The Active Role of the Judge in Japanese Civil Litigation

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THE ACTIVE ROLE OF THE JUDGE IN JAPANESE CIVIL LITIGATION

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I. General observations

1. The active functions of judges in several kinds of proceedings

(a) Among several different kinds of civil proceedings the functions of judges are particularly active in the proceedings relating to the voluntary jurisdiction of the civil courts. This proceeding is typically provided by the Japanese Code of Non-Contentious Cases Procedure (NCP), which was originally drafted in 1898, following the German Code relating to the Cases of the Voluntary Jurisdiction of 1898 (*das Reichsgesetz über die Angelegenheiten der Freiwilligen Gerichtsbarkeit*). According to typical non-contentious civil procedure the proceeding may sometimes be initiated *ex officio* even if a petitioner does not demand it. The court may grant relief which is different from or greater than that which the petitioner demands. The Court may also seek facts and evidence *ex officio* (art. 11 NCP), and its decision may be based on them. The participants in this kind of proceeding are deemed to be the objects rather than the

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The following paper was originally written by the author in 1973 as a National Report on the same subject, which was submitted to the Ninth International Congress of the International Academy of Comparative Law in Teheran 1974. This National Report was much utilized by the General Reporter, Professor J. A. Jolowicz, at the University of Cambridge, in his General Report which will be published in a separate volume under the title 'The Active Role of the Judge in Civil Litigation'.

subjects of the proceeding.(1) The court always leads the procedure.

(b) In the field of contentious civil procedure in Japan, as well as in that of other states, a lawsuit ought not to be started without a plaintiff's action; but it ends with his discontinuance of the action. Apart from this aspect of initiation and discontinuance of action, the question of how far the litigants may dispose of the subject-matter of the proceeding depends on the different types of procedure in this field.

According to the most usual contentious civil procedure provided by the Japanese Code of Civil Procedure (CCP), the party's right to dispose of the subject-matter is completely in his own hands: The court may grant no relief beyond that which the plaintiff demands (art. 186 CCP). A compromise or the renouncement or recognition of the claim protocolled has the same effect as the irrevocable judgment (art. 203 CCP).(2) In the judgment, the court may consider only the evidence and facts produced by the parties in the oral-arguments. The party's admission of facts binds the court (art. 257 CCP).(3)

According to the Japanese Code of Family-Contentious-Procedure (FCP), which was originally modelled in 1898 on the special part of German Civil Procedure Law (Zivilprozessordnung)

(1) It has been recently insisted that the right to be heard should also be guaranteed to the participants in this kind of proceeding. K. Yamakido, *Soshō ni okeru Tōjisha-Ken* (The Party-Rights in Procedure), in his collected Essays (*Minji-Soshō-Riron no Kisoteki-Kenkyū*) 1961, p. 60; T. Yoshimura, *Minji-Jiken no Hishōka-Keikō to Tōjisha-Ken* (The Trend toward "Transferring to the Voluntary Jurisdiction Court" and the Party-Rights), in *Nichi-Ben-Ren Shōwa* 41-*Nendo Tokubetsu-Kenkyū-Sōsho* (Selected Lectures provided by the Japanese Bar Association in 1966) p. 135 *et seq.*

(2) These are called *Shobun-Ken-Shugi*, that is, in German, *Dispositions-maxime*. In English, this principle is sometimes called party-disposition.

(3) These are called *Benron-Shugi*, that is, *Verhandlungs-maxime* in German. This principle is sometimes referred to as party-presentation in English.

of 1877 relating to matrimonial and parental relations, the party's right to dispose of the case is partial ; so the court has a more active role to play in this kind of litigation: The parties are not permitted to renounce or recognize the claim (arts. 10 I, 26, 32 II, FCP), nor to settle the dispute by compromise, except in the cases where the Japanese Civil Code permits the spouse to divorce by consent.(4) Apart from the case of divorce, the court must give a judgment despite the parties' settlement, renouncement or recognition of the claim, unless the petitioner discontinues the action. The party's admission of facts does not bind the court (articles 10 II, 26, 32 I FCP). The court may consider the facts not produced by the parties, and also take evidence *ex officio* (arts. 14, 26, 31 II FCP). But this *ex officio* "facts and evidence-taking" is deemed to be different from the *ex officio* "facts and evidence-seeking" in the voluntary jurisdiction court. In the former proceeding the court should always hear the parties about the facts and evidence which were taken *ex officio* (art. 14 FCP), while in the latter it needs not hear them (art. 11 NCL). In family contentious procedure the Code of Civil Procedure is generally applied unless especially provided by the Code of Family-Contentious-Procedure, because the latter is a special rule of the former. On the contrary, voluntary jurisdiction is completely different from these two branches of contentious civil procedure, so that the Code of Civil Procedure can never be applied in voluntary jurisdiction. Thus, the court plays a more active role in family-contentious-procedure than in usual civil procedure, but less than in voluntary jurisdiction.

2. The historic change of the judge's functions in civil procedure

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(4) In divorce cases it is provided that the recognition of the claim is not permitted (art. 10 sect. 1 FCP), but there are no reasonable grounds for prohibiting only the defendant from recognizing the plaintiff's demand for divorce, while the couple can divorce by consent according to the Civil Code (art. 763). So argues K. Yamakido, *Jinji-Soshō-Tetsuzuki-Hō* (The Law of Family-Contentious-Procedure), 1958, p. 128.

Japanese Civil Procedure Law allows only the parties to dispose of the subject-matter of the proceeding (the principle of party-disposition), and to present facts and evidence which the court may consider in its judgment (the principle of party-presentation). On the other hand, the court has directive powers to preside over the proceedings in pursuit of a rapid and proper hearing of the case.(5)

Some directive powers which the law (CCP) bestows on the judge are the following: (i) the power to direct proceedings, e.g. to fix the date of sessions (art. 152), to summon the litigants (art. 230), and to conduct preparatory procedure (art. 249); (ii) the power of "clarification" (art. 127); (iii) the power to direct (art. 126), limit, separate, or combine oral arguments (art. 136) and so on.

In actual practice how actively has the court utilized its directive powers? The use of these powers has dramatically changed since the end of World War Ⅱ. The historic change in Japanese civil procedure and its practice is described in detail by the late Mr. Justice K. Tanabe in an article written in English.(6)

(a) Prewar civil procedure and its practice

Prewar Japanese civil procedure was strongly influenced by the German System. The first Code of Civil Procedure, adapted in 1890, was mainly modeled after the German Code of Civil Procedure (*Zivilprozessordnung*) of 1877. Although a significant revision of the code was enacted in 1926, the basic characteristics of the

(5) Here the court's use of its directive powers usually refers to the single judge court in the Summary and District Court. But it can also refer to a presiding judge or a commissioned judge in case of the full three judges court in the District and High Court.

(6) K. Tanabe, "The Process of Litigation: An Experiment with the Adversary System", *Law in Japan* edited by A. T. von Mehren, 1964, p. 73 *et seq*. Most of my explanation in this respect is derived from this invaluable article.

Japanese system were left unchanged. Under the influence of the Austrian Code of 1899, the 1926 revision augmented the court's directive powers and introduced even an *ex officio* proof-taking (art. 261, later eliminated in 1948). Thus, the prewar system maximized the active role of the trial judge and minimized that of the litigant and his lawyer in the trial of an action. Unlike Anglo-American Procedure, the trial judge actually exercised strong directive powers in the course of defining the issues and of proof-taking, and a trial was conducted in a piecemeal fashion with several successive sessions often separated by a substantial time-interval. Although the 1926 revision sought to prevent a prolonged piecemeal trial by making preparatory procedure (similar to the American pretrial conference) mandatory in the District Court, a "concentrated" trial was not achieved in actual practice.

Throughout these successive sessions both at the pretrial and the trial stages, the court assumed leadership and responsibility, both for determining and narrowing the issues, and for adjusting the pleadings to the evidence. This power of the court to "clarify" the matter in dispute was exercised by continuing free discussion between the court and attorneys about pleadings and proof at every session. Pleadings were in a constant state of modification and at each stage reflected the results of preceding stages. Amendments of pleadings were freely made at any stage. In other words, the facts of the case were gradually clarified by a process of continuing discussion and cooperation between the court and counsel and of direction by the court during a series of sessions.

At the stage of evidence-taking too, the court played an active role. Counsel was far less vigorous in searching out the facts and in presenting evidence to the court than his Anglo-American

counterpart.(7) Of course, counsel consulted fully with his client ; but was prohibited to interview prospective witnesses prior to the trial, so that he could not acquaint himself with the factual circumstances of the case until the trial. Furthermore, all examination of witnesses was conducted by the court. Counsel could ask supplementary questions with the judge's permission or submit them to be asked by the court. The responsibility for exploiting the witness' testimony and for assessing his credibility rested almost entirely upon the trial judge. The court could, and occasionally did subpoena witnesses and other evidence *ex officio*.(8)

Thus, it is evident that prewar procedure strengthened the active leadership of judges in marshaling and presenting facts and evidence, and weakened the responsibility of counsel and client in this respect. Instead of making extensive pretrial preparation for a concentrated trial, counsel could expect to develop his pleadings and proof gradually, in the course of a piecemeal trial under the guidance of an experienced trial judge. There was consequently little danger of surprise. Accordingly, this system tended to make counsel inactive and to prolong the trial process.(9)

(b) The postwar civil procedure reform and its practice

Following the dramatic change in Japan's political climate at the end of World War Ⅱ, the Anglo-American Adversary System

(7) The passive attitude of the pre-war lawyer in Japan seems to have been quite similar to the present attitude of German lawyers. A Comparison with the American Lawyer is made in Kaplan, von Mehren and Schaefer, Phases of German Civil Procedure, 71 Harv. L. Rev. 1199-1202, and with English solicitors in Cohn, *Der englische Gerichtstag*, 1965, p. 30 *et seq*.

(8) *Ex officio* proof-taking was permitted when the court was not persuaded in either direction by the evidence presented by the parties, and on other occasion when the court considered it necessary. Code of Civil Procedure art. 261.

(9) The actual practice of prewar civil process, as a whole, seems to have been similar to present German procedure. See Kaplan, von Mehren and Schaefer note (7) at 1471.

in the field of civil procedure became attractive to the "democratization movement". Stripping the judge of power and placing the burden of initiative and responsibility on the litigant and his lawyer was felt to be in keeping with this movement.

The revision, in 1948, of the Japanese Civil Procedure Code was deemed to be in keeping with this trend under the influence of the Anglo-American System especially in the following two points : First, the article giving the trial court the power to take proof *ex officio* was eliminated. Second, a new provision, article 294, put the burden of examining and cross-examining witnesses on the litigants. Of course, the trial judge can supplement the litigant's examination of witnesses with his own questions, but primary responsibility for the presentation of proof is now placed on the litigant. Thus, the abolition of *ex officio* proof-taking was generally accepted by the profession as a declaration of the new adversary principle, under which the litigant bore the prime responsibility for disclosing the facts, while the trial judge's role was to evaluate passively the merits of the litigant's presentation. Implicit in the shift of responsibility for the examination from judge to counsel was the intent to make the lawyer the leading figure in the court room and to require of him not only skill in the examination and cross-examination of witnesses but also pretrial preparation, especially fact investigation. This pretrial preparation was also required by the reform of 1950 to help establish the "concentrated trial": The Supreme Court Regulation of 1950 concerning the continuous trial (later made a part of the court's Civil Procedure Regulations of 1956) declared it to be the duty of the litigant and his lawyer to make a careful pretrial investigation of facts, including interviews with witnesses, to word the pleadings, and to present the evidence without being urged by the judge to clarify these things. (10) In

(10) Regulations Concerning Continuous Trial in Civil Procedure, Supreme Court Regulation No. 27 of 1950, art. 2; Civil Procedure Regulations, Supreme Court Regulation No. 2 of 1956, art. 4.

addition to these pretrial preparations, preparatory procedure became generally available in single judge courts of the District Court in an effort to achieve a speedy and continuous trial. (11)

Has the new idea of the Adversary principle which was aimed at by the postwar reform successfully been achieved in actual practice? Through somewhat confusing practical experience over the decade since the postwar reform, the profession has begun to realize that the political and social climate of Japan does not necessarily encourage the new reforms. It was not easy for Japanese Lawyers who were accustomed to prewar practice to fulfil the new expectation. In fact, under the new Code, evidence is not taken *ex officio*; witnesses are generally examined and cross-examined by counsel. The pretrial interviews with witnesses are not officially discouraged and are gradually coming into use among counsels in practice. But lawyers have been reluctant to utilize preparatory procedure for the continuous trial, because the American type of discovery devices are not available. Moreover, the Civil Procedure Regulation of 1956 made preparatory procedure available *only* in a complicated case. (12) Although the Regulation still declares that oral argument of a case with fixed issues and evidence should be conducted in a continuous trial or in sessions with a short time-interval between each session,(13) the actual trial is still held in a piecemeal style over several successive sessions with substantial gaps between the sessions. This practice tends to promote delay of proceedings and inactivity of counsel.

During the first decade since the postwar reform most trial judges tried to retain a passive attitude toward investigation of facts; but now they have become gradually more active in exercising their

(11) Regulations Concerning Continuous Trial in Civil Procedure, Supreme Court Regulation No. 27 of 1950, arts. 10, 11.

(12) Civil Procedure Regulations, Supreme Court Regulation No. 2 of 1956, arts. 16, 17.

(13) Civil Procedure Regulations art. 27.

powers of "clarification" in an effort to give a proper judgment. The passive attitude of judges was felt to result in unjust fact-findings. Since about 1954, the Supreme Court has reversed a considerable number of judgments of the trial court because of its failure to clarify. (14)

It has been found necessary to revise some aspects of the postwar reform of civil procedure and bring it more into line with the traditional system. Gradually, the role of the judge has been strengthened and emphasized by changes in Civil Procedure. Does this development signal a return to the prewar type of trial, strongly controlled by the judge's leadership? Will the growing self confidence of the Japanese counsel, with regard to his active function of producing factual materials to the court, be shaken or lost? While assessing these points let us also observe how far the judge controls the actual process of current civil litigation.

II. The active functions of judges in the process of litigation

The extent to which the judge plays an active part in the process of litigation depends on several factors. First, his role varies with different aspects of litigation (e.g. factual investigation or control of procedure). Furthermore, the differing views of judges often influence the course of proceedings. We shall observe the actual functions of judges at several stages of current procedure and practice.

1. The court's power to check the complaint filed and to control commencement of action

The action being commenced by filing of the complaint with the court, the presiding judge has the power to check the formal requirements of the complaint, to order amendments if there are

(14) So argue Saitō & Yasui, *Sengo no Shakumei-Ken ni kansuru Hanrei* (Postwar Cases concerning the Power to Clarify), 6 *Minji-Soshō-Zasshi* (Journal of Civil Procedure) (1960) p. 155 *et seq.*

defects, and to dismiss the complaint if the defects are not amended (art. 228 CCP). Here the presiding judge examines only the formal requirements of the complaint before a copy is served on the defendant. After the action becomes pending at the court by the service of the complaint the court has to examine all the requirements of the action, such as jurisdiction, venue and need for action. Among them such items of public interest as jurisdiction should be examined by *ex officio* facts and proof-taking, (15) while others, such as the need for action, by party-presentation. In case these requirements are not fulfilled, the action is dismissed by a final judgment, unless the case is to be transferred to a competent court. (16)

2. The court's power to control the claim

The claim should be identified by the demand for relief and the grounds of action set forth in the complaint. The judgment ought to be confined within the claim thus identified. The court may grant no relief which is different in kind or degree from that demanded in the complaint. (17)

So, the court has to make sure at the outset of action exactly what the content of the claim is. If the claim is obscure or self-contradictory, the judge has the duty to "clarify" the meaning of the claim. For failure to clarify, judgments are often reversed by

(15) It is provided that the court may take evidence *ex officio* in regard to matters relating to jurisdiction. Code of Civil Procedure, art. 28.

(16) When the court finds that a case does not fall under its jurisdiction, it shall transfer the case to the competent court. Code of Civil Procedure art. 30 sect. 1.

(17) It follows, for example, that if P demands special delivery of a definite thing, the court may not order redress for damage caused by D's destruction of that thing unless P's demand is changed. When redress for damage is demanded, the court may grant it, not in excess of, but within, the amount demanded. See e.g. H. Kaneko, *Minji-Soshō-Hō-Taikei* (The System of Civil Procedure Law), 1954, p. 324, A. Mikazuki, *Minji-Soshō-Hō* (Civil Procedure Law), 1959, p. 154.

revision. (18) If other relief than that demanded were to be granted on the facts and evidence produced during the trial, we could ask whether or not it is the duty of the judge to "clarify", that is, to suggest a change of claim. The resolution of this question depends on the actual facts of the case. If the vague purport of the claim can be understood to contain also a demand for other relief, the judge has to "clarify" if the other relief is also intended. (19) But usually, the "clarification" for a change of claim is not mandatory but discretionary. (20)

Another problem is whether the plaintiff's claim is to be identified according to a legal theory or a material right. It would seem inappropriate to argue that only the legal theory which the plaintiff names binds the court. It is, however, the traditional view as well as the rule of case law in this respect, that the claim is identified according to a legal theory derived from the complaint, composed of the demand for relief and the grounds of action. (21) Therefore, the court should clarify and determine what kind of a legal theory is claimed through the demand and grounds of action

(18) See e.g. Fukuhisa v. Takeshita et. al., Supreme Court, II Petty Bench, April 12 1954, 8 *Saikō-Saibansho Minji-Hanrei Shū* (A Collection of Civil Supreme Court Cases) [hereafter cited *Saihan Minshū*] 1505. In this case the court reversed the case not only because of the judge's failure to clarify, but also because of "insufficient inquiry". As to the relation between both reasons, see Tanabe, note (6) at 93-94. But now only a failure to clarify is held to be a reason for revision. See e.g. Nara, *Shakumei-Ken to Shakumei-Gimu no Han'i* (The Scope of the Right and Duty to clarify), *Jitsumu-Minso-Kōza* (Selected Essays on the Practice of Civil Procedure) I, 203 *et seq.* (1969).

(19) See T. Nakano, *Uttae no Henkō to Shakumei-Gimu* (The Change of Claim and Duty to Clarify) 279 *Hanrei*-Times 27.

(20) Suzuki v. Meitoki Co. Ltd., Supreme Court, I Petty Bench, June 11, 1970, 24 *Saihan Minshū* 516: In this case it was held that the trial court had the power to suggest a change of claim, from that for sale price to that for work-contract cost.

(21) E.g. Kaneko, note (17) at 162 *et seq.* esp. 166.

if the position is not clear. To the contrary it is argued under a different view of "claim" that the claim remains the same within the same demand for relief regardless of legal theories or forms of legal reasoning.(22) The difference between the two views will be clear when the same demand for relief can be based on different legal theories. According to the new concept of claim, the court can base its decision on a legal theory not originally derived from "the grounds of action" of the complaint without making a change of claim, so far as the legal theory justifies the same relief demanded in the complaint. Practice has rarely conformed to follow the new concept,(23) which would allow the court much wider powers to control the claim than before.

3. The court's power to control the pleadings

It is deemed to be the responsibility of the litigants to allege facts, on which the court must base its decision. The judgment may not be based on facts not alleged by either litigant in oral arguments, even though these facts may have been disclosed in the proof-taking. But the facts here mean substantial facts, not evidential facts which may be considered as grounds of judgment without allegation of litigant. There is a view, though not prevailing, that allows the judge to base his decision on the facts not alleged by either party but judicially noticed.(24)

How far does the court actually exercise the power to "clarify" the pleadings? Does or should the court require the litigant (a) to clear up the pleadings if obscure or self-contradictory, (b) to add new fact-allegations if required to justify the claim or the defense, (c) or to amend the pleadings to conform to the proof? Does or should the

(22) E.g. Mikazuki, note (17) at 80 *et seq.* esp. 101–116.

(23) As an exceptional case of a lower court, see Ohara Syōten v. Miura, Sendai District Court, Feb. 21, 1961, 259 *Hanreijihō* 34: The court held that a change of the ground of action from sale price to bill debt does not lead to a change of claim.

(24) So Mikazuki, note (17) at 159, 391.

court require the party (d) to limit the issues by eliminating unnecessary allegation or by admitting facts of no serious contest? It has been already mentioned that after the decade's experience of the postwar reform, the court's attitude toward the "clarification" has shifted from that of a passive umpire to that of an active leader of the parties' arguments. Of course, the extent to which the judges exercise the power of "clarification" depends, to some degree, on each judge's view of his role in this respect. There are still rather passive judges as well as active ones. But, generally speaking, most judges try to cooperate with the litigant and his lawyer with the aim of a proper adjudication by exercising the power of "clarification" in instances (a)—(d) noted above. It is, however, another problem if the judgment should be reversed by revision because of the judge's failure to clarify in these cases. If there is a probability, rather than merely a possibility, that an exercise of the power to clarify would lead to a proper judgment, failure to clarify is deemed one of grounds of revision. (25)

Of course, the judge's direction for "clarification" has no formative power. So far as the litigant, not following the judge's direction, does not make the pleadings clear, nor add new fact-allegations nor amend the pleadings, the court may not base its judgment on them. Moreover the judge may dismiss the party-allegations which are still obscure, or tardily added or amended as a result of the lawyer's inexactly following the judge's instruction. (26) In actual practice most lawyers readily obey the judge's direction and add or amend the fact-allegations. Consequently the judge's instruction often has the effect of giving favorable allegations to one of the parties only. This makes the judge, who is conscious of his impartiality and fairness, reluctant to exercise his power to

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(25) So Nara, note (18) at 230; Nakano, *Benron Shugi no Dōkō to Shakumei-Ken*, (The Trend of Party-Presentation-Principle and Power to Clarify), 500 Jurist 348, 351 (1972).

(26) Code of Civil Procedure art. 139.

clarify. (27) This happens occasionally in practice with the result that the judge, not exercising the power to clarify, finds facts not alleged by either party according to the result of proof-taking. This practice is criticized, because it is not only against the principle of party presentation, but also a surprise to the party. (28)

Although the Civil Procedure Regulation declares it to be the responsibility of the litigant to marshal issues, (29) there is no special legal sanction against non-performance of the responsibility. Whether or not the issues and evidence can be satisfactorily marshalled in preparatory procedure or in oral arguments strongly influences the success or failure of the speedy and continuous trial. In the absence of sanctions, issues are often inadequately defined, and the judge must take an active role.

4. The court's power to control proof-taking

(a) Because of the postwar abolition of *ex officio* proof-taking, the court may take only the evidence produced by either litigant. But the court should urge the litigant to produce evidence when he presents no evidence or insufficient evidence to support the fact-finding; above all in case the evidence seems to be easily produced by the litigant, or in case the litigant mistakes the facts already proved. (30)

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(27) See Niimura et al., *Minji Saiban no Sho-Mondai* (Various Problems in Civil Trials) 13 *Hōsō Jihō* 286, 306 (1961).

(28) So Ishii, *Minji Hōtei Oboegaki* (Memorandum on Civil Trial), 23 (1962): Thus, the court should avoid so called "clarification by the judgment", and instead urge the litigant to present sufficient allegations at the trial.

(29) Civil Procedure Regulations arts. 5, 20.

(30) See e.g. Abe v. Chiba, Supreme Court, II Petty Bench, June 26, 1964, 18 *Saihan Minshū* 954: In this action for redress of damage caused by D's unlawful cutting P's wood, it was held that when only a part of the wood chopped down clearly belonged to P, the court should urge P to produce evidence detailing the exact amount of wood chopped down.

If the litigant does not produce evidence in spite of the judge's "clarification", the court may not take the evidence. Recently, a judge proposed a reintroduction of *ex officio* proof-taking, e.g., of evidence unfavorable to both parties which they would not normally produce themselves.(31) But it is usually accepted that in case of the litigant's failure to comply with the jndge's "clarification" the case should be decided according to the principle of burden of proof; the court should not intervene, other than in the clarification, in the private relations between the litigants. The litigant and his lawyer, who readily follow in general the judge's instruction, would have to have special reason for not obeying it. (32)

Also in current civil procedure there are still certain types of cases where the court may take proof *ex officio*, for example in the case of the examination of the parties themselves (art. 336 CCP), of the jurisdiction (art. 28), of the request for necessary investigation (art. 262) and so on. These are exceptional cases, where *ex officio* proof-taking is permitted, because the matter to be proved is of public interest, or because the litigants are not expected to be active in the proof-taking. In practice such evidence is rarely taken *ex officio*. There is a view, though not held by all, that an expert witness should be heard *ex officio*; for his testimony helps the judge's professional legal knowledge. (33)

(b) How far has the court the power to limit the evidence presented by the party? It depends on the discretion of the court according to the Japanese Code, which provides that "evidence tendered by a

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(31) Chigusa, *Shōko-Shirabe o meguru Sho-Mondai* (Various Problems surrounding Proof-taking), *Jitsumu Minji-Soshō Kōza* (Selected Eassays on the Practice of Civil Procedure) I, 311, 324.

(32) See Muramatsu, *Shōko ni okeru Benron-Shugi* (Party Presentation Principle in Evidence) in his collected Essays III (*Minji-Saiban no Riron to Jitsumu*) 127, 136 (1967): Here he gives as such a reason, for example, difficulties on the part of the litigant to pay the cost of proof-taking.

(33) See as a typical case, Mikazuki, note (17) at 419.

party need not be taken if the court finds it unnecessary to do so". (34) This can be explained as a corollary of the principle, that the judge can find facts according to his conviction as derived from the result of proof-taking (cf. art. 185 CCP). But as the principle of "free evaluation" is said to be restricted by the rule of experience, there must be a rational standard for the court's exercise of discretion in limiting the evidence tendered by the litigant.

It was also argued, for some time after the postwar reform, that all the evidence tendered by the litigant should be taken, unless the matter to be proved is not relevant to the case or the evidence is not related to the matter to be proved. (35) But the traditional case law holds that the court has to take proof in case the evidence is the sole evidence on that issue for the party presenting it. This so called "only one evidence rule" of Japanese case law is often criticized because of its formalism. But the substantial grounds of this rule are to be understood as a minimum requirement to give the guarantee of fairness, and the chance for both sides to be heard. (36) In practice, the court tends to accept all the evidence tendered by the litigant, which results in unnecessary proof-taking. (37) According to the substantial grounds of the "only one evidence rule" a rational standard should be established for limiting the evidence presented by the party. For example, the judge may take only the most influential aspects of the evidence which have the same purport and the same resource; and he needs not take more evidence after he forms his own conclusions derived from taking evidence presented by both of the parties, unless it may be convinc-

(34) Code of Civil Procedure art. 259.

(35) See *Minji-Saiban Shiryō* (Data of Civil Trial) No. 33, *Kaidō-Yōroku* (Record of Judge's meeting), 141 (1953).

(36) Such is the prevailing view: E.g., Mikazuki, note (17) at 423; Kaneko, note (17) at 264, Chigusa, note (31) at 334.

(37) See Muramatsu, *Shūsengo no Minji-Soshō no Ichi-Dammen* (One Aspect of Post-war Civil Procedure) in his collected Essays I (*Minji-Saiban no Sho-Mondai*) 18 (1953); the same, note (32) at 137.

ingly rebutted. (38)

(c) The introduction of the Anglo-American type of cross-examination of witnesses by the litigant and his lawyer was one of the main points of the postwar reform. The system requires of the lawyers sufficient pretrial preparation as well as skill in the examination of witnesses. But Japanese lawyers did not fulfil these prerequisites at the beginning. The lawyers' examinations were criticized because of their inefficiency and unskillfullness. Most judges remained passive in checking lawyer's improper questions, and in their own supplementary inquiries. Because of the increasing delay in adjudication caused by this inefficient practice, it was once proposed even to abolish the system of the lawyer's examinations. (39) But after 10 years experience of the system judges came to realize that they must actively participate in, and also lead, examinations. They are now more resolute in excluding irrelevant and improper questions. Moreover, they often inquire into matters that litigants have failed to explore. On the other hand, there is no doubt that the lawyer's skill in examination as well as his preparatory preparation has gradually improved. Japanese lawyers, especially those educated after the war, now seem proud and self-confident in the role and status that the new system gives them. At present, judge and counsel collaborate in keeping alive the system of the lawyer's examinations. As one judge has stated,(40) "the judiciary apparently has learned the basic truth that even the best efforts of judges are no substitute for the resourcefulness of litigants in probing for the facts." "The bar appreciates the important role that a skilled judiciary can play in the examination of witnesses." It would now be impossible and seemingly undesirable to revert to the prewar system.

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(38) Kaneko, note (17) at 264.

(39) See Azekura, *Minji Soshō Sokushin no tameni* (For the Expeditious Civil Trial) 198 Jurist 14 (1960).

(40) Tanabe, note (6) at 104.

5. The court's functions in developing the process

It has already been noted that Japanese civil litigation is still conducted in piecemeal sessions with substantial time intervals. This practice is not prescribed by law. The Japanese Code, unlike the Anglo-American system, provides no sharp distinction between pleadings and trial, but allows the litigant to present facts and evidence at any time until the end of the oral arguments (art. 137 CCP). The court may only reject facts and evidence tardily presented by either party (art. 139 CCP) in order to prevent a prolongation of the proceedings. But the court's power is rarely utilized, because the judge is inclined to accept any materials presented by the litigant and reluctant to find the rigid requirements for rejection.(41) Therefore, a law reform is proposed, whereby it would be easier than it is now to reject tardy presentation, (42) but its enactment is not anticipated in the near future.

The 1950 regulation (later civil procedure regulation of 1956) of preparatory procedure, (43) or of so called "preliminary oral sessions" was an endeavour to modify the principle of any time presentation. The court may order that the case, if complicated, should be prepared in preparatory procedure by a preparatory judge. After fixing issues and evidence here under the judge's leadership,

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(41) The court may reject tardy allegations, whenever it finds that the party intended to cause delay or showed gross negligence. Code of Civil Procedure art. 139 sect. 1.

(42) E.g., Mikazuki, note (17) at 345.

(43) See the above explanation, note (11), (12).

new presentation is prevented in a trial with some exceptions.(44) If no preparatory procedure is held, "preliminary oral sessions" are to be conducted to determine the issues in the case before proof-taking. It was here expected that the case thus prepared in "preliminary oral sessions" as well as preparatory procedure should be tried continuously. The expectations of achieving a continuous trial have not been realized. Preparatory procedure is not frequently utilized; an interesting experiment of a new section of Tokyo District Court, exclusively conducting "preliminary oral sessions",(45) also failed in its attempt, resulting in an even more laborious handling of cases.(46) The failure is said to be due to many reasons; e.g. insufficiency of the lawyer's pretrial preparation, lack of the American type of discovery devices, shortage of experienced judges accustomed to the preparatory system, limited power of preparatory

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(44) Exceptions are allowed, for example, when the presentation is to be done *ex officio*, or when the presentation dose not prolong the proceedings, or if it was not possible in preparatory procedure without gross negligence. Code of Civil Procedure art. 255. It was said that because of the rigid nature of "preclusion of new presentation" the preparatory procedure was not utilized. But the case law has increasingly mitigated the exceptional clause and allowed new presentations of facts and evidence at the trial, especially when they effect the conclusion. See Kikui and Muramatsu, *Minji-Soshō Hō* (Civil Procedure Law) Commentary II, §255 (p. 204).

(45) In this new section the court rendered a final judgment if the defendant defaulted or did not dispute the case, or it took evidence and gave a final judgment if the case had no serious issue. If the case was complicated, the court made preparatory preparations and sent it to another section, where a "concentrated" trial was conducted. Koseki, *Shinkembu no Secchi* (The Foundation of the new Section) 11 *Hōsō-Jihō* (Journal of Jurists) 1202 (1959).

(46) See Morino, *Tokyo Chihō-Saibansho ni okeru Minjibu no Kinji no Dōkō* (Recent Trends in the Civil Section of Tokyo District Court) 249 Jurist 64 (1962): The new section was abolished in 1961 after over 3 years experiment.

judges.(47) Despite such reforms and attempts to achieve a continuous trial, Japanese civil cases are still handled in the traditional piecemeal way. A judge in a big city often has several hundred pending cases on his calendar, and trials frequently extend over two or more years. (48)

Various efforts, especially on the part of judges, have been made in an attempt to expedite judgment. Traditionally, Japanese judges, unlike their Anglo-American colleagues, are accustomed to making a preliminary preparation such as documents-reading and being acquainted with the outline of the case before presiding over the trial. (49) Thus, the experiment of the so called "planned trial", where the judges hold an extensive preliminary inquiry including the examination of relevant documents, before entering proof-taking sessions, is a realistic and workable compromise.(50) All proof-taking sessions are carefully planned after discussion between the court and counsel, and counsel is instructed to follow the arranged schedule. This experiment has a characteristic common with the German one called the "Stuttgart Model" in the respect that the court

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(47) See Kikui and Muramatsu, note (44) at 166-167; Mikazuki, *Wagakuni no Jumbi-Tetsuzuki-Seido no Sho-Mondai* (Various Problems of our Preparatory Procedure System) in his collected Essays (*Minji-Soshō-Hō Kenkyū*) III p. 189, 196-199.

(48) In 1970, the average length of a trial in the District Court was 12.8 months and about 32% of trial cases took more than 2 years for their disposal. See *Saikō-Saibansho Jimusōkyoku* (General Secretariat of the Supreme Court), *Shihō-Tōkei-Nempō, Minji-Hen* (Annual Report of Judicial Statistic, Civil Cases) for 1970, p. xxviii, 130.

(49) For a comparison of Continental and Anglo-American judges in this respect, see Cohn, note (7) at 32-34.

(50) So argues Tanabe, note (6) at 109; For this kind of experiments, see Niimura et al., note (27), at 294-298, 300.

actively prepares the main trial beforehand.(51) But the German court, following the "Stuttgart Model", exercises a much stronger leadership in requiring the litigant to present facts and evidence even at the pretrial stage, while the "planned trial" is scheduled after discussion between the court and counsel in the early sessions of the trial. The difference between the two systems may be caused by the fact that Japanese lawyers are now accustomed to making much more active pretrial investigations than their German counterparts. The "Stuttgart Model" type of trial, which is prepared and conducted under the strong leadership of the court, is not suited to Japanese practice. The direction of the procedural reform for the expeditious adjudication will be sought in "the middle way approach" between the German type of the judge's leadership and the Anglo-American type of the counsel's initiative.

6. The court's power to encourage to a "compromise"

The Japanese Code of Civil Procedure (art. 136) provides, that the court may encourage the litigants to a compromise at any stage of the proceedings. A case of little dispute is often settled by a compromise even in preparatory procedure or in preliminary oral sessions. In the case of a complicated dispute it is not easy for the court to persuade the parties to reach settlement unless the court is convinced of the outcome of the case to some degree following proof-taking.

In any case the court intensively promotes an agreed settlement;(52) the litigants are often ready to accept the judicial encouragement of settlement. This has been explained to be a result of the general attitude of Japanese people in favor of compromise in-

(51) For the "Stuttgart Model" experiment, see Bender, *Die "Haupt-verhandlung" in Zivilsachen*, DRiZ 1968, 163 *et seq.*; *Beschleunigt die Beschleunigungsnovelle*;, ZRP 1969, 58; Fezer, *Die Funktion der mündlichen Verhandlung im Zivilprozess und im Strafprozess*, 1970, 144 *et seq.*

(52) See Kikui and Muramatsu, note (44) I at 454 warning against judicially imposed compromise.

stead of dispute. Moreover the piecemeal nature of the trial serves to effect a gradual mitigation of the emotional aspects of the dispute. But there seems to be an increasing tendency for Japanese judges to become much more eager to exhort the parties to reach a settlement in order to relieve their heavy work-load. It may be explained by this strong judicial impulsion that the rate of settlement by compromise has been increasing recently. (53)

III. Some problems surrounding the active role of judges

1. The active exercise of the judge's function in the social and economic climate of postwar Japan

In the postwar reforms of civil procedure the active role of judges was less emphasized than the initiative of counsel and client. But the actual exercise of the judge's functions depends not only on the legal innovations, but also on the social and economic setting in which they are to operate. The innovations, which aimed at shifting the initiative in the litigation from the judge to the litigant and his lawyer, seemed to conform to the political climate of postwar Japan. However, the ingrained behavior of judges and lawyers could hardly be changed overnight. The social and economic background in which the reforms have operated were not much different from those of the prewar years. (54) It became increasingly clear after the first decade of experience with the postwar innovations that their chief aim of making counsel a dominant figure in the court room could not be achieved in practice. Consequently the necessity of actual participation of judges began to be emphasized.

However, during 20 years development of the postwar legal system, the activities of lawyers have been steadily growing, espe-

(53) The percentage of trial cases settled through compromise in the District Court was 17.8% in 1960, 21.5% in 1965 and 25.6% in 1970. See *Saikō-Saibansho Jimusōkyoku*, note (48) at xxiv.

(54) For the political, social and economic climate of that time, see Tanabe, note (6) at 80-85, especially 83-85.

cially those who have been trained at the Legal Training and Research Institute.(55) The lawyer's self-confidence and his responsibility are increasing. Moreover, the rapid growth of the Japanese economy in these 20 years has changed the economic background and framework of social relations in which legal disputes occur. People are becoming more conscious of their rights. The lawyer's increasing activities in pretrial investigation and also at the trial stage are now enhanced by the exigencies of modern life and his role will not revert to that of the inactivity of prewar time. This means that there will not be a return to the prewar type of trial, where the trial was totally controlled by the judge, although the active participation of judges is now particularly emphasized. Thus, the judge's active functions should be exercised to promote the pretrial preparation and trial activity of counsel and client, and to give them a proper orientation in the achievement of a fair and prompt trial.

2. The judge's active function in small-claim cases and in suits without counsel

(a) Despite the increasing activities of lawyers there are still a considerable number of suits without counsel. Most small-claim cases are not represented by lawyers and are dealt with in the Summary Court.(56) The procedure of the Summary Court summarizes that of the ordinary District Court to some extent, but provides no special proceedings. Apart from exceptional cases, it is difficult to expect an active and proper participation of the litigant himself without counsel. The judge has to direct the litigant under his strong leadership to produce the materials to the court. Furthermore,

(55) See Abe, "Education of the Legal Profession in Japan", *Law in Japan* edited by A. T. von Mehren p. 152 *et seq.*, esp. 164-170.

(56) The Summary Court deals with cases which do not exceed in amount 300,000 yen. In 1970, about 90.4% of the cases were not represented by lawyers either on both sides (73.4%) or on one side (17%) of the parties. *Saikō-Saibansho Jimusōkyoku*, note (48) at xxx, p. 113.

the judge should sometimes, even from the beginning, question the litigant himself *ex officio* in order to ascertain the key points of the case and he should be a main examiner of the witnesses.

One of the reasons why most small-claim cases are not represented by lawyers is that the substantial residue of the winner, if he pays the lawyer's fees, is very small. This results from the fact that the lawyer's fee is not chargeable on the loser, because expenses of litigation in Japan, unlike in England or Germany, do not include the lawyer's fee.(57) It is therefore under serious discussion whether or not the system of charging the lawyer's fee to the loser should be adopted,(58) but there is little possibility of its realization in the near future. Also lawyers are reluctant to be counsels for small-claim cases because of the difficulty involved in being paid.(59) Because of these reasons most small-claim cases are not represented by lawyers, so that the situation requiring the judge's active role will remain unchanged for a while.

(b) Lawsuits not represented by lawyers do not always involve small claims. About 58.5% of cases dealt with in the District Court in 1970, being above 300,000 yen in their amount, were not represented by lawyers either on both sides (26.5%) or on one side (32%) of the parties. (60) In these cases too, the judge must carry

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(57) For a comparison of several countries' lawyer's fee systems, see Mikazuki et al., *Kakkoku Bengoshi-Sheido no Kenkyū* (Study of the Lawyer Systems of Several Countries), 1965.

(58) See Mikazuki, note (17) at 358-360, Nakano, *Bengoshi-Hiyō no Haisosha-Futan* (Charging the Lawyer's Fee to the Loser) 388 Jurist 58; Tamura, *Bengoshi-Hiyō* (The Lawyer's Fee), *Jitsumu Minji-Soshō-Kōza* (Selected Essays on the Practice of Civil Procedure) II 153, 163-165; etc.

(59) Regardless of the amount of the claims, most cases of real property are represented by lawyers because the result of the litigation is important to the litigant in spite of the lawyer's fee. See *Saikō-Saibansho Jimusōkyoku*, note (48) at xxx p. 113.

(60) *Ibid*, note (48) at xxxi, p. 149.

out his active function, which here is to induce both litigants to produce satisfactory material to the Court.

Indeed one of the main reasons for strengthening the function of judges is obviously to keep the weak litigant equal to his opponent in his presentation. But, the active intervention of the judge is not necessarily the only solution of the problem created where the parties are of unequal strength. If the poor could have an institutional support to employ lawyers who are equal to those employed by the opponent, it would be much more desirable to achieve the equality of the parties through the activities of counsels thus employed than through the active intervention of the judge. These devices would avoid not only the danger of the judge's misleading of a party caused by his possible bias, but also mitigate an avoidable burden on the over-loaded court system.

The Japanese Code of Civil Procedure (articles 118—124) provides state legal aid for indigent parties; but the litigation expenses to be granted through state legal aid do not include the lawyer's fee. Thus, Japanese state legal aid, unlike that of Germany, does not secure complete legal representation for the poor. It has been argued that the lawyer's fee should be included in the litigation expenses, which would come out of state legal aid. (61) Apart from these the present system of state legal aid still has the following problems : The system is not useful at the stage of preliminary investigation before action, because it is not available before the commencement of action. Also it is not easy to obtain legal aid because of the rigid prerequisites in actual practice.

In order to supplement these defects of state legal aid there is also a private system of legal aid provided by the Legal

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(61) See Mikazuki, note (17) at 360; Uchida, *Soshō jō no Kyūjo* (State legal aid) *Jitsumu Minji Soshō Kōza* II 169, 194; Togashi, Soshō Kyūjo (The state legal aid) *Enshū Minji Soshō Hō* (Seminar Civil Procedure Law) I 86-92; etc.

Aid Association set up in 1952 by the Japanese Bar Association. Comparing the situation of the system at the beginning, it is developing but by no means satisfactorily fulfils its function, having a budget of only 180,000,000 yen in 1968. (62)

Supposing the system of either state or private legal aid were built up further, and the lawyer's fees of lower-middle and working class people could be covered by legal aid, cases not represented by lawyers would decrease in number, except for the cases involving small amounts not suitable for legal representation.

3. The judge's function in the litigation with counsels

In cases represented by lawyers, how does the judge exercise his active function? Among lawyers there may be those who are not competent enough to advocate the clients' interest. In such cases the judge should induce counsels to produce the necessary facts and evidence through the use of his "clarification" powers. It is often said that the spirit of "making the party win who should win" continues to mold the conduct of most Japanese judges.(63) The judge should not allow the parties to be sacrificed because of the incompetence of their lawyers. It has also been argued, that "the litigant who chose an incompetent lawyer should not be looked upon in the same light as the patient who chose an incompetent doctor, because the lawyer is not the only doctor in his case, since the judge should also be his doctor, collaborating to protect his

(62) For private legal aid, see Koyama, *Hōritsu Fujo* (The legal aid) (1954); Morimura, *Wagakuni no Hōritsu-Fujo-Seido* (Our system of legal aid) 359 Jurist 45 *et seq.*; Kishi, *Nihon ni okeru Hōritsu-Fujo-Jigyō no Genjō to sono Shōrai* (The Present Situation and the Future of the Legal Aid Project in Japan) *Kaneko-Hakase Kanreki-Kinen Rombunshū* (Collected Essays for Dr. Kaneko's 61st Birthday Celebration) II 151 *et seq.*

(63) In this sense the court's power of "clarification" is actually called the "Magna Carta" for protection of citizens' interests. See Muramatsu, *Benron Shugi* (The Principle of Party Presentation) *Minji Soshō Hō Kōza* (Selected Essays on Civil Procedure Law) II 513, 530, 534.

interest". (64) As already mentioned, this does not mean a return to the prewar type of trial controlled through the judge's leadership. There are few lawyers who are not competent to protect their clients' interest by producing the right materials necessary for the facts investigation, if the judge gives them the proper suggestions and keeps in touch with them throughout the trial. The excessive emphasis on the necessity of judge's intervention in cases represented by lawyers will have the adverse effect on the independence and sense of responsibility of the Bar.

Furthermore, the active function of the judge should be exercised to check extreme technique and tactics of lawyers. It is often pointed out that the lawyer uses tactics aimed at prolonging the proceedings and then the opponent lawyer responds to these tactics out of comradeship as a colleague.(65) It follows that the interest of the parties (at least on one side) in a speedy adjudication will be sacrificed for the sake of the lawyer's convenience. Moreover, it causes the delay of the court-proceeding as a whole. The court should control the lawyers tactics by exercising its directive powers.

IV. The trend toward an increase in the number and power of special tribunals and the future of civil procedure

1. There is an increasing tendency for cases traditionally tried under normal civil procedure to be dealt with in a special proceeding at the court or at special tribunals. The so-called "trend towards removing contentious civil cases to the voluntary jurisdiction

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(64) See Someno et al., *Minji Saiban no Hōkō* (The Direction of Civil Trial), 32 *Hōritsu Jihō* 1022, 1036.

(65) So is also argued as a cause of the court's delay in Germany, see Habsheid, *Richtermacht oder Parteifreiheit*, 81 ZZP 177, 187-188; As an opposite argument, see Lancelle, *Umwelt und Recht-Richtermacht oder Parteifreiheit*, NJW 1968, 1959.

court'' is one of these significant tendencies.(66) It has been already mentioned that the court plays a much greater role in voluntary jurisdiction than in the proceedings of a normal court. After World War Ⅱ, as well as World War Ⅰ, there were a considerable number of enactments which removed a certain number of ordinary civil cases to the voluntary jurisdiction court. In 1948, an Act relating to Family-Noncontentious-Cases (FNC) came into force, so that many cases traditionally tried in Family-Contentious-Procedure are now treated under the new proceedings at Family Court.(67) Family non-contentious procedure, following the proceedings of voluntary jurisdiction (art. 7 FNC), enables the Court to have strong powers of leadership. Moreover, mediation is required to be offered at the Family Court before commencement of any kind of family-case-action (articles 17, 18 FNC). In the mediation proceeding the mediators have dominant leadership over, and strong influence upon, the participants in settling their disputes.

Also in the ordinary civil courts (District and Summary Court) there are an increasing number of cases which are dealt with in the same manner as cases involving voluntary jurisdiction. In 1967 there was enacted a new proceeding for landlord and tenant cases (a revision of Landlord and Tenant Law (LTL)) which, following the voluntary jurisdictional procedure (art. 14-3 LTL), gives the right to the participants to be heard on the case to some extent

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(66) See Mikazuki, *Soshō Jiken no Hishōka to sono Genkai* (Removing Contentious Cases to the Voluntary Jurisdiction Court and Limitations on this) *Jitsumu Minji Soshō Kōza* (Selected Essays on the Practice of Civil Procedure) VII p. 3 *et seq.*; etc.

(67) Under the Act relating to Family-Noncontentious-Cases (*Kaji-Shimpan-Hō*), the Family Tribunal, a branch of the District Court, was set up for the purpose of handling certain family cases under non-contentious procedure. In 1948, the Judicature Act was revised for establishment of the Family Court, which was a reconstruction of the Family Tribunal. See Yamakido, *Kaji Shimpan Hō* (Family Noncontentious Cases Law) 3-4 (1958).

(art. 14-6 LTL). In this respect, this new proceeding is deemed a new direction in the recent trend toward "transferring cases to the voluntary jurisdiction court".(68) The mediation of normal civil cases, unlike that of family cases, is not required as a prerequisite to action; but here also, the mediators actively excercise their directive powers to settle the disputes. Compared with the peaktime of 1950, the number of mediation cases has decreased somewhat, but still a considerable number of cases are settled by mediation. (69)

2. It has been said that the new trend toward spreading the coverage of these kind of tribunals, which have dominant leadership in the proceedings, was caused by new developments in social relationships. (70) Traditional private law and procedure do not often fit in with these new relationships and it will be necessary to adjust the law so as to fit in with them. The scope of state intervention especially has been increased in the many relationships formerly regarded as being left exclusively to "private autonomy" (e.g. that of landlord and tenant). Correspondingly there has also been an increasing necessity for special kinds of procedure, in which the court or the tribunal may initiatively intervene in the disputes between citizens.

In these circumstances it may be asked what the future of civil procedure should be. First of all, these new types of dispute cannot be properly settled in traditional civil procedure, whose principles, such as party disposition or party presentation, have been deemed to be reflections of "private autonomy" in the procedure. On the other hand, the traditional proceeding of the voluntary juris-

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(68) See Yamakido et al., *Shakuchi-Jiken no Hishōteki-Shori*, (Non-contentious-Handling of Landlord and Tenant Cas s) 53 *Minshōhō Zasshi* 835, 897.

(69) The number of mediation cases in the District and Summary Court was 78,977 in 1955, 64,936 in 1960, 52,067 in 1965 and 53,377 in 1970. See *Saikō-Saibansho Jimusōkyoku*, note (48) at xxiii.

(70) See Mikazuki, note (66) at 32 *et seq.*, esp. n. (7); Yoshimura, note (1) at 137-140.

diction court enables the judge to intervene in the disputes, but lacks sufficient guarantee for the participants to be heard. Therefore it has been argued that the new types of dispute require the third proceeding which is more flexible than the traditional civil procedure and has more sufficient due process guarantee for the participants. (71) The new proceeding in landlord and tenant cases is deemed to direct an orientation of this kind of third proceeding. But it is also criticized, if there are insufficient guarantees for the hearing of participants in the proceeding. (72)

Secondly, another approach to the problem has been strongly advocated: traditional civil procedure should be modernized, so as to adjust itself to the new types of dispute. Some Japanese scholars have been recently trying to mitigate the traditional principles of civil procedure, such as of party disposition, or of party presentation, through the pragmatic or functional approach.

3. The new trend towards modernization of traditional civil procedure stands on the following fundamental points of view.

Some scholars and judges, who follow the new trend, strongly doubt the traditional idea that civil procedure is fundamentally a reflection of "private autonomy" on its subject matter.(73) According to the functional point of view, the traditional principles of civil procedure are not reflections of "private autonomy", but can be functional devices for approaching the truth-finding, or to be due

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(71) Wagatsuma, *Rikon to Saibantetsuzuki* (Divorce and Proceedings) 39 *Minshōhō Zasshi* 1 (1959); Kojima, *Hishōka no Genkai ni tsuite* (On the limitation of Transferring to the Voluntary Jurisdiction) *Chūō-Daigaku* 80 *Shūnen Kinen Rombunshū* (Collected Essays for 80th Anniversary of Chūō University) 301.

(72) Yamakido et al., note (68) at 863.

(73) Particularly this is the case as to the principle of party presentation. See Mikazuki, *Benron-Shugi no Dōkō*, (Trend of the Principle of Party-Presentation) in his collected Essays (*Minji-Soshō-Hō Kenkyū*) I 49, 71-72.

process guarantees for protecting the parties' interest. So far as these functions are fulfilled, the traditional principles would be mitigated.

(a) The priciple of party disposition would be mitigate if the judge granted redress of damages in excess of the plaintiff's demand. So it is argued in torts cases.(74) According to the new idea too, the plaintiff should allege the grounds of damages in the pleadings, so that such a judgment would be no surprise to the defendant.

(b) As to the principle of party presentation it is also argued that small variance between pleadings and proof do not prevent the finding of facts not alleged by either party in accordance with the result of proof, unless it gives surprise to the opponent's party. (75)

4. These new endeavours to make traditional civil procedure correspond to recent social relationships should be seriously considered. But at the same time, it is also indispensable to ascertain the substantial values of traditional principles, and not put them at risk just for the sake of shortsighted necessity. Above all, in a free society, the relationships between its citizens are of necessity to be left to "private autonomy"; State intervention should be limited to the minimum. For example, it would clearly be a permissible intervention for the State to assist the poor in order to secure substantial equality between citizens. Strengthening the judge's powers in civil procedure naturally leads to an extension of the state's powers of intervention in private relationships. In such cases of State intervention where is to be sought the guarantee that the judge's power is properly exercised, for example, in order to assist the poor in securing substantial equality? In my opinion such a guarantee is to be sought in the supervision and checking of the trial

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(74) Isobe, *Songaibaishō Santei ni okeru Soshō jō no Tokuisei* (Procedural Speciality for Estimating the Amount of Damage) 79 *Hōgaku Kyōkai Zasshi* 720, 741-742.

(75) Takeshita, *Benron-Shugi* (The Principle of Party-Presentation) *Enshū Minji Soshō Hō* (Seminar Civil Procedure Law) I 329, 336.

by the litigant and the public. In this sense it is indispensable in civil procedure to encourage the active participation of the litigant and his lawyer.

追　　記

英文で書かれた「日本民事手続における裁判官の積極的役割」についての，この小稿は，1973年に作成し，比較法国際学会（International Academy of Comparative Law）に提出したものである。1974年にテヘランで開かれた第9回比較法国際学会（The Ninth International Congress of Comparative Law in Teheran 1974）において，「民事手続における裁判官の積極的役割」（Active Role of the Judge in Civil Litigation）が民事訴訟法の統一テーマとされたところから，日本における同学会の国内委員会の理事をされている三ケ月章教授の依頼をうけ，日本の民事手続についての報告書として執筆したものである。当時，三ケ月教授からも何らかの形で公表してはというお勧めをうけながらその機会のないままにしていたものを，この度ほぼそのままの形で活字にすることにした。ヨロビッツ教授（Professor J. A. Jolowicz）の一般報告書を見ると，日本報告書の多くの部分が要約再現されており，これは近く公刊される予定であると聞くので，この一般報告書と対比する場合の便宜にでもなれば，と考えたためである。