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THE EVOLVING LAW OF DOCUMENT PRODUCTION IN JAPANESE CIVIL PROCEDURE: CONTEXT, CULTURE, AND COMMUNITY

*Carl F. Goodman**

INTRODUCTION

In 1996, Japan enacted a new Civil Procedure Code as part of its judicial reform effort (the “1996 Code”).¹ It was, to a great extent, a rewrite of the old Japanese Civil Procedure Code (the “Old Code”)² in the modern Japanese used by the general public.³ The 1996 Code did, however, make several substantial changes. The most significant addressed procedures dealing with the production of evidence, particularly those dealing with document production.⁴ One new provision expanded the scope of documents available for production, but also restricted expansion so that a document prepared solely for the use of the party in possession of the document (a “self-use document”) was excluded from production.⁵ This change represented a compromise between those who argued for open production of relevant documents and those who argued for retention of the old rule wherein only documents that met three specific statutory criteria were available for production. It was anticipated

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1. MINSOHŌ [Code of Civil Procedure], Law No. 109 of 1996, *translated in* 7 EHS LAW BULL. SER. no. 2300 (2007) [hereinafter MINSOHŌ]. The 1996 Code was adopted in 1996 and came into effect in 1998.

2. KYŪ-MINSOHŌ [Code of Civil Procedure], Law No. 29 of 1890, *translated in* 2 EHS LAW BULL. SER. no. 2300 (2007) [hereinafter KYŪ-MINSOHŌ].

3. See Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 563 (2001) (“The old Code of Civil procedure of 1926 . . . was basically a streamlined version of the Code of 1890, which was in turn basically a translation of the German Code of Civil Procedure of 1877.”).

4. Some of the specific changes included the creation of a new preparation for oral argument procedure that permitted parties to engage in private discussions with the court before entering the public oral argument phase of the case, MINSOHŌ, arts. 168–74, a new inquiry procedure loosely modeled after American interrogatories but without any sanction or compulsion requiring answers to inquiries, MINSOHŌ, art. 163, and a loosening of the procedural requirements that needed to be met as part of a motion to require that a party or third person produce documents to be used in litigation. MINSOHŌ, art. 222.

5. MINSOHŌ, art. 220, para. 4.

that the judicial system would articulate the parameters of this compromise in actual litigations.

In 1999, the Supreme Court of Japan decided *Fuji Bank v. Maeda*,⁶ a case that broadly interpreted the self-use document exception and severely restricted the right to obtain documents from a recalcitrant party. Both lawyers (*bengoshi*⁷ as well as foreign lawyers) and judges read *Fuji Bank* as a broad application of the self-use document exception excluding from production corporate documents prepared by employees for in-house use and restricted from distribution outside the corporation.⁸ Nonetheless, Japanese *bengoshi* continued to press lower courts to order the production of in-house corporate documents. Over time, these cases reached the Supreme Court, which, through a series of decisions interpreting the self-use exception, has moderated the reach of *Fuji Bank*. Consequently, although greater production of documents is now possible than was originally thought permissible under *Fuji Bank*, the recent series of cases has introduced added complexity as to how broadly or narrowly the Court will interpret the self-use document exception to production.

It is the purpose of this Article to update a 2003 study of the 1996 Code, with special focus on the document production article of the 1996 Code and the Supreme Court of Japan's evolving self-use document ju-

6. See Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

7. A *bengoshi*, the rough equivalent of the American lawyer, is licensed to represent parties in litigation before all courts in Japan. *Bengoshi* must belong to a bar association and are subject to a special law known as the *bengoshi-ho*.

8. See John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?*, 19 J. JAPAN. L. 5, 6 n.6 (2005) [hereinafter Haley, *Heisei Renewal*]. Haley notes:

The new Code of Civil Procedure . . . is perhaps better described as a revision rather than a reform. The new code was designed as a linguistic up-dating of the code to make it more accessible to contemporary readers. The new version made hardly any substantive changes. Among the few was to be a broadening of discovery. However, whatever the intended changes may have been, in light of the Supreme Court's decision in *K.K. Fuji Bank v. Maeda* . . . denying discovery of a bank memo evaluating a loan application as an "internal" memo under [MINSOHŌ] article 220(4)(c), the most significant preexisting limits on discovery appear to remain.

Id.

risprudence in the ten years since the 1996 Code was adopted.⁹ Although proceeding cautiously, the Court appears to be relaxing the rules governing document production to allow parties greater access to documents where production will not have a seriously detrimental effect on the operations of the producing entity—while simultaneously creating a doctrine that supports Japanese customs and community values.

This Article contains three parts. Part I provides a background of the Japanese civil litigation system so that the cases that address document production issues may be placed in a litigation perspective. Part II discusses the Supreme Court decisions dealing with document production under the 1996 Code. Finally, Part III discusses the contextual, cultural, and community rationale that underlays and supports the decisions.

I. BACKGROUND

A. *A Civil and Common Law Hybrid*

The modern Japanese legal system's structure resembles that of civil law systems.¹⁰ Like other civil law systems, its fundamental laws are contained in codes. The centerpiece of the Japanese system is the Civil Code.¹¹ The basic law of civil procedure is the Civil Procedure Code, which was re-written in 1996.¹² But Japan's version of the civil law system has always been somewhat different from the classical civil law systems represented by the Napoleonic Code, where, consistent with the equality notion of the Revolution, the law was to be easily understood by

9. See Carl F. Goodman, *Japan's New Civil Procedure Code: Has it Fostered a Rule of Law Dispute Resolution Mechanism?*, 29 BROOK. J. INT'L L. 511 (2004) [hereinafter Goodman, *Japan*].

10. For a general discussion of the civil law system, see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed., Little, Brown and Co. 1977) (1957); ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (1977).

11. KYU-MINSOHŌ [Code of Civil Procedure], Law No. 29 of 1890. Although there are five basic codes in Japan (Civil Code, Criminal Code, Commercial Code, Code of Civil Procedure, and Code of Criminal Procedure), the Constitution is usually referred to as part of the compilation of the Six Codes.

12. For a discussion of the process and substantive changes made by the 1996 Code, see Takeshi Kojima, *Symposium Honoring Professor Robert C. Casad: Japanese Civil Procedure in Comparative Law Perspective*, 46 KAN. L. REV. 687 (1998); Toshiro M. Mochizuki, *Baby Step or Giant Leap?: Parties' Expanded Access to Documentary Evidence Under the New Japanese Code of Civil Procedure*, 40 HARV. INT'L L. J. 285, 294–299 (1999); Ota, *supra* note 3, at 568–70; Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997).

all people,¹³ and the German Civil Code, where the law was considered a science.¹⁴ Nonetheless, Japan's civil law system retains the fundamental elements of a civil law system (as distinguished from a common law system):

- (i) Codes are the law, whereas judicial decisions, while useful in teaching how judges have interpreted the Codes in the past, are not law.¹⁵
- (ii) Judges are part of a civil service government bureaucracy and their duty is to apply the law as found in the Codes, rather than using their authority to make their own law.
- (iii) Procedure follows the inquest model rather than the adversary model of the common law system. As a consequence, the judge is in charge of fact-finding and is the central figure in all courtroom dramas, while the role of the attorney is marginalized.¹⁶ In Japan, the classical inquest, wherein the judge may take evidence *ex officio*, has been modified to require that the parties suggest witnesses to be called,

13. VON MEHREN & GORDLEY, *supra* note 10, at 48–53 (“On July 5, 1790, the Constituent Assembly voted that the civil laws would be reviewed and reformed by the legislators and that there would be made a general code of laws simple, clear and appropriate to the constitution.”)

14. See generally Carl Steenstrup, *German Reception of Roman Law and Japanese Reception of German Law*, 1 INT'L J. INTERCULTURAL COMM. STUD. 273, (1991). See also VON MEHREN & GORDELY, *supra* note 10, at 59–68. As a consequence of American influence after World War II, the current legal system has many common law aspects, rendering it in some respects a hybrid system with a decided emphasis on the Civil Law. See *infra* notes 43–44.

15. See Kaoru Yunoki, *Hanrei Kenkyū No Mokuteki To Hōhō* [*Objectives and Methods of Studies of Precedents*], 16 HŌ-SHAKAIGAKU KENKYŪ 1, 3–5 (1964), translated in THE JAPANESE LEGAL SYSTEM 150–51 (Hideo Tanaka ed., Univ. of Tokyo Press 1976) (“A judgment is after all a solution of a dispute between individuals, which is particularistic in nature, and does not establish a general rule which is applicable to all persons. This applies also to a judgment of the Supreme Court, even one entered by its grand bench.”); Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424, 426 (1967).

16. See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1021 (1998) (“The central task in a civil law adjudication is for the judge to identify the legal and factual issues involved and to decide them correctly.”).

leaving the decision whether to call such witnesses to the judge. Moreover, the function of the judge encompasses the duty of the State to assure that the party in the “right” prevails in litigation.¹⁷

- (iv) Preclusion rules are an autonomous regime, separate from the doctrine of *stare decisis*. Thus, a higher court’s ruling is binding on the lower court only in the case in which it is rendered, and is not binding on lower courts in other cases.¹⁸
- (v) Trials are not seen as the end product of a long road involving a separate pre-trial discovery procedure. Rather, trials are seen as a seamless sequence of meetings, evidence gathering, witness testimony taking, etc., constituting one “plenary proceeding,” at the conclusion of which the judge, having “clarified” the facts and issues, gives her decision.¹⁹
- (vi) The first-level appeal is seen as a continuation of the trial. New evidence and arguments may be presented if doing so will lead to a correct decision,²⁰ unlike the appellate review of the trial court record in the common law system. Second-level appeal is

17. *Id.* (“Under the civil law procedural systems, the judge is responsible for deciding a case according to the truth of the matter . . . [and] eliciting relevant evidence.”).

18. See MINSOHŌ, arts. 114, 115. Indeed, in cases where the judgment awarded damages to be paid over time, where there are significantly changed circumstances, it is possible to initiate a new suit to lower or increase the amount awarded to take account of the changed circumstances. See MINSOHŌ, art. 117.

19. The Japanese trial or “plenary hearing” is broken into parts—a preliminary oral argument stage, which is like a traditional trial, and a second stage, where witness testimony and documents are presented. See MINSOHŌ, arts. 148, 164–67. Both the preliminary oral argument and the oral argument stages are part of the continuous, plenary hearing. The 1996 Code introduced another procedure, the preparation for oral argument, which is less formal and is also less open to public view. This stage is designed to move cases more quickly and to encourage early settlements. See Ota, *supra* note 3, at 568–70. For a general discussion of Japanese procedure, see CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN (2004) [hereinafter GOODMAN, JUSTICE].

20. See Akira Mikazuki, *Saibansho Seido* [*Judicial System*], 5 NIHONKOKU KEMPŌ TAIKEI 73 (J. Tanaka ed., 1962), translated in THE JAPANESE LEGAL SYSTEM, *supra* note 15, at 444, 465–68. For a chart showing the percentage of cases where the first level appeal court received new evidence in the form of witness testimony on appeal, see GOODMAN, JUSTICE, *supra* note 19, at 436.

seen as a review of the case to correct errors made by the lower court, unlike the role of American highest courts, which resolve splits among courts within their jurisdiction to ensure uniformity.²¹

Nonetheless, the Japanese system has retained elements that in one way or another mirror notions of common law or customary law systems.²² For example, while the Commercial Code trumps the Civil Code when it comes to commercial matters, issues not resolved by the Commercial Code are determined by commercial custom.²³ Only in the absence of such custom does the Civil Code come into play.²⁴ Thus, the provisions of the Civil Code that determine whether a written document is required for a contract (generally it is not, as there is no general statute against frauds in the civil law system) are not applied when the commercial custom in the industry favors written contracts.²⁵ In addition, mediation, conciliation, and negotiation are the preferred means of dispute resolution, rather than the invocation of the state's coercive power through the organized judiciary.²⁶ The assistance of the judiciary may,

21. Compare BENJAMIN NATHAN CARDOZO, *THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK* 11 (2d ed. 1909) (describing the court's function as "not of declaring justice between man and man, but of settling the law."), with Masako Kamiya, *Narrowing the Avenues to Japan's Supreme Court: The Policy Implications of Japan's Code of Civil Procedure Reforms*, 4 *AUSTL. J. ASIAN L.* 53, 64 (2002) (noting that the American system of limited review may not lead to a "just" result).

22. See *THE JAPANESE LEGAL SYSTEM*, *supra* note 15, at 59 ("Custom is to regulate a transaction if it is found that the parties either explicitly or impliedly acted upon it, so long as such custom is not repugnant to public policy. . . . If the custom in question is so well established that the people concerned regard it as *ipso facto* binding upon them, it is called customary law (*kanshū hō*) and is applied without the necessity of an allegation by either party.").

23. See SHŌHŌ [Commercial Code], Law No. 48 of 1899, art. 1, *translated in* EHS LAW BULL. SER. no. 2200 (2001).

24. See *id.*

25. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 360–61 (2003) [hereinafter, GOODMAN, *THE RULE OF LAW*]. Goodman explains:

Thus, while in the case of a soy-bean contract a writing may not be required because the custom in the industry is to do things orally, a contract will be required in certain real estate transactions, not because the Code says a contract is required but because it is the customary thing to do.

Id.

26. For a discussion of the role of conciliation, see DAN FENNO HENDERSON, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN*, 2 vols. (1965). See also Masayuki Yoshida, Discussion Paper, *The Reluctant Japanese Litigant: A "New"*

however, be invoked to facilitate the process of conciliation and settlement.²⁷ And, finally, consistent with Emperor Meiji's Charter Oath,²⁸ which called for a break with the evils of the past and for determinations based on the just laws of nature, Japanese judges are not immune from the temptation to create legal rules based on reason rather than the letter of the law.²⁹

B. History

The Japanese version of the civil law system was adopted in the late nineteenth century as a step towards modernization of the legal system. Although the ruling class did not believe that the codes borrowed from France and Germany represented either pre-existing Japanese customary rules or legal ideals, they recognized that they must convince the Western imperialist powers that Japan's legal system was civilized.³⁰

Assessment, ELEC. J. CONTEMP. JUST. STUD. 5 (2003), available at <http://www.japanese-studies.org.uk/discussionpapers/Yoshida.html> ("In Japan there appears to be a preference for mediation and conciliation. This is in sharp contrast to how similar disputes might be settled in the United States and elsewhere in the Western world, where some forms of legal proceedings would constitute an initial position."); Alan Macfarlane, *Law and Custom in Japan: Some Comparative Reflections*, 10(3) CONTINUITY & CHANGE 369 (1995), available at <http://alanmacfarlane.com/TEXTS/law&custom.pdf> ("[I]n 1987 'roughly one third of all civil lawsuits in the first instance (district court) are concluded as default judgments or withdrawal of complaints[,] . . . another third are contested judgments; . . . the remain[der] are in-court compromises.' There are various theories . . . to account for this preference for conciliation.").

27. See MINJI CHŌTEIHŌ [Law for Conciliation of Civil Affairs], Law No. 222 of 1950, translated in 2 EHS LAW BULL. SER. no. 2360 (1999). See also Kota Fukui, *Justice System Reform in Japan: The Connection Between Conflict Management and Realization of General Rules of Law*, 51 OSAKA U. L. REV. 55, 55 n.3, 66–67, 74 (2004); GOODMAN, JUSTICE, *supra* note 19, at 398–406; Shunko Muto, *Concerning Trial Leadership in Litigation: Focusing on the Judge's Inquiry and Compromise*, 12 LAW IN JAPAN 23 (1979); Tetsuya Obuchi, *The Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, With Special Emphasis on In-Court Compromise*, 20 LAW IN JAPAN 74, 75 (1987); Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L. QUARTERLY 491, 507–08 (1979) ("Conciliation procedures, however, are not exclusively extra-judicial, but are now also an important part of the enacted procedural law.").

28. For a translation of the Charter Oath of Five Articles (1868), see W.W. McLAREN, JAPANESE GOVERNMENT DOCUMENTS VOL. 1 8 n.1 (Univ. Publications of America, reprint ed., 1979).

29. See YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 222–24 (Anthony H. Angelo trans. & ed., 1976) (1966).

30. The adoption of the Civil Law system was a part of Japan's modernization during the Meiji era and was an essential step in the renegotiation of the unequal treaties under which Japan had lost a great deal of her sovereignty to the Western powers. See Harald Hohmann, *Modern Japanese Law: Legal History and the Concept of Law: Public Law*

The first step to modernization was quite natural—a look to the Chinese legal system that had been the font of Japanese law beginning in the seventh century.³¹ However, it was quickly realized that borrowing Chinese legal rules would not achieve the objective sought by the ruling class: to regain Japanese sovereignty that had been wrested away by the imperialist Western powers through treaties that stripped Japan of various sovereign powers.³² The Westerners, who applied extraterritoriality and Consular Courts to China, would not undo these institutions in Japan if Chinese law was adopted as Japanese law. Thus, the natural second step was to find and adopt a Western legal system that would convince the Western imperialist powers that Japan had a modern, civilized legal system.³³

As an initial matter, Japan's leaders were split between the civil law system of France and the common law system of England. French law was being taught at the law school created at the Ministry of Justice, giving members of the French School a decided advantage in its influence on Japanese legal thinking.³⁴ Common law, on the other hand, resembled Tokugawa principles in some respects, as the Tokugawa Magistrates had, at least in the later days of the Shogunate, been attempting to create some

and Economic Law of Japan, 44 AM. J. COMP. L. 151, 155 (1996) (in discussing Wilhelm Rohl's explanation of the Westernization process of Japanese law: "Since these 'unequal treaties' were criticized as threats to Japan's full sovereignty by many Japanese, the Emperor saw only one chance to modify them; by establishing an European legal order in Japan—this was often regarded as a prerequisite for a modification of these treaties by those foreigners . . .").

31. See generally PAUL HENG-CHAO CH'EN, *THE FORMATION OF THE EARLY MEIJI LEGAL ORDER: THE JAPANESE CODE OF 1871 AND ITS CHINESE FOUNDATION* (1981). See also Hohmann, *supra* note 30, at 155.

32. For example, such treaties had the effect of nullifying Japanese ability to raise the unreasonably low tariffs on imported products that had destroyed the Japanese monetary system. They also placed Westerners in charge of legal matters involving their own citizens through extraterritoriality provisions and the creation of "Consular Courts." See Hohmann, *supra* note 30, at 155.

33. See DANIEL V. BOTSCHAN, *PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN* 144–45 (Princeton Univ. Press 2005) ("The new Chinese-style penal code certainly did nothing to help the Japanese leader's cause. . . . [I]t was precisely in order to protect British subjects from *Chinese* laws that the institution of extraterritoriality had been introduced to East Asia in the first place.").

34. A French school of law was established in the Ministry of Justice in 1873 and an Academy of French Law was established in 1876. See HENG-CHAO CH'EN, *supra* note 31, at 72–73; HIDEO TANAKA, *THE JAPANESE LEGAL SYSTEM* 201–03 (1976); Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868–1961*, in *LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY* 5, 27 (Arthur Taylor von Mehren ed., 1963).

systematic rules based on the decisions reached by the Magistrates.³⁵ A vibrant English School objected to the French-inspired Civil Code, and was supported by nationalists who, for entirely different reasons, opposed the new Civil Code.³⁶ A Francophile Civil Code was written (with the assistance of French legal scholars) but the English School was successful in postponing its final adoption.

With the adoption of a Germanized Constitution and the ascendance of German legal thinking in Japan,³⁷ the Civil Code was rewritten to adopt the German style, while retaining some French elements.³⁸ The family law and inheritance provisions, which applied to all Japanese society, were written to embody the family law system of the Samurai class (the *ie*).³⁹ While the Criminal Procedure Code retained a French orientation, the Code of Civil Procedure was based on the German Civil Procedure Code.⁴⁰

Yet before the adoption of Western codes, an indigenous judicial system was required to deal with cases that were not within the jurisdiction of the Consular Courts. Judges needed guidance as to how to approach cases until written laws governing the entire array of anticipated problems could be adopted. The ruling oligarchs found the answer to this dilemma in the use of custom and reason as a foundational principle for

35. See Steenstrup, *supra* note 14, at 282.

36. See Shinichiro Michida assisted by Robert Braucher, *The Legal Structure for Economic Enterprise: Some Aspects of Japanese Commercial Law*, in LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY 507, 512 (Arthur Taylor von Mehren ed., 1963); Steenstrup, *supra* note 14, at 284. Professor Noda notes that in the early stage of westernization, Japan looked to French law; this was ultimately superseded by German influences. See NODA, *supra* note 29, at 194–208.

37. The German legal thinking was perhaps influenced in part by the Prussian victory in the Franco-Prussian War, but certainly influenced by Ito Hirabuni's preference for a German—as opposed to either a French or English—constitutional regime. Ito Hirabuni was the head of the Japanese Constitution writing committee and a prominent figure in the government during the Meiji era.

38. See Wilhelm Röhl, *Generalities*, in HISTORY OF LAW IN JAPAN SINCE 1868 1–28 (Wilhelm Röhl ed., 2005). For a discussion of the Code debate and history, see Ronald Frank, *Civil Code*, in HISTORY OF LAW IN JAPAN SINCE 1868 172–88 (Wilhelm Röhl ed., 2005).

39. See V. LEE HAMILTON & JOSEPH SANDERS, EVERYDAY JUSTICE 28 (1992) (“Japan’s historical form of family organization is called *ie*. . . . In Japanese family life *ie* refers to the descent group to which an individual belongs. The *ie* continues backward and forward in time, and the living family members are but a representative of the underlying lineal genealogy.”)

40. For a discussion of the adoption of the Western codes in the context of the renegotiation of the “unequal treaties,” see Frank, *supra* note 38, at 169 and GOODMAN, JUSTICE, *supra* note 19, at 49–71.

judicial decisions.⁴¹ Naturally, reason required the judge to find what was considered a fair, reasonable, and appropriate determination—much as the Tokugawa Magistrate had done. When the Western codes were adopted as Japanese law, pre-war judges continued to utilize custom and reason in their decision-making.⁴²

The defeat of Japan and the subsequent Occupation,⁴³ headed by Americans with a decided preference for the common law, as well as the adoption of a constitution infused with common law thinking, brought about corresponding changes in the Civil Procedure Code and the judicial system. Echoing the U.S. Constitution, Japan established a single

41. See Wilhelm Röhl, *Law of Civil Procedure*, in HISTORY OF LAW IN JAPAN SINCE 1868 665 (Wilhelm Röhl ed., 2005) (According to general principles of adjudication, as set forth by decree of the *dajōkan* in 1875, “[j]udgment of civil cases shall be rendered according to custom in the absence of law; and in the absence of custom they shall be decided according to reason.”).

42. The Western Codes were adopted over a period of years after the Meiji Restoration. The process was complete before World War I and the judges before, and even after, World War II continued to use custom and reason in their decisions. See NODA, *supra* note 29, at 223–24. Tom Ginsberg comments:

Particularly whenever a clear answer was not to be found, the judges would utilize the (pre-Meiji) notion of ‘judicial reason’ to find that particular Western norms ought to be adopted as logical rules. This adaptation played an important role in transforming the normative basis of Japanese law.

Tom Ginsberg, *Japanese Legal Reform in Historical Perspective* 23 (October 8, 2002) (unpublished article), www.law.uiuc.edu/academics/asianlaw/pdfs/JapaneseLegalReforminHistoricalPerspective-revised.pdf. In a similar vein, Seigo Hirowatari observes:

By this I mean a phenomenon wherein social relations are not established in terms of rights and duties, but by traditional, social norms: norms dictated by moral and social obligation (*giri*) and personal emotion (*ninjo*), which are indefinite and based primarily upon the customary practices of communities. The result is that social conflicts are mostly solved without resort to the courts. This phenomenon was explicitly identified as a ‘problem to be overcome’ in the immediate aftermath of World War II

Seigo Hirowatari, *Post-War Japan and the Law: Mapping Discourses of Legalization and Modernization*, 3 SOC. SCI. JAPAN J. 155, 156 (2000).

43. Following the atomic bombing of Hiroshima and Nagasaki, Japan accepted the Potsdam Declaration and unconditionally surrendered to the Allies. American military forces under General MacArthur occupied the main islands of Japan. Although nominally an “Allied Occupation,” the reality was that the American forces were in control of the Occupation, while Japan retained a form of government with a Cabinet and a Diet that could pass laws. Legislation was subject to Occupation approval and the government adopted many laws in compliance with Occupation goals. Included among the laws proposed by the American Occupation was the current Japanese Constitution. See GOODMAN, JUSTICE, *supra* note 19, at 75–160.

judicial system headed by a Supreme Court with authority to handle all cases of both public and private law. Although the constitution prohibits the creation of specialized public law courts, such as an administrative court or a constitutional court that are a mainstay of most civil law systems,⁴⁴ the Japanese judicial system created panels at the trial court level (district courts) to ensure that specialist judges with knowledge of the administrative climate and administrative law hear administrative law cases.

C. The Function of Japanese Judges and Attorneys

The quintessential American common law idea of judicial review enshrined in Marshall's decision in *Marbury v. Madison* is granted to the Japanese court system by the Japanese Constitution.⁴⁵ But in a system rooted in a narrow doctrine of preclusion that forswears stare decisis, the question of what exactly a finding of unconstitutionality in one case means for future cases is unclear.⁴⁶ Moreover, a court system that lacks the power of contempt or any substitute to enforce its orders without assistance from the public prosecutor is unlikely to aggressively pursue its judicial review power—as is the case with the Japanese Supreme Court. In over fifty years, it has held laws unconstitutional in only seven cases.⁴⁷

44. See KENPŌ, art. 76, para. 2.

45. KENPŌ, art. 81 (“The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”).

46. See HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 108–110 (1989); Ichiro Kitamura, *The Judiciary in Contemporary Society: Japan*, 25 *CASE W. RES. J. INT’L L.* 263, 277 (1993).

47. See, e.g. *Aizawa v. Japan*, 27 KEISHŪ 265, (Sup. Ct., Apr. 4, 1973) *translation available at* <http://www.courts.go.jp/english/judgments/text/1973.04.04-1970-A-No.1310.html> (holding unconstitutional Japan’s Patricide Law, which was enacted as part of the support system for the old feudal family law system that venerated ancestors); *Sumiyoshi v. Governor of Hiroshima*, 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975) *translation available at* <http://www.courts.go.jp/english/judgments/text/1975.04.30-1968-Gyo-Tsu-No.120.html> (holding unconstitutional a law that prohibited locating pharmacies near each other violated the right to choose an occupation when the law had no basis other than to stifle competition); *Hiraguchi v. Hiraguchi*, 41 MINSHŪ 408 (Sup. Ct., Apr 22, 1987) *translated in* LAWRENCE W. BEER & HIRSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 327, 329 (1996) (holding unconstitutional as a violation of property rights the pre-war law that permitted division of a forest by a greater-than-fifty-percent owner but not by a less-than-fifty-percent owner); *Kurokawa v. Chiba Prefecture Election Comm’n*, 30 MINSHŪ 223 (Sup. Ct., Apr. 4, 1976) *translated in* LAWRENCE W. BEER & HIRSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 355, 363 (1996) (holding unconstitutional certain voter disparities that denied equality to those who lived in populous districts where their votes counted for less than those living in sparsely populated districts); *Kanao v. Hiroshima Prefecture Election Comm’n*, 39

During the Occupation, the Old Code was amended to provide a greater role for attorneys. The Occupation objected to the dominant paternalistic Japanese judge; thus, the role of the judge was subordinated to attorneys' examination and cross-examination.⁴⁸ Although the Old Code was amended during the American Occupation to include cross-examination provisions and appeared to place lawyers at the front of the litigation process,⁴⁹ the reality was that post-war Japanese lawyers were untrained in adversary trial methods, which conflicted with the norms of harmony and avoidance of conflict in Japanese society. Moreover, Japanese judges did not change their ways simply because the Code placed

MINSHŪ 1100 (Sup. Ct., July 17, 1985) *translation available at* <http://www.courts.go.jp/english/judgments/text/1985.07.17-1984-Gyo-Tsu-No.339.html> (holding unconstitutional certain voter disparities that denied equality to those who lived in populous districts where their votes counted for less than those living in sparsely populated districts); Case No. 1767 of 1999, 56 MINSHŪ 1439 (Sup. Ct., Sept. 11, 2002) *translation available at* <http://www.courts.go.jp/english/judgments/text/2002.09.11-1999.-O.-No.1767.html> (holding the Post Office Law's limits on liability and damages to be unconstitutional limits on the right to sue the state); Case Nos. 82 and 83 of 2001, 59 MINSHŪ No. 7 (Sup. Ct., Sept. 14, 2005) *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu.-No..82%2C.2001.-Gyo-Hi.No..76%2C.2001.-Gyo-Tsu.-No..83%2C.2001.-Gyo-Hi.-No..77.html> (holding that it was unconstitutional to prohibit voting by Japanese citizens assigned to work abroad in single district election districts).

48. See ALFRED C. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN* 131–32 (1976). Writing about the Japanese criminal law system, Professor Daniel Foote notes:

[U]nder the influence of the Occupation following World War II, Japan adopted an adversary system that, in structure, is very similar to that of the United States. In practice, however, the adversary system operates in a much less adversarial fashion in Japan than in the United States.

Daniel H. Foote, *Reflections on Japan's Cooperative Adversary Process*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT* 29 (Malcolm M. Feeley & Setsuo Miyazawa eds., Palgrave Macmillan 2002).

49. See MINSOHŌ, art. 202, para. 1 (providing that the party offering the witness directly examines the witnesses first, followed by examination by the opposition party, and finally examination by the court); MINJI SOSH-O KISOHU, art. 114 (using the phrase “cross-examination” and limiting cross-examination to credibility and matters brought out in direct examination). *But see* MINSOHŌ, art. 205 (expressing a preference and accepting written witness statements in lieu of oral testimony); MINSOHŌ, art. 202, para. 2 (permitting the judge to modify the order of examination so that the court may question the witness first). These provisions diminish the role of cross-examination. Indeed, there are few, if any, oral witnesses in the typical Japanese civil case. In 2001, 85.5% of cases had no witnesses testify, and in 2002, that percentage increased to 86.4%. See GOODMAN, JUSTICE, *supra* note 19, at 354.

them in a different light.⁵⁰ In addition, unlike in the United States where it is common for lawyers to represent parties, parties in Japan at the first-level trial frequently appear *pro se*,⁵¹ inspiring judges to rise to their defense when the occasion demanded. As a consequence, the trial process atrophied into a procedure that minimized lawyer participation and maximized the role of the judge. Judges with a paternalistic attitude towards the parties and attorneys before them once again predominated despite the Occupation era reform of the Old Code.⁵²

The Occupation's view of judicial reform resulted in the abolishment of Japan's Administrative Court in favor of a single judiciary without special courts,⁵³ the adoption of judicial review, and the grant of independence from the Ministry of Justice to the judiciary.⁵⁴ As a consequence, the immediate post-war judicial system was composed mostly of judges who had served pre-war. As the system was bureaucratic in nature (the Occupation had taken the judicial bureaucracy out of the hands of the Ministry of Justice and placed it in the hands of the Supreme Court), the more senior judges in the system were those who had served the longest pre-war and the judges appointed post-war tended to be junior to those who had served in the pre-war period. On bench, these judges quite naturally applied the legal thinking that had guided them through the Hogakubu law faculties they had attended and the reasoning they applied to cases before the war.⁵⁵ That thinking was strongly influenced by custom, reason, and the notion of Japanese norms of behavior. Pre-war judges tended to decide cases according to what was viewed as right or

50. See Kohji Tanabe assisted by John B. Hurlbut, *The Process of Litigation: An Experiment With the Adversary System*, in LAW IN JAPAN 73, 74 (Arthur Taylor von Mehren ed., 1963); GOODMAN, JUSTICE, *supra* note 19, at 184.

51. See Goodman, *Japan*, *supra* note 9, at 567.

52. This is especially true in a system like Japan's, where the judge is not an impartial referee, but rather is a representative of the state charged with ensuring that the *correct* party wins. See Tanabe, *supra* note 50, at 87; Makoto Itoh, *The Reception in Japan of the American Law and its Transformation in the Fifty Years since the End of World War II: Civil Procedure Law*, 26 LAW IN JAPAN 66, 68–69 (2000).

53. Before World War II, Japan's Administrative Court operated as a tribunal independent from the primary judiciary, as is common in civil law systems. However, changes to the Japanese Constitution in 1946 provided that "no extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power." KENPŌ, art. 76, para. 2.

54. See OPPLER, *supra* note 48, at 85–91; Takaaki Hattori assisted by Richard W. Rabinowitz, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN 111, 121–24, 130 (Arthur Taylor von Mehren ed., 1963).

55. See Tanabe, *supra* note 50, at 90–94. For a discussion of the development of the Japanese "legal mind" and the influence of senior judges on more junior judges, see JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 121–22 (1998) [hereinafter HALEY, SPIRIT].

appropriate in the circumstances, rather than based on the science of the Code or other statutory principle.⁵⁶

The ability of Japanese judges to create a body of judge-made law, much as American judges can, is highlighted by lines of decisions like those that establish the legal foundation for the lifetime employment system,⁵⁷ the rights of tenants to remain in possession of leased property even though the term of the lease has expired,⁵⁸ and the rights of distributors not to be terminated unless procedures deemed fair under the circumstances are followed.⁵⁹ And, like common law courts, Japanese

56. See Takayanagi, *supra* note 34, at 25–27. See also HALEY, SPIRIT, *supra* note 55, at 205 (“In case after case throughout the century, Japanese judges have denied ‘rights’ in order to ameliorate what they have perceived to be the injustice of property and contract enabling those with greater economic or social leverage to enlist the aid of the state against those with whom they dealt.”). Prewar judges also applied the Japanese concept of *jori* (also written as *dori*). This application was based, at least in part, on Decree No. 103 of 1875, which provided that when no written law or custom applied to a case, the judge should apply reason. See Takayanagi, *supra* note 34, at 25–26.

57. See Daniel Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 UCLA L. REV. 635 (1996); Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L. J. 3, 44 (1996) (“Judge-made law supports the lifetime employment system by supplying bargaining endowments to both employers and employees, enabling malleable, long-term employment patterns.”). For a critique of Foote’s explanation that the rule arose as a consequence of the judiciary’s action to protect a weaker party (the employees) from the unilateral action of a stronger party (the employer) while maintaining stability, see David Kettler & Charles T. Tackney, *Light from a Dead Sun: The Japanese Lifetime Employment System and Weimar Labor Law*, 19 COMP. LAB. L. & POL’Y J. 1 (1997). Kettler and Tackney, while agreeing with Foote’s basic theory that lifetime employment is a product of judge-made law, believe that “[n]ot judicial traditionalism but a novel combination of labor activism and imported legal approaches led Japanese courts to assimilate the employment relationship Foote emphasizes.” *Id.* at 4.

58. See Yukio Noguchi, *Land Problems and Policies in Japan; Structural Aspects, in LAND ISSUES IN JAPAN: A POLICY FAILURE?* 26 (John O. Haley & Kozo Yamamura eds., Society for Japanese Studies 1992). See also Fukui, *supra* note 27, at 69 n.37 (“In the realm of lease law in Japan, . . . the theory of trust relations has developed.”).

59. See WILLEM M. VISSER ‘T HOOFT, JAPANESE CONTRACT AND ANTI-TRUST LAW: A SOCIOLOGICAL AND COMPARATIVE STUDY 46–47 (2002) (“Since no specific legal rules govern the termination disputes between manufacturers and distributors, court decisions have constituted the main source of law [I]n cases of termination, Japanese Courts do sometimes not distinguish the differences between distribution agreements and other continuing commercial contracts”). For a discussion of judicial law-making in the area of landlord-tenant relations, see HALEY, SPIRIT, *supra* note 55, at 140–47. For a discussion of judicial law-making in the areas of labor and employment law, see TAKASHI ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN 23 (Japan Institute of Labor 2002) (“The most important characteristic of legal protection for employment security, restraint on dismissals, is not imposed by legislation (statutes) but by case law or judicial precedent

judges may modify court-established rules to meet new circumstances.⁶⁰ In applying both the good faith and morals as well as the abuse of rights provisions of the Civil Code,⁶¹ Japanese judges are not averse to the application of Japanese norms, even when a statute or the constitution itself may point in a different direction. This kind of common law approach is not a reflection of the influence of American legal thinking, but rather reflects indigenous Japanese thinking on the proper role of the judiciary in society. It reflects a subtle blend of civil law, common law, and customary law.

The function of the judge in rendering a “right” decision, meaning a decision in which the party who should win does win, is based on German legal thinking. Although modern cases eschew such a hard and fast rule, the reality is that the Japanese judge sees it as her function to make the correct decision. What is correct depends very much on the circumstances at the time of decision as well as at the time of the act, social norms, and the facts of the case.⁶²

D. Post-War Movement to Broader Production Practice

The post-war circumstance of Japan was dire indeed. The war left a ravaged country with little or no economic structure. To most, the first order of the day was to rebuild the economy and, as a consequence, many other values took second place to the creation of the economic miracle.⁶³ Courts were not immune to this need. It was not until the Mi-

. . . . [E]mployers’ freedom to dismiss is significantly curtailed by the established case law requiring just cause.”) and Foote, *supra* note 57.

60. See VISSER ‘T HOOFT, *supra* note 59, at 187. Visser ‘T Hooft remarks:

[R]ecently in relation to termination disputes the Japanese courts have tended to place more emphasis on the principles of classical contract law, such as the freedom of contract. . . . Many factors such as the current poor economic climate and internationalisation may have reduced the reliance upon unwritten social codes and mutual trust.

Id.

61. See MINPŌ [Civil Code], Law No. 89 of 1896, arts. 1, 90, *translated in* EHS LAW BULL. SER. no. 2100–2101 (2007).

62. See Fukui, *supra* note 27, at 70–75; Tanabe, *supra* note 50, at 87, 92–94. See also HALEY, SPIRIT, *supra* note 55, at 156–76.

63. See Julian Gresser, Koichiro Fujikura, & Akio Morishima, *The Crucible of Value Transformation—Excerpts from* Environmental Law in Japan, 7 SCI. TECH. & HUM. VALUES 61, 61 (1982) (“World War II left Japan economically, socially, and politically destitute. The transcendent concern of the Japanese in the early postwar period was economic recovery It was assumed that industrial growth was an immutable ‘good’ to which all else might be subordinated.”).

namata disease and other major pollution cases,⁶⁴ which marked a change in Japan's attitude toward environmental matters, that values other than purely economic values were embraced. As a consequence, the power of major corporations to affect the Civil Procedure Code and civil procedure in general diminished, enabling others to press for changes that might help plaintiffs in litigation against corporations. Moreover, many *bengoshi*, freed from the supervision of the Ministry of Justice, saw it as their role to strenuously represent the interests of their clients and to perform a societal service by representing the weak against the strong.⁶⁵ Many of these lawyers looked to the United States where the discovery rules were perceived to favor individual plaintiffs in disputes with corporations by placing corporate documents and other information in the hands of plaintiffs' lawyers. Many Japanese judges also desired access to some internal corporate documents so that a correct decision could be rendered in the case.⁶⁶

While the civil law system generally does not have a vibrant discovery process, the system in Japan does recognize a need for parties to produce evidence relevant to a case.⁶⁷ As the judge (as inquisitor) is the player who elicits the facts, the classic civil law system sees it as an abuse of the system for parties or their representatives to discuss the case with poten-

64. For a discussion of the Big Four pollution cases, see FRANK K. UPHAM, *LAW AND SOCIAL POLICY IN POST WAR JAPAN* (Harvard Univ. Press 1987); Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 *LAW & SOC'Y REV.* 579 (1976).

65. See Case No. 2126 of 2005, 61 *MINSHŪ* NO. 3 (Sup. Ct., Apr. 24, 2007) (Mutsuo Tahara, J., concurring) *translation available at* <http://www.courts.go.jp/english/judgments/text/2007.04.24-2005.-Ju.-No..2126.html>; Toshiro Nishimura, Partner, Nishimura & Partners, Speech at the Temple University in Japan "Professional Ethics in International Business" Seminar: The Code of Ethics Applicable to Bengoshi (Dec. 1, 1998), www.tuj.ac.jp/newsite/main/law/benethics.html. Similarly, as lawyers are seen as representing the public interest, including the interest to assure that the government does not abuse rights, *bengoshi* are prohibited (with limited exceptions) from being employed full time by government agencies. See *Bengoshi hō* [Lawyers Law of Japan], Law No. 205 of 1949, art. 30, *translated in* *EHS LAW BULL. SER. no. 2040* (2001) ("A lawyer shall not concurrently assume any public post for which compensation is made.").

66. In Japan, the judge determines what evidence is relevant and probative, while also serving as the decision maker. The judge's function is to see that the party who should win does in fact win. See *supra* note 62 and citations therein. Prior to the enactment of the New Code, many Japanese judges loosely interpreted the Old Code's document production article to permit greater production so that parties could properly form either their claim or defense. See Mochizuki, *supra* note 12, at 290.

67. For a discussion of some mechanisms to obtain information in Japan, see Koji Harada, *Discovery Under Japanese Law*, 16 *LAW IN JAPAN* 21 (1983) and Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Litigation*, 3 *ASIAN-PAC. L. & POL'Y J.* 1 (2002).

tial witnesses.⁶⁸ Witnesses are to be examined by the judge without advance preparation by the lawyer or party.⁶⁹ The pre-war Japanese system (and this remains true in the post-war period as well) allowed lawyers to send questions to prospective witnesses through the lawyer's Bar Association, thus avoiding the charge that the lawyer was influencing the testimony.⁷⁰ But there was, and still is, no mechanism requiring the Bar Association to forward the questions or compelling the witness to answer them. The Americanization of Japan's civil procedure system, which elevated the questioning of witnesses by the lawyers to a central feature, anticipated that, as in America, the lawyer in a case would interview witnesses before their testimony was given.⁷¹ Nonetheless, the Code of Civil Procedure retains the pre-war procedure and many Japanese lawyers still utilize the old system of forwarding questions through the Bar Associations rather than risk the appearance of influencing the witnesses' responses.⁷² This approach, in turn, leads to ineffective direct examination and leaves lawyers to rely on the court's questioning of witnesses,⁷³ even if the Code places that responsibility on counsel.⁷⁴

The civil law system in Japan has produced long, drawn-out, and contested cases, some of which last for many years before a judge is pre-

68. For the lawyer to interview a witness before the judge has examined the witness would be considered an ethics breach, as the lawyer does not play a role in gathering evidence in the civil law system—this is a judicial function. See Tanabe, *supra* note 50, at 75. The gathering of evidence is a “sovereign” function performed by the state's representative, the judge. See Hazard, *supra* note 16, at 1019–20.

69. See Tanabe, *supra* note 50, at 96 (“Under the prewar Japanese system . . . pretrial interview of witnesses was forbidden . . .”).

70. See Bengoshi hō [Lawyers Law of Japan], Law No. 205 of 1949, art. 23, para. 3, translated in EHS LAW BULL. SER. no. 2040 (2001). Questions sent through the Bar Association may be sent prior to the filing of the Complaint. There is no requirement to reply to questions sent through the Bar Association.

71. See Tanabe, *supra* note 50, at 81–83.

72. For a discussion of the Bar Association question process, see Craig P. Wignild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y JOURNAL 1, 10 (2002) and Harada, *supra* note 67, at 25–26.

73. See Itoh, *supra* note 52, at 68. See generally Tanabe, *supra* note 50.

74. See MINSOHŌ, art. 202; MINJI SOSH-O KISOHU [Japanese Rules of Civil Procedure], art. 113, para. 1–2, art. 114, translated in TAKA AKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN (Taniguchi-Reich-Miyake ed., Juris Publishing 2007) (1983) [hereinafter MINJI SOSH-O KISOHU]. Some critique the American approach of placing responsibility for questioning in the hands of the lawyers, and argue that the process was bound to fail because of the lack of discovery in Japan. See, e.g., Kojima, *supra* note 12, at 706–07 (“Witnesses are to be examined reciprocally, that is by both parties. . . . Partly because there was no discovery, reciprocal examination did not work effectively.”).

pared to render a decision. Of course, such long procedures make litigation an ineffective method of resolving disputes, yielding the varied conciliation and mediation methods of dispute resolution that are ubiquitous in Japan.⁷⁵ But a technologically industrialized Japan is bound to have some litigation, and political pressures to conclude cases more quickly have emerged. Responding to that pressure, the 1996 Code provided a statutory base for a new "Preparation for Oral Argument" phase of a case, wherein the formalities of a public trial could be avoided, enabling a relatively quick settlement.⁷⁶

The 1996 Code also looked to the American discovery model for tools to accelerate the plenary proceeding phase of a litigated case. The American interrogatory was seen as a vehicle to accomplish this goal while also aiding both the court and the parties. As a consequence, a pre-filing inquiry was adopted, under which a potential plaintiff could send questions to his target defendant in an effort to cabin the issues for the potential litigation.⁷⁷ Once litigation was initiated, the same process could be used post-filing to gather evidence.⁷⁸ However, unlike American interrogatories, there is no compulsion on the part of the receiving party to respond to inquiries, whether pre- or post-filing.⁷⁹ Because the process can be elected post-filing, most Japanese parties find it more convenient and consistent with past practices to utilize the inquiry process, if at all, after the case has been filed.⁸⁰ Then, if a party refuses to respond, the judge, who has power to compel a party to be forthcoming, may be prevailed upon to request the same information.⁸¹ The result has been that pre-filing inquiry is of virtually no use and post-filing inquiry

75. See *supra* note 26. See also GOODMAN, *THE RULE OF LAW*, *supra* note 25, at 259–63. For a discussion of various alternative dispute resolution mechanisms available in Japan, see GOODMAN, *JUSTICE*, *supra* note 19, at 199–204.

76. See MINSOHŌ, art. 168–74.

77. See MINSOHŌ, art. 132-2–132-8. See also Koichi Miki, *Roles of Judges and Attorneys Under the Non-Sanction Scheme in Japanese Civil Procedure*, 27 *HASTINGS INT'L & COMP. L. REV.* 31, 37 (2003).

78. See MINSOHŌ, art. 163. For a discussion of the inquiry process both pre-filing and post-filing, see GOODMAN, *JUSTICE*, *supra* note 19.

79. See MINSOHŌ, art. 163. See also Miki, *supra* note 77, at 38 ("A common feature of the new devices described above is that they do not have any sanctions or coercive power to compel enforcement."); *id.* at 40 ("In short, there are no means to compel an answer or guarantee a truthful answer.").

80. See Goodman, *Japan*, *supra* note 9, at 572–73, 577–78.

81. See Miki, *supra* note 77, at 42 ("[J]udges are expected to be investigators under the continental procedural system. Usually they do not hesitate to make inquiries of the parties in order to clarify issues and to request the production of evidence that they deem essential to the case.").

has not advanced the process much beyond the pre-1996 Code situation.⁸²

E. Production of Documents—Changes with the New Code

Civil law judges have the ability to require a party to produce documents and other evidence that is essential to reach a fair decision.⁸³ The Old Code gave this authority to Japanese judges—but limited its use in several important respects. It is in this area that the 1996 Code made several changes. This section reviews the limitations on this authority in the Old Code and as a counterpoint, discusses the changes wrought in the 1996 Code.

First, the procedure contemplated in the Old Code was not (and still is not) discovery. Unlike the American system where parties ask questions of each other in order to discover the existence of relevant documents or demand documents to ascertain relevance, the Old Code required that a party know of the existence of a document before asking a judge to have a party produce it.⁸⁴ Thus, a party requesting a document through a judge had to provide specific information concerning the document, including a justification for production that meant, or at least implied, that the requesting party must know what the document said before asking for it.⁸⁵ These procedural requirements of the Old Code inhibited production.

The 1996 Code retained the specificity requirements for document requests,⁸⁶ but added provisions making it easier for a requesting party to

82. *Bengoshi* also use the Japanese procedure for preservation of evidence in their attempt to discover documents. See MINSOHŌ, art. 234–42. If a court is convinced that evidence must be preserved, it may order the evidence produced for preservation purposes. The preservation motion can be made before a suit is filed, so the mechanism may operate like discovery. However, it is not designed for discovery purposes and the requesting party must make a compelling case for preservation—something that can be achieved if a witness is likely to die soon or leave the country, or evidence is likely to be destroyed in the immediate future unless preserved. In these cases, preservation has been used (although rarely) to actually discover what a witness has to say or to otherwise disclose facts. Nonetheless, the process is discretionary with the court and the burden on the party seeking preservation is high, even in the few situations where preservation may be required. It has limited value as a discovery device. See GOODMAN, JUSTICE, *supra* note 19, at 258–61 (discussing preservation of evidence under the 1996 Code).

83. See MINSOHŌ, art. 219–23. See also Hazard, *supra* note 16, at 1028 (“The letter of procedural law in the civil law regimes is that the judiciary is responsible for obtaining evidence, a responsibility that could not be delegated. It is a responsibility that certainly could not be delegated to partisan advocates for litigation parties.”).

84. See KYŪ-MINSOHŌ, art. 313.

85. See *id.* art. 313, paras. 1–5.

86. See MINSOHŌ, art. 221; MINJI SOSH-O KISOHU, art. 140 (regarding motions for production orders).

identify the desired documents when specifying the content of the document was not possible. As the theoretical basis for the requirement was to make it possible for the producing party to know what document was being sought, the 1996 Code merely required that the requestor furnish sufficient information to allow the holder to identify the desired document.⁸⁷ Then, the holder of the document would provide the necessary specification.⁸⁸

Second, under the Old Code, the obligation to produce a document was coextensive with a witness's requirement to testify; consequently, if a document was privileged, it was not subject to production.⁸⁹ The 1996 Code modified this requirement by allowing the judge to review privileged documents in camera and to order production of the requested materials in redacted form.⁹⁰

Third, production was limited to narrow circumstances in the Old Code. Thus, the Old Code allowed a judge to order production in only three situations:

- (i) where the party possessing the document was relying on the document in the case, but had not yet produced the document;⁹¹
- (ii) where the requesting party had a right to the document under some substantive law;⁹² or
- (iii) where the document had been created as a consequence of a relationship between the parties (a "relationship document") or was created for the benefit of the requesting party (a "benefit document").⁹³

Some Japanese judges, urged on by plaintiffs' lawyers, broadly interpreted the third requirement to avoid the restricted nature of these categories. Thus, what was considered a relationship document or a benefit

87. See MINSOHŌ, art. 222, para. 1.

88. See *id.* art. 222, para. 2.

89. See KYŪ-MINSOHŌ, arts. 280–81; Mochizuki, *supra* note 12, at 294 (explaining coextensive witness testimony and document production obligations under the Old Code).

90. See MINSOHŌ, art. 223, para. 1, 223, para. 3; MINJI SOSH-O KISOHU, art. 141. Where the holder of the document is a non-party, the court may question the holder before ordering production and/or redaction. See MINSOHŌ, art. 223, para. 2.

91. See KYŪ-MINSOHŌ, art. 312, para. 1.

92. See *id.* art. 312, para. 2.

93. See *id.* art. 312, para. 3.

document was given a broad interpretation by some lower court judges. Other judges saw this expansive reading of the Old Code as inconsistent with the real meaning of the limitations. To cabin the expansive reading of the Old Code, these judges adopted a rule under which a document prepared solely for the use of the possessor of the document (i.e., a self-use document) could not also be considered a relationship document or a benefit document.⁹⁴

Fourth, there was no provision in the Old Code allowing the judge to order the government to produce documents. Thus, documents in the possession of a government agency were unavailable in private litigation.

Reformers of the Old Code could not avoid dealing with these four limitations. On one hand, plaintiffs' lawyers wanted a major rewriting of the production rules to allow for production beyond that allowed by the Old Code.⁹⁵ On the other hand, lawyers who represented corporate interests (typical defendants) were quite happy with the status quo.⁹⁶ The government, for its part, was hesitant about having to produce documents, especially when it thought the national interest (or at least the government's interest) could be harmed by production. The 1996 Code sought a compromise. This compromise took final form in article 220.⁹⁷

The 1996 amendments resolved the government's complaint by postponing to a later date the terms under which the government could be ordered to produce documents. To satisfy those demanding a provision requiring that the government could be compelled to produce, the 1996 Code made clear that an amendment to that end would be forthcoming (a two-year period was provided).⁹⁸ In due course, an amendment was en-

94. For a discussion of lower courts' efforts to expand production and the corresponding effort of other courts to limit it through the judicial creation of the self-use exception, see Mochizuki, *supra* note 12, at 290–93; Taniguchi, *supra* note 12, at 776–78; Harada, *supra* note 67, at 43–48; Kojima, *supra* note 12, at 702–03. See also KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW 176–89 (2003).

95. See Mochizuki, *supra* note 12, at 296 (explaining that the Old Code's document production provisions gave insufficient access to individual plaintiffs bringing suits against corporations and the government).

96. See *id.* at 299 (explaining that corporations favored a plan narrower than the New Code); Taniguchi, *supra* note 12, at 776–78.

97. See MINSOHŌ, art. 220.

98. As adopted, the 1996 Code provided that an investigation would be undertaken and an amendment to deal with the issue of documents in the government's possession would be submitted within approximately two years of June 26, 1996, the date on which the 1996 Code was promulgated.

[A] compromise was worked out between the Government and the Diet, in which the bill was amended as follows: (4)(b) was dropped (Art.220(4)) and a provision was added to the chapter of transitory provisions to the effect that the

acted that authorized a court to direct the government to produce documents, except where it would hinder performance of the public duty, harm the public interest, or disclose a government secret.⁹⁹ In addition, production should be denied if it would be likely to harm national security, damage the relationship between Japan and a foreign country or international organization, or prejudice the government in negotiations with a foreign power or international organization.¹⁰⁰ Once a party makes a motion to have the government produce a document, the court, unless it finds the reasons for production given by the requestor clearly unreasonable, must confer with the appropriate government official concerning the request.¹⁰¹ The government is then given an opportunity to present its opinions as to why production is exempted under the law.¹⁰²

Article 220 took account of the arguments made by defendants' lawyers by retaining the three limited categories pursuant to which documents could be produced.¹⁰³ In this sense, it left the Old Code unchanged. But to account for the desires of plaintiffs' lawyers, the 1996 Code contained a catch-all provision allowing production of virtually any document.¹⁰⁴ To contain this open-ended production category, the 1996 Code limited the production of any other document by providing that certain categories of such documents not be produced.¹⁰⁵ Among these categories was the self-use document¹⁰⁶ (i.e., a document prepared solely for the use of the party in possession of the document), thereby meeting

Government must further consider the matter to come up with an appropriate conclusion within two years in keeping consistency with the system of the public access to the government documents currently in deliberation.

Taniguchi, *supra* note 12, at 777.

99. See MINSOHŌ, art. 220, para. 4(b).

100. See *id.* art. 223, para. 4(1).

101. See *id.* art. 223.

102. See *id.* art. 220, para. 4(b), art. 223.

103. See MINSOHŌ, art. 220, paras. 1–3.

104. See *id.* art. 220, para. 4.

105. See *id.* art. 220, paras. 4(a)–4(c). Professor Mochizuki describes the compromise as follows:

Article 220[] begins with a restatement into modern written Japanese of the three clauses of Article 312 of the Old Code. Clause 4, however, states that people must also produce documents that are *not* covered by the first three clauses, so long as one of four exceptions does not apply.

See Mochizuki, *supra* note 12, at 299.

106. See MINSOHŌ, art. 220, para. 4(c).

the desire of defendants' counsel that the self-use exception be made a part of the 1996 Code.¹⁰⁷

Scholarly opinion as to the effect of these code changes varied, although there was general consensus that the changes would lead to a shift in judicial approach as to the presumption of production, and consequently, a narrowing of the scope of the judicially created self-use doctrine. Nonetheless, the Justice Ministry handbook on the 1996 amendments took a position that is similar to the test for self-use documents under the Old Code:

[W]hether a document is a Clause 4 self-use document will turn on whether it "was created solely for internal use and is not expected to be shown to unrelated outsiders, considering the totality of circumstances such as the content of the document, and the process by and reason for which the document was created and is now possessed by its current possessor."¹⁰⁸

An intriguing question was the effect the structure of the 1996 Code production provision would have on the meaning of a benefit document or a relationship document. From a purely grammatical point of view, the categories that had given rise to the self-use exception were not included in the language limiting production on the basis of self-use status. Yet it could be argued that the language of the 1996 Code was meant to place relationship and benefit documents back into the narrow category they had occupied before some courts broadly interpreted them as producible.¹⁰⁹ Such broad—some would say strained—interpretation was no longer necessary, as any document could be ordered for production.¹¹⁰

107. See Mochizuki, *supra* note 12, at 302 ("[O]pponents of generalizing the duty to produce wanted documents covered by the old self-use exception to be similarly protected under the new law . . .").

108. Mochizuki, *supra* note 12, at 302 (quoting ICHIMON ITTO SHIN MINJI SOSHO HO [QUESTIONS AND ANSWERS ON THE NEW CODE OF CIVIL PROCEDURE] 252 (Counsellor's Office, Civil Affairs Bureau, Japanese Ministry of Justice ed., 1996)). See also Taniguchi, *supra* note 12, at 778.

109. See *supra* note 105 and accompanying text.

110. See Mochizuki, *supra* note 12, at 299–301 ("Uncertainty about the breadth of the self use exceptions raises questions about the New Code's commitment to greater access to information."). In addition to the exceptions to production mentioned above, the Code also applies the various privileges that apply to oral testimony to documents. See MINSOHŌ, art. 220, para. 4(b). Privileges in Japan are somewhat broader than the privileges in the United States, and include privileges for pharmacists, midwives, and foreign lawyers licensed to give foreign legal advice in Japan, as well as a privilege for trade and professional secrets. See MINSOHŌ, art. 197. In addition, although not designated a "privilege," a witness may not be asked questions that embarrass the witness. MINJI SOSHO-KISOHU, art. 115. How broadly a judge will interpret embarrassment remains to be seen

In sum, by attempting to meet the objections and requirements of all parties, the language of article 220 of the 1996 Code set the stage for judicial interpretation of the meaning of the document production requirement, especially the statutory self-use exception.

II. THE EVOLUTION OF THE JAPANESE SUPREME COURT'S JURISPRUDENCE ON THE PRODUCTION OF DOCUMENTS

A. *The First Judicial Interpretation of Self-Use: Fuji Bank v. Maeda*

Litigation concerning the meaning of the document production provisions followed on the heels of the 1996 Code, which took effect in 1998. The Supreme Court rendered its first decision dealing with the meaning of the 1996 Code's document production provisions in November 1999 with *Fuji Bank*.¹¹¹ The plaintiff was the family of a debtor who had killed himself when he was unable to repay loans he spent speculating in the stock market.¹¹² The defendant was the banking institution that had lent him the money.¹¹³ The document sought was an internal bank document prepared because the loan amount exceeded the branch bank's lending authority.¹¹⁴

The debtor's family argued that the lending bank owed a duty to the borrower when the bank was aware or should have been aware that the borrower had no assets to repay the loan and thus, the bank should have refused to extend the loan.¹¹⁵ The family sought damages for breach of this duty, arguing that it was the proximate cause of the suicide.¹¹⁶ To establish its case, the family asked the court to order the bank to produce the internal bank documents used to determine whether a loan should be granted.¹¹⁷ Such internal documents were required by the bank's home office because the size of the loan exceeded the local branch manager's lending authority.¹¹⁸ The plaintiff argued that the documents would dis-

but it is not unreasonable to conclude that questions to an executive of a company that would elicit responses embarrassing to the company would run afoul of article 115.

111. See Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

117. *Id.*

118. *Id.*

close that bank officials were aware of the decedent's precarious financial position and that some of them had urged that they reject the application because the decedent would be unable to repay,¹¹⁹ which would establish that the bank was aware of the risks to the decedent and accordingly owed a duty to the decedent not to extend credit.¹²⁰

The document was the bank's internal document containing the advice and opinions of bank executives that was relevant to the case. The issue before the court was whether the document was a self-use document exempt from production under the 1996 Code. The Tokyo High Court held that the document was not a self-use document and ordered its production.¹²¹ On interlocutory appeal, the Supreme Court reversed and held that the document was exempt from production.¹²²

The Supreme Court reasoned that: (i) the document was prepared for the internal use; (ii) the bank did not intend to allow others outside the company to ever view the document; and (iii) the bank would suffer harm if the document was produced because in future situations persons within the company would be afraid to present their views in an open and forthright matter out of concern that their opinions would later be subjected to public scrutiny.¹²³ What appears to have been of greatest concern to the Court was that production might inhibit the free flow of information and views within the company, causing damage to the decision-making process.¹²⁴ Accordingly, the Court held that the document was a self-use document, and in the absence of some special circumstance, was not subject to production.¹²⁵ Since no special circumstance was shown, the High Court's production order was reversed.¹²⁶

Several things about the decision are of importance. First, although there are some differences regarding the proper translation of the self-use exception in the 1996 Code, the translations make it clear that to be a self-use document, the document must have been intended only for the

119. *Id.*

120. *Id.*

121. Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

122. *Id.* Under article 223, paragraph 7 of the 1996 Code, a ruling granting or denying a motion for production is subject to immediate interlocutory appeal, known as a *kokoku* appeal. See MINSOHŌ, art. 223, para. 7.

123. Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

124. *See id.*

125. *Id.*

126. *Id.*

use of the holder of the document (and it seems reasonably clear that such a holder would have been the preparer of the document—thus it was prepared solely for the use of the preparer-holder).¹²⁷ The statutory language contains no other requirements for a document to be an excluded self-use document.¹²⁸ Yet the Supreme Court in *Fuji Bank* makes it clear that a self-use document is not shielded from production merely because it was prepared for the exclusive use of the preparer-holder of the document.¹²⁹ In addition to meeting the statutory definition of a self-use document, the document will only be exempted from disclosure if disclosure “is likely to cause disadvantage” to the preparer-holder.¹³⁰

Second, the Supreme Court’s opinion takes the position that even if a document is a self-use document whose production will cause disadvantage to the holder, the Court may nonetheless order its production if there are “special circumstances.”¹³¹ The 1996 Code does not reference or define “special circumstances,” and the Court in *Fuji Bank* likewise failed to define “special circumstances,” even when it introduced the concept.¹³²

Having decided that the document fell within the self-use exception, the Supreme Court also noted that it was clear that the document was not producible under the provision of the 1996 Code governing relationship documents, article 220, paragraph 3.¹³³ The Court did not explain why a self-use document could not also be a relationship document, although the opinion implied that a self-use document, by definition, could not be

127. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html> (“[a]ny document for the exclusive use of the holder of the document”); Case No. 14 of 2004, 58 MINSHŪ NO. 8 (Sup. Ct., Nov. 26, 2004), translation available at <http://www.courts.go.jp/english/judgments/text/2004.11.26-2004-Kyo-No..14.html> (“a document that is intended exclusively for the use by the holder thereof”); Case No. 39 of 2005, 60 MINSHŪ NO. 2 (Sup. Ct., Feb. 17, 2006), translation available at <http://www.courts.go.jp/english/judgments/text/2006.02.17-2005.-Kyo-.No..39.html> (“[a] document provided exclusively for use by the holder . . .”); Case No. 15 of 2001, 55 MINSHŪ 1411 (Sup. Ct., Dec. 7, 2001), translation available at <http://www.courts.go.jp/english/judgments/text/2001.12.07-2001-Kyo-No.15.html> (“is exclusively offered for use by the holder thereof”).

128. See MINSOHŌ, art. 220, para. 4.

129. See Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

130. *Id.*

131. *Id.*

132. However, on the facts in *Fuji Bank*, the Court found that special circumstances did not exist and thus refused to order production. *Id.*

133. *Id.*

a relationship document.¹³⁴ As the grammatical structure of article 220 appears to limit the self-use exception to the catch-all category of documents, this implication may be important.¹³⁵ It would appear that the self-use exception would, in fact, also apply to relationship documents through an indirect mechanism; that is, by limiting the definition of relationship documents so that a document must fail the self-use exception as a necessary condition for relationship status.

B. The Aftermath of Fuji Bank

Four months after the *Fuji Bank* decision was issued, the Court had another opportunity to discuss document production.¹³⁶ The plaintiff in this case was a purchaser of telephone communications equipment who sought damages after the equipment failed to operate properly, making communication through use of the equipment impossible.¹³⁷ To establish its case that the equipment was defective, the plaintiff sought production of schematic drawings of the equipment, relying on the catch-all provision of article 220.¹³⁸ The defendant objected to production on two grounds. First, article 220, paragraph 4(b), by incorporating the testimonial privilege applicable to trade and professional secrets, exempts from the catch-all category documents that record professional or technical secrets.¹³⁹ Second, the defendant claimed that the schematic was created solely for the internal use of the company, i.e., it was a self-use document.¹⁴⁰ The Osaka High Court refused to order production.¹⁴¹ The Su-

134. *Id.*

135. The catch-all provision is article 220, paragraph 4. See MINSOHŌ, art. 220, para. 4.

136. See Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html>. Japanese cases are not cited by the names of the parties, but are referred to by case number and date. This practice preserves the privacy of the litigants. However, it is possible to determine the names of parties in some cases, and for convenience these cases (e.g., *Fuji Bank*) may be referred to as such. Additionally, since Japanese High Court cases are not binding, the court's opinions may not be published and are not cited by the Supreme Court. The Supreme Court fully explains the High Court holding and reasoning in many cases, so citations in this Article to the High Court reasoning refer to the Supreme Court opinion.

137. *Id.*

138. *Id.*

139. See Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html>.

140. *Id.*

141. *Id.*

preme Court reversed and remanded for further proceedings to determine whether the documents were exempt from production.¹⁴²

As an initial matter, the Court found that merely because the document related to a product that defendant manufactured and contained information concerning the product, it was not ipso facto a trade secret document.¹⁴³ To make a document a trade or professional secret document, the possessor needs to establish that production of the document would disadvantage her in some fashion.¹⁴⁴ The risk that competitors might see the document does not itself amount to disadvantage.¹⁴⁵ In short, to be a professional or trade secret document, disclosure must somehow disadvantage the profession or otherwise adversely affect the party trying to keep the document secret.¹⁴⁶ The matter was remanded for the High Court to consider whether the document in fact contained secrets within the *Fuji Bank* definition.¹⁴⁷

In dealing with the defendant's second claim, the Court reaffirmed its statement in *Fuji Bank* that to be a self-use document, the possessor must show that: (i) the document had been prepared solely for the use of the possessor; (ii) the document was never intended for disclosure to others; and (iii) production would cause disadvantage to the possessor.¹⁴⁸ In *Fuji Bank*, the defendant bank was able to show that it would be injured by production.¹⁴⁹ However, in the instant case, no such showing had been made.¹⁵⁰ The High Court was satisfied that it was a self-use document

142. *Id.*

143. *Id.*

144. Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html>.

145. *Id.*

146. *Id.*

147. *Id.* The Supreme Court observed that:

[A]lthough the Documents may contain technical information which the manufacturer of the equipment has, the opposite party has not presented the nature of the information or the specific content of the disadvantage which may result from the disclosure, and the decision of the original instance court has not specified this.

Id.

148. *Id.* (citing and using the same language that it had used in *Fuji Bank*).

149. See Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

150. See Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html>.

simply because the document was made for the sole use of the company.¹⁵¹ The High Court failed to consider whether any disadvantage would result to the holder of the document if the document was produced.¹⁵² Without a finding of such injury, the document could not automatically be considered outside the catch-all category on the ground that it was a self-use document.¹⁵³ The matter was remanded for further proceedings.¹⁵⁴

In December 2000, the Court had another chance to refine its *Fuji Bank* holding.¹⁵⁵ In this case, the Supreme Court reversed a ruling by the High Court of Tokyo that ordered a defendant credit union to produce a document regarding a loan in a stockholder's derivative suit.¹⁵⁶ The stockholder argued that the directors had made certain loans with inadequate security, and hence, had breached their duty to the corporation.¹⁵⁷ The stockholder requested internal documents of the credit union relating to the making of the loans, claiming that the documents would disclose the alleged breach of fiduciary duty.¹⁵⁸ The credit union opposed production, arguing that the documents had been prepared solely for the use of the credit union, and thus were self-use documents not subject to production.¹⁵⁹

The Tokyo High Court reasoned that although the documents may not have been created with an intent to distribute them outside the credit union, since the documents contained information concerning loans and the actions of the directors thereto, the company should have known that, in the event of a derivative lawsuit, the document could be produced as evidence.¹⁶⁰ The High Court seemed particularly concerned with the availability of company documents to shareholders in a derivative suit—after all, the shareholders own the company and a derivative action is brought

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

against directors for the benefit of the corporation, which is the holder of the document.¹⁶¹

Upon review of the Tokyo High Court's ruling, the Supreme Court majority held that "special circumstances" justifying production were not met merely because the documents were sought in a derivative suit.¹⁶² To qualify as a "special circumstance" within the meaning of *Fuji Bank*, the requestor of the credit union documents would have to show that it was "in a position identifiable with that of a credit association or the holder of the document."¹⁶³ Although stockholders may have a right to inspect certain documents pursuant to substantive law that gives them access to such documents (e.g., articles of incorporation, minutes of directors' meetings, certain financial statements, etc.), the substantive law also limits the documents a stockholder is entitled to obtain.¹⁶⁴ In addition, while stockholders bringing a derivative suit may be in a position identifiable with that of the credit union by virtue of the fact that any recovery flows to the credit union, because the statutes limit the documents available to stockholders (and there is no statutory exception for stockholder-plaintiffs in a derivative case), stockholders are not in a position identifiable with that of the credit union itself.¹⁶⁵ Hence, no "special circumstance" existed.¹⁶⁶ A stockholder who brings a derivative suit is no more entitled to internal decision-making documents (that are not made available by substantive law) than is any other litigant.¹⁶⁷ While the action was instituted on behalf of the corporation, a derivative plaintiff is not

161. See *id.* On shareholder derivative suits in Japan, see Tsuyoshi Yamada, *Summary Translation: The Daiwa Bank Case (1999)*, 15 COLUM. J. ASIAN L. 193, 193 (2002) ("The following is a summary translation of a representative action brought by Daiwa Bank's stockholders against the Bank regarding the New York Daiwa Bank scandal. . . . This case . . . fostered much debate about the derivative action system in Japan."). See also Mitsuru Misawa, *Daiwa Bank Scandal in New York: Its Causes, Significance, and Lessons in the International Society*, 29 VAND. J. TRANSNAT'L L. 1023 (1996).

162. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

163. *Id.*

164. Shinyō kinko hō [Credit Association Law] Law No. 238 of 1951, art. 36, para. 4, art. 37, para. 3, translated in EHS LAW BULL. SER. no. 6250 (1988). The Supreme Court recognized these substantive rights in its decision. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

165. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

166. *Id.*

167. *Id.*

the corporation and is not entitled to documents created solely for the benefit of the corporation.¹⁶⁸ As an aside, the Court again noted that the self-use document cannot be considered a relationship document.¹⁶⁹

Justice Machida Akira (who became Chief Justice in 2002) dissented.¹⁷⁰ In his view, while the documents sought were self-use documents, the fact that they were sought in a derivative suit and contained relevant information regarding whether there had been a breach of trust, created the special circumstances required to override the self-use exception.¹⁷¹ The documents' role in assuring consensus decision-making within the company gave them a fundamental role in assuring that the decision-making process complied with the duty of trust the directors owed to the corporation.¹⁷² Accordingly, he believed the documents should be produced in a derivative suit.¹⁷³

In another derivative suit decided on the same day, the Court based its decision on a matter of standing, not on the merits of the case.¹⁷⁴ The Court upheld a decision of the Tokyo High Court, which had ordered a credit union to produce documents in a derivative suit against directors.¹⁷⁵ The directors appealed the production order, but the credit union did not.¹⁷⁶ The Supreme Court held that only the possessor of docu-

168. *Id.*

169. The decision may reflect a judicial bias against derivative lawsuits. Such suits were generally disfavored, and until recently, few derivative suits were brought because the plaintiff received little, if any, financial gain, so that the filing fee alone made the lawsuit cost prohibitive. Lower court decisions and pressure from the United States caused the cost to be decreased to 8,200 yen, lowering the bar to derivative suits. See Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1463–65 (1994). The lower filing fee opened the door to more derivative litigation but also raised concerns that such suits would be utilized by Sokaiya Racketeers to extort money from corporations. See Mark D. West, *Why Shareholders Sue: The Evidence From Japan*, 30 J. LEGAL STUD. 351, 374–75 (2001).

170. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000) (Akira, J., dissenting), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

171. Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>.

172. *Id.*

173. *Id.*

174. See Case No. 36 of 1999, 54 MINSHŪ 2743 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..36.html>.

175. *Id.*

176. *Id.* The corporation on whose behalf a derivative suit is brought may intervene to support its directors. See Case No. 17 of 2000, 55 MINSHŪ 30 (Sup. Ct., Jan. 30, 2001) translation available at <http://www.courts.go.jp/english/judgments/text/2001.01.30->

ments—here, the credit union—had standing to appeal an order requiring production, and only a party seeking production could appeal an order refusing production.¹⁷⁷ As the directors did not fit either category, they lacked standing to appeal the order to produce.¹⁷⁸

A year later, in December 2001, the Supreme Court again contemplated whether a credit union's internal document was subject to production.¹⁷⁹ In this litigation, the debtor-plaintiff claimed that the credit union was at fault in its dealings with him, and as a consequence, there should be no liability under the debt.¹⁸⁰ What distinguishes this decision from the previous cases was that the original creator of the document was neither possessor of the document nor a party in the case. Rather, the credit union had failed and all of its assets had been sold to a company that had the job of liquidating assets of failed credit unions for the benefit of the Japanese Government's equivalent of the United States Federal Deposit Insurance Corporation.¹⁸¹

This successor corporation filed suit to recover on the debt, and the debtors set up a defense of unlawful conduct by the original lender.¹⁸² To prove their contention, the debtors asked for documents that they claimed would show improper conduct in connection with the loan by the original lender.¹⁸³ The successor corporation, which was in possession of the documents, argued that the documents were similar to the documents in the *Fuji Bank* case because they contained the opinions of firm employees and had been prepared solely for use inside the firm.¹⁸⁴ Thus, they

2000.-Kyo-.No.17.html. Why the credit union did not object and file an appeal is not stated in the Supreme Court opinion.

177. See Case No. 36 of 1999, 54 MINSHŪ 2743 (Sup. Ct., Dec. 14, 2000), translation available at <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..36.html>.

178. See 54 MINSHŪ 2743 (Sup. Ct., Dec. 14, 2000) (“[B]ecause the kokoku appellant is not the holder ordered to produce the document but merely a party concerned in a case as to the merits, not having the standing to lodge complaint against the original decision, this kokoku appeal should inevitably be dismissed as unlawful.”).

179. See Case No. 15 of 2001, 55 MINSHŪ 1411 (Sup. Ct., Dec. 7, 2001), translation available at <http://www.courts.go.jp/english/judgments/text/2001.12.07-2001-Kyo-No.15.html>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Case No. 15 of 2001, 55 MINSHŪ 1411 (Sup. Ct., Dec. 7, 2001), translation available at <http://www.courts.go.jp/english/judgments/text/2001.12.07-2001-Kyo-No.15.html>.

were self-use documents not subject to production.¹⁸⁵ The Osaka High Court, however, ordered the defendant to produce the documents.¹⁸⁶

The Supreme Court upheld the High Court's production order and dismissed the appeal.¹⁸⁷ The Court reasoned that the original lender, which had created the documents sought in the action, was no longer in the lending business and was in the process of liquidation.¹⁸⁸ Accordingly, it was no longer going to make any loans.¹⁸⁹ Further, the possessor of the documents, the successor company, might make loans in the future, but its opinions and the opinions of its employees would not be adversely affected by the production of documents created by the original lender.¹⁹⁰ Unlike *Fuji Bank*, production would not inhibit communication and decision making inside the possessor company. Accordingly, the Court found that special circumstances existed that warranted the production of these documents.¹⁹¹ The Court made no reference to the question of employee privacy.¹⁹²

In a similar case, when an insurance company failed and the responsible government authority directed the administrators to appoint a special independent committee to report on the role of former directors in the company's failure, the resulting report was not considered a self-use document.¹⁹³ In the main suit, which was between insurance companies, the defendant, a failed company, was charged with obtaining funds from the plaintiff based on fraudulent financial statements.¹⁹⁴ To establish its case, the plaintiff sought production of a copy of the investigative committee's report.¹⁹⁵ The report concluded that there was reason to believe that there had been wrongdoing on the part of past management and recommended suit against former directors.¹⁹⁶ The company administrator possessing the report objected to production, claiming that the report was

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Case No. 15 of 2001, 55 MINSHŪ 1411 (Sup. Ct., Dec. 7, 2001), *translation available at* <http://www.courts.go.jp/english/judgments/text/2001.12.07-2001-Kyo-No.15.html>.

190. *Id.*

191. *Id.*

192. *Id.* See *infra* Part III for a discussion of the privacy issue.

193. See Case No. 14 of 2004, 58 MINSHŪ NO. 8 (Sup. Ct., Nov. 26, 2004), *translation available at* <http://www.courts.go.jp/english/judgments/text/2004.11.26-2004-Kyo-No.14.html>.

194. *Id.*

195. *Id.*

196. *Id.*

a self-use document.¹⁹⁷ The company administrator also argued that because opinions of lawyers on the committee were set out in the report, it was exempt from production because of attorney-client privilege.¹⁹⁸ Both the Tokyo High Court and the Supreme Court rejected these arguments and ordered production.¹⁹⁹

It was the view of the Court that the report, prepared for the failed company's administrators at the demand of the government agency supervising insurance companies, was not in the nature of a company-prepared document.²⁰⁰ Moreover, the administrators had been appointed by the same governmental body in order to protect policy holders.²⁰¹ The report was prepared for the same public interest purpose, and thus was not prepared solely for the benefit of the failed company or its administrators.²⁰² The Court also concluded that although lawyers were members of the committee, they had not been engaged to provide legal advice or services, so no attorney-client privilege was involved.²⁰³

Up through 2004, although the Supreme Court did not define "special and unusual circumstances," it found them to exist where there was a lack of standing to complain about production, where the creator of the document was no longer in business, and where the document was created for a public interest purpose. Still, the thrust of the *Fuji Bank* case, as reaffirmed by the Court's refusal to order production in a derivative suit, led the Japanese bar and lower court judges to conclude that little had changed as a consequence of the 1996 amendment.²⁰⁴

C. Movement Away from the Strict Application of the Fuji Bank Holding

The prospect of change emerged in 2005. In a series of cases, the Supreme Court has clarified the requirements of the self-use exception to production and has more clearly defined when special circumstances exist that require document production. Although the most recent cases have relaxed the production rules, the basic reasoning of *Fuji Bank* ap-

197. *Id.*

198. Case No. 14 of 2004, 58 MINSHŪ NO. 8 (Sup. Ct., Nov. 26, 2004), translation available at <http://www.courts.go.jp/english/judgments/text/2004.11.26-2004-Kyo-No..14.html>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Case No. 14 of 2004, 58 MINSHŪ NO. 8 (Sup. Ct., Nov. 26, 2004), translation available at <http://www.courts.go.jp/english/judgments/text/2004.11.26-2004-Kyo-No..14.html>.

204. See Goodman, *Japan*, *supra* note 9, at 581, 584 n.282; Haley, *Heisei Renewal*, *supra* note 8, at 7.

pears to remain intact: documents of an ongoing business entity will be considered self-use documents exempt from production if the documents are prepared for decision-making purposes solely for examination within the entity, and production might interfere with the free flow of information. That said, while the party seeking the exception bears the burden of showing that production will cause injury, the party requesting production still faces a difficult task when seeking what American lawyers would call a smoking-gun document—a document disclosing wrongdoing on the part of the possessor entity.

In July 2005, the Supreme Court upheld a debtor's claim for money damages based on an emotional injury suffered when a lender refused to make available financial records concerning the loans between them.²⁰⁵ The debtor needed the records to work out an arrangement with his creditors.²⁰⁶ In this case, the possessor of the document was a lender licensed to do business under the Money Lending Business Law ("MLBL").²⁰⁷ The borrower had engaged in a series of transactions with the lender over a period of time and had made numerous payments in connection with the loans.²⁰⁸ Under the substantive law, the maximum rate of interest payable on the loans was fixed.²⁰⁹ The debtor was unable to continue payments on the loans and engaged counsel to consolidate and make an arrangement for the payment of his debts.²¹⁰ Counsel, in turn, asked the lender to produce the records of the various loans and payments made in connection therewith, in an attempt to show that the rate of interest charged to the debtor exceeded the maximum rate allowed by the law.²¹¹ The lender, while willing to discuss an arrangement for future repayment, was unwilling to produce the books.²¹² The debtor's representatives were unwilling to discuss an arrangement until the records of prior transactions had been produced.²¹³ The debtor filed suit alleging that the

205. See Case No. 965 of 2004, 59 MINSHŪ No. 6 (Sup. Ct., July 19, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.19-2004.-Ju-.No..965.html>.

206. *Id.*

207. *Id.*

208. *See id.*

209. *Id.* See also Risoku seigen hō [Interest Rate Restriction Law], Law No.100 of 1954, art. 1, translated in EHS LAW BULL. SER. no. 2121 (1999) (providing for maximum interest rates).

210. See Case No. 965 of 2004, 59 MINSHŪ No. 6 (Sup. Ct., July 19, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.19-2004.-Ju-.No..965.html>.

211. *Id.*

212. *Id.*

213. *Id.*

interest rate charged exceeded the rate permitted by law, and that the lender's refusal to produce the records prior to the suit had caused the debtor injury by impeding him from arranging for the payment of his debts.²¹⁴ Damages were sought for the emotional harm this allegedly caused the debtor. In the litigation, the lender produced the records.²¹⁵

With respect to the plaintiff's first claim, the High Court found that there had been overpayments and ordered the lender to make restitution for overpayment of interest.²¹⁶ With respect to plaintiff's second claim, alleging emotional injury, the High Court found that such relief was only available if it could be said that there had been a breach of good faith by the lender that had caused the non-pecuniary injury to the debtor.²¹⁷ The High Court found that there was no obligation for the lender to produce the records.²¹⁸ As the debtor and his representatives had not disclosed that failure to make production was delaying the arrangement for payment of creditors and was having an adverse emotional effect, there was no basis for the debtor's claim that the lender's conduct was such a gross violation of the duty of good faith.²¹⁹ Critical to the High Court's reasoning was that there was no statutory duty on the part of the lender to produce the record of prior transactions.²²⁰

The plaintiff appealed this finding as to the second claim, and the Supreme Court rejected the lower court's reasoning.²²¹ The Supreme Court found that, under the MLBL, the lender was required to keep records of loans, repayments, and interest paid, and to provide copies to the debtor when payments were made.²²² The Court found that it was unreasonable to believe that even sophisticated debtors would not at some point lose or otherwise not have copies of some of these records.²²³ The Court also concluded that the purpose of requiring the lender to keep records was, at least in part, to have records available to resolve disputes that might arise

214. *Id.*

215. Case No. 965 of 2004, 59 MINSHŪ NO. 6 (Sup. Ct., July 19, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.07.19-2004.-Ju-.No..965.html>.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *See* Case No. 965 of 2004, 59 MINSHŪ NO. 6 (Sup. Ct., July 19, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.07.19-2004.-Ju-.No..965.html>.

221. *Id.*

222. *Id.*

223. *Id.*

between the lender and debtor.²²⁴ The Court noted that this conclusion was supported by the Financial Services Agency guidelines, which require lenders make details of debt available to debtors.²²⁵

Thus, the Court concluded that the lender was required to produce records requested by a debtor attempting to work out an arrangement with creditors.²²⁶ Moreover, the Court reasoned that no great burden would be placed on the lender if it were required to produce the records from its books, whereas great disadvantage would result to the borrower if denied access to such records.²²⁷ The Court viewed this obligation as part of the lender's duty of good faith under the loan agreement, and unless there was an abuse of right by the debtor, production was required.²²⁸ Since the lender had unlawfully refused the debtor's request over a period of six months, the debtor had a right to recover non-pecuniary relief.²²⁹ The case was remanded to the Osaka High Court for a determination of the damages to be awarded.²³⁰

Although the above case did not directly involve an issue under article 220 of the 1996 Code, its holding is nonetheless relevant. The 1996 Code requires, as did its predecessor, that a party to litigation produce any document to which the requesting party has a right under substantive law.²³¹ In determining that a debtor could base a claim for non-pecuniary relief on the failure of a lender doing business under the MLBL to make available copies of records to a debtor, the Court also established a debtor's right in similar litigation to request production of the records under the 1996 Code. As the MLBL did not specifically state that such records were to be made available to debtors—the Court reached this conclusion based on agency guidelines, the purpose of the law, and the relative harms caused by production and non-production—this case may be viewed as broadening the scope of production under the 1996 Code.²³²

224. *Id.*

225. See Case No. 965 of 2004, 59 MINSHŪ No. 6 (Sup. Ct., July 19, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.19-2004.-Ju-.No..965.html>.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Case No. 965 of 2004, 59 MINSHŪ No. 6 (Sup. Ct., July 19, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.19-2004.-Ju-.No..965.html>.

231. See MINSOHŌ, art. 220, para. 2.

232. It may be that this case is limited to its facts. Many lenders' practices are under scrutiny in Japan, and the Court may have been reacting to a general feeling that there is something very wrong in some segments of the lending community. Guidance by a gov-

Three days after the Third Petty Bench of the Supreme Court decided the above case and held that borrowers were entitled to production of the records of their loan from a licensed lender, the Second Petty Bench decided a case which dealt with documents from a police investigation.²³³ Here, the Tokyo High Court held that the documents that formed the basis for a search warrant constituted documents regarding the legal relationship between the subject of the warrant and the police, and hence were documents that could be ordered produced by the police under the document production section of the 1996 Code, absent other legal provisions limiting production.²³⁴ Although the Supreme Court found that provisions of the Code of Criminal Procedure inhibited production, and thus refused to order production of most of the materials sought,²³⁵ in an expansive reading of the 1996 Code, the Court reasoned that the underlying documents upon which the search was authorized were relationship documents.²³⁶

The production issue in this case arose in a lawsuit brought by the subjects of a series of searches made in connection with an arson attack on the home of a Prefectural Assembly Member.²³⁷ The plaintiffs sought production of the warrant allowing the search, as well as numerous underlying documents. The subjects of the search were not arrested for the crime—indeed, no arrests had been made—and argued that the government was responsible for damages in connection with the search and sei-

ernment agency in Japan has significantly more compulsion than guidance from an agency in the United States. Although parties in Japan are not required to follow guidance, most administrative guidance is in fact followed. For a discussion of administrative guidance, see Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984), Tom Ginsburg, *Dismantling the "Developmental State"?: Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 593–94 (2001), and Meryll Dean, *Administrative Guidance in Japanese Law: A Threat to the Rule of Law*, 1991 J. BUS. L. 398.

233. See Case No. 4 (Kyo) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html>.

234. *Id.*

235. The warrants for conducting the search were subject to production, but under article 110 of the Code of Criminal Procedure these documents must be shown to the subject of the search and contained none of the information that was critical to plaintiff's case against the police. See KEISOHŌ [Code of Criminal Procedure], Law No. 131 of 1948, art.110, translated in EHS LAW BULL. SER. no. 2600 (2005).

236. See Case No. 4 (Kyo) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html>.

237. *Id.*

zure under the provisions of Japan's Constitution that render the state responsible for unlawful acts of its agents.²³⁸

The criminal investigation into the arson was ongoing at the time of the Supreme Court's decision. The Tokyo High Court ordered all of the requested documents be produced. Although the Supreme Court concurred that the materials involved were relationship documents, it refused to order production of most materials because of the ongoing investigation.²³⁹

The Supreme Court found that the search and seizure constituted a legal relationship between the police and the subject of the search.²⁴⁰ This followed from the constitutional provisions requiring a warrant for a search and making citizens and their effects secure in their homes.²⁴¹ This constitutionally protected security could only be breached pursuant to a warrant.²⁴² Thus, the warrant and its execution created a legal relationship between the police and the subject of the search.²⁴³ The papers allowing this legal relationship to be created, i.e., the warrant and the underlying documents on which the issuance of the warrant were based, were documents concerning the legal relations between the holder of the document (the police or prosecutor) and the requesting party (the subject of the search).²⁴⁴

238. See KENPŌ, art. 17 ("Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official."). The Law Concerning State Liability for Compensation carries out this constitutional provision and provides a cause of action to those injured by illegal acts of the government or its agents. Kokka baishō hō [Law Concerning State Liability for Compensation], Law No. 125 of 1947, art. 1, *translated in* EHS LAW BULL. SER. no. 1015 (1993).

239. See Case No. 4 (Kyo) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html>. The Code of Criminal Procedure provides that "[d]ocuments relating to litigation shall not be made public prior to the opening of a public trial." KEISOHŌ [Code of Criminal Procedure], Law No. 131 of 1948, art. 47, *translated in* EHS LAW BULL. SER. no. 2600 (2005).

240. See Case No. 4 (Kyo) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html>.

241. See KENPŌ, art. 35 ("The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause. . . .").

242. See Case No. 4 (Kyo) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No..4.html>.

243. *Id.*

244. *Id.*

Since the documents in their entirety were subject to production under the 1996 Code, the Court next examined whether there were any other legal provisions that exempted the materials from production.²⁴⁵ As to the warrants, it found none.²⁴⁶ As a matter of law, the warrants must be shown to the subject of the search at the time of the search, and therefore it was an abuse of discretion for the police and prosecutor to claim that the material contained in the warrant was confidential.²⁴⁷ A further ground for rejecting the State's argument was that the warrant contained information already known to the subject of the search, i.e., the name of the search subject and the address of the residence.²⁴⁸ As to the documents underlying the warrants, the Court found that the provisions of the Criminal Procedure Code that protected information concerning an ongoing investigation from disclosure formed a basis for refusing production.²⁴⁹ It was not outside the realm of police discretion to claim that confidentiality was required, so the materials were exempted from production.²⁵⁰

This case makes clear that a relationship document need not be a document prepared between the parties, such as a contract.²⁵¹ The documents underlying the search warrant were prepared solely by the police authorities for the purpose of presentation to a court, and surely were not designed to create a legal relationship, as traditionally understood, between the police who prepared them and the search suspect.²⁵² Surely the police did not intend to find themselves engaged in a legal relationship with suspects to a crime any more than a prosecutor considers himself as having a legal relationship with an accused. In this sense, the willingness of the Court to broadly interpret what is a legal relationship document may have significance. On the other hand, it may be that the case is limited to documents underlying arrest and search—matters specifically covered by the Constitution and where the criminal law likely prohibits any meaningful production in any event.

On the same day as the decision in the search and seizure case, the Second Petty Bench of the Supreme Court delivered an opinion regard-

245. *Id.*

246. *Id.*

247. Case No. 4 (Kyo) of 2005, 59 MINSHŪ No. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Kyo-.No.4.html>.

248. *Id.*

249. *Id.*

250. *Id.*

251. *See id.*

252. *See id.*

ing the scope of production permitted against the government when the documents sought might affect the foreign relations of Japan.²⁵³ As previously noted, the original rewrite of the document production provisions of the 1996 Code failed to resolve the issue of how documents possessed by the government are treated.²⁵⁴ In a subsequent amendment, government documents were made subject to production, but were limited in certain respects. Documents exempt from production include those that could harm the foreign relations of Japan, harm national security, or adversely affect negotiations between Japan and a foreign country or international organization.²⁵⁵

In addition, a procedural safeguard was established to give the government a means of objecting to production of documents, although it was subject to judicial review. A court considering a production request for potentially prohibited materials must give the government authority an opportunity to express a reasoned view as to whether production should be prohibited.²⁵⁶ The court must review the rationale to determine its validity. If it finds the government's reasons inadequate, the court may order production.²⁵⁷

The boundaries of production of government documents were explored in a case where a citizen of Pakistan sought political asylum in Japan.²⁵⁸ The foreign citizen claimed he was the subject of political retribution and that there was a warrant for his arrest in Pakistan.²⁵⁹ To support his

253. See Case No. 4 (Gyo-Fu) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>.

254. See *supra* notes 98–102 and accompanying text.

255. See MINSOHŌ, art. 223. Under article 223, the competent government authority in possession of documents sought to be produced must be advised of the request. If the authority objects to production, it must present an opinion explaining that the documents fall within the official secrets exemption of article 220. See *id.* art. 223, para. 3.

256. The opinion must disclose the grounds for the opinion and the court may order production if “the opinion is not sufficient to be considered to have reasonable ground.” *Id.* art. 223, para. 4.

257. Article 223 lists the following concerns as grounds for refusing to make production: that national security will be impaired, that the trust between Japan and other countries or international organizations will be damaged, that negotiations between Japan and other countries or international organizations may be compromised, that prevention or investigation of crimes will be inconvenienced, or that public safety will be compromised. See *id.* art. 223, paras. 4(1)–4(2). The government may also have grounds for refusing to produce government documents that contain private-party secrets.

258. See Case No. 4 (Gyo-Fu) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>.

259. *Id.*

claim, the foreign citizen presented papers to the Minister of Justice, including a copy of the arrest warrant from his home country.²⁶⁰ The Minister of Justice wrote to the Minister of Foreign Affairs and requested that contact be made with the Pakistani government to determine the validity of the documents.²⁶¹ The Pakistani government responded to the inquiry by stating that the arrest and other documents were forgeries.²⁶² The Minister of Foreign Affairs then notified the Justice Ministry and refugee status was denied.²⁶³

To challenge this outcome, the foreign citizen sought production of: (i) a copy of the initial request from the Minister of Justice to the Minister of Foreign Affairs (which was in the possession of the Ministry of Justice); and (ii) copies of the correspondence between the Ministry of Foreign Affairs and the foreign government (which were in the possession of the Ministry of Foreign Affairs).²⁶⁴ Both Ministers objected to production on the grounds that production would harm relations between Japan and a foreign power.²⁶⁵ Further, the Ministry of Foreign Affairs opined that the documents exchanged between the governments were generally considered confidential in customary diplomatic relations, and thus should not be produced.²⁶⁶ Both Ministers also claimed that the documents were exempt from production because they contained state secrets; production would harm the public interest and interfere with the performance of public duties. The Tokyo High Court, without conducting an *in camera* review, ordered the documents produced. The Supreme Court reversed and remanded for an examination into the validity of the claims made by the Ministers.²⁶⁷

The Supreme Court noted that the question of production involved not simply whether the ultimate fact disclosed by the correspondence was secret (i.e., that the foreign government said that the documents provided to the Japanese government by the alleged refugee were forgeries), but whether production of the material as a whole would harm diplomatic

260. *Id.*

261. *Id.*

262. *Id.*

263. Case No. 4 (Gyo-Fu) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

relations and disclose state secrets.²⁶⁸ In this regard, the Supreme Court noted that the Ministers claimed that production of the documents would disclose internal investigative techniques, background information not provided to the foreign government, and comments about internal political matters in the foreign country, all of which would damage the public interest if disclosed.²⁶⁹ Because the High Court had neither examined the documents in camera nor adequately reviewed the Ministry's rationale, the matter was remanded for a more thorough examination.²⁷⁰

Although concurring to the remand, Justices Takii and Imai seemed to sympathize with the Tokyo High Court.²⁷¹ In their view, the Ministry may not simply rely on generalities or speculative injury to the public interest to support a denial of production.²⁷² Rather, the objection to production must provide concrete reasons why production would cause the public interest to suffer.²⁷³

Justice Fukuda also wrote separately.²⁷⁴ His view was that the correspondence between governments constituted a note verbale, and under customary international law, such correspondence may not be disclosed absent the consent of the other country.²⁷⁵ Justice Fukuda seems to suggest that if upon examination the government's objection is unjustified, the court should then consider whether the foreign state would object to production. The clear import of his logic is that if the foreign state objects, production should not be ordered.

It is not certain whether there is a majority that would support Justice Takii's rationale. Only two Justices have signed on to the Court's opinion and Justice Fukuda's view was not discussed in the other opinions. Nor does Justice Fukuda address whether he approves or disapproves of the approach taken by Justices Takaii and Imai. What does seem clear is that, while the Court had some question about the presentations by the Ministries, it was unwilling to allow production simply because the Ministries had not supported their opinions with concrete reasons—and the Court was not prepared to allow the High Court to determine the matter

268. Case No. 4 (Gyo-Fu) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>.

269. *Id.*

270. *Id.*

271. *Id.* (Takii, J. and Imai, J., concurring).

272. *Id.*

273. Case No. 4 (Gyo-Fu) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>.

274. *Id.* (Fukuda, J., concurring).

275. *Id.*

without a searching investigation into the Ministries' rationale, including an in camera review of the documents. Moreover, at least two Justices sitting in the Second Petty Bench were prepared to place a substantial burden on the government when it objects to production of documents that may be relevant in a civil litigation involving the government. However, the case did not examine whether a more stringent standard would apply when government documents are sought for use in a private lawsuit in which the government is not a party.

In October 2005, the Third Petty Bench of the Supreme Court had an opportunity to discuss this issue in a case dealing with an industrial accident in which a child worker was injured.²⁷⁶ The Labor Ministry conducted an investigation of the accident pursuant to its statutory authority.²⁷⁷ The Ministry prepared an investigative report that contained government investigators' opinions on the future steps required to prevent such accidents, and a factual statement of the investigators' analysis as to what had occurred.²⁷⁸ This analysis was based, in large part, on interviews with management and other company personnel.²⁷⁹ In a suit by the injured child's family against the company, the family sought disclosure of the report.²⁸⁰ The Labor Office objected to production, claiming that the report contained official secrets and that disclosure would discourage cooperation in future investigations, damaging the government's ability to serve the public interest.²⁸¹ The report disclosed the names of persons contacted by the office and summarized interviews, but it did not quote individual statements.²⁸² The various workers contacted during the investigation also objected to production of the report.²⁸³ The High Court in Nagoya refused to order production. The Supreme Court reversed in part and affirmed in part.²⁸⁴

The Supreme Court noted that the report contained two types of information.²⁸⁵ First, there was information that disclosed opinions of gov-

276. See Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

ernment workers as to what future action should be taken.²⁸⁶ This information disclosed the government's investigative techniques, which the Court concluded were state secrets and the disclosure of which was unwarranted ("Category I materials").²⁸⁷ The other type of information contained in the report was material based on interviews, reports, and measurements, which the Court concluded, as an initial matter, were the secrets of the employer, not the government.²⁸⁸ The employer's secret material wound up in the government's hands as a consequence of the investigation, was of a factual nature, and was not linked to any specific interviewee.²⁸⁹ The Court ordered production of this material ("Category II materials").²⁹⁰

The interaction between the Court's holdings regarding the two categories of material is instructive. As an initial matter, the Court concluded that all of the material being sought constituted government secrets.²⁹¹ Private secret information retains its secret character and becomes a government secret when it comes into the government's hands as a consequence of the government's investigation and could damage the government's ability to perform its public interest functions if disclosed.²⁹² Thus, both categories of information may be denied production if there is likelihood that production will damage the ability of the government to carry out its functions in the public interest.²⁹³ The Court then turned to the government's reasons for objecting to production. It first established

286. Case No. 11 of 2005, 59 MINSHŪ No. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

287. *Id.* As noted in its discussion of the case, the Court was concerned about two types of information in the report. One type was "private" (i.e., company) secrets. Under article 223 of the 1996 Code, when the government possesses documents that disclose a private party's technical or business secrets, the government must allow the private party to object to production and must give the private party an opportunity to present its position as to why the document should not be produced. *See* MINSOHŌ, art. 223, para. 5. The Court notes that the employees of the corporation objected to production. It is likely that in addition to giving the company an opportunity to object, the government possessor of the documents also gave the employees an opportunity to object.

288. *See* Case No. 11 of 2005, 59 MINSHŪ No. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. Case No. 11 of 2005, 59 MINSHŪ No. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

the appropriate standard for evaluating the government's reasons for nondisclosure. Here, the Court adopted the same approach as Justices Takaii and Imai (although it did not cite them or otherwise refer to the July decision), holding that there must be a specific or concrete showing that there exists a likelihood that the public interest will be damaged by production.²⁹⁴ An abstract possibility that production could hurt the public interest is not sufficient to deny production.²⁹⁵ Second, the Court determined that the likelihood of damage to the public interest must be based on the content of the documents sought.

As the documents sought in the instant case contained two different categories of information, the Court dealt with each in turn. As to the Category I materials, the Court found that production should not be made.²⁹⁶ This determination seems to mirror the determination in the *Fuji Bank* line of cases. In both the public and private sector, the Court is concerned about keeping decision-making lines of communication open and allowing the unedited and unfettered statements of employees. Accordingly, the Category II material need not be produced.²⁹⁷ As to Category I material, the Court recognized the arguments based on privacy concerns of workers at the company and the potential inability of the government to properly carry out future investigations.²⁹⁸ The Court rejected both arguments.²⁹⁹

The employee privacy argument was rejected as a factual matter since the report itself failed to disclose who said what.³⁰⁰ Moreover, the report mixed interview materials with other materials and opinions of the investigators to such an extent that the statements of individual employees or directors could not be discerned.³⁰¹ As a consequence, the Court found there was no real loss of privacy at stake.³⁰² Further, production would not hinder the ability of the government to perform future investigations since the statutory law required employer-employee cooperation with

294. Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

300. *Id.*

301. *Id.*

302. *Id.*

government investigators.³⁰³ As the two types of information in the report could be readily segregated, there was no reason not to order production of the Category I materials, and the Court did so.³⁰⁴

In a case involving the Sendai City Assembly,³⁰⁵ it was alleged that funds disbursed to various political factions to use in research under the Local Autonomy Law³⁰⁶ were improperly allocated.³⁰⁷ As a consequence, the plaintiff sought repayment of such sums to the municipal government.³⁰⁸ In the course of the litigation, and to prove the validity of the claim, the plaintiff sought an order that would require production of the

303. Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>. The Labor Safety and Sanitation Law requires cooperation with government investigations. *See* Rōdō anzen eisei hō [Labor Safety and Sanitation Law], Law No. 57 of 1972, art. 100, *translated in* EHS LAW BULL. SER. no. 8070 (1999).

304. *See* Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

305. Japan is divided into numerous prefectures and municipal governments that serve local governmental functions. The Sendai City Assembly is a municipal government that is part of the Miyagi Prefecture. The Japanese Constitution provides that prefectural governors and councils are to be elected, rather than appointed by the central government. *See* KENPŌ, art. 93, para. 2. Japanese prefectures perform many agency functions for the central government. Japanese prefectural governors can be ordered to perform functions on behalf of the national government by the Minister, provided the Minister's order is within the scope of his authority. *See, e.g.,* Okinawa Mandamus Case, Case No. 90 (Gyo-Tsu) of 1996, (Sup. Ct., Sept. 28, 1996) *translation available at* <http://www.courts.go.jp/english/judgments/text/1996.08.28-1996-Gyo-Tsu-No.90.html>.

306. *See* Chihō jichi hō [Local Autonomy Law], Law No. 67 of 1947, *available at* <http://nippon.zaidan.info/seikabutsu/1999/00168/mokuji.htm>. The Local Autonomy Law permitted the prefectural governments to provide funding for the various political factions in the prefectural assemblies for the purpose of conducting research. *See id.*, art. 100.

307. *See* Case No. 2 of 2005, 59 MINSHŪ NO. 9 (Sup. Ct., Nov. 10, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.11.10-2005.-Gyo-Fu-.No..2.html>. A prefecture enacted a local ordinance in conformity with the Local Autonomy Law that required the factions to provide certain information concerning studies done with allocated funds. But, the factions were not required to provide the study results to the public or the prefecture government. The results of the study were, of course, made available to the members of the faction performing the study. *Id.*

308. *Id.* While plaintiffs in such a taxpayer suit would likely lack standing in the United States, the Administrative Case Litigation Law permits such suits in Japan. *See* Gyōsei jiken soshōhō [Administrative Case Litigation Law], Law No. 139 of 1962, art. 5, *translated in* EHS LAW BULL. SER. no. 2391 (1999). *See also* Chihō jichi hō [Local Autonomy Law], Law No. 67 of 1947, *available at* <http://nippon.zaidan.info/seikabutsu/1999/00168/mokuji.htm>.

studies.³⁰⁹ The issue before the Court was whether the reports were self-use documents and thus exempt from production.³¹⁰

The Court began its analysis by stating the basic principles for the self-use exception: (i) a document must be prepared solely for the use of the holder or those within its organization and was not intended for disclosure; (ii) disclosure is likely to violate privacy or prevent or inhibit employees from making unfettered opinions and decisions; (iii) a significant or at least not insignificant injury to the holder of the document in the event of disclosure; and (iv) no special circumstances exist that would warrant production, even if all of the above considerations were met.³¹¹

In applying these principles, the Court recognized the necessity for transparency since public monies were being expended, but noted that the local ordinance provided that information concerning the studies be filed with the prefecture, although not the final report or its substance.³¹² The Court then noted the highly political nature of such reports and the obvious reasons for not providing copies to either opposition factions in the Assembly or to the executive branch of the prefectural government.³¹³ Both privacy concerns of persons who may have assisted in the compilation of the report and the risk that those opinions may not be objectively voiced if the report's contents were published counseled in favor of holding them self-use documents.³¹⁴ In addition, it could be expected that production of the report would cause significant problems for the faction preparing it, both with the executive branch and competing factions.³¹⁵ As a result, the Court deemed such reports self-use documents and exempt from production.³¹⁶

Justice Yokoo dissented.³¹⁷ In his view, research reports are subject to review by an outside person who is not a member of the faction undertaking the study.³¹⁸ This conclusion follows from an analysis of the legal basis for spending public monies for the report and the need to ensure

309. See Case No. 2 of 2005, 59 MINSHŪ NO. 9 (Sup. Ct., Nov. 10, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.11.10-2005.-Gyo-Fu-No..2.html>.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. Case No. 2 of 2005, 59 MINSHŪ NO. 9 (Sup. Ct., Nov. 10, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.11.10-2005.-Gyo-Fu-No..2.html>.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

that public funds are properly spent.³¹⁹ Justice Yokoo reasoned that since the study report may be reviewed by an outside person, it fails to meet an essential element of a self-use document; namely, that there is no expectation that the document will be disclosed to other than the holder of the document or those within its organization.³²⁰ The dissent disagreed with the majority on this essential issue: whether the laws governing the reports contemplated disclosure to persons other than faction members.³²¹ However, the dissent did not disagree as to the proper test to determine whether a document is a self-use document.³²² Thus, the dissent and the majority were of the view that if the report met the basic requirements listed above, it would be a self-use document.³²³ The disagreement was over whether the preparer of the report contemplated that the report would be disclosed to persons other than the preparing faction and its members.

In the most recent self-use document case to be decided by the Supreme Court—yet another dispute between a bank and a customer—the Court appears to have further relaxed the restraints on production of an ongoing bank’s records.³²⁴ A bank claimed that it had lent money to a

319. Case No. 2 of 2005, 59 MINSHŪ NO. 9 (Sup. Ct., Nov. 10, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.11.10-2005.-Gyo-Fu-No..2.html>.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Case No. 39 of 2005, 60 MINSHŪ NO. 2 (Sup. Ct., Feb. 17, 2006), *translation available at* <http://www.courts.go.jp/english/judgments/text/2006.02.17-2005.-Kyo-.No..39.html>. This decision is consistent with the views of Professor Taniguchi:

Under the New Code which has made the production duty a “general duty,” the same reasoning should not apply. If the court nevertheless uses the previous definition of “internal document” for defining a (4)(d) document, the exception will be too broad. For example, a so called *ringisho* (circular letter within a corporation for a major decision making) or a fax correspondence between a branch office and the corporate headquarters has been considered as “internal” and not subject to a production order. Under the New Code, only a limited category of personal documents protected by the rule of privacy should be privileged.

Taniguchi, *supra* note 12, at 778. However, Professor Taniguchi’s suggestion that a circular letter for major decision-making should not be considered an exempt document was rejected in both the *Fuji Bank* case and in Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000). *See supra* note 155 and accompanying text.

customer.³²⁵ The customer stated that he thought he was buying insurance, not taking a loan, and the mistake voided the deal.³²⁶ In an effort to prove the mistake, the customer sought production of internal documents of the bank.³²⁷ The documents were communications from the bank's head office to its branches detailing the bank's policy of selling variable insurance together with loans.³²⁸

The bank argued that the documents were prepared solely for the use of the holder (i.e., the bank) and hence fell within the self-use exception to production.³²⁹ The Court acknowledged that the documents had been prepared solely for the internal use of the bank and its employees.³³⁰ But, because the documents were informational and not prepared in the course of decision making, the Court concluded that production would not adversely affect the bank's ability to make decisions in the future.³³¹ In other words, unlike *Fuji Bank*, where the Court found the documents were part of the decision-making process and production would hamper future decision-making by impairing the free flow of information and opinions, these documents merely reported bank policy.³³² Consequently, the Court found that a key element in the self-use document analysis was missing—namely, that production would impose any disadvantage to the future operations of the bank.³³³ The documents were ordered produced.³³⁴

III. CONTEXT, CUSTOM AND COMMUNITY—SUPPORT FOR AND SUPPORTED BY THE DECISIONS

A. Introduction

The *Fuji Bank* decision placed a severe limitation on the production of documents in a holder's possession by broadly interpreting the new statutory self-use exception. Yet the decision did not completely exempt self-

325. Case No. 39 of 2005, 60 MINSHŪ NO. 2 (Sup. Ct., Feb. 17, 2006), translation available at <http://www.courts.go.jp/english/judgments/text/2006.02.17-2005.-Kyo-.No..39.html>.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. Case No. 39 of 2005, 60 MINSHŪ NO. 2 (Sup. Ct., Feb. 17, 2006), translation available at <http://www.courts.go.jp/english/judgments/text/2006.02.17-2005.-Kyo-.No..39.html>.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

use documents from production under the 1996 Code. Rather, the Court focused on two characteristics in order to assess whether a self-use document could be considered exempt from production: (i) the document's production would work some significant hardship to the possessor of the document, or (ii) there were special circumstances warranting production notwithstanding its status as a self-use document. *Fuji Bank* was viewed by both *bengoshi* and lower court judges as a severe restriction on document production.³³⁵ However, subsequent decisions have significantly modified *Fuji Bank*, allowing parties greater access to documents while simultaneously developing a doctrine that supports Japanese customs and community values.

Japan is a collective, or group, society, whereas the United States is an individualist society.³³⁶ American society places a high value on individual rights, and it is believed that society in general—as an aggregation of individuals—will ultimately benefit from the protection of individual rights. Still, the concept of rights in the United States is an individual one. In contrast, in Japan the group or collective is significantly more important than the individual.

Collective societies tend to be “high context” societies, which means that interactions may only be understood by taking into account the entire context of the communication, including the parties to the communication, body language, and the customs that are prevalent in the society.³³⁷ In collective societies, “group goals have precedence over indi-

335. See Goodman, *Japan*, *supra* note 9, at 582–85. See also Haley, *Heisei Renewal*, *supra* note 8, at 6 n.6.

336. See EDWIN O. REISCHAUER, *THE JAPANESE TODAY: CHANGE AND CONTINUITY* 128 (Harvard Univ. Press 1998) (1977); Charles R. Fenwick, *Culture, Philosophy and Crime: The Japanese Experience*, 9 INT'L J. COMP. & APPLIED CRIM. JUST. 67, 71–72 (1985). Haim Weinberg summarizes the views of Hofstede and Kotani, both of which are relevant in this regard:

Hofstede (1991) describes Japanese society as one “in which people from birth onwards, are integrated into strong, cohesive subgroups, which, throughout people's lifetimes continue to protect them in exchange for unquestioned loyalty.” This is why Kotani (1999) hypothesizes that when Japanese people are in a group, the intense cohesiveness is experienced as if there were a common self.

Haim Weinberg, *The Culture of the Group and Groups from Different Cultures*, 36 GROUP ANALYSIS 253, 260 (2003). See also Kim & Lawson, *supra* note 27, at 498–99.

337. See Richard L. Wiseman et al., *A Cross-Cultural Analysis of Compliance Gaining: China, Japan, and the United States*, INTERCULTURAL COMM. STUD. 1, 4 (1995) (“The dimensions of individualism/collectivism and context are related. That is, the predominant mode of communication in collective cultures is high context while the primary

viduals' goals"³³⁸ and "the group is the center of decision-making."³³⁹ Not only is Japan a group society, but is also a society in which hierarchy and status matter significantly.³⁴⁰

The concepts of hierarchy and status were first solidified and stratified in the late fifteenth century by the unifier and civil ruler of Japan, Hideoshi, and then hermetically sealed in the sixteenth and later centuries by the Tokugawa Shoguns.³⁴¹ "[S]tatus and group lines created the vertical

means of communication in individualistic cultures is low context."). See also *infra* notes 379–82 and accompanying text.

338. Wiseman et al., *supra* note 337, at 3–4.

339. *Id.* at 6. This characteristic of high context societies has implications for the Supreme Court's emphasis on the need to keep the decision-making process open and to protect the free flow of information and opinions through restricting the production of documents reflecting opinions and information outside the group.

340. Charles Lockhart, *Using Grid-Group Theory to Explain Distinctive Japanese Political Institutions*, 19 E. ASIA 51, 58 (2001).

341. See JOHN K. FAIRBANK, EDWIN O. REISCHAUER & ALBERT M. CRAIG, EAST ASIA TRADITION AND TRANSFORMATION 406–07 (1973); John Henry Wigmore, *Introduction*, in 1 LAW AND JUSTICE IN TOKUGAWA JAPAN 6 (John Henry Wigmore ed., 1969). Although Japan has had an Emperor from as early as the seventh century, see Donald H. Shively & William H. McCullough, *Introduction*, in 2 THE CAMBRIDGE HISTORY OF JAPAN 1, 3–4 (Donald H. Shively & William H. McCullough eds., Cambridge Univ. Press 1999), from at least the twelfth century forward, power resided in the military, or Samurai, class. See Jeffrey P. Mass, *The Kamakura Bakufu*, in 3 THE CAMBRIDGE HISTORY OF JAPAN 46, 46–47 (Kozo Yamamura ed., Cambridge Univ. Press 1990). After Japan successfully resisted the efforts of Kublai Khan to bring Japan within his orb in the thirteenth century, the military government of Japan (the Kamakura Shogunate) collapsed and Japan entered a period wherein power resided in war lords who controlled territory known as Han. See Ishii Susumu, *The Decline of the Kamakura Bakufu*, in 3 THE CAMBRIDGE HISTORY OF JAPAN 128, 137–148, 160–174 (Kozo Yamamura ed., Cambridge Univ. Press 1990). For the next two hundred years, these war lords fought each other, but none was powerful enough to reunify the country. See John Whitney Hall, *The Muromachi Bakufu*, in 3 THE CAMBRIDGE HISTORY OF JAPAN 175, 225–230 (Kozo Yamamura ed., Cambridge Univ. Press 1990). Finally, at the end of the sixteenth century Toyotomi Hideyoshi successfully brought all of Japan under his military rule. See Asao Naohiro, *The Sixteenth-Century Unification*, in 4 THE CAMBRIDGE HISTORY OF JAPAN 40, 45–50 (John Whitney Hall ed., Cambridge Univ. Press 1991). When Hideyoshi died in 1598, a struggle ensued between lords supporting Hideoshi's minor son and those supporting Tokugawa Ieyasu. Tokugawa was successful and, in the early seventeenth century, was named Shogun by the Emperor. See John Whitney Hall, *The Bakufu System*, in 4 THE CAMBRIDGE HISTORY OF JAPAN 128, 141–147 (John Whitney Hall ed., Cambridge Univ. Press 1991). Succeeding members of the Tokugawa family were named Shogun by later Emperors and the Tokugawa family controlled a unified Japan for the next 250 years—a period known as the Tokugawa Shogunate. The Shogunate came to an end with the Meiji Restoration. See Marius B. Jansen, *The Meiji Restoration*, in 5 THE CAMBRIDGE HISTORY OF JAPAN 308, 353–359 (Marius B. Jansen ed., Cambridge Univ. Press 1989). The Tokugawa Shogunate was a period of high feudalism in Japan characterized by a strict class system headed by

and horizontal boundaries which defined and confined the individual within his society.³⁴² Further, status was the defining characteristic of law during the feudal period.³⁴³ During Japan's feudal period most of the population lived in villages that were semiautonomous and where the self-policing, five-household group organization created joint responsibility.³⁴⁴ But hierarchy and status were a critical element of life, whether one was in the elite samurai (warrior) class or the peasant farming class.³⁴⁵ Belonging to your appropriate group in society was an essential element of life.

Chief among the status-binding institutions was the family system (the *ie*). The *ie* was a household system wherein authority over the family resided in the head of the house, who controlled the property of the house and had significant decision-making authority over house members.³⁴⁶ Members of society belonged first to their house; second to their community (such as their village, their block in town, or their military organization, etc.); and third, to neighborhood groups within their commu-

the Samurai class. See Wakita Osamu, *The Social and Economic Consequences of Unification*, in 4 THE CAMBRIDGE HISTORY OF JAPAN 96, 121–125 (John Whitney Hall ed., Cambridge Univ. Press 1991); Kenneth B. Pyle, *Meiji Conservatism*, in 5 THE CAMBRIDGE HISTORY OF JAPAN 674, 708–713 (Marius B. Jansen ed., Cambridge Univ. Press 1989).

342. John W. Hall, *Rule by Status in Tokugawa Japan*, 1 J. JAPAN. STUD. 39, 45 (1974).

343. Yoshirō Hiramatsu, *Tokugawa Law*, 14 LAW IN JAPAN 1, 40–41 (Dan F. Henderson trans.). Yoshirō Hiramatsu explains:

In Tokugawa times, status discipline and legal discipline had inseparable structures. . . . Status discipline regulated the people It showed the superior-inferior relationships within the groups. . . . Ethics and humanity were usually advocated for each social status based on superior-inferior relations transcending all In daily life, status norms were regarded as the primary obligation, and the penal law protected them.

Id.

344. See Macfarlane, *supra* note 19, at 369; HAMILTON & SANDERS, *supra* note 39, at 32.

345. HERMAN OOMS, TOKUGAWA VILLAGE PRACTICE: CLASS, STATUS, POWER, LAW 338 (1996) (“Hierarchy seems to be present in all societies at all levels as the result of an informing ideological principle”); *id.* at 168 (“Hierarchical lineage structure seems to have determined all important relationships within the village.”).

346. See GOODMAN, THE RULE OF LAW, *supra* note 25, at 90–92. See also William Burke, *Creative Response and Adaptive Response in Japanese Society*, 21 AM. J. ECON. & SOC. 103 (1962).

nity (such as the five-household groups).³⁴⁷ In this setting, collective decision-making and codependence became ingrained in society and a culture based on “mutual, interdependent relations and reliance” developed.³⁴⁸ Given this culture and its emphasis on hierarchy and status, it is but a short step to realize that “legal relations” flowed from group and status structure.³⁴⁹

The efforts of the judicial branch to create a legal doctrine favoring the lower-status class in its conflict with the upper classes evidence the persistence of hierarchical and status elements that characterized Tokugawa Japan in modern Japanese society. Thus, tenants are favored over landlords, employees over employers, franchisees over franchisors and distributors over manufacturers, leveling the status divide between them.³⁵⁰ Modern legislation integrates this theme by providing consumers with protections against business.³⁵¹

Notwithstanding the post-war Americanized constitution that emphasizes individual rights, Japan remains a communal society that recognizes hierarchy and class status. Judges, as part of the community, apply the common sense of the community in rendering judicial decisions that uphold community values.³⁵² A compelling example of the judiciary's need to apply community values and the common sense of the society is

347. See OOMS, *supra* note 345, at 80 (“The five-household groups were adopted nationwide in the mid 1630s in order to establish multipurpose subvillage administrative units . . .”).

348. Kinko Ito, *Nihon Shakatowa Nanika: Fukuzatsukeimo Shitenkara [What is Japanese Society?—From the Perspective of the Complex System]*, 5 JAP. STUD. REV. 108, 110 (2001) (book review).

349. In Tokugawa Japan, households, rather than individuals, were the subject of regulations and parties to disputes. OOMS, *supra* note 345, at 5. See also Richard B. Parker, *Law, Language and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 200 (1988) (“If it is true that Japan is a society of ‘contextuals’ rather than ‘individuals’ and that the use of language in Japan is highly contextual, then we should expect that law in Japan to also be ‘contextual.’ It is.”).

350. See *supra* note 39 and accompanying text.

351. See, e.g., Consumer Contract Law, Law No. 61 of 2000, art. 3, 4, 8, *translation available at* <http://www.asianlii.org/jp/legis/laws/cca2000an61o2000274/> (giving consumers the right to withdraw consent to a contract in various situations, requiring consumer contracts to be written in “clear and plain terms,” and voiding various contract provisions that place business in a preferred position over consumers); Arbitration Law, Law No. 138 of 2003, Supp. Prov., art.3, *translation available at* The Arbitration Law Follow-up Research Group, http://www.kantei.go.jp/foreign/policy/sihou/arbitration_law.pdf (Mar. 2004).

352. See, e.g., Hiroshi Itoh, *How Judges Think in Japan*, 18 AM. J. COMP. L. 775 (1970).

found in the Gokoku Enshrinement case.³⁵³ In this case, the Christian wife of a deceased Self-Defense Force member contested the enshrinement of her husband at a Shinto Shrine dedicated to members of the military establishment.³⁵⁴ The plaintiff based her claim on the Japanese Constitution's protection of the freedom of religion—in this case her religion was Christianity, while the religious affiliation of the Shrine was Shinto.³⁵⁵ Her husband apparently had no religious affiliation.³⁵⁶ The Court concluded that the enshrinement was a “private law matter” between the wife and the Shrine.³⁵⁷ As such, it did not implicate government action.³⁵⁸ Thus, the constitution was not directly applicable to the Shrine's actions.³⁵⁹

The Court then turned to the issue of whether, as a private law matter, the enshrinement was a violation of article 90 of the Civil Code that voids juridical acts that are contrary to good faith.³⁶⁰ The Court found that the enshrinement did not violate any of the wife's legal rights, so there was no violation of the Civil Code.³⁶¹ The concurring opinion of Justice Nagashima is instructional. Justice Nagashima pointed out that although the wife was Christian, the other surviving relatives of the deceased were Buddhist or Shinto.³⁶² In his view, there was no reason to prioritize the wife's religious beliefs over the beliefs of the other family members.³⁶³ Similarly, Justice Sakaue was concerned about the effect of

353. See Case No. 902 of 1982, 42 MINSHŪ 277 (Sup. Ct., June 1, 1988), translation available at <http://www.courts.go.jp/english/judgments/text/1988.06.01-1982-O-No. 902.html>.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. Case No. 902 of 1982, 42 MINSHŪ 277 (Sup. Ct., June 1, 1988), translation available at <http://www.courts.go.jp/english/judgments/text/1988.06.01-1982-O-No. 902.html>.

359. *Id.* The government, in the form of the Self-Defense Force, did play a role in the enshrinement when it provided data and administrative assistance to the shrine. The government also supported the enshrinement by having an officer attend meetings concerning enshrinement and by cooperating with the Veterans Association, which was instrumental in securing enshrinement at this particular site. *Id.*

360. *Id.*

361. *Id.*

362. Case No. 902 of 1982, 42 MINSHŪ 277 (Sup. Ct., June 1, 1988), translation available at <http://www.courts.go.jp/english/judgments/text/1988.06.01-1982-O-No. 902.html>.

363. *Id.* (Nagashima, J., concurring). Justice Nagashima remarked:

There is no legal grounds for giving priority to a surviving spouse over surviving parents or children with regard to mourning and honoring the memory of the deceased, and it is obvious that things would be out of control if relatives who believe in different religions may seek legal remedies against each other

the wife's actions on the other family members. He would have gone further than the Court or Justice Nagashima, and would have recognized the need for the individual to subordinate her personal "right" to the "rights" of others in the community.³⁶⁴ Professor Haley, in reference to this case, has said:

The *Yamaguchi Shrine* case, along with the landmark 1977, 1983, and 1997 Supreme Court decisions, together reflect judicial deference to community values. . . . Stripped of legal garb . . . the case involves a challenge to community practice and an established pattern of life. The plaintiff petitioned for the state to intervene to protect her individual interest and beliefs against the actions taken by and on behalf of the community of which she was a part. The judicial response was refusal. Acting through the courts, the state denied her the protection she sought. This I submit, is the crux of the case and much of Japanese law.³⁶⁵

More recently, the Supreme Court used community values to inform legal relations between parties.³⁶⁶ This decision recognized a common

because of the discomfort for the other relative's religious action of mourning and honoring the memory of the deceased. Thus religious tolerance is necessary even with relatives among each other.

Id.

364. *Id.* (Sakaue, J., concurring). As Justice Sakaue explained:

It would considerably contradict our common sense or socially accepted idea if anyone is free to worship or to pray for the deceased with a religious ceremony which is against the will of his or her surviving relatives such as his spouse, descendant or parents and if those relatives are not allowed to oppose and has to tolerate such activity of others as long as it is related to religion no matter how their mental peace are disturbed. . . . This is the very case where conflict of personal rights of surviving relatives occurred, in which case the tolerance that the majority opinion mentioned is required. Therefore, even if the religious ceremony of praying or mourning by other close relatives or those conducted according to their will is against one's will, he or she should be tolerant of it and, unless there is such special circumstances as to give priority to his or her mental peace, the infringement of his or her personal rights should not be considered unlawful since it is within the limitation to be endured.

Id.

365. HALEY, SPIRIT, *supra* note 55, at 196. However, the constitution did attempt to make that transition. *Id.* at 199. For example, the constitution provides that "[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." KENPO, art. 14, para. 1.

366. See Case No. 354 of 2005, 61 MINSHU NO. 2 (Sup. Ct., Mar. 8, 2007), translation available at <http://www.courts.go.jp/english/judgments/text/2007.03.08-2005.-Gyo-Hi-.No..354.html>.

law spouse's rights against the national pension system upon the death of her husband, even though the spouses were related (uncle and niece) and thus could not enter into a lawful marriage under Japan's Civil Code.³⁶⁷ The Supreme Court recognized that there were strong social policy reasons for prohibiting the marriage of such close relatives and further recognized that such marriages were, as a general rule "significantly unethical or prejudicial to the public interest."³⁶⁸ Nonetheless the Court noted that:

[A]ccording to the facts mentioned above, in the appellant's community, due to such regional characteristic, marriage between relatives took place somewhat frequently [I]t was acknowledged without resistance among their relatives and also publicly accepted in their community³⁶⁹

Although the American Occupation did not replace the traditional Japanese cultural values of community with American values of individualism,³⁷⁰ it did have a significant effect on Japanese life, including the replacement of the traditional *ie* with a more nuclear family.³⁷¹ The

367. *Id.* Given this community acceptance of the common law marriage, the fact that the uncle and niece lived together as husband and wife for forty-two years and had two children born of the common law marriage, the Court found that the "spouse" was entitled to recognition by the national pension system. Given that one principal reason to prohibit marriage between an uncle and niece is to avoid circumstances where they might have children, forty-two years of cohabitation and the birth of two children might just as easily be cited as reasons for denying benefits. Here, the community acceptance of the practice outweighed the Civil Code's prohibition, at least where surviving spouse benefits under the national pension system was concerned. *See id.*

368. *Id.*

369. *Id.*

370. *See* Lockhart, *supra* note 340, at 61–62. Lockhart's observations in this regard are particularly apt:

American postwar occupation, with its imposition of liberal democratic institutions, mitigated many aspects of the starkly differentiating hierarchical practices of the prewar period. . . . Yet some aspects of social practice routinely deviate sharply from these formal standards. . . . [T]he thoroughly hierarchical labor market is riddled with preferences based on family background and age. As a result, formally equal Japanese citizens . . . routinely relate to one another, not as relative equals, but as social superiors and subordinates.

Id.

371. The American-drafted Japanese Constitution is quite explicit in rejecting the old family system:

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. . . . With regard to choice of spouse, property rights, inheri-

growth of the economy after the war also had the effect of loosening group ties that centered on the "home village."

B. Principles Governing Document Production by Corporations and the Government

The Supreme Court's evolving jurisprudence concerning production of documents can only be fully understood by taking into account Japan's group orientation, its hierarchy and the importance of status, its high-context communication style, and the significant role of the employing corporation in modern Japanese society. Understanding the function of document production as merely a means to present evidence in a civil litigation is insufficient to appreciate the Supreme Court's language and the thrust of its decisions. Social and cultural factors influence several aspects of the Court's decisions, including: (i) the limitation of the self-use exception to documents whose production will work a disadvantage to the holder of the document; (ii) the emphasis on privacy; and (iii) the significance of the decision-making document in the group-oriented culture of the Japanese corporation. For example, the Supreme Court's creation of the significant disadvantage requirement as a necessary condition for application of the self-use doctrine in the *Fuji Bank* case echoes the Court's acceptance of interference with privacy as a significant hardship that may be sufficient to avoid production. Neither disadvantage nor privacy is found in the statute, and privacy is nowhere explained in the *Fuji Bank* decision.³⁷²

While the concept of disadvantage is not found in the language of article 220 of the 1996 Code, the statute does exempt from production documents that contain information that is covered by a privilege set out in article 197, paragraph 1.³⁷³ Under this privilege, technical or profes-

tance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

See KENPŌ, art. 24. See generally Kurt Steiner, *The Revision of the Civil Code of Japan: Provisions Affecting the Family*, 9 FAR E.Q. 169 (1950).

372. The concept of disadvantage is also not included in the Ministry of Justice's manual explaining the application of the self-use doctrine. See Mochizuki, *supra* note 12, at 302. The Justice Department Manual is quoted to the effect that the old rule of self-use documents is incorporated into the statutory language. Under the old rule, there was no need for, and no judicial opinions dealing with, an exception based on disadvantage.

373. Under the 1996 Code, the provisions dealing with witness testimony precede those dealing with documents. Article 197, which is contained in the witness portion of the Code, deals with witness privileges. Pursuant to article 197, paragraph 1, government officials may refuse to testify about official secrets unless the supervising government has

sional secrets contained in documents need not be disclosed. As noted in one of the cases discussed above, the holder argued that the electronic schematic of its telephone equipment was a technical or professional secret that should not be subject to production.³⁷⁴ The Supreme Court remanded the case to the High Court to determine whether the schematic qualified as a technical secret, stating:

The term “technical or professional secret” as provided by Art. 197, para. 1, subpara. 3 of the Code of Civil Procedure should be understood as matters, which, if made public, their social value of which would decline and the activities using these will be difficult, or will seriously affect the profession and make it difficult to continue the profession.³⁷⁵

Thus, under one subpart of article 220 of the Code, there is explicit reference (by way of incorporation) to the concept of disadvantage as it relates to the issue of document production. It is possible that the Court, reading the self-use document provision in the context of article 220, was persuaded that the concept of disadvantage also permeated the self-use exception.³⁷⁶

Among the various forms of significant disadvantage that could meet the self-use exception, the Court specifically mentions both privacy and limits on the decision-making process of individuals and organizations.³⁷⁷ These are not the only possible categories of disadvantage; they are merely illustrations of disadvantage to the holder of a document that

granted permission for such testimony. *See* MINSOHŌ, art. 197, para. 1 (referencing article 191, which governs examination of a government official regarding official secrets). Article 197, paragraph 2 incorporates the more familiar evidentiary privileges such as attorney-client and physician-patient. *See id.* art. 197, para. 2. Article 197, paragraph 3 permits a witness to refuse to testify if the testimony would disclose technical or professional secrets. *See id.* art. 197, para. 3.

374. *See supra* notes 136–54 and accompanying text.

375. *See* Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), *translation available at* <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html>.

376. At first glance, traditional privileges do not appear to involve a determination of disadvantage. After all, a patient need not make a showing of disadvantage to prevent testimony concerning his medical records. However, the traditional privileges are all founded on disadvantage or privacy concerns. For instance, the doctor-patient privilege deals with personal private materials, while the attorney-client privilege implicates both private matters and disadvantage. Just as the Supreme Court has bundled the concept of privacy into disadvantage, it has bundled article 197, paragraph 2 into the disadvantage definition.

377. Although the Court has grounded its determination that there was a significant disadvantage solely on the latter. *See* Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), *translation available at* <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html>.

call for denial of production. Precisely whose privacy the Court appears prepared to protect is not stated. There are several possibilities—the privacy of the corporate entity, the privacy of the author(s) of the document, or the privacy of corporate employees who provided information incorporated in the document.

The fact that the Court did not specifically define whose privacy was involved may trouble an American observer, but this is merely a reflection of the difference in cultural communication between the United States and Japan. What Americans may view as a failure to expressly state something in a conversation or court decision may simply be a reflection of cultural differences. Japan is a high context society wherein contextual factors affect the meaning of words, rules, actions, etc., whereas the United States is a low context society.³⁷⁸ In a low context society, it is expected that communications will be more precise and specific than would be expected in a high context society.³⁷⁹ In contrast, vagueness in communication is a key characteristic of a high context society.³⁸⁰ Indeed, vagueness may be a means of permitting later reconsid-

378. See generally EDWARD T. HALL, *BEYOND CULTURE* (1976); EDWARD T. HALL & MILDRED REED HALL, *HIDDEN DIFFERENCES: DOING BUSINESS WITH THE JAPANESE* (1987); TAKIE SUGIYAMA LEBRA, *JAPANESE PATTERNS OF BEHAVIOR* 46–48 (Univ. Press Hawaii 1977). See also Martin Rösch & Kay G. Segler, *Communication with Japanese*, 27 *MGMT. INT'L REV.* 56, 60 (1987) (“In countries such as Japan with a highly contexted mode of communication a message will generally carry a smaller part of explicitly stated information; i.e., the context carries more information than it would in countries with a low level of context information”); Kristiina Jokinen & Graham Wilcock, *Contextual Inferences in Intercultural Communication*, 19 *SKY J. LINGUISTICS* 291, 291–92 (2006) (“In the low context culture, everything is fully spelled out In a high context culture . . . communicators assume a lot of shared knowledge, experience, and world view . . . less is made explicit and much more is implicit . . .”).

379. See Judy Minot, *On Common Sense*, www.kokikai.org/. Judy Minot elaborates on this distinction as follows:

In high context cultures a lot of communication takes place through “things not said.” In low context cultures people mean what they say (or at least they think they do) in any case people place highest value on explicit communication through words. If someone doesn’t understand something in a low context, they ask questions. In a high context culture they would find out the answer by looking around them, seeing how people interact, understanding from the context.

Id.

380. Hiroshi Hasegawa, *Japanese Linguistic Ambiguity*, *INT’L J. LANGUAGE SOC’Y & CULTURE* (2000), <http://www.educ.utas.edu.au/users/tle/Journal/ARTICLES/Hasegawa/Hasegawa2.html>. Hiroshi Hasegawa discusses this in detail:

High context is the situation in which human interaction can be exercised exchanging less information such as knowledge, concept and experience between individuals. . . . This implies that more and accurate information is required

eration of the question as a consensus begins to form on a meaning.³⁸¹ Thus, to understand what the Court meant by its reference to privacy as a significant hardship factor, one must look to its context.

Just as the initial draftsman of Japan's civil law system had to invent Japanese words in an attempt to capture concepts of Western law that did not exist and could not be written or said in Japanese, so too do modern Japanese freely borrow words from another language.³⁸² But the concept behind the word may be quite different in Japanese.³⁸³ Indeed, "the assumption that the same words [in the different languages of English and Japanese] have the same meaning may well be misleading."³⁸⁴

It seems obvious that disclosure documents prepared for a decision-making process containing views of the bank employees would implicate their individual privacy concerns. How, then, can it be explained that the Supreme Court allowed the views of the employees to be disclosed through production of the bank's records once the bank no longer issued loans?³⁸⁵ While the Court was concerned with the privacy rights of employees of the ongoing *Fuji Bank*, it was apparently unconcerned about the privacy rights of the employees of the bank that had failed and was in

with precise words/phrases/topic selection in undeviating speech pattern in order to minimize the communication failure. . . . In the consideration of the interacting procedure created by most Japanese people, they are categorized as the high context personalities.

Id.

381. See Joan C. Howden, *Competitive and Collaborative Style: American Men and Women, American Men and Japanese Men*, IV:1 INTERCULTURAL COMM. STUD. 49, 54 (1994) ("Deliberate vagueness is employed in Japanese language not to show weakness and subordination, but to leave room for arrangements and planning to be conducted or negotiated among many members of a collectivist group, or a network of those concerned.").

382. See Kenneth K. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan*, 28 STAN. J. INT'L L. 139, 166–67 (1991) (discussing how the Japanese do not share the Western concept of "rights").

383. For example, a Japanese "mansion" is generally a small apartment in a concrete building with a door person, not a "mansion" as visualized in the United States. A Japanese "mansion" is an apartment that is distinguished from a Japanese "apartment" by the nature of the building in which it is located.

384. Rösch & Segler, *supra* note 378, at 62. In Japanese, a word may even have different meanings based on its context. "Even in the Japanese language, context to a large extent determines the significance of a word. Japanese allows a fairly substantial range of interpretations; the actually intended meaning of a word will only be clear when all its circumstances are taken into account." *Id.* at 61.

385. See Case. No. 15 of 2001, 55 MINSHŪ 1411 (Sup. Ct., Dec. 7, 2001), translation available at <http://www.courts.go.jp/english/judgments/text/2001.12.07-2001-Kyo-No.15.html> and *supra* notes 179–92 and accompanying text.

liquidation. To American eyes, the employees' privacy interests would appear to be the same in both instances, rendering the decisions inconsistent. The answer may reside in the different meaning given to the concept of privacy rights in Japan. Privacy, when used in the context of a corporate employee's relationship with her employer, may not carry the individual or personal connotation that it has in American law. In the analysis of the Supreme Court of Japan, privacy is seen in a group context rather than in a personal context.

The interpretation of employee privacy in the context of the document production decisions may have additional roots in the varying nature of the concept of rights as understood in Japan. Rights may be individual in some contexts (such as when a female employee sues because she has been sexually harassed by her employer), but group-oriented in others (such as when the government passes special laws to better the economic conditions of the so-called Burakumin, but fails to pass laws that prohibit discrimination against them—even though they are Japanese citizens³⁸⁶—or fails to pass laws that protect the indigenous people of Japan, who are also Japanese citizens). In addition, rights may also be understood as relating to the contextual relationship in which the right is in-

386. See Leslie D. Alldritt, *The Burakumin: The Complicity of Japanese Buddhism in Oppression and an Opportunity for Liberation*, J. OF BUDDHIST ETHICS 7 (2000), <http://www.buddhistethics.org/7/alldritt001.html>. Leslie Alldritt describes the plight of the Burakumin as follows:

Through sustained political activism, the *burakumin* have caused legislation to be passed since the war that has dramatically bettered conditions for themselves. These improvements have come primarily in such issues as better housing and education. . . . [T]he *burakumin* . . . continue to suffer from, in comparison to the majority Japanese, higher illness rates, higher unemployment, lower wages for the same jobs, illegal lists that corporations buy and use to avoid hiring *buraku* people, discrimination in marriage, and myriad abusive and discriminatory attacks on their person and position.

Id. Frank Upham criticizes the current Burakumin policy as follows:

If . . . the goal of *dowa policy* is the full acceptance of Burakumin by the majority, the present mode of affirmative action seems, at least in the short run, anomalous if not deliberately destructive of the goal. It stresses precisely the programs which will intensify Buraku isolation and ignores those that would bring them into the mainstream. It is as if the present intent was to improve their lot as a group in a narrow economic sense while ignoring the facilitation of individual entry into majority life.

Frank K. Upham, *Ten Years of Affirmative Action for Japanese Burakumin: A Preliminary Report on the Law on Special Measures for Dowa Projects*, 13 LAW IN JAPAN 39, 69 (1980). See also UPHAM, LAW AND SOCIAL POLICY IN POST WAR JAPAN, *supra* note 64, at 78–124.

voked. In the case of corporate documents, the right may be one that exists in relation to the employees' relationship with their employer.

Because individual identity in Japan is grounded on group membership,³⁸⁷ where "the primary principle is to safeguard the harmony of the group, and the main challenge for the individual is to find their place within a wider fellowship,"³⁸⁸ it is easy to comprehend a system where the privacy interest is understood in group terms, i.e., what is at stake is not the right of individual employees to privacy, but the right to privacy of the company collectively.

An individual's identity in Japan is grounded on the individual's group identity:

The strong sense of belongingness as a stake for self-identity, reinforced by collectivism and conformism, calls for the individual's total commitment and loyalty to his group. . . . These mutual obligations of loyalty and total protection are an established practice in the Japanese employment system, particularly in large corporations. . . . In such a system, the employee not only is obligated to stay on in the same company. . . but he cannot afford to move. Chances are that he will not be offered a job from the outside. . . . All this reflects the tendency of the Japanese employee to find his identity in belongingness rather than in the cultivation and exhibition of professional expertise. . . . Employment seems to mean, above all, the teaching and learning of the employee's role in relation to the employer and other senior employees, with emphasis upon loyalty and group identification.³⁸⁹

This is particularly so when hierarchy and status within the group are as significant as they are in Japanese culture.

Similar themes emerge in Japanese human rights theory. Professor Ishida, who has traced its development, noted that after the restoration, but prior to the promulgation of the Constitution of the Empire of Japan (Meiji Constitution), a "collectivity-realism" theory of law developed to deal with questions of human rights: "The collective realism theory neglected the idea that a group is organized of individuals and, moreover,

387. CAROLYN S. STEVENS, ON THE MARGINS OF JAPANESE SOCIETY 16 (1997) ("In Japanese society, group membership is the basis for individual identity . . ."). See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC. REV. 461, 465 (1986) ("Traditional Japanese norms emphasize harmonious interpersonal relations and group solidarity. . . . Within a group, maintenance of harmonious and smooth interpersonal relations, interdependence and mutual trust are of utmost importance."). See generally LEBRA, *supra* note 378, at 22–37.

388. Dag Leonardsen, *The Impossible Case of Japan*, 35 AUSTL. & N.Z. J. CRIMINOLOGY 203, 220 (2002).

389. LEBRA, *supra* note 378, at 31–32.

advocated the idea that the group existed as a natural organic body which transcends individuals.³⁹⁰

Professor Ishida further elaborated: "The group has an existence apart from its members. This has similarity with the concept of 'realism' in the philosophical sense, which is the doctrine that universals have real objective existence; therefore *collectivity realism theory* is the translation used."³⁹¹ Ishida also observed a tendency to overemphasize the collectivity realism theory in the post-war era.³⁹² In his discussion of the theoretical work of Yozo Watanabe, he commented:

[T]he important thing, from the viewpoint of fundamental human rights, is the group's decision-making process. Watanabe assumed the group decision as though it had an organic nature. . . . [F]or example:

The rights and liberty of the group are at the foundation of the rights and liberties of the individual. The destruction of the freedom of the group is no more than destruction of the freedom of the individual. We must, therefore, place a guaranty of freedom of group activity at the core of the problem of spiritual freedom in present days.³⁹³

390. Takeshi Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, 8 LAW IN JAPAN 39, 52 (Hiroshi Wagatsuma & Beverly Braverman trans., 1975).

391. *Id.* at 52 n.38.

392. *Id.* at 63.

393. *Id.* at 65 (citing Y. WATANABE, *KEMPŌ TO GENDAI HŌGAKU* 79 (1963)). Parker explains:

In other words, for the Japanese, one is one's share in social relationships, not metaphorically, but literally. . . . Understanding the Japanese conception of the self as contextual helps us to understand . . . the beginning of a general explanation of the nature of the "mutual trust," "personal interdependency," and "group harmony" which the Japanese value so much. In a society made up of "contextuals" rather than "individuals," terms such as "trust" and "interdependence" and "harmony" do not describe moral goals to be achieved by individuals; they are rather part of the definition of what it means to be human and Japanese.

Parker, *supra* note 349, at 189. The question of the relationship of the individual to the group is discussed at length in Hamaguchi Eshun, *A Contextual Model of the Japanese: Toward a Methodological Innovation in Japan Studies*, 11 J. JAPAN. STUD. 289 (Kumon Shumpei & Mildred R. Creighton trans., 1985). Hamaguchi notes:

It has also been argued that, in contrast to individual actors, the Japanese are contextual actors participating in *aidagara* relationships. It has further been argued that this type of actorship is consistent with the Japanese social system, a system of holonic decentralized control where spontaneous cooperation is essential. Such an evaluation is only a first step. If we can proceed to develop a new general systems theory that lays a foundation for methodological contextualism, new horizons for Japan studies will be opened.

Thus, it is possible to interpret the privacy interest mentioned by the Court as an interest that the employer-employee corporate group has in protecting the views and opinions of the employees from public disclosure. The right is a communal right of protection that belongs to the employer-employee group, not to the individual employees. Once the bond of the group is broken (such as by the dissolution of the employer), the group right is also broken. Hence, it is consistent to say that a right to privacy might be implicated in the continuing business context of the *Fuji Bank*, where the bond of the employer-employee corporate group remains intact, but is not implicated in the case of the financial institution that was dissolved.³⁹⁴

Moreover, it has been suggested that in post-modern industrial Japan, the corporation has replaced the family and home village as the central community for Japanese workers.³⁹⁵ More recently it has been postulated that the corporate community is an aspect of Japan's post-war modernization, which flows from the unique relationship of the Japanese company to both its shareholders and employees.³⁹⁶ As a consequence: "Em-

Id. at 321. Takie Sugiyama Lebra describes the nature of collectivism:

The Japanese concern for belonging relates to the tendency towards collectivism, which is expressed by an individual's identification with the collective goal of the group to which he belongs. Collectivism thus involves cooperation and solidarity What would be strictly a private matter in an individualistic society tends to be a group enterprise in Japan.

LEBRA, *supra* note 378, at 25.

394. See Case. No. 15 of 2001, 55 MINSHŪ 1411 (Sup. Ct., Dec. 7, 2001), *translation available at* <http://www.courts.go.jp/english/judgments/text/2001.12.07-2001-Kyo-No.15.html> and *supra* notes 179–92 and accompanying text.

395. See HAMILTON & SANDERS, *supra* note 39, at 29. Hamilton and Sanders describe this transformation:

The parallel between firm and family must be understood in light of the fact that even the traditional family *ie* was as much a corporate group, an economic unit, as it was a bloodline. Membership in an *ie* was to some extent determined by who contributed to the economic welfare of the group. . . . Thus the Japanese household is both a descent group and a corporate group.

Id.

396. See Joseph Sanders & V. Lee Hamilton, *Distributing Responsibility for Wrongdoing Inside Corporate Hierarchies: Public Judgments in Three Societies*, 21 LAW & SOC. INQUIRY 815, 827 (1996). Sanders and Hamilton describe the corporation-employee relationship:

Japanese employment policies reflect the relatively contextual nature of social relationships. Lifetime employment for permanent employees in larger firms ties workers to employers more closely than in the United States. Practices such as *tsukiui*, the after-hours socializing among white-collar workers, and work-

ployees of a firm identify themselves so strongly with the corporate community that they lose their sense of being members of civil society and become completely absorbed in their roles as members of the corporate community.”³⁹⁷ Japanese corporations engage in a structured orientation of new employees that aims to socialize the new employee to the corporate community. Thereafter, the lifetime employment system, the seniority-based pay system, and the after-work socializing hours among employees operate to cement the community.³⁹⁸

It has been suggested that Japanese corporate governance is based on the concept of the corporate community:

The Company Community consists of management, board members, and core employees, who share an identity as “company men.” In Japan, when people say “company,” it means the Company Community. The Company Community provides a *raison de etre* to its members and plays a role as a competing unit in the product market. Members of the Company Community owe, in their psychological level, the duty of loyalty to the Community itself and their fellow members.³⁹⁹

group activities such as quality circles produce an employment relationship that is more like family relationships than is typically the case in the United States. . . . For many Japanese workers the firm is not simply their place of employment but a community with which they identify.

397. Hirowatari, *supra* note 42, at 163. The strength of the concept of corporate community is reflected in questions and comments posed to Professor Millhaupt after his talk on Choice as Regulatory Reform:

Q: . . . The concept of a company community is very strong and so far shareholders have never intervened. . . .

. . .

Q: Parent-subsidiary relationships are not the same as in the U.S. In Japan, even 100% subsidiaries organize their own communities. For the company community members of the subsidiary, the parent company is an outsider for them. . . .

. . .

Curtis Millhaupt, Professor, Columbia Law School, Speech at the BBL Seminar, Choice as Regulatory Reform: The Case of Japanese Corporate Governance (May 12, 2004), available at <http://www.rieti.go.jp/en/events/bbl/04051201.html>.

398. See HAMILTON & SANDERS, *supra* note 39, at 67–70. For the importance of community in Japanese law, see JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991) and HALEY, *SPIRIT*, *supra* note 55, at 134–40, 211; Luke Nottage, *Translating Tanese: Challenging Paradigms of Japanese Law and Society*, Seminar Paper Presented at Sho Sato Conference at Boalt Hall School of Law, Berkeley, California (Feb. 12–13, 2005).

399. Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of the Corporate Law and Their Solutions* 16 (Berkeley Program in Law & Economics, Work-

It may be that privacy as used in corporate document production cases is not the *personal* privacy that is common to American lawyers. Rather, privacy may be viewed in the context of the corporation-employee group relationship.⁴⁰⁰ In such a case, it is not a personal privacy interest⁴⁰¹ of the employee that is at stake, but rather a privacy interest of the employee as it relates to her relationship with the corporation.⁴⁰² In essence,

ing Paper No. 23, 1999). *See also* TOYOHIRO KONO & STEWART R. CLEGG, TRANSFORMATIONS OF CORPORATE CULTURE: EXPERIENCES OF JAPANESE ENTERPRISES 373–74 (1998).

400. *See* HAMILTON & SANDERS, *supra* note 39, at 55. Hamilton and Sanders explain the importance of context as follows:

Japanese talk—and apparently think—about themselves as individuals in context. Thus it is hardly surprising that the philosopher Hajime Nakamura (1968) boldly concludes that “Japanese in general did not develop a clear-cut concept of the human individual qua individual as an objective unit like an inanimate thing, but the individual is always found existing in a network of human relationships.”

Id.

401. *See* Burke, *supra* note 346, at 104–05. This notion of privacy is an aspect of what Burke describes as “reciprocal duties and obligations”:

There is no disputing the fact of the existence of this family-centered group society. It is characterized by a “web” of reciprocal duties and obligations that permeates all levels of society. In this web society, the individual has no real existence outside his group. He lives only as a member of his family or community

Id. (citations omitted). *See also* Fukui, *supra* note 27, at 69 (“At least in Japanese society . . . the binding of community is considerably solid compared with other modern societies.”).

402. Recent changes in Japan’s labor market may have the effect of eroding to some degree the strong corporate community ties that have characterized Japan’s corporate world. For example, Kazuo Sugeno explains:

Such supply-side changes of the labor market are influenced by the changing values of workers. In contrast to workers during the growth periods of Japanese economy, one finds workers in the recent low-growth years decreasingly identify themselves with their employer and increasingly desire respect for their privacy and family life. This is particularly the case with younger workers. These employees also criticize the egalitarian approach in the traditional seniority-based wage and promotion systems as unfair and inefficient. They thus support differentiation of treatment in accordance with the differences in performance and contribution. They request to have choices in jobs and career paths. Harmonization of working life with workers’ private life is another frequent request. These phenomena have made the once-solid corporate community increasingly fragmented in its social control.

employee-company privacy gives rise to a right on the part of the corporation (as the representative of the corporate community) not to produce the document, but does not give rise to a corresponding right on the part of the employee to prevent production of the document. Accordingly, the corporate possessor of the document may waive the right and produce. This principle would help to explain why only the corporate possessor of the document and not the employee has standing to contest a production order.⁴⁰³

And, as Professor Ishida noted, “the important thing, from the viewpoint of fundamental human rights, is the group’s decision-making process.”⁴⁰⁴ Similarly, Hall notes the “essential” nature of an open decision-making process to Japanese business and to the welfare of employees.⁴⁰⁵ Accordingly, to protect that decision-making process, it makes sense to exempt from discovery documents that explore the process and disclose the thoughts of the members of the corporate group participating in the decision-making process.

Related to the need to protect the decision-making process is the need to achieve consensus, i.e., harmony within the decision-making group, in

Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform*, 25 COMP. LAB. L. & POL’Y J. 519, 523–24 (2004).

403. If the modern corporation-employee relationship is seen as a surrogate for the feudal relationship, the employee’s privacy interest in matters relating to the corporation is more easily understood as creating a right in the corporation that the employing corporation may rely on or waive, and not as an interest that can exist outside the corporation-employee relationship. For a discussion of the corporate community and the company-centered society, see Hirowatari, *supra* note 42, at 162–64.

404. Ishida, *supra* note 390, at 65.

405. HALL & HALL, *supra* note 378, at 82–83. Hall and Hall describe the collective decision-making process in the corporate context as follows:

This process of collective decision-making allows everyone involved a chance to review, evaluate, discuss, and approve or disapprove the proposal. This process is absolutely essential. . . . Final decisions entail many, many meetings, where all points of view are presented and discussed until consensus is achieved. At every stage differences are reconciled. . . . It’s also important to remember that in a system of lifetime employment in one of the major firms, decisions that affect the future of the company have great personal impact on each employee; he knows he will have to live with the results of these decisions.

Id. Hall and Hall also compare the closed-door, separate office of an American executive with the bull-pen style offices of Japanese companies where the senior executives are immediately available to others in the organization. *Id.* at 10 (“[N]ot only are other people constantly coming and going, both seeking and giving information, but the entire form and function of the organization is centered on gathering, processing, and disseminating information.”).

Japan.⁴⁰⁶ Achieving harmony may require that individuals compromise their personal views to maintain a harmonious relationship with other group members. Production of decision-making documents can adversely affect the consensus-forming process, and has the added disadvantage of disclosing that harmony might not in fact exist.⁴⁰⁷

Once the corporation is in the process of liquidation, the decision-making process of that corporate group is no longer sacrosanct—the group bond has been broken. Accordingly, that group’s decision-making document may be subject to discovery. Likewise, as protection of the group process is the object of the exercise, once a decision has been reached, the decision itself is not protected from disclosure. Hence, the Supreme Court may allow production of the corporate document sent to branch offices that recites the policy and determination of the firm, but also protect the decision-making documents that led to that policy.⁴⁰⁸ It is not the opinion of the individual employee that the employer seeks to keep private. Rather, it is the opinion rendered to the ongoing entity or group that must be protected. Once the group is disbanded, the employee has no legitimate reason to have his opinions remain private.⁴⁰⁹

It is relevant to note that in the 2005 decision ordering production of the factual material in a government labor investigation case, the employees of the company who had been interviewed by the investigators

406. See KONO & CLEGG, *supra* note 399, at 3 (“Within Japanese organizations it is the extent and the substance of shared values that determine the members’ decision-making patterns. . . . It is these patterns that we argue are at the core of corporate culture.”). Kono and Clegg also emphasize the importance of shared information to the Japanese decision-making process and the importance of consensus and group decision-making. *Id.* at 374–75, 380–81. See also ROBERT C. CHRISTOPHER, *THE JAPANESE MIND* 53 (1988) (“Probably the single most important thing to know about Japanese is that they instinctively operate on the principle of group consensus.”); HALL & HALL, *supra* note 378, at 81–82 (“Harmony and consensus are keystones of Japanese society.”); HAMILTON & SANDERS, *supra* note 39, at 69 (“Authorities’ decision-making is also considerably more consensual in Japanese firms than in their American counterparts.”); Dag Leonardsen, *Crime in Japan: Paradise Lost?*, 7 *J. SCANDINAVIAN STUD. CRIMINOLOGY CRIME PREVENTION* 185, 206 (2006) (“Japan is a society based on consensus . . .”).

407. See Dag Leonardsen, *Crime in Japan—A Lesson for Criminological Theory? The Cultural Dimension in Crime—What Can the Japanese Experience Tell Us?* 9 (British Society of Criminology Conference, Bangor, U.K., Paper, June 2003), <http://www.britishsociology.org/volume6/008.pdf> (“The concept of *kaisha* means group consciousness and this group consciousness is all-important for Japanese citizens If one arranges the value foundation of Japanese society hierarchically, the value of harmony within the group is at the top.”).

408. See Case No. 39 of 2005, 60 *MINSHŪ* No. 2 (Sup. Ct., Feb. 17, 2006), *translation available at* <http://www.courts.go.jp/english/judgments/text/2006.02.17-2005.-Kyo.-No..39.html> and *supra* notes 324–34 and accompanying text.

409. *Id.*

had a shared interest with their company in objecting to the disclosure of the report prepared by the government investigators.⁴¹⁰ Unlike *Fuji Bank*, in this case the information in the report was not internal to the group or company. Rather, the information was disclosed because of a positive obligation to disclose information to the higher group, namely the society at large in the form of the government. No group privacy interest was implicated because disclosures were not made in a group context. Likewise, no personal privacy interest was implicated as there was no way to link the various opinions or factual statements to any specific employee. Hence, no group decision-making interest was implicated. However, the portion of the investigative report that disclosed the internal decision-making process of the Labor Department was deemed exempt from production.⁴¹¹ Indeed, Japan's Freedom of Information Act ("FOIA") specifically exempts from disclosure government documents containing "internal deliberations that would harm the free and frank exchange of opinions or hinder internal decision-making."⁴¹²

Viewed in this light, the Supreme Court of Japan may be supporting the communal value and group norm of Japanese society when it implies that a privacy interest exists when an ongoing firm (or government agency)⁴¹³ is asked to produce decision-making documents, but does not

410. See Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html> and *supra* notes 276–90 and accompanying text.

411. *Id.* The Court explained:

The part of the Document relating to Information II contains information on the decision-making process within the administrative authorities, and it is obvious in light of its contents that there is a specific likelihood that this part might prevent the administrative authorities from making decisions without restrictions and significantly hinder the performance of public duties when it is submitted to the main case.

Id.

412. See DAVID BANISAR, *PRIVACY INT'L, FREEDOM OF INFORMATION AROUND THE WORLD 2006 95*, *available at* <http://www.privacyinternational.org/foi/foisurvey2006.pdf>.

413. The Japanese bureaucracy also operates on a lifetime employment system. Thus, there exists a government equivalent of the corporate community that is present in the private sector. See John O. Haley, Professor of Law, Washington University in St. Louis, Address at Cornell University School of Law: *Why Study Japanese Law?* (Feb. 27, 2007) (on file with author). Professor Haley describes this analogue:

A newly hired twenty-two year old assistant judge, newly recruited Ministry of Finance official, Mitsubishi bank employee or Fuji Motors manager knew then that thirty-five years hence at age 57 his (women were not included) and his family's welfare depended fundamentally on the political presence or prosperity of the organization they had joined. Lacking the possibility of exit, individ-

protect a privacy interest once the community has been broken by the dissolution (or pending dissolution) of the firm. Similarly, the communal value may be protected when internal communications made in the decision-making process are protected. Group values are not adversely affected by the disclosure of communications containing policy determinations as to how the group should deal with the public from higher ranking members of the group to other group members. By leaving the parameters of the privacy interest vague, the Supreme Court allows itself the opportunity to better define the scope of privacy at a future date when a clearer consensus regarding privacy emerges in Japanese society.

It seems that both ongoing private employers and government agencies may comfortably rely on the self-use exception when the decision-making advice from its employees is the subject of a document production motion. The Court seems clear in holding that private and public employers must be allowed to receive the uncensored opinions of staff and must be assured that employees can freely engage in the decision-making process without the concern that those opinions or ideas will be used to the company's disadvantage in litigation.

ual Japanese had (and I believe still have) little choice but to pursue the collective interest of the public agency, the firm or family business to which they had tied their future.

Id. See also John O. Haley, *Whence, What and Whither Japan*, 19 COMP. LAB. L. & POL'Y J. 473, 479–80 (1998) (reviewing TROUBLED INDUSTRIES: CONFRONTING ECONOMIC CHANGE IN JAPAN (Robert M. Uriu ed., 1996) and JAPANESE LABOUR AND MANAGEMENT IN TRANSITION: DIVERSITY, FLEXIBILITY AND PARTICIPATION (Mari Sako & Hiroki Sato eds., 1997)); TAKIE SUGIYAMA LEBRA, *supra* note 378, at 31–32.

To some degree, the ties within a government community may be even stronger than those in the purely private sector, as mandatory retirement from government may come at an earlier age than in the private sector, necessitating post-government employment through agency assistance. See BRIAN WOODALL, JAPAN UNDER CONSTRUCTION: CORRUPTION, POLITICS, AND PUBLIC WORKS 140 (1996) (“The lifetime employment and *amakudari* systems also offer fierce disincentives for would-be whistle-blowers. Since the post retirement prospects of government officials relate directly to the level and prestige of their final posting in the bureaucracy, officials do whatever it takes to secure promotion.”). Kono and Clegg describe the role of lifetime employment policies in Japan as follows:

In Japan, male organization members are expected to devote themselves to the organization, sacrificing their leisure and home life for the obligations that the company assumes. . . . The obligation that respect for people must be behind the policies that the organization assumes supports organization members in their devotion to the organization. Lifetime employment is one of these policies.

KONO & CLEGG, *supra* note 399, at 371.

The cases do not address the potential interaction between the in camera and redaction rights of the Court and a plaintiff's need for production of *facts* as distinguished from *opinions* or *advice*. In other words, would the free flow of in-house ideas and communications be subverted if factual material was produced, even if the opinions of staff were redacted? In at least one case the Court has made such a distinction—when it exempted opinions and techniques of government investigators in its order requiring production of material obtained by the government investigators from interviews with employees of the company.⁴¹⁴ The factual material encompassed by the order did not meet the self-use exception because it did not constitute a government secret and was not directly connected to a specific employee. Thus, no personal privacy interest was at stake.

It may be that a similar rule will arise in the private company production arena; however, the employer-employee group relationship may be so inviolable that even a redacted version of internal communications would be deemed unpalatable. While the scope of the group privacy right is untested, the Supreme Court's emphasis on the free flow of information within an ongoing business entity may mean that *all* decision-making documents prepared solely for use within the company are immune from production, even if the material is simply factual in nature or merely records policies or decisions.

Among the types of disadvantage that might be utilized to support the self-use exception are the common privileges, such as the trade secret or attorney-client privileges. Still, the cases to date suggest that more is required than simply the possessor's statement that a privilege or secret is involved. The Court has required a searching inquiry into whether the material involved is truly secret or privileged. For example, the manufacturer who argued that its schematic was a secret could nonetheless be ordered to produce the schematic unless it could show that it would suffer some disadvantage as a consequence of production, thus demonstrating it was indeed a trade secret.⁴¹⁵ Similarly, the insurance administrator

414. See Case No. 11 of 2005, 59 MINSHŪ No. 8 (Sup. Ct., Oct. 14, 2005), *translation available at* <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No.11.html> and *supra* notes 276–90 and accompanying text.

415. See Case No. 20 of 1999, 54 MINSHŪ 1073 (Sup. Ct., Mar. 10, 2000), *translation available at* <http://www.courts.go.jp/english/judgments/text/2000.3.10-1999.-Kyo-.No.20.html> and *supra* notes 136–54 and accompanying text. Under Japanese law, a news reporter may refuse to identify sources under the professional secrets privilege of article 197 of the 1996 Code. See MINSOHŌ, art. 197, para. 2. However, this privilege is not absolute and in determining whether the reporter may refuse to testify, the court must balance factors such as the significance of the news report, the manner in which the reporter gathered the information, and the effect that disclosure would have on future re-

could not invoke attorney-client privilege to avoid production when the attorney was merely an investigation commission member, not a lawyer for the insurance company.⁴¹⁶ This principle is consistent with the Court's treatment of official or state secrets in documents held by the government. In this context, the court must make a searching examination into the validity of the government's rationale for refusing production. A court is unlikely to substitute its judgment for that of government, but it will require a reasoned explanation that is within the realm of discretion afforded the official refusing production.

C. Cultural Values Affecting Unresolved Issues—Third Party Document Creators

In article 220, the Code refers to the exclusive use of the document by the *possessor* of the document but does not specify whether the possessor must also be *creator* of the document.⁴¹⁷ If the creator of the document is not also the corporation-possessor, does the self-use exception apply? In *Fuji Bank*, the Court discussed preparation only in terms of its ultimate use, i.e., whether the document was intended for internal use only. *Fuji Bank* did not consider the questions raised by third party document creators, as the documents in that case were internally created. The issue will

porting activities against the nature of the suit and its value to society, the importance of the testimony, and whether alternative means of proving the relevant fact are available. See Case No. 19 of 2006, 59 MINSHŪ (Sup. Ct., Oct. 3, 2006), translation available at <http://www.courts.go.jp/english/judgments/text/2006.10.03-2006.-Kyo-.No..19.html>. The reference by the Court to the manner in which the reporter obtained the information may relate to an earlier decision by the Court upholding a reporter's conviction in a case where a news reporter was found to have overstepped the line of what was culturally acceptable when he obtained material for his report through a sexual relationship with a source and ended the affair after obtaining the report information. See *Nishiyama v. Japan*, 32 KEISHU 457 (Sup. Ct., May 31, 1978), translated in LAWRENCE W. BEER & HIRSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 543, 545 (1996). *Nishiyama* involved a report that there had been a secret deal between the United States and Japan regarding the payment of certain costs relating to the reversion of Okinawa to Japan. *Id.* The government denied that there was any such deal. In 2000 and 2002, the United States government released files indicating that the reporter's story may have been accurate. *Id.* *Nishiyama* sued, arguing that the government had illegally convicted him and had ruined his reputation. *Id.* In March 2007, the Tokyo District Court dismissed the action based on the twenty-year statute of limitations. See *Reporter Fails to Clear Name over '72 Scoop*, JAPAN TIMES, Mar. 28, 2007.

416. See Case No. 14 of 2004, 58 MINSHŪ No. 8 (Sup. Ct., Nov. 26, 2004), translation available at <http://www.courts.go.jp/english/judgments/text/2004.11.26-2004-Kyo-No..14.html> and *supra* notes 193–203 and accompanying text.

417. See MINSOHŌ, art. 220, para. 4(d).

inevitably arise, and the principles reviewed thus far do, nonetheless, provide some guidance as to how a court would approach the issue.

Japanese companies make extensive use of business consultants. Production of a consultant's reports could be at least as damaging to the free flow of decision-making materials as the disclosure of documents in *Fuji Bank* would have been. While outside consultants do not participate in the employer-employee corporate community, they do share some commonality with the community. At least for the duration of the project for which they have been engaged, the outside consultant may reasonably be considered as a part of the "corporate team." In this sense, a document created by a third party could be viewed as user-created. Moreover, a strict interpretation of the self-use exception, which requires commonality between the creator and possessor, might chill the use of independent examination at the very time when statutory auditors (who, in Japan, audit all activities of the company, not simply its accounting or financial functions) are being phased out in favor of independent directors.⁴¹⁸ In this context, cooperation with independent investigators is not subject to fine or potential criminal penalty, as is the case in a government investigation. Thus, independent investigators truly rely on the cooperation of company employees and interviewees to perform their investigative function. Such cooperation could well be compromised if the report were subject to production in litigation.

Similarly, to require production of advice documents from independent consultants would force companies to perform such functions in-house. When those functions are better performed by outside consultants, it could have a detrimental effect on the entire corporate community. In cases where an independent investigation or consultant's report has been prepared for use exclusively by the company commissioning the project,

418. Prior to 2006, Japanese corporations were required to appoint statutory auditors. See SHŌHŌ [Commercial Code], Law No. 48 of 1899, arts. 273–280, translated in EHS LAW BULL. SER. no. 2200 (2001). In response to the economic downturn of the 1990s, the Commercial Code was amended to permit a more Americanized board of directors structure under which outside directors (i.e., directors who are not employees of the corporation) would serve on boards of large corporations. See Ronald J. Gilson & Curtis Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 AM. J. COMP. L. 343, 344 (2005). The board would monitor the affairs of the company and the operations would be carried out by corporate executives. *Id.* at 353. Corporations utilizing the outside director system could also adopt a committee system, provided the committees' composition consisted of a majority of outside directors. *Id.* at 352–53. Companies adopting the outside director system could do away with the statutory auditor positions. *Id.*

it is likely that a court would treat such a report as it would treat an internally-created document.⁴¹⁹

An even more likely scenario is where the party for whose exclusive use the document was prepared distributes the document externally to obtain advice from a consultant. In such a case, can the possessor successfully invoke the self-use exception? In *Fuji Bank*, the Court did discuss the fact that, when the document was prepared, the possessor did not anticipate that it would ultimately be disclosed to outsiders.⁴²⁰ But the Court in *Fuji Bank* did not contemplate a scenario in which a document might be sent to a consultant as part of a decision-making process. In such a case, this out-of-house consultant should be deemed in-house for purposes of the self-use exception because she performs the same function as an in-house employee.

Since Japanese companies have different stakeholders and stakeholder relationships than do American firms, it is possible to imagine a variety of scenarios not addressed by *Fuji Bank*.⁴²¹ What if the out-of-house possessor is a related company—perhaps the lead bank for the preparer of the document? What if the lead bank prepared the report for the use of the possessor? Are members of a corporate group like members of a political faction who receive research reports prepared by the faction?⁴²² In the case discussed above, the faction members that received the report were not the preparers, nor was the faction an incorporated group. Nevertheless, the faction members arguably represented a group that, like the

419. Of course, the court has the authority to order third persons, i.e. not parties to litigation, to produce documents. See MINSOHŌ, art. 223, paras. 1–2.

420. See Case No. 2 of 1999, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999), translation available at <http://www.courts.go.jp/english/judgments/text/1999.11.12-1999-kyo-No.2.html>.

421. Milhaupt, *supra* note 57, at 19–22. Milhaupt explains this difference:

[L]arge independent shareholders and groups of interconnected institutions, not dispersed individuals, have characterized Japanese shareholding patterns [C]apital investment seldom represents the totality of the relationship between shareholders and the managers who concededly control the corporation even in Japan. . . . [S]hareholder-oriented corporate organs and mechanisms have traditionally played little role in the life of the Japanese firm. . . . As career-long employees themselves, Japanese managers pursue employee welfare at least as vigorously as shareholder interests. . . . Strong institutions characterized by highly relational interaction form the key constraints: main banks, *keiretsu* corporate groups, enduring firm-specific employment patterns.

Id.

422. See Case No. 2 of 2005, 59 MINSHŪ No. 9 (Sup. Ct., Nov. 10, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.11.10-2005.-Gyo-Fu-.No..2.html>.

corporate community, was entitled to the free-flow of information so that faction decisions could be made with all information available to all members. This principle, to the extent it applied to members of a political faction, should apply to consultants and other important players in the Japanese corporate context.

Another possible factual scenario within this third-party issue is how a holding company will be treated by a court. Now that holding companies are once again permissible in Japan, is a court to consider all members of the holding company structure as a single possessor?⁴²³ Is there a difference between the parent of a wholly-owned subsidiary and a parent of a partially-owned subsidiary? Should the Japanese legal system adopt an analysis similar to that found in the American *Copperweld* case and its progeny?⁴²⁴ The Court is unlikely to enter this arena. Instead, the Court will likely adopt a general rule that treats all members of the holding company as one for purposes of possessor analysis. The determining factors will likely be whether the possessor for whose benefit the document was made will be significantly injured, and whether the entity to whom the document was sent and who is in possession would, as a matter of Japanese norm, be considered an appropriate entity to receive the document. It is unlikely that technical questions of the juridical relationship of preparer and possessor will be considered.

It seems clear that only the possessor ordered to produce or the requestor denied production have standing to appeal a production order.⁴²⁵ Thus, if the document is in the hands of a third person who is not a party to the litigation, the party whose cause might be hurt by production lacks standing to appeal the production order. But does such party have stand-

423. See *Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni kansuru Hōritsu* [Antimonopoly and Fair Trade Maintenance Act], Law. No. 54 of 1947, *translation available at* http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf; Andrew H. Thorson & Frank Siegfanz, *The 1997 Deregulation of Japan's Holding Companies*, 8 PAC. RIM L. & POL'Y J. 261, 263 (1999) (explaining that pure holding companies had been banned for fifty years).

424. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 742, 767 (1984), the Supreme Court held that there was an economic unity between a parent corporation and a wholly owned subsidiary because there was only one economic actor and only one economic mind. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 742, 767–77 (1984). Thus, the parent and subsidiary could not conspire to violate the antitrust laws. *Id.* at 777. See also *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005) (economic unity test applied in a Sherman Act Section 1 case where separate entities had common objective and were not competitors).

425. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), *translation available at* <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html> and *supra* notes 155–69 and accompanying text.

ing to object to the request for production in the first instance? Does the lack of standing to appeal mean that the party has no standing to raise the self-use exception when a motion to order production has been made? After all, the *party* is not the possessor, and if the possessor of the document has no objection to production, why should the *party* have any right to object? The answer may lie in the nature of “voluntary” production by a third person.

If a third person possesses a document, he may volunteer that document to a party to use in litigation, assuming no other legal bar exists, such as a confidentiality agreement. On the other hand, a third person in possession of a document may be unwilling to produce without a court order, even when they have no objection to production. The order, issued by government authority, may provide the needed societal lubricant for the possessor, who would otherwise be seen as volunteering to produce. Since Japanese courts lack general injunctive powers, a determination by the court not to enter an order requiring production does not obligate the third person possessor to refuse to voluntarily produce. Nonetheless, if the requestor resorted to the court, it is likely that a court’s refusal to enter such an order (or to suggest that production be made) would have a chilling effect on attempts by the requestor to obtain voluntary production. In such a situation, it makes sense for the objecting party to present its objections to the court. Limiting the right to make such arguments to the first-level trial court is consistent with the Supreme Court’s determination that only the possessor ordered to produce or the requestor denied production may appeal to the High Court.⁴²⁶

D. Reconciling the Freedom of Information Act and the 1996 Code

The Supreme Court has interpreted the 1996 Code to be less lenient on the government and has required production even when state secrets are involved. These cases may be instructive when the Japanese Freedom of Information Act is tested in the Supreme Court.⁴²⁷ Under the FOIA:

426. See Case No. 35 of 1999, 54 MINSHŪ 2709 (Sup. Ct., Dec. 14, 2000), *translation available at* <http://www.courts.go.jp/english/judgments/text/2000.12.14-1999.-Kyo-.No..35.html>. Allowing the party adversely affected to present its position to the District Court is also consistent with article 223 of the 1996 Code, which allows an entity whose private secret is in government possession an opportunity to object when the secret would be revealed if the document request were granted. See MINSOHŌ, art. 223.

427. See Gyōsei kikan no hōyūsuru jōhō no kōkai ni kansuru hōritsu [Law Concerning Access to Information Held by Administrative Organs], Law No. 42 of 1999, art. 5, *translation available at* <http://www.soumu.go.jp/gyoukan/kanri/translation4.htm>. Article 6 contains provisions under which certain information may be partially disclosed and partially withheld. *Id.* art. 6.

There are six broad categories of exemptions. Documents can be withheld if they contain information about a specific individual unless the information is made public by law or custom, is necessary to protect a life, or relates to a public official in his public duties; corporate information that risks harming its interests and was given voluntarily in confidence; information that puts national security or international relations or negotiations at risk; information that would hinder law enforcement; internal deliberations that would harm the free and frank exchange of opinions or hinder internal decision-making; business of a public organ relating to inspection and supervision, contracts, research, personnel management, or business enterprise. Exempted information can be disclosed by the head of the agency "when it is deemed that there is a particular public-interest need." The head of the agency can also refuse to admit the existence of the information if answering the request will reveal the information.⁴²⁸

Article 220 of the Code also specifically exempts government documents from production, providing that it is: "a document containing official secrets held by public officials, which is likely to harm the public interest or significantly hinder the performance of public duties when it is produced."⁴²⁹ Yet to be worked out by the Supreme Court is the relationship between the FOIA and the requirements for production of government-held documents.⁴³⁰

The Supreme Court has held that company secrets disclosed to the labor investigators in the course of an investigation became government secrets once integrated into the investigator's report.⁴³¹ The secrets in-

428. See BANISAR, *supra* note 412. Of particular relevance here is article 5(5), which exempts from disclosure "information concerning deliberations, examinations, or consultations internal to or between either organs of the State . . . [or] local public entities . . . that, if made public, would risk unjustly harming the frank exchange of opinions or the neutrality of decision making . . ." MINSOHŌ, art. 5, para. 5.

429. See MINSOHŌ, art. 220, para. 4(b). This code language is quoted by two Supreme Court cases. See Case No. 4 (Gyo-Fu) of 2005, 59 MINSHŪ NO. 6 (Sup. Ct., July 22, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>; Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>.

430. For a discussion of the needs for greater disclosure in Japan, see C. Raj Kumar, *Corruption in Japan—Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance*, 10 NEW ENG. J. INT'L & COMP. L. 1 (2004).

431. Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No..11.html>. The Court held:

"Official secrets held by public officials" thus construed should be deemed to include not only secrets relating to affairs under the control of public officials

volved in that case did not implicate the FOIA because they were not given to the investigators voluntarily (the Labor Law compelled disclosure), nor were they given in confidence.⁴³² But it is easy to contemplate a situation where private information is given voluntarily yet is also confidential. While exempt from general public disclosure under the FOIA, would this kind of private secret be converted into a public secret exempt from production? It is likely that a court's analysis would turn on whether disclosure by the government would adversely affect the government's ability to carry out its public interest functions.

While the Court has concluded that an employer could not refuse to cooperate with the government when the law requires disclosure,⁴³³ the analysis could change where the information is given voluntarily. The principle expounded by the High Court—namely that disclosure would restrict the government's access to information, injuring its ability to perform its functions—would apply, rendering disclosure in this context inappropriate.⁴³⁴

but also secrets of private persons that public officials came to know in the performance of their duties, which are likely to damage the relationships between the public officials and the private persons and hinder fair and smooth operation of public duties when they are disclosed.

Article 223 of the 1996 Code recognizes a right for the government to refuse to produce private secrets contained in government documents and also gives the private party whose technical or business secrets might be disclosed an opportunity to present its reasons for non-disclosure.

Id. (citing MINSOHŌ, art. 223).

432. See Gyōsei kikan no hōyūsuru jōhō no kōkai ni kansuru hōritsu [Law Concerning Access to Information Held by Administrative Organs], Law No. 42 of 1999, art. 5, para. 2(b), translation available at <http://www.soumu.go.jp/gyoukan/kanri/translation4.htm>.

433. See Case No. 11 of 2005, 59 MINSHŪ NO. 8 (Sup. Ct., Oct. 14, 2005), translation available at <http://www.courts.go.jp/english/judgments/text/2005.10.14-2005.-Kyo-.No.11.html>.

434. *Id.* The Court reasoned:

[I]t cannot be denied that if, when workers and subcontractors have provided information on industrial accidents, the fact that they provide information or the contents of the information were easily made public, some of such persons concerned would provide the investigators in charge with only insufficient information, for fear of reprisals of the employer disadvantaged by the provision of information. . . . Therefore, the disclosure of the Document would damage the relationships of trust between the workers and the Investigators in Charge, which seems likely to hinder the investigators from hearing statements of the persons concerned, an extremely important duty for identifying the safety control system at workplaces and the cause of accident in similar types of accident investigation.

Article 220 of the 1996 Code defines the categories of documents that are subject to court-ordered production, illustrating that document production is neither automatic nor, like the United States system, under the parties' control. In Japan, production is a matter of court order.⁴³⁵ Article 223 of the 1996 Code, which deals with court orders, specifically requires that the government be given notice and the opportunity to object when a party seeks production of government documents.⁴³⁶ The government is then given an opportunity to object to the production. Article 223 also contains special exemption provisions for government documents, one of which tracks one of the six FOIA exemptions: "[t]he document is likely to impair national security, harm the relationships of trust with foreign countries or international organizations, or put Japan at a disadvantage in negotiation with foreign countries or international organizations."⁴³⁷

While the FOIA does not contain a provision allowing a court on an appeal of an FOIA determination to conduct an *in camera* review of the materials requested, the 1996 Code does. Under article 223, the court has authority to examine reasons given by the government supporting its objection to production and should deny production if there is good reason for the official's position. In making this determination, the 1996 Code directs the court to conduct an *in camera* examination of the document at issue so that it can evaluate the reason given against the information contained in the document.⁴³⁸ Although the Supreme Court has yet to apply article 223 to order production, it has indicated that the government must have sufficient and good reasons to refuse document production. It appears that while production of government documents is not to be rejected lightly, good reasons must be submitted to the court to sustain such a finding. It is likely that the government has received this message and it will be easier for future litigants to obtain government documents when there is no state secret involved.⁴³⁹ Or, at least it will be more diffi-

Id. The High Court noted that the employee's concern was not with personal privacy, but with reprisal against their employer. *Id.* This reflects the need to protect the corporate community.

435. Although the Code calls for court orders to produce documents, it is more likely that the court will request that the documents be produced, using its authority to compel only if necessary. See MINSOHŌ, art. 223.

436. See *id.* art. 223.

437. *Id.*

438. See MINSOHŌ, art. 223, paras. 3–5.

439. This being said, it does not mean that the government will not try to devise new means for avoiding production of documents it wishes to keep confidential. With the passage of a privacy law designed to protect certain personal privacy interests of individuals from disclosure by private corporations, it is likely that the government will make

cult for the government to withhold documents on the basis of government secrets than has been the case in the past.

CONCLUSION

Fuji Bank appeared to be a major setback to those who sought a more relaxed standard for production, but the decision aligns with Japanese norms of community and harmonious decision making. *Fuji Bank* changed the pre-1996 Code judicial interpretation of what constituted a self-use document and implicitly rejected the views of Professors Taniguchi and Mochizuki that the 1996 Code changed the presumption that a document should be produced. Since *Fuji Bank*, the Court's decisions appear to both protect the decision-making functions of the corporate community while also furthering and strengthening the norms of harmony and community within the corporation. The Supreme Court's focus on and protection of the sanctity of decision-making documents is consistent with the historic and cultural values of the Tokugawa village and feudal family structure and reinforces their analogies in their modern surrogate, the corporate employer in a lifetime employment system.

Clearly, distribution of internal memos is an important part of the free flow of information within an organization that is important to the proper functioning of the entity. The free flow of information can positively affect morale, sales, manufacturing, and much more. All of these positive effects may flow even when the information sent does not implicate privacy concerns or disclose trade secrets. Yet, the Court, in its decision allowing production of a bank's internal correspondence setting out bank policy, does not explore whether the production of the documents might adversely effect the free flow of information from management to employees or from the home office to branches.⁴⁴⁰ If production adversely affects the free flow of information within the organization, it might very well cause the company to restrict the type and volume of information the company shared between head offices, branches, management, and employees. The Court seems focused solely on the free flow of information for decision-making purposes, the fact pattern found in *Fuji Bank*.

greater use of the exemption from the FOIA where information about a specific individual (e.g., a government official or employee) is involved. See *Kojin jōhō no hogo ni kansuru hōritsu* [Act on the Protection of Personal Privacy], Law No. 57 of 2003, translation available at <http://www.cas.go.jp/jp/seisaku/hourei/data/APPI.pdf>. See also FRESHFIELDS BRUCKHAUS DERINGER, PERSONAL INFORMATION PROTECTION LAW (Sept. 2007), available at <http://www.freshfields.com/publications/pdfs/2007/sept12/19861.pdf>.

440. Case No. 39 of 2005, 60 MINSHŪ No. 2 (Sup. Ct., Feb. 17, 2006), translation available at <http://www.courts.go.jp/english/judgments/text/2006.02.17-2005.-Kyo-.No..39.html>.

This focus exposes some internal administrative documents to production orders—but it also protects the Japanese norms of community and harmony in decision-making.

Similarly, the Court allowed production of factual information in investigative reports that have the public interest as their ultimate goal—in a decision about a government labor investigation, and in another decision dealing with an investigative report prepared for the administrator of a failed insurance company.⁴⁴¹ In both cases, although the subject of the investigation did not instigate the investigation, the public interest served by the investigation was a major factor in the Court's decisions. Where a company commissions an external independent investigation to serve both a company goal (e.g., restoring public confidence in the company) and a public goal (e.g., protecting the public from a potentially unsafe product), the preparer and possessor will be different juridical entities. Recognizing the legal difference between the preparer and possessor of the document, as well as the public interest in the investigation report, would allow courts to order production of at least some information in independent investigative reports.

On the other hand, ordering production of investigative reports, as a general matter, could spell the end of outside independent investigations and could inhibit the free flow of material that company executives need to make decisions. How the Court will expand or restrict these outside investigative reports in the private sector remains to be seen. Perhaps the Court will develop an ad hoc rule based on the undefined special circumstances exception in *Fuji Bank*, enabling it to protect the free flow of decision-making information to management while recognizing the public's need for factual information in some circumstances.

Additionally, the Court appears to have relaxed the definition of a relationship document to include documents that are not mutually executed by the parties and to include some of the documents underlying the creation of the relationship. The provision of article 220 of the 1996 Code that allows a party access to documents where that right is secured in substantive law, has also been relaxed. Thus, although there may not be a specific statutory provision that grants a party a right to have a document produced, it may be sufficient that one party has a legal duty to keep records, and refusing access to those records would be a breach of good faith or an abuse of rights—especially if there is administrative guidance to permit access.

441. See Case No. 14 of 2004, 58 MINSHŪ No. 8 (Sup. Ct., Nov. 26, 2004), translation available at <http://www.courts.go.jp/english/judgments/text/2004.11.26-2004-Kyo-No.14.html> and *supra* notes 193–203 and accompanying text.

It must be remembered that what is at stake in these cases is not *discovery* in the American legal sense, but production of documents. A party seeking production still has a high hurdle when making a case for production of documents. Most smoking gun documents are likely to be related to decision making, and thus fall within the self-use exception. Still, the recent cases are a departure from the more restricted rule of *Fuji Bank*, a literal reading of the 1996 Code, and diverge from the Old Code's judicial doctrine of self-use. The Supreme Court's emerging doctrine, while somewhat opening production to administrative corporate documents, keeps the door closed to the production of decision-making documents, both of which further the cultural value of community in the corporate setting.

It remains to be seen how far the Supreme Court will go in liberalizing the document production rules. It is likely that additional cases dealing with the interpretation of the 1996 Code will be forthcoming. Meanwhile, lower courts, especially those that have previously shown themselves to be more accommodating to document production than the Supreme Court, may well read these recent cases as allowing them greater discretion in ordering parties to produce documents. As the Japanese courts cautiously proceed to define the boundaries of document production under the 1996 Code, it is likely that the notions of context, custom, and community will continue to guide the doctrine.