Civil Execution in Japan: the legal economics of perfect honesty

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Bailiffs ... are generally mean persons employed by the sheriffs on account only of their adroitness and dexterity in hunting and seising their prey. (W. Blackstone) [1]

I'll be back. ("the Terminator", in *Terminator*) [2]

Introduction

At the blunt end of every plaintiff's judgment worthy of the name, a deeply unpopular individual stands ready to impose its terms on the losing party. Under current Japanese law, this melancholy task falls to a special class of public servants who bear the title of *shikkōkan* (執行官). Even given the small size of the Japanese judicial establishment, these are relatively few in number. As at 1 January 1997, there were 521 such officers. The number of filings for civil execution per officer

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per year stands (very roughly) at about 770. As a point of comparison, similar figures for England (with about three fifths the population of Japan) show 2,800 bailiffs, and about 470 cases per officer.[3] These figures will not astonish anyone accustomed to seeing small staff numbers and large workloads next to the Japanese legal system. But as Hobbes reminds us, civil judgments in any country have little utility apart from their value as a basis for civil execution. How did the Japanese execution system come to have such small teeth? And how does it sustain the judicial system that apparently thrives above it?

The answers to these questions have implications for the long-running debate over the effectiveness of the Japanese courts. Since the publication some 20 years ago by John Haley of *The Myth of the Reluctant Litigant*,[4] two lines of argument concerning the relationship between Japanese courts and the society of which they form a part have emerged. One position, first explicitly forwarded by Haley himself in 1982,[5] begins with the observation that the Japanese legal system is remarkable for the weakness of the sanctions available to its courts. Haley argues that this weakness of court sanctions has permitted alternatives for the resolution of disputes to survive and flourish in Japanese society.[6] The courts are thus seen to be less central to social ordering than courts in societies (such as England, Germany and the United States) which back up their judges with more muscle.

An alternative view was proposed by Mark Ramseyer in his decennial comment on the implications of *The Reluctant Litigant*. Reexamining Haley's principal argument through the lens of economic analysis,[7] Ramseyer pointed out that while litigation can be discouraged by high costs, it can equally well be rendered unattractive by a court that is able to send very clear signals to litigants about probable outcomes:

> "By focusing on litigation costs, 'The Reluctant Litigant' seemed to say that litigation was scarce because the system worked *poorly*. Japanese avoided the courts, it implied, because the courts were cumbersome and expensive and offered inadequate remedies. Yet ... Japanese may be settling out of court more because the system is predictable than because it is expensive. If so, then they are settling their disputes because judges are doing their job properly. Litigation may be scarce, in short because the system works *well*.[8]

These hypotheses are not mutually exclusive, in fact, but the small size of the civil execution establishment raises problems for both. In Haley's model, the effect of cost, delay and the lack of judicial contempt powers in Japanese judges is to provide limited access to a service for which there is a large unsatisfied demand:

> What is remarkable about the Japanese legal system is not that people are reluctant to sue, but that they sue at all. Despite these hurdles, the demand for relief, for sanctions, strains the legal resources of Japan to their limits.[9]

Broadly speaking, this view assumes that sanctions can be had, at a cost in money and time, once the arduous path of litigation has been traversed.[10] But if the sanctioning establishment becomes glutted with judgments, that fact should by itself reduce the demand for the service that the courts have on offer. The civil justice system should be as slim

as the sanctioning establishment is weak. The fact that it is not wants explaining.

In the rational settlement model forwarded by Ramseyer, an undersized enforcement engine introduces a different set of problems. Consistent, predictable judgements by the courts and early signalling of likely outcomes by judges will, he argues, foster a strong back-wash of settlements. But this is true only insofar as there is an expectation that judgements that *are* handed down by the court are reasonably certain to be enforced. If the court is unable to deliver the goods, so to speak, the parties should not settle in line with what they expect the court to say. If they do, they may be behaving sensibly — but not rationally, since they would then be shaping their behaviour on the basis of words, not deeds.

Settlement models suggest that erratic judgments (coupled with strong enforcement) should lead to increased levels of litigation as parties gamble on the outcome (as, Ramseyer notes, may be the effect of jury awards in the United States). If the same logic applies to the execution process, weak enforcement should lead to an increased demand for the service of private armies, with their attendant problems of lawlessness, uncertainty and inefficiency.[11] In fact, the Japanese civil justice system suffers from precisely this problem.[12] But it was not always so.

The Early Execution Establishment

The original civil execution officers in Japan, known as *shikkōri* (執行吏),[13] were introduced by the Imperial Order of 4 May 1886 that created the first national system of courts in the imperial era.[14] This brief

order provides that the *shikkōri* are to be responsible for delivering documents issued by the court, and for enforcing court orders. It is completely silent on the method of their appointment and terms of employment. The position is said to have been modelled on either the Prussian post of *Gerictsvollzieher*, or the French *huissier* from which the former was derived.[15] It may therefore be that, like their Continental counterparts, they worked on a commission basis. In any case, with the passage of the *Saibansho kōsei hō* (裁判所構成法)[16] and the *Minji soshō hō* (民事訴訟法)[17] of 1890, the title of these officers was changed from *shikkōri* to *shittatsuri* (執達吏), and their responsibilities were spelled out in greater detail.

The *shittatsuri* system established by the 1890 legislation lasted without major change until the end of the Second World War. The position and duties of these early officers differed in significant respects from the *shikkōkan* of today. They were also somewhat more plentiful; the Ministry of Justice figures presented in **Table 1** show that their average population between 1927 and 1936 was about 630 nationwide.[18] The power of appointing *shittatsuri* resided in the Home Minister,[19] who was permitted to devolve the authority for making appointments to the head justice in each of the district courts. As this arrangement suggests, appointments were made on a jurisdictional basis; a *shittatsuri* was appointed to serve within the area covered by a specific district court. Their offices (referred to by the same name as the officials themselves) were not located inside the court, but in a separately established office. The separation in space reflected a separation in function and in status; unlike other publicly appointed officials, the *shittatsuri* were not paid a salary. Instead they undertook work on behalf of judgement creditors under a form of quasi-private contract,[20]

Table 1

Year	Officers	Old	New	Service	Lawsuits
1927-1936	630	170,394	627,648	2,266,599	
1955	328	178,642	298,201	1,031,037	417,000
	335	199,569	295,885	999,063	415,000
	339	205,307	314,291	1,048,057	419,000
	349	238,191	352,503	1,144,333	449,000
	352	268,089	359,718	1,082,746	435,000
1960	354	279,288	347,098	1,121,748	413,000
	349	292,625	317,001	1,224,049	388,000
	343	304,705	302,684	1,382,956	383,000
	345	307,474	280,354	1,302,875	375,000
	334	308,493	286,842	1,083,135	404,000
1965	330	312,391	312,334	993,980	461,000
	341	325,295	314,169	897,511	488,000
	361	343,859	302,773	861,629	502,000
	368	359,997	314,399	771,801	525,000
	360	365,523	300,336	659,646	505,000
1970	354	362,568	290,976	617,022	506,000
	354	349,008	289,614	512,870	512,000
	356	336,000	259,474	414,367	481,000
		300,371	208,194	316,073	438,000
		259,078	217,551	265,472	445,000
1975		222,672	244,875	227,478	477,000
		214,081	265,032	216,201	505,000
		195,908	306,840	176,834	562,000
		183,034	328,184	158,245	590,000
		171,670	343,203	153,129	626,000
1980		162,692	369,575	141,224	716,000
		163,814	398,493	101,231	782,000
		168,846	441,041	98,829	920,000
		160,415	363,950	91,140	1,074,000
		165,006	426,594	89,465	1,267,000
1985		175,535	464,154	50,006	1,207,000
		176,975	483,598	35,159	1,138,000
		163,995	517,143	26,212	1,085,000
		152,730	480,000	20,000	961,000
		123,644	412,611	18,949	826,000
1990		90,933	332,631	16,538	792,000
		73,278	322,062	16,512	891,000
		74,409	351,836	18,897	1,063,000
		84,358	375,645	19,201	1,146,000
		87,667	386,633	16,918	1,173,000
1995		89,034	402,135	14,517	
		87,274	403,097	12,495	
	521	74,777	387,964	10,989	

Sources: C. Wollschläger, *Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics*, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM (1997); 司法統計年報 (民事編).

and unless their income fell below a specified support threshold they earned their keep entirely from commissions. This arrangement, like other aspects of the *shittatsuri* system, closely followed Continental institutions of that time. But it was not adopted blindly.

The drafting committee responsible for the Code of Civil Procedure of 1890 engaged in a fierce debate over the terms on which the new *shittatsuri* should be retained. The scholars drafting the code initially proposed a salaried position. Upon receiving this, some members of the committee suggested that a commission-based system (following the then-existing French and Prussian models) be adopted instead. Their concern — a salutary reminder to anyone tempted to doubt the intention behind the Meiji legal reforms — was that these officers should be given strong incentives to enforce judgments under the new law. Proponents of a salaried position argued that the more mercenary commission-based system would lead to abusive over-reaching, and bring the legal system into disrepute among the general population. Opinions divided, but when the matter was put to a vote, the commission-basis camp won the day.[21]

Other features of the *shittatsuri* system further promoted the aggressive enforcement of judgments. Civil execution against goods requires fast action in any country; Japanese procedural law permitted judgment creditors to submit petitions for enforcement against goods directly to the *shittatsuri* once judgment had been obtained.[22] A judicial warrant of execution was required only for execution against immoveables and choses in action, which were, however, easier to trace because subject to public registration. Japan was not unusual in this regard, but it is worth noting that such provisions scrupulously track the creditor's interest.

Most interesting, however, is the atmosphere of competition that permeated the *shittatsuri* system. Where more than one officer was appointed to work within a given jurisdiction, they shared the same quarters.[23] But judgment creditors were permitted to direct their collection matters to a specific *shittatsuri* if they wished. Officers were prohibited, in principle at least, from cooperating in enforcement work; so although their numbers were limited, those in more populous jurisdictions were nonetheless placed in a position of direct competition with one another. Furthermore, each was permitted to sub-contract his work to deputies, who carried the same authority as the *shittatsuri* themselves, and for whose acts the *shittatsuri* were held directly accountable.[24] The system thus introduced fulfilled the entire expectations of the committee that drafted the legislation. The new officers were indeed aggressive in their enforcement of court judgments. And they were indeed reviled by the general population.

In this, as in many other areas of Japan's nascent legal system, there was soon talk of reform. In 1925, the Home Ministry convened an Investigative Committee on the Revision of the Compulsory Execution and Auction Acts, and supplied it with some of its own complaints about the operation of the then-existing system.[25] Whatever problems had been identified, the committee did not seem to feel root and branch reform was in order. A report emerged in 1931, among the recommendations of which was that:

> Execution work should be [kept] separate from the court, and passed to a special agency established for this purpose. But the position of the *shittatsuri* should remain as it is at present.

A subcommittee subsequently considered concrete options, such as the creation of an Execution Bureau, and merger of the *shittatsuri* into the courts (this option was ultimately adopted, some 30 years later). But like a number of other proposals for legislative reform in this period, the work of the committee was overtaken by events, and lay dormant until after the war.

Following the war, the title of the execution officers was changed (from *shittatsuri* to *shikkōri*, and powers of appointment were devolved formally to the district courts.[26] Their activities were gradually brought under closer supervision.[27]

Apart from these changes, the system was left untouched, but the economic position and quality of the *shikkōri* service was said to have declined in the immediate postwar period. The closer supervision to which officers were subjected may have been part of the reason for this, but the commission system was probably the leading factor; for obvious reasons, litigation rates declined, and resistance to civil execution increased, in the immediate aftermath of the war.[28] Dependent as they were on commissions, the *shikkōri* found it hard to make a living, and most found themselves relying on the minimum payment provided to them by the state in the event of a shortage of commission work.[29] With the recovery of the economy, their business appears to have returned, but concern over inefficiency and corruption in the execution system had begun to mount in official circles.[30] In 1950, the Supreme Court convened an internal committee of judges to investigate, which ultimately forwarded its findings to the Law Reform Committee,[31] requesting a formal response on the question of revision of the *shikkōri* system. This was followed by a consultative exercise led

by the Ministry of Justice, the results of which were published in November of 1955. After this point the sources fall silent for a decade, but a full-scale overhaul of the staffing of the service took place in 1966, with the passage of the Shikkōkan Act.[32] This has been followed in due course by a number of reforms affecting execution procedure to a greater or lesser degree: the Civil Execution Act of 1979;[33] the Provisional Remedies Act of 1989;[34] amendments to the Provisional Remedies Act in 1989;[35] and the passage of a revised Code of Civil Procedure in 1996.[36]

All of these reforms have been concerned, in some part at least, to combat abuses in the execution process. Curiously, this was arguably aggravated at the first step of the reform process, with the passage and implementation of the 1966 Shikkōkan Act (which was intended, as it happens, to have precisely the opposite effect). We now turn to a consideration of this initial reform.

Problems Observed in 1954

The published result of the consultative exercise conducted by the Ministry of Justice is a welcome resource. Legal institutions react to corruption in much the same way that a civilised person reacts to sarcasm; if the underlying tension can be dispelled without comment, that is all to the good. Only when the badgering becomes persistent enough to interfere with the normal flow of conversation is the challenge openly acknowledged and faced down. In 1954, under the bland title of "A Collection of Opinions on the Subject of the Reform of the *Shikkōri* system", the Japanese legal establishment stooped to take up the glove.

A set of queries was put to district courts, public prosecutor offices,

shikkōri, the bar associations (including the Japan Federation of Bar Associations), and university law faculties. Respondents were asked to comment on a series of issues relating to reform of the execution system:

- The position of the *shikkōri* within the administrative framework of the civil justice system.
- The scope of duties appropriate to the *shikkōri*.
- The status of the *shikkōri* as public officials under the new Public Officials Act.[37]
- The method of paying *shikkōri* for their services.
- The availability and use of deputies.
- Other comments.

In the report, the responses from lawyers and participating university law faculties on these issues are reproduced verbatim; responses from other institutions are reported in summary form. The report provides an invaluable, multi-faced window on the nature of the problems in civil execution as perceived at that time.

References in the report to the precise shortcomings of the execution system tend to be oblique or truncated, but the return from the Meiji University Faculty of Law and Economics is reasonably clear. Responding to the question concerning deputies, the faculty states:

> There should be careful reflection on the present system of execution assistants. It is not going too far to say that this system is the cause of much of the misunderstanding surrounding the position of the *shikkōri*.

> The process is as follows. The *shikkōri*, in carrying out civil executions, often need to call on workers to transport goods and the like; and so it has become a standard practice to retain people in the conduct of execution. And it has become practice to retain these workers as assistants (as provided under Code of Civil Procedure sec.537). These workers have become professionalized, and a certain class of disagreeable persons [38] has come to gather at the offices of the *shikkōri* in search of work. The *shikkōri*, with a hard-hearted task on their hands, have come to realize that by making use of the disagreeable aspect of these persons, they can clear up cases more rapidly. [39]

This passage tells us that the *shikkōri* made good use of their separate premises, their relative independence from court supervision and their freedom to retain deputies.[40] We are not told whether the "disagreeable persons" referred to here sported body tattoos or lacked one or more digits of the left hand, but they were presumably marginal persons with little (mainstream) reputation to lose, and possessing the authority that travels with a veiled threat of violence. Assuming that this was the case, they differed from Blackstone's bailiffs only in that their selection was not subject to bond.[41] Abuses by these deputies were one of the principal problems that motivated the review of the then-existing *shikkōri* system.

The overall result of the consultation exercise is summarised in **Table 2**. The division of opinion over whether the system of deputies should be retained is instructive. The highest percent of support was voiced by the *shikkōri* themselves (at 35%), while 30% of bar associa-

Table 2

Issue	Position	Rate of agreement						
		Courts	Shikkōri	Universities	Bar Associations		Prosecutors	Average
					Nat'l Fed'n	Indiv. Assns		
Position of the shikkōri	Status quo	(22) 21%	(13) 27%	(4) 44%	no	(6) 20%	(2) 5%	(47) 20%
	Execution under the sole control of the execution court	(44) 42%	(14) 29%	(4) 44%	yes	(22) 73%	(6) 16%	(90) 39%
	Execution under the sole control of an execution office of the court	(11) 10%	(5) 10%	none	no	none	none	(16) 7%
	Execution under the sole control of shikkōri	none	(5) 10%	none	no	(1) 3%	(1) 3%	(7) 3%
	Place shikkōri under the control of an administrative agency	(1) 1%	none	(1) 11%	no	none	(20) 54%	(22) 10%
Duties	Status quo	(38) 36%	(21) 43%	(2) 22%	no	(14) 47%	(7) 19%	(82) 35%
	Restrict to execution matters	none	none	(1) 11%	no	(2) 7%	(5) 14%	(8) 3%
	Exclude service of process matters	(25) 24%	(12) 24%	(5) 56%	yes	(5) 17%	(12) 32%	(59) 26%
	Need for special execution office for labor matters	(6) 6%	(2) 4%	none	no	(5) 17%	(1) 3%	(14) 6%
	Need for special execution office for family matters	(15) 14%	(1) 2%	none	no	(5) 17%	(2) 5%	(23) 10%
Status	Status quo	(8) 8%	(9) 18%	none	no	(6) 20%	(2) 5%	(25) 11%
	Full public servant	(68) 64%	(29) 59%	(9)100%	yes	(20) 67%	(28) 76%	(154) 67%
Pay	Status quo	(10) 9%	(16) 33%	(1) 11%	no	(7) 23%	(4) 11%	(38) 16%
	Salary	(51) 48%	(17) 39%	(8) 89%	yes	(11) 37%	(26) 70%	(113) 89%
	Salary plus commission	(13) 12%	(5) 10%	none	no	(11) 37%	(2) 5%	(31) 13%
Supporting actors	Provide for execution agents	(14) 13%	(17) 35%	(2) 22%	–	(9) 30%	(6) 16%	(48) 21%
	Eliminate execution agents	(60) 57%	(23) 47%	(5) 56%	–	(9) 30%	(13) 35%	(110) 48%

* Figures in parenthesis show the number of responses. Percentage figures show the Proportion of responses in that category against total returns.

Source: 小野木常, 執行吏制度改善に関する意見集 136– 37 (1955).

tions also favour its retention; these are the groups which benefited most directly from a rigorous execution system (and had the least to lose, it should be said, in reputational terms).[42] The system was most strongly opposed by judges and public prosecutors, presumably because of their stake in the public image of the legal system as a whole, and their responsibility for enforcement of the criminal law.

The ultimate result of reform efforts was the Shikkōkan Act of 1966, which remains in force today. In addition to giving civil execution officers a new title, the new Act continued the process of bureaucratisation that had been initiated by the tightening of court supervision in 1954. The *shikkōkan* were moved from their separate residential premises to new offices inside the district courts themselves. A system of training was introduced, and an effort was made to raise the quality of officers through a more rigorous selection process. The former requirement that applicants pass "an examination on the relevant law" was replaced by an examination and interview, the examination portion of which can be waived for applicants who are judicial clerks (書記官). Applicants must also be Civil Service grade 7 staff or above, and be 40 years of age or older. The commission system was retained intact, and a few officers were added to the service in the year the legislation was introduced.

The most important change, however, was the elimination of the deputy system; as public officials, the new *shikkōkan* are not permitted to delegate their functions to others. At a stroke, the new legislation thus produced a substantial drop in manpower.

The Economics of Execution

We can most easily understand what was wrong with the pre-1966 execution engine, and what the effect of reform was on the execution process, by considering how creditors, debtors and enforcement officers might best have sought to maximise their respective benefits from the system.[43]

The Problem in 1954

The most frequently cited problem in the 1954 survey is the intervention of outside middlemen.[44] The establishment view of such middlemen was (and is) that they are parasites on the execution process who injure creditors and debtors alike, by extracting revenues that should legally be available to one or the other. This is bound to be the view of anyone imbued with allegiance to the legal order, but strictly speaking the relationship is one of partial symbiosis; in the context of an underpaid official execution establishment,[45] such interlopers help support the private law system by attracting additional manpower into the execution trade. The way this works can be explained in economic terms.

In 1954, judicial supervision of *shikkōri* accounts was tightened.[46] There is no published record of the reasoning that triggered this policy adjustment, but it was clearly meant to assure that the gleanings of officially recognised officers would be limited to the officially approved fee schedule. Middlemen who bought at auction or seized property directly were naturally free from these constraints. They followed (and follow) two principal methodologies. With respect to goods, the "debt

recovery racketeers" compete on speed in the clearance, particularly, of corporate inventories.[47] As such they are in head-to-head competition on quality (speed) with the official execution establishment.

The "auction racketeers" (競売屋) specialise in registered assets, title to which must, in most cases, be transferred through official procedures. Their relationship to the official establishment is therefore somewhat more complex. Until 1979, the most common form of security interest in immovable property [48] was enforced by sale at a public auction at which the bidders appeared in person. This made the communication of threats against competing bidders relatively easy; auction racketeers operated by collusively driving down public auction prices, and turned a profit by reselling the property on the open market.[49]

Driving down auction prices is pure rent-seeking behaviour; auction racketeers extract profit from the sale process by controlling competition in the market for auction properties. The symbiotic aspect of their operations arises with eviction. Judicial auctions often take place with the owner and any tenants still in possession; it is left to the purchaser to obtain vacant possession after obtaining legal title via the auction sale.[50] A bidder who can (shall we say) induce the occupants to leave voluntarily enjoys an extra profit from his purchase. And when middlemen carry out self-help evictions (or negotiate a voluntary surrender of possession on the basis that they might do so), they release time to the official officers that can be spent on other matters.

This is not to suggest that middlemen provide these services efficiently or in accordance with commonly accepted notions of fair play. That competition in the clearance of inventories can be destructive is

obvious, but the same is true in the auction process. If a "disagreeable aspect" can make evictions easier, it can equally well make them more difficult. A middleman obtaining possession before auction can resist eviction, offering to clear out immediately in exchange for a payment from the auction purchaser. This will lead to delay if the value of resistance (to the middleman) is greater than the value of enforcement (to the *shikkōri* or to another middleman). If the presence (or absence) of such persons in occupation can be known before auction, the auction price of that property will be affected accordingly. If this cannot be known, bidders will discount *all* properties according to the risk that an opportunistic occupant might exist. In either case, the lost auction value is money in the pockets of those who control the bidding process.

Let us now return from hypothesis to 1954. *Shikkōri* working on commission with the independent power of appointing deputies could bring in additional manpower to cover evictions and civil execution for which the commission exceeded the cost of hiring out the work. Evidence suggests that they did so. But they did not operate in a vacuum; opportunistic middlemen could be expected to attempt to extract rents from the process by pre-empting execution or impeding eviction. To counter this, prior to the tightening of court supervision of their accounts, the *shikkōri* and the *shittatsuri* before them could (conceivably) have circumvented the fee structure by striking a working agreement with auction middlemen; bribes paid from the middlemen would have justified the pursuit of cases which were rent-rich but fee-poor. The *shikkōri* would have had a means of enforcing any such agreements that might have existed, by virtue of their control over access to the richest source of rents: the auction premises. With closer supervision of accounts, it would have become more difficult, but not impos-

sible, for the *shikkōri* to capture a share of the rents in this way. It must be stressed that this is speculation: there is no direct evidence that such arrangements existed. But the Shikkōkan Act of 1966 does seem to have been designed to eliminate the possibility of such collusion between officials and the underground.

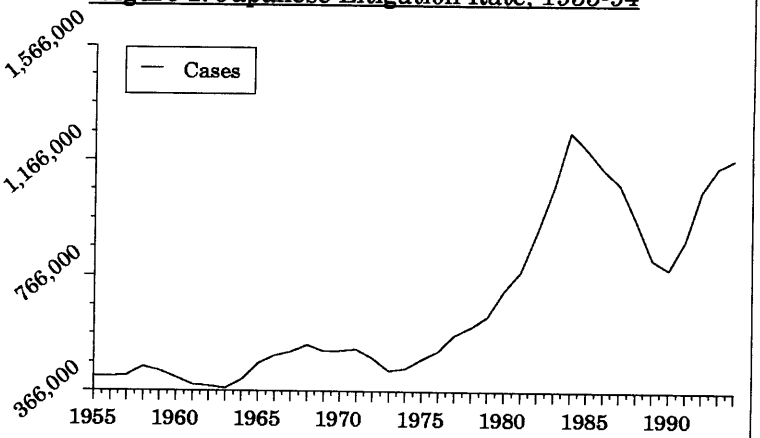
These economics of the official and the black market execution services were implicit in the response from Sendai High Court prosecutors' office. They proposed that underground operators be co-opted through the introduction of a licensing system.[51] Others, including (unsurprisingly) the *shikkōri* themselves, proposed increasing salaries or fee rates,[52] which would have had the effect of expanding the official service, as the best way of combating the malaise of corruption and delay. As we have seen, an altogether different strategy was ultimately adopted.

Impact of the 1966 Legislation

The 1966 reform attempted to have it both ways. By moving *shikkōkan* inside the physical premises of the court and denying them the independent power of drafting in deputies, it sought to jettison the "disagreeable persons" who had become an embarrassment to the execution process. Providing for the recruitment of persons of "better quality" was aimed at clinching this change in the culture of the service. On the other hand, by retaining the commission system, it was thought that officers would still have strong incentives to vigorously enforce judgments of the court.

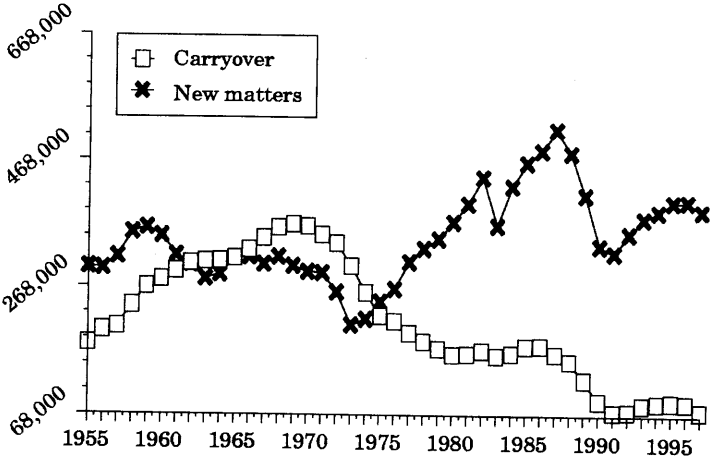
Unfortunately for Japanese litigants, even court systems cannot have it both ways. **Figures 1** and **2** show the rate of litigation and the

Figure 1: Japanese Litigation Rate, 1955-94



Source: Wollschlaeger, Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics, in Japan: Economic Success and Legal System 89-142 (de Gruyter, H. Baum ed., 1997).

Figure 2: Execution matters, 1955-95



Source: Saiko saibansho jimu sokyoku, Shiho tokei nenpo (1955-1995).

workload of the civil execution establishment. To date there have been three postwar litigation peaks, cresting in 1958, 1968 and 1984. The impact of the 1966 legislation is unmistakable; the rise in enforcement work that one would expect to accompany the second wave of litigation does not materialise. Instead, enforcement work *declines* until the third litigation wave begins in 1974.

Common sense tells us that an increase in litigation should be accompanied by an increase in enforcement work. Here the opposite is true, and the question (as ever) is, why? There are two factors to consider: settlement in advance of litigation; and competition between the official and the underground enforcement networks. We can begin unpacking the matrix of decisions made by those with a stake in the execution process by first assuming (arbitrarily, and with full awareness that it will lead us into error) that the latter factor does not exist. The possibilities open to a successful judgment creditor are then "give up", "settle" and "enforce". Giving up makes sense if the debtor has no assets, or if the prospective cost of enforcement will consume them (the costs sunk in litigation are irrelevant — what is done is done). If enforcement is swift and sure, settlement in advance of actual enforcement will make sense to both creditor and debtor; the creditor can afford to relinquish a portion of the debt in exchange for voluntary compliance,[53] and the debtor knows that he faces compulsion if he refuses to deal. Enforcement will make sense if enforcement is uncertain, and creditor and debtor appraise their chances differently — each might decide, in other words, that it is worthwhile to gamble on the result.

Under this oversimplified model, the pegging of enforcement manpower in 1966 should have made enforcement more uncertain, because

all actions could not be covered by existing staff. So we have just proven that there should have been an aggravated rise in enforcement work, as the enforcement system became overwhelmed and creditors and debtors dug in their respective heels. This is not, of course, what actually happened.

Now consider the same model with the possibility of underground enforcement. The creditor has a fourth alternative: hire an independent. This is not at all implausible. We have seen that there was a significant population of persons who had worked for the *shikkōri* before the reform, and soon after the 1966 reform these people found themselves out of a job. In addition, existing middlemen would have found it much more difficult to strike stable arrangements with the new *shikkōkan* inside the courts. This in turn would have released what bargaining controls existed on rent-seeking obstruction of enforcement. Such obstruction seeks to increase market share by driving out competing agents — much as the police, in enforcing the criminal law, serve to protect the market share of official agents. If we treat these competing forces as a wash (for the sake of argument) [54] we can see that eliminating the possibility of bargaining controls that existed under the *shikkōri* system exposed the *shikkōkan* to something not unlike the cold wind of competition.

A model that allows the possibility of competition can account for the falloff in enforcement work that we find during Japan's second postwar wave of litigation. Whereas the previous system created a market for execution services that was able, albeit imperfectly, to overcome the effects of an under-subsidized fee schedule, the new regime introduced a curious sort of cartel in official enforcement services. Rates are fixed. Working in close quarters with judges and other court staff,

officers cannot cheat on the fee schedule. Entry is controlled. The *shikkōkan* are allowed exactly one unit of manpower each, and there are effective barriers to entry. New recruits to the service are drawn from among persons who currently enjoy a secure income at Civil Service grade 7 or above; and each prospective entrant will check out how members of the service are faring and, when the position looks like a bad deal, refrain from applying (or resist the tap on the shoulder, as the case may be).

By all accounts, *the shikkōkan* are extremely busy, and make a reasonably good living — in practice, most are court managers (書記官) close to retirement when they join the service. The corollary, given the way in which they are recruited and paid, must be that there are not enough of them to go around. Because *shikkōkan* cannot cheat on the commission system, their only means of improving their income is to concentrate on those cases that produce the best return on their limited time. This does *not* suggest that the new *shikkōkan* increase their real wages through shirking; that is what we salaried employees tend to do. Rather, the restriction in their numbers assures them a plentiful supply of work, and their most effective response to that must be to work very hard indeed, but concentrating on matters that generate the best return on their time with the least risk.[55] In more concrete terms, there is no point in risking a beating or returning empty-handed unless that is necessary ... and it is not. Some types of case are inherently more costly to handle (executions against inventory, which involve a race against time, and evictions against rent-seeking racketeers, which can be physically hazardous, fall into this category), and one would therefore expect to find a systematic bias away from such cases.

One might object that under the *shikkōkan* system, the enforce-

ment service seems to have become *more* effective, since the proportion of actions carried over to the following year has declined steadily since it was introduced. Some of this improvement is due to the steady drop in service-of-process matters between 1962 and 1975; but the entire reduction in back-logged matters takes place later, between 1975 and 1995. Staffing levels have increased by 55%; but litigation rates have risen by 140% across the same interval. Furthermore, a proportion of the additional manpower has been taken up by an increased burden of labor-intensive work. For example, the Civil Execution Act of 1979 [56] charged *shikkōkan* with the task of preparing site-inspection reports on immovable properties going up for auction, to the end of reducing the impact of opportunistic evictions on overall auction prices.[57]

The simplest explanation for the reduction in backlog is a partitioning of the market for enforcement work. The official enforcement service costs less to creditors, but because of understaffing, it is less effective than (more costly) underground alternatives. It would not conflict with common sense to suppose that the most difficult stratum of enforcement work has come to be taken elsewhere. And indeed, if the official system is in active competition with networks of independent operators, officers (and private operators) would have a very real incentive to keep the backlog of unfinished business as small as possible.

That the *shikkōkan* are strapped for time can be inferred from the sharp bias away from executions that involve a higher risk of failure.[58] A Japanese judge writing in a leading law journal recently stated that without middlemen willing to purchase goods at auction and resell them to the original owner at a 100% to 300% mark up, that part of the execution system would cease to function altogether.[59] This makes

perfect sense once it is recognised that the goods of greatest value — the inventories of failed businesses — are not finding their way into the official auction system.

If the inferences drawn here from publicly available materials are correct, the Japanese system of civil execution may consist of two layers. The first, official layer provides a well-regulated and relatively cheap service for a proportion of cases, but has a limited capacity because of the bureaucratic cap on manpower. The second, unofficial layer provides an unregulated service which can respond flexibly to demand; but the cost of these unofficial services is high because unofficial providers must contend with one another's private armies. One would dearly like to know, of course, more — including the relevance of this model in other jurisdictions. But we must make do with reasonable inference at present, as unofficial providers are not obliging enough to publish statistical records of their operations.

Implications

Above, I have argued that the 1966 Shikkōkan Act and staffing policy since its introduction have been bad for judgment creditors and their debtors, because it drives up the cost of enforcing judgments. The reduction in enforcement strength may have been costly, but it has also, in a certain respect, succeeded remarkably well. Prosecutors, judges and law faculties expressed concern in the 1954 survey over the disrepute into which corruption in the auction process had drawn the legal system. By forcing the *shikkōri* to jettison their support network and by bringing them within the judicial fold, the courts dissociated themselves from the quandaries engendered by under-subsidised enforce-

ment. The problems continue to exist,[60] but the blame for them is laid on the gangsters who have succeeded the deputies and middlemen who once worked with the *shikkōri*. And there is plenty to blame them for; with the breakdown of (admittedly unstable) back-scratching arrangements between execution officers and their non-governmental counterparts, rent-seeking obstruction of the execution process has increased. The courts, on the other hand, have received double plaudits, being credited on the one hand with conducting trials that promote settlement in the way that trials should, and with permitting alternative methods of dispute settlement to survive in the wider society. Looks pretty good. But what is wrong with this picture?

Haley and Ramseyer were both right. First, civil justice in Japan *is* characterised by weak enforcement, and that weakness *does* have an impact on the volume of disputes that find their way into the courts. Haley observed that litigation was more frequent in Japan in the imperial period before the War than it was after. This finding was recently confirmed by Christian Wollschläger.[61] Without pretending to offer a definitive answer, the data are at least superficially consistent with the hypothesis that fee schedules and reduction in enforcement manpower reduced the quality of the judicial service at the back end, resulting in decreased demand. It may be that people found other ways of managing their affairs because they had to. If correct, this would suggest that one conclusion drawn by Haley, that "What the Tokugawa shogunate did for Japan, a Henry II could undo"[62] is open to question. The evidence presented here suggests that, if there are virtues in the current Japanese system of limited civil enforcement, they have arisen in the wake of that very undoing. If the top-heavy Japanese judicial structure has attractions, it could be adopted elsewhere. At a price.

The model presented here is also consistent with the empirical evidence offered by Ramseyer and Nakazato.[63] They suggested that even one-time disputants in Japan settle their claims more or less in line with judicial judgments. If the weakness of Japanese enforcement turns up as a systematic bias against particular types of cases in the enforcement system, then settlement should still track judicial norms in cases in which civil execution is unproblematic. And it does. Their study considered just such a set of claims: fatal automobile accidents covered by an insurance policy. The areas of social and commercial life which one would expect to be affected by a weakened enforcement system are those in which the assets at stake are harder to track down, or in which there is substantial resistance to enforcement. Consumer credit cases, bankruptcy cases, and eviction cases during surges in bankruptcy statistics come to mind. Following the bubble economy, and with the advent of automated lending machines, we now find ourselves blessed, if that is the word, with an ample supply of data for further empirical research in this line.[64]

If any point is to be made in conclusion, it is that this is not the end of the story. Like Sarah Connor in James Cameron's *Terminator*, the Japanese civil justice system cannot escape from the competitive furies to which it has given life. The Supreme Court Secretariat cleaned house in 1966. Three major procedural reforms have since been enacted. While the clarity and speed of judicial process have improved, rent-seeking incursions on the court's terrain have not gone away. Underground enforcement is widely perceived to be a problem of the criminal law at present, but it is only a matter of time before strategy demands a return to a more robust, if more closely controlled, civil execution establishment.[65] And when that day comes, the staff of the

evolving Japanese judicial system will face a bigger challenge than those that have come before.

Notes

1 BL. Comm. *334. Blackstone refers here not to bailiffs generally, but to "special bailiffs" appointed for the purpose of "serving writs, and making arrests and executions".

2 James Cameron, director (1984).

3 These figures are presented only to illustrate in a rough-and-ready way that there is a significant difference in bailiff workload in the two countries. The number of *shikkōkan* was obtained from the public relations department of the Japanese Supreme Court Secretariat. This was divided into the number of execution matters handled by *shikkōkan*, as given in Japan's Civil Judicial Statistics (司法統計年報) for 1955. The approximate number of English bailiffs was obtained from Philip Evans, of the Civil & Family Business Directorate in London. The number of enforcement filings for England was taken from the section "Enforcement of Judgments", in Judicial Statistics: England and Wales 43 (Cmd.3290, 1995). Thanks are due to Sian Stickings and Richard Small for their help in obtaining the English figures. I also imposed on Christian Wollschläger and Chris Black for data from, respectively, Germany and South Africa which, for reasons of time and space, await a future occasion.

4 Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

5 Haley, *Sheathing the Sword of Japanese Justice: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265 (1982). *See also* J.O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX (1991).

6 Game theorists will recognise this as a social order based upon a game played by each potential disputant, in the light of payoffs determined in part by the courts, in part by other social institutions, and in part by the expected

strategy of other players. In Haley's view, the payoffs of the courts are smaller, and so they have less control over the strategies chosen by the players. For an attempt to apply such a model to litigation behaviour in rural California, see R. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

7 *See* Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Landes, *An Economic Analysis of the Courts*, 14 J. LAW AND ECON. 61 (1971); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) (all cited in J.M. Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988)).

8 Ramseyer, *supra* note 7, at 120.

9 Haley, *The Myth of the Reluctant Litigant*, *supra* note 4, at 274.

10 Haley does refer to excessive costs arising *after*, as well as during trial: "To force an obstinate seller off the land even after title has been transferred can be ... costly and time-consuming". Haley, *Sheathing the Sword of Japanese Justice*, *supra* note 5, at 267. As noted in the text, the problem is not one of cost alone, but of capacity as well.

11 *See, e.g.*, R. COOTER & T. ULEN, LAW AND ECONOMICS 94–97 (1988); J.M. RAMSEYER, ODD MARKETS IN JAPANESE HISTORY 9–22 (1996).

12 *See, e.g.*, 林則清, 不良債権回収と知能暴力犯罪 (1996); 林則清 et al., どう排除する：執行妨害 (1996); 占有妨害排除の理論と実務 (占有妨害対策研究会 , 1996); 青木雄二 , ナニワ金融道 (manga series).

13 In Tokugawa and early Meiji times, the execution of court orders in civil cases was apparently left to village headmen to sort you. 寺田治郎 , 執行吏制度 , in 民事訴訟法講座 1068–69 (1955).

14 裁判所管制 secs. 7 & 39 (勅例 no.40 of 1886).

15 寺田治郎 , *supra* note 13, at 1067–70.

16 Law no.6 of 1890.

17 Law no.29 of 1890.

18 Note that this under-represents the population of *shittatsuri* in the imperial era since, as discussed below, they had the power to appoint deputies.

19 司法省大臣.

20 *See* 寺田治郎, *supra* note 13, at 1087–89.

21 Summary drawn from 寺田治郎, *supra* note 13, at 1070. The remainder of this section relies heavily on the same source, which appears in an advanced text on civil procedure used in the 1950's.

22 A judgment was not, and is not today, always required. Debtors could consent in advance to execution under a lending agreement confirmed by a public notary (公証人). For the modern provision supporting this practice, see 公証人法 (Law no.53 of 1908); 民事執行法 sec.22 (Law no.4 of 1979).

23 Like police serving at a modern chūzaisho (駐在所), collection officers were required to live on the premises.

24 The relationship between English sheriffs and their bailiffs is almost identical to this arrangement. *See* WIGAN & MESTON, MATHER ON SHERIFF AND EXECUTION LAW 43–44 (3rd edn., 1935).

25 This committee and its report are referred to in 寺田治郎, *supra* note 13, at 1096–97.

26 裁判所法 sec 62 (1 & 2) (Law no.59 of 1947).

27 *See, e.g.*, 執行吏監督規程 (Supreme Court regulation no.10 of 1954), reproduced in 執行吏執務提要 (最高裁判所事務総局 ed., 1954) (providing for the appointment of a supervising judge in each district court with powers of investigation and a duty to audit the books of the *shikkōri* twice in each year).

28 *See, e.g.*, 小野木常, responding for 大阪大学法計学部 in 執行吏制度改善に関する意見集 52 (1955) ("In part because the housing situation is currently so desperate that it cannot be managed as a *legal* problem, in eviction cases, particularly against residential properties, even though the plaintiff wins the lawsuit, the practical impossibility of enforcing the court's order has led to the attitude that 'Even though you've lost in court, you're best off sticking it out and staying put.' This attitude has an unfortunate impact on the authority of

the courts and the esteem in which they are held, and undermines the law.").

29 小山教授, responding for 北海道大学法計学部 in 執行吏制度改善に関する意見集 48 (1955) ("In 1932, the commission income of the *shikkōri* [sic] was very good. At that time, there probably wasn't anyone who considered introducing a salary-based system. In 1949, the commission income of *shikkori* was very bad. The average commission income was a bit lower than the minimum base salary for public officials, and clearly below the minimum level for the payment of the state supplement.").

30 Further details on the problems that raised concern are considered below. See notes 36–43 and accompanying text.

31 法制審議会.

32 執行官法 (Law no.111 of 1966).

33 民事執行法 (Law no.4 of 1979).

34 民事保全法 (Law no.91 of 1989).

35 民事訴訟法の執行に伴う関係法律の整備等に関する法律 (Law no.110 of 1996).

36 民事訴訟法 (Law no.109 of 1996).

37 国家公務員法 (Law no.120 of 1947).

38 The Japanese here is a delightfully delicate paraphrasis: "一種の好ましからざる雰囲気をもった者".

39 Response of 明治大学法学部 in 執行吏制度改善に関する意見集 85 (1955). While this passage provides an invaluable insight into the operation of the *shikkōri* of that time, it is followed by the rather bizarre recommendation that, in the interest of improving the legal consciousness of the population, the professional deputies should be replaced by ordinary citizens drafted in to assist in civil executions in their neighbourhoods (something like jury service). To its credit, the Ministry of Justice did not act on this suggestion. That said, applying this system to law professors might be an exercise worth considering.

40 寺田治郎, *supra* note 13, at 1096, also suggests that the separate-office

arrangement gave the *shikkōri* an unwonted degree of independence that made it difficult for their betters to educate them in the appropriate manner of conducting their trade.

41 The *shikkōri* themselves were required to make an insurance payment of not more than 10,000 yen within 30 days of their appointment. There was apparently no such requirement for the deputies (代理人).

42 A majority of *shikkōri* came out in favour of abolishing the system, but there are grounds for doubting this return; the weak position of the *shikkōri* in the exercise is exemplified by the fact that, alone among the five groups consulted, their opinions are reported almost entirely as bare statistics. For all the disparaging remarks made by others about their abilities, they surely had enough nous to tell which way the wind was blowing.

43 While it is true that some have questioned the applicability of rational choice models to Japanese society, on this occasion we have seen that both the original architects of the civil execution system, and the participants in the 1954 consultative exercise relied explicitly on this line of reasoning. It seems unobjectionable to interpret the result of their efforts in terms that they themselves would have accepted.

44 Termed "立会屋" in all references I have seen circa 1955. Later appellations referring to rent-seeking middlemen include 競売ブローカー, 競売屋, 債権取立屋, 占有屋 and 損切り屋.

45 That is to say, an execution establishment that is not sufficiently subsidised to drive out competitors and maintain a monopoly in enforcement services.

46 See *supra* note 27.

47 A common method of offering movable property as security in Japan is the "title transfer security interest". This has an effect similar to so-called *Romalpa* reservation of title clauses at English law, but can be created in favor of a lender who had no preexisting interest in the property concerned. Because the creditor obtains title in advance under such an agreement, a forcible recovery of possession does not raise problems of conflicting ownership. The act

of seizure itself may well, of course, constitute a breach of the criminal law.

48 抵当権.

49 For a discussion of bidding processes before and after the Civil Execution Act of 1979, see Bennett, Clash of the Titles: Japan's Secured Lenders Meet Civil Code Section 395, 38 NETHERLANDS INT'L L. REV. 281 (1991). A sealed bidding system was introduced in 1979, and strategies for intimidating competing bidders have adjusted accordingly. See 林則清, *supra* note 12. The brokerage pattern is well-recognised. Its impact on the value of security is one of the points commonly covered in empirical studies of mortgage execution. *See, e.g.*, 井口博, 不動産競売事件とその問題点, 738 判例タイムズ 21 (Dec.12, 1990); 東北民事執行研究会, 不動産執行（追跡調査), 判例タイムズ 27 (Jan. 1, 1992); 竹下守夫, 実体調査から見た不動産競売, in 不動産執行法の研究 373 (1977); 中野貞一郎・栗田隆, 不動産競売の実体——大阪地裁における昭和四七年度の状況, 91 大阪法学 179 (1974).

50 The Grand Bench of the Japanese Supreme Court has accepted a case on appeal in which one of the points at issue is whether the holder of a security interest can sue for eviction in advance of auction sale. Asahi shinbun, p.1, Jan. 28, 1999.

51 Responses from prosecutors' offices in 執行吏制度改善に関する意見集 131 (1955).

52 In other words, pumping a larger subsidy into the system.

53 Strategies are complicated in the event of insolvency, since the debtor's stake in sums he receives is considerably reduced. Analysis of the strategies that result are beyond the scope of this article.

54 To establish the argument here, it is only necessary to assume that neither the police nor the "independents" are able to effect 100% exclusion of competitors through the use of force. No one, I think, would assume otherwise.

55 They have also sought to increase their efficiency in the large offices through specialisation of functions, and to reduce their individual risk through

pooling of commission income. Arrangements vary widely between offices, in part because public servants who opt to become *shikkōkan* drop out of the staff rotation system, and remain with the same district court for the remainder of their careers.

56 Enacted, interestingly enough, just as the last of the execution officers recruited under the *shikkōri* system would have been retiring.

57 See *supra* note 49 and accompanying text. Opportunistic occupation continues to be a problem. A leaflet obtained at the auction information counter at one of the Japanese District Courts informs auction purchasers:

> [A set of reports on each property] is provided for your reference. Please submit your bid after consulting these materials. However, in comparison with properties in the ordinary market, auction properties have several special features of which you should be aware. For example:
>
> - It is difficult for prospective purchasers to inspect the inside of properties;
> - These are not necessarily "vacant houses"; there are instances in which the property is occupied by so-called "occupation racketeers", and even failing that we cannot promise you a smooth transfer of possession;
> - The purchase price must be paid immediately;
> - Procedures for the transfer of possession are the legal and financial responsibility of the purchaser.

See also 林則清, *supra* note 12, at 112–23.

58 The fee payable for failed executions is much lower than that for cases successfully cleared up.

59 執行官に女性がなってもらうための前提条件, 1042 ジュリスト 2 (April 1, 1994).

60 *See* sources cited *supra* note 12.

61 C. Wollschläger, *Historical Trends of Civil Litigation in Japan, Arizona,*

Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 89 (1997). This excellent cross-jurisdictional study is highly recommended to anyone tempted to indulge in the fraught business of cross-border comparison of judicial statistics.

62 Haley, *Sheathing the Sword of Japanese Justice: An Essay on Law Without Sanctions*, *supra* note 5, at 281.

63 Ramseyer & Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

64 As the finishing touches were being put on and early draft of this article, the NHK broadcast a documentary on the operations of the 損切り屋 and 占有屋. NHK スペシャル：企業舎弟·闇の暴力 (NHK broadcast, 21:00–21:50, Apr.6, 1997).

65 Movement in this direction began as this manuscript was being prepared for publication. See, e.g., 座談会, 債権譲渡特例法と金融実務, 1141 ジュリスト 95-118 (1998).