BIG BUSINESS AND THE LAW IN JAPAN — AN HISTORICAL AND CONTEMPORARY CONSPECTUS

New Zealand lawyers are dealing increasingly with Japan, and with its big corporations. This article discusses points of interest which arise, e.g. Cross-cultural overview, the status of the merchant, the development and use of law, the strength of tradition and how Japan and its business community have dealt with the sorts of problems New Zealand is currently struggling with.

The article may provide readers with an introduction to more specific studies of Japanese law in the future.

I HISTORY

The Japanese merchant class had its origins early in Japan's recorded history and at least 1000 years ago. Merchants formed an active section of the community in the 9th century in the prosperous Heain period,[1] are thought to have been grouped in associations by the 12th century,[2] and are clearly recognisable as a force to be reckoned with in society from the 14th century. By that time fairs and markets were well established and the businessmen[3] were organised in groupings that took their name, *za*,[4] from the seat or place where the commercial business was transacted. Later developments saw the organisation of specialised guilds[5] for each type of trader and this gave the merchants not only a monopoly over the exchange of goods but also control over who could deal in which commodity. The merchants were often connected with the feudal manors and very frequently with the Buddhist monasteries that were scattered through the country. It was at these focal points that they held their fairs and exchanged goods. The monasteries in particular had an important role because they had skills and contacts,[6] and like the feudal lords they had strong armies

1. 794-1192. Named after the capital city of those years. Heian is the present-day Kyoto.
2. Cp. Gonthier, *Histoire des Institutions Japonaises*, (Brussells 1956) p. 96.
3. *Shoonin* in Japanese. The character for *shoo* means trade and in its original Chinese sense it indicated deliberations. Japanese for commercial law is *shoohoo*.
4. Cp. Sansom, *Japan*, (London 1946) p. 360 where the *za* are compared with the *hansa* of Europe. The character used (Chinese *tso*) depicts two people seated facing each other on a platform. It appears today in *Ginza* the name of the bright light district of Tokyo. Historically a silver mint was sited in the area.
5. For detail of the nature and extent of these *Kabu-nakama* cp. Wigmore, *Law & Justice in Tokugawa Japan*, Part I (Toyko 1969) Ch. VII.
6. The priests were Government advisers on international trade. Cp. Sansom, *Japan*, (London 1952) p. 357.

which assisted in protecting communication and transportation routes. The merchants, because of their money-lending activities, favoured the protection given by the monasteries, and in return for this patronage with its religious overtones[7] they paid a due and performed various maintenance tasks.

The merchants' position continued to strengthen till the beginning of the Tokugawa era[8] in 1603. Society then became much more rigidly stratified on Confucian lines than it had been,[9] and of the four classes of persons[10] in society the merchants were the lowest. They were despised and held in contempt because their occupation was regarded as ignoble and parasitic, because they practised usury and because they were said to be concerned only with the advancement of their own ends. As the link between producers and consumers they were, however, tolerated as a necessary evil.

By an edict of 1635[11] the Tokugawa government enforced the isolation of Japan from the rest of the world for 230 years and this isolation brought with it relative peace and stability. Commerce expanded steadily, rural markets flourished, transport and communications improved, standards of living rose, and material expectations increased. The merchants with their tightly controlled monopolies prospered financially, but status-wise they remained oppressed. They were not allowed[12] to own large houses, wear silk, or desport the luxuries of life and if they evidenced any excesses their property was confiscated. Because of their position the traders were able to accumulate enormous wealth yet they were not allowed to use it openly and were thus prevented from restoring their gains to the economy in the usual way. The merchants, therefore, became a hidden force in the nation, as the military government worked its way into increasingly serious economic difficulties and dependence on the financial support of its inferiors. Typical of the policies of the time which both aggravated the economic situation and also worked to the advantage of the traders

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7. Enforcement of debts was presumably made easier.
The connection of religion with commerce did not always work to the benefits of the clergy. cp. Lu, *Sources of Japanese History* Vol. I, (New york, 1974) p. 160, Document 21; the report of a peasant uprising in 1428: "They . . . went on to destroy wine shops, pawn shops and temples which engaged in usury. They took everything they could lay their hands on, and cancelled the debts"; and the tightening of controls on temples in the 17th century Lu, op. cit. p. 214.
8. 1603-1868. Named after the ruling military family of the era.
9. The Tokugawa simply confirmed the existing class restrictions which had been made by Hideyoshi at the end of the 16th century. Cp. particularly the Collection of Swords Edict, and the Change of Status Edict reproduced in Lu, op. cit. at p. 186 and p. 189 respectively.
10. The warriors, the peasants, the artisans, and the merchants. Outside these groups were (1) the nobility and the clergy, which were in a privileged position, and (2) the slaves, slaughtermen and other lowly creatures who were classified as non-persons *(eta)*.
11. Translated into English in Lu, *op, cit.* p. 216 Document 13.
12. Decree of 1649.

was the enforced residence of large numbers of unproductive people in the capital city.[13]

From very early times Confucian notions of law and order held sway in Japan.[14] The aim was a strong and centralised administration and to the extent that rules were made they tended to take the form of moral directives to government officials[15] and were definitely not promulgated. As late as the 19th century the official view was still that laws were to be obeyed by the people but were not to be known or understood by them.[16] The settlement of disputes which involved neither government administration nor the maintenance of public order was not a concern of the State. Individuals were expected to resolve their problems amicably and peaceably within the appropriate niche in society, be it the family, the village or the community at large. Where necessary the assistance of a social superior of the disputants was resorted to but the Staete as such was not involved. Conciliation was the rule[17] and in fact a necessity. This pattern of dispute resolution continued into Tokugawa times and through to today with little major change.[18]

The administration of justice during the Tokugawa period was essentially non-pecuniary in nature and this clearly did not serve the interests of the merchant class, who by then controlled the rice[19] and money markets and the transport of commodities. Enforceable

13. This was essentially a military control measure and was formalised by various decrees from 1624-1643. In 1787 Edo (modern Tokyo) was a city of one and a half million inhabitants.
14. cp. Henderson, *Conciliation & Japanese Law,* (Toyko 1965) Vol. I, p. 37 et seq.: *Sourecs of Japanese Tradition* ed. de Bary, (New York 1960), Chapter XVI.
15. E.g. The Seventeen Article constitution of 604 A.D. provided: "The ministers and functionaries should make decorous behaviour their leading principle, for the leading principle of the government of the people consists in decorous behaviour. If the superiors do not behave with decorum, the inferiors are disorderly: if inferiors are wanting in proper behaviour, there must necessarily be offences. Therefore it is that when lord and vassal behave with decorum, the distinctions of rank are not confused: when the people behave with decorum, the government of the commonwealth proceeds of itself" Article IV; and "Let the ministers and functionaries attend the court early in the morning, and retire late. The business of the State does not admit of remissness, and the whole day is hardly enough for its accomplishment. If, therefore, the attendance at court is late, emergencies cannot be met: if officials retire soon, the work cannot be completed Article VIII. Translation from *Sources of Japanese Tradition, supra* pp. 49-53.
The Code of One Hundred Articles of 1742 was endorsed: "These provisions have been submitted to the Shogun and approved. They are not to be seen by others than the magistrates".
16. Even the early criminal laws of the Meiji era had as a preamble: "We order our officials to obey these rules".
17. See generally Henderson, *op. cit.* Criminal cases could also be settled by conciliation procedures, cp. Henderson *op. cit.* pp. 171-173.
18. Cp. Kawashima, *Dispute Resolution in Contemporary Japan,* in *Law in Japan,* (ed. Von Mehren) (Tokyo 1969(pp. 41-72.
19. Much more than just the staple food, rice was also the traditional form of paying taxes. Control of the rice market therefore carried with it great financial power. Cp. Sansom *op. cit* p. 471 et seq.

rights and the ability to collect a debt due were of more value to them than a system of compromise. The advantages of compromise in terms of cost, time and social harmony weighed little in its favour while the conciliation process with its strong hierarchical and social pressures continued to work unfavourably for the lower classes.

By and large it was the merchants who wanted laws and their enforcement by courts, and development of the legal system during the 18th and 19th centuries was related in large part to their demands. As early as 1700 the government had recognised the needs of the trading community sufficiently to provide for a special procedure before the shogunal courts for money matters, but in spite of the developments the courts of Edo were not, in practice, much help to suitors.[20] The government frequently prescribed debts by legislation, the courts themselves created such pressures for litigants to compromise that dispute resolution by judicial decision was rare, and further, few traders would even think of suing the major debtor, the government.

In social terms there was no common ground between the military at the top of the class ladder committed to a life of frugality[21] and the businessmen at the bottom of the ladder who stood to benefit by the encouragement of a taste for luxury. However, historical reality is no respecter of such divisions and as more recent years have shown the interaction and interdependence of the military and big business was not a phenomenon peculiar to Japan of the pre-1868 era.

In 1868 the Shogunal government collapsed under foreign and local pressures.[22] The Shogun, who had always nominally been the Emperor's delegate, surrendered his powers and the Emperor took full control once more. The restoration of Emperor Meiji[23] saw the ushering in of a new era for Japan. The country was opened to a flood of new ideas from the West, the class system was abolished,[24] and trading began on a new basis with the nationalisation of a number of existing industries, state development of a host of new industries[25] and government control of the nation's financial development. The restoration was a signal for social advances and incidentally an occasion to recall the glorious days of Imperial rule in the 8th, 9th and 10th centuries. One aspect of this reference back was the precedent it provided for State control of commerce.[26]

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20. Cp. Henderson, *op. cit.*, pp. 100-103, pp. 180-181.
21. "The samurai of all domains must practise frugality", Article 12 of Laws for Military Households 1615, translated in Lu, *op. cit.*, p. 201 Document 2. Frugality was just one aspect of *bushido*, the guiding ethic of the warrior class.
22. The catalyst was the "open up or else" stance of Commodore Perry when he arrived in Japan with his U.S. naval force in 1853.
23. The Meiji era was 1868-1912. The two characters employed in the word *meiji* mean clear or bright tand government. Symbolically therefore 1868 was the beginning of an era of enlightened rule.
24. The idea of a society without classes was officially reinforced by the provisions of Chapter II of the Constitution of 1889.
25. E.g. railways, telegraphy, shipbuilding.
26. In the 9th century the Emperor had a monopoly of all external trade.

The Meiji Government created monopolies for itself but found it needed the merchants' expertise in its development of the country. Consequently by the end of the 19th century the merchants had, with the encouragement and assistance of the Government, re-asserted themselves in the community. In the 1890s the unequal trading treaties that had been negotiated from 1858 onwards had been revised in Japan's favour and a Commercial Code and other laws on a Western model were promulgated. Many of the families that came to the fore in the commercial world at this time were those of the former military class, though others, the Mitsui[27] family for example, had played a leading role in the commercial life of Japan in pre-Meiji times. The strength and influence of the merchant families was phenomenal, and groups such as Mitsui, Mitsubishi, and Sumitomo played an ever-increasing role in the economic development of Japan both nationally and internationally. The class restrictions of former times were no longer operative and the merchant families lived in opulence and occasionally even were honoured by the grant of a title of nobility.

The great trading groups that developed between 1868 and 1945, the *zaibatsu*, were (inevitably because of their intimate connection with Government business)[28] involved in Japan's military undertakings. So great in fact was the participation of the big companies in World War II that in calling on Japan to surrender on 26 July 1945 the Allies meeting in Potsdam proclaimed: "Japan shall be permitted to maintain such industries as will sustain her economy and allow exaction of just reparations in kind, but not those industries which will enable her to rearm for war." When Japan surrendered some weeks later the Declaration of July 26 was accepted, and the Supreme Commander of the Allied Powers arrived in Tokyo on 30 August 1945[29] to implement the policies enunciated at Potsdam. By a directive of September 6 1945 President Truman ordered General MacArthur to commence work on the reforming of the Japanese economy and in particular "to favour a program for the dissolution of the large industrial and banking combinations which had exercised control of a great part of Japan's trade and industry."[30]

On October 8 1945 the securities of Mitsui[31] and Mitsubishi were seized. By August 1949 the whole job had been completed. Forty-two holding companies, including the Mitsui, Mitsubishi, Yasuda, Sumitomo, Kawasaki, and Nissan *zaibatsu*, had been dissolved. Strict rules were

27. For a detailed account of this remarkably family and business undertaking see Roberts, *Mitsui*, (Tokyo 1973).
28. While big business may have similarities all over the world it does appear that the degree of interplay between the bureaucracy and big business in Japan is unique. Government and big 'business have been very close collaborators in all of Japan's developments and achievements in the past century.
29. The formal surrender was signed on 2nd September.
30. Cp. Bisson, *Zaibatsu Dissolution*, (Berkeley 1954) p. 239.
31. In 1945 Mitsui controlled approximately 300 companies employing 3 million people in Japan and overseas. At prewar value the securitites seized were worth US $281 million.

promulgated to prevent the companies reforming by buying up the 180-odd million impounded shares that were being sold to the public, equally strict rules were made to control any en masse regrouping of employees, and restrictions were also placed on the freedom of entering into supply contracts worth more than US$150.

The *zaibatsu* disintegrated, but by and large Japan's businessmen showed themselves remarkably resilient to the changed circumstances. The result of the Occupation dismemberment of the *zaibatsu* is a number of *keibatsu*. There is now no holding company nor perhaps personal family control of a large sector of the Japanese economy but there are large families of companies which co-operate and co-ordinate their activities vis-a-vis competitors outside their group. Whether or not the *keibatsu* are the lineal descendants of the *zaibatsu* is a moot point[32] but it seems reasonable to think that they are.[33] In 1971 the four largest Japanese traders bore the name Mitsui, Mitsubishi, Sumitomo and Yasuda, and those groups between them handled more than half of Japan's international trade.[34]

During the same periods the law has developed slowly to reflect commercial needs. By 1900 the Japanese legal system looked very European. There was a regular system of courts, a judiciary patterned on Western models, and a full range of legislation. Criminal law codes had been brought into force in 1882, a Constitution of 1889, a Judicature Act in 1890, a Civil Procedure Code in 1891, a Civil Code in 1898, and a full Commercial Code in 1899. Significantly the provisions of the Commercial Code on bankruptcy and companies were regarded as more important in practical terms than the Civil Code or the other rules of the commercial code. While the Civil Code, and the Commercial Code as a whole, had their passage through the Legislature delayed for some years the company and bankruptcy rules became law in 1891. In the 1930s the laws relating to bills of exchange and companies were completely reformed and then were further amended in the late 1940s. The biggest change, however, was the shift of constitutional authority from the Emperor to the people, and the greater protection of human rights and freedoms. Both these changes were effected by the Constitution of 1946[35] and were accompanied by significant reforms of the commercial and civil law to meet American standards of democracy and justice.

Originally, merchants were despised and grouped as the lowest ranking persons in society because of their preoccupation with money matters. Today people's attitudes towards those preoccupied with money and material gain are little changed, and though individuals are more

32. Cp. Seki's review of Henderson *Foreign Enterprise in Japan: Laws and Policies*, 4 LAWASIA No. 2, pp. 204-205.
33. On the basis of data such as that presented by Roberts, *op. cit.*
34. This resurgence is due in large part to the strength of tradition, but also, on the financial side, to extensive American investment in Japan, and the market booms provided by the Korean and Vietnam wars.
35. Came into force 3rd May, 1947.

dependent upon the industrial tycoons than they have ever been commercial attitudes are still generally resented. In *An Introduction to Japanese Law* [36] Professor Noda states that the traditional rules of conduct *(giri)*[37] are shown least respect in the commercial field. This lack of respect for traditional, social and moral rules, evidences itself in the rather greater use of courts and legal processes by commercial interests than by individuals. Nevertheless, as statistics and trading practices show, the Japanese do not, in the Western terms, use the law and legal processes. There is still strong pressure and a desire for conciliation and mutual accommodation in the resolution of disputes even in the cut and thrust business world. Japanese businessmen as a rule insert a clause in international contracts to the effect that any differences arising between the parties in the interpretation or performance of the contract will be settled by discussion between them.[38] Arbitration is frequently prescribed.[39] On the other hand lengthy contracts providing answers for all conceivable types of future difficulties are not favoured. Such contracts, Japanese say, neglect the human and variable element, and it is much better once agreement on essentials is worked out to negotiate other matters as they arise. The problems can then be settled to the parties mutual convenience taking into account the conditions prevailing at the time of the difficulty. A preoccupation with legal rights or an insistence on a strict application of the law regardless of the circumstances is suggestive of lack of trust or ruthlessness and hence something Japanese seek to avoid.

II THE CONTEMPORARY SCENE

Japanese, even businessmen, view law with a certain disfavour. In many circumstances, however, they do get involved with law and their reaction to these situations can be seen from a consideration of three areas of law which have concerned Japanese big business and the general public in the 1970s. These three issues, industrial pollution, the rights and freedoms of employees, and fair trading, are also interesting in a general way because they are problems with which the law,

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36. Published in Paris in French in 1966. An English edition is scheduled for publication in Tokyo in 1976.
37. Noda, *Introduction au droit japonais* (Paris 1966) p. 199. For further information on the rules of *giri* cp. Benedict, *The Chrysanthemum and the Sword* (London 1967).
38. E.g. "If in the future a dispute arises between the parties with regard to the rights and duties stipulated in this contract the parties will setle the dispute harmoniously by consultation".
39. A note on the Japan Commercial Arbitration Association's rules appears in 2 Lawasia p. 171.
Material on trade negotiatoins with Japanese businessmen can be found in Adams & Kobayashi, *The World of Japanese Business* (London 1969). The most recent periodical information is in 27 Business Lawyer 1259 *(Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer);* 4 Lawasia Vol. 2 180 *(An Australian Lawyer's View of Japanese Business);* 29 Business Lawyer 835 *(Advising Japanese Corporations doing business with Americans);* 8 International Lawyer 822 *(Negotiating and Administering an International Sales Contract with the Japanese).*

industrialists and society in general are currently struggling in most countries of the world.

A. Industrial Pollution

Japan was a relative latecomer to the field of environmental pollution awareness though with its heavy industrialisation and concentrated population it has had significant problems for some time. In characteristic fashion, when the country was finally aroused to the seriousness of the situation there was intense activity and a great number of problems were solved in a short period.[40] Since 1967 the government has passed legislation on air pollution, water pollution, land pollution, disposal of wastes, noise pollution, pollution by odour, nature conservation, and pollution compensation measures. In 1970 alone Parliament passed fourteen laws on pollution control and the Environmental Agency's *Environmental Laws and Regulation in Japan*[41] contains 317 closely printed pages of state legislation.

The most critical areas of pollution have been the noise of road traffic, trains and aircraft, smog, industrial effluent, and garbage disposal. In some cases the pollution has reached such proportions that it has created actual serious health hazards and in other cases, such as the problem of the disposal of Toyko's daily 13,000 tons of rubbish, there appear to be no answers. The situation necessitated legislation at a local level too and to the body of State laws should be added a mass of local body law. In 1971 for instance Tokyo City authorities brought the Tokyo Metropolitan Anti-Environmental Disruption Ordinance into effect. The rules it provided were more strict than the national ones: all chimneys had to be equipped with dust collectors, sulphur dioxide levels in the air had to be kept to levels which would force many industries to use lower grade fuel oil and others to abandon oil fuel in favour of electrical or gas power. Further, the Ordinance controlled the disposal of industrial waste and ground subsidence, and extended the air pollution warning system to water pollution.

Industrialists have been greatly concerned about the relationship of their activities to environmental protection measures and in many cases have shown themselves unwilling to bear the cost burden that implementing the spirit of the new legislation would impose on them. There is, by way of example, evidence to suggest that pollution concentration limits are met not by the adaptation of processes or the extraction or neutralising of pollutants but simply by diluting the effluent with water before its discharge from the factory.

While responsibility under legislation is thus being averted, litigation

40. Alongside legislative and judicial activity there have been advances at the scientific level. Notable among such achievements was the development by Honda in 1972 of a "pollution-free" car which operates well within the requirements of the U.S. Muskie Act.
41. Published by the Environmental Agency in Japan 1974.

has shown that the courts will protect the rights of the individual in cases of serious neglect of duty by industry and it is at the judicial level that the most momentous developments have taken place.

In 1956 the first victim of a strange new disease was identified at Minamata in the south of Japan. Many years and lives later this disease, the Minamata sickness, became known to be the result of methyl mercury poisoning.[42] The culprit in the Minamata instance was a petro-chemical industry which discharged its toxic wastes from its fertiliser plant into the Minamata Bay. The organic mercury was concentrated by natural processes in fish and shellfish eaten by the local people who then suffered the destruction of the cells of their central nervous system. The company responsible was for a long time unprepared to accept any blame for the disaster. In 1959 it did make an offer of compensation ex gratia at the rate of about NZ$830 per victim but has continually denied any causal link between the factory effluent and the disease in spite of the fact that independent researchers had early shown the intimate relationship of the two. The company was later also shown to have suppressed the results of experiments and investigations that were available to it.[43] After much discussion and finally a split with the more conservative of their fellow-sufferers, a small group of the afflicted, in a desperate attempt to get the country to do its duty, broke with tradition and sued the company for damages.

In 1973, after four years of court proceedings, judgment was given in the victims' favour. The award was for the equivalent of NZ$45,000 for each person who had died or suffered serious injury, and also provided for the maintenance and treatment of future victims. The estimated total cost of compensation to the victims of Minamata is about NZ$55,000,000.[44]

This decision[45] related to one of the first noted pollution diseases and attracted a great deal of public attention, but it was not the first pollution decision of its kind to be handed down.

The Minamata disease had been noticed in 1956, but the case that showed the way for later victims of industrial negligence involved the unusual and excruciatingly painful disease induced by cadmium

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42. The case history is fully set out in 1974 Japan Interpreter 1 *(The Aftermath in Minamata).*
43. E.g. The report on the death of an experimental cat, Cat 400, after drinking a sample of the company's waste was passed over by the company.
Judge Saito of the Kumamoto District Court held the damage caused was foreseeable and was highly critical of the callousness of the company.
44. To be added to this figure is the phenomenal cost required to clean Minamata Bay, and to provide pensions for the fishermen and others who had earned their living from working in the bay. The other side of the coin is the reduction of labour in the chemical industry necessitated by the strain the compensation award has placed on the defendant's finances.
45. Kumamoto District Court, 20 March 1973. A decision at first instance.

poisoning. Contaminated water was used to irrigate rice and vegetable crops, and the poison taken into the body accumulated in the bones distorting them and making them brittle. The plaintiffs succeeded at first instance in June 1971, the first time a court had placed blame for environmental pollution fairly and squarely on an industry. The defendant immediately entered an appeal on the grounds first that the plaintiff had failed to prove the necessary causal link between the cadmium tainted effluent from its factory and the disease *(itai-itai)*, and secondly, that the toxicity of the cadmium waste had in any case been reduced to reasonable levels before discharge. This appeal was dismissed by the Nagoya High Court in August of 1972.

Proceeding at about the same time was another methyl mercury case in a different part of the country. Judgment, emphasising the responsibility of industries to take effective measures to prevent their activities causing harm to the community, was given for the victims of the poisoning in September 1971 by the Niigata District Court. The economic argument of supporting industrial advance at the expense of human health and well-being, was forcefully rejected. In addition to its basis in general principles the decision drew support from the ideas embodied in article 71 of the Civil Code which provides that "If a juristic person carries on undertakings which are outside the scope of its objects or contravenes the conditions under which permission for its creation was procured or otherwise commits acts which are likely to prejudice public interests, the competent authorities may annul such permission."[46] While this provision provides no remedy in itself, read in conjunction with the principles of the Civil Code Chapter V Book III[47] it clearly describes an act of the type for which material and moral damages may be payable.

Finally in this line of cases is the decision of July 1972[48] which allowed the claim of the victims of Yokkaichi asthma, an air pollution affliction caused by the vapours emitted from a petro-chemical industrial complex.

The struggle of the victims in all these cases was an uphill one. They had to fight tradition, the whole industrial and commercial establishment, and to satisfy the legal requirements for the proof of negligence from a mass of conflicting scientific data. The reluctance of the industries responsible for the damaging effluent to accept any responsibility in the matter was marked and in some notable cases resulted in a distortion of traditional patterns. In the methyl mercury

46. The Japanese Civil Code is available in English both in a publication of the Supreme Court of Japan, and (along with all other legislation) in the E.H.S. Law Bulletin Series published by Eibun Horei-Sha Inc., Tokyo.
47. The basic principle of delictual liability tin this Chapter is in article 709 which provides: "A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom". The only English commentary on the Japanese Civil Code known to be available in New Zealand is that of De Becker published in 1916 in the Transactions of the Asiatic Society of Japan.
48. Tsu District Court, 24 July 1972.

cases victims of the poisoning were ostracised by fellow workers and dissension even arose as among the victims themselves, some arguing that even in the distressed situation in which they found themselves there was no justification, in traditional terms, for resorting to the courts for settlement of the matter. Eventually, however, resolution did depend on court action and it is clear there would have been no satisfactory resolution of the matter if the suit had not been undertaken.

Victory on the civil side opened up the possibility for the future of criminal prosecution for the infliction of injury by environmental pollution, and, perhaps more importantly has led to the enactment of special legislation granting a degree of compensation on the basis of strict liability for injury resulting from industrial pollution.

B. Rights and Freedoms of Employees

In the field of employee rights a similar resistance by the business world is seen. Article 19 of the Constitution[49] provides that "Freedom of thought and conscience shall not be violated". The Constitution also provides that "All people have the right and obligation to work".[50]

Japanese business management has for many years been hostile to unions and political radicals and has often adopted employee selection criteria and procedures that disqualified leftists and those with an anti-government or anti-corporation background from getting a job. In 1963 Mitsubishi Plastics dismissed a probationary employee on the grounds that he did not disclose in the curriculum vitae submitted at the time of his engagement that, as a University student, he had taken part in the demonstrations in 1960 against the renewal of the 1951 Security Treaty with the U.S.A. Takano, the employee, sought reinstatement and won his case at first instance . On appeal the Tokyo High Court upheld Takano's reinstatement on the grounds of article 19 on the Constitution and on the basis of article 14.[51] Mitsubishi Plastics appealed again, this time to the Supreme Court, and in December 1973 the full Court quashed the lower court decisions and ordered a new trial before the Tokyo District Court. In this its first ruling on the nature of the constitutionally protected freedom of thought and conscience the Supreme Court held that the protection provided was against State and governmental encroachment on the liberties of individuals but that it did not relate to the private law sphere and hence had no relevance to the relationship of the parties to a work contract. This somewhat restrictive view of what is meant by freedom of thought and conscience while not according with the interpretation of courts in some other jurisdictions was very much within the main-

49. Available in English through the Public Information Bureau, Ministry of Foreign Affairs, Japan.
50. Article 27.
51. "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin".

stream of decisions of the Japanese Supreme Court.[52] In a not dissimilar case the Supreme Court ruled in November 1974 that a statute prohibiting the participation of civil servants in any political activity was not constitutional. At a lower level, the Sapporo High Court ruled in 1973 that the National Railways were justified in penalising workers who insisted on wearing a union ribbon during working hours.[53]

It would be wrong to suggest that these decisions were given to protect business and commercial interests, but there is no doubt that the resultant state of the law is favourable to employers and it is equally clear that in a case such as *Takano* that the individual with limited resources is in a very weak position compared with his *zaikai*[54] opponent.

C. Fair Trading

Finally there is the matter of fair trade practices to be considered. Here the law touches the very heart of big business. The Anti Monopoly Law of 1947[55] was an obvious follow-up in the anti-*zaibatsu* campaign. Article 9 (1) states that "The establishment of a holding company is prohibited", and is complemented in article 9 (2) by a prohibition on a company's becoming or operating as a holding company. The statute however goes much further. Its purpose is set out in article 1[56] and implemented by a categorical proscription of any entrepreneur effecting a private monopoly or undertaking any unreasonable restraint of trade.[57] Article 6 extends the enactments to international trade, article 8 lists activities trade associations may not undertake, and finally article 13 places restrictions on interlocking

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52. Cp. Maki, *Court & Constitution in Japan,* (Seattle 1964); Henderson, *The Constitution of Japan,* (Seattle 1969).
53. Reversing judgment for the plaintiffs in the Hakodate District Court.
54. A term used since the early 1950s to refer to the big business financial community.
55. The statute's full title is *Law concerning the prohibition of private monopoly and the maintenance of fair trade.* Its pre-1963 history is discussed in detail by Kanazawa: *The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power* in *Law in Japan* (ed. Von Mehren) (Tokyo 1969) p. 480.
A short but recent commentary with useful bibliographical data is "International Transactions and the Japanese Anto-Monopoly Act", 4 Lawasia No. 2 p. 169.
56. *Article 1.* "This Law, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of power over enterprises, and by excluding undue restriction of production, sale, price, technology, etc. through combinations, agreements, etc., and all other unreasonable restraints of business activities, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and national income, and thereby to promote the democratic and wholesome development of national economy as well as to assure the interest of the general consumer."
57. Article 3.

directorates.[58] Originally the Act also included a specific rule[59] against price-fixing and market control but this clause was repealed in 1953. The administration of the Anti Monopoly Law is by a Fair Trade Commission which has complete independence in the exercise of its powers but is responsible to the Prime Minister.[60]

Shortly after the promulgation of the Act pressures were exerted by the business community to have its provisions repealed, and some changes were in fact necessary immediately to facilitate the sale of the stocks of the outlawed *zaibatsu*.[61] After the Occupation ended in April 1952, further changes were made, and its area of application was also reduced by the enactment over the year of exempting statutes.[62] The Fair Trade Commission objected strongly to this eroding of its powers and repeatedly called for the introduction of more stringent controls on trading practices.

Pressure from the Commission became particularly pronounced from 1972 onwards. In the 1969-1973 period approximately 200 illegal price cartels were exposed, but not positive effect was recorded.[63] Frustrated by its lack of authority the Commission in 1974 put forward a four-point plan for amending and significantly tightening the provisions of its statute.[64] It proposed powers to break down compulsorily a monopolistic corporation into smaller units in the interests of competition, to publish the costing information by companies forming cartels, to cut prices compulsorily and impose heavy penalties on members of illegal cartels, and to limit shareholding in specified corporations by other corporations. Big business reacted sharply to these proposals and effectively rejected them all in November 1974. The official view of the Ministry of International Trade and Industry (MITI) at the time was that "competition could be promoted by other means"[65] and related concern about the Anti-Monopoly Law to the effects of the oil crisis, which it regarded as short term.

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58. "No officer or employee . . . of a company shall hold at the same time a position as an officer in another company or companies in Japan in the event that the effect of such interlocking directorate may be substantially to restrain competition in any partitcular field of trade".
59. Article 4.
60. Articles 27 and 28.
61. One result of changes was to allow inter-corporate shareholding in specific circumstances and this not only helped dispose of the stocks but also provided a method of building the new industrial and commercial empires which correspond so closely to the old.
62. These have generally related to aspects of international trade with the purpose of establishing "order among export and import transactions and thereby provide for the sound development of foreign trade" (Art. 1 Export-Import Transactions Law 1952).. The Ministry of International Trade and Industry (MITI) has an important part to play in controlling activities in this field and its implementation of Government policy and the exempting of trading groups from the Anti-Monopoly Law often seem antagonistic to the Fair Trade Commission's duties.
63. The companies concerned indicated compliance with the Commission's directives but prices did not change.
64. In many ways the call was for a reversion to the pre-1949 position.
65. Cp. *Japan Times Weekly* of 16th November 1974.

In December 1974 there was a leadership crisis in the business-backed Liberal-Democratic Party and the new Prime Minister Takeo Miki, concerned to clear the Government's image of the taint of big business influence, pledged himself to the revision of the Anti-Monopoly Law. By March 1975 the Government had completed a draft of the reforms it proposed to introduce in the next legislative session. The draft differed significantly from the Fair Trade Commission proposals in that the breaking down of large monopolistic corporations was to be subject to Cabinet approval, the possibility of disclosing cost-accounting data was omitted, and certain types of corporations were to be excluded from the stockholding restrictions proposed by the Commission. The Prime Minister's Office draft nevertheless did reflect the views of the Commission to some degree. However at inter-Ministerial level, where the views of MITI weighed heavily, the proposals were further emasculated. Even then criticism of the draft law continued unabated both from the business sector and the permanent head of MITI.

Eventually a draft was presented to the Legislature but at the close of session in June 1975 it had not been voted and was shelved. Quite apart from lack of Parliamentary time it had by June become clear that the Government's interest would not be advanced by any move against private enterprise such as that envisaged in the Bill. The conflict of interest was essentially one between big business[66] and the people, and the result was very clearly in favour of the business community.

III CONCLUSION

Looking back over this survey of the history of Japanese law and business the first point to be noticed is the high degree of continuity maintained in the business community over the centuries. Then there is the somewhat uneasy but seemingly inevitable relationship of the political authorities with big trading interests. There is also the pronounced clash at a societal level between the merchant class and the other members of the community. Finally there is the role of the law.

Business and financial pressure has been a factor in nearly all the major legal developments in Japan in the last two centuries. The changes have not always been to the merchants' advantage but by and large the position of the merchants in society has been and still is sufficiently strong to protect them from the effects of the more radical departures from tradition.

The interest in the future will be to see whether the business

66. Throughout this article merchant and synonymous expressions have been used to refer generally to large-scale business and industry. Small-time traders, artisans and shopkeepers are not included in the reference. These latter would in terms of conflict of interests regard themselves as public vis-a-vis big enterprises.

community will remain strong enough to protect itself from the sorts of pressures that engendered the Fair Trade Commission's recent anti-monopoly revision proposals, from the demands of the labour force, and from the awakening attitudes of the public in the environmental domain. The big question is whether the patterns of the past will be those of the future. The lesson of the past is that they will be.

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