

**Knocking at the Door of the Stone Fortress:
Appeals to the Supreme Court
under Japan's 1996 Code of Civil Procedure**

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- I. Introduction
- II. Appeals in Japan's Supreme Court:
Background to Reforms of the Code of Civil Procedure
 - A. Appeals in Japan and pre-1998 Appeal Procedures
 - B. Drivers and Goals of Reform
 - C. The Reform Process
 - D. Amendments to Code of Civil Procedure
 - E. Filing for Regular and Discretionary jōkoku Appeal to the Supreme Court
- III. Fifteen Years On: Have the Reforms been 'Successful' ?
 - A. Appeals to the Supreme Court of Japan:
The Statistical Evidence
 - B. Determining Success
- IV. Is There Need for Reform in the Future?
- V. Conclusion: Why Hasn't Reform Happened?

I. INTRODUCTION

In 1996, significant reforms of Japan's Code of Civil Procedure changed the scope of appeal to the Supreme Court of Japan. Reactions varied: where some loftily predicted a new era in the Court's jurisprudence under a reduced caseload,¹ others dreaded its decline into 'obscurity' as avenues of appeal were limited.² Evaluations of the new ap-

* The title of this article borrows from M. KAMIYA, 'Chōsakan': Research Judges Toiling at the Stone Fortress, in: *Washington University Law Review* 88(6) (2011) 1601.

** This paper won the 2011 ANJeL/Ashurst Essay Prize in Japanese Law (*the editors*).

*** An earlier draft of this article was submitted as part of coursework undertaken for the JD at Melbourne Law School. The author would like to thank Senior Lecturer Stacey Steele for her guidance and helpful comments in preparing this article, and Judge Atsuyuki Taniike for his assistance on the statistical research for this article.

1 T. KOJIMA, Japanese Civil Law in Comparative Law Perspective, in: *University of Kansas Law Review* 46 (1997-8) 687.

2 M. KAMIYA, Narrowing the Avenues to Japan's Supreme Court: The Policy Implications of Japan's Code of Civil Procedure Reforms, in: *Australian Journal of Asian Law* 4 (2002) 53, 71.

pellate procedures in practice, however, describe a more muted outcome: ‘practice at the [Supreme Court] level has not changed much’.³ Fifteen years later – and after a decade of momentous judicial reform in Japan – there has been little written on the more long-term developments in Supreme Court appeals under the 1996 Code. This article adds to the evaluation effort with an exploration of longer-term trends in Supreme Court appeals under the 1996 Code of Civil Procedure. It argues that civil appeals to the Supreme Court have changed significantly under the Code in ways contrary to the reformers’ original goals, reflecting disagreement about the proper role of Japan’s highest court.

This article begins with a brief overview of the 1996 reforms of the Code of Civil Procedure, including the main drivers and objectives of reform and the technical changes made to Supreme Court appeals. Second, it discusses the success of the reforms with regards to appeals procedures, building on the work of previous authors by (i) extending statistical analysis of Supreme Court appeals during the past two decades and (ii) considering success in terms of the reformers’ original objectives and other benchmarks. Third, it considers the potential for future appeals reform, ultimately concluding that whether and how appeal procedures are reformed in future depends on the role expected of the Supreme Court in Japan’s civil justice system.

3 L. NOTTAGE, *Civil Procedure Reforms in Japan: The Latest Round*, in: *ZJapanR/J.Japan.L* 18 (2004) 204, 205.

II. APPEALS IN JAPAN'S SUPREME COURT:
BACKGROUND TO REFORMS OF THE CODE OF CIVIL PROCEDURE

A. *Appeals in Japan and pre-1998 Appeal Procedures*

In the Japanese civil justice system, the judiciary has four levels: (1) Summary Courts; (2) District and Family Courts; (3) High Courts; and, at the top of this hierarchy, (4) the Supreme Court.⁴ For students of comparative law, the Japanese Supreme Court is known for three features in particular: its contentious reputation as conservative,⁵ its high level of institutional integrity and public trust,⁶ and its notoriously heavy annual caseload.⁷ In 2010, 7410 civil and administrative matters alone were filed in the Court.⁸ The Supreme Court does not exercise discretion over its docket in the same way as the United States Supreme Court through petitions for writs of certiorari, or Australia's High Court in hearing applications for special leave.⁹ Partially as a result, the Court very rarely sits *en banc*: it has one Chief Justice and fourteen Associate Justices, but the vast majority of matters filed in the Court are heard by one of three petty benches of five justices assisted by highly experienced *chōsa-kan* (research judges).¹⁰ With the *chōsa-kan*'s assistance, every year a judge may be responsible for as many as 400 civil matters, and participate in over 2000 matters as a member of a petty bench.¹¹

As a court of last resort, most cases filed in the Japanese Supreme Court are appeal cases. There are a variety of different appeals within the Japanese judicial system. First-level appeals from the court of first instance (e.g. from a District Court to a High Court) are known as *kōso* appeals, and allow an appellant to raise both new matters of fact and

4 M. DEAN, *The Japanese Legal System* (London 2002) 345.

5 There is a great deal of disagreement over whether the term conservative should be used to describe Japan's Supreme Court. A good example of this discussion can be found in the recent symposium volume of the Washington University Law Review on judicial decision-making in the Japanese Supreme Court. For a contemporary justification of the 'conservative' label, see e.g. S. MATSUI, *Why Is the Japanese Supreme Court so Conservative?*, in: *Washington University Law Review* 88(6) (2011) 1416. For a contrasting account of the court's 'stealth activism', see F. UPHAM, *Stealth Activism: Norm Formation by Japanese Courts*, in: *Washington University Law Review* 88(6) (2011) 1493.

6 See e.g. T. IZUMI, *Concerning the Japanese Public's Evaluation of Supreme Court Justices*, in: *Washington University Law Review* 88(6) (2011) 1769; M.A. LEVIN, *Civil Justice and the Constitution: Limits on Instrumental Judicial Administration in Japan*, in: *Pacific Rim Law & Policy Journal* 20(2) (2011) 265, 268.

7 J.O. HALEY, *The Spirit of Japanese Law* (Athens 1998) 96–7.

8 GENERAL SECRETARIAT, SUPREME COURT (JAPAN), *Shihō tōkei nenpō, Minji gyōsei hen* [Annual Report of Judicial Statistics, Civil and Administrative Cases Volume] (2010) Figure 1-1.

9 J.O. HALEY, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in: Foote (ed.), *Law in Japan: A Turning Point* (Seattle et al. 2007) 99, 105.

10 See e.g. C.F. GOODMAN, *Justice and Civil Procedure in Japan* (New York 2004) 442.

11 Based on *Shihō tōkei nenpō* 2010, *supra* note 8.

law at the second-instance court (a ‘second bite of the apple’).¹² By contrast, second-level, final or *jōkoku* appeals (e.g. from a High Court to the Supreme Court) are limited to matters of law.¹³ The Supreme Court hears mostly *jōkoku*, which have recently comprised around seventy per cent of the Court’s overall civil caseload.¹⁴

Prior to 1998, the grounds for *jōkoku* to the Supreme Court as of right were threefold: ‘either a violation of the Constitution, a gross violation of procedural provisions, or a “violation of procedural law which influenced the judgement of the lower instance”’.¹⁵ As Tokyo University law professor Shozo Ota writes, the scheme of appeal provisions in the old Code ‘was not an effective gate keeper’: ‘[i]t was not very difficult for a good lawyer to find or to construct an error of legal interpretation in a High Court judgement’ that would meet these criteria for appeal.¹⁶ So long as the formal requirements of *jōkoku* were satisfied, the Supreme Court would consider a ‘frivolous’ case and deliver a judgement:¹⁷ although typically in short, standardised opinions (referred to colloquially as ‘*mikudari-han*’ or ‘three-and-a-half-line’ decisions).¹⁸ By the 1990s, rates of civil litigation in Japan began to rapidly climb, partly as a result of economic restructuring after Japan’s economic bubble burst in 1989.¹⁹ Those calling for civil procedure reform identified the Supreme Court’s appeal procedures as a principal cause of the Court’s increasingly unmanageable caseload. When reforms to the Code were passed in 1996, changes to the Court’s appellate procedures were considered long overdue.

B. Drivers and Goals of Reform

In 1996, Japan made the largest changes to its Code in seventy years.²⁰ Several official reasons were cited for the reforms.²¹ First and foremost was the need to update the Code

12 For a detailed account of the Japanese appeal process in practice, see DEAN, *supra* note 4, 338. A useful visual outline of the Japanese appeal system in practice is available in H. ITOH, *The Supreme Court and Benign Elite Democracy in Japan* (Burlington 2010) 330.

13 *Minji soshō-hō* [Code of Civil Procedure] (*Minso-hō*), Law No. 109/1996, as amended by Law No. 109/2006, Art. 321, para. 1 provides that the facts legally determined by the judgement in prior instance shall be binding on the final appellate court when hearing *jōkoku* appeals.

14 *Shihō tōkei nenpō* 2010, *supra* note 8.

15 T. KONO, Recent Trends in Japanese Civil Procedure: Reform of the Code of Civil Procedure, in: *European Journal of Law Reform* 2(1) (2000) 155, 162.

16 S. OTA, Reform of Civil Procedure in Japan, in: *The American Journal of Comparative Law* 49 (2001) 561, 571.

17 H. ITOH, The Role of Precedent at Japan’s Supreme Court, in: *Washington University Law Review* 88(6) (2011) 1631, 1636.

18 KAMIYA, *supra* note 2, 59.

19 See e.g. T. GINSBURG / G. HOETKER, The Unreluctant Litigant?: An Empirical Analysis of Japan’s Turn to Litigation, in: *Journal of Legal Studies* 35 (2006) 31.

20 Y. TANIGUCHI, The 1996 Code of Civil Procedure of Japan – A Procedure for the Coming Century?, in: *American Journal of Comparative Law* 45 (1997) 767, 768.

to meet the changing needs of Japanese litigants. Being more than a century old, the old Code was perceived as simply 'inadequate' for the increasingly complex civil cases coming before the courts.²² Another rationale was the need to address issues surrounding the high cost, lengthy delay and other issues of accessibility in the civil justice system, which may have contributed to the avoidance of courts by many Japanese citizens²³ (echoing public complaints that civil litigation was 'too slow, too complex, and too expensive').²⁴

The most frequently cited objective of reform to final appeal procedures was to reduce the Supreme Court's heavy caseload.²⁵ By 1990, appeals filed in the Court had increased considerably, leading to complaints that the Court was overworked and its opinions 'rushed' or 'not as reasoned as litigants or professors of law might prefer'.²⁶ It was expected that – should the reforms lighten the Court's caseload – it would be possible for the justices to devote greater time and effort to 'more important legal issues', to unify precedents across the High Courts, and to produce higher quality opinions.²⁷ It was hoped this would enhance the Court's efficiency and public legitimacy, and hopefully help to reverse society's negative perceptions of civil litigation that may have contributed to avoidance of courts.²⁸

C. *The Reform Process*

Reform of the Code followed the usual pattern of law reform in the 1990s. A *shingi-kai* 'deliberative council' on the Japanese Legal System was formed within the Ministry of Justice. Within that body, a Civil Procedure Sub-committee was established, including members from academia, the judiciary (Supreme Court judges) and practicing attorneys (the Japan Federation of Bar Associations). The Council published a first draft of the New Code in 1993 identifying the core 'issues' in Japan's civil justice system, and conducted opinion surveys on the draft with members of the judiciary, bar associations, law schools and industrial organisations.²⁹ The final draft of the New Code was submitted to

21 See e.g. K. YANAGIDA, *Minji soshō tetsuzuki ni kansuru kentō jikō ni tsuite* [On the List of Reform Issues of the Code of Civil Procedure], in: *Jurisuto* 996 (1992) 50.

22 KONO, *supra* note 15, 155.

23 *Ibid.*

24 OTA, *supra* note 16, 565; see also NOTTAGE, *supra* note 3, 205.

25 See e.g. Y. ARAKI, *Minji soshō-hō no kaisei to sono eikyō* [Revision of the Code of Civil Procedure and its Impact], in: *Sompo Japan Research Institute Report* 23(3) (1999) 38, 43.

26 GOODMAN, *supra* note 10, 442.

27 KAMIYA, *supra* note 2; C.F. GOODMAN, Japan's New Civil Procedure Code: Has It Fostered a Rule of Law Dispute Resolution Mechanism?, in: *Brooklyn Journal of International Law* 29 (2004) 511, 536; KOJIMA, *supra* note 1, 717.

28 ARAKI, *supra* note 25, 43.

29 K. YANAGIDA/M. SHISEKI/H. OGAWA/O. HAGIMOTO/R. HANAMURA, Returned Answers to the Questionnaire on the First Draft of the New Code of Civil Procedure (1)-(10), in: *New Business Law* (1995) 561, cited in Ota, *supra* note 16, 567 n 21.

the Japanese Diet in March and passed in June of 1996, coming into effect on 1 January 1998.³⁰

The reform process itself has been criticised by those closely observing the introduction of the 1996 Code: Ota, for instance, censures the *shingi-kai* for basing its reforms on impressions gathered from strategically distributed questionnaires, instead of gathering systematic empirical data.³¹ Masako Kamiya also contends that the reform process did not involve adequate discussion with scholars, political scientists and constitutional lawyers, save for the limited academic members of the council.³² Unlike more recent judicial reform over the past two decades, the minutes of the *shingi-kai* responsible for the 1996 Code have not been published, making it difficult to determine whether the official goals and justifications published reflect the content of the council's internal deliberations.³³ While the reform process itself is not the focus of this article, these criticisms are important in the context of the possibility of future reform, discussed below.

D. Amendments to Code of Civil Procedure

The changes implemented by the 1996 reforms included a range of measures to encourage the early identification of issues at trial (e.g. preliminary oral proceedings);³⁴ measures to assist the gathering of evidence (e.g. expanded court-orders for the production of documents);³⁵ and a new one-day-trial small claims procedure for cases where the value in dispute is less than 600,000 yen.³⁶ Finally, of direct concern to this article, the 1996 Code introduced a new set of appeal procedures to the Supreme Court.

1. Narrowing right of appeal to Supreme Court of Japan (regular *jōkoku* appeals)

The first major change to Supreme Court appeals in the 1996 Code was to restrict appeals as of right to the Court (or 'regular' *jōkoku* appeals). A substantial ground for appeal under the former Code – 'violation of procedural law which influenced the judgment of the prior instance' – was removed from the list of grounds for regular *jōkoku* appeal.³⁷ The 1996 Code limits regular *jōkoku* appeals to two grounds in Art. 312:

30 H. KOBAYASHI/A. TAKATA, Comparing the First, Second and the Final Drafts of the Code of Civil Procedure, in: Hanrei Taimuzu 900 (1996) 70, cited in OTA, *supra* note 16, 564.

31 OTA, *supra* note 16, 572–3.

32 KAMIYA, *supra* note 2, 63, 71.

33 See generally A. MIKAZUKI, *Intabyū – shin-minji soshō-hō no seiritsu* [Interview: On the New Code of Civil Procedure], in: Jurisuto 1098 (1996) 8.

34 *Minso-hō*, Art. 164-167.

35 *Ibid* Art. 223-225.

36 *Ibid* Art. 368-381; increased from 300,000 yen in 2004 (NOTTAGE, *supra* note 3, 209).

37 KONO, *supra* note 15, 162–3.

clear constitutional misinterpretation or violation in para. 1, or ‘absolute cause’ under para. 2.³⁸

The first five grounds of ‘absolute cause’ in para. 2 are extreme or gross defects in procedure: for instance, situations where a judge who should not have participated in a judgement made or was otherwise involved in the making of that judgement,³⁹ or where the matter was not heard in the court with exclusive jurisdiction for such matters.⁴⁰ It has so far been rare for applicants to seek appeal on these grounds.⁴¹ The sixth ground of absolute cause under Art. 312, para. 2 is available where the prior instance judgement lacked reasons or provided ‘inconsistent’ reasons (including situations where there was a difference of opinion between justices of the prior instance court).⁴² As discussed below, the majority of regular *jōkoku* appeals in recent years have been based on this final ground of absolute cause.⁴³

2. *Introduction of form of certiorari appeal by permission to the Supreme Court (discretionary jōkoku appeals)*

For parties who wish to appeal to the Court on different grounds, the 1996 Code also introduced a form of ‘discretionary’ appeal to the Supreme Court.⁴⁴ This is similar to a writ of certiorari in the United States Supreme Court.⁴⁵ Unlike regular *jōkoku* appeals under Art. 312, discretionary *jōkoku* appeals under Art. 318 are submitted directly to the Supreme Court. The grounds for a discretionary appeal cannot be based on the grounds described above in Art. 312 for regular *jōkoku* appeals.⁴⁶ Rather, they are limited to instances where the judgement in the prior instance is inconsistent with Supreme Court precedent (or the precedent of a High Court, where no Supreme Court precedent exists), or alternatively where ‘material’ or ‘important’ issues of legal interpretation are involved.⁴⁷ What constitutes an important matter within the meaning of Art. 318 is not defined in the Code, but (according to the Ministry of Justice) includes situations involving novel legal issues or out-dated precedent.⁴⁸

38 *Minso-hō*, Art. 316, 318.

39 *Minso-hō*, Art. 312, para. 2, no. 2.

40 *Ibid* Art. 312, para. 2, no. 3.

41 There were only eleven such appeals in 2010, and all but one were dismissed: GENERAL SECRETARIAT, SUPREME COURT (JAPAN), *Saiban no jinsoku-ka ni kakaru kenshō ni kansuru hōkoku-sho, Saikō Saiban-sho ni okeru soshō jiken no gaikyō (2010)* [Report of the Inspection Regarding the Expediting of Trials, Chapter on the State of Litigation Inside the Supreme Court (2010)] (*‘Saikō Saiban-sho ni okeru’*) (2011) 214.

42 *Minso-hō*, Art. 312, para. 2, no. 6.

43 *Saikō Saiban-sho ni okeru*, *supra* note 41, 214.

44 *Minso-hō*, Art. 318.

45 TANIGUCHI, *supra* note 20, 780.

46 *Minso-hō*, Art. 318, para. 2.

47 *Ibid* Art. 318, para. 1.

48 KAMIYA, *supra* note 2, 64-65; see also GOODMAN, *supra* note 10, 443.

E. Filing for Regular and Discretionary jōkoku Appeal to the Supreme Court

After a case is finalised by the prior-instance court, civil litigants have two weeks to file for a final *jōkoku* appeal.⁴⁹ As under the previous Code, the Supreme Court lacks any significant control over its docket: ‘neither the codes nor the rules of procedure provide for an initial process to select cases worthy of full and detailed deliberation from among all appellate cases’.⁵⁰ Therefore, the Court still relies heavily on the *chōsa-kan*⁵¹ to ‘separate the wheat from the chaff’ in selecting “‘conference-worthy” cases’.⁵² *Chōsa-kan* at the Supreme Court are highly trained career judges, typically with more than 10 or even 20 years of experience working in the judiciary, selected by the Supreme Court to assist judges in research necessary for trial and adjudication of cases.⁵³ Most civil appeals submitted to the Court are pro-forma reviewed by a single *chōsa-kan* specialised in civil law, who scrutinises the prior instance judgement and researches the relevant law or precedent.⁵⁴

For the vast majority of applications, the *chōsa-kan* will determine that a case is not worthy of the Court’s deliberation, and submit that recommendation in a report to the presiding justice responsible for that case. The presiding justice then distributes the report to the other four judges on his or her petty bench (known as ‘conference by circulation, or “*mochi mawari shingi*”’) for their (typically automatic) approval.⁵⁵ Once the *chōsa-kan*’s report is ‘rubber stamped’ in this way, the appeal is ‘dismissed’. For regular *jōkoku* appeals, the 1996 Code provides that the Court can dismiss appeals by a *kettei* decision where the appeal is unlawful or provides no reasons for appeal (known as *kyakka*, or dismissal without prejudice),⁵⁶ or where there is clearly no unconstitutionality or ‘absolute cause’ as described above (*kikyaku*, or dismissal with prejudice on the merits).⁵⁷ While *kikyaku* include reasons for dismissal, they are usually short and relatively perfunctory. Discretionary *jōkoku* appeals can also be dismissed (or rather rejected) by the Court through a *kettei* decision.

In the minority of cases that the *chōsa-kan* recommend that the Court should further deliberate, or where the presiding justice disagrees with the *chōsa-kan*’s recommendation to dismiss a case (a rare occurrence), the assigned petty bench (or occasionally the grand bench) will deliberate the case in a judicial conference, and subsequently deliver

49 Although the reasons for appeal may be submitted later: *Minso-hō*, Art. 285, Art. 315 para. 1; *Minji soshō kisoku* [Rules of Civil Procedure], Law No. 5/1996, Art. 193, 194.

50 M. KAMIYA, ‘Chōsakan’: Research Judges Toiling at the Stone Fortress, in: Washington University Law Review 88(6) (2011) 1601, 1611.

51 There are currently 37 *chōsa-kan*, and 17 appointed to assist with civil matters: *Ibid*, 1601–2.

52 *Ibid* 1612.

53 *Ibid* 1602.

54 ITOH, *supra* note 12, 57.

55 *Ibid*.

56 *Minso-hō*, Art. 317, para. 2.

57 *Ibid*, para. 1.

hanketsu (judgement).⁵⁸ The *hanketsu* will usually either reverse the original judgement of the prior instance court, or dismiss the appeal.⁵⁹ For Supreme Court appeals, only *hanketsu* can successfully overturn a prior instance decision. Therefore, from the appellant's perspective, a successful appeal largely depends on the *chōsa-kan* recommending the case for the Court's deliberation.

III. FIFTEEN YEARS ON: HAVE THE REFORMS BEEN 'SUCCESSFUL' ?

In the years immediately following the introduction of the 1996 Code, both Japanese and foreign academics closely examined the success of the new appeal procedures. For the most part, their reports suggested that the procedures in practice were underwhelming. In 2001, Ota suggested that the 1996 Code had failed the reformers' goals by allowing for the steady increase of *jōkoku* appeal cases from 1998 to 2000.⁶⁰ In 2004, Carl Goodman added that the 1996 Code was successful in accelerating the pace of civil appeal cases, but the number of *jōkoku* appeals at the Supreme Court level – and discretionary *jōkoku* in particular – had continued to rise contrary to the reforms' stated objectives.⁶¹

Over the past decade, however, there has been little written on the more long-term developments in Supreme Court appeals under the 1996 Code. In order to determine whether the 1996 Code's *jōkoku* appeal procedures have been successful, this article first analyses the available statistics on the Court's caseload to make several observations and, second, tests those observations against benchmarks of success.⁶²

58 *Hanketsu* are typically much longer than *kettei*: DEAN, *supra* note 5, 387. Recent examples of *hanketsu* and *kettei* delivered by the Court can be found online at the Supreme Court's website at

<http://www.courts.go.jp/search/jhsp0020Recent?hanreiSrchKbn=02&recentInfoFlg=1>.

However, as noted on the website, only *hanketsu* or *kettei* that are considered 'important' are published. It is therefore likely that published *kettei*, being considered 'important', may not reflect the length of a typical *kettei*.

59 *Minso-hō*, Art. 325.

60 OTA, *supra* note 16.

61 GOODMAN, *supra* note 27, 549–60.

62 Due to space limitations, this article focuses on civil appeal cases. It should also be noted that criminal cases do not involve the use of the appeal procedures within the Code of Civil Procedure.

The Code applies only to administrative cases to the extent that the *Gyōsei jiken soshō-hō* [Administrative Case Litigation Act], Law No. 139/1962, as last amended by Act No. 109/2007, and the *Gyōsei fufuku shinsa-hō* [Administrative Appeal Act], Law No. 160/1962, as last amended by Act No. 109/2007, do not apply.

A. *Appeals to the Supreme Court of Japan: The Statistical Evidence*⁶³

1. *Received jōkoku appeals*

a) *Overall increase in new jōkoku appeals received*

Figure 1:

Total number of civil cases and civil *jōkoku* appeals received by the Supreme Court (1990-2010)

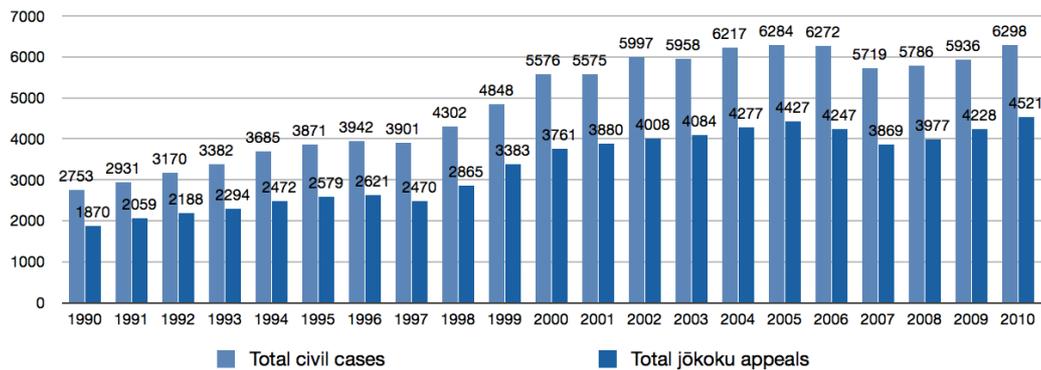


Figure 1 displays the overall number of civil matters received annually in the Japanese Supreme Court, alongside the total number of applications for civil *jōkoku* appeals during the same time (this figure includes both regular and discretionary *jōkoku* appeals filed under Art. 312 and Art. 318 respectively). The number of *jōkoku* appeals has increased considerably since the 1996 Code came into effect in 1998. Where the Court received 2470 *jōkoku* appeal applications in 1997, it received 4521 applications in 2010: an increase of 83%, or 6.4% per year on average. Since the introduction of the 1996 Code, *jōkoku* appeal matters also appear to be taking up a greater percentage of civil matters filed in the Court. While *jōkoku* appeals in 1997 made up 63% of new civil cases filed under the old Code, this figure jumped to 70% in 1999, and has hovered around 70% since 2005.

63 The statistics below are mainly taken from four sources: *Shihō tōkei nenpō* (2000-2010), *supra* note 8; *Saikō Saiban-sho ni okeru*, *supra* note 41; SUPREME COURT (JAPAN) *Hanrei chōsa-kai, Saiban-sho dēta bukku 2006* [Court Data Book 2006] (on file with author); SUPREME COURT (JAPAN), *Saiban-sho dēta bukku 2010* [Court Data Book 2010] (on file with author).

b) *Shift towards discretionary jōkoku appeal cases*

Figure 2:

Regular, discretionary and total civil *jōkoku* appeals in the Japanese Supreme Court (1994-2010)

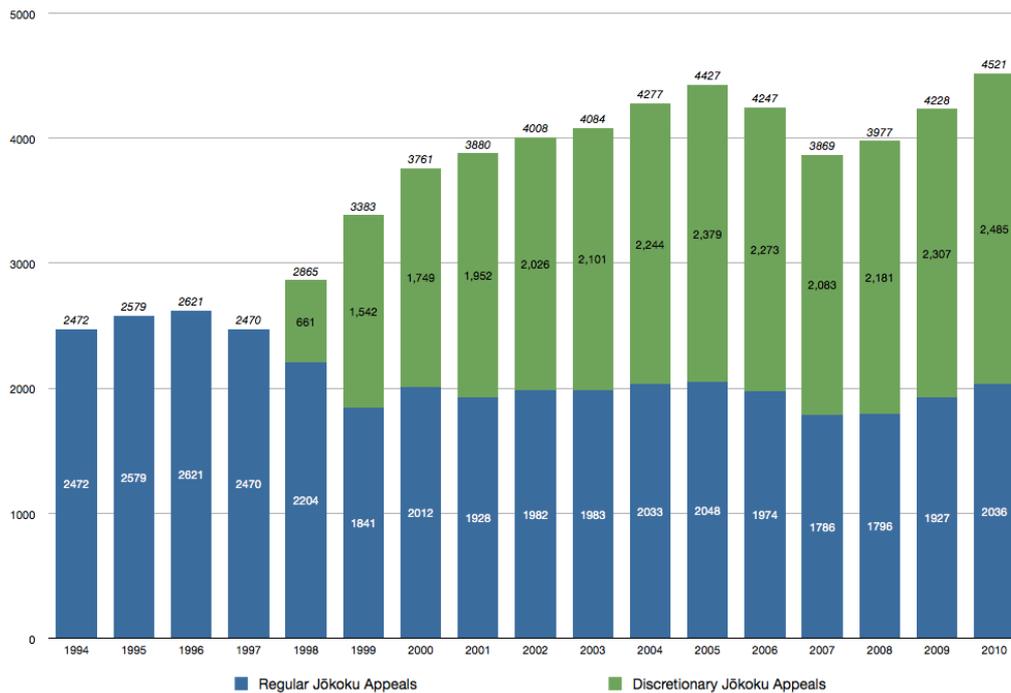


Figure 2 collapses the total number of *jōkoku* appeals filed in the Supreme Court into regular *jōkoku* appeals filed under Art. 312, and discretionary *jōkoku* appeals filed under Art. 318. This breakdown reveals an additional trend: since their introduction in 1998, discretionary *jōkoku* appeals have rapidly increased to represent the majority of *jōkoku* appeals filed in the Supreme Court, overtaking the number of regular *jōkoku* appeals from 2001. While only 661 *jōkoku* appeals were filed in 1998, by 2010 this number reached a peak of 2485 (an increase of 275%). During this time, the number of regular *jōkoku* appeals filed dropped from 2470 in 1997, to 2036 in 2010 (an 18% decline). The increase of discretionary *jōkoku* appeals identified by Goodman in 2004 has continued during the past decade.⁶⁴

64 GOODMAN, *supra* note 27, 446

It is important to consider the extent to which there may be an ‘overlap’ between regular and discretionary *jōkoku* appeals filed: that is, how many litigants are simultaneously filing both regular and discretionary *jōkoku* appeals under Art. 312 and Art. 318 respectively. In 2004, Goodman suggested that the overlap was a heavy one: litigants seeking appeal under Art. 312 had ‘nothing to lose’ by also seeking a discretionary appeal under Art. 318.⁶⁵ If simultaneous filing is common practice, it means that the total number of *jōkoku* appeals filed in the graphs above does not accurately represent the number of litigants seeking appeal in civil cases. Unfortunately, there is no information currently available to answer this question: the Supreme Court Secretariat does not publish individual case data, and has not included any information on the simultaneous filing of discretionary and regular *jōkoku* appeals in its Annual Reports following the 1996 reforms. Whether the practice of simultaneous filing has been common in the past, or continues to be common, is unclear.

A Japanese lawyer interviewed during the preparation of this article suggested that simultaneous filing was common only in the early years of the 1996 Code, when the discretionary appeal was still relatively new and litigators were unsure of how far the grounds for those appeal could be pushed.⁶⁶ In his view, it has become clear that the Court will reject groundless discretionary appeals outright; accordingly, litigants filing an Art. 312 *jōkoku* appeal today will rarely file a discretionary *jōkoku* appeal simultaneously without solid grounds. While they may have ‘nothing to lose’ by doing so, recent experience now suggests that they also understand they have ‘little to gain’.

2. Finalised *jōkoku* appeals

a) Number of finalised cases

The statistics above have focused on the Court’s ‘intake’: that is, new *jōkoku* matters received by the Court. This section focuses on the Court’s output: that is, how many *jōkoku* appeal cases the Court is finalising each year, and how those matters are being finalised.

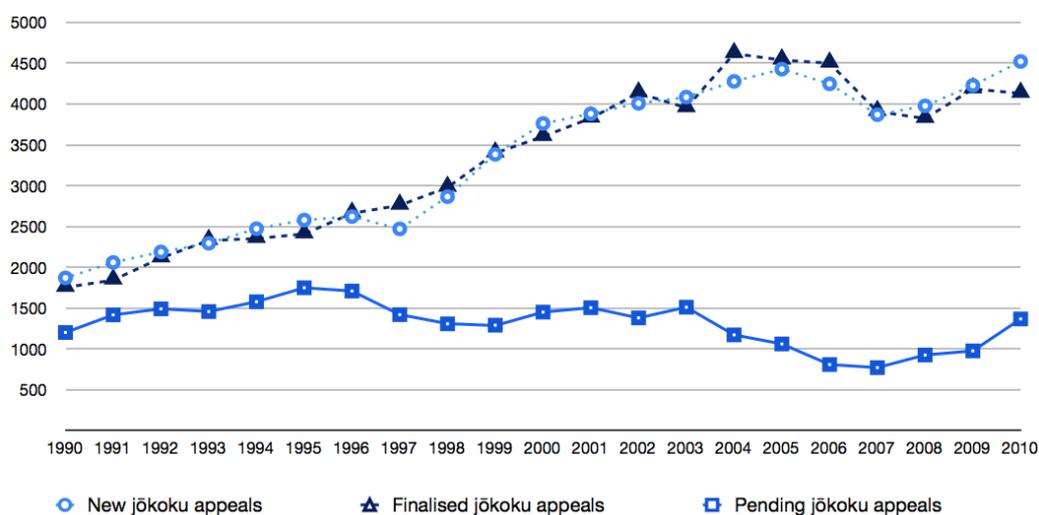
Figure 3 (see p. 241) displays the total number of *jōkoku* appeals received, finalised and pending in the Supreme Court over the past two decades. The total number of finalised cases has increased at a rate similar to the number of new cases received, even exceeding the number of new cases during the period from 2004 to 2006. As would be expected, the number of pending *jōkoku* appeals has maintained a relatively stable level during this time, tending to decrease when the Court has finalised more appeals that year than received (as in 2004), or increase when the opposite has been the case (as in 2008). As Ota wrote in 2001, the increasing number of cases disposed of by the Court may possibly reflect an improvement of efficacy under the 1996 Code, but may also be

65 GOODMAN, *Justice and Civil Procedure in Japan*, supra note 10, 446.

66 Interview with H. ISHIKAWA (Melbourne, 7 March 2012).

Figure 3:

New, finalised and pending civil *jōkoku* appeals
in the Supreme Court
(1990-2010)



	New <i>jōkoku</i> appeals	Disposed <i>jōkoku</i> appeals	Pending <i>jōkoku</i> appeals
1990	1870	1753	1201
1991	2059	1843	1417
1992	2188	2114	1491
1993	2294	2327	1458
1994	2472	2352	1578
1995	2579	2408	1749
1996	2621	2661	1709
1997	2470	2759	1420
1998	2865	2978	1307
1999	3383	3399	1291
2000	3761	3601	1451
2001	3880	3826	1505
2002	4008	4133	1380
2003	4084	3953	1511
2004	4277	4616	1172
2005	4427	4538	1061
2006	4247	4499	809
2007	3869	3907	771
2008	3977	3822	926
2009	4228	4184	976
2010	4521	4130	1367

simply a result of ‘the increase in the number of newly filed [appeal] cases; as courts are flooded by new filings, judges work harder to cope with them’.⁶⁷ Nor is it possible to entirely attribute to the 1996 Code the decline in the number of pending *jōkoku* cases in the Court, as this trend appears to have begun in 1995 (three years before the reforms came into effect).⁶⁸

Since 1998, the Court has rarely received more matters in a year than it has finalised, though a new pattern appears to be emerging. In 2008, 2009 and 2010, the number of cases received by the Court exceeded the number of cases disposed: the Court received 4521 *jōkoku* appeal matters in 2011 but disposed of only 4130. It is unclear why, though it is not likely to be a matter of institutional capacity, as the Court previously demonstrated the ability to finalise over 4500 cases annually (from 2004 to 2006).

b) How are these cases being finalised by the Court?

There has been an increase in the number of *jōkoku* appeals finalised by the Supreme Court, typically paralleling a similar increase in the number of *jōkoku* appeals received. The data below focuses on *how* these cases are being finalised by the Court: for instance, whether finalised by *hanketsu*, dismissed with a perfunctory *kettei* or outright ‘rejected’. This analysis is separated between regular and discretionary *jōkoku* appeals.

(i) Regular *jōkoku* appeals

Figure 4:

Disposition of regular *jōkoku* appeals
(2000-2010)

	Total	<i>Hanketsu</i> judgements			<i>Kettei</i> decisions		Case settled, withdrawn or otherwise disposed
		Appeal dismissed	Appeal allowed	Other	Appeal rejected (<i>kyakka</i>)	Appeal dismissed (<i>kikyaku</i>)	
2000	2019	106	32	0	132	1720	29
2001	1960	43	27	0	70	1781	39
2002	2061	24	17	2	55	1939	24
2003	1914	7	2	0	60	1821	24
2004	2194	12	7	0	80	2073	22
2005	2107	4	4	0	64	2014	21
2006	2048	6	8	2	63	1943	26
2007	1800	2	3	0	51	1730	14
2008	1719	4	2	0	59	1640	14
2009	1905	2	2	0	73	1817	11
2010	1867	3	4	1	49	1793	17

⁶⁷ OTA, *supra* note 16, 581–2.

⁶⁸ *Ibid* 581.

The *table* above displays the regular *jōkoku* appeals finalised in the Court each year over the past decade, and how those appeals were finalised. There has been a significant decline in regular *jōkoku* cases finalised by *hanketsu* over the past decade. In 2000, two years after the reforms, 138 of the 2019 appeals received (or 6.8%) were finalised by *hanketsu*. A decade later in 2010, the Court delivered only 7 *hanketsu* for the 1867 appeals received (or 0.4%) (see *Figure 5*). Simultaneously, the number of appeals dismissed by *kikyaku kettei* decision increased: 96% of regular *jōkoku* appeals received in 2010, up from 85% in 2000 (see *Figure 6*).

Figure 5: Percentage of regular jōkoku cases disposed by kettei decision (2000-2010)

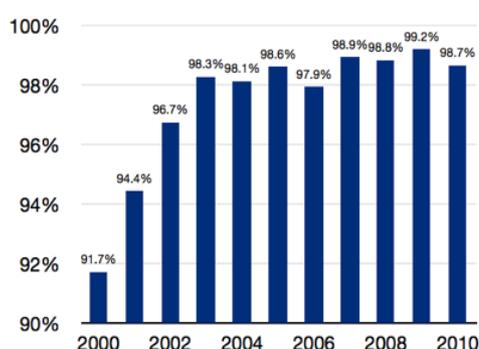


Figure 6: Percentage of regular jōkoku cases disposed by hanketsu judgement (2000-2010)

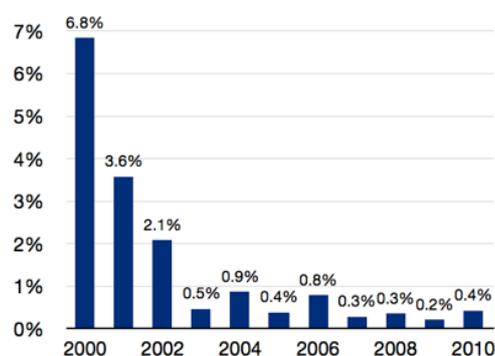


Figure 7 shows the grounds of appeal for the cases disposed by the Court in 2010. The vast majority of those cases were based on Art. 312, para. 1 (Constitutional violation or misinterpretation) or Art. 312, para. 2, no. 6 (an inconsistency of reasoning within the prior instance decision). Those filing a regular *jōkoku* appeal on grounds of constitutional misinterpretation or violation (Art. 312, para. 1) experienced little success: 99.3% of those appeals were dismissed by *kikyaku* decision, and only four finalised by *hanketsu*.⁶⁹ Of those four, only one was successful in overturning the prior instance decision. Similarly, appeals based on the grounds of inconsistency in reasoning (Art. 312, para. 2, no. 6) were finalised by *kikyaku* dismissal in 99.8% of instances, with only two *hanketsu* overturning the prior instance decision. Of the 1549 regular *jōkoku* appeals finalised in 2010, only eleven were based on grounds of ‘gross procedural error’ (Art. 312, para. 2, no. 1-5), and only one finalised by *hanketsu*.

⁶⁹ Goodman argues that ‘because the SC’s authority is broadest when questions of constitutionality are raised, such questions are frequently raised in appeals to the court even though there are really no constitutional issues presented’: *supra* note 10, 442.

Figure 7:

Disposition of regular *jōkoku* appeals by grounds of appeal
(2010)

	Total	<i>Hanketsu</i> judgement		<i>Kettei</i> decision	
		Appeal dismissed	Appeal allowed	Appeal rejected (<i>kyakka</i>)	Appeal dismissed (<i>kikyaku</i>)
312(1)	701	3 0.4%	1 0.1%	1 0.1%	696 99.3%
312(2)(i)-(v)	11	-	1 9.1%	-	10 90.9%
312(2)(vi)	837	-	2 0.2%	-	835 99.8%

(ii) Discretionary *jōkoku* appeals

Figure 8:

Disposition of discretionary *jōkoku* appeals
(2000-2010)

	Total	<i>Hanketsu</i> judgements			<i>Kettei</i> decisions		Case settled, withdrawn, or otherwise disposed
		Appeal dismissed	Appeal allowed	Other	Appeal rejected (<i>kyakka</i>)	Appeal dismissed (<i>kikyaku</i>)	
2000	2019	4	14	0	1762	34	4
2001	1960	10	25	0	1773	47	10
2002	2061	17	31	0	1982	33	17
2003	1914	11	69	0	1908	68	11
2004	2194	15	48	0	2321	30	15
2005	2107	13	34	1	2331	40	13
2006	2048	23	68	9	2284	45	23
2007	1800	11	35	2	2020	25	11
2008	1719	10	36	0	2025	26	10
2009	1905	16	51	0	2167	31	16
2010	1867	12	43	0	2172	27	12

Figure 8 displays the regular *jōkoku* appeals finalised in the Court each year from 2000-2010, according to how those cases were finalised. In stark contrast to the trend for regular *jōkoku* appeals during this time, discretionary *jōkoku* appeals finalised by *hanketsu* have increased considerably under the 1996 Code since 2000: where 18 *hanketsu* were delivered in 2000, there were 80 delivered in 2003 and 91 in 2006, although only 55 were delivered in 2010. Furthermore, and in contrast to regular *jōkoku* appeals, *hanketsu* in discretionary *jōkoku* appeals have been mostly in favour of appellants (for instance, 78% of *hanketsu* in 2010 were appeals allowed, in comparison to 37.5% of regular *jōkoku* appeal judgements). During this time, the percentage of discretionary *jōkoku* appeals rejected by *kettei* has remained relatively stable with only a slight decrease (97% in 2000 and 96% in 2005 and 2010). Compared to regular *jōkoku* appeals, therefore, appellants who file discretionary *jōkoku* appeals under the 1996 Code are more likely to have their appeal properly ‘heard’ by the Court for *hanketsu* and, moreover, to successfully overturn the prior instance decision.

Figure 9:
Percentage of discretionary *jōkoku* cases
disposed by *kettei* decision
(2000-2010)

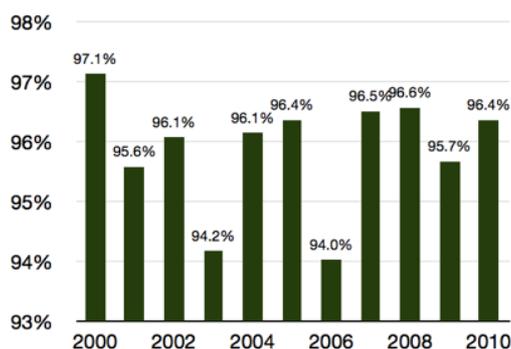
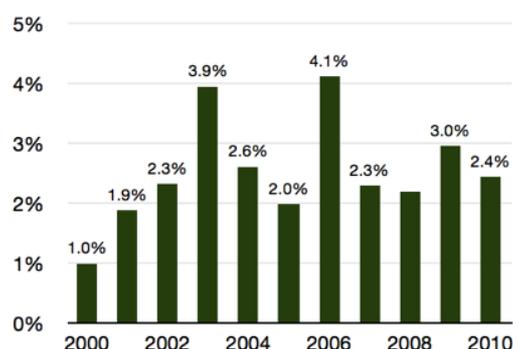


Figure 10:
Percentage of discretionary *jōkoku* cases
disposed by *hanketsu* judgement
(2000-2010)



It is possible that different trends in the disposition of regular and discretionary appeals under the 1996 Code have been influential on litigants in deciding whether and on what grounds to appeal. For instance, the waning number of regular *jōkoku* appeals filed in the Court since roughly 2005 may reflect a gradual realisation by litigants and litigators that the chance of a regular appeal under Art. 312 being ‘accepted’ by the Court for deliberation and *hanketsu* was becoming increasingly slim. At the same time, the growing number of *hanketsu* (and more importantly, *hanketsu* overturning a prior instance decision) in discretionary appeal cases following 2001 may partly explain the steady increase in the number of discretionary appeals being filed in the Court from 2000 to 2005 (see Figure 2). It is difficult to test these hypotheses without more information on individual cases and instances of simultaneous filings, which are currently unavailable.

*Figure 11:**Hanketsu* judgements delivered
(2000-2010)

	Regular <i>jōkoku</i> appeals	Discretionary <i>jōkoku</i> appeals	Total
2000	138	18	156
2001	70	35	105
2002	43	48	91
2003	9	80	89
2004	19	63	82
2005	8	48	56
2006	16	100	116
2007	5	48	53
2008	6	46	52
2009	4	67	71
2010	8	55	63

Finally, the total number of *hanketsu* delivered appears to have declined since the introduction of the 1996 Code: while there were 156 *hanketsu* in 2000, there were only 63 in 2010. The decrease in the number of regular *jōkoku* appeals finalised by *hanketsu* has been greater than the increase of discretionary *jōkoku* appeals finalised by *hanketsu*.

3. *Time for finalisation*

So far, this article has detailed how many appeals are being filed in the Court, and how the Court has chosen to dispose of those appeals. The following section focuses on the interval between – that is, how long it has taken the Court to finalise *jōkoku* appeals.

a) Average disposition times for regular and discretionary *jōkoku* appeals

Figure 12:

Average finalisation times for regular and discretionary *jōkoku* appeals and numbers of civil *jōkoku* appeals filed in the Supreme Court (1994-2010)

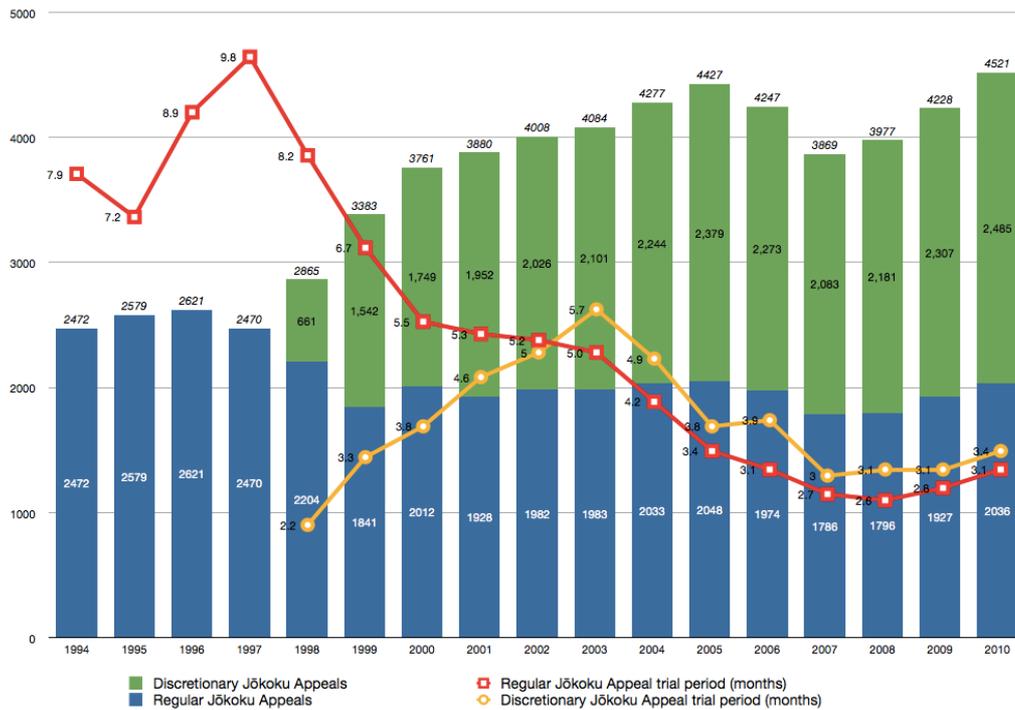


Figure 12 above shows the average finalisation time for both regular and discretionary *jōkoku* appeals from 1994 to 2010, as well as the number of *jōkoku* appeals received by the Supreme Court during that time frame. In the first few years under the 1996 Code, the average disposition time for regular *jōkoku* appeals appears to have declined: dramatically from 1998 until 2001, and then at a steady rate until 2007. The average disposition time for discretionary *jōkoku* appeals, by contrast, climbed quickly in the first few years under the 1996 Code, until also beginning a general path of decline in 2004.

The difference in disposition times between regular and discretionary *jōkoku* appeals under the 1996 Code may be a product of the different trends in disposition evidenced above. *Hanketsu*, because of the judicial conference process, are more time-consuming than *kettei*. Because discretionary *jōkoku* appeals have more often been finalised by *hanketsu* than regular *jōkoku* appeals, this might help to explain why discretionary *jōkoku* appeals have typically taken longer for the Court to finalise.

It is important to make two further observations. First, there was a notable decline in average finalisation time for *jōkoku* appeals in the period from 2003 to 2007. It is unclear why, though one possible explanation is that following 2003, the Court began finalising *jōkoku* appeals faster in order to manage the increasing number of new *jōkoku* appeals being filed (noting a corresponding increase in cases disposed from 2004 to 2007, in *Figure 12*). Second, from 2007 to 2010, the average disposition time for both regular and discretionary *jōkoku* appeals appears to have been increasing. For regular *jōkoku* appeals, this is the first time that the average finalisation time has increased since 1997.

b) Regular *jōkoku* appeals

Figure 13:

Regular *jōkoku* appeals finalised,
according to time taken for finalisation
(1989-2010)

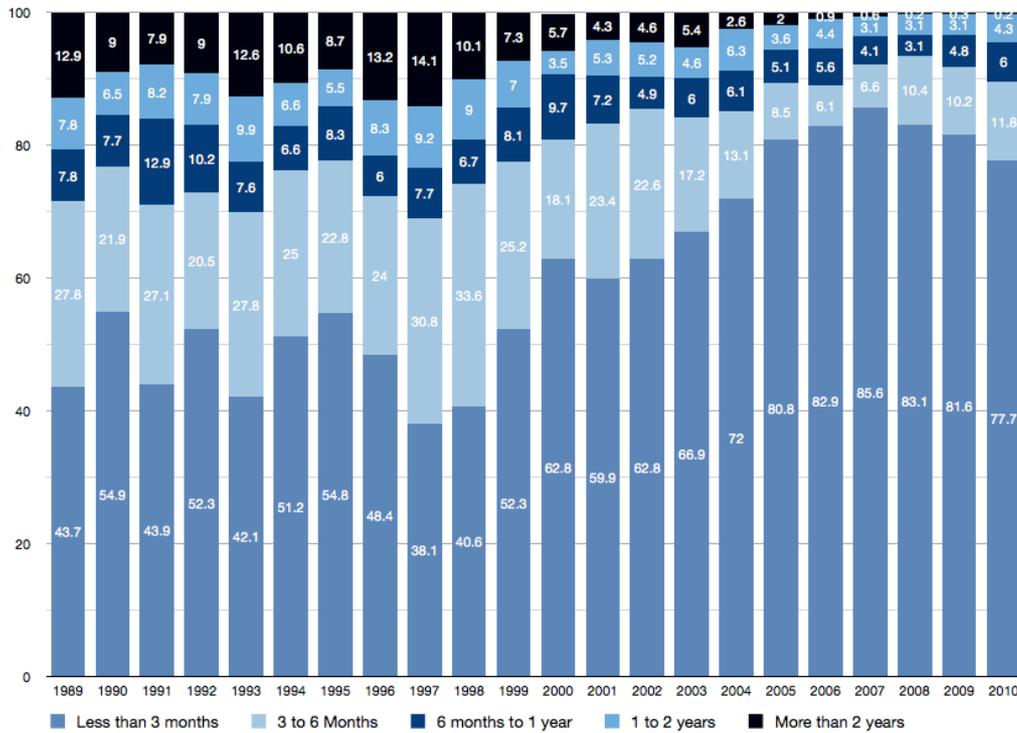


Figure 13 displays the percentage of regular *jōkoku* appeals finalised within a certain time frame each year. Since the 1996 Code came into effect in 1998, more regular *jōkoku* appeals are being resolved in a shorter time frame: where 38.1% of regular appeals were resolved within three months in 1997, in 2007 that percentage had more than doubled to 85.6%. Similarly, while 14.1% of regular *jōkoku* appeal cases disposed in

1997 had taken more than two years to be processed by the Court, this number had shrunk to 0.6% in 2007 and 0.2% in 2010.

While these trends *prima facie* suggest that the Court has become more efficient in processing appeals under the 1996 Code, they may also be a result of increases in the number of appeals filed in the Court and trends in their disposition. The overall number of *jokoku* appeal cases has increased, and the percentage of these matters disposed by *kettei* rather than *hanketsu* has also grown. Given that *kettei* take far less time to deliver than *hanketsu*, it is not surprising that regular *jokoku* appeals are taking on average less time to dispose under the 1996 Code.⁷⁰ *Figure 14*, which displays the time taken for finalisation of regular *jokoku* appeals according to how they were disposed, supports this hypothesis: all of the cases resolved within three months in 2010 were either rejected or dismissed by *kettei*, or withdrawn or settled by the parties. *Hanketsu* have tended to take far longer, with the majority being finalised within six months to two years.

Figure 14:

Time taken for finalisation
of regular *jokoku* appeals by finalisation type
(2010)

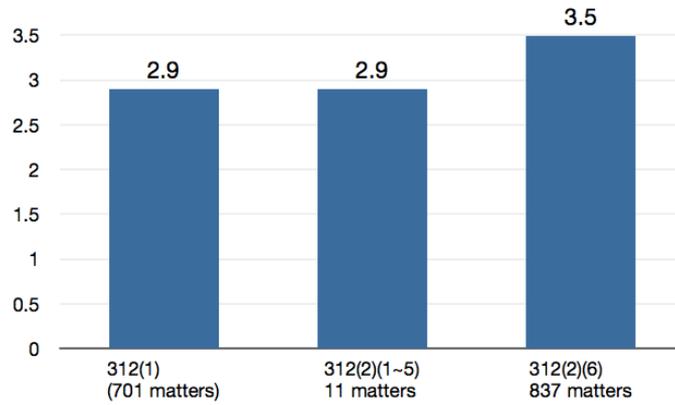
	Total	<i>Hanketsu</i> judgements		<i>Kettei</i> decisions	Withdrawn	Other
		Appeal dismissed (judgement)	Appeal allowed (judgement)			
Total	1859	3	4	1835	10	7
Average	3.1	9.0	11.3	3.0	3.0	7.3
Within	1445	-	-	1433	8	4
3 months	77.7%	-	-	78.1%	80.0%	57.1%
3 to 6 months	219	2	-	217	-	-
6 months to 1 year	11.8%	66.7%	-	11.8%	-	-
1 to 2 years	111	-	3	105	2	1
More than 2 years	6.0%	-	75.0%	5.7%	20.0%	14.3%
	80	1	1	76	-	2
	4.3%	33.3%	25.0%	4.1%	-	28.6%
	4	-	-	4	-	-
	0.2%	-	-	0.2%	-	-

The grounds for a regular *jokoku* appeal appear to affect the time taken to dispose of that application. *Figure 15* (next page) indicates that the average disposition time for regular *jokoku* appeals that were filed on the basis of Art. 312, para. 2, no. 6 (or grounds of inconsistency in reasoning) took on average 3.5 months to resolve in 2010 (including *kettei*), or 2.6 weeks longer than regular *jokoku* appeals based on other grounds.

⁷⁰ ‘There is a distinct difference in the Supreme Court between [*kettei*] and [*hanketsu*], in terms of the documents that must be prepared (and the time this requires)...’: KAMIYA, *supra* note 2, 59.

Figure 15:

Average disposition time for regular *jōkoku* appeals by grounds for appeal (months) (2010)



c) Discretionary *jōkoku* appeals

Figure 16:

Regular *jōkoku* appeals finalised annually according to time taken for finalisation (1998-2010)

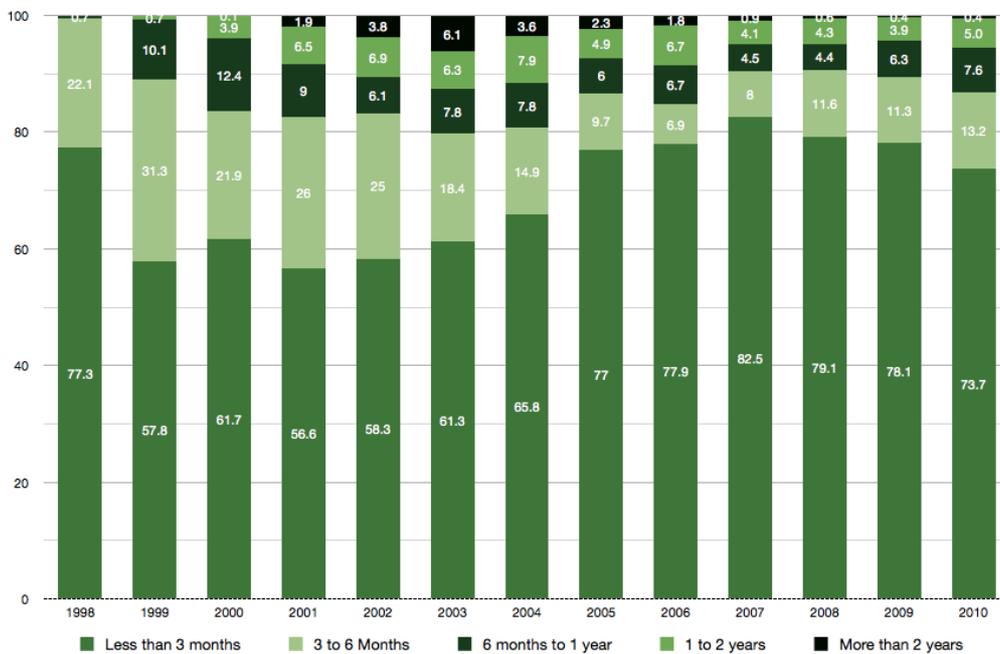


Figure 16 displays the percentage of discretionary *jōkoku* appeals finalised within a certain time frame each year. Similar to regular *jōkoku* appeals under the 1996 Code, the proportion of discretionary appeals finalised within three months has grown since 2000 but started to decline from 2007 to 2010. In comparison to regular *jōkoku* appeals, the proportion of discretionary *jōkoku* appeals resolved within three months has been lower, while the proportion of cases resolved in greater than three months, six months, and particularly two years has been markedly higher. Since 2003, the number of discretionary *jōkoku* appeals finalised in greater than two years has decreased considerably, as with regular *jōkoku* appeals.

Figure 17:

Time taken for finalisation of discretionary *jōkoku* appeals
by finalisation type
(2010)

	Total	<i>Hanketsu</i> judgements		<i>Kettei</i> decisions	Withdrawn	Other
		Appeal dismissed	Appeal allowed			
Total	2247	12	43	2166	16	10
Average	3.4	16.3	16.6	3.1	2.8	5.6
Within	1657	-	-	1638	12	7
3 months	73.7%	-	-	75.6%	75.0%	70.0%
3 to 6 months	296	-	1	293	2	-
6 months to 1 year	13.2%	-	2.3%	13.5%	12.5%	-
1 to 2 years	171	5	13	150	2	1
More than 2 years	7.6%	41.7%	30.2%	6.9%	12.5%	10.0%
	113	5	23	83	-	2
	5.0%	41.7%	53.5%	3.8%	-	20.0%
	10	2	6	2	-	-
	0.4%	16.7%	14.0%	0.1%	-	-

The longer finalisation time for discretionary *jōkoku* appeals may be related to the greater proportion of discretionary *jōkoku* appeals finalised by *hanketsu*, and the slightly lower percentage of discretionary *jōkoku* appeals being dismissed through *kettei*. Figure 17, which shows the period of time taken to dispose of discretionary appeals depending on how those cases were disposed, partly supports this hypothesis for 2010. Of the 55 *hanketsu* delivered in discretionary *jōkoku* appeal cases that year, 54 took longer than six months, and 36 took longer than a year. In 2010, the Court also appears to be taking more time to deliver judgements for discretionary *jōkoku* appeal cases than regular *jōkoku* appeal cases: an average of 16.3 months (compared to 9.0 months) for ‘appeal dismissed’ judgements, and 16.6 months (compared to 11.0 months) for ‘appeal allowed’ judgements.

4. *Summary of findings*

Before analysing the success of the 1996 Code with respect to appeals performance, it is useful to summarise the findings above. The following conclusions can be made of civil appeals performance under the 1996 Code based on the data examined in this article:

- Since the 1996 Code came into effect, the overall number of *jōkoku* appeals filed in the Supreme Court has grown, and has consumed a greater proportion of the Court's overall civil caseload. In particular, applications for discretionary *jōkoku* appeal have grown dramatically since their introduction in 1998, while applications for regular *jōkoku* appeal have noticeably decreased.
- The vast majority of all *jōkoku* appeals are still being dismissed or rejected by *kettei*, and *hanketsu* are becoming fewer.
- More and more discretionary *jōkoku* appeals are being finalised by *hanketsu*, but the number of regular *jōkoku* appeal cases disposed by *hanketsu* has declined drastically. Discretionary *jōkoku* appeals are more likely to successfully overturn a prior instance decision than regular *jōkoku* appeals.
- The average finalisation time for both discretionary and regular *jōkoku* appeals declined from 2003 to 2007, but increased between 2007 and 2010. On average, discretionary *jōkoku* appeals are taking longer to finalise than regular *jōkoku* appeals, especially those finalised by *hanketsu*.
- New trends appear to be developing from 2007 onwards, including an overall increase in *jōkoku* appeal cases and an increase in disposition times for both regular and discretionary *jōkoku* appeals.

B. *Determining Success*

Whether trends in the Court's jurisprudence following 1998 represent success of the 1996 Code depends, of course, on how success is defined and measured. This article considers two benchmarks: first, the goals of the reformers; and second, the 'rule of law'.

1. *The goals of the reformers*

(i) Reducing the number of appeals

The most frequently cited objective of the new *jōkoku* appeal procedures was to reduce the Supreme Court's workload. More specifically, by limiting appeals as of right and by providing discretionary appeals only for important legal issues, it was hoped that more cases would be resolved at an earlier stage and applications for appeal to the Supreme Court would be reduced, thus increasing the manageability of the Court's caseload and the time available to consider the 'most important legal issues'.⁷¹ However, as evi-

71 GOODMAN, *supra* note 10, 445.

denced above, the number of applications for appeal in civil cases received by the Supreme Court has *increased* under the 1996 Code. In particular, the discretionary *jōkoku* appeal introduced by the reforms has proliferated rapidly, and now represents the largest portion of civil matters initiated in the Court. If the reformers' goal was to reduce the Court's appeal caseload, the 1996 Code has not been successful based on assessment of the number of appeals filed.

However, the number of appeals being filed may not be the whole story. While the Court's caseload may have increased, it does not necessarily follow that its workload has followed suit. The majority of *jōkoku* appeals submitted to the Court are disposed through *kettei* that are largely the responsibility of the *chōsa-kan*, and the total number of *hanketsu* delivered each year has been fewer. Former justices from the Court have described their work in 'rubber stamping' *kettei* as not particularly intensive. For instance, former Supreme Court Justice Fujita, who retired from the Supreme Court in April 2010, states that in his experience the majority of appeal cases reaching Court are 'without merit, and do not require any further work beyond reviewing and approving a presiding judge's recommendations, which are often based on a research judge's report'.⁷² It is still open for speculation exactly how 'non-intensive' the Court's role in such decisions may be. It is also difficult to believe – without knowing more about the internal workings of the Court – that an increase from 2470 civil *jōkoku* appeals in 1997 to 4521 appeals in 2010 has not increased the Court's workload, even if the increase is one of simply reviewing and rubber-stamping a presiding justice's report.⁷³ Accordingly, if the goal of the 1996 Code was to reduce the Court's appeal caseload and workload, it is difficult to conclude that it has been successful in either case.

(ii) Reducing the disposition time of appeal cases

Another key goal of the 1996 Code was to reduce the time for the finalisation of cases, including *jōkoku* appeal cases at the Supreme Court level. As evidenced above, the average finalisation time for *jōkoku* appeals under the 1996 Code appears to have declined considerably since the reforms came into effect in 1998, suggesting at least some success on this front.

However, this success is qualified. First, while average finalisation times may have declined, focus on the average litigant's appeal (especially if those appeals are overwhelmingly 'frivolous' and quickly dismissed by *kettei*)⁷⁴ obscures the experience of the considerable number of appellants experiencing longer finalisation times: for instance, the 207 civil litigants in 2010 who waited for over a year to have their appeal finalised by the Supreme Court, or the 14 who had been waiting over two years. Second, *jōkoku* appeals occur in the context of a much longer trial process: while the average

72 ITOH, *supra* note 12, 43.

73 H. CHIKUSA, Japanese Supreme Court – its institution and background, in: SMU Law Review 52 (1999) 1719, 1730.

74 ITOH, *supra* note 12, 70.

discretionary *jōkoku* appeal finalised in 2010 may have taken 3.4 months in the Supreme Court, on average those cases took roughly 35 months (almost three years) since being filed at the first instance court.⁷⁵ Thus, while the average time for disposition of *jōkoku* appeals has decreased since the introduction of the 1996 Code, there is still room for debate on whether this alone constitutes ‘success’.

(iii) Direction of Court effort to more ‘important’ cases

One of the most important questions surrounding the success of the 1996 Code is whether it has effectively diverted the Court’s time and effort to the ‘most important’ cases. This was identified as the underlying purpose of reducing the Court’s appeal caseload and expediting appeal cases: to allow the Court to spend more time on the most ‘difficult’ and ‘important’ cases, produce ‘more reasoned opinions’,⁷⁶ and achieve a national uniformity of law by reviewing inconsistencies in High Court precedents.⁷⁷ This objective has elicited a great deal of apprehension from both academic observers of the Supreme Court and the justices themselves: former Supreme Court Justice Hideo Chikusa, writing while on the Court in 1997, doubted whether ‘the total energy used for disposition of final appeal cases could possibly be mobilized to the difficult cases...’.⁷⁸

It is difficult to determine whether the quality of the Court’s opinions have improved under the 1996 Code; quality of civil justice is hard to measure.⁷⁹ Likewise, it is difficult to identify which cases can be considered the most ‘important’, ‘difficult’ or ‘complicated’, particularly where so few *kettei* or *hanketsu* are published for civil cases. The statistical trends observed above suggest some success: the Court, particularly since 2002, has delivered an increasing number of *hanketsu* for discretionary *jōkoku* appeals which – under Art. 318, para. 1 of the Code – feature ‘legally important’ matters or matters concerning the consistency of Supreme and High Court precedent.⁸⁰ The Court on average is also spending longer processing these discretionary appeals than other appeals. Furthermore, within regular *jōkoku* appeals, the Court appears to be spending greater time on appeals based on Art. 312, para. 2, no. 6 (that is, cases where the reasoning of justices in the prior instance judgement contained disagreement or inconsistency), arguably representing the more ‘difficult’ or ‘complicated’ cases. These trends support the suggestion that the under the 1996 Code, Courts have diverted greater time or effort to what might be more important cases. However, further research is necessary to confirm this claim: in 2008, Justice Fujita explained that even after the 1996 reforms, the Court ‘continued to struggle in sorting out legally important cases with significant socio-economic consequences’.⁸¹

75 *Saikō Saiban-sho ni okeru*, *supra* note 41, 218.

76 KOJIMA, *supra* note 1, 721.

77 KAMIYA, *supra* note 2, 63.

78 CHIKUSA, *supra* note 73, 1727.

79 OTA, *supra* note 16, 581.

80 *Minso-hō*, Art. 318, para. 1.

81 ITOH, *The Supreme Court*, *supra* note 12, 42.

Even if the Court has been able to focus on discretionary appeal cases, this focus may have come at the expense of attention to other arguably important matters. There has been a drastic decrease in regular *jōkoku* appeal cases considered for judgement, and the Court appears to be spending less time and effort addressing questions of Constitutional violation or misinterpretation (grounds for a regular *jōkoku* appeal under Art. 312 para. 1, and thus excluded from the grounds of discretionary *jōkoku* appeal under Art. 318). In 2004, when this trend began to manifest, representatives from the General Secretariat of the Supreme Court explained that despite the Court's 'undeniably still heavy' caseload, '...most of the justices currently serving on the Supreme Court would say that, however busy they may be, questions of constitutionality can always be decided...'.⁸² The statistics suggest some reason for suspicion: in 2010, as evidenced above, the Court delivered only four judgements for civil cases based on grounds of Constitutional misinterpretation or violation, with some Constitutional law academics blaming this dearth on the Court's persistently heavy caseload and the growing burden of screening applications for discretionary appeal.⁸³

Thus, when considering the success of the 1996 Code's appeal procedures in light of the reformers' original objectives, there appears to have been only limited success. The Court's civil appeal caseload is undeniably greater under the 1996 Code. The average finalisation time for *jōkoku* appeals has been decreased, though delay persists for a considerable number of litigants. Finally, it is questionable whether the ultimate goal of the appeals reform – to focus the Court's effort on the more 'important' legal questions put forth on appeal – has successfully been achieved: more discretionary appeals on 'important legal questions' are being heard, but it is difficult to determine whether this in itself constitutes success.

2. *Rule of law or 'rubber stamp' justice?*

The goals of the reformers offer one perspective in evaluating the success of the 1996 Code. However, it is important to consider whether the new appeal procedures can be evaluated against other benchmarks, one being the extent to which the reforms have facilitated the 'rule of law'.

The rule of law is a difficult concept to define and a complicated benchmark for evaluating a legal system.⁸⁴ In the judicial context, it may be defined as existing if a legal system offers 'a reliable means of resolving legal disputes within a nation'.⁸⁵ It therefore includes factors such as the speed of trials, public confidence in the Courts, and the extent to which appellate procedures provide litigants with the chance to have

82 JAPANESE HOUSE OF REPRESENTATIVES, *Minutes of the Subcommittee on Ideal Constitution as Supreme Law (Third Meeting) Thursday, March 25, 2004* (2004) http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20040325slf.htm.

83 *Ibid*, 2: see especially 'Main points of Professor Sasada's statement'.

84 LORD BINGHAM, *The Rule of Law*, in: *Cambridge Law Journal* 66(1) (2007) 67.

85 GOODMAN, *supra* note 27, 517.

their matter ‘properly heard’ by a Court.⁸⁶ The concept is considered here for two reasons. First, judicial reform in Japan has frequently cited strengthening of the rule of law as its central aim.⁸⁷ Second, other authors have frequently used the rule of law to evaluate the success of the 1996 Code. In the years immediately following reform, Kamiya criticised the 1996 Code on rule of law grounds, arguing that restricting the right of final appeal to the Supreme Court infringed procedural justice and endangered public confidence in the Court.⁸⁸ Goodman in 2004 also analysed the success of the reforms in terms of whether they had fostered a ‘rule of law dispute resolution mechanism’, concluding that reforms had only limited success.⁸⁹

As evidenced above, the 1996 Code in practice has not significantly restricted appeals to the Supreme Court; instead, more *jōkoku* appeals are being filed. However, the question remains whether the Code has facilitated *meaningful* access. Under the 1996 Code, the Court has grown even more reliant on the *chōsa-kan* to cut a swath through its increasingly heavy caseload.⁹⁰ While the *chōsa-kan* are highly trained and professional judges in their own right, they ‘consider it their responsibility to ensure the [Court’s] decisions are consistent with its own existing case law’, and ‘do not feel free to suggest, and indeed discourage, departures from precedent’.⁹¹ They recommend dismissal in the vast majority of appeal cases.⁹² If the Court only has the time to ‘rubber stamp’ these recommendations for *kettei* dismissal, as recently retired justices have described, the 1996 Code may have compromised the ability of civil litigants to have their appeal properly ‘heard’ by the Court.⁹³ Thus, whether the current *jōkoku* procedures have provided meaningful access to the Courts is questionable: the increasing reliance on reports of the hesitant *chōsa-kan* in processing (and more importantly, dismissing) appeals may suggest ‘rubber stamp justice’ rather than rule of law success.

86 K. OHBUCHI et al., Procedural Justice and the Assessment of Civil Justice in Japan, in: *Law & Society Review* 39(4) (2005) 875, 875.

87 See especially C.F. GOODMAN, *The Rule of Law in Japan: A Comparative Analysis*, Second Revised Edition (The Hague 2008) 5; see also V. TAYLOR/J.O. HALEY, Rule of Law in Japan, in: Peerenboom (ed.), *Discourses on Rule of Law in Asia* (London et al. 2004) 446; C.J. GREEN, Japan: “The Rule of Law Without Lawyers” Reconsidered, in Milhaupt et al. (eds.) *The Japanese Legal System: Cases, Codes and Commentary* (New York 2006) 154.

88 KAMIYA, *supra* note 2.

89 GOODMAN, *supra* note 27.

90 CHIKUSA, *supra* note 73, 1727.

91 D.S. LAW, The Anatomy of a Conservative Court: Judicial Review in Japan, in *Texas Law Review* 87(7) (2009) 1545, 1581.

92 *Ibid.*

93 MATSUI, *supra* note 5, 1412.

IV. IS THERE NEED FOR REFORM IN THE FUTURE?

二兎を追う者は一兎をも得ず

Nito o ou mono wa, Itto o mo ezu

A man who chases two hares doesn't even catch one.

Fifteen years after the introduction of the 1996 Code, the Court's 'staggering' *jōkoku* caseload continues to increase. As a leading American authority on Japanese law, John Haley, argues, the 'number of appeals the Court must decide remains a major problem' and, he argues, 'reduces the quality of its decisions'.⁹⁴ Ultimately, whether reform of the Supreme Court's appeal procedures is necessary or desirable in the future – and what that reform might look like – depends on the role expected of the Court. At present, there is a chronic lack of consensus on the proper function of Japan's highest Court, and the jobs demanded of it are many: 'interpret the Constitution, unify statutory interpretations and legal doctrines, correct errors which occurred in the courts below, and administer justice...', all without any significant discretion over its docket.⁹⁵

Simultaneously, there is a tension between those who hope for a more judicially active Court (particularly on matters of Constitutional review), and those who seek to affirm the Court's traditional role as a 'court of errors' that only 'occasionally exercises the power of review in a fairly passive way'.⁹⁶ The appeal procedures under the 1996 Code in many ways reflect a difficult compromise between these two strongholds: on one hand introducing a system of discretionary appeal to allow the Court to focus on the more important legal questions, but failing to provide any effective screening mechanism (other than the ideologically predisposed *chōsa-kan*) to control the large number of applications that would result.

If the Court in future is expected to engage in more creative judicial decision-making and judicial review (and particularly Constitutional review), there ultimately needs to be reform that allows for effective limitation of its caseload.⁹⁷ Comparative law professor Takeshi Kojima argues that this shift in the Supreme Court's role – towards what he calls a 'common-law style Court' – is inevitable, as legal reform and economic deregulation in Japan create the need for a Court that serves 'not only as an organ of protecting individual rights, but as an organ for social control, shaping the law to reflect social change'.⁹⁸

94 HALEY, *supra* note 9, 106.

95 KAMIYA, *supra* note 50, 1624.

96 KAMIYA, *supra* note 2, 55, 56.

97 MATSUI, *supra* note 5, 1420–21.

98 KOJIMA, *supra* note 1, 722. For a discussion of whether this change is already becoming visible in the Supreme Court's jurisprudence, see also T. FUJITA, *The Supreme Court of*

Possible reforms to appeal procedures could include additional limitations on the right of appeal or discretionary appeals, or a new screening mechanism (for instance, where petitions for appeal are handled by the High Court,⁹⁹ or separate petty benches are established as ‘auxiliary organs’ of the Supreme Court).¹⁰⁰ However, appeal reforms alone will not give rise to a more judicially active Supreme Court: Supreme Court judges are ‘plugged in’ to a system of heavy ‘monitoring and mentoring’ that precludes the type of judicial activism seen in countries such as the United States or Australia,¹⁰¹ and the Court ‘has not traditionally seen the Constitution as a source of positive law to be enforced by the judiciary’.¹⁰² From that perspective, those seeking a more judicially active force in the Japanese legal system – specifically in the area of constitutional review – should also consider reform elsewhere, such as the establishment of a separate ‘special high court’ to hear appeals from High Courts,¹⁰³ or a Constitutional Court designed specifically to handle matters of Constitutional violation or misinterpretation.¹⁰⁴

Alternatively, if the Court is expected to maintain its role as a ‘court of errors’ – with appeals serving as a means for litigants to ‘vindicate their rights, rather than vehicles for moulding general policy’¹⁰⁵ – there may be little need for appeals reform. Instead, the Court’s increasingly heavy caseload could be managed ‘by proper structural changes of the judiciary, including increasing the number of justices’, or even increasing the number of *chōsa-kan*.¹⁰⁶ In either case, any future reform of appeals procedures should begin with a proper discussion of the Court’s role, an ingredient many feel was missing from the 1996 reform efforts, and partly to blame for the reforms’ mixed and limited successes.¹⁰⁷

Japan: Commentary on the Recent Work of Scholars of the United States, in: Washington University Law Review 88(6) (2011) 1507, 1519; J. SATOH, Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight, in: Loyola of Los Angeles Law Review 41 (2008) 603.

99 KAMIYA, *supra* note 2, 62, 63.

100 JAPAN HOUSE OF REPRESENTATIVES, *supra* note 84, 1.

101 HALEY, *supra* note 8, 99.

102 MATSUI, *supra* note 5, 1376.

103 E. SASADA, *Shihō no henyō to kenpō* [Changes in the Judiciary and the Constitution] (Tokyo 2008) 15. See also HOUSE OF REPRESENTATIVES (Japan), Final Report of the Research Commission on the Constitution (15 April 2005) [http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/report.pdf/\\$File/report.pdf](http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/report.pdf/$File/report.pdf).

104 See e.g. MATSUI, *supra* note 5, 1417; ITOH, *supra* note 11, 389; LAW, *supra* note 93, 1577.

105 KOJIMA, *supra* note 1, 720.

106 KAMIYA, *supra* note 2, 63. See also M. YOSHIDA, The Reluctant Japanese Litigant: A ‘New’ Assessment, in: Electronic Journal of Contemporary Japanese Studies 5 (2003), available from <http://www.japanesestudies.org.uk/discussionpapers/Yoshida.html>.

107 *Ibid*, 63.

V. CONCLUSION: WHY HASN'T REFORM HAPPENED?

Despite the failure of the 1996 Code to reduce the number of appeals in the Supreme Court, there have been no substantial changes to Supreme Court appeals under the Code since 1998. In fact, despite the large-scale judicial reform in Japan over the past decade, there have been no substantial changes to the Supreme Court in general.¹⁰⁸ As Ota writes, 'the schedule by which laws will be enacted or reformed has been set by bureaucrats', acting 'not so much in response to societal necessity, as in accordance with [the Ministry of Justice's] priorities'.¹⁰⁹ After fifteen years of increasing appeal caseloads, the lack of further reform suggests that reducing the Court's caseload is not on the Ministry's list of priorities. It may also point to the Ministry's preference that the role of the Supreme Court continue to exist predominantly as a court of errors, rather than a vehicle of social change or judicial review.¹¹⁰ Indeed, Japanese government has arguably benefited from a Supreme Court that has rarely used its Constitutional power to challenge government action.¹¹¹

Whether or not the role of the Supreme Court should or does change, the rising number of *jōkoku* appeal cases filed in the Supreme Court under the 1996 Code gives cause for concern. While *jōkoku* appeals are being finalised faster on average and the Court is arguably focusing its effort on more legally important cases, the Court's appeal caseload has increased drastically since 1998 contrary to the reformers' stated goals. This has created an enormous burden upon the justices and increased their reliance on the *chōsa-kan*'s recommendations, raising questions about the accessibility of the Court itself, and the repercussions for the rule of law. Ultimately, however, the desirability and likelihood of reform to appeal procedures in the future depends on the role expected of the Supreme Court: if that role is to be more than a court of errors, further changes to final appeal procedures under the 1996 Code are required.

ABSTRACT

In 1996, reforms to the Code of Civil Procedure significantly changed the scope of appeal to the Supreme Court of Japan. A key objective of the reform was to reduce the Court's heavy caseload. The new appeal procedures restricted appeals 'as of right' to the Court, and introduced a new form of 'discretionary' appeal to give the Court greater control over its docket. Over fifteen years later, this article presents the first long-term statistical analysis of Supreme Court appeals under the 1996 Code. It finds that, contrary to the reformers' original goals, final appeals filed in the Supreme Court have increased signifi-

108 See e.g. D. FOOTE, The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan, in: Washington University Law Review 88(6) (2011) 1745.

109 OTA, *supra* note 16, 566.

110 GOODMAN, *supra* note 10, 443.

111 ITOH, *supra* note 12, 253.

cantly since the 1996 Code came into operation. In particular, the number of discretionary appeals has increased dramatically under the 1996 Code.

The article begins with a discussion of the drivers of reform and the technical changes to appeals introduced by the 1996 Code. Second, it analyses the statistical evidence on appeals performance over the past two decades, focusing on the number of applications for appeal filed, how those appeals are finalised, and the average times for finalisation. The third section of this article discusses the 'success' of the reforms by reference to the reformers' original objectives and the rule of law. The statistical evidence suggests that, while the Court's civil appeal caseload has increased drastically under the 1996 Code, those appeals are being finalised faster on average and the Court is arguably focusing its effort on more legally 'important' cases. The final portion of this article discusses whether there is need for further reform in the future, ultimately concluding that the desirability of further changes to appeal procedures depends on the role expected of the Supreme Court in the Japanese civil justice system.

ZUSAMMENFASSUNG

Die Reform des Zivilprozessgesetzes im Jahr 1996 hat die Möglichkeit, beim Obersten Gerichtshof Revision einzulegen, erheblich eingeschränkt. Ein wesentliches Ziel der Reform war, den OGH zu entlasten. Nach den neuen Regeln ist das „Recht auf Einlegung einer Revision“ beschränkt und im Gegenzug eine neue Form der Revision geschaffen worden, bezüglich deren Annahme der OGH einen Beurteilungsspielraum bekommen hat, um damit die Zahl der zu entscheidenden Verfahren besser steuern zu können. Mehr als 15 Jahre nach dem Inkrafttreten der Reform untersucht Der Beitrag erstmals eine langfristig angelegte statistische Analyse der unter der reformierten Regelung eingelegten Revisionen. Er kommt zu dem Ergebnis, dass die Zahl der Revisionen in dem Zeitraum entgegen dem Ziel der Reform nicht ab-, sondern zugenommen hat. Dies gilt insbesondere für die Revisionen, über deren Annahme der OGH nach seiner Beurteilung entscheiden kann und deren Zahl dramatisch zugenommen hat.

Der Beitrag beginnt mit einer Übersicht über die Motive für die Reform von 1996 und deren Ausgestaltung. Zum Zweiten analysiert er das statistische Material der vergangenen zwei Jahrzehnte bezüglich der Einlegung von Revisionen, deren Erfolgsquote und der Dauer. Der dritte Abschnitt des Beitrages untersucht den „Erfolg“ der Reform gemessen an deren ursprünglichen Zielen und rechtsstaatlichen Grundsätzen. Die statistischen Auswertungen ergeben, dass die Zahl der eingelegten Revisionen in Zivilsachen unter der Geltung der 1996 novellierten Regelungen stark zugenommen hat, dass sich zugleich aber die Verfahrensdauer im Durchschnitt wesentlich verkürzt hat, was indiziert, dass der OGH sich auf rechtspolitisch „wichtige“ Fälle zu konzentrieren scheint. Der letzte Abschnitt diskutiert, ob es in der Zukunft weiterer Reformen bedarf, was am Ende davon abhängt, welche Rolle man dem OGH im japanischen Justizsystem zuweisen möchte.

(Übers. durch d. Red.)