unchanged for over one hundred years.\textsuperscript{39}

Moreover, the terms here should not be surprising to observers from the U.S. legal world. The provisions are generally comparable to statutory provisions in a sample of three states and federal law in U.S. civil procedure,\textsuperscript{40} except that these U.S. codes of judicial conduct go further by adding into consideration the appearance of prejudice.\textsuperscript{41}

\textbf{B. Cases}

Seven fact scenarios have been addressed by Japanese courts in published judicial decisions. All of the cases are first presented in a summary digest, roughly chronological by court, followed by an overview discussion.

\begin{itemize}
\item\textsuperscript{39} The original 1890 provisions, numbered as Articles 35–37, were written in the more archaic language of Meiji period Japanese legislation. Apart from renumbering, modernization of the writing style, and the merging of articles 35 and 36 to two paragraphs of a single Article 24 in 1996, the substantive language of these provisions is entirely unchanged. The back history of Rules of Civil Procedure Article 12 was not available for this writing.
\item\textsuperscript{40} See, e.g., 28 U.S.C.S. §144 (Matthew Bender & Co., through P.L. No. 112-263 (excluding P.L. 112-239)), HAW. REV. STAT. ANN. §601-7 (LexisNexis 2012), N.Y. JUD. CT. ACTS §14 (Consol. 2012), WASH. REV. CODE ANN. §4.12.040 (LexisNexis 2012). There are nonetheless minor variations. Like Japan’s CCP Article 23, Hawai’i and New York specify circumstances for disqualification. U.S. federal law and Washington’s provision are entirely unspecific, akin to CCP Article 24. For example, in Washington, judges are barred when it is established that "said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." Id. As well, Hawai’i and Washington explicitly consider the possibility of a prejudicial nexus to legal counsel in the litigation, but U.S. federal law and New York, like Japan, do not.
\item\textsuperscript{41} U.S. Canons 2 and 3; Hawai’i Canon 2.11, Washington Canon 2.11, New York Canon 100(E). See generally Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 MARQ. L. REV. 949 (1996); ALFINI ET AL., supra note 34, GARWIN ET AL., supra note 34. Japan’s Court Act addresses judicial conduct only as to prohibiting judges’ political and commercial activities and the secrecy of deliberations; there is no counterpart to the U.S. codes of judicial conduct. Saibansho hō [Court Act], Law No. 59 of 1947, arts. 52 (Prohibition of Political Activities, etc.) and 75 (Secrecy of Deliberation).
\end{itemize}
1. Art. [23]: Disqualification pursuant to having "participated in the prior level of the case" requires that the judge had a formal role in the final decision at the prior level.

Supreme Court of Japan, 1953; accord, 1964.

Facts: Judge A had presided over much of the proceedings in the original trial in Sapporo District Court, Otaru Branch, but was promoted and transferred to the Sapporo High Court prior to the conclusion of the trial proceedings. Although Judge A's investigative dossiers were referenced in the factual findings ultimately handed down with the first trial verdict, Judge A was not a signatory on that ruling.

Judge A was then assigned to hear the case as a member of panel hearing the case on appeal to the Sapporo High Court.

Held: Appeal to Japan's Supreme Court dismissed.

Rationale: Although Judge A had been involved in the original trial, this did not constitute having "participated in the prior level of the case" within the contemplation of CCP Article [23] because he was not a signatory on the final ruling.

 Accord: In a 1964 decision by the Supreme Court of Japan's 3rd Petty Bench, the court provided a modicum of clarification. Facing similar facts as had occurred in the 1954 decision, the Court

42. Saikō Saibansho [Sup. Ct.] June 26, 1953, Shô 26 (o) no. 759, 7 MINSHÔ No. 6 783, 9 SAIBANSHÔ MINJI 565.


45. This is not reported in the published decision, but appears in Professor Michio Makoshi's commentary regarding the case. Michio Makoshi, Zenshin Ni Kanyō Shita Saibankan No Jyoseki (Judicial Challenge pertaining to a Judge's Participation in Prior Proceedings of the Case), 76 BESSATSU JURISTO (MINJI SOSHÔHÔ HANREI HYAKUSEN DAI 2 BAN) [100 SELECT CASES IN CIVIL PROCEDURE] 36 (2d ed. 1982).

46. One can only wonder whether judicial administrators realized (and simply ignored) the potential conflict in appointing Judge A to this case after his appointment to the Sapporo High Court.

47. Saikô Saibansho [Sup. Ct.] June 26, 1953, Shô 26 (o) no. 759, 7 MINSHÔ No. 6 783, 9 SAIBANSHÔ MINJI 565.

48. See supra note 46 (questioning how the same judge came to be appointed at
explained that CCP Article [23]'s "'participated in the case' means formal participation in the exercise of the national will that is the trial, i.e., deciding the verdict or preparing the judgment decision."\textsuperscript{49}

2. Art. [23]/[24]: Familial relation to one party's legal counsel (presiding judge was the son-in-law of prevailing party's counsel) neither disqualifies a judge under Article [23] nor gives ground for challenge under Article [24].

Supreme Court of Japan, 1955.\textsuperscript{50}

\textbf{Facts}: Judge A presided over the proceedings of a three-judge panel at the Tokyo High Court, which ruled in favor of party B. Counsel for the losing party learned subsequently that Judge A was the son-in-law of his opposing counsel and appealed to the Supreme Court of Japan on the grounds that the High Court decision had been illegally decided owing to the participation of a judge who lacked lawful authority to have participated owing to Articles [23] and [24].\textsuperscript{51}

\textbf{Held}: Appeal to Japan's Supreme Court dismissed.

\textbf{Rationale}: In what must be described as genuinely minimalist, the following declaration was the entirety of the Court's elucidation of its rationale:

Appellant's argument on point number five is without reason because the fact that the judge who was the presiding judge in the trial court was the son-in-law of the lawyer for the appellee partnership is not among the provisions of Code of Civil Procedure Article [23] and furthermore we cannot say that there are circumstances regarding the judge which would directly (直ちに, tadachi ni) implicate the terms of Article [24] by impairing

\textsuperscript{49} Saikō Saibansho [Sup. Ct.] Oct. 13, 1964, Shō 39 (gyo-tsu) no. 28, 18 Minshū No. 8 1619, 394 Hanjī 64, 169 Hanta 131 (emphasis added).

\textsuperscript{50} Saikō Saibansho [Sup. Ct.] Jan. 28, 1955, Shō 28 (o) no. 277, 9 Minshū No. 1 83.

\textsuperscript{51} This is a mandatory appeal for the Supreme Court to resolve. "Jōkoku-appeal shall always be deemed to have the ground therefor in the following cases: . . . (2) In case a judge who shall not participate in a judgment by virtue of the law has participated in the judgment." Minshō (C. Civ. Pro.) art. 395 (Law No. 29 of 1890) (EHS Law Bulletin Series trans. 1992). The provision remained essentially unchanged in the code following the 1996 revision. Minshō (C. Civ. Pro.) art. 312 (2) (1996).
the fairness of the trial."\(^{52}\)

3. Art. [24]: Participation in judicial rulemaking that is the subject of the instant litigation does not create grounds for judicial challenge.

**Supreme Court of Japan, 1991.**\(^{53}\)

**Facts:** Plaintiffs, seeking the revocation of judicial rules promulgated by Japan’s Supreme Court that had ordered the closing of the District Court and Family Court branch offices in Amagi City, challenged the ability of the justices who had served on the Judicial Assembly that had originally approved the rules to then decide the validity of the same under CCP Article [24].\(^{54}\)

**Held:** Appeal to Japan’s Supreme Court dismissed.

**Rationale:** In light of the fact that judicial rulemaking is formally carried out by the Judicial Assembly, a body constituted by all of the judges or justices assigned a particular court,\(^{55}\) it was inevitable that the Justices of the Supreme Court would have been participants in the Supreme Court’s rulemaking. At the same time, the Court is constitutionally assigned to be the final arbiter of all justiciable disputes in the nation. Accordingly, there were no “circumstances that would prejudice impartiality” since the justices were carrying out their intended roles pursuant to the Constitution and the Court Act (which establishes the Supreme Court’s Judicial...

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\(^{52}\) Saikō Saibansho [Sup. Ct.] Jan. 28, 1955, Shō 28 (o) no. 277, 9 Minshō No. 1 83, point 2. Arguably, this holding adds a wrinkle to the statutory interpretation. The adverbial 直ちに / tadachi ni, translated here as “directly,” inserts a notion of narrowness into the judicial scrutiny of complaints; this is not explicitly provided for in the statutory text of Article [24]. Kenkyusha translates tadachi ni with words including “at once, immediately, directly, [and] forthwith.” Kenkyūsha shin wa-ei daijitoten (Kenkyusha’s New Japanese-English Dictionary) 1696 (4th ed. 1974).


\(^{54}\) Only three of the five justices on the challenged petty bench had been involved in the rulemaking; two were newer appointments who had come onto the bench after the rules were enacted. *Id.*

\(^{55}\) See, e.g. Saibansho [Court Act], Law No. 59 of 1947, art. 12 (“(1) The Supreme Court shall execute judicial administration affairs through deliberations of the Judicial Assembly and under the general supervision of the Chief Justice of the Supreme Court; (2) The Judicial Assembly shall consist of all Justices, and the Chief Justice of the Supreme Court shall be the chairperson.”); but see id. art. 13 (“The Supreme Court shall have a General Secretariat, which shall handle administrative of the Supreme Court.”). See generally Levin, *supra* note 2, at 276 n.56 & 308-09 n.190.
Assembly).

Given that the Supreme Court intrinsically (本来, honrai) will enact Supreme Court rules and at the same time, our current judicial system intends for the Court to be addressing litigation concerning those rules that properly arises on appeal, it is appropriate to understand that there can be no petition for challenge based upon Code of Civil Procedure Article [24] with regards to a justice of the Supreme Court who participated in a Judicial Conference owing to their having participated in that Judicial Conference where the rule in question was enacted.56

4. Art. [24]: Alleged bias expressed in public statements, reflecting a general opinion but not an opinion about the pending matter, does not present circumstances which would prejudice impartiality under Article [24]. Parties' involvement with pending impeachment proceedings pertaining to other litigation against a judge similarly do not present such circumstances nor grounds for Article [23] disqualification and Article [24] challenge.

Tokyo High Court, 1970.57

Facts: In labor-related social justice litigation,58 petitioners filed a judicial challenge petition pursuant to CCP Articles [23] and [24] raising several grounds:

1) that Judge A,59 having previously expressed antagonistic

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58. The underlying social justice aspect of the litigation is apparent from the fact that the case, on appeal to the Supreme Court, included 34 co-counsel supporting the lead attorney on the pleadings. Saiikô Saibansho [Sup. Ct.] Sept. 29, 1970, Shô 45 (ku) no. 191, 100 Minshû 499.

59. Judge A was Tokyo High Court Judge Kenta Hiraga, who was genuinely infamous at the time (on the level of television and front-page national news) for having giving guidance to a subordinate judge ("advice to a junior colleague") that was viewed as directing a pro-government result in a hugely significant case concerning the constitutionality of Japan's self-defense forces. See Levin, supra note 2, at 262-63 and sources cited there. Days after scandal surrounding these events became public in October 1969, Judge Hiraga was transferred to Tokyo High Court. Although impeachment proceedings followed with complaints against both Judge Hiraga and the receiving Judge Shigeo Fukushima, Judge Hiraga suffered only a formal reprimand. See Naganuma Jiken Hiraga Shokan: 35 Nen Me no Shôgen
views in media (i.e., magazines and journals), demonstrated a bias regarding the underlying issues that could be reasonably anticipated to factor into his decision making in the particular case,

2) that the plaintiffs' and their counsel's involvement with pending impeachment proceedings against Judge A would either generate bias against them warranting challenge under Article [24] or serve as grounds for his disqualification under Article [23].60

3) that Judge A demonstrated actual hostility and bias against the petitioners when ruling on their request for his recusal, and

4) that the various grounds raised in the complaint should be synthesized into a compound rationale (in essence, an argument of the whole being greater than the sum of its parts).61

Held: Rejected in Tokyo High Court on all grounds.62 Appeal to Japan's Supreme Court dismissed.63

Rationale: Although the Supreme Court's dismissal was not particularly explanatory, the Tokyo High Court's ruling in the case provides the most extensive discussion that can be found

[THE NAGANUMA CASE AND THE HIRAGA MEMO: THIRTY FIVE YEARS' OF BEARING WITNESS] (Fukushima Shigeo et al. eds., Nihon Hyoronsha 2009) at 5 (timeline) and 346 (impeachment committee findings). Looking from today's perspective, it seems rather remarkable that Judge Hiraga was so quickly assigned to yet another significant social justice dispute in the courts.

60. John Haley advises that impeachment complaints are not particularly uncommon in Japan. Haley, supra note 44, at 113 (number of petitions is "surprisingly high."). Most, however, are brought by dissatisfied litigants, and "rarely if ever is the personal integrity of the judge challenged." Through the time of Haley's writing, only four judges in postwar Japan had been impeached and ultimately removed from office. Id.


62. Id.

63. Saikō Saibansho [Sup. Ct.] Sept. 29, 1970, Shō 45 (ku) no. 191, 100 MINSHŌ 499. The Supreme Court's opinion first rejected the Article 32 constitutional claims, finding that Article 32 goes no further than guaranteeing the right to a trial in a court of law. The analysis bifurcated the remaining arguments. As to two which appeared to be constitutional, the Court held that their "quality in fact is nothing more than a claim that there was a simple violation of the laws and regulations, and therefore, meritless." As to the one remaining claim: "It is difficult to gather the gist of the points there, but... none can escape being rejected."
elaborating on Articles [23] and [24].

Ultimately denying the petition, the court's explanation included the following insights:

[T]he grounds for challenge in CCP Article [24]... means situations where between the judge and the concrete facts [of the case], there are specific personal or material connections which, objectively regarded, would bar an expectation of a fair trial (公正な裁判を期待しきないような人間的の特に特殊な関係がある).

The judicial challenge system is intended to add flexibility (弾力性をもたせため) as a supplement to [Article 23's] judicial disqualification provisions. The system has the same purpose as the judicial disqualification system, which is to ensure fairness in the exercise of judicial power and preserve the people's trust in the courts (裁判権行使の公正と裁判に対する国民の信頼を担保する目的).

Consequently, as to the grounds for judicial challenge, the provision is not standardized as are the grounds for judicial qualification; instead [determining] circumstances that would prejudice impartiality is said to be entrusted to the judgment of the courts (裁判所の判断に委ねている). Article [24]'s bounds cover the gap between the provisions for disqualification as provided for in Code of Civil Procedure Article [23] and what is called for by the purpose of the system as described above.

Following this general explication, the Court's ruling used strikingly dismissive language with regards to the various grounds raised by the petition.

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65. Id. (emphasis added, paragraph breaks also added for English language reading clarity).

66. The politically charged environment of Japan's legal system, particularly at the time of the earlier cases, would surely have been a factor in drawing out the language used in cases at least through the 1970s. As Professor Yasuhei Taniguchi has explained, a strong current of mistrust separated the bench and bar in the early postwar years. In contrast to the post-war unified track for legal education of judges and lawyers, the earlier generation of pre-war judges and lawyers launched their careers from separate institutional paths. This social gap was exasperated owing to a significant cohort of lawyers being openly associated with communist and socialist political movements, and movement causes underlying many social justice cases. Though legacy traces of this history may remain, the bold force of the polarized dynamics has clearly dissipated. Levin, supra note 2, at 316-17 (citing Yasuhei Taniguchi, The Changing Image of Japanese Practicing Lawyers, in EMERGING
Where points I and II raised complaints that Judge A had demonstrated bias through prior public remarks, the Court held:

As to Judge A's words and actions that have been indicated [as problematic] by the petitioners, these were nothing more than personal expressions in magazines and journals of the judge's impressions generally about the law (法律上の一般的見解ないし所感等表明したに過ぎないもの) with no connection to the instant litigation. Therefore, they cannot serve as the factual grounds for a judicial challenge.

Point III raised complaints that Judge A should be subject to challenge under Article [24] or be disqualified under Article [23] with regards to a pending Judicial Impeachment Complaint that the petitioners and their counsel had participated in filing for.

As to the Article [24] claim:

It is clear that this rationale in and of itself involves no specific personal connection between the judge and the instant case. In this manner, with no specific connection linking to the actual case, it being merely a complaint for impeachment by the parties and legal counsel in this case against same judge as in this case, it should be said that this does not give rise to circumstances with regards to the judge which, objectively regarded, would directly interfere in the fairness of the trial. The current situation derives from the petitioners' and their counsel's risk burden in having filed the impeachment complaint, brought on by their own decision; they in essence consented to the facts which have led to their worrying about disadvantageous trial proceedings owing to the judge's animosity. Accordingly, this cannot be recognized as grounds for judicial challenge regardless of how great their sense of insecurity.

And as to the Article [23] claim:

[I]t is clear beyond even the need for explanation (論ずるまでもなく明らかである, ronzuru made mo naku akiraka de aru) that an impeachment petition against the presiding judge

CONCEPTS OF RIGHTS IN JAPANESE LAW 223, 228-30 (Harry N. Scheiber & Laurent Mayali eds. 2007).


68. Perhaps intentionally drawing upon the prior precedent holding, the Japanese phrasing here, 直ち / tadachi ni, is the same as in the Supreme Court's 1955 ruling in the son-in-law case, discussed supra.

brought by a party or their counsel as in this case does not give rise to grounds for disqualification pursuant to Code Of Civil Procedure Article [23].

Point IV raised complaints that Judge A should be subject to challenge under Article [24] having demonstrated actual hostility and bias against the petitioners when ruling from the bench on their request for his recusal.

[W]e cannot conceivably recognize (到底認められない, tōtei mitomerarenai) that it represents the risk of an unfair trial or that Judge A had hostility or prejudice against the petitioners just because, as the presiding judge, he did not accept the petitioners' request as to the court's prior configuration and his recusal.

5. Art. [24]: Shakumeiken guidance to counsel for one party to detriment of opposing party did not demonstrate bias or unfairness to the opposing party.

Tokyo High Court, 1971.

Facts: After two trial court judges gave allegedly advantageous guidance to counsel representing the Governor of Tokyo as to additional legal claims available under the factual evidence that had been already proffered, the opposing party objected that the circumstances demonstrated prejudice implicating the judges' impartiality in the proceedings.

Held: Appeal to Tokyo High Court dismissed.

Rationale: The judges' guidance to one party was fitting to the

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70. Id. (emphasis added).
71. Id. (emphasis added).
72. Id. The idea that the various points could be synthesized into some larger more significant rationale was also rejected outright.
73. Shakumeiken guidance, 釣明権, represents the practice of Japan's judges to provide guidance to one party in a civil matter as might advance that party's presentation of the facts or law in the case. Yūhikaku Shin Hōritsu Gaku Jiten [Yūhikaku's New Legal Dictionary] 658-59 (3d ed. 1989). This is formally expressed in the Code, via the judge's explicit authority to ask for explanations, at Minsōho (C. Civ. PRo.) art. 149. However, given Japan's limited number of lawyers and high percentage of pro se litigation, shakumeiken is viewed as means for leveling the playing field in litigation between a represented and unrepresented party. It is also seen as a means of promoting judicial efficiency as it gives the court the means to streamline and direct litigation to the most meaningful factual or legal issues.
judicial role and did not demonstrate a bias or unfairness to the opposing party.

There is no room for doubt that it is within the proper range of *shakumeiken* authority for courts to suggest alternative legal claims to a party in circumstances where a different legal claim can be contemplated from the documentary evidence, etc. that has been already produced [in the case]. And so in this case as to Judges A and B, it cannot be said that there were circumstances with regards to either judge that would prejudice the impartiality of a judicial decision. 75

6. **Art. 24: Alleged bias demonstrated in prior litigation pertaining to identical issues did not present circumstances which would prejudice impartiality under Article 24.**

Osaka District Court, 2001.76

**Facts:** Judge A77 was the presiding judge and Judge B was a judge on the panel in a set of highly publicized workplace gender bias suits filed in Osaka in the mid-1990s. The two judges ruled against the plaintiffs with factual findings and legal holdings strongly antagonistic to workplace gender bias claims. Given that the two judges remained assigned to a pending case, Plaintiffs' counsel petitioned under CCP Article 24 to have Judges A and B removed from the remaining case in light of a risk of prejudice purportedly demonstrable from their earlier rulings.

**Held:** Article 24 petition for judicial challenge denied.

**Rationale:** Fact findings are inherently case specific and legal conclusions are handed down in the exercise of a judge's professional responsibility. Accordingly, a judge's prior fact findings and legal conclusions, even in similar litigation, would ordinarily not present circumstances which would prejudice impartiality under Article 24. The sole exception would be a history

75. Id.
77. Professor Hiroko Hayashi, who participated in the case as an *amicus curiae* in support of the plaintiffs, identifies Judge A as Tetsuo Matsumoto. Professor Hayashi believes that Judge Matsumoto demonstrated "strong gender-bias against women, especially women's role in the society and family life." E-mail to author from Hiroko Hayashi, Professor of Labor Law, Fukuoka University Law School and President-elect of Miyazaki Municipal University (Nov. 28, 2012) (on file with author).
revealing a severe deviation from social conventional wisdom in the judge's views.

The judicial challenge provision of "circumstances with regards to a judge that would prejudice impartiality" awakens when there are concerns, which when viewed objectively, suggest a likelihood of unfairness (不公正な裁判がなされるであろう) in the trial proceedings...

[As to judge's findings and legal determinations in prior unrelated cases, then,] except in the rare situation where specific circumstances reflect bias or prejudice in the involved judges such as would give rise to a risk of unfair judgment contrary to social conventional wisdom such as findings or judgments being considerably slanted away from societal common sense, it is understood that the rulings of the involved judges in prior unrelated cases cannot be a reason for judicial challenge.

7. Art. [23] [24]: Presiding over a State Redress Act claim arising from that same judge's ruling in earlier litigation may present circumstances for judicial disqualification under Article [23].

Kobe District Court, 1983 (judicial challenge denied); if

BUT Takamatsu High Court, 2002 (reversing district court and recognizing grounds for disqualification).81

Kobe District Ct., 1983.

Facts: In an initial matter, Judge A had ruled against Plaintiff B and dismissed Plaintiff B's case. Plaintiff B then brought several collateral actions pursuant to Japan's State Redress Act against the

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78. In Japanese: "認定・判断が社会常識から著しく偏ばしており、当該裁判官が当該事件について社会通念上不公正な裁判がなされるとのおそれを生じさせるような偏見や予断を抱いている等の特別な事情がうかがわれる例外的な場合を除いて。"


82. Kokka baishō hō [State Redress Act], Law No. 125 of 1947. This law, codifying and expanding pre-war judicial precedent, is the implementing statute
state seeking damages for the alleged wrongful public act of a state employee (Judge A) for ruling against Plaintiff B in the first action. Plaintiff B also brought a new case before the court pertaining to his marriage. When Judge A was assigned to preside over the new action, Plaintiff petitioned under CCP [24] to have Judge A removed from the case in light of Judge A's being a defendant in the state redress actions.

**Held:** Article [24] petition for judicial challenge denied by trial court.

**Rationale:** There is qualitative difference between civil actions where a judge is a defendant concerning his private interests and civil actions where a judge is a defendant only as to his public acts in carrying out judicial duties. Apart from "special circumstances," pending state redress claims do not present circumstances which call for removing a judge in unrelated litigation.

To begin with, we begin with a review of the meaning of the claim in petitioner's challenge owing to "Judge A being the defendant in separate matters brought by petitioner." According to the record in the case, the separate matters claimed by the petitioner (Kobe District Court Toyooka City Branch case numbers 29, 30, 32, 33, 35 seeking compensatory damages) are all complaining of impropriety in the fact-finding and legal decision-making as actually carried out by Judge A in case number 103, with the claims seeking state redress against the state and Judge A based upon these complaints.

However, in cases where there is a relationship between a party opposing a litigant on the one hand and presiding over a case concerning that litigant on the other hand, this would be limited to ordinary common civil litigation matters where the parties are divided by their private interests. In a case such as a state redress claim as here, entirely focused upon how the judge carried out his

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83. It is unclear what the initial litigation addressed, though it seems a likely guess that Judge A's prior ruling also concerned Plaintiff B's marriage.

84. Köbe Chihō Saibansho [Köbe Dist. Ct.] Oct. 28, 1983, Shō 58 (mo) no. 1038, 1109 HANJI 126, 517 HANTA 191. The court notes this purported exception, but does not offer any explanation of what kinds of "special circumstances" (in Japanese, 特段な事情がない限り) would call for a different result.
public duties, (and what's more the case decisions and the general academic consensus rejecting a judge's personal liability for damages pursuant to the State Redress Act), the particular quality of that kind of action is that, except in special circumstances (*if* $\text{not}$), this alone cannot give rise to grounds for judicial challenge.\textsuperscript{85}

\textit{Takamatsu High Court, 2002}

\textbf{Facts:} Judge A was the presiding judge of a High Court three-judge panel that ruled against Plaintiff B and dismissed Plaintiff B's case. Plaintiff B then brought a collateral action pursuant to Japan's State Redress Act\textsuperscript{86} against the state seeking damages for the alleged intentional wrongful public act of a state employee for the initial ruling against Plaintiff B.\textsuperscript{87} Judge A (then a judge on the Takamatsu District Court) was assigned to preside over the trial against the state, arising in part on claims pertaining to his earlier ruling in Plaintiff B's previous case.\textsuperscript{88} Judge A then ruled against the Plaintiff and dismissed his later case. Plaintiff appealed this further loss to the High Court.

\textbf{Held:} The Takamatsu High Court \textit{reversed and set aside} Judge A's decision and remanded for retrial of the collateral action litigation before a new judge.

\textbf{Rationale:} Although Judge A was technically not a party in the collateral litigation against the state, he was nonetheless an interested party within the meaning of CCP 23(1). This was because, if Plaintiff B prevailed in the collateral action for wrongful action in the first matter, and it could be proven that Judge A's action had been intentional or grossly negligent, the state would have the right under State Redress Act Article 1(2) to seek indemnification from him for the judgment awarded. Accordingly,

\textsuperscript{85} Id. (emphasis added).

\textsuperscript{86} Kokka baishō hō [State Redress Act], Law No. 125 of 1947.

\textsuperscript{87} This collateral action sought damages with regards to two prior matters. Judge A appears to have only been involved with one of the two.

\textsuperscript{88} Judge A's career promotional track most likely took him from being presiding judge of a single High Court panel to a senior role overseeing the entire Takamatsu District Court, but details are not immediately available. Assuming that he was in a senior administrative role at the District Court (and therefore carrying a reduced case load), one can wonder if it was merely coincidental that he was assigned to preside over Plaintiff B's later case. In particular, if in fact Judge A went out of his way to be assigned to the case, then it would seem that Plaintiff B's concerns of a preexisting bias might have been reasonably founded.
Judge A's potential to be liable to the state made him an obligor for redemption (償還義務者/shôkan gimusha), one of the specifically listed situations in Article 23(1) that compels disqualification. Having not stepped down from the case, the original trial judgment in the collateral action was reversed pursuant to CCP Article 306 and the case remanded for a retrial under a new judge pursuant to CCP Article 307.

C. Discussion

1. Observations from Judicial Disqualification and Challenge Cases

This set of cases, representing the total body of case law regarding the substantive standards of CCP Articles 23 and 24, opens a window revealing the meaning of fairness in Japanese law through concrete decisions of Japan's judges in their own words.

A number of observations are available.

First, the courts appear willing to draw upon formalistic determinations that inflexibly address the statutory language to the detriment of judicial challenge claims. For example, contrary to the rulings in the first cases above, it seems at least a plausible interpretation of Article 23 that a judge who had presided over months or years of ongoing litigation, prepared factual dossiers, etc., but transferred away before the final ruling was officially handed.

89. Minsohô (C. Civ. Pro.) art. 306 ("If the procedures followed by the court of first instance when making a judgment are in violation of any Acts, the court of second instance shall revoke the judgment of first instance.").

90. Minsohô (C. Civ. Pro.) art. 307 ("The court of second instance, when revoking the judgment of first instance that has dismissed the action as unlawful without prejudice, shall remand the case to the court of first instance; provided, however, that this shall not apply where additional oral arguments concerning the case are not necessary.").

91. See supra note 33 (explanation of search methodology).

92. Formalism is not a given. The courts have interpretively traveled beyond statutory phrasing when it fit the purpose of addressing abusive or incessant petitions for judicial challenge. For example, despite the unambiguous text of CCP Article 25 that "a judge may not participate in making a judicial decision on the disqualification of or a challenge to him/herself," at least two lower courts have upheld a judge's spontaneous bench ruling denying an incessant Article 24 petitioner's challenge without staying the proceedings for a panel of uninvolved judges from the court to resolve the petition. Tôkyô Kôtô Saiibansho [Tôkyô High Ct.] Jan. 16, 1964, Shô 38 (ra) no. 746, 15 Kaminshô No. 1, 15 Tôkô Jiho Mînjî No. 1; Osaka Chihô Saiibansho [Osaka Dist. Ct.] March 12, 1966, Shô 24 (wa) no. 510, 17 Kaminshô No. 3.4 138, 455 Hanjî 50, 191 Hanta 197.
down, would be seen as having "participated in a prior level of the case." Similarly, it again seems plausible that there would be a potential for unfair bias when the presiding judge of a three-judge appellate panel is the son-in-law of the counsel for one party in the litigation. Nonetheless and particularly in these early cases, the case holdings demonstrated a remarkably narrow acknowledgement of the potential for bias warranting disqualification or upholding a judicial challenge.

Second, the courts appear strikingly comfortable with minimal articulations of their reasoning in rejecting petitions for disqualification or judicial challenge.\(^3\) I have previously joked that the 1955 son-in-law decision mimicked former U.S. First Lady Nancy Reagan famous exhortation to "just say no."\(^4\) Without meaning any disrespect, this seems to be generally consistent throughout the body of decisions reported here. All but two were decided with the court's declarations in summary conclusions and really only one, the Tokyo High Court decision of 1970, provided elucidation into its interpretation of the purpose, meaning, and best application of the statute.\(^5\)

Third, several of the holdings were framed in language that was dismissive, and in at least one case severely dismissive, of the claims

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\(^3\) The 1991 judicial rulemaking case seems especially notably for deftly avoiding any exploration of the meaning of impartiality. By simply setting the justices' legally designated duties as being *ipso jure* legitimate and *ipso facto* superior to Article 24's dictates, the question of whether there were circumstances that would prejudice impartiality escaped substantive attention entirely. See *supra* text accompanying notes 53-56. Moreover, the Court could have chosen an alternative path. Although it is not historical practice, nothing in the Court Act appears to bar a justice being substituted in from another petty bench and the Court could thus establish rules allowing for substitution to address circumstances that would prejudice impartiality. *See* Saibansho hō [Court Act], Law No. 59 of 1947, arts. 9 (Full Bench and Petty Bench) and 10 (Examination of the Full Bench and Petty Bench).

\(^4\) Levin, *supra* note 2, at 304.

\(^5\) Even there, the court's conclusion took back the opening provided in the dicta when it expressed that these matters are, in the end, simply entrusted to the judgment of the courts. In the Osaka Gender Discrimination case, the court briefly explained Article 24 with a seemingly broader vision (as addressing "concerns, which when viewed objectively, suggest a likelihood of unfairness in the trial proceedings") before closing the door with a narrow standard as to the question it was called upon to address. Nonetheless, that decision was also at least modestly revealing of the court's rationale. Tōkyō Kōtō Saibansho [Tōkyō High Ct.] May 8, 1970, Shō 45 (u) no. 283, 590 HANJI 18; Ōsaka Chihō Saibansho [Ōsaka Dist. Ct.] May 18, 2001, Hei 13 (mo) no. 2356, 1072 HANTA 249.
raised. (The Tokyo High Court particularly stands out, with each of the petitioners' various points being forcefully shut down. In any legal system, the legal method is fundamentally an inquiry into the evidence of the law from the texts, judicial opinions, and scholarly commentary. Thus, any lawyer facing a question regarding either Article 23 or 24 today would surely draw a chill from the textures and tones of these decisions when assessing the likelihood of success in raising a similar issue to the court. Moreover, the lawyer's professional responsibility demands honest contemplation of possible judicial retribution; the Tokyo High Court has given clear notice that this risk is assumed by the moving party.

Rights discourse is also notably absent. Despite the explicit textual inclusion of an ostensible due process right in Japan's Constitution, all of the cases are presented under statutory analysis of the Code of Civil Procedure and no holdings consider the Constitution's Article 32 in their rationale. International human rights treaties, which are periodically referenced in Japan's judicial discourse, are similarly unmentioned.

96. As noted supra note 66, the rancor was almost certainly reflecting the politically charged environment of Japan's legal system at the time. Nonetheless, the harsh tone against judicial challenge petitions in those earlier opinions remains on display for lawyers and judges assessing the state of the law today.

97. See supra text accompanying notes 66-72. In the prior participation cases as well, supra text accompanying notes 42-49, both rulings called out the arguments raised on appeal as being nothing more than "the appellants' peculiar opinions" (独自の見解).

98. Judges researching the issue would correspondingly see the same evidence when assessing their choices in how to respond to requests for recusal and petitions for disqualification or challenge.

99. Again, this is not meant to impugn Japan's judges, but to recognize honestly the inherent foibles of the human ego. See, e.g., FLAMM, supra note 32, §1.7.

100. "They in essence consented to the facts which have led to their worrying about disadvantageous trial proceedings owing to the judge's animosity." Tōkyō Köto Saibansho [Tōkyō High Ct.] May 8, 1970, Shō 45 (u) no. 283, 590 HANJĪ 18.

101. Contrast FLAMM, supra note 32, §2.5 (presenting cases drawing upon constitutional due process grounds for judicial disqualification in the U.S.). Flamm also reports that "determinations are rarely made on due process grounds," but this is owing to state and federal legislation providing stricter standards. Id. at 34-35.


103. Perhaps this derives from the fact that all but one of the decisions rejected the various petitions raised and that rights discourse would be more likely to be
Finally, in light of both the formalistic and narrow perspectives, and the reticence to provide careful explanation, what seems most dramatically absent is any contemplation of the appearance of bias as a factor in the jurisprudence surrounding Articles 23 and 24. The most significant deviations are arguably the 1970 Tokyo High Court decision and the 2001 Osaka Gender Discrimination Case, but the exceptions there essentially prove the rule. The Tokyo court noted the importance of "the people's trust in the courts", before setting an absolutist standard that there be "concrete facts [of the case]... which, objectively regarded, would bar an expectation of a fair trial."\textsuperscript{104} The Osaka court ostensibly set out a more open review for "concerns, which when viewed objectively, suggest a likelihood of unfairness" but shut the door with a severely narrow standard addressing the facts in the case.\textsuperscript{105} Under either articulation instances, the appearance of bias "in which the judge's impartiality might reasonably be questioned" as is used in U.S. federal courts, would apparently be insufficient.\textsuperscript{106}

In short, these cases show a set of circumstances where Japan's judges seem to be comfortable setting the bounds of fairness for civil justice in Japan internally, opaquey, and drawing strictly upon an internalized self-regard for their professional capacities to decide matters fairly. This is, as Professor Daniel Foote has already aptly observed, a declaration to the public to "Trust Us."\textsuperscript{107}

\begin{itemize}
\item Presented in a decision granting a petition. Rights discourse, though absent here, is anything but foreign in the Japanese legal socio-legal setting. See, e.g., \textsc{Eric A. Feldman}, \textit{The Ritual of Rights in Japan: Law, Society, and Health Policy} (2000), and \textit{Emerging Concepts of Rights in Japanese Law} (Harry N. Scheiber & Laurent Mayali eds. 2007)
\item \textsuperscript{104} Tokyō Kōtō Saibansho [Tōkyō High Ct.] May 8, 1970, Shō 45 (u) no. 283, 590 HANJI 18 (emphasis added).
\item \textsuperscript{105} Ōsaka Chihō Saibansho [Ōsaka Dist. Ct.] May 18, 2001, Hei 13 (mo) no. 2356, 1072 HANTA 249.
\item \textsuperscript{106} U.S. Code of Judicial Conduct, Canon 3. Alfini et al. provide a clear explanation: "This standard for disqualification when objective appearance casts reasonable doubt upon impartiality even though the judge in question subjectively feels that he or she can act fairly and evenhandedly." Alfini \textsc{et al.}, supra note 34, 4-11 (citations omitted); see generally Cynthia Gray, \textit{Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility}, 28 \textsc{U. Ark. Little Rock L. Rev.} 63 (2005); Flamm, \textit{supra} note 32, ch. 5; Alfini \textsc{et al.}, \textit{supra} note 34, §4.04; Garwin \textsc{et al.}, \textit{supra} note 34, 58-69.
\item \textsuperscript{107} Daniel H. Foote, \textit{Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?}, 66 \textsc{Ho-Shakaigaku [Sociology L.]} 128, 151 (2007). The Tokyo High Court literally expressed this when explaining that the bounds of Article 24 are "entrusted to the judgment of the courts." See \textit{supra} text accompanying notes 57-65.
\end{itemize}
2. Analytical Limitations and Some More Tentative Hypotheses

Before moving on, it is important to acknowledge what we do not know, i.e., what is not presented in the data from this body of published judicial decisions.

Most importantly, we do not know whether the paucity of published cases represents a positive or negative reality of how unreported cases have been decided. Put another way, we do not know whether trust in the courts to determine fairness bestowed by Articles 23 and 24 is warranted.108

One plausible hypothesis is that the scarcity of published decisions reflects commendable self-policing. In this line of reasoning, we can believe that Japanese judges sagely recuse themselves or are otherwise relieved of their duties when “circumstances that would prejudice impartiality” arise.109 Hence, there are few reported decisions because there has been little need for appeals. If we could view the system from an omniscient platform, we would conclude that the system admirably provides fair arbiters to litigants in Japanese courts, or at least as fair as might be reasonably hoped for from a humanly operated social system.

Alternatively, one could believe that that the scarcity of reported decisions can be attributed to a scarcity of petitions, which derives from a perception of futility on the part of litigants and/or their legal counsel in seeking a disqualification or challenge. Petitions for judicial challenge carry an inevitable risk that a challenged judge will not only remain in the case after the petition is

108. The Tokyo High Court’s explanation that these questions have been entrusted to the courts by the Code’s provisions may be valid on its face, but it does not go far enough. It is a separate question, and less clear, whether the drafters of the Code intended for Japanese courts to make their decisions so opaquely and yielding the narrow interpretations that the courts have given.

109. It is well-acknowledged by all observers that Japan’s judicial bureaucracy exercises substantial control over the work and career paths of the nation’s judges. See, e.g., Haley, supra note 44, at 114 (“As members of a close-knit elite bureaucracy, career judges are subject to an institutional system of formal and informal peer control familiar only to the military in the United States.”) Accordingly, I had anticipated learning of a mechanism, such as nonpublished internal guidelines, that would help judges in Japan address questions concerning recusal, disqualification, and challenge. However, a recently retired judge recalls there being nothing of the kind; when questions of this sort arose in his service, the judges looked to the Code, cases, and applicable legal scholarship on their own accord. E-mail to author, dated Nov. 29, 2012 (on file with author). In that case, of course, a judge would be looking for guidance from the Code provisions and case holdings presented in this paper.
denied, but that the judge will then view the moving party less favorably as a result. Accordingly, every challenge involves a risk-benefit calculation and such calculations will be processed taking into account the extant jurisprudence on this issue in the cases presented above. Under this conjecture, litigants see bleak odds in seeking a disqualification or challenge, petitions are not filed even when a fitting sense of justice suggests that they would be warranted, and the system regularly fails.

The two hypotheses offer a lead for future empirical study to assess perceptions of judges and participants, but some information is already available. Careful research has been presented in a survey of former participants in the justice system showing a mixed review. But more research, and particularly research focused on perceptions of bias, appearances of bias, and the circumstances of judicial challenge petitions filed and unfiled, remains to be carried

110. Just as was alleged about Judge Hiraga, this presumes that judges will incorporate emotional sentiments into their judicial behavior. Though the mythic lore of civil justice might contest that assumption, I accept it as an undeniable truth long ago established by the great legal realists and repeatedly since. See, e.g., Karl Llewellyn, Some Realism about Realism, 44 HARV. L. REV. 1222, 1254 (1931) ("There is fairly general agreement on the importance of personnel, and of court organization, as essential to making laws have meaning."). For more recent work in this area, see Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind 86 CORNELL L. REV. 777, 780 (2000-01) ("Our research . . . identifies a more fundamental source of systematic judicial error: wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations.")

111. A June 2000 interview survey carried out for the Japanese government's Judicial Reform Council from a representative national sample of former civil trial litigants determined a mean score of only 3.13 (1 = very unsatisfied, 5 = very satisfied; SD = 1.27) and a roughly comparable inquiry in 2006 demonstrated almost identical results with regards to their evaluation of fairness of the nation's civil judicial system. Ken-ichi Ohbuchi et al., Procedural Justice and the Assessment of Civil Justice in Japan, 39 LAW & SOC'Y REV. 875, 882 (2005); MINJI SOSHÔ SEIDÔ KENKYÜKAI (STUDY GROUP ON THE CIVIL JUSTICE SYSTEM), 2006 NEN MINJI SOSHÔ RIYÔSHA CHÔSA (2006 SURVEY OF CIVIL LITIGANTS) 543 (2007) (mean score = 3.15, SD = 1.11). Of course these results were shaped by respondents' satisfaction with the outcomes they had received, but "the standardized total effect of perceived procedural fairness on the evaluation of the judicial system was larger than that of favorability of the outcome. . . . [W]hat the litigants obtained from the civil trials was not the primary influence on their evaluation of the judicial system. Instead their perception of procedural fairness of the trials was more influential in this regard." Ohbuchi et al., supra at 887. Professor Dan Foote presents a more favorable assessment: "Opinion polls of the Japanese public have consistently recorded rather high levels of respect for the judiciary." Foote, supra note 107, at 151 (citing Chuô Chôsasha (2004)).
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out.112

For the time being, given that the two scenarios are not mutually exclusive, my tentative impression is that both hypotheses have ample grounding. In other words, I believe there is truth in both lines of reasoning.

Personal conversations with judges and a handful of academics have been reassuring and confident that the system works properly most of the time.113 In this regard, I stand with Professor John Haley’s often-cited assessment that “Japanese judges are among the most honest, politically independent, and professionally competent in the world today.”114 As I have written previously, I firmly believe that “almost all of Japan’s judges, almost all the time, do their jobs just as one would hope.”115

But this high regard does not absolve the Japanese judges from being subject to mortal fates and foibles. I am not convinced their track record is perfect and it may not even be adequate. In this latter regard, I have also had many conversations with lawyers and academics who perceive a flawed system, where judges harboring unfair biases may nonetheless preside over relevant cases.116 There appears to be truth in these impressions as well.117

III. Conclusion: Looking Back after Ten Years’ Experience with Japanese Justice System Reform

The establishment of the Justice System Reform Council by the nation’s Cabinet in July 1999 initiated a new era for Japan’s legal system. Headed by one of the country’s most highly regarded

112. Grant funding institutions will be welcome to take notice here.
113. These conversations have been informal and off the record. Accordingly, the information is shared without citation and not meant to represent substantive authority on the point.
115. Levin, supra note 2, at 289.
116. As in note 113 supra, this shares anecdotal information and is not meant to present an evidenced claim.
117. The apparent lack of even internal guidelines that could help Japanese judges navigate these waters, see supra note 109, adds weight to my concerns here.
constitutional law scholars, the Council took on major structural reforms for the civil justice system, the criminal justice system, responses to internationalization, coordination of comprehensive legal support, and launched reforms concerning all elements of legal personnel training and development from the legal education system at the universities, up through the career tracks of legal professionals. In June 2001, the Council submitted its report to the Cabinet, and the real work began with twenty-one separate pieces of legislation enacted between January 2002 and December 2004 implementing pieces of the system reform proposals. Although significant components of the justice system remained untouched and critical scholars in Japan have suggested that elements of change may have been nothing more than “form over substance” or “a rapid lapse from idealism to instrumentalism,” the Reform Council plainly launched a set of significant changes to the legal system on a scale rivaled only by the Meiji and Occupation era reforms in recent Japanese history.


119. JSRC Report, supra note 6.

120. JSRC Pamphlet, supra note 118, back cover.


123. The subject is vast as well. Working from a list started by Professor Setsuo Miyazawa, William S. Richardson School of Law third-year law student Adam Mackie and I have assembled a bibliography of over 150 English-language doctrinal and socio-legal law journal articles and book chapters published in the past ten years that investigate changes brought about by the Council’s report. Mark A. Levin and Adam Mackie, Truth or Consequences of the Justice System Reform Council: An English Language Bibliography from Japan’s Millennial Legal Reforms, 14 Asian-Pac.
Thus, it was entirely appropriate that the University of California, Hastings College of Law convened this symposium coinciding with the Tenth Anniversary of the Justice System Reform Council’s report in June 2001 and more closely, the Cabinet’s approval of the Plan for Promotion of Justice System Reform in March 2002, titled “Successes, Failures, and Remaining Issues of the Justice System Reform in Japan.” This author was tasked with assessing the successes, failures, and remaining issues with regards to civil justice and alternative dispute resolution. However, given the scope of just that one component of the justice system reform initiatives, I chose to look through the lens of procedural justice jurisprudence in Japan to assess the image projected there.

While the picture is unclear, the evidence seems to warrant modest optimism.

On a minor note, the Takamatsu High Court decision of 2002 presents the first instance, groundbreaking in the Japanese context, of an appellate court reversing a trial court owing to a flawed determination to reject a petition for judicial disqualification or challenge. Given the pervasive and percussive sound of the call for justice system reform in the national public discourse of the time, there can be little doubt that the judges of the Takamatsu High Court would have perceived a changed environment wherein the courts could and should offer more transparent sensitivity to perceptions of the fairness of the judicial process. While Japan’s jurisprudence with regards to Articles 23 and 24 remains severely constrained, the Takamatsu High Court’s decision at least raised the count from zero to one and thus opened up new possibilities for litigants confronting circumstances of a potentially biased judge.

124. Civil justice and ADR engage nine subtopics in the JSRC Report: “improvement and acceleration of civil procedures, comprehensive and intensified efforts in cases involving intellectual property rights, comprehensive and intensified efforts in cases involving labor relations, reinforcement of the functions of the family courts, reinforcement of the functions of the summary courts, secured execution of rights, expansion of access to the courts, improvement of alternative dispute resolution (ADR) mechanisms, and reform of the administrative litigation system.” JSRC Pamphlet, supra note 118, 3-6.


126. Just as the number one is sometimes described as infinitely larger than zero in mathematics, the Takamatsu High Court decision surely represents a significant step forward.
Another decision, handed down by Japan’s Supreme Court in April 2011 almost precisely coinciding with the tenth anniversary of the JSRC Report, appears to be demonstrating the Court’s stronger consciousness towards fundamentality of procedural fairness in civil litigation in Japan, or at least opening a new debate on this subject. In this concluding section, I wish to briefly introduce that case, its jurisprudential foundation, and its merits in serving as a beacon for hope.127

A. The Supreme Court of Japan, 2nd Petty Bench decision of April 13, 2011 and the Requirements of (Civil) Procedural Justice

On April 13, 2001, the 2nd Petty Bench of Japan’s Supreme Court reversed a Tokyo High Court decision owing to a failure of procedural fairness in the High Court’s handling of pretrial discovery in the case.128 The lawsuit sought unpaid overtime wages. After filing suit on the claim, plaintiff sought an order for the production of documents including the plaintiff’s workplace timecard that would evidence the hours he or she had worked. Defendant objected to the plaintiff’s motion on the ground that it no longer had the timecard in its possession and thus, a discovery order should not be issued. The District Court found for the plaintiff that the timecard existed in the defendant’s possession and ordered its production. Defendant then sought an immediate interlocutory appeal at the Tokyo High Court, seeking to reverse the District Court’s factual finding that it possessed the timecard. However, the plaintiff had no notice of the appeal. Neither defendant nor the Tokyo High Court notified the plaintiff or copied the brief to him or her as required by law and it appears the plaintiff in fact had no notice of the appeal otherwise. Thus, with only the defendant’s filing in its purview presenting a \textit{prima facie} case in support of the motion, the High Court found for the defendant that the timecard did not exist in its possession and accordingly ordered

127. The 3rd Petty Bench’s rulings of May 8, 2008, pertaining to Article 32 might also be viewed as opening a jurisprudential discussion on constitutional due process. Though the majority decision offered nothing new, at least Justice Tahara’s concurrence and Justice Nasu’s dissent engaged somewhat on the meaning of the provision. \textit{See supra} note 23.

dismissal of the plaintiff's motion for production of evidence.\(^{129}\)

Plaintiff sought an immediate appeal to the Supreme Court claiming that the High Court ruling, handed down without any notice or opportunity to respond, violated its constitutional rights under Article 32 and was illegal in variance from the Code of Civil Procedure. The Supreme Court's 1st Petty Bench unanimously approved the appeal, reversed the High Court decision, and remanded for further proceedings in accordance with its ruling.\(^{130}\)

Though the appellant had raised constitutional claims, the ruling was framed strictly on statutory grounds.\(^{131}\) In relatively straightforward reasoning, the Court recognized that the High Court's fact-finding with regards to the existence of the timecard would be essentially determinative of the plaintiff's motion for production of evidence, and the failure to obtain that evidence would be essentially determinative of the ultimate result in the case.\(^{132}\) Moreover, the fact-finding of the High Court would be shaped by the plaintiff's "opportunity to advance his/her allegations and evidence," and it was precisely that opportunity that was absent owing to the lack of any notice of the appeal.\(^{133}\)

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Avoiding constitutional grounds was jurisprudentially conservative, but entirely consistent with Japan's Supreme Court's doctrine more generally. See supra text accompanying note 101; see generally Symposium, Decision Making on the Japanese Supreme Court, 88 WASH. U. L. REV. 1365 (2011). The approach was quite understandable in light of the fact that statutory grounds offered ample rationale for the holding. Moreover, in a published commentary on the case, Professor Uno has suggested that while a constitutional framing would have been theoretically possible, it was not used here owing to the interlocutory procedural setting of the appeal. Constitutional claims would ordinarily be addressed in remedying a final judgment. Matoshi Uno, Kōkokuijō no utsushi no fusōfu tō to kōkoshin ni okeru tetsuzuki hoshō (Failure to deliver notice of appeal and procedural protections for appeal proceedings), 1440 JURIST (2011) 131, 132 point 3.

\(^{132}\) "Whether or not the Petition is granted is likely to have a material influence on the policies of the parties to the suit on the merits in making their allegations and proof, as well as the determination to be made by the court.... Whether or not the appellee is found to be in possession of the Document is significant to the extent that it nearly decides the determination of the court on whether or not to order the submission of the Document, and the finding of the existence or nonexistence of such fact of possession largely depends on the allegations made and evidence produced by the parties." Saîkō Saibansho [Sup. Ct.] Apr. 13, 2011, Hei 22 (ku) no. 1088, 65 Minshū no. 3, 1530 Saibansho Jiho 1, 2119 Hanta 32, 1353 Hanta 155, 1945 Kinyō hōmu 107.

\(^{133}\) Id.
Ultimately, the absence of notice was recognized to be “clearly contrary to the requirements of procedural justice in civil procedure (明らかに民事訴訟における民事手続き的正義の要求に反するべき)” and thus illegal.\textsuperscript{134} Code of Civil Procedure (CCP) Article 2,\textsuperscript{133} noted in the Court’s list of references,\textsuperscript{136} can be plainly understood as the legal source of the identified “requirements.” Thus as noted above,\textsuperscript{137} this case represents the inaugural sailing of CCP Article 2 in Japanese Supreme Court jurisprudence in the context of rectifying what would seem to be a fundamental procedural failure with regards to notice and opportunity to be heard in civil litigation.\textsuperscript{138}

**B. Civil Procedural Justice Cases in Japan’s Supreme Court Jurisprudence: Looking Behind and Ahead**

Interestingly, the Court’s phrasing in the April 2011 decision comes out of a traceable jurisprudential history and it appears to be launching a new conversation as well.

Looking backwards, the term “procedural justice”\textsuperscript{139} appears in just three decisions of Japan’s Supreme Court.\textsuperscript{140} It can first be seen

\begin{itemize}
\item \textsuperscript{134} Because only the Japanese language version carries jurisprudential weight, I am once again taking liberties to give my English language translation rather than the Court’s, which I believe is flawed and bound to mislead readers who cannot follow the original. I have made “requirements” plural because Japanese nouns ordinarily do not indicate singular or plural, and my choice is simply for readability. More important is my disagreement with the choice of phrasing for手続き正義 / \textit{tetsuzuki seigi}, presented here as “procedural justice” rather than the Court’s choice of “due process.” Readers from the American legal tradition might otherwise misunderstand the term as incorporating the richer connotations of constitutional due process that we are accustomed to. This choice is further supported by the fact that, in other contexts, Japanese legal parlance precisely references due process with phrases such as 適正な手続き / \textit{tekisei na tetsuzuki} andデュ・プロセス / ‘\textit{de-yu pu-ro-se-su}’. See, e.g. \textit{EI-BEI HO JITEN} (\textsc{anglo-american law dictionary}) (Tanaka Hideo ed. 1998) 281 (due process of law) and 669 (procedural due process). For Japanese readers, the phrasing \textit{tetsuzuki seigi} is a Japanese word with inherently domestic connotations and meanings. Accordingly, I use “procedural justice,” which directly translates the Chinese characters in the phrase.
\item \textsuperscript{135} \textit{MINSOHŌ} (C. CIV. PRO.), art. 2.
\item \textsuperscript{136} The Court’s sources of law were generally indicated in a preliminary list of references and there were no specific citations in the decision text.
\item \textsuperscript{137} \textit{See supra} text accompanying notes 25-28.
\item \textsuperscript{138} Perhaps champagne should be poured to celebrate.
\item \textsuperscript{139} \textit{See supra} note 134 for an explanation of the word choice in translation here.
\item \textsuperscript{140} Research was carried out using the Dai-ichi Hōki Hō Jōhō Sōgō database service by searching for Supreme Court civil cases listing \textit{tetsuzuki seigi} in three Japanese spelling variations:手続き正義,手続き正義, and手続きの正義. A handful of
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in a 1964 decision where the Court incorporated the term in the context of describing the importance of fair administrative (i.e., non-judicial) proceedings.\textsuperscript{141}

The Court's second use of the phrase "procedural justice" in a decision handed down September 24, 1981,\textsuperscript{142} is far more interesting because the Supreme Court's decision of April 13, 2011, lifted, albeit without citation, extended phrasing verbatim from this 1981 ruling. In that 1981 case, the Supreme Court reversed and remanded a decision of the Tokyo High Court, denying a request to reopen proceedings based on a crucial fact being withheld from the losing party during the pendency of the action.\textsuperscript{143} The Supreme Court found the High Court's refusal to reopen proceedings in light of the changed circumstances that had been unknown to the appellant through no fault of his own to be "clearly contrary to the requirements of procedural justice in civil procedure (明らかに民事訴訟における民事手続き的正義の要求に反するべき)" and thus illegal.\textsuperscript{144} Thus, though its progeny is limited, this case

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\textsuperscript{141} Saikō Saibansho [Sup. Ct.] Oct. 13, 1964, Shō 39 (gyo-tsu) no. 28, 18 MINSHŌ No. 8 1619, 394 HANJII 64, 169 HANTA 131. The action, to avoid an administrative ruling by the National Personnel Agency, was coincidentally the same case introduced earlier in this article with regards to disqualification pursuant to having "participated in the prior level of the case." See supra text accompanying notes 43 to 49. However, given that Court's discussion of procedural justice appears in the context of discussion regarding administrative proceedings, and not the judicial process, its use is not especially relevant for our study here.

\textsuperscript{142} Saikō Saibansho [Sup. Ct.] Sept. 24, 1981, Shō 55 (o) no. 266, 35 MINSHŌ No. 6 1088, 823 SAIBANSHO JIHÔ 2, 1019 HANJII 68, 453 HANTA 66, 683 KINYÜ HANREI 48, 979 KIN’YÔ HÔMÛ 45.

\textsuperscript{143} The facts of the case are long and convoluted. Distilled down to a core, the case concerned purportedly fraudulent real estate transactions in the name of an elderly person (D), carried out by his adopted son and another agent. Ultimately the lawsuit became a contest between D's claim to having been innocently defrauded and the ultimate buyer's claim to owning the property in good faith reliance on the apparent agency of the adopted son and the agent. Unbeknownst to the ultimate buyer and the court, which handed down a final judgment in D's favor, D died in the interim between the close of proceedings at High Court and the final ruling, leaving the adopted son and agent as his successor in the litigation. The ultimate buyer petitioned the High Court to re-open proceedings in light of the fact that the alleged wrongdoers had stepped into the shoes of the allegedly innocent D. When this request was denied by the High Court, title to the property was transferred from the ultimate buyer to D's adopted son and the agent. \textit{Id.}

\textsuperscript{144} The Court cited earlier precedents indicating that the reopening of proceedings is ordinarily within a lower court's discretion and not a matter of right that can be claimed by a party, and concluded that the bounds of discretion had
must be seen as the originating source for procedural justice jurisprudence in Japan.

Only one other Supreme Court decision using the phrase "procedural justice" can be found prior to April 2011. On July 14, 1995, the Supreme Court's 2nd Petty Bench reversed a decision originating in the Fukushima Family Court Koriyama Branch in which a biological father had been effectively barred from participating in pending adoption proceedings brought by the biological mother and a third party. The Family Court judge had in fact known of the biological father's pending nonjudicial proceedings aiming to acknowledge paternity of the child, but chose to disregard those proceedings in order to finalize the mother and third-party’s adoption petition. When the biological father sought to appeal the adoption ruling, the Sendai High Court barred him from participating owing to his having lost legal standing to sue through the finality of the adoption. The Supreme Court, recognizing a "considerable injustice in terms of process (著しく手続き的正義に反するもの)" reversed the Sendai High Court decision because "due process," i.e., an opportunity to be heard, was lacking.

This brief history brings us to April 13, 2011, and the above-discussed ruling referencing CCP Article 2. Just two months later, the phrase "procedural justice" found its way again into the Supreme Court jurisprudence, but in a dissenting voice that seemed been exceeded in this case, but otherwise gives no explanation as to the legal foundation for the illegality. Id.


146. Here the Court integrated the notion of (in)justice into its English-language translation of procedural justice. Omitting my edit, the Court's translation is "we must say that it would bring about a considerable injustice in terms of due process." Id.

147. Due process explicitly appears in the Japanese phrasing here: 適正な手続き/ teki sei na tetsuzuki. Thus, the Court's translation accurately reflects the original Japanese.

148. "We have no choice but to say that the Adjudication was made without following due process which took into consideration the aforementioned circumstances, while providing the person who should be the party to the case with the opportunity to participate in the adjudication proceedings. (適正な手続きを執らず、事件当事者となるべき者に対して手続きに関与する機会を与えることなくされたものといわざるを得ないことになる)." Id.
both a response to the April 2011 decision and antagonistic to procedural justice's newly elevated status.\(^{149}\)

That case was also an administrative procedure case. In a dissent, Justice Nasu's first comment on procedural justice objected to the majority's conclusion that the administrative decision revoking an architect's license needed to be in writing: "procedural justice is not something that cannot be achieved in any case unless it is evidenced in writing."\(^{150}\) However Justice Nasu, opposed to the majority's decision to remand the case for further proceedings, went on to argue against procedural justice's import when set against competing values such as judicial economy and efficiency.\(^{151}\)

It seems an exciting jurisprudential conversation has begun.\(^{152}\)

C. Ten Years After: Assessing Japan's Justice System Reform from the Vantage Point of Fairness and Procedural Justice Jurisprudence

Without a doubt, the concept of justice was a central core of the Judicial System Reform Council's efforts:

Justice is expected to correct illegal actions and to provide a remedy for injured persons' rights in concrete cases and contests by properly resolving the cases and contests in question through proper interpretation and application of law; to play a role in coping with violations of rules appropriately by properly and promptly realizing the power of punishment through fair procedures; and thereby to maintain and to develop the law. Accordingly, the judicial function has an aspect of realization of public values, and the courts (the judicial branch) shall be


\(^{150}\) Id. Here too, the phrasing concerned the administrative process, not procedural justice in the courts. Thus, its use is not especially relevant for our study.

\(^{151}\) "Such situation can be somewhat positively appreciated from the perspective of pursuing procedural justice, but from the perspective of efficiency in court proceedings, or in consideration of the time, labor, and cost to be required for such repetition of the procedure, there is no choice, in a sense, but to make a judgment to the contrary. In view of the above . . . [I would uphold the prior decision and accordingly dissent.]" Id. Interestingly, Justice Nasu's judicial conservatism here seems to be opposite to his more liberal dissenting position in the family court proceeding case in 2008, supra note 24.

\(^{152}\) For the record, my inclinations go with the proceduralists.
positioned as a pillar supporting "the space of the public good" (公共性の空間 / kökyösei no kukan) in parallel with the Diet and the Cabinet (the political branches), which seek to create order by mapping out policies against the backdrop of majority rule and by fixing and conclusively executing norms in the form of law for the future.153

With ten years' hindsight in the implementation of the Report's recommendations, there has been some success. Courts in Japan have come to understand the slogan chanted by demonstrators at the 1968 Democratic Party convention in Chicago: "The Whole World Is Watching." Of course it is overblown to imagine that the whole world has focused its attention on judicial proceedings in Japan, but it does seem fair to believe that the Japanese public now watches more actively and critically. Moreover, they are watching from a new vantage point made possible by increased public participation in the justice system154 and a new awareness made possible by all of the deliberations and discussions surrounding justice system reform.

Thus, through the process of justice system reform, legal education, lawyering, and the judicial process have all become more of "everybody's business." Surely, all participants in the system, including the courts, must be deeply aware of this. And I am confident both that this exposure has been reflected in the positive developments already seen and that there will be more good things to come.

I used to view Japan's justice system as somewhat like a porcelain statue, frozen in time. But its substance has softened and there is now room for assessment, change, and most importantly, ongoing reevaluation.155 Japan's judges, while still mainly operating nameless and faceless under the "Trust Us" mantra,156 have begun

153. JSRC Report, supra note 6, Part 2, Section 1.
155. This was also the point behind my 2001 article on the reform of legal education in Japan, urging ongoing evaluation and reform. Mark A. Levin, The American Kaizen of Law Teaching, 2 Asian-Pac. L. & Pol'y J. 6 (2001).
156. Nameless and faceless are adjectives Professor Daniel Foote used to title his
to understand that the Japanese public will be watching what they do. Accordingly, there may be a stronger aim towards legitimacy and fairness in the judicial system. Procedural justice appears to be entering the Japanese jurisprudential lexicon with both proponents and detractors. But at least people are talking about it. And so I will hold on to a degree of optimism for the future, noting that optimism demands that the system retains fluidity, introspection, and openness to change.

Whether that will happen is the real question.

157. Another outside observer of Japanese law, Professor Craig Martin, has called for an investigation of legitimacy in the context of Japanese constitutionalism and richly explored what that should mean. "The key distinction is that the inquiry into legitimacy focuses on the nature of the decision-making process, assessing the analytical approach employed by the Court against a set of criteria that flow from well-established theoretical approaches to constitutional interpretation, rights, and judicial review." Even outside the constitutional arena, Martin's work offers us all new tools to work from. Craig Martin, The Japanese Constitution as Law and the Legitimacy of the Supreme Court's Constitutional Decisions: A Response to Matsui, 88 WASH. U. L. REV. 1527, 1535 (2011).