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# CIVIL PROCEDURE REFORM IN JAPAN

*Takeshi Kojima\**

## I. INTRODUCTION

Delay in court has been a problem common in all eras, both ancient and modern, and to all systems of law, Western and Eastern alike. In Japan, however, the problem is arguably more acute. The average delay between filing and judgment for cases that require at least a minimum level of proof-taking or an evidentiary hearing is 27 months.<sup>1</sup> Far longer delays are experienced before final judgment if an appeal is made.<sup>2</sup>

The typical civil case proceeding through litigation will be heard before a career judge without a jury.<sup>3</sup> On average, each case will have seven oral hearings, two settlement hearings, and four party or witness examination sessions. In the average case, little more than 3 witnesses are examined for a total of 4 hours.<sup>4</sup> The average time spent between sessions is 40 days. However, evidentiary hearings can be scheduled only once every 75 days. Moreover, in half of all cases the judge is moved to another jurisdiction and replaced due to Japan's system of rotating judges to serve in different jurisdictions.

This deplorable reality has recently led to renewed efforts to tackle the problem of delay in Japan. Two groups that have been particularly important in this effort are two local bar associations and the

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1. The Japan Federation of Bar Associations, *Kokumin no Saiban wo Ukeru Kenri* (3), in THE 11TH SHIHO SYMPOSIUM RECORD 30 (1987). This contrasts with judicial statistics from 1988 which show the average time taken for the disposition of cases filed at the district court was 12 months. The Supreme Court Jimusokyuoku Minjikyoku (General Secretarial Civil Department) *Syowa 63 Nendo Minji Jiken no Gaikyo*, 41 HOSŌJINHŌ 2728, 2802 (1988). However, this official statistic makes no distinction between the types of cases; it is an average of all cases filed, including those that lead to default judgment and those that are promptly settled.

2. In cases where the claim is less than or equal to ¥900,000, the summary court has jurisdiction with appeal to the district court and then to the high court. For cases over ¥900,000, the appropriate forum is the district court with appeal to the high court, and from there to the Supreme Court. The first appeal is for reviewing fact and law; the second appeal is for reviewing only law.

It is noteworthy that, with the exception of a two week time limit and penalties for abusive appeal, there is no limitation on appeals. MINSOHŌ (Code of Civil Procedure), at arts. 366, 384 and 396 (Japan).

3. The basic structure of Japanese civil procedure is similar to the European continental style, particularly that of West Germany.

4. The Japan Federation of Bar Associations, *supra* note 1, at 30.

Tokyo and Osaka district courts. The First Tokyo Bar Association and the Second Tokyo Bar Association have each separately published their own recommendations as to how to remedy the situation.<sup>5</sup> The First Tokyo Bar Association's publication, entitled "A Tentative Draft of a New Civil Procedure Law," is a radical proposal, while the Second Tokyo Bar Association's proposal is more or less similar to the more moderate proposals of the Tokyo and Osaka district courts. These proposals are particularly noteworthy because they represent a change of heart by the two bar associations. Like some of the other bar associations in Japan, they were not supportive of attempts at procedural reform in the past.

In 1987, the Tokyo and Osaka District Courts, two of the leading courts in Japan, each published their own prescription for reform<sup>6</sup> and have actually put many of their suggestions into practice. It should be noted that there is a subtle difference in the language that the bar associations and the courts each use to characterize the goal of reform. While the bar associations use the phrase "a faster disposition of cases,"<sup>7</sup> the courts have called for "a higher quality of hearing."<sup>9</sup> This difference in terminology is understandable in light of the fact that the Chief Justices of the Supreme Court have for a number of years repeatedly called for speedier hearings, while the bar associations have resisted reform in that direction. Consequently, the courts have attempted to avoid a confrontation with the bar by using more neutral terminology in their proposals.

Because of the important role the bar and judiciary play in building a faster procedural mechanism, reform should be approached in a spirit of cooperation between the two groups. Although in the past the judiciary and the bar have been on different sides of the debate on procedural reform, they have now, for the first time, come to share a common ground in their approach, thus making the future of reform brighter.

This article will describe and evaluate these recent proposals for reform and conclude that the legal community should experiment with

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5. Daiichi Tokyo Bengoshikai (First Tokyo Bar Association), *Shin-minjisoshō Tetsuzuki Shian*, 914 JURIST 40 (1988); Daini Tokyo Bengoshikai (Second Tokyo Bar Association), *MINJISOSHŌ JUJITSU SOKUSHIN JISSEN MANUAL SHIAN* (1989).

6. Tokyo Chihō Saibansho (Tokyo District Court), *Minjisoshō no Shinri wo Jujitsu Saseru tameno Tokyo Chihōsaibansho no Hōsakuan*, 914 JURIST 32 (1987); Osaka Chihō Saibansho (Osaka District Court), *Minjisoshō no Shinri wo Jujitsu Saseru tameno Osaka Chihōsaibansho no Hōsakuan*, *id.* at 35.

7. Some members of the bar have recognized the need for speedy hearings, but have insisted that the only method employed should be to increase the number of judges and assistant judges.

8. Daiichi Tokyo Bengoshikai, *supra* note 5, at 45.

9. Tokyo Chihō Saibansho, *supra* note 6, at 36.

the suggested procedural changes. The constitutional, procedural and social implications of the innovative methods will also be considered.

## II. A NEW STIMULUS TOWARD REFORM OF CIVIL PROCEDURE

There are several factors behind the new movement to reform civil procedure in Japan. One directly influential factor has been the new civil procedure reforms in West Germany, the country which provided the model for Japanese procedural law. In addition, the reforms and lively debate that have taken place in other civil law jurisdictions, such as France, and in the common law countries of England and the United States, have had a significant impact in Japan. However, the international reform movement has its roots not just in changing legal fashions, but in more fundamental structural causes. Increasingly, countries have recognized that speedy and efficient deliberation and judgment of the issues in a case is a fundamental procedural right.<sup>10</sup> This recognition goes so far as to conceive of an international minimum standard to be followed in each case and is beginning to provide us with a new yardstick with which to measure the fairness and quality of the particular procedural system in each country.

Another impetus for reform indirectly comes from ordinary citizens and the corporate sector. Citizens who became involved in the consumer and environmental litigation of the 1960s and 1970s<sup>11</sup> began to exert pressure for reform by relaying their criticisms of the legal system through their lawyers. Also, as many companies and businesses have begun to form large corporate law departments with extensive workloads, they have come to realize that there is a significant gap between the dynamic needs of business and the plodding world of law. Hence, threatened with the "*bengoshi banare*" (disgruntled clients deserting the use of lawyers), lawyers have had to deal with and account for the criticisms aired by their private and corporate clients. This pressure has shaped their attitudes toward reform.<sup>12</sup>

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10. A speedy hearing is guaranteed by constitutional provisions in Spain, Turkey and South American countries. Such guarantees can also be read through the interpretation of constitutional law in Japan, West Germany, the United States and Greece. In some countries, such as the Netherlands, a speedy hearing is provided for in the procedural law. FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION (M. Cappelletti & D. Talon eds. 1973); Schwab & Gottwald, *Verfassung und Zivilproze*, in EFFECTIVENESS OF JUDICIAL PROTECTION AND CONSTITUTIONAL ORDER 1, 63-66 (W. Habscheid ed. 1983); Kojima, *Judicial Protection of Human Rights*, in WORLD CONGRESS ON PROCEDURAL LAW FOR THE NINTH CENTENARY OF THE UNIVERSITY OF BOLOGNA, JUDICIAL PROTECTION OF HUMAN RIGHTS AT THE NATIONAL AND INTERNATIONAL LEVEL 281, 314-315 (1988).

11. Various consumer and environmental litigation in Japan is described in PERSPECTIVES ON LITIGATION AND ADR: JAPAN AND THE U.S.A. (T. Kojima ed. 1990).

12. The Japanese Federation of the Bar has regularly held a symposium entitled "Towards a Populist Lawyer" since 1985. I had the pleasure of delivering the key-note address to the first,

Courts have not been immune from actual and anticipated pressures either. Recently, there has been a phenomenal increase in litigation. While many of the new cases are simple or undisputed credit cases, the proportion of complex cases in which difficult scientific proof is required or multiple parties are involved has increased, adding to the workload of the courts. The courts anticipate that as Japanese society becomes more individualistic, there will be a rise in the number of complex cases. The pressures resulting from such an increase will inevitably have a significant impact on both the bar and judiciary.

Finally, with the increasing globalization and internationalization of Japan, many Japanese lawyers specializing in foreign or international law who have been exposed to more efficient procedural systems in other countries have come to realize that Japan has an acute delay problem. Similarly, with the international community's increased contact with Japan's legal system, foreigners have begun to focus on the faults of Japanese procedural law. Japanese lawyers have thus seen the need to renovate the legal machinery and discard their traditional negative attitudes towards reform.

### III. A SKETCH ON THE NEW REFORM MODEL

Although there have been many previous reforms and reform proposals, the present proposals by the bar associations and the Tokyo and Osaka district courts are unique in that they go beyond piecemeal reform<sup>13</sup> and envisage a thorough and complete reform of Japanese civil procedure and practice. The basic element underlying these proposals is the idea of a three-session hearing for the average case in litigation. They provide for the implementation and support of the three-session model. The following is a description of the features underlying these new reform proposals.<sup>14</sup>

#### A. *The First Session*

The first session should, in principle, be held as early as practicable: It serves two main functions. First, at this session the court has the opportunity of weeding out those cases that do not involve a dis-

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fourth and sixth symposia. The organization's extraordinary enthusiasm is motivated by a sense of urgency, largely due to the thought that citizens may soon start deserting lawyers.

13. Several of the reforms that have been implemented include the active use of the preparatory conference, MINSOHŌ (Code of Civil Procedure) art. 249 (Japan); preparatory oral hearings in open court, Minjisoshō Kisoku (Civ. P. Ct. R.) 26 (Japan); penalties for abusive appeals, MINSOHŌ art. 384, para. 2, and summary procedure for bill and check litigation, MINSOHŌ art. 444. Various other reforms have been advocated by judges, lawyers and scholars.

14. Here I follow the new model as summarized in Takeshita, *Minjisoshō no Kaizen to Aratana Shinrimoderu no Masaku*, 40 JIYŪ TO SEIGI 95 (1989).

pute, i.e., cases that can be disposed of by default judgment, cases where one of the parties (usually the defendant) does not appear, or cases where service of the complaint has been by public notice.<sup>15</sup> The court then categorizes the remaining cases according to whether they are appropriate for mediation or settlement in court, whether they require a preparatory conference or informal hearing and whether they will have a public hearing. In making such a categorization, the court is to look at, *inter alia*, the parties' expectation and any negotiations that may have taken place between the parties prior to the case.

Second, during this session the court should attempt to clarify the issues and allegations involved in the case and also make preliminary arrangements for the evidence to be presented in later sessions. This is undertaken so as to ensure the efficient progress of later sessions.

Before the first session, the plaintiff submits a complaint which, in order to facilitate careful deliberation of the issues, must clearly state the causes of action upon which the plaintiff is suing and the facts from which the allegations arise.

At this first session, the court prepares those cases that contain an element of dispute for later sessions by instructing parties to clarify certain matters or to make preparations to do so. Parties are also encouraged to submit documentary evidence. Parties, usually defendants, who have not prepared sufficiently for the case are encouraged or — if necessary — ordered to prepare.

### B. *The Second Session*

Between the first and second sessions an exchange of briefs takes place. At this time the court makes an effort at clarifying the matter and comes to an understanding of what is at the core of the dispute. The preparation for the second session takes between two to three months.

At the second session, the court examines documentary evidence and decides whether witnesses will be examined and the order in which they will be examined. All orders and dispositions that need to be made to secure the attendance of witnesses are made at this stage.

The procedure for the second session is a form of hearing designed to prepare the parties for efficient proof-taking. The primary method of examination is that of an informal "round table" hearing (*benron-ken-wakai*), which is radically different from the traditional form of

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15. In cases where service of the complaint has been by public notice, the court usually completes proof-taking and informs the plaintiff when the decision will be rendered. There is no admission effect in this type of case, due to the lack of advance notice. MINSOHŌ (Code of Civil Procedure) art. 140, para. 3 (Japan).

public oral hearing. The judge, the lawyers and the parties, as well as those related to the case, such as parents and spouses, attend a conference in the judge's chambers or in a settlement room in the court. The atmosphere is informal and the session conducted orally, with the parties communicating directly with the judge. Both sides further elaborate on the facts they have alleged. At all times, the role of the judge is to assist in the clarification of the evidence that is produced and to get to the core of the dispute and its detailed factual basis. The judge is encouraged to convey his opinion of the case to the parties through the use of his clarification power<sup>16</sup> so that the parties gradually come to an understanding of the issues as well. Thus, it is hoped that legal and factual matters can be dealt with in a relaxed manner without the judge ever assuming an intimidating posture.

At this session, there is often an emphasis on settlement. While the court is determining and clarifying the issue, it is also making efforts to settle the case. If a general understanding of the case can be obtained on the basis of documentary evidence alone, the court may recommend settlement to the parties.

### C. *The Third Session*

At the third and final session, an evidentiary hearing with extensive proof-taking is held before the court. After the witnesses are examined, both parties present their closing statements.<sup>17</sup> The court then closes the case, although it has the discretion to order further sessions if the evidence obtained in the examination is inadequate or if the issues have not been sufficiently clarified.

The proposals provide that the evidentiary hearing should be conducted as a continuous proceeding to the greatest extent possible, with minimal interruption. Although a majority of legal opinions agree that Japan should move towards this more concentrated or continuous form of hearing, this has not yet been achieved in practice.<sup>18</sup>

## IV. IMPORTANT FEATURES OF THE REFORM MODEL

The foregoing sections described the main thrust of the new model. In the following section I discuss in greater detail the advisability of

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16. Article 127 of the Code of Civil Procedure provides a judge with the power to ask a party to make his or her allegations clear or suggest the addition of facts, allegations or evidence, including the modification of pleadings. MINSHÖ (Code of Civil Procedure) art. 127 (Japan).

17. There is still no provision in the Code of Civil Procedure for closing statements, but such a practice would be useful for injecting life into court hearings.

18. After World War II, there was much procedural modification in favor of an Anglo-American judicial administration, notably a continuous hearing and cross-examination of witnesses.

categorizing cases, the round table discussion, the feasibility of a concentrated evidentiary hearing and settlement procedure.

#### A. *The Advisability of Categorizing Cases*

All the proposed models provide that, from the earliest stages, the court should select the most appropriate procedure for the case before it.<sup>19</sup> Before coming to court, the plaintiff, in all probability, will have already determined the procedure under which he or she wants to pursue the case, the choice being influenced by prior contact with the defendant. It seems only correct, then, that the court respect the parties' preferences.

However, the court may still have a large role in determining the most suitable procedure, as in the case where the parties are unrepresented and have not had legal advice. Even if parties are represented by counsel, the court may still find additional factors in the case which make selection of one particular procedure more suitable than others. The court's neutral position and expertise make it a desirable body for making such a selection.

Because a lawsuit is dynamic and can develop in diverse ways as it progresses, the court must pay continuous attention to the development of the case and not be too rigid in its choice of procedure if the proposed categorization of cases is to be most effective. The change of procedural gear should be a smooth and simple process in order to facilitate the appropriate selection of process in later stages of a case.

The categorization of cases as advocated by the reform proposals is an effective measure for diversifying procedure and making use of alternative dispute resolution ("ADR") methods. By matching the substantive dispute with an appropriate procedure, the categorization of cases aids in the facilitation of justice. A party is provided with the most suitable procedure for its case, and the court makes the most efficient use of its resources.

#### B. *The Round Table Discussion*

The Tokyo and Osaka district courts' introduction of the audacious new method of round table discussions into their court practice represents a significant departure from the traditional form of hearing, which, as an embodiment of the best elements of modern systems of

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19. The First Tokyo Bar Association proposed an early categorization of cases for the reason that parties take into account the procedure under which they will pursue their case in deciding whether they want to retain a lawyer. Also, if the case is to be disposed of by settlement, a simple complaint is all that is required.

procedural law, has long been considered beyond reproach.<sup>20</sup>

The primary considerations in evaluating the round table approach are its substantive merit and its practical expediency. Advocates of the round table discussion characterize this new form of hearing as a child of judicial wisdom, conceived in the hope of injecting life into court hearings.<sup>21</sup> The traditional form of hearing was similarly born out of a desire for an active oral presentation, rather than the mere exchange of briefs and documents. The newer form of hearing therefore remains faithful to the spirit of the earlier form.

Supporters argue that round table hearings conducted behind closed doors would be more participatory and far more likely to result in a fair settlement. This is because the participants would be more relaxed and candid, thus enabling the court to reach the heart of the dispute more easily. They also contend that the round table discussion would ameliorate the present shortage of court clerks and available courtrooms because the discussion would be held in the judge's chambers. However, the round table discussion should be adopted for reasons that have more to do with substantive considerations. If expediency is the paramount consideration, the proposals must be considered dubious.

Critics of the round table method argue that the traditional method of open court hearing cannot be discarded simply because the present methods do not work well.<sup>22</sup> They advocate using more orthodox methods to improve the system. In short, they contend that it is inappropriate to start using the back door instead of repairing the front door.

Because the round table method has developed out of the daily experience of the court and is based on a mutual understanding between the judiciary and the bar,<sup>23</sup> there is a certain rationality and legitimacy behind it. With careful monitoring to determine its merits and shortcomings, the implementation of this method on an experimental basis is worthwhile. Nevertheless, a one-track experiment in reform is not sufficient. As the round table method is tested, we should make efforts to revitalize the traditional hearing in open court and conform it to the needs of modern Japan.

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20. In the traditional system introduced to Japan from Germany in 1891 and 1926, sessions for oral presentation were held in open court.

21. Suzuki, "Benron Ken Wakai" *Hōshiki ni Tsuite*, 36 MINJISOSHŌ ZASSHI 1 (1990); see also, Nakano, MINJI TETSUZUKI NO GENZAI MONDAI 57 (1989).

22. Inoue, *Shinri no Jujitsu Sokushin to Wakai*, 914 JURIST 104 (1988).

23. The Tokyo and Osaka District Courts' proposals were formulated through the process of joint discussion on various levels among judges and practicing lawyers. MINJISOSHŌ NO PRACTICE NI KANSURU KENKYŪ 8-9 (Institute of Legal Training ed. 1989).

Essential to the success of the new method is the need to reconcile it with existing constitutional and procedural law. It may be argued that the round table discussion has a legitimate basis in procedural law as a hybrid conference, containing elements of a preparatory conference in the judge's chambers<sup>24</sup> and a hearing in open court.<sup>25</sup> What has been done in chambers is then stated by the judge in court in the third session, thus creating a legitimate basis for the decision. Even if we candidly admit that the round table discussion is different from the traditional device, it can be justified as an expression of the power inherent in the judiciary, as long as it is not clearly prohibited by procedural law.

It is more difficult, however, to reconcile properly the round table discussion with article 82 of the Japanese Constitution which requires that a judicial hearing be held in "open court."<sup>26</sup> It is questionable whether the essence of the public hearing requirement can really be preserved under the proposed reforms. A claim that we have a public hearing system would be rather hollow if hearings were conducted in chambers and the results were merely announced in open court. While it may not be necessary to go as far as to rethink the concept of a public hearing, we should carefully aim to preserve the essence of the public hearing requirement by ensuring the parties' active participation in the third session, either in the opening statement or in the final argument. The Constitution requires that the essence of the hearing be public: that focal issues be discussed and evidence be examined. This constitutional interpretation is faithful to the spirit of the Constitution.

The First Tokyo Bar Association has proposed a form of hearing even more radical than the round table discussion method, known as the "Informal Hearing Session" (*shinri kijitsu*). According to the proposal, a closed door hearing would be the rule rather than the exception. Under the scheme, almost every aspect of a court hearing, including the examination of witnesses, would take place during informal sessions behind closed doors. This contrasts with the Osaka and Tokyo district courts' proposal, in which the round table discussion in the judge's chambers is used only in the second session.

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24. MINSOHŌ (Code of Civil Procedure) art. 249 (Japan).

25. Minjisoshō Kisoku (Civ. P. Ct. R.) 26.

26. Article 82 of the Japanese Constitution provides:

Trials shall be conducted and judgment declared publicly. Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

The First Tokyo Bar Association's proposal attempts to solve the conflict with Article 82 of the Constitution, the public hearing requirement, by allowing the parties themselves to choose whether their hearing will be conducted in chambers or in open court. However, the parties' consent is simply not sufficient to justify such non-public hearings. In my opinion, the effect of the proposal amounts to an almost wholesale replacement of the open court hearing.

### C. *Feasibility of a Continuous Evidentiary Hearing*

The concentrated, or continuous, hearing is an evidentiary hearing that is held over consecutive days until finished. One of the benefits of a continuous hearing is that the whole process is more visible to the public, and the enhancement of visibility increases the public's appreciation of events in court and ultimately their confidence in civil justice.

Present Japanese procedural law provides for a concentrated court hearing. The practice is embodied in the Civil Procedure Court Rules which state that: "when issues and evidence have been placed in order, the hearing in open court of a case should be held continuously to the greatest extent possible, if such a hearing is to last more than one day."<sup>27</sup> The Rules further provide that if such a continuous hearing is not feasible, "the lapse between sessions should be as short as possible."<sup>28</sup>

However, the existence of a continuous hearing rule does not necessarily result in an effective hearing in practice. The rule must first be effectively implemented, and this raises some problems. For example, when the court schedules a continuous session, a party's or witness' failure to appear interrupts the court's schedule and results in a considerable loss of time. In a non-continuous hearing this problem can be more or less absorbed. Under the adversary system, the court may continue with the proceedings and ultimately render a judgment unfavorable to a non-attending party or to a party whose witnesses have not appeared. However, in Japan a court may hesitate to do so because, after calling the witnesses, it implicitly has the responsibility of ensuring their attendance.<sup>29</sup> Also, because witnesses are a third party to the hearing, the parties cannot be punished for their failure to attend. Of course, if a party fails to appear, or if a party scheduled to be a witness fails to appear, the concept of the adversary system applies,

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27. *Minjisoshō Kisoku* (Civ. P. Ct. R.) 27 (author's translation).

28. *Id.*

29. *MINSOHŌ* (Code of Civil Procedure) arts. 276-78 (Japan).

so that the court may proceed in the party's absence and close the hearing.<sup>30</sup> The court has the ability to minimize absences by encouraging parties or their attorneys to cooperate and insure that their witnesses will appear, and if inevitable events prevent witnesses from attending, attorneys are encouraged to give early notification of non-attendance.

Another difficulty with the implementation of the continuous hearing is caused by settlements reached on the eve of trial, resulting in disruption of the court docket. A list of stand-by cases waiting for hearing that could come on immediately would ameliorate this problem. However, this would be a difficult practice to implement in Japan due to a simple lack of cooperation by Japanese lawyers. This lack of cooperation is caused, in part, by the enormous sacrifices they would have to make to operate on a stand-by basis. Japan does not use the jury trial system, and for that reason a continuous hearing is not an absolute requirement of the Japanese legal system. Therefore, Japanese lawyers have reasoned that the sacrifices to be made in implementing such a hearing do not justify the gains. A second factor is the small number of lawyers in Japan. Lawyers have such a high proportion of litigated cases on their hands that it would be very difficult for them to participate in continuous hearings. Third, a continuous hearing would require intensive preparations. To make such preparations possible, some form of discovery must be made available to lawyers. In Japan, where there is cross-examination of witnesses but no discovery,<sup>31</sup> we have to find some device to facilitate the continuous hearing. If, as suggested by the model, evidentiary documents are provided in early stages of procedure, parties will come to a better understanding of the case, thus increasing the chances of a successful hearing.

The first Tokyo Bar has advocated the continuous trial, but the Tokyo and Osaka district courts have been more cautious, a caution based on the sacrifices that will have to be made if such a hearing is adopted for all cases. Under the district courts' approach, a continuous hearing would be selectively employed.

There are other innovations contained in the district courts' proposals that need to be examined in the context of the continuous hearing. The courts propose that a party to a case be examined as early as possible. This is suggested in spite of Article 336 of the Code of Civil Procedure, which states that the court may examine a party after other witnesses have been examined. The courts make this suggestion

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30. MINSOHÖ (Code of Civil Procedure) art. 263 (Japan).

31. This aspect of Japanese procedural law is a hybrid of the West German and the American systems. Cross-examination was transplanted from the United States after World War II.

so that the court and both parties can get an early grasp of the issues in the case or of the direction of the case. The courts also propose that the parties and witnesses present statements of the testimony they propose to give in court before any examination session. Before the hearing commences, the other party can prepare for cross-examination, thus being able to avoid surprise or postponement.

In my opinion, while a continuous hearing is a good policy in view of its probable efficiency, decisiveness and high visibility, the court should retain flexibility over its use. Even if only a minority of cases are processed this way, the system will be improved to a remarkable extent.

#### *D. Encouraging a Settlement in Court*

The proposals of both bar associations and courts emphasize the voluntary settlement of disputes in court. They encourage the courts to take an active role in bringing both parties to settlement. The Osaka District Court's proposal encourages settlement at any stage of a case whenever the court feels that a particular compromise is appropriate. The proposal further provides that the courts should encourage settlement by submitting an opinion or assessment in which the court indicates a prospective decision whenever it is requested to do so or feels it is necessary. In exceptional cases, the court may issue a written opinion proposing concrete terms of settlement. This aspect is striking in that it gives the court the freedom to express conditions of settlement that accord with its own view of how a particular case should be resolved. In this way the court will be able to avoid allowing a settlement that does not correspond to the merits of the case. The Tokyo District Court's proposals have a similar thrust, emphasizing settlements that reflect the merits of a case.

It is usually appropriate that the court, in its attempts to bring about a voluntary resolution of disputes, should form its own opinion about the conditions of the settlement toward which it is urging the parties. It is hoped that such an effort by the court will succeed in bringing about the most appropriate solutions based on fact finding and legal rules.

However, there are some problems with this heavy emphasis on settlement. Critics argue that voluntary settlements should be brought about at the parties' initiative and the parties should play the primary role. If the judge expresses his own view of the case and his proposals for settlement, the terms of the settlement will be as inflexible as a judgment. In effect, the concept of settlement will be little more than a time-saving device for the court. In my opinion, the criticisms are

valid only to some extent. It is certainly problematic if a party feels pressured by the judge to reach a settlement. More importantly, if the contents of the settlement agreement are no different from those of a judgment, the process loses flexibility and becomes valueless as it denies the unique benefits a settlement can bring.

The conditions of settlement should be more or less based on predicted court decisions consistent with the law, including legal precedent and probable fact-finding. At the same time, a settlement should maximize the parties' satisfaction through the utilization of creative ideas. A new negotiation theory suggests that a result consistent with law but maximizing the parties' satisfaction is negotiated by ascertaining true needs and preferences of the parties and accommodating their interests.<sup>32</sup> This could be called a creative or integrated negotiation format, as opposed to the traditional adversary format. Although the result of a settlement may be the same as the judgment that would have been obtained in court, the contents of the settlement might be very different. For example, where the enjoyment of an orange is contended by two parties, a judgment rendered according to law would give both parties one half of the orange.<sup>33</sup> A negotiated settlement, however, would be able to take into account the use for which each party desired the orange. A judgment at law would require the equal division of either the orange or its monetary value. However, it is possible to reach a settlement that is consistent both with the law and with the wishes of the parties. Party X takes the orange peel for making marmalade and Party Y takes the fruit for relieving thirst. These are terms that are not possible at law.<sup>34</sup>

The district courts propose that courts should be selective as to whether, where and when negotiations for settlement are suitable. This approach contrasts with the First Tokyo Bar Association's proposal that an attempt at settlement in every case should be compulsory. This, I believe, goes too far. As the above example illustrates, if the courts selectively employ the round table negotiation method, taking into consideration the desires of each party, successful dispute resolution can be achieved.

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32. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); D. PRUITT, *NEGOTIATION BEHAVIOR* (1981); H. RAIFFA, *THE ART OF NEGOTIATION* (1982); W. ZARTMAN & M. BERMAN, *THE PRACTICAL NEGOTIATOR* (1982). See also Kojima, *Hôteki Koshō Kenkyū no Genjyō to Kadai*, 381 NBL 12 (1987).

33. MINPŌ (Civil Code) art. 250 (Japan).

34. MINPŌ (Civil Code) art. 258 (Japan).

## V. THE COORDINATION OF PROCEDURES FOR SETTLEMENT AND JUDGMENT

One of the primary issues of the reform is the coordination of the settlement procedures with the judgment procedures: should we have a combined one-track procedure or two separate procedures? Some interesting opinions and criticisms have been aired on this issue. If a judgment and settlement are to be consistent, is it advisable to separate cases into settlement and oral hearing categories at the earliest stages of the procedure? A possible rationale for the two-track system is that a hearing session and a settlement session are so completely different in form, setting and substance that cases must be categorized early.

The critics of the two-track system advocate a single procedure for settlements and judgments.<sup>35</sup> The rationale behind this view is that rules for judgment and rules for settlement both retain equal flexibility. Any attempt by the court to distinguish them or characterize them as different undermines the flexibility.

I agree with this criticism to a certain extent. We often overemphasize the differences in rules between judgment and settlement. Nonetheless the differences do exist. In the reform model, the round table session serves the dual purpose of facilitating a smooth hearing and encouraging a settlement. Settlement and judgments are two separate aspects of a case. Both, as far as procedure is concerned, are integrated parts. Efforts at judgment and settlement are procedurally separate but meet together at some point, i.e., at the round table discussion. In this respect, the reform model has a sound basis.

Another aspect of the relationship of settlement and judgment is their several related effects. The most fundamental effect is, of course, actual or possible *res judicata*, but all possible effects of the hearing should be considered. If we look at litigation through its various stages we see that the "litigation effect" (*teiso koka*) or "confrontation effect" (*taiketsu koka*) starts working as soon as the plaintiff submits his complaint. As the hearing moves on, the parties are influenced by the judge's developing impression of the case. This is the "persuasion effect" (*settoku koka*) or "judicial impression effect" (*shishokeisei koka*). If the court declares its decision, such a decision has an impact on the party ("decision effect," or *hanketsu koka*) even if the decision is not yet enforceable and an appeal is still possible. Finally, *res judicata*, which emerges when an appeal becomes impossible, has a decisive effect on a party as the end product of civil procedure.

According to the strictly legalist concept of procedure and its ef-

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35. Inoue, *supra* note 21, at 105.

fects, *res judicata* is the only effect we should discuss. However, other forces, i.e. the litigation effect, persuasion effect and decision effect, are equally important in evaluating the progress of a case. If we take all effects into account, we have a clearer image of what is actually going on in court and the forces shaping a settlement. As the sound of the approaching judgment becomes audible, it is more likely the case will be settled.

A settlement more or less corresponds to a judge's view of the case at hand and the legal rules that he will have to apply. In coming to a settlement, parties will generally take as their starting point the applicable law and the available evidence and then go on to refine and delimit the terms of the settlement by appealing to other factors and conditions. One should not be misled by the process of bargaining where it appears that there has been little or no effort made to rely on the merits and relevant rights of the case in support of the offers made, withdrawn, refused or accepted. Beneath the veneer of negotiation, there is generally an on-going rational calculation of what the final outcome should be. The several procedural effects mentioned above will usually be realized in the settlement negotiation context. There are, of course, exceptional situations where settlements in court and judgments bear little relationship to one another. In undertaking procedural reform, we also have to bear in mind this lack of relationship.<sup>36</sup>

The Tokyo District Court has taken into consideration some of the more detrimental effects of settlement efforts. As soon as the court discovers that one or both parties intend to delay judgment by repeatedly asking for a settlement session when a settlement appears improbable, the court should promptly cease settlement proceedings and prepare for judgment. This is a cautious measure to prevent a case from being diverted from the right track.

In order to implement a policy that promotes fair and effective settlements in the procedural system, a party should have sufficient

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36. Exceptional settlements can be divided into two groups. First, some settlements are achieved because the party has misread the situation or miscalculated the law due to his ignorance or unavailability of a lawyer. This kind of settlement is undesirable. The second group are settlements where the parties are fully aware of the law and of the factual situation but prefer to settle the case in a way different than that dictated by law and fact, most probably because of the existence of extra-legal factors, such as humanitarian reasons or perhaps because of a sense of new or better emerging norms. Eventually such new norms may become accepted by court and may be incorporated in some way into the law. *See also*, Kojima, *Arbitration System in Japan*, THE INSTITUTE OF COMPARATIVE LAW IN JAPAN, CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY 327, 347 (1989) (discussing the "Planetary System of Justice" model, in which settlements close to law are near to the center of the galaxy and exceptions are farther away; this model welcomed the first type of exceptional settlement but certainly did not exclude the second).

access to useful and relevant information. The reform model in which the early production of copies of documentary evidence is encouraged by the court contributes to the smooth exchange of information, at least to some extent. However, it is not clear to what extent such "encouragement" is effective. In some situations it will not be effective due to dilatory tactics. In view of this possibility, efforts should be made to find a way to compel a party to produce the relevant information required.<sup>37</sup> Devices for a moderate form of discovery should be introduced to contribute towards fair settlements and concentrated hearings. This is an important task for the future.

## VI. SOME FINAL REMARKS

In this paper, I have discussed several problems relating to the reform of civil procedure in Japan. There are still some remaining problems, such as the relationship between a speedy examination and a high quality hearing, the advisability of increasing the court's power, the problem of making the court's opinion easier to understand and the utilization of new computer technology.<sup>38</sup>

Several attempts in the past to achieve speedy justice have proved to be a failure. In Japan, there is an anxiety about another possible failure. I believe, however, that the proposed model has great potential because of its comprehensive nature, its emphasis on case management and practice guidelines (improving the legal framework alone would not be adequate) and building a cooperative work spirit among judges, clerks and lawyers.

Second, the philosophy and style of the presiding judge, that is, wisdom (*chie*), moderation (*setsudo*) and respect (*sonkei*), are important. Respect toward parties and their lawyers is especially crucial. Without such a judicious attitude, parties would be reluctant to cooperate with the court.

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37. At present there are several existing procedures which are of use. Under the Code of Civil Procedure, a party has the legal right to ask the court to order another party to produce a document. MINSOHÖ (Code of Civil Procedure) arts. 312-14 (Japan). In the same way, an inspection order can be made vis-à-vis property. It should be emphasized that a party or attorney has the right to demand the production of documents, to inspect property and to examine witnesses to a certain extent, even before a case commences. MINSOHÖ art. 343. In addition, an attorney has the right to request a report from a public or private organization with the Bar Association's permission. Furthermore, in Japan a party or his or her attorney may interview their witnesses voluntarily. Minjisoshō Kisoku (Civ. P. Ct. R.) 4-5. It may be possible to strengthen these rights through judicial interpretation. However, those tools are of limited use in view of their narrow scope and piecemeal nature.

38. The utilization of new technologies, such as the teleconference or TV conference, would be useful in making a pre-trial or preparatory conference more efficient and would dispense with the time-consuming physical movement of parties and lawyers. Such a device would also considerably reduce the parties burden in terms of cost and time.

Third, court administrators and judges must have confidence in the procedural reform cause. The popular belief among lawyers, that speedy examination collides with quality of justice, may work as an obstacle to reform. A clear understanding of the relationship between time and quality in judicial proceedings is a valuable asset for the reformer to have in attempting to overcome this obstacle. Some argue that a longer examination produces a better judgment. Such an argument is false: a "reasonable" time produces a better judgment while an excessively long or short proceeding produces an inferior judgment. Based on this recognition, reformers are justified in asserting that the pursuit of a speedy examination also means the pursuit of high quality justice.

Judicial reform should be explored with procedural principles in mind, avoiding the inflexibility that comes from insisting on procedural technicalities, but being careful not to disregard broader underlying principles. For example, the constitutional mandate of a public hearing<sup>39</sup> enjoys little appreciation as long as the spirit of freedom and democracy is maintained. Almost no one realizes the true value of the mandate; it appears to be merely a procedural technicality. However, the real value of a public hearing is that it is an insurance policy against possible corruption and tyranny, and only when freedom and democracy are endangered will the value and meaning of this constitutional guarantee be appreciated. It takes a person with far-reaching vision to understand and appreciate the true meaning of the guarantee of a public trial. Procedural reform must be based on such understanding. In the author's view, the essence of the constitutional mandate "hearing in open court" as provided for in article 82 of the constitution is found in the debate of focal issues and examination of issues (proof-taking) in open court. The round table discussion, even behind closed doors, satisfies this requirement and is thus constitutional.

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39. KENPŌ (Constitution) art. 82 (Japan).