

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

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## ABSTRACT

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

## 1. INTRODUCTION

It is a commonplace in comparative law that, when compared to Americans, Japanese do not litigate much (see Wollschlager 1997). This fact has been seized on by American critics of lawyers and the litigation system (Bok 1983), by Japanese who argue that it demonstrates the superiority of the Japanese political and social system, and by reformers who argue for an expanded role for law and litigation in Japan.

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While there is little dispute about the lower levels of litigation, the question of why Japanese litigate less is the subject of great dispute. A traditional explanation, offered by many Japanese academics, was that Japanese had a basic cultural preference for consensus and harmony (Kawashima 1963; Noda 1976, pp. 165–66). In a classic article, John Haley (1978) argued that cultural accounts were overblown and that institutional factors, such as the relative dearth of judges and lawyers in Japan, explained the alleged difference in propensities to litigate. Later, Mark Ramseyer (1988; Ramseyer and Nakazato 1989) used economic analysis to develop a different institutional account of the sources of litigation, focusing less on institutional barriers and more on institutional quality.

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

We use a unique set of prefectural-level data for the 1990s to evaluate the various theories of Japanese litigation behavior. Our approach is longitudinal. Rather than enter the thicket of cross-national comparisons, which typically involve apples and oranges, we compare litigation in Japan over time to allow us to isolate which factors have the greatest impact in encouraging litigation (see Haley 2002, p. 125).

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

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tributes to the empirical and comparative literature on litigation rates by providing evidence about the determinants of litigation in one country.

Any study of litigation rates is limited by the problem of baselines. The law and society literature has identified this as the issue of “naming, blaming, and claiming” (Felstiner, Abel, and Sarat 1980; see also Trubek et al. 1983). Before any dispute gets to court, the aggrieved party must first feel that it has suffered a wrong and must identify a responsible party. Only then will a dispute be potentially available for litigation. Without knowing the underlying baseline level of potential disputes, it is difficult, even in one society, to determine whether a level of litigation is “high” or “low” or even to evaluate how substantial an increase has occurred. We are not asserting that Japanese have now become litigious in some absolute sense but rather are seeking to unpack what factors may influence change in litigation patterns.

The paper proceeds as follows. Section 2 reviews the 4-decade-old theoretical debate on litigation in Japan. Section 3 describes the increase in litigation during the 1990s along with other reforms of the legal system that might be thought to contribute to this phenomenon. Section 4 presents the model and empirical analysis. Section 5 analyzes the implications of the analysis for the theoretical debate. Section 6 concludes.

## 2. THEORIES OF LITIGATION IN JAPAN

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

The most sophisticated variant of this argument was offered by Takeyoshi Kawashima (1963). In keeping with the dominant paradigm of his time, Kawashima saw Japan as a society whose modernization was incomplete. Invoking Japanese history going back to Shotoku Taishi (573–622 C.E.), he asserted that Japanese held a cultural preference for informal mechanisms of dispute resolution. This preference was rooted, in his view, in a comfort with particularistic, hierarchically defined roles and relationships and was incompatible with judicial decisions based on

universal standards of behavior. Kawashima also noted that Japanese society was changing and becoming more modern. The implication was that as modernization proceeded, Japanese would become more litigious.

This culturalist argument was attacked in a classic article by John Haley (1978; see also Upham 1998). Haley first observed that litigation in most countries is an expensive and time-consuming process.<sup>1</sup> An assertion that Japanese have a cultural preference for alternative dispute resolution implies that Japanese would be willing to pay rather than to go to court, that is, accept an outcome that is less favorable than would be reached in court.<sup>2</sup> He noted that at certain times in Japanese history, such as the interwar period, litigation rates had been high, which suggests that there was more to the story than a unidirectional modernization process or a permanent cultural aversion to litigation. A better explanation for the observed low litigation rates, argued Haley, was the lack of institutional capacity in the legal system. Compared with the United States, Japan had relatively few lawyers per capita.<sup>3</sup> It also had few judges, with correspondingly high caseloads and delays. Furthermore, Japanese courts had inadequate remedies available, with no contempt power.<sup>4</sup> Thus, there was little incentive to bring cases to court.

Another answer to the puzzle of low litigation rates was provided by Mark Ramseyer in a pair of articles revisiting Haley's thesis (Ramseyer 1988; Ramseyer and Nakazato 1989). Ramseyer argued that it was not the weakness of the Japanese legal system that accounted for low litigation rates, but rather its strength. Litigation occurs only when parties either cannot or do not predict what the court will do. If courts are predictable and the result can be accurately determined in advance, rational parties will settle. Greater predictability makes it more likely that the estimated outcomes of the parties will converge, thus making it easier to reach agreement. There are many features of the Japanese court system

1. Indeed, Haley noted that Japanese litigation rates are not particularly low when compared with those of other industrial democracies; they appear low only in a binary comparison with the United States.

2. Haley (2002, p. 127) provides survey data from the Justice System Reform Council that shows that Japanese, by and large, seek to advance interests in court. See also Rokumoto (1978).

3. In contrast, Kawashima had attributed the lack of lawyers to the low demand for litigation. See Kawashima (1963, p. 42): "The fairly small number of lawyers in Japan relative to the population and the degree of industrialization suggests that people do not go to court so frequently as in Western countries and that the demand for lawyers' services is not great."

4. This is the theme of Haley's book *Authority without Power* (1991). Ramseyer and Nakazato (1999, pp. 147–50) rebut this claim.

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

Takao Tanase's (1990; see also Tanase 2001) contribution to the debate sought to combine institutional and cultural accounts with a perspective he called "management." Tanase argued that the Japanese elite had an interest in low levels of litigation, to insulate government policies from challenge. But they also needed to provide alternative fora in which disputes could be resolved away from the courts. This account echoed that of Upham (1986), who had argued that the bureaucracy encouraged informality. Tanase (1990, pp. 658–59) also focused on availability of lawyers as the key barrier to pursuing justice in courts. But the management perspective, besides having political overtones, is distinctive for emphasizing the availability of alternatives to litigation.

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

One should not overstate the degree to which these various theories are mutually exclusive. It is perfectly possible and in fact likely that the

function explaining litigation would include elements of culture, institutional barriers, predictability, and alternatives. Nevertheless, the theories do have different empirical implications. This provides us with an opportunity to use recent data to try to sort out the various explanatory strands.

### 3. THE JAPANESE TURN TO LITIGATION

Around 1990, Japan's great economic bubble began to pop. As the economy bounced in and out of recession for the next decade, pressure began to build for legal change. A wave of reforms to fundamental legislation and legal institutions followed, including, *inter alia*, reforms of civil procedure and corporate law; an overhaul of financial law; passage for the first time of an administrative procedures act, a law on information disclosure, and a products liability law; and, most recently, efforts to overhaul the system of legal education and professional training. Because of the range and scale of these reforms, some have compared the current period with the systemic transformations of the late 19th century and the U.S. Occupation era (Rokumoto 2001), and the reformers themselves have invoked the parallels (Justice System Reform Council 1999).

As legal reform was proceeding, Japanese began to litigate more frequently. Table 1 provides an indicator of the number of suits filed in district courts since 1986. During this period, there was a stark increase in litigation beginning in 1992 and steadier increases from 1993 onward, along with a slight decline in the last 2 years.<sup>5</sup>

This section considers three recent institutional reforms and their potential impact on civil litigation, along with other factors that might conceivably lead to greater litigation rates. The three reforms that we focus on are expansion of the bar, changes to the civil procedural code, and substantive legal reform that gives expanded opportunities to litigate. We also consider the role of judges and of economic change. We do not, in this section, consider the availability of alternatives, the factor focused on by Tanase in his analysis, but we return to that issue in Section 5. For each set of reforms, we consider the predictions of the various theories.

5. We offer no specific theory here for the decline over 1989–1990, but we note that it corresponded with the peak of the real estate bubble and the illness and death of Emperor Hirohito. See Field (1991).

**Table 1.** New Common Actions in District Courts per Year

Year	New Common Actions	New Common Actions per 1,000 Persons
1986	111,937	.9200
1987	113,804	.9309
1988	112,557	.9168
1989	104,469	.8478
1990	100,212	.8107
1991	105,161	.8474
1992	122,670	.9848
1993	136,326	1.0912
1994	139,130	1.1107
1995	136,806	1.0895
1996	135,455	1.0762
1997	139,652	1.1070
1998	144,809	1.1450
1999	142,272	1.1232
2000	147,759	1.1641
2001	146,113	1.1479
2002	143,859	1.1289

### 3.1. Expansion of the Bar

Japan is famous, or infamous, for having a small number of lawyers, leading prominent observers such as Derek Bok (1983) to call for the United States to become more like Japan in encouraging smart students to go into engineering rather than law. Legal education developed out of a continental model and saw as its goal the training of generalist state officials (Levin 2000). Bar passage was seen as a separate goal, reserved for an elite group. Some early observers, such as Kawashima, attributed the small number of lawyers to a lack of demand for legal services from the Japanese public, ignoring the role of regulation in determining the availability of legal services.

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

as the exclusive set of policymakers when it came to regulation of the legal profession for most of the postwar period (Rokumoto 2001, p. 553).

In 1991, an agreement among the three main actors led to a revision of the National Bar Examination Act and a gradual expansion in the size of the bar passage group, combined with a reduction in the term needed to complete the LTRI course. The exam control committee adopted a quota that reserves 30 percent of passage “slots” for those who take the exam three times or fewer, beginning in 1996. By 1999, the period of training was shortened from 2 years to 18 months, and the LTRI graduated 1,000 persons in 2000, a 100 percent increase over the 500 graduates in 1991. This expansion will continue, according to the final report of the Justice System Reform Council, released on June 12, 2001. The report calls for expanding the bar to an expected number of 50,000 lawyers by 2018, roughly tripling in 18 years. The goal is stated in terms of expected number of graduates of the LTRI and thus continues the tradition of managing the growth of the profession rather than setting a standard and relying on market processes to control entry. Nevertheless, the expected substantial increase in lawyers is an important step.

Other things being equal, greater availability of lawyers should make litigation cheaper and more accessible, and hence we would expect litigation rates to increase. This is consistent with all of the theories, save that of Kawashima, who would say that both litigation rates and lawyers were caused by the shared independent factor of socioeconomic modernization.

One of the articulated rationales for expanding the bar was to increase the availability of lawyers in rural prefectures. Lawyers are unequally distributed around Japan, with most concentrated in urban centers and some prefectures having only a handful of attorneys (Yonemoto 1995). We obtained prefecture-level data on the number of attorneys and learned that the increase in lawyers has not been uniform around the country. Figure 1 presents a map showing which prefectures had increases or decreases in the number of lawyers per capita. Prefectures shown in white lost lawyers, while prefectures shown in gray gained. The intensity of the gray scale captures the extent of the increase. Note that growth is very uneven. Most of the increase in the number of lawyers occurred in the urban prefectures, where lawyers had been previously concentrated. Urban prefectures uniformly added above-average percentages of lawyers, and of course in absolute terms the effect is even



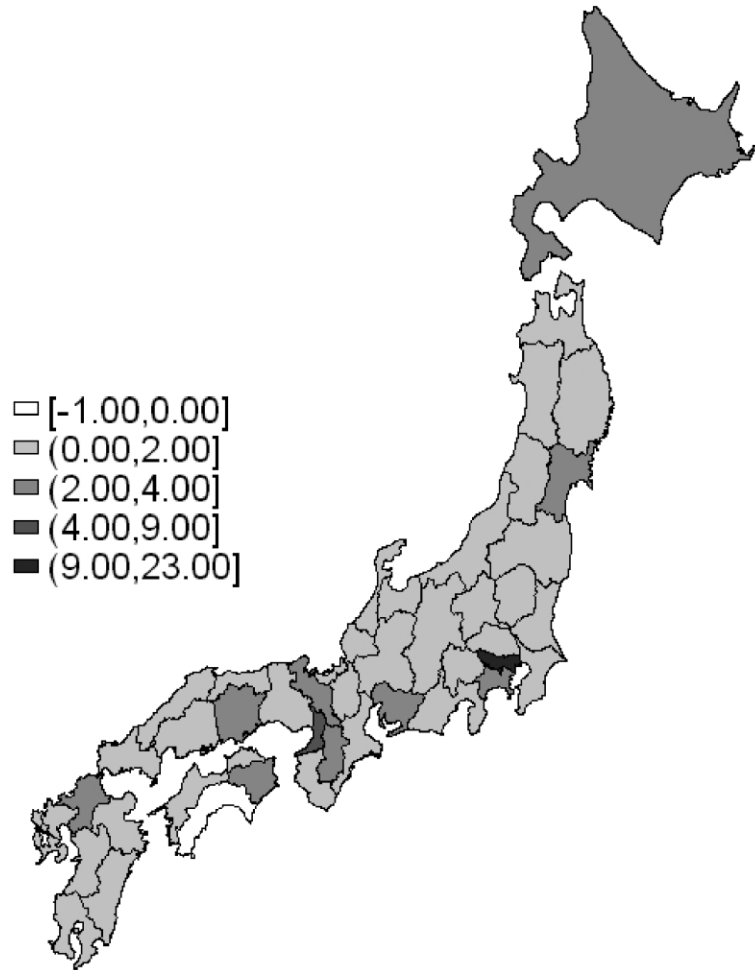


Figure 1. Increase in lawyers per 100,000 persons, 1986–2002

stronger because of high base rates there. Tokyo, for example, added 3,039 lawyers during the period, a 51 percent absolute increase. This represented 53 percent of the increase for all of Japan.

### 3.2. Procedural Reform

After long discussions, the Civil Procedure Code was amended in 1996, effective January 1, 1998, to make litigation more attractive (Ota 2001).

A major factor behind the reform was perceived disincentive for business to use the courts.<sup>6</sup> Taniguchi (forthcoming; see also Taniguchi 1997) traces three forces behind the civil procedure reforms. First was German influence, specifically the reform of German civil procedure in the 1970s. Second was the support of some elements of the bar, in the context of more cooperative relations between the bar and the judiciary. Third was pressure by Keidanren and Keizai Doyukai, the leading business associations in Japan, which became interested for the first time in facilitating litigation. Against these interests stood certain elements of the bar that preferred slower procedures: a concentrated trial, while easier on the judge, requires more preparation by the lawyer. Furthermore, some lawyers had been charging by the appearance, creating a disincentive to shift to a concentrated trial. But the bar ultimately was unable to resist reforms.

There were several major reforms, two of which are most relevant to our analysis. First, there was a shift toward more concentrated trial procedure and new techniques of case management to reduce delay. Second, discovery procedures were expanded, including the introduction of a general duty to produce documents, judicial power to order production, and the use of interrogatories for the first time. Discovery should encourage filings by making proof easier to obtain, raising the expected benefit of litigating certain types of cases.<sup>7</sup>

What empirical predictions would be associated with the concentrated trial procedure? The issue is complicated. To the extent that the concentrated trial procedure and case management tools reduce disposition times, we would expect that filings might increase following the introduction of reforms. However, the increased workload from new filings would put new pressure on disposition times, so it is hard to say whether disposition times would actually improve. Barring an increase in the size of the judiciary, streamlined procedures could actually lead to longer backlogs, as filings increase to fill “unused” judicial capacity. In our analyses that follow, we code for an effect to see if there was any increase in filings associated with the civil procedure reforms effective January 1, 1998, although we do not consider disposition times directly.

Ramseyer and Nakazato (1989) have argued that discontinuous trial

6. Ota (2001, p. 565). The reforms do not include sanctions on violators, apparently because practicing attorneys in the Diet resisted them. Ota (2001, p. 564) notes that this is consistent with the lack of contempt power of Japanese judges.

7. Of course, discovery might lead the parties' expectations on the ultimate outcome to converge, encouraging settlement before a final decision.

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

To be certain, even after the reforms, institutional barriers to litigation are many. Compared with the United States, the unavailability of punitive damages for many kinds of civil disputes means that attorneys have no positive incentive to seek out plaintiffs. Furthermore, plaintiffs have relatively less incentive to litigate when at best they will be made whole, without the "tort lottery" that allows them to get a share of punitive damages. Certain other features of the American system, such as contingency-fee arrangements, have analogues in Japan, but it is not clear whether they are frequently utilized. A related expense is the need to purchase revenue stamps (*inshi*) as a portion of the amount claimed.<sup>8</sup> Finally, the weaker sanctions available to judges in the Japanese discovery process discourages fishing expeditions whereby lawyers can pursue low-probability claims in the hope that the discovery process will produce some information that would increase the probability of a victory. All of these factors mean that there are still procedural and institutional barriers to litigation, at least as compared with the United States.

### 3.3. Legal Reforms

Another factor that may give rise to changes in litigation behavior is substantive legal change that makes suits easier or more difficult. For example, effectively lowering the fees of shareholders' derivative actions in 1993 no doubt encouraged such filings (West 1994). Corporate law reforms were staggered throughout the period, and a 1993 products liability law led to more lawsuits in that area, albeit from a low base (Nottage 2004). Legislative changes in the financial sector associated with the "Big Bang" were no doubt a factor too. For example, Zaloom

8. West (1994, pp. 1464–65) notes that in 1993, the Tokyo high court held that derivative suits ought to be subject to a procedural rule that allowed set fees in cases claiming indeterminate amounts, significantly reducing this expense.

and Nagashima (forthcoming) note that as foreign “vulture funds” took over the nonperforming loan portfolios of certain Japanese banks, they became more aggressive in collecting on the loans than did the Japanese banks.

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

### **3.4. Judges**

Judicial capacity formed a significant constraint on litigation in Haley’s analysis. He notes that the number of judges in Japan has historically been very small, and the size of the judiciary remained relatively constant during the 1990s. Data from the Japanese Supreme Court indicate that there were 3,050 judges nationwide at the end of 2003. The comparable figure from 1994 was 2,808.

We also have no reason to think that judicial quality declined during the period under review. The training mechanism remained constant, albeit with a shortening of the formal training period by 6 months. The mechanisms of hierarchical control and supervision, so well documented by Ramseyer and Rasmusen (2002), remained intact. And there is no reason to think that judges were able to exercise more independence at the end of the period than at the beginning, as there were no major political shifts in the period. In any case, it is arguable that the cases we analyze, civil disputes, are those wherein the ruling Liberal Democratic Party (LDP) would have little interest, as opposed to tax cases and suits against the government.

### **3.5. Structural Changes in the Economy**

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

Other things equal, sustained economic downturns are likely to lead

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

#### 4. EMPIRICAL INVESTIGATION

##### 4.1. Data and Variables

To investigate which of the predicted factors had an effect on the amount of litigation, we analyze litigation in each of Japan’s 47 prefectures from the period 1986–2001.<sup>9</sup> Our dependent variable is the amount of litigation per capita. We obtained information on the number and type of litigation in each year in each prefecture from the *Shiho tokei nenpo* (Annual report of judicial statistics) published by the Supreme Court of Japan. We counted litigation at the level of the district courts, which handle the first instance of most types of civil cases.<sup>10</sup> Following Haley (1978), we focused on new common civil actions (*tsujo sosho jiken*), calculating the number of actions per capita. This category includes many types of “ordinary” civil cases, such as tort suits, loan collections, and commercial cases.

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

There are 50 district courts in Japan having territorial jurisdiction

9. We selected the 1986 date because of the availability of data on lawyers per prefecture, one of our independent variables.

10. We chose to focus on district courts rather than summary courts in part because of our independent variables. Our data on the number of judges are at the district court level. Further, Tanase (2001) has argued that the role of lawyers is different at the district level than the summary level, where pro se arguments are common. Therefore, we believe it more appropriate to model cases at the district level, where additional lawyers may more plausibly have an impact.

over their particular judicial districts, and 478 summary courts within these districts.<sup>11</sup> Except in Hokkaido, which is divided into four judicial districts, the area of each judicial district is identical with that of each prefecture. (We treat the four Hokkaido districts as a single unit for purpose of our analysis, since economic and demographic data are available only at the level of the entire prefecture.) There is a local bar association for each district, with the exception of Tokyo, which has three local bar associations, mainly for historical and political reasons. To obtain the number of lawyers in Tokyo, we summed the total number of reported attorneys in all three bar associations.

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

We captured the effects of the 1998 civil procedure reforms in two alternative ways. On the assumption that their full effect was felt immediately, we generated a dummy variable set to one in years during which the reforms were in effect (1998 and later). To allow for the possibility that their effect was more gradual, we generated a variable measuring the number of years in which the reforms had been in effect.<sup>12</sup>

We also gathered annual demographic and economic data for each prefecture from the *Kenmin keizai keisan nenpo* (Annual report on prefectural accounts), compiled by the Japanese government's Economic and Social Research Institute. In order to investigate the effect of economic conditions on litigation rates, we included both prefectural income and annual change in prefectural income. The former captures absolute wealth, while the latter indicates growth or decline, which will allow us to assess the degree to which economic growth or downturn influences litigation rates.<sup>13</sup> Finally, to allow for the possibility that litigation is

11. Henderson (1997, p. 59) reports that 50 summary court districts do not have a single lawyer's office.

12. As explained in note 16, these alternative specifications generated substantially similar results.

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

more common in urban settings, where interpersonal relationships may be less strong on average, we generated a dummy variable set to one for the most urban prefectures. We hypothesize that urbanization is associated with the modernization variable emphasized by Kawashima and the culturalists. In the reported results, we defined the most urban prefecture as the specially designated *fu* (urban prefectures) and *to* (metropolis): Kyoto-fu, Osaka-fu, and Tokyo-to. In robustness checks, we used several other definitions, by including prefectures containing three, four, five, or six of Japan's four largest cities as of 2000.

Table 2 provides descriptive statistics and correlations for our data. Two measures provide no evidence of problematic multicollinearity. The maximum variance inflation factor is 2.32, and the mean variance inflation factor is 1.48, both well below the critical value of 10. The condition number of the model is 13.79, well short of the critical value of 30.

#### 4.2. Model

Our data are a balanced panel with 16 annual observations for each of the 47 prefectures. If we performed ordinary least squares without controlling for the panel nature of our data, we would risk obtaining inflated standard errors. Therefore, we estimate a random-effects model that accounts for potential heterogeneity across prefectures and yields accurate standard errors (Hsiao 2003).<sup>14</sup>

In addition, we need to address the possibility that the numbers of lawyers and judges are endogenous to the amount of litigation in a prefecture, in particular, that all three quantities may be simultaneously determined. In the presence of endogeneity, our coefficient estimate would be biased and inconsistent. Indeed, Davidson and McKinnon's (1993, pp. 236–42) augmented regression test strongly rejects the hypothesis that the numbers of judges and lawyers are exogenous ( $p = .0132$ ). Therefore, we also estimate a generalized two-stage least squares model to control for both endogeneity and the panel nature of our data, providing consistent coefficient estimates (Balestra and Varadharajan-Krishnakumar 1987).

After performing a generalized least squares transformation on the variables to control for their panel nature, the first stage of this method

14. We also estimated a fixed-effects regression, which does not allow us to include time-invariant variables. Thus, we could not model the effect of being a large urban prefecture. The remaining estimates were, however, substantively unchanged from those we report based on the random-effects model.

**Table 2.** Descriptive Statistics and Product-Moment Correlations

	Mean	SD	Min	Max	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1. New common actions per capita	.000840	.000343	.000393	.002883	1.00							
2. Judges per capita	.000015	.000006	.000005	.000032	.32	1.00						
3. Lawyers per capita	.000069	.000086	.000022	.000740	.82	.29	1.00					
4. Post-civil procedure reform	.250000	.433301	.000000	1.000000	.12	.01	.05	1.00				
5. Per capita income (10 million yen)	.000296	.000194	.000062	.001427	-.06	-.13	-.03	.05	1.00			
6. Annual change in per capita income (10 million yen)	.000005	.000081	-.001041	.001018	-.03	-.00	.00	-.14	.19	1.00		
7. Largest urban prefectures	.063830	.244612	.000000	1.000000	.72	.25	.74	-.00	.00	.00	1.00	
8. <i>Shiho shoshi</i> (legal scriveners) per capita	.000152	.000041	.000056	.000269	.05	.46	-.02	-.09	-.06	.03	-.02	1.00



generates instrumented values of the endogenous variables, number of lawyers and number of judges, by regressing each against all of the exogenous variables in the system. The results of this stage are used in the second stage, in which litigation is estimated using the predicted value of each instrumented variable in place of its actual value. This removes the impact of endogeneity by purging the endogenous variables of their correlation with the error term in the litigation equation (Wooldridge 2003, p. 500).

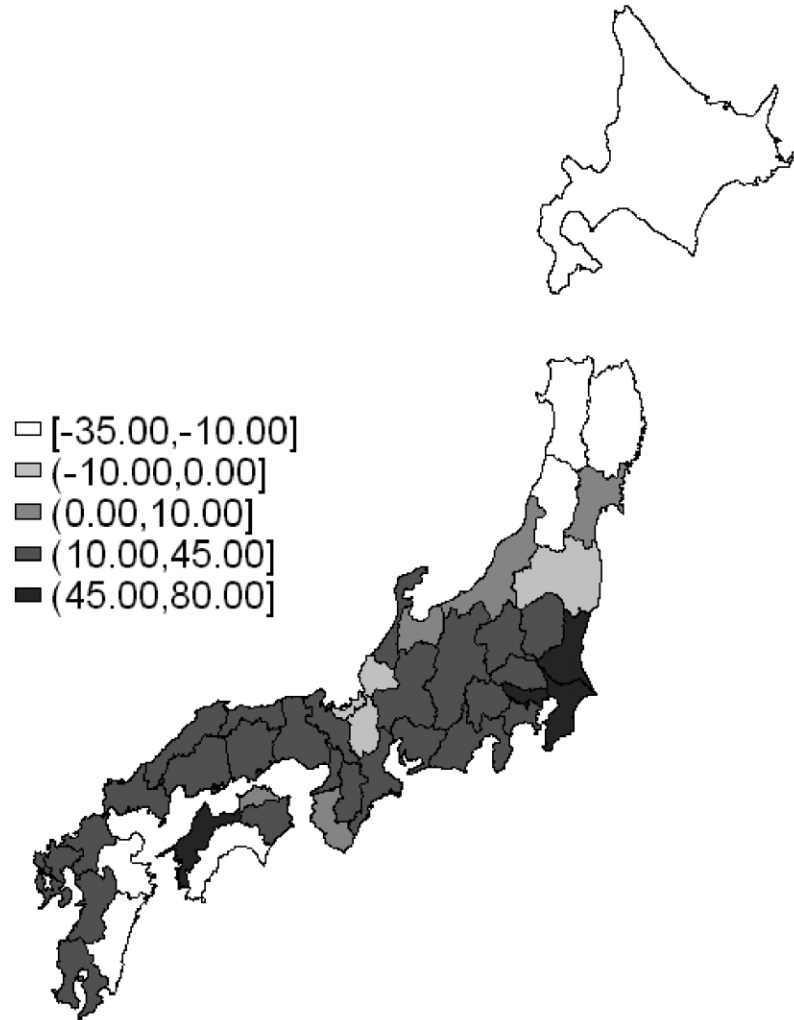
To perform this estimation, we require variables that are correlated with the endogenous variables but not with the error term in our main equation. We use the high court district for each prefecture (a set of seven dummy variables) and the number of *shiho shoshi* (legal scriveners) in the prefecture as identifying variables. While attorneys and judges may have preferences regarding the high court district in which they want to practice, we expect that few potential litigants will be aware of what high court district they are in, much less be aware of the implications of those districts for litigation they might pursue. *Shiho shoshi* should not affect the amount of litigation, as litigation is limited to *bengoshi*. However, since the services of *shiho shoshi* and *bengoshi* overlap somewhat (for example, legal advice), the presence of *shiho shoshi* would influence the economic attractiveness of a prefecture to an attorney.

Estimation indicates that our instruments fulfill both requirements for use in a two-stage least squares model. First, they exhibit sufficient correlation with the endogenous variables ( $p < .01$  for each). Second, Hausman's (1978) overidentification test indicates that they are valid; that is, we cannot reject the hypothesis that they are uncorrelated with the error term of the litigation equation ( $p > .10$ ).

### 4.3 Findings

First, we note that the increase in litigation in Japan, like the increase in the number of lawyers, has not been uniform during the period under review. A total of 36 prefectures experienced gains in per capita litigation, while 11 prefectures experienced losses (see Figure 2). Urban prefectures tended to gain. Rural prefectures were more varied.

Table 3 presents the results of our regression with the number of new ordinary civil cases per capita as the dependent variable. The data cover 1986–2001. Column 1 presents the initial random-effects model, and column 2 the results of the generalized two-stage least squares model. The models are substantively similar in terms of the direction and sig-



**Figure 2.** Percentage change in litigation per capita, 1986–2000

nificance of results, although the magnitude of the coefficients varies across models. The latter model yields consistent estimates despite the endogeneity of the number of lawyers and judges, albeit at the cost of less efficient estimates than the random-effects model.

As indicated by an  $R^2$  value of .6, our model fits fairly well. Each of our theoretical variables, with the exception of urban prefectures, is

**Table 3.** Regression Results: New Common Actions per Capita

	Random-Effects Regression (1)	Generalized Two-Stage Least Squares Random- Effects Regression (2)
Lawyers per capita	4.15813** (.000)	2.13934* (.014)
Judges per capita	10.76755** (.000)	21.19843** (.002)
Post-civil procedure reform	.00005** (.000)	.00007** (.000)
Per capita income (10 million yen)	.06235+ (.063)	.06362+ (.069)
Annual change in per capita income (10 million yen)	-.10174* (.035)	-.08870+ (.079)
Largest urban prefectures	-.00015 (.206)	.00031 (.189)
Constant	.00037** (.000)	.00033** (.000)
$R^2$ :		
Within	.383	.323
Between	.706	.698
Overall	.661	.649

**Note.** Values in parentheses are  $p$ -values. Number of observations = 752; number of prefectures = 47.

+ Significant at 10%.

\* Significant at 5%.

\*\* Significant at 1%.

statistically significant at the .10 level or better. Our results are consistent with the view that institutional constraints explain the relatively low rate of litigation in Japan. We turn now to the results for each of the three primary institutional constraints: a shortage of lawyers, a shortage of judges, and procedural barriers.

We find that an increase in the number of attorneys per capita does lead to an increase in the amount of litigation per capita. However, the increase per attorney is fairly small, just over two additional cases per year.<sup>15</sup> However, it does add up. Focusing on the period affected by the

15. Since both the number of attorneys and the number of new cases are in per capita terms, the coefficient represents the number of new cases associated with each additional attorney in a prefecture. We use the consistent estimates from column 2 in our numerical calculations.

1991 revision of the National Bar Examination Act and related measures to expand the bar, we see that Japan added 4,030 lawyers between 1986 and 2001. On the basis of the 2001 Japanese population, these lawyers were responsible for approximately 8,622 more new common actions in 2001 (out of a total of 146,113 new common actions that year) than would have occurred if the number of lawyers had stayed at the 1986 figure. The prefectures where it made the largest difference were of course the ones that gained the most lawyers.

Turning to judges, we find that the addition of a judge has a larger effect than the addition of an additional attorney, with each additional judge in a prefecture increasing the number of new common cases by slightly over 20 a year. However, since the expansion of the judiciary was less than the expansion of the bar during the 1990s, the total effect of judicial expansion was smaller. As Japan added approximately 124 judges at the district court level between 1986 and 2001, this translates to 2,604 additional cases in 2001.

The 1998 civil procedure reforms also had a significant impact. We estimate that it led to approximately 8,910 more new common actions nationwide in 2001 than would have occurred without the reform.<sup>16</sup> In other words, the procedural reforms have had approximately the same effect of all the lawyers that have entered the field since 1986.<sup>17</sup>

In sum, therefore, Japan's institutional reforms appear to be having the desired effect of encouraging greater use of the legal system. Taken together, civil procedure reform and the expansion of the bar and judiciary account for over 20,000 additional cases per year, an almost 20 percent increase over the number of cases that would otherwise have been predicted. Each aspect of the reforms has played an important role in the increase.<sup>18</sup>

16. Using the alternative measure for effect of civil procedure reform, the number of years since the reforms took effect, yields substantively identical results.

17. An additional .00007 cases per capita times the 2001 Japanese population of 127,290,000.

18. Indeed, there may be a synergistic impact of the civil procedure reform and increase in the bar or judiciary that we do not capture. For example, without the easier access to the courts provided by the civil procedure reform, it is possible that each additional attorney would have been less able to bring new cases, reducing their impact. In the context of a two-stage least squares model, we cannot test this possibility simply by interacting the dummy for civil procedure reform and number of lawyers. The inclusion of the civil procedure reform variable among those used in the first stage to generate instrumented values for the number of lawyers means that the standard error for the interaction between civil procedure reform and the (instrumented) number of lawyers in the second-stage estimation would be biased. Recognizing the potential bias due to endogeneity, we note that the

The noninstitutional results are also interesting. The impact of the economy on litigation is twofold. As one would expect, where there is more economic activity in absolute terms, there is also more litigation per capita. More economic activity means more transactions, and hence one would expect more litigation even if the rate of litigation per transaction remained constant. However, we also find that change in economic activity over time affects litigation. During downturns in which the prefectural income has declined since the previous year, litigation increases.<sup>19</sup> This is consistent with the literature that finds that litigation is countercyclical, as bad times mean more broken contracts and a willingness to break relationships.<sup>20</sup>

Finally, we note that, controlling for population, economic activity and the availability of lawyers, there is no evidence that urban prefectures (Tokyo-to, Osaka-fu, and Kyoto-fu) are more litigious than non-urban prefectures.<sup>21</sup> The coefficient is far from significant ( $p \approx .2$ ). Cultural

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interaction between number of lawyers and civil procedure reform in a simple random-effects model is far from significant ( $p = .76$ ).

19. While we did not gather data on the types of disputes involved at the district court level, we do have disaggregated data on types of cases litigated at the summary court level within prefectures. Loan cases at the summary level went from 60,111 in 1986 to 135,265 in 1998. Over the same time period, they went from being 28.5 percent of all cases to 44.2 percent. Other types of litigation also increased, going from 150,558 cases in 1986 to 170,904 in 1998. Our findings are consistent with Tanase's (2001) assertion that loan and debt collection constitutes the bulk of the increase in litigation in Japan.

20. Nottage and Wollschlager (1996) have a similar finding. As the magnitude of the coefficient for changes in per capita income is larger than the coefficient for per capita income, a decrease in per capita income from year  $t$  to  $t + 1$  will mean a temporary increase in per capita litigation, as the impact of economic stress overwhelms the decrease caused by reduced economic activity. Assuming no further change in income, litigation in years  $t + 2$  and after will be lower than that in year  $t$ , which reflects the smaller base of economic activity. Conversely, an increase in income from year  $t$  to  $t + 1$  will result in a temporary decrease in litigation due to the benefits of an "expanding pie." Thereafter, however, the rate of litigation will be higher, reflecting greater economic activity.

21. We conducted a variety of robustness checks, two related to model specification and two to the definition of "urban prefecture." We first used a fixed-effects model to control for the panel nature of our data rather than the random-effects model used in the reported model. It is impossible to estimate via fixed effects the impact of variables that do not change over time, meaning that we cannot estimate the effect of being an urban prefecture. The estimates of the other coefficients change very little. Next, we control for the possibility of autocorrelation, that is, the error terms for each prefecture being correlated across time. The estimates of the institutional variables remain significant and of approximately the same relative magnitude, although their absolute magnitude is slightly reduced. However, both the absolute income and change-of-income variables lose significance. We also estimate models redefining urban prefectures as those containing Japan's three, four, five, or six largest cities. The impact of being an urban prefecture is actually negative and significant under several definitions. A continuous measure of urbanization, the percentage

and sociological theories of litigation often assume that urbanization increases litigation in and of itself.<sup>22</sup> Our results provide no evidence in support of this explanation while establishing that institutional and economic factors play an important role. Of course, it is possible that urbanization is simply a poor proxy for cultural variables within Japan.

## 5. DISCUSSION

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

Ramseyer's theory focuses on predictability. Japanese sue less than Americans because their courts are more predictable and stable. This theory, however, does not directly predict a change in litigation behavior within Japan. Japan's legal system remained fairly stable in the period under review. There were no major changes in the way judges were selected or trained and no influx of new judges who might apply the law less predictably than their forebears. Nor were there dramatic changes to the core statutes interpreted by judges, such as the Civil Code.

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of economic activity generated by tertiary industries (Tanase 2001), yielded a positive coefficient that approached conventional levels of significance, with *p*-values of .133 and .099 in the random-effects and generalized two-stage least squares regressions, respectively. Estimates of the other variables remain substantively unchanged under all definitions. In summary, our findings for the effects of institutions (judges, attorneys, and civil procedure reform) are extremely robust. Our findings for the impact of economic factors are generally robust, although they lose significance under one specification.

22. While Kawashima (1963) does not discuss urbanization per se, other modernization theorists have associated urbanization with cultural change. See generally Weiner (1966).

While there were some changes in Japanese substantive law in the 1990s, these were concentrated in the financial and securities area and hardly fundamental to the types of cases that might be litigated in Aomori.<sup>23</sup> Predictability, then, remained relatively constant, but there was still a dramatic increase in litigation.

Another theory of Japanese nonlitigiousness, articulated by Tanase and Upham, is that litigation rates are low because of elite management of dispute resolution. The availability of alternative dispute resolution, it is argued, channels conflict resolution away from courts in a manner that does not threaten elite rule. The paradigm case was the interwar land tenancy mediation system, which scholars have argued was designed to extend government control but also to reduce pressure for widespread social challenge (Vanoverbeke 2003). The suggestion, then, is that informal alternatives are a substitute for, rather than a complement to, formal litigation in the courts. Following this theory, one might expect that the shift toward litigation was produced by or related to a corresponding move away from the informal alternatives. That is, one might expect that the increase in litigation resulted from a decline in either the availability or quality of informal alternatives, reflecting a loss of political control by elites.

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

The increases in alternative dispute resolution (ADR) use and liti-

23. Note that we do observe the increase in loan collection litigation, but there is no indication that there was legal change facilitating this so much as the indirect factor of allowing foreigners to enter the market. See Zaloom and Nagashima (forthcoming) and Tanase (2001).

**Table 4.** Alternative Dispute Resolution Institutions in Japan (Includes Referrals, Conciliation, and Arbitration)

	Years Data Available	Low Number of Cases	High Number of Cases
Japan Real Estate Dispute Resolution Center	1995–98	2,646	5,086
Product Liability Dispute Resolution Center	1995–2000	223	1,083
Pollution Dispute Resolution Center	1980–2003	1	48
Tokyo Consumer Dispute Resolution Center	1995–98	28,618	31,987
Construction Industry Centers	1981–2003	206	302
Equal Employment Opportunity Disputes	1999–2003	22,885	37,346
Auto accident centers total	1989–2003	22,359	40,218
Total			116,070

gation are themselves highly correlated. Table 5 traces the number of traffic accident cases filed in summary courts from 1989 to 2002 as compared with the total number of cases handled by the Traffic Accident Dispute Resolution Center and two similar centers operated by the Japanese bar.<sup>24</sup> All centers report cases as referrals, mediation, and arbitration, and these figures are combined in Table 5. The annual numbers are correlated at a rate of .91. (Note that it is hardly surprising that the absolute number of cases handled by the informal alternative is greater, given the cost and time involved in formal litigation.)

The positive correlation between ADR and litigation is consistent with what we know from Japanese history. During the previous high-litigation era in Japan, the 1920s and 1930, use of ADR mechanisms also increased.<sup>25</sup> The elite management theory, whatever its explanatory power into the reasons ADR systems are established, does not provide insight into the changing demand for formal litigation. Japan's elite iron triangle of bureaucracy, business, and LDP has remained largely intact,

24. Nichibenren Kotsu Jiko Soodan Senta and the Tokyo Begoshikai Jiko Soodan Senta. These two were merged in April 2004.

25. See Nottage and Wollschlager (1996, pp. 369–73). We are not asserting that there is some fixed number of disputants who must choose between one or the other type of dispute resolution system. One possible explanation for the observed correlation is that structural changes in the legal system send a signal to the public about the appropriateness of pursuing claims in general, so all types of claiming increase.



**Table 5.** Traffic Accident Dispute Resolution (ADR), 1989–2002

Year	ADR Total	Litigation Total	Ratio
1989	22,359	4,260	5.25
1990	22,939	4,056	5.66
1991	23,532	3,970	5.93
1992	26,443	4,224	6.26
1993	28,552	4,416	6.47
1994	27,530	4,400	6.26
1995	28,439	4,408	6.45
1996	30,469	4,795	6.35
1997	33,067	4,484	7.37
1998	33,150	4,719	7.02
1999	35,236	5,549	6.35
2000	36,860	6,090	6.05
2001	38,571	6,249	6.17
2002	40,218	6,712	5.99

despite a decade of economic stagnation. With the elite a constant, other factors must explain the increase in litigation.

Kawashima's culturalist theory has been widely criticized by most of the authors under consideration. Our results on urbanization are consistent with these criticisms, since we find that, controlling for levels of economic activity and population, urban residents are not statistically more likely to sue. It is of course conceivable, though not in our view likely, that the urban/rural distinction is a poor proxy for cultural differences within Japan.

We also hypothesized that economic decline might be associated with increased litigation. The data suggest that absolute levels of wealth increase litigation, but economic decline also increases it. More transactions should mean more litigation, but relative growth or decline is also an important factor in the decision by firms to go to court. This result also suggests something about the earlier debate. Ramseyer, Haley, and others focused on the cross-national comparison with the United States and offered explanations for relatively low Japanese litigation rates. Our results suggest that another unexplored factor during the classical period may have been the rapid growth of the economy. Within Japan, we suggest, litigation is countercyclical. Thus, the bursting of the bubble, by breaking social and economic relationships, might have encouraged litigation in the 1990s. Figure 3 presents the data on growth and litigation, showing that they had an inverse relationship in the period under study.

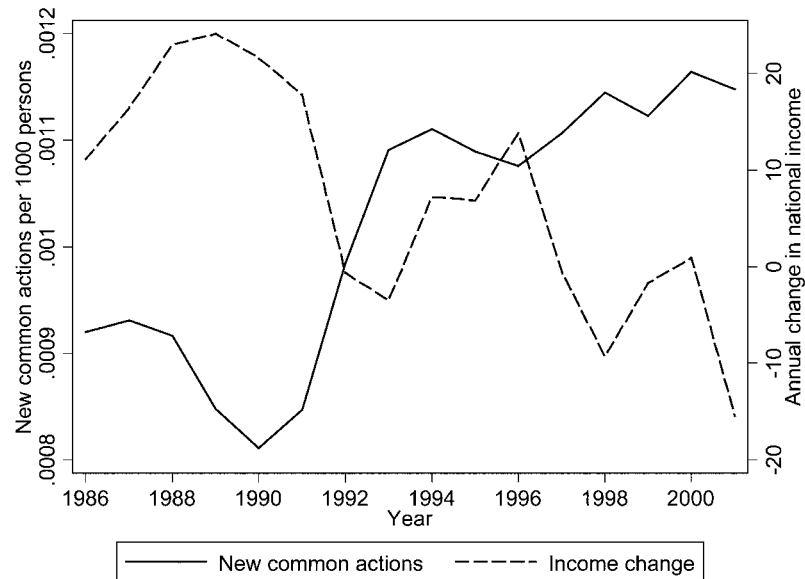


Figure 3. Growth and litigation

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

## 6. CONCLUSION

This paper has explored Japan's turn to litigation in the 1990s. From 1986 to 2001, the Japanese civil litigation rate increased by 29 percent. Most of this increase was concentrated in urban prefectures but can be explained as primarily resulting from economic decline, the expansion in the bar, and the streamlining of civil procedure. We find no support for the hypothesis that cultural factors play a major role. Among legal reforms, the expansion of the bar and civil procedure reform had the

largest cumulative impact. The slight increase in the judiciary also accounted for increased litigation, as each additional judge increased litigation by more than each additional lawyer.

While our results are limited to Japan, they have implications for the comparative study of law and legal institutions. Litigation rates provide a notoriously difficult field for cross-national study because institutional environments vary so widely (but see Wollschlager 1997). Within a single legal system, however, we can try to isolate the factors that lead to more or less litigation and the impact of particular reforms. Our analysis suggests that both procedural incentives to litigate and attorney availability matter, and matter a good deal, relative to other institutional factors. Perhaps more important, however, are underexplored relationships between the economy and litigation.

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