

Santa Clara University School of Law
Center for Global Law and Policy
2015 Tokyo Summer Program
At Asia Center of Japan, June 8 – June 12, 2015

Introduction to Japanese Law

Professor Yasuhei TANIGUCHI, LL.M. Berkeley 1963 & J.S.D. Cornell, 1964
Prof. Em. of Kyoto University and Of Counsel, Matsuo & Kosugi, Tokyo

This course follows the Prof. Abe's course of the same title and tries to approach the Japanese legal system from a slightly different perspective. Emphasis will be on general subjects such as historical developments, constitutional schemes, judiciary and legal professions, dispute resolution, etc. rather than on specific topics of practical interest, which are to be dealt with in other courses. The instructor was born in 1934. His long personal experiences will be infused in the course hopefully to make the course historically interesting.

A. Historical and Comparative Basis of Japanese Law

It is important to understand the present Japanese law from a historical perspective. Japan experienced a radical legal reform at least twice in its modern history, firstly during Meiji period starting in 1868 under an influence of the European Civil Law and secondly after the defeat in the Pacific War under an influence of the American Common Law. The third wave of reform has visited Japan in the first decade of this century as the justice system reforms dealt with in C below.

(1) Tokugawa Law (1603-1868)

1. John H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1936), VII Japanese Legal System (III) Third Period, pp. 479-525
2. DAN F. HENDERSON, CONCILIATION AND JAPANESE LAW – TOKUGAWA AND MODERN Vol. I (1966) pp. 157-169

(2) Meiji Westernization

3. YOSHIYUKI NODA, Introduction to Japanese Law (1976, Translation by Anthony Angelo from French) Chapter III, Reception of Western Law pp. 41-62
4. CONSTITUTION of the Empire of Japan of 1889 (known as Meiji Constitution) (same as ABE MATERIAL)

(3) Post 1945 Reforms

5. CONSTITUTION of Japan of 1946 (known as Post-War Constitution) (same as ABE MATERIAL)

B. Nature of Japanese Law

Is the Japanese law fundamentally different from the Western counterpart? This is a question constantly asked by the students of Japanese law in and outside of Japan. Here is one of the answers.

6. J. C. SMITH, *Ajase and Oedipus: Idea of the Self in Japan and Western Legal Consciousness*, 20 U.B.C. L. REV. 341-377 (1986)

C. Courts and Judges

Japanese courts and judges share common features with European Civil Law countries. But there are some Common Law elements as well. In this area, a significant reform has taken place as a result of the Justice System Reform movement driven by the Prime Minister Koizumi from 2001.

7. YASUHEI TANIGUCHI, *Post-War Court System as an Instrument for Social Changes*, in GEORGE DEVOS ED., *INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY* (1984) pp. 20-40
8. SETSUO Miyazawa, *Successes, Failures and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue*, 36 *Hastings Int'l & Comp. L. Rev.* 313 (2013)

D. Legal Education and Professional Training

The post-War system of university legal education, National Legal Examination and professional training at National Legal Training and Research Institute has undergone a fundamental reform with the creation of "Law Schools".

9. DANIEL H. Foote, *The Trials and Tribulations of Japan's Legal Education Reforms*, 36 *Hastings Int'l & Comp. L. Rev.* 369 (2013)
10. No material

E. Lawyers, Quasi-Lawyers and Foreign Lawyers

Practicing legal profession in Japan faces a challenge. Demand for a radical increase in number, deregulation, foreign lawyers, etc. are some of the issues.

11. EXCERPT from Japan Business Law Guide: Introduction to Japanese Law by Veronica Taylor with Kyoko Ishida (2007), pp. 47-60 [7-230 – 7-920]
12. Yasuhei Taniguchi, *The Changing Image of Japanese Practicing Lawyers (Bengoshi): REFLECTIONS and a Personal Memoir*, in Harry N. Scheiber & Laurent Mayali eds., *Emerging Concepts of Rights in Japanese Law* 223 (2007)
13. BRUCE E. Aronson, *The Brave New World of Lawyers in Japan Revisited: Proceedings of a Panel Discussion on the Japanese Legal Profession after the 2008 Financial Crisis and the 2011 Tohoku Earthquake*, 21 *Pac. Rim L. & Pol'y J.* 255 (2012)

F. Dispute Resolution

This is a favorite subject in the study of Japanese law because law is but the ultimate means of dispute resolution. Kawashima's article is a classic in this field to be cited first when writing about Japanese law in English.

14. Takeyoshi KAWASHIMA, *Dispute Resolution in Contemporary Japan*, in ARTHUR VON MEHREN, ED., *LAW IN JAPAN* pp. 39-72 (1963)
(same as ABE MATERIAL)
15. Tom GINSBURG & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 *J. Legal Studies* 33 (2006).

15bis Yasuhei Taniguchi, *The Development of an Adversary System in Japanese Civil Procedure*, in Daniel H. Foote ed., *Law in Japan: A Turning Point*, p. 80 (2007)

16. Aya YAMADA, *ADR in Japan: Does the New Law Liberalize ADR from Historical Shackles or Legalize It?* 2 *Contemp. Asia Arb. J.* 1 (2009)

G. Constitutional Review and Constitutional Issues

Constitutional review system created by the post-War Constitution has enabled the Supreme Court to create a significant body of constitutional case law.

17. David S. Law, *Why has Judicial Review Failed in Japan*, 88 *Wash. U. L. Rev.* 1425 (2011)

H. Criminal Process

Criminal process is traditionally characterized by an extremely high rate of conviction and a low rate of incarceration. The whole system is now under fire when “the safe street of Japan” is becoming a myth and the new assessor (*saiban'in*) system has been introduced..

18. HIROSHI Fukurai, *A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice system Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 *Hastings Int'l & Comp. L. Rev.* 517 (2013)

I. Administration and Business

Relationship between the government and business circle has been changing since the collapse of bubble economy.

19. Tom Ginsburg & Glenn Hoetker, *The Effects of Liberalization on Litigation: Notes toward a Theory in the Context of Japan*, 8 *Wash. U. Global Stud. L. Rev.* 303-315 (2009)

J. Family Law and Women's Rights

Family law underwent a radical change after the War but the society could change only slowly. Now that the process of adaptation is completed, new issues face the family law. Slow development of women's right in workplace under the Equal Employment Opportunity Act is analyzed by Prof. Ishida, a female law professor.

20. Yasuhei Taniguchi in collaboration with Akiko Taniguchi, *Succession Law and Inheritance Disputes in Japanese Family Court Conciliation*, in Harry N. Scheiber & Laurent Mayali eds., *Japanese Family Law in Comparative Perspective* 119 (2009)

21. Kyoko Ishida, *Promotion of Workplace Gender Equality and the Impact of Free Market PRINCIPLES in Japan*, Potter & Gibb, eds., *Gender Equality and Trade Regimes: Coordinating Compliance* (2012, The North-South Institute, University of BC, Canada)

[The End]

John Henry Wigmore, A Panorama of the World's Legal Systems (Washington Law Book Company, 1928, 1936 ed.)

VII Japanese Legal System

(iii) THIRD PERIOD

7. The first great figure in the third period is that of the victorious Regent, Tokugawa Iyeyasu, in the early 1600's.¹¹ Under the Tokugawa dynasty of the Regency (A. D. 1603-1868), the nation reached a permanent state of political equilibrium, economic prosperity and social quiet,—comparable to that of France under Louis XIV. Feudal tenures continued, and the military class dominated. But the central federalized government of Tokugawa held unquestioned sway. It now proceeded to close the Japanese islands against all foreign intercourse and the fear of foreign invasion, and provided within its own extensive domains a model of administration for the liefs of the greater semi-independent barons. The nation henceforth, for nearly three centuries, enjoyed a complete peace, internal and external, unparalleled in any European country.

(480) During that period literature and commerce flourished, and prosperity prevailed. The activities of commerce developed all the expedients and principles of European commercial life. Bills of exchange and banks, the clearing house and the produce-exchange, the promissory note and the check, the insurance-policy and the bill of lading, the chain-store and the trade-guild,—all these features of advanced commercial life are seen reflected in the legal records. Even the clearing-house check, and "future"

sales on the rice-exchange, are found. How many of the germs of these devices had been originally imported from China, cannot be told. But at any rate the technique of commerce had developed far beyond that of Athens, the most advanced commercial state of ancient times, and at least on a par with that of the then contemporary Europe.

8. Naturally, the native legal talent for law and order now also found its opportunity for development. This took place under the control and guidance of the Regent's Supreme Council. Iyeyasu obliged the great barons to spend a part of each year under his sight in Yedo, his new capital (now Tokyo); and their castle-like mansions and parked estates were a notable feature of that city.¹¹ And though the great barons, when at home in their own provinces, were allowed to retain local jurisdiction in legal matters (for they had their own courts, like the English courts baron), yet they were virtually under central control. The Tokugawa Supreme Court at Yedo was given a federal original jurisdiction, for suits between parties from different provinces; a certain confirmatory jurisdiction was reserved for death sentences imposed on a vassal in the baron's court for political offences;¹² the barons' judges, on cases within their own provinces, often consulted the Tokugawa Court with a view to uniformity of law; and "in all matters" (says an edict of A. D. 1635) "the example set by the laws of Yedo is to be followed in all the provinces".

Under this regime, a copious stream of legislation and decision, during three centuries of a legal-minded dynasty, now built up the nation's legal system. Three or four outstanding features may be noticed.

9. In general, the laws and decisions were not publicly promulgated; they were circulated in manuscript for the use of officials only. "Not to be seen by any but the officials concerned", is the rubric at the end of the Code of A. D. 1790. This was perhaps on the Confucian principle that the responsibility of doing justice rests on the ruler, not on the people. "The way to govern the country is to secure the proper men; if there be capable men in office, the country is sure to flourish; if there be not capable men in office, it will go to ruin"; such is the literal quotation from Confucius that forms the closing article of the feudal Code of A. D. 1615. Another saying of Confucius was often repeated by the Tokugawa rulers: "Let the people abide by the law, but not be instructed in it". The ideal in the framing of a law was to guide the dull magistrate by its provisions, and to permit the wise magistrate to supplement it with his wisdom. And so the written laws were commands addressed to the officials, and not addressed to the people; therefore not needing to be generally circulated.

But the administration of justice was in the hands of a professional class, and to this class the laws were fully made known. There was a large staff of clerks and assistants for the Supreme Court at Yedo, and also for every one of the local magistrates in the counties, who virtually formed a special trained class with permanent tenure and a system of promotions. They were required to be skilled in the keeping of accounts, to have a general knowledge of civil and criminal law, and to be familiar not only with the customs of their own county but with those

of adjacent regions. There were numerous books of instruction for these magistrates—some printed, some copied by hand. They went under various names. "Code of Practice" (Kōji-sosho-tori-sabaki-sho) is the name borne by a manuscript code dated A. D. 1791—the well-worn 'vade mecum' of some local judge. And there has survived doubtless many a "Manual for Trials" (Kohan-go-tei-sho) in the record-chests of the old county-families.

There were no professional advocates or juriconsults (as in Greece or among the Mohammedans). Each party was supposed in theory to conduct his own case. To obtain payment of a claim on behalf of another, taking a fee, was unlawful. Nevertheless, many made a practice of thus acting for others, on the pretext of relationship with the party or of his illness and inability to attend; much money was made by such attorneys; but the fee was clandestine.

The trial method was identical with the one already developed in China and in continental Europe,—the inquisitorial method, which gives all responsibility to the trial magistrate. Japan was a country of law and order, for its criminal justice was stern and highly organized. The ideal judge of Oriental romance, endowed with piercing penetration into the hearts of litigants and a sturdy sense of equal justice, was a prominent figure, not only in the government, but also in the popular imagination. Oka Tadasuke, Baron Echizen, in the early 1700's comes down to posterity with a fame like Solomon's; there still circulates among the humbler classes of Tokyo

next is [488]

a popular book containing the sensational stories of his wonderful insight and shrewd justice." One of the anecdotes handed down about him is almost the exact duplicate of Solomon's judgment between the two women who claimed the same child:

[*A Judgment of Oka Tadasuke.*] "About a century and a half ago, a woman who was acting as a servant in the house of a certain Baron had a little girl born to her. Finding it difficult to attend to the child properly while in service, she put it out to nurse in a neighboring village, and paid a fixed sum per month for its maintenance.

"When the child reached the age of ten, the mother, having finished the term of her service, left the Baron's mansion. Being now her own mistress, and naturally wishing to have the child with her, she informed the woman who had it that she wanted the child. But the woman was reluctant to part with her. The child was very intelligent, and the foster-mother thought that she might get some money by hiring her out. So she refused to give her up to the mother. This of course led to a quarrel. The disputants went to law about it; and the case came up before Oka Tadasuke, then Magistrate of Yedo.

[488] "The woman to whom the child had been intrusted asserted that it was her own offspring, and that the other woman was a pretender. Oka saw that the dispute was a difficult one to decide by ordinary methods. So he commanded the women to place the child between them, one to take hold of its right hand and the other of its left, and each to pull with all her might. 'The one who is victorious,' said the Magistrate, 'shall be declared the true mother.' The real mother did not relish this mode of settling the dispute; and though she did as she was bidden and took hold of the child's hand, she did what she could to prevent the child from being hurt, and slackened her hold as soon as the foster-mother began to pull, thus giving her an easy victory. 'There!' said the foster-mother, 'the child, you see, is mine.'

"But Oka interposed: 'You are a deceiver. The real mother, I perceive, is the one who relaxed her grasp on the child, fearing to hurt her. But you thought only of winning in the struggle, and cared nothing for the feelings of the child. You are not the true

mother; and he ordered her to be bound. She immediately confessed her attempt to deceive, and begged for pardon. And the people who looked on said, "The judgment is indeed founded on a knowledge of human nature."

Though the governmental codes were compiled in the form of instructions to officials, it must not be supposed that the laws were secret in any sense. The ordinary trial courts were open to the public. New or standard penal laws were posted on public placards at the crossroads. The laws of land tenure and family succession were founded on notorious custom. And each village had its own written code of rules for local affairs; this was read aloud by the district magistrate on the first day of each year, and then signed by every householder. It corresponded somewhat to the "keuren" of the Netherlands and the "handfest" and "weistum" of Germany at an earlier period.

(489)
(491)
↓
10. Another fundamental feature of the system was the principle of conciliation,—the principle so prominent in Chinese justice (*ante*, Chap. IV), and here again (if not a general Oriental trait) a result of the Confucian philosophy imported a thousand years before.

The principle of conciliation resulted thus: Every town and village was divided into "kumi", or companies of five neighbors, the members of which (somewhat as in the Saxon frankpledge or frithborg), were mutually responsible for each other's conduct. In case of a disagreement between members of a company, the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as

(497) at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the company would meet and consult over the case. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him socially; this usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or company. A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. If even the company-chief could not settle the matter, it was laid before the higher village officers, the elder and the headman. In fact, the chief village officers might almost be said to

form a board of arbitration for the settlement of disputes; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring [492] headman. If the headman was unable to settle a case, it was laid before the local magistrate, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity.

When a case finally came before the magistrate for decision, it passed from the region of arbitration, and became a law-suit. From the magistrate it might pass to the higher courts at Yedo. But even when the case finally came to the magistrate's court, it was not always treated in the strictly legalistic style familiar to us; the spirit of Japanese justice dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

A few selections of actual cases will give a better idea of this conciliatory justice than any number of generalizations. The following documents are from public records, not quite a century old, belonging to a village some eighty miles from Tokyo, lent from the family-chest of an old [493] deputy-magistrate.* The first document explains itself:

VIII. Japanese Legal System

[A Conciliation Case.] "Bond offered to Haikichi and Tsubei. My son Sutegoro, on the occasion of a festival at the Zoko temple on the 28th of last month, wounded you and your son Tsubei in a quarrel. We are distressed at hearing that you are to take the matter into court, for my son's punishment would doubtless be severe. We asked Wahei, representative of the farmers of this village, and Tomoyemon, of Hatta village, to mediate and to ask your pardon. We are grateful to you for having extended it, and now promise not to suffer the said son Sutegoro to live in this village hereafter. He has already fled the village, dreading the consequences of his conduct; but if he ever is found again within the village, he shall be treated according to your pleasure: we shall offer no objection to whatever you may do. We offer this document of apology, sealed by the chief of the company and by the mediator.

"Tempo, 11th yr., 8th mo., 3d day [1841].

Farmer Yobei, the parent.

Farmer Sujibei, his relative.

Farmer Isobei, Chief of company.

Wahei, Mediator.

Tomoyemon, Mediator, Chief Farmer."

The next tale is a longer one; for this case went as far as the magistrate:

[Another Conciliation Case.] "Petition to Shinomoto Hikojiro, Magistrate of Koma County. The undersigned respectfully represents as follows:—

"Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry

10. Conciliation

her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

"Tempo, 10th yr., 2d mo. [1840].

Farmer Uhei, Complainant.

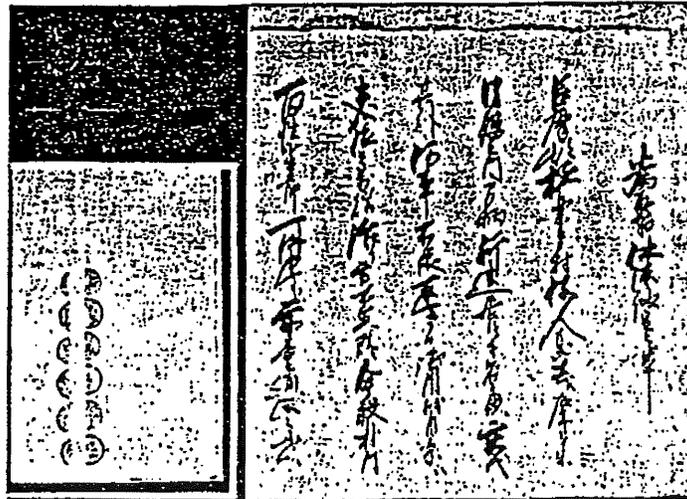
Warrantor, Asayemon, Headman of Village.

Countersigned, Ichikawa, Deputy-magistrate of County."

"Petition for Dismissing a Case. In the matter of Cho, already reported, we beg to file the following petition for dismissing the case:—

"Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you

10. Conciliation



VIII. 19—PARTIES' SETTLEMENT-RECORD, A. D. 1779

The seals at the left show a mode of authenticating similar to the English indenture. The counterparts of the instrument are placed edge to edge, folded, and half the seal-mark remains on each

province and under the same jurisdiction, alleging that Kurohira Village was located at Ontake Mountain, that its inhabitants had since time immemorial been accustomed to make a good subsistence from the woodbote and other profits à prendre on the mountain-side; that nevertheless the right of taking wood for buckets and for goldsmith charcoal, included in the aforesaid profits, which Kurohira Village was entitled to take for its own use, was seized by inhabitants of Ontake Village, who prevented passage by the road known as Takashiba Road; and that, since a judgment formerly given on this dispute in the Shotoku period [A. D. 1711-1716] Kurohira Village was greatly suffering for lack of the means of livelihood, and now asked for restoration of its rights under the former custom.

[497]

VIII. Japanese Legal System

will shut your eyes to the case, and not give it any further consideration.

"Tempo, 10th yr., 2d mo. [1840].

Ichikawa, Deputy-magistrate.

Farmer Uhei, Complainant.

Headman Asayemon, Warrantor.

Farmer Jirozayemon, Defendant.

Farmer Hichibei, his relative.

Farmer Masabei, his company-chief.

Headman Shirozayemon, Warrantor."

"Approved: Shinomoto Hikojiro, Magistrate of Koma County."

When the controversy was pushed beyond the stage of conciliation and reached the Supreme Court at Yedo, still the principle of conciliation left its marks: for the judicial record was usually completed by the filing of an instrument drafted in the name of the parties, reciting the issues, the facts found, and the terms of the decision, and signed by all the parties in token of their assent to the settlement.¹⁹ The following record, marking the last stage of a long-drawn-out litigation over a rural right of easements and profits, illustrates this method:²⁰

[Record of a Case Appealed.] "*Lawsuit of Kurohira Village, Kai Province, vs. Ontake Village, same province, over Profits à Prendre.* Anyei, 8th year, 10th month, 21st day [1779].

"Yamamura, Baron Shinano [Exchequer Judge], sitting Judge.

"Kurohira Village in Koma County, Kai Province, under the jurisdiction of Local Magistrate Kubo Heizaburo, brought an action before the said magistrate against Ontake Village, same county and

VIII. Japanese Legal System

"This suit was disposed of by Heizaburo under the usual procedure and referred by him to the Supreme Court together with the documents and his report. By the Supreme Court a summons was then caused to be served upon both parties and the case was examined anew. It was found difficult to give a correct decision on the matter without a view of the land in question. For this purpose, Nakai Seidayu, another local magistrate, was sent to the said land, and he made an inspection thereof. Upon the report of Nakai Seidayu stating the result of such view and survey, a hearing was again had. Now, by instruction of Baron Matsudaira of Ukio [chief judge] the judgment is given as follows:

"In the judgment given on this dispute in the Shotoku period, it is stated that 'branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom'. But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along that road bearing any profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever. In testimony of obedience to this judgment by both parties, a certificate will be forwarded to this court.

"This judgment will be notified in writing to Ishii Saichiro, clerk of the magistrate Kubo Heizaburo. This case was referred

10. Conciliation

here by Kubo Heizaburo through the Exchequer Magistrate; there is therefore no declaration on file in this court.

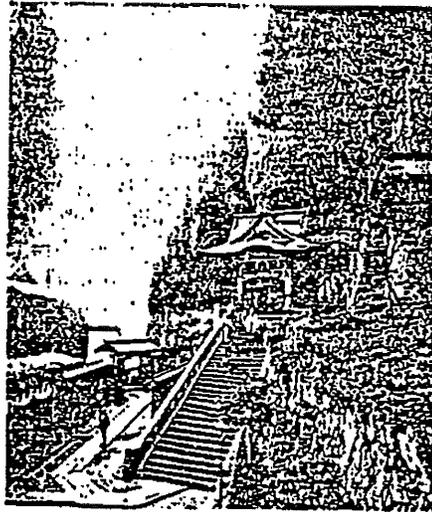
"Attest:

Kamiya Ruhachiro, clerk of the Court".

"Certificate to the Honorable Supreme Court:

"1. Our suit came to this honorable court; but owing to the location of the land in question, it could not, without further inquiry, give a correct decision, and Magistrate Nakai Seidayu was sent to the land, and the land was actually surveyed by him. Upon his return of the results of that survey, a new hearing was had.

"2. Kurohira Village as complainant alleged that since many years ago Kurohira Village had been in possession of the eight sections of land on Ontake Mountain and that certain other hillsides had belonged to it,¹⁰ when they were under the jurisdiction of Matsudaira, Baron Kai; moreover, a hot spring commonly called Tonohira Spring had been in its possession; thus there had been many profits à prendre, such as timber for planks and for charcoal and mushrooms, the use of the hot springs, and the clearing of ground for cultivation. Every year, a quantity of mushrooms and a



VIII. 20—HARUNA MOUNTAIN AND TEMPLE

This is a region similar to the one concerned in the lawsuit,—temple lands in a mountain region

VIII. Japanese Legal System

tax amounting to 3 Kwar and 500 mon in Yeiraku coinage had been presented and paid in to the then holder of the fief. All the said profits were used to be carried away along the Takashiba Road to Kofu, through the Ontake Temple lane, and sold in the market thereof. In the course of the period Hoyei [A. D. 1704-1710] a dispute took place between Kurohira Village and Ontake Village which was finally adjudged by the honorable Supreme Court, a copy of which was indorsed on the back of the map of the land in question. Later on, in the course of the period Shotoku [A. D. 1711-1716] another suit was brought before the same court with respect to the profits à prendre of the same land, in which judgment was given by the court and again indorsed on the back of a new map of the same land. On that occasion, the map containing the terms of the first judgment given in the period Hoyei, and the old registry of land ownership, was surrendered to the honorable Supreme Court, and the lands of the Ontake Mountain and hot spring above referred to, and other mountain lands individually owned by the farmers, were declared to be temple property. Thus, the old communal rights of Kurohira Village, as well as certain individual titles of its farmers, were lost at one stroke, and the whole community of Kurohira was extremely distressed, so that it was thereafter compelled to seek the profits à prendre of the above description on the land above referred to, for urgent need of want of the means of subsistence, although it did not knowingly act contrary to the judgment given in the period Shōtoku. It was truly forced by its extreme necessities to cut down trees, break off branches, and even scrape together leaves, to make the handles of hoes, mallets, etc. All these articles were carried along the Takashiba Road to Kofu, where they were sold to the public. Pursuant to this custom, a group of men of Kurohira Village were passing along the Takashiba Road with the wood for bucket-handles and charcoal, in October, 4th year of Anyei [A. D. 1775] when the watchman of Ontake Village intercepted their passage and seized all their loads, to their great distress. Often before this, the people of Ontake Village had robbed

[500]

10. Conciliation

the men of Kurohira Village of the fruits of their labors; the foregoing was only one instance. Since the judgment in the period Shotoku, Kurohira Village has become gradually poorer and more distressed. On the other hand, the people of Ontake Village continue to open new sections for cultivation on the land in question, and they cut down standing trees at their pleasure.

"The plaintiff village further alleged that it was unaware of any ground for Ontake Village's conduct, which appeared to be inconsistent with the law. The plaintiff was in the habit of presenting mushrooms and paying a tax to the owner of the fief in conformity with former custom. Moreover, it prayed the honorable Supreme Court to recognize its rights in the section bounded by the Iwana river on the South, the Muroka meadow and the peak of Hiraiwa on the North, Ara river on the East, and the two peaks of the Ko mountain and of Hishi mountain on the West. The hot spring would thus, it was believed, fall within its territory. Further, as to the profits à prendre, the plaintiff asserted that it was entitled to carry its loads along the Takashiba Road without any obstruction by the people of Ontake Village.

"3. On the part of the defendant village, it was alleged that the judgment of the period Shotoku expressly forbade the villagers of the plaintiff Kurohira to take the aforesaid profits, or pass along the Takashiba Road therewith or to occupy the said sections, and that, therefore, the defendant village had posted watchmen there to watch for travellers. In October, 4th year of Anyei [1775] some men of Kurohira Village came along the Takashiba Road with loads of wood, and the watchman thereupon seized and took from them the wood, within the limits of their right. Defendant, Ontake Village, possesses a tract of land, granted by the government, yielding 240 bushels of rice; the product of which is allotted to the temple staff for the public expenses of Ontake Village. The section of land between the Main Temple Gate and the Upper Temple is temple-land, by the judgment of the period Shotoku, whose terms are in-

VIII. Japanese Legal System

dorsed on the back of the map. Defendant, Ontake Village, has been duly observing the terms of the judgment. Plaintiff, Kurohira Village, owns one piece of farm-land, 26 bushels yield, located within the limits of the Ontake Mountains. But, in strict point of law, it has no title to any of the forest land therein. It did have, by virtue of the former judgment, the right to enter and take the branches and leaves of trees (as materials for hoes and clubs) and ferns and mushrooms, to be found in the forest lands, and it did so take them. Such forest profits are sufficient for its requirements. Nevertheless, it frequently attempted to exceed these rights contrary to the terms of the former judgment, and proceeded also to take articles not expressly permitted by the former judgment to be taken, and passed with them along the Takashiba Road, along which it was unlawful for Kurohira Village to pass. Thus, in spite of its lack of grounds, Kurohira Village unjustly claims that its people are entitled to use that road.

"As to the plaintiff's further charge that Ontake Village has unlawfully and surreptitiously cleared certain land for cultivation and cut down standing trees, the defendant Ontake denies any unlawful conduct on its part. What happened was merely that, at the repair of the temple, some standing trees were cut down, to be used only for that purpose, and after request made to the Temple Commissioner for instructions. In no respect has the defendant acted unlawfully.

"4. The claims of neither party in this suit are fully sustained by the honorable Supreme Court. We have now been given the following judgment: 'In the judgment given on this dispute in the Shotoku period, it is stated that "branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom". But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is

[502]

10. Conciliation

clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along the road bearing profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever.

"We respectfully acknowledge these honorable orders. In case of our disobedience, we shall be liable to any punishment. In witness of our obedience, we have the honor to file this certificate with the honorable court.

"21st day, 10th month, 8th year of Anyej [1779]

"Plaintiff: Under the jurisdiction of the Local Magistrate Kubo Heizaburo, Kama County, Kai Province;

[Signed] Kurohira Village, by Tozayemon, headman, general representative,

Rihei, company-chief, general representative,
Taroyemon, Agent of the farmers.

Under the jurisdiction of the same office, same county, same province;

"Defendant:

[Signed] Ontake Village

Naito Iki, Chief Elder and Temple Custodian and general representative,

Kubodera Iyo, general representative."

11. The foregoing two features of Japanese justice were attributable to the borrowed Chinese philosophy of

VIII. Japanese Legal System

life. But a third feature was indigenous, and has its nearest analogy in English legal history. From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's. It is by reason of this achievement of the Tokugawa dynasty that the Japanese legal system is entitled to be regarded as an independent one. A national law has been developed through precedents by a few other peoples also,—by the Hebrews, the Romans, and the Mohammedans; but in those three systems this was done by unofficial jurists, while in the English and the Japanese systems it was done by the official judges themselves.

For understanding the purpört of two or three illustrations, the judiciary organization must be briefly sketched. The Regency domain (i. e. apart from the few large self-governing baronies) was divided into three jurisdictions,—metropolitan, rural, and ecclesiastical. To the Metropolitan Judge were brought all suits in which the plaintiff was a townsman; to the Exchequer Judge all suits in which the plaintiff was a countryman; and to the Temple Judge, all suits by a resident of the ecclesiastical lands. These three judges, sitting in banc, formed the Supreme Court. But the judges were not always the

[504]

11. *Judicial Precedents*

same persons; because each of these posts was dual, held by two officials, each one of whom in alternate months sat in the Supreme Court (six days in a month.) At other times he officiated in his own jurisdiction. But even here he was more or less an appellate judge, because many or most cases had already been heard by a lower magistrate in each of these jurisdictions; so that there were two possible stages of revision. Original jurisdiction was taken by the Supreme Court in one class of cases only, viz., in suits between parties from different jurisdictions. Otherwise its jurisdiction was appellate only. But an appeal in the strict sense was allowable only on the ground of a denial of justice in the court below—an extreme and rare issue. Instead, however, the revisory function was supplied by frequent voluntary references of cases by the individual member-judges on doubtful points or on subjects calling for a uniform practice.

Such, in rough outline, was the judiciary scheme by which the law was now professionally developed under the Tokugawa dynasty.

The rules of procedure were thoroughly worked out, as befitted an elaborate judiciary system. The following set of rules for the use of maps and plans in land-title disputes will serve to illustrate; it is taken from the Code of A. D. 1742:¹

[505]

VIII. Japanese Legal System

[*Rules of Procedure for Using Maps.*] "Upon the adjudication of boundary disputes the plans prepared by the courts of the boundaries of provinces and of counties shall be certified by the seal of the Council of State and those of the three Judges.

"Other plans embodying the judgment of a court shall be endorsed and certified by the joint seals of all three Judges

"In land disputes, the plans of both parties shall be produced; and whether it be the boundaries of a province that are in controversy or merely the boundary of a county, these shall be compared with the government map of the province; and if it be found that in the main there is no discrepancy between them, it shall not be necessary to send a surveyor before delivering judgment. As a rule surveys are not to be too freely ordered, but only in very complicated cases.

"In cases which cannot be decided without the holding of a survey, if the dispute has reference to the boundary of a province or of a county, the government inspectors and the magistrate shall be sent to make the survey. If the dispute relate merely to the boundaries of villages, the magistrate alone is to be sent. And even in disputes as to county boundaries, when the case is free from complications judgment may be given after a survey held by the local magistrate.

"In disputes about rice fields and dry fields and hills and forests and other private rights, when the maps and documents produced by the parties are not sufficiently clear to allow of a decision being given without a rectification of the boundaries, it shall not be necessary to report the case to the Supreme Court for trial, but a subordinate magistrate of the neighborhood is to be sent to carry out a rectification of the boundary."

Formal appeals were comparatively rare. But when the individual member-judge, acting in his own juris-

11. Judicial Precedents

diction, was in doubt, he prepared a full statement of the case (much after the manner of an equity judge's findings), and submitted it to the Full Chamber for decision. The following commercial case, readily paralleled in our modern civic life, and raising an interesting question of partnership law, shows the technique of this method of decision:

[Record of a Decision on a Partnership Claim.]

"An Action by Kinsuke, of Susaki Village, Musashi province, against Toshichi and another, of Ofune-kuramaye ward, Fukagawa District, Yedo, before Baron Sado.
Dated Kokwa, V (Ape), 2, 4 [March 8, 1848].

"1. *Consultation* by Kusumi, Baron Sado, Exchequer Judge. Kinsuke, dependent in the household of Sobei, elder of Susaki village, Katsushiká county, Bushu province, in the magistracy of Saito Kabei *Plaintiff*.
Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa District, [Yedo] *Defendant*.
Summoned for examination [as witness], Mosuke, renter of the shop of the five-men company, in Shimo ward, Reiganjima, [Yedo].

"The above action was brought before me, a summons issued for the 7th day, and trial had. The plaintiff Kinsuke had formerly lived in Tokoyama-dóbo ward, [in Yedo], dealing in sandals. The defendant Toshichi was some years ago in the employment of Heibei, Kinsuke's adoptive father. That Kinsuke had lent certain sums to Toshichi was clear; but the case could not be determined without examining the above Mosuke, renter of the shop of the five-men company, of Shimo ward, Reiganjima, [Yedo], and he was summoned and examined.

VIII. Japanese Legal System

"The plaintiff Kinsuke pleaded as follows:—

"The alleged loan to Toshichi was made under the following circumstances. Toshichi, in the last Dragon year [1844] joined in the contract, long held by Mosuke, for the cleaning of the canal passing under Kyo Bridge, and undertook half of the length to be cleaned, agreeing to contribute to the expense, the total amount of which was to be about 3,237 'ryo'. But, his available money not being enough, he informed Kinsuke and requested him to make a loan, showing the indenture executed between himself and Mosuke, and agreeing that payment of principal and interest should be made from the Government-money received from time to time in payment during the progress of the cleaning. The plaintiff then from time to time, beginning with the 12th month of that year, lent various sums to the defendant, sometimes taking an instrument of loan, sometimes getting the defendant's seal in an account-book. But as the undertaking went on, the expense increased beyond the estimates, and the work began to go more slowly; and finally Mosuke, who had other undertakings of the sort on his hand and was pressed for money, proposed to the plaintiff and the defendant to take up jointly with him the cleaning-contract for the above place, just as the work stood. The plaintiff was informed of this proposal by the defendant, and agreed to it, the arrangement being that those sums which had been lent up to that time to the defendant should, with their interest, be left as they were; and any moneys which might be received [from the Government] for the undertaking should be divided among them without caring for settlement of the loan-account. In the 10th month of the next Serpent year [1845] a new indenture to this effect was made out by all parties, and Toshichi and Kinsuke entered upon the work. Kinsuke might have taken an active part with the others in watching the work, employing laborers, paying wages, etc.; but as the business was unfamiliar to him, he left all to the others. The cleaning went on; but after a time some spots were found where the difficulty of the work un-

11. Judicial Precedents

expectedly increased the expense, so that the original estimate of cost was exceeded; and at last the plaintiff and the defendant were obliged to withdraw from the undertaking, and Mosuke proceeded alone with the remainder and ultimately finished it.

"The total amount of the advances made [by Kinsuke] in this undertaking was 1,920 'ryo' 1 'bu' odd, and of this sum 945 'ryo' had been paid, leaving a balance due of 975 'ryo' odd. Toshichi, indeed, had also made some contributions [to the expenses of the joint undertaking before Kinsuke entered], but these were small. It would be unreasonable, were the plaintiff alone to be the sufferer. Toshichi had invariably evaded with profuse apologies his requests for payment, declaring that he was quite willing to pay, but could not until the accounts had been settled with Mosuke; and yet he continually delayed the settlement of that account. The plaintiff himself had borrowed from different quarters the amounts advanced [to Toshichi], and being without excuse for his own creditors, had been obliged to sell even his house and furniture, and had become a dependent in the household of Sobei, a relative, of Susaki village, Musashi, where he now is. The plaintiff therefore demands a detailed account of the payment of all sums due.

"The defendant Toshichi pleaded as follows:—

"He had formerly been employed by Heibei, the adoptive father of Kinsuke. In the preceding Dog year [1838] he had left this position, and had entered the sandal business for himself, hiring the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa. Meanwhile Mosuke, renter of the shop of the five-men company in Shimo ward, Reiganjima, had taken a contract for the cleaning of the canal flowing under Kyo Bridge; but the area to be cleaned was larger than he was able to undertake alone, and in the last Dragon year [1844] he had asked Toshichi to become his partner and undertake half the length to be cleaned. The cost of the whole undertaking was to be 3,237 'ryo' odd. An indenture was drawn up between them, agreeing that whenever the Government-instalments should

VIII. Japanese Legal System

be paid, they should be divided between them. Toshichi thereupon advanced 250 'ryo' odd for the work, and then, not having the money himself, he applied to Kinsuke to furnish further capital. The loans began in the 12th month of the same year, sometimes an instrument of debt being given, sometimes the seal being affixed in an account-book. The agreement was that payment should be made, principal and interest, at each time that a Government-instalment was received. The work of cleaning was begun in the 1st month of the ensuing Serpent year [1845], but it progressed slowly, though several advances of money were made. At this juncture Mosuke, who had taken other contracts of the sort and was pressed for money, proposed that the defendant and Kinsuke should take the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for hire of mud-scows, and take up jointly with him the cleaning-contract for the place already undertaken by Toshichi, just as the work stood. Toshichi informed Kinsuke of the proposal, and, a favorable reply being made, Mosuke gave notice to the authorities and obtained their sanction. The sums already borrowed by Toshichi, with the interest, were to be left as they were, the agreement being that whatever money might be obtained from the undertaking should be divided among the plaintiff, the defendant, and Mosuke. The former having thus become the partners of Mosuke, a new indenture was made out on the 20th of the same month, and the work was entered upon by them.

[Rubric.] "The above instrument was ordered to be produced, and read as follows:

'Indenture.

'Whereas the cleaning of the canal under Kyō Bridge has been undertaken by you, and one of us then agreed to undertake the cleaning of one-half the length, advancing his own share of the expense, and since the work has been begun and during its progress the Government-money has not been sufficient and large amounts of money have been spent; now

[510]

11. Judicial Precedents

therefore it is agreed between all parties that we shall receive the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for the hire of mud-scows, and undertake the cleaning of the portion now remaining, and carry it on until completed and officially inspected; that we shall pay the wages of the bargemen, the expense of official inspectors' sheds and laborers' sheds, fees of superintendents, laborers' wages, etc., and shall make every effort to guard against delay; that we shall have no responsibility in regard to the two special places [left to your charge]; that on request we shall deliver to you your share of any extra payments [of the Government-money] which we may obtain for specially difficult portions; and that you shall leave the pumps, scaffolding, and other apparatus just as they now are, the same to be restored to you on completion of the work. Acting under the agreement thus privately made between us, we shall complete the cleaning not later than the last day of the ensuing 11th month, putting on a sufficient number of men and boats; and if this proves impossible we shall endeavor to cause as little inconvenience as may be. In testimony of this we hereby exchange instruments of the above effect.

'Kokwa, II [Serpent], 10, 20 [Nov. 19, 1845].

Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa.

Kinsuke, land-renter of Jutaro, in Tokoyama-dobo ward.
To Mosuke, Esq.'

"The above instrument being drawn up, the plaintiff and the defendant became the partners of Mosuke. . . But in a short time difficult portions were found in the area to be cleaned, and the cost increased largely, until the amounts paid in by Kinsuke by the 11th month of that year amounted to 1,920 'ryo', 1 'bu'; for the slowness of the work made it difficult to estimate the total cost of any portion

VIII. Japanese Legal System

beforehand. Moreover, as the time for completion named in the contract had now expired, the two [Kinsuke and Toshichi] were obliged to give up the undertaking, the remainder of the work being undertaken and ultimately completed by Mosuke. Of the above 1,920 'ryo', 1 'bu', 945 'ryo' in all has since been paid at various times to Kinsuke, and the amount left unpaid is 975 'ryo'; 1 'bu'. The above facts are admitted. But [there are reasons why the payment of this remainder should not be enforced]. Now that the plaintiff and defendant, after entering into the above contract and making out a new instrument in which they appeared as partners [of Mosuke] (who appears to have taken advantage of their inexperience in such matters and knowingly included the most difficult places in the portion assigned to them), have given up the undertaking on account of their miscalculation of the expense, it is difficult to see why Kinsuke should make the claim that he does. Of course the defendant occupies the position of a former servant of Kinsuke, and does not wish to appear guilty of a breach of the duty of devotion arising from that relation; but as his account with Mosuke is still unsettled, it is impossible for him yet to settle the claim of the plaintiff.

"Mosuke's statements were as follows: . . . [here his testimony is fully analyzed by the judge.]

"[Findings]: Such were the statements of the parties, [and the court has reached the following conclusions]: It is clear that the plaintiff had lent various sums to Toshichi, taking sometimes an instrument of loan, sometimes the defendant's seal in an account-book. But when the new instrument was drawn up, by which both parties became the partners of Mosuke, and [it was stipulated that] these advances should be left as they were, and that any money which might be received by them from the government for the undertaking should be divided among them on its completion, without caring for any settlement in regard to the above advances, this claim for the advances became merely a partner's contribution sub-

11. Judicial Precedents

ject to the risk of profit and loss, and was no longer to be regarded as a debt due from one to the other.

"The parties declare that they have no fault to find with the proceedings as related above.

"Trial was held as above related. The parties disagree as to the validity of the claim, but it seems to me that the matter is one of profit and loss, and that the judgment should be that no order of payment should be made. I therefore consult you on the subject.

"Year of the Ape, 2nd month."

"2. Judgment by the Full Chamber.

"Kokwa, V (Ape), 2, 4 [March 8, 1848].

Before the Baron Sado, Exchequer Judge.

"An action having been brought by Kinsuke, of Musashi province, Katsushika county, Susaki village, in the district of Magistrate Saito Kabei, for arrears of a money loan of 975 'ryo', 1 'bu' odd, alleged to be due from Toshichi, renter of the shop of Kinjiro, of Fukagawa, Ofune-kuramaye ward, [the defendant, was summoned by a 7-day indorsement and trial was had. The judgment is that no further trial shall be had. It is plain that the plaintiff lent the above sum to the defendant, partly on instruments of loan, partly in the shape of book-debts. But when the new instrument was drawn up and the partnership was formed with Mosuke, renter of the five-men-company's shop in Reiganjima, Shimo ward, for the cleaning of the canal, the loan was left as it was, the parties agreeing that whatever moneys might be received for the cleaning upon its completion should be divided among them, and that no further account should be taken of the loan in question, the advances thus becoming a partnership risk of profit and loss. The parties should be directed to hand up an instrument (of submission).

"Note, that as the case was brought up by the Exchequer Judge, there is no complaint on file."

VIII. Japanese Legal System

The development of an independent system by case-law is amply revealed in the records of these two hundred and fifty years of Tokugawa precedents. Throughout that period of records, there is found not a single citation of a Chinese or any other foreign law-book, but only of Japanese laws and precedents,—a feature not true of any European people (except the Keltic) since Roman times. The underlying political philosophy was in origin Chinese; but the Tokugawa technique was Japanese. The system was self-developed.

.. In the following two typical cases, one judge consults another about a pending case; is answered by an opinion citing precedents, drawing a distinction and reserving the distinguished case for future decision; and then, a few months later, the distinguished case comes up on the calendar and the Full Chamber decides it,—all in the best traditional spirit of English case-law^t. It will be noted that the search for precedents ranged back nearly a century:

[*Supreme Court Opinions on the Survival of a Money-Claim.*]
"Payment by a Debtor who has suffered Local Exile.

"Dated Bunsei, X, 11, 2 and 18 [December 19, 1826, and January 4, 1828].

"1. *Consultation by Sakakibara, Metropolitan Judge of Yedo.*

"Ought not the successor, if any, of a person who has suffered local exile, to undertake the debts of his predecessor; provided no

[514]

11. Judicial Precedents

forfeiture of cultivated and residence land and of other property was made?"

"2. *Answer by Ishikawa, Exchequer Judge.*

"We acknowledge the receipt of your inquiry. We understand you to refer to the case where the defendant suffers local banishment, and we searched for precedents on that point, but found none. We discovered, however, a case where this court was asked, in Gembun, IV, 10 [November, 1739], whether a claim for money lent by one who was afterward sentenced to local exile was subject to extinguishment, in which a negative answer was given, although the contrary rule would apply if a confiscation of patrimony had accompanied the sentence, for this would include the money loan. A sentence of local exile has nothing to do with wife or son, so that the wife or the son may take the cultivated and residence land and other property, or, if there be none, the exile may be given the proceeds of a sale of the property. Now, as even the claim of an exiled creditor is not extinguished, much less should the liability of such a debtor. In the latter case, the name of the debtor's successor, if any, should be substituted by the court in the order for payment; and even if there is no successor, the court should revise the instrument (if confiscation has not occurred), as soon as the debtor has fixed his residence, and deliver it to him, ordering payment without fail. But in Kwansai, VI [1794], the defendant in a suit pending before your predecessor, Ikeda, Baron Chikugo, absconded, and the Full Chamber decided (there being no precedent in which the wife or son had under those circumstances been ordered to be substituted in the order for payment) that in the future in such cases no substitution should be ordered, but the order for payment should be annulled. According to this it would seem proper in the present case to annul the order for payment. Yet if such a rule be established, it would not be just, in our opinion. In ordinary actions on money loans, we have customarily allowed the plaintiff to name the successor as defendant, where [the debtor has died and] a successor is in

VIII. Japanese Legal System

existence; and so in case of a pending action, when the absconder's successor is determined, it is but just to have his name substituted, and deliver it to him and order payment.

"If you agree with these views, we trust that you will lay the matter before the Full Chamber, so that our practice for the future may be determined.

"11th month"

"3. *Letter from Ishikawa to Sakakibara.*

Bunsei, XI, 1, 28 [March 13, 1828].

"You consulted us in the 11th month of last year as to the case of a debtor who has suffered local exile. We answered that we hoped to see a rule fixed for the future, not for that case only, but also for that of a debtor absconding pending action brought, and requested you to lay the matter before the Full Chamber, if agreeable. We shall be glad to hear your views on this subject, and beg to ask your advice."

"4. *Answer by Sakakibara.*

Bunsei, XI, 2.

"I consulted you, as you say, in regard to local exiles' debts, and your answer suggested that payment should be ordered, which in fact accorded with my own view, and I made order accordingly. You also noted the case of a debtor absconding pending an action before my predecessor, Ikeda, Lord of Chikugo, in which the Full Chamber decided not to order a substitution of wife or son, which seemed to require me in this case to annul the order of payment; and suggested that such a general rule would be productive of injustice, and that where a successor has been determined, we should order him to pay; and proposed a reference to the Full Chamber. But what I consulted you about was not the case of a debtor absconding pending action brought, but a first-seal case [that is, a case where the defendant is out of the jurisdiction of the Lower Court (in this

[516]

11. Judicial Precedents

case by banishment), and the case must be sent to the Full Chamber for trial]; and we were both agreed, as to this case, that payment should be ordered, and I did so order. So that as to this point no reference to the Chamber seems to be required. As to the other case you spoke of, I am myself not yet decided, and I think it more suitable to consult the Full Chamber when the occasion calls for it."

This particular question, here left undecided, came up a few months thereafter; as the next precedent shows:

[*Supreme Court Opinion on a Successor's Liability.*]

"Dated Bunsei, XI, 4, 2 [May 15, 1828]."

"1. *Inquiry by Saga, Baron Bugo, and Ishikawa, Imperial Steward, Exchequer Judges.*

"In cases where the defendant in an action for money lent or unpaid purchase-money has absconded, we have hitherto thought that we should not entertain the complaint, where the creditor sues the successor, because the whereabouts of the debtor may eventually be discovered and he may then be sued. This practice of refusing in such cases originated perhaps in the idea that, even though a so-called successor exists, either there has been no determination that he has in fact become the successor, or else, as sometimes happens, his house is extinct and one of his relatives assumes his estate. Moreover, the disappearance has taken place because of the debtor's adverse circumstances; so, it seems doubtful whether a suit against the successor, supposing there were one, would be of any avail. In those cases where a debtor has died [pending suit], and his widow has succeeded him, we have been accustomed to order the suit to be reinstated against her, describing her in the complaint as 'Haru, widow of Taro,' and alleging that a sum of money lent to the husband in his lifetime is due and unpaid. We have also made some investigations as to proceedings in similar actions against villagers.

[517]

VIII. Japanese Legal System

In the last year of the Hare [1819], when Ishikawa, Imperial Steward, and Toyama, Palace Warden, were Lawsuit Judges in the Exchequer Department, there were a number of actions on money loans in which the creditor, because the debtor had died or was otherwise unavailable and had left no estate, was suing the surety. It was thought by the court that the clause of the instrument 'If the principal shall be in arrears, etc.,' signified only the case where the principal, in his lifetime, utterly fails to pay the debt; so that where the principal had merely absconded, and no successor exists, the creditor should wait until the whereabouts of the debtor was discovered [and then sue him]; and that therefore suits against the surety should thenceforth be entertained, the principal having absconded, only when the clause read 'If payment by the principal is in any way hindered, payment shall be made by the surety,' and not otherwise, even where the principal had died. The matter was referred to the Full Chamber, and they came to the following conclusion: 'Generally, when a debt is secured by the addition of a surety's name, the purpose of having a surety is that he shall attend to the debt if payment is not made; so that the addition of a surety is to no purpose if the court declines to order payment merely because there is no clause expressing the undertaking of the surety. The obligation of a surety, of course, lasts only during his lifetime [and does not descend to his successor], while that of a principal debtor who dies or absconds survives against his son, grandson, etc., if there be any patrimony inherited. But when a debtor leaves no such successor, the court should order payment by the surety, if, after examining the circumstances under which he became surety, it considers that he ought to be regarded as liable,—and this in spite of the absence of any clause expressly undertaking liability. In answer to the argument that we ought not to hold him liable without such a clause, it may be said that, if we should refuse [creditors would be loath to lend], the money circulation would diminish, and undesirable results would follow. It appears better to order payment by the surety without distinguishing between the clauses "If

[518]

11. *Judicial Precedents*

the principal shall be in arrears, etc.," and "If the principal's payment is in any way hindered."

"Such was the decision of the Full Chamber. In the present case, too, we think that it would be unjust if the creditor could not sue the successor, even though the debtor's non-payment is owing merely to his having absconded. However, if on this principle we decided that a relative who assumes charge of the estate and acts on behalf of the debtor in his business or in his cultivation is liable for all the debts of the fugitive as 'undertaker of the estate', then nobody would ever be found to perform such offices, and the result would be many waste estates. In such a case, therefore, the rule should be as hitherto, that the mere undertaker is not to be charged with debts. But henceforth, when a suit is brought by the creditor against the son or other alleged successor to the estate of the fugitive, the plaintiff should consult with the officers of the defendant's village, and obtain from them a certificate of identity of the defendant, bearing the names and seals of the village officers and certifying that the defendant has succeeded to the estate of the fugitive; and if the plaintiff can show such a document, he may go on with his suit.

"We think that the rule should be thus, and [we have the less hesitation in coming to this conclusion because] there can be no objection, since the order of the last year of the Horse [1822] respecting money loans, unpaid purchase-money, etc., on the part of village officers, to forwarding the necessary certificate of identity.

"We therefore make the above proposal. 4th month.

2. *Decision of the Supreme Court Full Chamber.*

"Decided in accordance with the proposal, Bunsei, XI, 4, 2, [May 15, 1828]."

The Tokugawa legal system, thus developed by native genius, might in the local course of events have produced

VIII. Japanese Legal System

more distinctive fruits of independence. But at this juncture international history diverted its destiny.

(IV) FOURTH PERIOD

12. In 1853 the long international seclusion of Japan was broken. Commodore Perry came with his American fleet, and demanded rights of trading. Other nations followed. In these treaties the Japanese gladly conceded to the foreign nations the power and duty of extra-territoriality, i. e. jurisdiction over the foreign nationals, as the price for refusing general rights of settlement throughout the land. Meanwhile the powerful semi-independent barons seized the opportunity to rebel, denouncing the Regency for its subservience to the foreign nations. By the revolution of 1868, the political government shifted back, after seven centuries, from the Regency to the Emperor.

Japan now realized that the time had come for it to absorb all the science and arts of the Occident, from which it had been secluding itself. To this task the nation's talent devoted itself for the next thirty years.

This task accomplished, the national pride now became restive under the concession of extra-territoriality. In demonstration of its right to resume complete sovereignty over national justice, the Government undertook to re-

12. Juristic Revolution

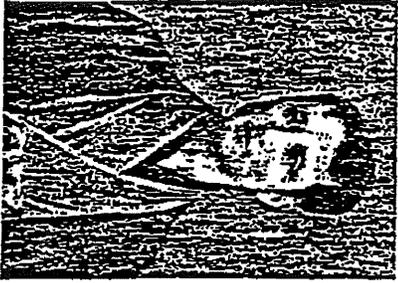
make the form of its law on Occidental models. In 1880 came the written constitution; Count Ito, its inspirer and draftsman, ranks as Japan's greatest statesman of the last generation. The most able younger minds were sent abroad to master the Occidental systems of government and law. During the 1880's and 1890's, in Tokyo, thousands of aspirants in Tokyo schools studied the laws of France, Germany, and Anglo-America,—at first under imported law teachers, afterwards under the returned Japanese jurists bearing Occidental degrees. Meanwhile, five new codes were prepared,—first drafted by jurists imported from France and Germany; then re-cast, in contents better adapted to Japanese institutions, by the new generation of Japanese jurists trained in the Occidental laws. These went into force in the last decade of the century. In the next decade, foreign extra-territoriality was relinquished.



VIII. 22.—Count Ito Hirobumi
Framer of the Imperial Constitution
of 1889



Jouji Akazawa
Dean of the Law Department
Imperial University



Kakuei Takano
President of the Law Institute



Hanayama Kazuo
President of the Seimon
Law School

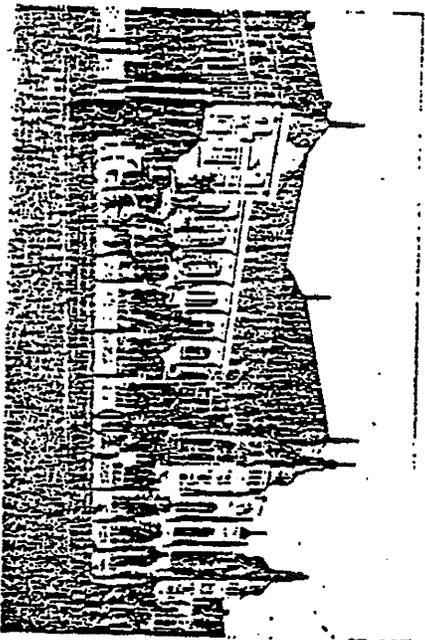


Kakuro Kenzawa
President of the Japan Law School

VIII. 23—MODERN LAW PROFESSORS

[522]

12. Juristic Revolution



VIII. 24—MODERN SUPREME COURT BUILDING

From what has been sketched of the Tokugawa institutions of the third period, it is easy to see that the task, in these new codes, was not to create a legal system, but to revise an existing one. But the officials of the old Regency had judicially disappeared; and there existed no body of professional juristic literature available for educating the new generation and for supplying the technical legal phrasology. Moreover, foreign expectations had to be satisfied. Hence, in framing the new codes, resort was had to the compact scientific materials of the Romanesque system from the continent of Europe.

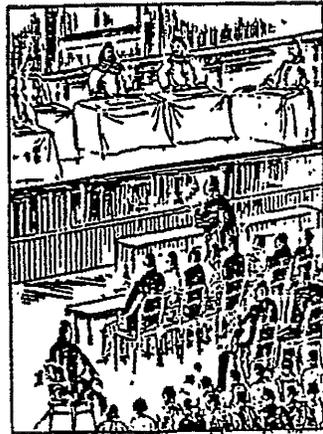
[523]

VIII. Japanese Legal System

The law was re-stated on the classification of the Romanesque law; the new legal language being constructed from the Chinese etymology; for Chinese literature had been to Japan what Latin had been to Germanic Europe.

The Supreme Court," for example, was now called "Tai-shin-in", Supreme Judicial Office, instead of "Hyo-jo-sho", or Chamber of Decisions; and the Code of Civil Procedure was termed "Minji Soshoho Seikai", instead of "Kori-sosho-tori-sabaki-sho". Criminal trials

were conducted in court-rooms furnished on the Occidental model; and the bailiffs and police, though gentry ("samurai") by descent, everyone of them, now wore Occidental uniforms." The external modes of the West have been adapted by the native spirit of Japan to form a new composite whole.



VIII. 25—MODERN CRIMINAL COURT-ROOM

This reorganization of the ancient native institutions to suit the times, welding together

12. Juristic Revolution

West and East, signified hardly a new legal system, but the re-making of an old one, by a process with which Northern Europe was already long familiar, when Roman law was welded with Germanic law (*post*, Chap. XV). Japan was the first Oriental country to undertake it voluntarily. But it is this same process that is being repeated, in a later generation, in Siam, in China, in Turkey, in Persia; and in those also it has come as a 'quid pro quo' for the relinquishment of extra-territoriality and as a symbol of external assimilation between Orient and Occident.

To future historians must be left the analysis of the future result. The old Japanese artists, in their masterly woodcuts, were fond of depicting the celebrated mountain Fuji, one of the nation's (and the world's) scenic gems. The art of the modern photographer, too, may present it to us in another guise. The impressions are different. But the mountain is the same."



VIII. 26—Fuji MOUNTAIN

Dan Fenno HENDERSON,

Conciliation and Japanese Law
-Tokugawa and Modern -, Vol. I

(University of Washington Press &
University of Tokyo Press, ca. 1966)

SUIT INNS

Throughout the proceeding in Nuinosuke's case we have made passing comments on the role of the innkeeper in the conduct of litigation in the Edo courts, and perhaps now with the case as background, we should consider more fully what the innkeeper's position and function really were. For he was indeed the only person connected with Edo litigation who might be regarded as a predecessor of the modern Japanese lawyer.¹⁰¹ The inns at Edo and Osaka differed considerably in origin and functions, and we will confine ourselves to the Edo inns.

Initially the innkeepers situated in the vicinity of the Edo courts developed their legal expertise from the fact that they were regarded by the Shogunate as the houseowner for the itinerant litigants whom they might be housing, and in that status the innkeeper was required to sign documents and appear at the commissions with his tenant. Having observed the role of Chūbē's houseowner in the foregoing proceeding, we can appreciate that an innkeeper who catered to litigants and who was treated as their houseowner would go to court often and become quite knowledgeable in the procedures and practices at the courts.

It is next important to note that this quite ordinary Tokugawa status of houseowner, implying certain authority over any litigant tenant who might be lodging at the inn, grew into a specialized vocational status recognized by the Shogunate at least after the Temmei period (1781-88). Eventually the innkeepers of Edo organized into three guilds comprised collectively of about two hundred member inns located in Bakurō-chō and Kodemma-chō. Also apparently some from the Eighty-Two-Inn Group were scattered about what is now the Marunouchi district. They were granted a monopoly franchise for all of the suit inn business, and it seems that their inns catered rather exclusively to litigants at least from the Genroku period (1688-1704) until they were dissolved at the time of

¹⁰¹ Besides the materials in Nakada Kaoru, "Tokugawa jidai no minji saiban jitsuroku," 3 *Hōseishi ronshū* 753-904 (1943), this account of the Edo inns is based on Takigawa, *Kujiyado no kenkyū* (1959); and Hiramatsu Yoshirō's review thereof in 12 *Hōseishi kenkyū* 242-43 (1961). Compare Okudaira Masahiro 奥平昌洪 *Nihon bengoshishi* 日本辯護士史 (History of the Japanese lawyers) (1914) and the following works which seem to be based on Okudaira: *Osaka bengoshikai* (ed.), *Osaka bengoshi shikō* 大阪辯護士史稿 (Draft history of the Osaka lawyers) (1937); Tōkyō bengoshikai (ed.) *Bengoshishi* 辯護士史 (History of lawyers) (1939); *Nihon bengoshi rengōkai* (ed.), *Nihon bengoshi enkakushi* 日本辯護士沿革史 (History of the development of the Japanese lawyers) (1959).

the Tempō reform (1842). Thereafter the individual inns operated separately and apparently catered to regular travelers as well as litigants.

In exchange for its monopoly protection granted by the Shogunate from roughly 1781 to 1842, the Edo inns performed the following four services for the Shogunate: (1) they delivered the summons issued by the courts; (2) they were responsible for the custody of persons Entrusted to the Inns (*yado azuke*) by the court; (3) they were required to supply food to persons entrusted to them; (4) they had the duty of providing fire protection to the various court buildings. The services the innkeeper supplied to his tenant-client were many and varied, and a review of them indicates that the innkeeper was a busy man. Apparently, however, the inn's legal services were concerned almost exclusively with civil litigation, and the tenant-clients were usually rural litigants. We can suppose that Edo townsmen and other urban litigants relied heavily on their town officials and the expert underlings in the town office to handle their litigation, since these officers were required to accompany the litigant to court anyway, as we saw in Chūbē's case. In Osaka the inns were apparently sometimes consulted even by litigants not lodging in the inn, but we have found no evidence to date that such a practice had developed in Edo.

A rather concrete idea of the nature and extent of the innkeeper's legal services can be obtained by surveying Buzaemon's activities on behalf of Nuinosuke. Buzaemon or Kōsuke, his assistant, personally drafted all of the legal documents in the course of the litigation—including petitions, receipts, notices, reports of failure of conciliation, and the final conciliation agreement—as well as all corrections required by the court. All of these documents were handwritten in brush in several copies, and sometimes this drafting was done under considerable pressure at the commission. The actual documents show a certain skill in anticipating and avoiding legal problems (e.g., the receipt of the summon). The innkeeper instructed Nuinosuke on the procedures that had to be followed to file a suit, get the endorsement, and serve the summon. He also led the tenant by the hand to the various offices and then accompanied him personally to the numerous hearings. Just to get the endorsement of each of the eight commissions in the rice case took two full days of trudging through the busy streets of Edo afoot. It took six days of scurrying about to get the approval of Nuinosuke's daimyō. For these reasons it has been aptly suggested that the innkeepers really ate with their feet.

At the hearings, the innkeeper went into court with Nuinosuke and sat on the gravel just back of him, where he could carefully watch the course of testimony and request a continuance if his client got himself into difficulty. Likewise, the innkeeper participated in the negotiation of twelve continuances and numerous conciliation sessions and did the paper work

involved, including five notices of failure of negotiations. In addition, Buzaemon was indeed an innkeeper and in that capacity during the course of the proceedings he furnished Nuinosuke with his room and meals, which were the chief source of income for the suit inns, although it can be surmised that they also received a success fee and clerical fee besides. The Edo inns were rather plain compared with those in Osaka, which also carried on a profitable business as fiscal agents for farmers. These farmers brought in their rice to be sold by the inn, which paid the farmer's tax for him to the lord in cash. The daily rate of an Edo inn was said to have been 240 *mon*, which was roughly equivalent to the rate of a low-class inn catering to the general public (not a suit inn) in Osaka of the same period.

One final point needs to be emphasized. Including both his legal and hostelry services, the innkeeper was an important part of the workings of civil justice in Edo, and it can be fairly concluded that without his services, the complexities of jurisdiction, procedure, and documentation in the Edo courts would have effectively barred the assertion of many claims, otherwise valuable under Shogunate law. In evaluating these officially authorized innkeepers and their role in the judicial process, it is important to distinguish them from the unauthorized Suit Solicitors (*kujishi*), who were prohibited to operate and who conducted a marginal practice with frequent cases of bribery and swindling.¹⁰² Indeed, confusion of the suit inn and the suit solicitor has tended to obscure the fact that the authorized suit inns, even if they had not acquired the attributes of modern professional ethics and sense of mission, were nevertheless hard working, skilled, and resourceful legal experts, whose services were quite necessary to the Edo courts and litigants, especially rural petitioners. Indeed, the Shogunate seems to have ordinarily referred to the inns as "Edo yado" in its regulation, thus avoiding adverse inferences associated with the "kujishi," which had been banned from the Genroku period (1688-1704) onward. The Tokugawa public, however, used the term *kujiyado* and modern Japanese historians have failed to distinguish between them and *kujishi*, and therefore they have tended to overlook this legitimate element of the modern lawyer's forebears in Japan.

CONCLUSIONS

In conclusion, several features of the Tokugawa civil trials deserve to be re-emphasized. Dispute-settlement powers were decentralized in the family, village, or fief. Such decentralization meant that, for litigants, the first hearing before the official or lord in charge of the territory was usually the last hearing; what "appeals" there were existed largely for officials.

¹⁰² Takigawa, *Kujiyado no kenkyū* 8-10 (1959).

CHAPTER III RECEPTION OF WESTERN LAW

THE PROCESS OF RECEPTION

In 1853 Commodore Matthew Calbraith Perry of the United States Navy arrived in Japan to present to the Tokugawa government a letter from President Fillmore to the Japanese emperor, asking Japan to open its doors freely to foreigners once more. Perry was escorted by four warships. Though the tone of the letter was courteous, it left no doubt of the real intention of the United States, and the Bakufu was thrown into great confusion. Already a small number of Japanese had seen the reopening of Japan to the outside world as a necessity and had launched an impassioned campaign to propagate their ideas at the risk of losing their lives.¹

The Bakufu finally took account of the fact that it was no longer possible to maintain its policy of *sakoku* and decided to reestablish relations with foreign countries. In 1858, the fifth year of the era of Ansei, Japan concluded commercial treaties with the United States, England, France, Russia, and the Netherlands, but in its ignorance of international law it accepted unfavorable conditions. These treaties, concluded as they were on the basis of an inequality of bargaining power, could not but hurt the pride of the Japanese people, and the Meiji government which succeeded the Bakufu was obliged to try to do away with them.

The Bakufu had, even before the arrival of Perry, begun to become unsettled, and the change it then made in its policy was decisive for its fall. In the end, after violent political and military campaigns between the partisans of the imperial court, who sought to strike down the Bakufu by means of the imperial authority,

¹ E.g., Yoshida Shoin.

and those who sustained the Bakufu, the imperialists won. They were a group made up mostly of *bushi* of the lower class of the four great *han* of the southwest: Satsuma, Choshu, Tosa, and Hizen. In 1867 the last shogun handed back his political powers to the emperor, and the system of military government that had lasted for seven hundred years came to an end. A new page in Japanese history began with the era of Meiji.

This revolution is called Meiji Ishin, and *ishin* means literally "here are new things."¹ From the beginning the new government had to grapple with a critical problem—what could be done to maintain the independence of the state against the imperialistic forces of the West? Were there other ways besides adopting capitalism? No better means could be found for preserving its independence, so the new government set to modernizing the social and political organization of the country on the principles of modern capitalism. This of course called for a restructuring of the legal system, but the reform of the law was an urgent necessity anyway, as the Meiji government wanted to obtain the revision of the treaties of Ansei and the other parties to the treaties demanded the modernization of the Japanese legal system as a condition precedent to that revision. The Japanese government did not have time to allow the law to be created spontaneously in response to the needs arising from the gradual transformation of the social structure to a capitalist society. The pressure was to concentrate on providing a new legal system whatever the social state of Japan might be.

The best way to obtain this result as quickly as possible was of course to follow the example of the advanced capitalist countries, which at that time were France and England. Japan chose the legislation of France as its guide because the Common Law

¹ It is a matter of dispute whether this historical event can be called a revolution. It all depends on the definition of revolution. According to the *Vocabulaire juridique* of Henri Capitant a revolution is "a popular movement of reasonable size which aims at overthrowing the rulers of a state by force and changing the organization of that state without observing the legal requirements previously laid down." The Japanese political reform had all the elements required by this definition with the exception of "popular movement." Since the Meiji Ishin brought about a change of the subjects of political power only within the same privileged class, it could not be qualified as a revolution. It is perhaps better to speak of restoration rather than revolution, though this movement, which was not in itself a popular one, did constitute an anticipation of the will of the people.

system appeared too complicated, whereas France had the five Napoleonic codes. Moreover the French codes had already been the inspiration for many countries that were modernizing their societies. From 1869 the Japanese government showed a great interest in the translation of the French codes. One of the members of the first imperial government, Soejima Tancomi, in that very year ordered Mitsukuri Rinsho, an intellectual with a good knowledge of French, to translate the Penal Code. Mitsukuri finished a section of his translation before the end of the year and the minister of justice, Eto Shimpei, who read the translation, was greatly impressed. So impressed in fact that he rather hastily conceived the idea of also having the French Civil Code translated and applied as Japanese law, and he thereupon ordered Mitsukuri to translate the Civil Code and all the other Napoleonic codes as quickly as possible. When he gave the order to Mitsukuri, Eto is reported to have said: "Translate those codes as quickly as you can and don't worry too much about any errors you may make." Mitsukuri worked diligently and accomplished his task in less than five years.

At the end of the period the Bakufu realized the necessity of having information on things foreign and created an institute for the study and teaching of European culture (*yogaku*). The main topic for study in this institute was European languages; among them Dutch was originally considered the most important because the Netherlands was the only European country which had permission to trade with Japan through the period of the *sakoku* policy. Mitsukuri had begun by studying Dutch. He learned quickly and was soon an assistant teacher at the institute. It did not take him very long to see how important French was, and he busied himself with learning it too. He had no particular knowledge of law, but all the learned men of the *yogaku* were encyclopaedists, and were regarded as omniscient. With this background Mitsukuri undertook the task of translating the French codes. It is easy to imagine the difficulties that he must have encountered in completing his task—he did not have the use of a good French-Japanese dictionary or the assistance or advice of any French lawyer. It is therefore surprising to know that the greater part of the current Japanese legal terminology

was invented, or at least suggested, by him. Even the two basic words "right" (*kenri*) and "obligation" (*gimu*) are attributed to Mitsukuri.³ He was like an architect who had to begin by making his own bricks. One result is that his translations are highly defective to the eyes of modern jurists, though they were of invaluable assistance to the legal men of the time. As a judge of the Japanese Supreme Court said much later, "these translated codes were like a light shining suddenly through the dark night," and the judges of the time found in them the only legal bases on which they could properly base their decisions.⁴ Although none of the translated codes was applied in Japan as Eto had wished, these translations were the first step to the reception of Western law. Eto gave up the idea of applying the civil code in a translated form, but he did not give up the idea of having a Japanese civil code as soon as possible. He immediately undertook to draw up a Japanese civil code and set up a committee for the purpose, with himself as president, and proceeded with zeal on a draft based on the French Civil Code.

³ A biography of Mitsukuri gives us some idea of his extraordinary efforts: "At the time of his translation legal science was still in its formative stages and Rinsho had no knowledge of it anyway. He had no commentary, no dictionary, and no lawyer with whom to consult. He had great difficulty in understanding difficult passages in the French texts, and as he found many ideas in them which did not exist in the traditional Japanese conception of law, he was greatly embarrassed by the lack of words with which to translate the French. He sought advice from Sinological experts, but they were unable to advise him on adequate terms. He therefore had to invent the terminology himself, but his words were not readily accepted because they were not Japanese. Words such as *kenri* and *gimu* were borrowed from Chinese words which he found in the Chinese translation of an English text of International Law! Almost all the other legal terms, such as *dosan* (moveables), *fudosan* (immoveables), *sasai* (compensation), and *mitsuyaken* (condition subsequent), were invented by Rinsho after much difficult research." Fumihiko Otsuki, *Mitsukuri Rinsho Kan den* [Biography of Mitsukuri Rinsho] (Tokyo: Maruzen, 1907), pp. 88-100 *passim*.

⁴ Although it cannot be conclusively proved that the judicial decisions of the first years of the Meiji era were based on the Japanese translations of the French codes, there is good reason to presume that this was the case. The following expressions are found in the reasoning of numerous decisions: "It is obvious according to the general principles of law . . ."; "According to the nature of things . . ."; "For the reason that . . ."; "Equity requires that . . ." There is little doubt that the judges of the time in fact relied on the rules applicable in the French codes under the guise of general principles. Boissonade said: "The civil law judges of Japan, deprived of the sources of their ancient law, are most of the time unable to rely on fixed and certain customs, and are obliged to resolve their difficulties according to the principles of natural law which they find formulated in foreign codes which form a sort of common law of the West." Gustave Boissonade, *Projet de code civil de l'Empire du Japon* (Tokyo, 1882-1889), Vol. I, p. XXIV.

After the dramatic death of Eto in 1874 by capital punishment for a political crime, the drafting work was continued under the direction of the new minister of justice, Oki Takato. In 1878 a draft civil code in three books and 1,820 articles was completed, but it was not adopted because of its too faithful imitation of the French code.

The need to modernize the law was not limited to the field of civil law, but it was in the drafting work related to the civil code that the difficulties inherent in Europeanization of the law were most felt by the draftsmen. The government therefore decided to call in French jurists to help. In 1872 Georges Bousquet, advocate at the Paris Court of Appeal, came to Japan as legal adviser to the imperial government. He stayed four years and spent his time principally in educating Japanese lawyers at a special school of French law which was established on his advice in the Ministry of Justice.⁵ In 1873 Gustave Boissonade, professor at the Faculty of Law in Paris, was invited by the Japanese government to take on the task of improving the legal system,⁶ and he stayed in Japan for twenty years at the wish of the Japanese. He performed a great service, not only for the law and in the education of lawyers, but also in the political field.

Boissonade began his legislative work by drafting a penal code and a criminal procedure code. He finished both in 1877 in their French form, and they were then translated into Japanese for discussion and modification by the legislature.⁷ The codes were adopted and promulgated in 1880 and came into force in 1882. They were the first modern codes to be applied in Japan. Until

⁵ The Japanese translation of the course that he gave at this school of law is still extant. Bousquet participated in the drafting work for the civil code project and also suggested a section of the project which he drafted himself. After his return to France, he published a very interesting in-depth study on Japan, (*Le Japon de nos jours*, 2 vols.), which is essential reading for all those who are interested in Japanese history of the period.

⁶ Concerning Boissonade, see Yosiyuki Noda, "Gustave Boissonade, comparatiste ignoré," published in *Problèmes contemporains de droit comparé*, ed. Naojiro Sugiyama, a collection of comparative law studies commemorating the tenth anniversary of the foundation of the Japanese Institute of Comparative Law (1962), Vol. II, p. 235f.

⁷ The legislature was not as yet the Imperial Diet. The most important legislative organ before the creation of the Diet was the *Genroin* (Senate). Legislative bills were in principle discussed by this body, but the government could promulgate law without prior discussion in the *Genroin*.

25-7-76
7/1/83

then the Meiji government had formulated some rules relating to crimes, but it had publicized them only in the Chinese manner as directives to public officials.⁸ The Japanese people as a whole had no knowledge of the principle of legality in crime and punishment until the codes drawn up by Boissonade were promulgated. The penal code remained in force until 1908, and the criminal procedure code until 1890.

In 1879 Boissonade proceeded with the task of drafting a civil code. He took charge of drafting the bill only insofar as it related to property law. Family and succession law were to be left to Japanese draftsmen because these subjects were closely related to the traditional mores of the country, though the influence of Boissonade was very great on those parts of the draft also. Boissonade based his draft on the French Civil Code, but he used comparative methods in its elaboration. He worked tirelessly, studying the case law and theory of French civil law, trying as far as possible to harmonize it with legislative, judicial, and doctrinal developments in other countries. Of his method of work, Boissonade said: "Doubtless what Japan adopts should not be French law purely and simply. I want your government to adopt our laws only to the extent that they have been proved good by the experience of three-quarters of a century. I will use every effort to incorporate in the draft the improvements that time has shown necessary and particularly those improvements that other Western jurisdictions have adopted in their wisdom and justified by their experience."⁹ Thus inspired, he drew up the text and a commentary¹⁰ on the draft civil code in French. "The drafting of the civil code was finished in April, 1889. It has thus taken us ten years although we had the temerity to

⁸ More precisely, the government promulgated three penal codes between 1868 and 1873. The first code was officially known as the Provisional Criminal Code. The last two were applied concurrently until the promulgation of the Criminal Code of Boissonade. The third code amended and complemented the second without abrogating it. The influence of the French code, though slight, can already be seen in the third code. Though the last two codes were published by the government, the preamble to them declared: "All public officers are commanded to observe the rules of this code."

⁹ Gustave Boissonade, "Ecole de droit de Jedo," *Revue de Legislation* (1874), p. 511.

¹⁰ The text and commentary have come down to us in Boissonade's monumental work, "*Projet de code civil de l'Empire du Japon*, 5 vols.

believe that five years would be sufficient."¹¹ The draft was translated into Japanese as it was drawn up. Then the translated portions were discussed and modified by the legislature.¹²

In 1889 part of the draft drawn up by Boissonade was adopted. It contained the book on "Property," the greater part of the book on "Methods of Acquiring Property," the book on "Securities Guaranteeing Obligations," and the book on "Modes of Proof." In 1891 the other part, that was entrusted to the Japanese draftsmen, was completed. It included a book on "Persons" and a part of the book on "Methods of Acquiring Property" dealing with "Succession." Together the two parts formed a single code which was promulgated in 1891, to come into force on 1 January, 1894. The code was not just a copy of the French code but followed a plan very similar to that of the Napoleonic Code, even though it was composed of five books instead of three. Unfortunately it did not come into force as envisaged. From 1889 there were indications of a movement hostile to the future application of the code. Lawyers divided into two camps and a violent debate, which has been compared with that which arose in Germany between Savigny and Thibaut concerning the need there for a code, arose between the partisans of the immediate enforcement of the code and those who favored a postponement. Articles, monographs, and manifestoes were published and distributed for and against the Boissonade code. Postponement was demanded because the Boissonade code did not sufficiently take account of the traditional customs and morality of the Japanese people. One of the most conservative of the jurists, Hozumi Yatsuka, professor of constitutional law at the Imperial University in Tokyo, went so far as to state that once the civil code came into force, loyalty to the emperor and filial piety would be at an end. The reasoning of the partisans of postponement was ill-founded, because the part of the code strictly relating to moral traditions had been drawn up by Japanese and took account of those traditions. Furthermore, it had been modified to a great extent by the committee and by the senate in order to adapt it even more to Japanese

¹¹ *Ibid.*, Vol. I, p. VIII.

¹² The drafts were first discussed by the civil code drafting committee, then by the *Gwanin*, and finally were debated in the Privy Council.

tradition.¹³ The political situation, however, favored the adversaries of the Boissonade code, and in 1892 the Imperial Diet, which had begun to function as a legislative body in 1890, voted for the postponement of the civil code.

This failure of the Boissonade code is usually explained as the result of opposition between the school of French law and the school of English law.¹⁴ Outwardly this would appear to be so, but there is possibly a more important reason, a political rather than a legal one.¹⁵ The postponement of the code was only a manifestation of the general decline in influence of French culture.

The 1868 Restoration was brought about by *bushi* of the lower class. They had occupied a lowly place in the feudal hierarchy, though they had nevertheless belonged to the privileged class. Their ideology had never been bourgeois, but they wanted a capitalist society. For this reason the government born

¹³ For example, the first draft provided that a minor, man or woman, could not marry without the consent of the parents, but the Senate changed this provision to provide that every man and woman of no matter what age had to obtain the consent of parents to marry. The new civil code of 1898, which purported to be in conformity with the wishes of the partisans of postponement, demanded parental consent only for a man under 30 and a woman under 25. Boissonade himself said: "He [the French lawyer with responsibility for drawing up the draft of the civil code, i.e., Boissonade] submitted his work [text and commentary], bit by bit to the Japanese committee. The latter, having had it translated by those members who knew French and French law, sought to reconcile the new law with the old and often sought amendments for this reason, or else they made the changes themselves when the author was unable to accept them. This is to say that in spite of his reluctance, plurality of heirs was abandoned in favor of the maintenance of rights of seniority of the kind known under the former regime, with an absolute character as regards both moveable and immoveable goods and a generality of persons, such as had never existed in any European country." Boissonade, "Les anciennes coutumes du Japon et le nouveau code civil, à l'occasion d'une double publication de M. John Henry Wigmore," *Revue française du Japon* (1894), p. 12.

¹⁴ English law was taught along with French law from the beginning of the Meiji era. The center of instruction was the Law Faculty of Tokyo University for English law, and the school of French law in the Ministry of Justice for French law. Besides these two schools there were several others which specialized either in French law or in English law. The students of the two different systems naturally formed groups of differing legal outlooks.

¹⁵ It is worth recalling what P. Koschaker said: "Foreign law is not received because it is considered the best. What makes a legal system suitable for reception is rather a question of force [*eine Machtfrage*]. Reception relates on the intellectual and cultural plane, at least, to the extent to which the law benefits from a position of strength: Whether this strength still exists at the time in question, or whether there is a vivid recollection of it and the civilization it represents at the time in question, is an important political question." *Europa und das römische Recht* (München: Verlag C.H. Beck, 1947), p. 138.

of the Restoration, which was made up largely of these *bushi* of the lower rank, did not want the development of a bourgeois society. Instead they favored the formation of an absolutist state, but at the beginning the government was extremely weak. This government had succeeded somehow or other in bringing the *han* under the imperial power, but it was by no means certain that it could take strength from this situation in the immediate future. It was therefore obliged to seek the voluntary collaboration of the former *han* until it had consolidated its position. It was forced to appear democratic and even appeared to respect public opinion and to encourage discussions in public. One of the five articles of the imperial declaration promulgated at the beginning of 1868 says: "It is desirable to convoke public gatherings as often as possible for the purpose of discussing all important problems." And in the same year it proclaimed the fundamental principles of government in which the principle of the separation of powers was announced. In this milieu liberal ideas from the West quickly spread among the Japanese. In the first years of the Meiji era the works of Mill, Bentham, Montesquieu, de Tocqueville, and even Rousseau, to mention only the leading names, were well known.¹⁶ People even discussed French and English philosophy.¹⁷ Consequently it was quite natural that the legal ideas of France and England should also be received and that French law along with English law should have exercised a considerable influence on Japanese law.¹⁸

Inspired by liberal ideas, a political movement called the *Jiyu Minken Undo* (the liberal movement for human rights) started about 1880. It was supported by a large part of the populace, and it succeeded in getting the government to agree to the creation

¹⁶ From 1871 to 1877 translations of Mill's essay, *On Liberty, Representative Government, Political Economy, and Utilitarianism* appeared; in 1873, *Theory of Legislation* by Bentham was translated into Japanese; a complete translation of *L'esprit des lois* was made in 1875; Rousseau was well known by the partisans of the *Jiyu Minken*, and his *Social Contract* had been translated into Japanese by 1882.

¹⁷ "... the first two decades of the Emperor Meiji's reign saw a Japan to all appearances intoxicated with the strong wine of Western thought, techniques, and customs." Richard Storry, *A History of Modern Japan* (Penguin, 1960), p. 107.

¹⁸ Numerous French legal texts were translated in the first years of the Meiji era. From 1870 to 1889 there appeared translations of the works of Laferrière, Demolombe, Batbie, Accolas, Faustin-Hélie, Mourlon, Ortolan, Bélimé, Boistel, and Baudry-Lacantinerie among others.

of a national assembly. The movement was liberal in appearance only, for most of its supporters were discontented former *bushi* who had been excluded from political power. The government took steps against the movement both by oppressing it and by corrupting its leaders. The oppression was extremely violent and the leaders were easily corrupted, so the liberal camp did not last long.

Also about this time the government was beginning to feel strong enough to show its hand. Even in 1881, when it had submitted to the pressure of the liberal movement, it had secretly decided to draw up a constitution following the Prussian model to prepare for the opening of the national assembly which had been promised to the liberals. According to its idea the new constitution was to be granted by the emperor to his subjects, and for this reason the absolutist character of the Prussian Empire was more attractive to the Japanese statesmen than was the French Republic.

From 1881 on the absolutist character of government policy became more accentuated, and this political tendency was reflected at the legal level too. The decline in the influence of French law was only one of its aspects. Another aspect was the increasingly important role that German law was playing in the Japanese legal world.¹⁹ Seen in this context the failure of the Boissonade code becomes more comprehensible, and it is significant that the year in which the first attack was made against the code was also the year of the promulgation of the absolutist constitution.

In 1893 a council for codification studies was set up, and within the framework of this council a law-drafting commission was appointed for the civil code. It consisted of three persons, Hozumi Nobushige, Tomi Masaakira, and Ume Kenkiro, all of whom were professors in the Faculty of Law at the Imperial University of Tokyo. Tomi and Ume had done their legal studies in the Law Faculty of Lyons and both had obtained their doctorates in law there. The commission was formally charged with the revision of the Boissonade code, but basically its job was to draw up a new code. The three commissioners proceeded to their work by dividing the labor. All the topics of the code were

¹⁹ It is no accident that the translation of German works began about 1898.

shared among them, each choosing those topics in which he believed himself most knowledgeable.

Many foreign systems were consulted in this work, but particular reference was made to the two drafts of the B.G.B. (the German Civil Code). The commission had decided to give up the scheme of the French Civil Code and substitute it with that of the B.G.B. The code was divided into five books. The first three, the general part, the book on real rights and the book on obligations, were completed in 1895, and voted by the Diet and promulgated in 1896. The other two books, on family law and succession, were then drawn up with great prudence because the draftsmen had to avoid being in a position where they would be subject to criticism for not having taken proper account of traditional morality. The last two books were finished in 1898 and approved by the Diet, and the complete new Civil Code came into force on 16 July 1898.

How much did the new code differ from the Boissonade code? Those who had favored postponement of the Boissonade code wanted to believe that it differed substantially, and looking at form alone it could indeed be thought to be entirely different, for the method followed in its construction was German; but when the content is considered the story is different. The three draftsmen adopted many of the solutions given in the drafts of the German Civil Code, but they also retained many of the provisions drafted by Boissonade. What is more they sometimes accepted solutions other than those found in either the German or Boissonade codes. The new code was therefore somewhat eclectic. Articles 415-422, relating to damages for the non-performance of obligations, may be taken by way of example. Of these eight articles six were drafted on the basis of the articles of the code drafted by Boissonade supplemented by a study of the solutions provided in other European codes, such as the German, Swiss, Austrian, and Dutch. Sometimes the draftsmen of the new code were more faithful to the Code Napoleon than Boissonade himself. Article 420, relating to penal clauses, does not allow the court to increase or diminish the sum agreed upon between the parties. This is what the French Civil Code provides in article 1,152. Yet, in his code, Boissonade had admitted the possibility

of the sum being reduced. This example in itself is insufficient to give a total view of the new Civil Code, but it does serve to show that it was not a faithful imitation of the B.G.B.

The tendencies of the three draftsmen were as follows: Hozumi, *primus inter pares*, had been educated in English law but had also studied at the University of Berlin.²⁹ Ume and Tomi had been trained in French law. Tomi, who had not studied in Germany, thought that the German Civil Code was better than the French. Ume represented the French law school in Japan, although he too had studied in Berlin; he had been the most ardent of those supporting the immediate implementation of the Boissonade code. At the French Civil Code centenary celebrations in 1904 at the Faculty of Law at the Imperial University of Tokyo, Ume, who was presiding, stressed the influence of French law on the new Japanese Civil Code:

Professor Boissonade, who was invited to come to Japan, finished his drafts of the Penal Code and Criminal Procedure Code first. Then he began drawing up a civil code. This code was completed and promulgated in 1890. It was in form a little different from the French Civil Code but its content was based entirely on the French Civil Code, with account having been taken of the modifications made to it by legal theory and case law. This code never came into force. The code that replaces it and that resembles the German Civil Code in form has often wrongly been believed to follow exclusively the pattern of the German code. In truth, however, it does not. The new code is based on the French code and other codes of French origin at least as much as it is on the German code.

The legislator devoted his main efforts to the drafting of the Civil Code, but other laws were produced too.

The drafting of the Commercial Code was carried out along with that of the Civil Code. The person in charge was a German jurist, H. Roesler. He began his work in 1881 with a study of the commercial laws of all civilized countries. Although he was

²⁹ He was therefore familiar with German law. Hozumi was very interested in legal philosophy, and his legal ideas took an evolutionist tendency under Spencer's influence. His thinking on the civil code can be found in his English work: *Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence*, 2nd ed., (Tokyo: Maruzen, 1912).

German his draft is based principally on the French Commercial Code. Roesler ended his work in 1884. His draft was discussed in the legislative commission created under the minister of justice in 1887, and in 1890 the Commercial Code was promulgated to come into force from 1 January, 1891. However, apart from the articles on companies and bankruptcy, for which there was a great economic need, its coming into force was postponed just as was that of the Civil Code. In 1893, in the interim period, a commission to revise the Commercial Code was appointed to the council for codification studies. This body drew up a new draft in two and a half years. The Diet voted the new Commercial Code in 1899 and it came into force on 16 June of the same year. This new code followed the German system with the subject matter allocated as follows: Book I, General Part; Book II, Commercial Companies; Book III, Commercial Acts; Book IV, Bills of Exchange; and Book V, Maritime Commerce. Book IV was abrogated in 1933 and replaced by two special laws relating to bills of exchange and cheques, which were necessitated by the accession of Japan to the Geneva Conventions on those topics; Books I and II were entirely redrafted in 1938.

In the field of judicial organization and civil procedure the influence of French law was at first very great. From the early Meiji era, Eto Shimpei was much concerned with the improvement of the judicial system and followed the French model, though in his time the separation of powers had not been implemented because the Ministry of Justice was also the Supreme Court. In 1875 a Supreme Court of an autonomous nature, called the *Daisinin* (court of superior hearings), was constituted, and beneath it were structured inferior tribunals of various types. The special school of French law created in the Ministry of Justice in 1872 was training judges; English law was being taught in the Tokyo University Law Faculty; and the special school of French law where Bousquet and Boissonade taught was annexed as a French law section to the Faculty of Law of Tokyo University in 1885. In the first years of the Meiji era a very large number of the judges were trained according to French law, and prior to the coming into force of the Japanese codes the judges decided most cases according to French or English law.

In 1904 sixteen of the twenty-nine judges of the Supreme Court were law graduates who had specialized in French law. After the promulgation of the Constitution, however, the influence of German law gradually extended to the field of judicial organization.

In 1887 the government entrusted Otto Rudolph, a German jurist, with the task of drawing up the law on the organization of the courts. Rudolph drafted a bill on the model of the German law of 1877 but he also collaborated with other foreign jurists, notably Roesler, Albert Mosse, also Germans, Boissonade, and Kirkwood, an Englishman. The bill was discussed by a commission, became law in 1890, and governed the judicial and court system until the radical reform of the judicial organization after World War II. The statute was called the Law on Court Organization, but it also dealt with the *ministère public*.

The evolution of the law of civil procedure was almost the same as that on judicial organization. At the beginning of the Meiji era many civil procedure laws were established on the French model,²¹ but it is very doubtful whether the judicial officers of the time completely understood them. A Ministry of Justice memorandum addressed to judges in 1872 places on record that "Since the judicial service aims at protecting the rights of the people. . . , judges must handle litigants with care. However, it is said that there are some judges who confuse civil and criminal cases and submit civil litigants to birching or whipping. This is absurd, and judges are required henceforth to avoid any repetition of this sort of thing." It should also be pointed out that at this time conciliation in the manner of the preceding era was greatly encouraged, with the result that the judges had the conciliation of litigants as their main task. There was no desire to give a definitive solution to cases according to the law.²²

The modernization of the legal system demanded the perfect-

²¹ In the law of 17 July, 1873, relating to civil procedural forms, many provisions are reminiscent of those in the French code. For instance, a plaintiff had to go to a scrivener to have procedural documents drawn up. The function of this scrivener was incompatible with that of the *daigemin* (barrister), and the office was therefore perhaps created on the model of that of the *avoué*. Moreover, the number of words which may appear on each line of a page of a deed drawn up by the scrivener is laid down in the law. No such tradition had previously existed in Japan, so once again the limitation seems to have been imported from France.

²² This is still a very strong tendency today.

ing of procedural law as well. So, in 1884 a German jurist, Techow, was asked to draw up a draft civil procedure code based on the German law of 1877. This Code of Civil Procedure was promulgated in 1890 and came into force the following year.²³ In contrast to the Civil Code, which is an eclectic work combining the French and German principles, the Code of Civil Procedure follows the German system almost exactly. There was a failure, however, to harmonize it with the Civil Code, so that in many cases there is a significant gap between the solution given in each.²⁴

At the time when the movement of *Jiyu Minken* was flourishing, a great desire for a constitution was expressed among the Japanese. Numerous private projects for a constitution with varying political standpoints were published, and the greater number of the draftsmen saw that the constitution should be, if not an agreement emanating from the social will of the people, at least an agreement between the emperor and the people, and that a constituent assembly was required for this purpose. The government had other ideas; it had no intention of taking the wishes of the nation into account. After the repression of the liberal movement it secretly began the drafting of a constitution of its own. In 1882 Ito Hirobumi, one of the highest officials in the imperial government, left for Europe to study European constitutions. He concentrated his studies on constitutions of the German type and was strongly influenced by German constitutionalists such as Gneist and Stein. Ito returned to Japan in 1883, and the drafting of the constitution probably started in 1886. Three high officials faithful to Ito were chosen as his assistants, and one of them, Inoue Kowashi, was given prime responsibility for the drafting of the text. He worked with the assistance of advice from the two Germans, Roesler and Mosse, who were both known to be great admirers of the Prussian Constitution of 1850. It is natural, therefore, that the draft drawn up by Inoue bears the visible

²³ Since the date for coming into force of the Civil Code was 1898, the procedural rules were applied earlier than those of substance!

²⁴ For instance, the equivalent of the French *contrainte* is employed in differing senses in the two codes: article 414, paragraph 2, of the Civil Code uses it to mean *contrainte directe*, while article 734 of the Civil Procedure Code uses it in the sense of *contrainte indirecte*.

imprint of the Prussian Constitution. In 1888 the draft was completed and submitted to a specially set up private council for consideration. Ito thought that the draft of the constitution should be discussed not in any constituent assembly representing the nation but before a body composed of the great men of the state.²⁵ On 11 February, 1889 (legend has it that the emperor Jimmu ascended the throne on 11 February), the Constitution was solemnly granted by the emperor to his subjects. On that day the emperor informed his ancestors of the Constitution, and deigned to issue an imperial rescript in imposing style to impress upon his subjects the grandeur of the constitutional empire. He said in the rescript that he proclaimed this great charter as an intangible and everlasting gift to all his present and future subjects.

The Constitution was a work of compromise between the idea of divine law and constitutionalism, but the powers of the emperor were nevertheless undeniably great under it. Article 4 provided that the emperor was the head of the state and that he combined in his person all the governmental powers. The Imperial Diet was only an organ for collaboration with the emperor. The laws were made with its consent (article 37), but the legislative power was exercised by the emperor (article 5). The powers of the Diet were extremely limited. For example, the government could bring back the budget of the preceding year if the new year's budget was not voted on in the required time (article 71). This measure in itself considerably weakened the power of the Diet to control the government. What is more a very extensive controlling power was reserved to the emperor. He could promulgate several types of regulatory measures, such as urgent measures and independent measures (articles 8 and 9), without the intervention of the Diet. Urgent measures were issued during the period when the Diet was not sitting and could be abrogated if disapproved of by the Diet. Independent measures were those that sought to maintain public security or to increase national well-being. Neither could derogate from statutes, but they nevertheless limited the legislative power of the

²⁵ This privy council, which was never a constitutional organ, continued to play an important role in the absolutist government even after the promulgation of the Constitution.

Diet. Another point to note is the independence of the military. It was not the Constitution itself which formally provided for this, but under the constitutional regime the former practices continued. It consisted in placing the military power beyond the control of the civil ministers and in permitting the army and navy chiefs to deal directly with the emperor. This absurd custom favored military despotism and finally led Japan to catastrophe.

In spite of its absolutist character, the 1889 Constitution did permit the democratization of government, and a democratic political tendency did develop during this period of evolution of constitutional life in Japan. After World War I a liberal democratic movement grew in all sectors of national life. In the field of legal theory this tendency was represented by Minobe Tatsukichi, professor of constitutional law at the Faculty of Law of the Imperial University of Tokyo, and Yoshino Sakuzo, professor of political science of the same faculty. Unfortunately the democrats were forced to retract under the pressures of the military. In sum, what was assured by the Constitution was, as Professor Oka, one of the most eminent historians of Japanese politics, points out, only apparent constitutionalism.

In the field of administrative law the evolution was very complicated. In the first years of the Meiji era the political and administrative organization was modified frequently. Initially the *nitsu-ryo* system was reinstated, but slowly the influences of French and English law were felt in this field too. In 1871 the *han* regime was suppressed and the country was divided into *ken* (prefectures). The reform reverted to an old model, but even at this time some European influence could be traced in the law. About 1885 the central and local administration was perfected along Prussian lines. In 1885 the cabinet (*naikaku*) system of government was established, and in 1888 a law on *communes* and in 1890 a law on *departements* was promulgated. The operation of the Japanese administration before World War I was characterized by its bureaucratic, centralized, and police-state tendencies.

Japan made great efforts to modernize its legal system on the model of the advanced countries, and it is not an exaggeration to say that the modernization can be analyzed as a Europeanization or Westernization of Japan. It has been shown that the basic

structure of the Japanese legal system was formed mainly by German and French law, but, as has also been shown, the rules of these Western laws were not always properly understood by the Japanese draftsmen. In one piece of legislation rules borrowed from both French and German law could be found. The draftsmen were short of time and often combined rules superficially without harmonizing them at a conceptual level. The reception was not a direct one. It was the result of a complex process of referring from one body of law to the other.

REAL SIGNIFICANCE OF THE RECEPTION

Although Japan succeeded in faithfully and skillfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received. The rapid Europeanization was limited to the field of state law, which dealt with only a very small section of Japanese society. Further, it must not be forgotten that the modernized law was put into operation by men whose outlook was determined by a peculiar set of geographical and historical factors. As Koschaker said, "No legislator could avoid leaving some area for the application of indigenous law, and even if he envisaged an en bloc reception it is doubtful that he could even then completely exclude indigenous law. For though the law can be changed from one day to the next, the men to whom it is applied and those who have to apply it in the future cannot be changed this way."²⁸ Japan was destined to remain a long time subject to social rules that were quite foreign to the received law.

The modern codes predicated a bourgeois society in which every individual is presumed free and equal with everyone else, in which all legal relationships constitutive of rights and obligations are formed by the individuals themselves, and where legal relationships are created by the exercise of the individual's free will. This is of course an ideal which no real society fully attains, though it is true that any modern society worthy of the name does attain the ideal to a greater or lesser degree. There was no

²⁸ Koschaker, *Europa und das römische Recht*, p. 145.

important difference between the archetypal society on which the French Civil Code was based and the society to which it applied, which is why the school of exegesis was able to dominate French legal thought till the end of the nineteenth century. Japanese society, on the other hand, retained an essentially archaic morality from the preceding period after the reception of Western law. There was a great gap between the society presumed by the modern-style codes and that which existed almost independently of them. Japanese society had no knowledge of ideas of right and duty before the reception, and so the school of *Begriffs-jurisprudenz* prospered in Japan after the promulgation of the codes. Japanese jurists did not concern themselves with the actual life of the people because this life followed rules of quite a different kind from those of state law. Even the people did not want the state law to be interpreted for their benefit, so that judges contented themselves with giving logical coherence to their decisions without trying to convince the parties. A former professor commenting on the judicial practice of the prewar judges said, "A good judge was considered to be the one who disposed of contrary arguments by saying that they were ill-founded in as few words as possible. The judge's merit was in his being able to formulate his decisions in an extremely laconic manner and in his having some knowledge of the German language."

Why was Japanese society able to continue in this way for such a long time in spite of the rapid progress of modern capitalism? The development of capitalism in Japan was dominated from the beginning by political rather than economic considerations. The Meiji Restoration of 1868 was not brought about by the bourgeoisie. The lower ranking samurai, who were the main engineers of the political reform, had absolutely no intention of abandoning the feudal principles which they considered constituted a morality far superior to the European. They understood that they could not preserve Japan's independence without recourse to the material means that the Western powers controlled, but they believed that it was possible to adopt the material civilization of Europe and to harmonize it with Oriental morality. Even the most progressive intellectuals toward the end of

the Edo period expressed this idea, and their motto was "Western techniques, Oriental morality." As a consequence the Meiji government intended to modernize Japan only to the extent necessary to make it an equal of the great powers of the world. It was necessary to be wealthy and strong; thus the basic principle of government was embodied in the motto *fukoku kyohai* (rich country and strong military).

The adoption of capitalism proceeded not just from the economic point of view but also from the political and military points of view. From its inception Japanese capitalism was encircled by a martial halo, but being in its infancy it was weak both bodily and spiritually. It did not have enough energy to grow healthily. The initial accumulation of capital was insufficient, there was no spirit of liberalism, and free competition was unknown. All the modern industrial enterprises were promoted by the government and then given by way of concession to individuals subject to the diligent protection of the state. The Japanese bourgeoisie was nurtured by the government, and was, in a sense, the favorite daughter of absolutism. There was neither liberalism nor individualism in its spirit. What a difference between that and the *Geist des Kapitalismus* of which Max Weber speaks. The Japanese never thought that the state could be a necessary evil. They did not even realize that the state could be founded on social contract, and it is perhaps in this that their chauvinism lies.

The historical conditions were obviously favorable to the survival of the former morality, but there is yet another factor that prevented the breakdown of the previous structuring of Japanese society. Japanese capitalism was unable to make use of sophisticated machines in its early stages, so it had to resort to the labor of women and children. The rural population was therefore partially absorbed by industry, but even when the great industrial enterprises needed workers, those who had originally come from the country returned to the country in periods of unemployment. The result was that the rural areas were an asylum for the unemployed and sheltered a very large number of inhabitants living in conditions little better than those of the preceding era. Agricultural exploitation was maintained usually

by the labor of the members of each peasant family, and the mechanization of agriculture was retarded by this abundance of manpower. Naturally, the tempo of life remained static and society changed little.²⁷ As a result Japanese capitalism, prospering as it did at the expense of the peasants and workers, was unable to find any worthwhile internal market and was obliged to seek an outlet for its goods in external markets, which helped to accentuate its militaristic character.

The government for its part profited one hundred percent from the situation and tried to reinforce the outlook of the people through the national education system. In 1890 an imperial rescript was issued defining the fundamental principles of public education. These principles rested on Confucianism and emphasized loyalty to the emperor and filial piety as cardinal virtues. The state was conceived as a large family in which a hierarchical order was operative. At the top of the hierarchy was the emperor, the compassionate father of the nation. He was a divine man, literally an incarnate divinity. Not only was he omnipotent but he was himself the source of morality. On all national festivals a solemn ceremony took place in all schools for the cult of the emperor. All those present had to give adoration to the imperial image and then in an impressive voice the principal of the school would read the Imperial Rescript on Education. Thus the whole nation was indoctrinated from childhood with the idea that Japan was a holy country guarded by godly ancestors and the emperor himself and could never be conquered by its enemies. This sacred and mystical character of the Japanese state was called *kokutai* (the form of the state) and the slightest fault committed against *kokutai* was severely punished as a crime of *lèse-majesté*. The old customs were linked to *kokutai* and criticism of them, even of a purely scientific nature, was severely repressed as a dangerous idea.²⁸

²⁷ This state of affairs continues today in the backward areas of Japan. R. Gullain, Tokyo correspondent of *Le Monde*, published very interesting articles on this subject in *Le Monde*, 27-30 December, 1962.

²⁸ This is the sole reason why scientific historical studies ran into almost insurmountable difficulties in the prewar period. All critical research incompatible with the traditional myths was severely repressed. Many excellent historians were put out of jobs because they studied Japanese history from a critical viewpoint. It is only since the war that the history of ancient Japan is being clearly established.

After World War I jurists had begun a critical and sociological study of law, and also a very lively movement toward democracy was growing among a large section of the populace. This tendency coincided with the movement for social rights in Europe, but in Japan it was nothing more than the beginning of true liberalism and democracy. The dominant class feared this development, and in 1925 it had a law, which is well known in Japan for its severity, voted by the Diet. This was the *chian-iji-ho*, the law on the maintenance of the public security. The first article provided: "Those who have associated to reform the *kokutai* or to deny the private property regime as well as those who have knowingly cooperated with them, will be punished by imprisonment with or without hard labor for a term not exceeding ten years." This law was used, with the assistance of the police and the special secret police, *tokubetsu koto keisatsu*,²⁹ to repress progressive ideas.³⁰ Originally it was used to repress communist activities, but in the end it was used to stifle any idea that could, in the eyes of the ruling class, constitute the slightest danger to the existing political regime.

Such was the cultural milieu in which the reception of Western laws was undertaken. It is easy to see what a great gulf existed between the social structure presupposed by the received legal system and that which operated in Japan. Rationalism, which is the soul of modern law, was for the Japanese only a beautiful borrowed garment which hid a traditional psychology imbued with mystic sentimentalism. The *homo juridicus* on which modern law was based was a man who thought mathematically and logically and had no concern for the delicacy of the subtle nuances of concrete life. Those who were not used to the abstraction of objective things were embarrassed by a fashion of thought which admitted only two colors, black and white. The Japanese, a man of poetry, had great difficulty adapting to legal rationalism, but eventually he began to understand this law which guaranteed him his liberty and personal dignity.

²⁹ Also called *tokko*.

³⁰ A very large number of intellectuals were victims of the *meiko* because of their progressive ideas.

From; Hideo TANAKA, The Japanese Legal System
(University of Tokyo Press, 1976)

CONSTITUTION OF THE EMPIRE OF JAPAN, 1889
[Meiji Constitution]*

Promulgated on February 11, 1889; Put into effect on November 29, 1890 (based upon the 4th paragraph of the Edict); Superseded by the Constitution of Japan on May 3, 1947.

Imperial Oath Sworn in the Sanctuary in the
Imperial Palace (*Tsuge-bumi*)

We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will thereby to give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors. That we have been so fortunate in Our reign, in keeping with the tendency of the times, as to accomplish this work, We owe to the glorious Spirits of the Imperial Founder of Our House and of Our other Imperial Ancestors.

We now reverently make Our prayer to Them and to Our Illustrious Father, and implore the help of Their Sacred Spirits, and make to Them solemn oath never at this time nor in the future to fail to be an example to Our subjects in the observance of the Laws hereby established.

May the heavenly Spirits witness this Our solemn Oath.

Imperial Rescript on the Promulgation
of the Constitution

Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants.

* The following is the semi-official translation, which appeared in Count H. Itô, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Itô transl. 1889).

The Imperial Founder of Our House and Our other Imperial Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis, which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavours, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, and of securing forever the stability of the work bequeathed to Us by Our Imperial Ancestors.

Preamble [or Edict] (*jōyu*)

Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in the future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the 23rd year of Meiji and the time of its opening shall be the date, when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no otherwise shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.

CHAPTER I. THE EMPEROR

Article 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article 2. The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.

Article 3. The Emperor is sacred and inviolable.

Article 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitutions.

Article 5. The Emperor exercises the legislative power with the consent of the Imperial Diet.

Article 6. The Emperor gives sanction to laws, and orders them to be promulgated and executed.

Article 7. The Emperor convokes the Imperial Diet, opens, closes, and prorogues it, and dissolves the House of Representatives.

Article 8. The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law.

(2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

Article 9. The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Article 10. The Emperor determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws, shall be in accordance with the respective provisions (bearing thereon).

Article 11. The Emperor has the supreme command of the Army and Navy.

Article 12. The Emperor determines the organization and peace standing of the Army and Navy.

Article 13. The Emperor declares war, makes peace, and concludes treaties.

Article 14. The Emperor declares a state of siege.

(2) The conditions and effects of a state of siege shall be determined by law.

Article 15. The Emperor confers titles of nobility, rank, orders and other marks of honor.

Article 16. The Emperor orders amnesty, pardon, commutation of punishments and rehabilitation.

Article 17. A Regency shall be instituted in conformity with the provisions of the Imperial House Law.

(2) The Regent shall exercise the powers appertaining to the Emperor in His name.

CHAPTER II. RIGHTS AND DUTIES OF SUBJECTS

Article 18. The conditions necessary for being a Japanese subject shall be determined by law.

Article 19. Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any other public offices equally.

Article 20. Japanese subjects are amenable to service in the Army or Navy, according to the provisions of law.

Article 21. Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

Article 22. Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law.

Article 23. No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

Article 24. No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

Article 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

Article 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

Article 27. The right of property of every Japanese subject shall remain inviolate.

(2) Measures necessary to be taken for the public benefit shall be provided for by law.

Article 28. Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Article 29. Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.

Article 30. Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.

Article 31. The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.

Article 32. Each and every one of the provisions contained in the preceding Articles of the present Chapter, that are not in conflict

with the laws or the rules and discipline of the Army and Navy, shall apply to the officers and men of the Army and of the Navy.

CHAPTER III. THE IMPERIAL DIET

Article 33. The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.

Article 34. The House of Peers shall, in accordance with the Ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those who have been nominated thereto by the Emperor.

Article 35. The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election.

Article 36. No one can at one and the same time be a Member of both Houses.

Article 37. Every law requires the consent of the Imperial Diet.

Article 38. Both Houses shall vote upon projects of law submitted to it by the Government, and may respectively initiate projects of law.

Article 39. A Bill, which has been rejected by either the one or the other of the two Houses, shall not be brought in again during the same session.

Article 40. Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

Article 41. The Imperial Diet shall be convoked every year.

Article 42. A session of the Imperial Diet shall last during three months. In case of necessity, the duration of a session may be prolonged by the Imperial Order.

Article 43. When urgent necessity arises, an extraordinary session may be convoked in addition to the ordinary one.

(2) The duration of an extraordinary session shall be determined by Imperial Order.

Article 44. The opening, closing, prolongation of session and prorogation of the Imperial Diet, shall be effected simultaneously for both Houses.

(2) In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

Article 45. When the House of Representatives has been ordered to dissolve, Members shall be caused by Imperial Order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

Article 46. No debate can be opened and no vote can be taken in either House of the Imperial Diet, unless not less than one-third of the whole number of Members thereof is present.

Article 47. Votes shall be taken in both Houses by absolute majority. In the case of a tie vote, the President shall have the casting vote.

Article 48. The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.

Article 49. Both Houses of the Imperial Diet may respectively present addresses to the Emperor.

Article 50. Both Houses may receive petitions presented by subjects.

Article 51. Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

Article 52. No Member of either House shall be held responsible outside the respective Houses, for any opinion uttered or for any vote given in the House. When, however, a Member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

Article 53. The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offenses connected with a state of internal commotion or with a foreign trouble.

Article 54. The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

CHAPTER IV. THE MINISTERS OF STATE AND THE PRIVY COUNCIL

Article 55. The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

(2) All Laws, Imperial Ordinances, and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State.

Article 56. The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

CHAPTER V. THE JUDICATURE

Article 57. The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

(2) The organization of the Courts of Law shall be determined by law.

Article 58. The judges shall be appointed from among those, who possess proper qualifications according to law.

(2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

(3) Rules for disciplinary punishment shall be determined by law.

Article 59. Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear, that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provisions of law or by the decision of the Court of Law.

Article 60. All matters, that fall within the competency of a special Court, shall be specially provided for by law.

Article 61. No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

CHAPTER VI. FINANCE

Article 62. The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

(2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

(3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

Article 63. The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

Article 64. The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.

(2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

Article 65. The Budget shall be first laid before the House of Representatives.

Article 66. The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

Article 67. Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such

expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

Article 68. In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.

Article 69. In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.

Article 70. When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.

(2) In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

Article 71. When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

Article 72. The final account of the expenditures and revenues of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.

(2) The organization and competency of the Board of Audit shall be determined by law separately.

CHAPTER VII. SUPPLEMENTARY RULES

Article 73. When it has become necessary in future to amend the provisions of the present Constitution, a project to the effect shall be submitted to the Imperial Diet by Imperial Order.

(2) In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

Article 74. No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

(2) No provision of the present Constitution can be modified by the Imperial House Law.

Article 75. No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

Article 76. Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

THE CONSTITUTION OF JAPAN, 1946*

Promulgated on November 3, 1946; Put into effect on May 3, 1947.

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

CHAPTER I. THE EMPEROR ..

Article 1. The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.

Article 2. The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.

Article 3. The advice and approval of the Cabinet shall be re-

* The following is the official translation.

quired for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.

Article 4. The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.

(2) The Emperor may delegate the performance of his acts in matters of state as may be provided by law.

Article 5. When, in accordance with the Imperial House Law, a Regency is established, the Regent shall perform his acts in matters of state in the Emperor's name. In this case, paragraph one of the preceding article will be applicable.

Article 6. The Emperor shall appoint the Prime Minister as designated by the Diet.

(2) The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.

Article 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

- (i) Promulgation of amendments of the constitution, laws, cabinet orders and treaties;
- (ii) Convocation of the Diet;
- (iii) Dissolution of the House of Representatives;
- (iv) Proclamation of general election of members of the Diet;
- (v) Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
- (vi) Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights;
- (vii) Awarding of honors;
- (viii) Attestation of instruments of ratification and other diplomatic documents as provided for by law;
- (ix) Receiving foreign ambassadors and ministers;
- (x) Performance of ceremonial functions.

Article 8. No property can be given to, or received by, the Imperial House, nor can any gifts be made therefrom, without the authorization of the Diet.

CHAPTER II. RENUNCIATION OF WAR

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

CHAPTER III. RIGHTS AND DUTIES OF THE PEOPLE

Article 10. The conditions necessary for being a Japanese national shall be determined by law.

Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 14. 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.

(2) Peers and peerage shall not be recognized.

(3) No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Article 15. The people have the inalienable right to choose their public officials and to dismiss them.

(2) All public officials are servants of the whole community and not of any group thereof.

(3) Universal adult suffrage is guaranteed with regard to the election of public officials.

(4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters, nor shall any person be in any way discriminated against for sponsoring such a petition.

Article 17. Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.

Article 18. No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

Article 19. Freedom of thought and conscience shall not be violated.

Article 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority.

(2) No person shall be compelled to take part in any religious acts, celebration, rite or practice.

(3) The State and its organs shall refrain from religious education or any other religious activity.

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 22. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.

(2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 23. Academic freedom is guaranteed.

Article 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Article 25. All people shall have the right to maintain the minimum standards of wholesome and cultured living.

(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Article 26. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

(2) All people shall be obligated to have all boys and girls under their protection receive ordinary educations as provided for by law. Such compulsory education shall be free.

Article 27. All people shall have the right and the obligation to work.

(2) Standards for wages, hours, rest and other working conditions shall be fixed by law.

(3) Children shall not be exploited.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

Article 29. The right to own or to hold property is inviolable.

(2) Property rights shall be defined by law, in conformity with the public welfare.

(3) Private property may be taken for public use upon just compensation therefor.

Article 30. The people shall be liable to taxations as provided by law.

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 32. No person shall be denied the right of access to the courts.

Article 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.

Article 34. No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.

(2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

(2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

(3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Article 38. No person shall be compelled to testify against himself.

(2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

(3) No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Article 40. Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

CHAPTER IV. THE DIET

Article 41. The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Article 42. The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.

Article 43. Both Houses shall consist of elected members, representative of all the people.

(2) The number of the members of each House shall be fixed by law.

Article 44. The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

Article 45. The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.

Article 46. The term of office of members of the House of Councillors shall be six years, and election for half the members shall take place every three years.

Article 47. Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law.

Article 48. No person shall be permitted to be a member of both Houses simultaneously.

Article 49. Members of both Houses shall receive appropriate annual payment from the national treasury in accordance with law.

Article 50. Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.

Article 51. Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

Article 52. An ordinary session of the Diet shall be convoked once per year.

Article 53. The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.

Article 54. When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convoked within thirty (30) days from the date of the election.

(2) When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session.

(3) Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.

Article 55. Each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.

Article 56. Business cannot be transacted in either House unless one-third or more of total membership is present.

(2) All matters shall be decided, in each House, by a majority of those present, except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue.

Article 57. Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two-thirds or more of those members present passes a resolution therefor.

(2) Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy.

(3) Upon demand of one-fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes.

Article 58. Each House shall select its own president and other officials.

(2) Each House shall establish its rules pertaining to meetings, proceedings and internal discipline, and may punish members for disorderly conduct. However, in order to expel a member, a majority of two-thirds or more of those members present must pass a resolution thereon.

Article 59. A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

(2) A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

(3) The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.

(4) Failure by the House of Councillors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the

House of Representatives to constitute a rejection of the said bill by the House of Councillors.

Article 60. The Budget must first be submitted to the House of Representatives.

(2) Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

Article 61. The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.

Article 62. Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records.

Article 63. The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations.

Article 64. The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.

(2) Matters relating to impeachment shall be provided by law.

CHAPTER V. THE CABINET

Article 65. Executive power shall be vested in the Cabinet.

Article 66. The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.

(2) The Prime Minister and other Ministers of State must be civilians.

(3) The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

Article 67. The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

(2) If the House of Representatives and the House of Councillors disagrees and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

Article 68. The Prime Minister shall appoint the Ministers of

State. However, a majority of their number must be chosen from among the members of the Diet.

(2) The Prime Minister may remove the Ministers of State as he chooses.

Article 69. If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved with ten (10) days.

Article 70. When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign en masse.

Article 71. In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed.

Article 72. The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

Article 73. The Cabinet, in addition to other general administrative functions, shall perform the following functions:

- (i) Administer the law faithfully; conduct affairs of state;
- (ii) Manage foreign affairs;
- (iii) Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet;
- (iv) Administer the civil service, in accordance with standards established by law;
- (v) Prepare the budget, and present it to the Diet;
- (vi) Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law.
- (vii) Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.

Article 74. All laws and cabinet orders shall be signed by the competent Minister of State and countersigned by the Prime Minister.

Article 75. The Ministers of State, during their tenure of office, shall not be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

CHAPTER VI. JUDICIARY

Article 76. The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

(2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

(3) All judges shall be independent in the exercise of their con-

science and shall be bound only by this Constitution and the laws.

Article 77. The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

(2) Public procurators shall be subject to the rule-making power of the Supreme Court.

(3) The Supreme Court may delegate the power to make rules for inferior courts to such courts.

Article 78. Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.

Article 79. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

(2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

(3) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

(4) Matters pertaining to review shall be prescribed by law.

(5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

(6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 80. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

(2) The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Article 82. Trials shall be conducted and judgment declared publicly.

(2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein

the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

CHAPTER VII. FINANCE

Article 83. The power to administer national finances shall be exercised as the Diet shall determine.

Article 84. No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.

Article 85. No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.

Article 86. The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.

Article 87. In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorized by the Diet to be expended upon the responsibility of the Cabinet.

(2) The Cabinet must get subsequent approval of the Diet for all payments from the reserve fund.

Article 88. All property of the Imperial Household shall belong to the State. All expenses of the Imperial Household shall be appropriated by the Diet in the budget.

Article 89. No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Article 90. Final accounts of the expenditures and revenues of the State shall be audited annually by a Board of Audit and submitted by the Cabinet to the Diet, together with the statement of audit, during the fiscal year immediately following the period covered.

(2) The organization and competency of the Board of Audit shall be determined by law.

Article 91. At regular intervals and at least annually the Cabinet shall report to the Diet and the people on the state of national finances.

CHAPTER VIII. LOCAL SELF-GOVERNMENT

Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

(2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

CHAPTER IX. AMENDMENTS

Article 96. Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

CHAPTER X. SUPREME LAW

Article 97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

(2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Article 99. The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

CHAPTER XI. SUPPLEMENTARY PROVISIONS

Article 100. This Constitution shall be enforced as from the day when the period of six months will have elapsed counting from the day of its promulgation.

(2) The enactment of laws necessary for the enforcement of this Constitution, the election of members of the House of Councillors and the procedure for the convocation of the Diet and other preparatory procedures for the enforcement of this Constitution may be executed before the day prescribed in the preceding paragraph.

Article 101. If the House of Councillors is not constituted before the effective date of this Constitution, the House of Representatives shall function as the Diet until such time as the House of Councillors shall be constituted.

Article 102. The term of office for half the members of the House of Councillors serving in the first term under this Constitution shall be three years. Members falling under this category shall be determined in accordance with law.

Article 103. The Ministers of State, members of the House of Representatives, and judges in office on the effective date of this Constitution, and all other public officials, who occupy positions corresponding to such positions as are recognized by this Constitution shall not forfeit their positions automatically on account of the enforcement of this Constitution unless otherwise specified by law. When, however, successors are elected or appointed under the provisions of this Constitution, they shall forfeit their positions as a matter of course.

AJASE AND OEDIPUS:
IDEAS OF THE SELF IN JAPANESE AND
WESTERN LEGAL CONSCIOUSNESS

J. C. SMITH†

Justice and Mercy

The Supreme Court of Japan is one of the most impressive buildings in the city of Tokyo, and there is probably no finer edifice of a court of last resort anywhere in the world. One of the most striking features about this structure, to western eyes at least, is not the massive foyer, the size of the huge granite blocks, nor the fine woods and tapestries of the beautiful court rooms, but the statue of Justice, inconspicuously placed along one of the walls. While many court houses display the figure of the robed woman with scales in one hand and a sword in the other, that of the Supreme Court of Japan is truly unique; the head of the sculpture is the head of the Buddha.

Given the separation of church and state provided by the *Constitution of Japan*,¹ one would not interpret this as signifying any particular unity of the religious and the secular. Rather, it seems to symbolize for the legal world the familiar idea of "Western forms and Japanese soul".² One cannot help but wonder: is this union a reconciled unity or an unreconciled dialectic? Do the diverse parts make up a new harmony or do they operate together in tension as a contradiction?

† Of the Faculty of Law, University of British Columbia. I wish to acknowledge and express my appreciation to the following: Professor Masako Kamiya of Hokkaido University for her helpful suggestions and translations and explanations of texts to be found only in Japanese; Professors Mitsukuni Yasaki, and Yoshi Matsumura of Osaka University, and Yoshiyuki Matsumura of Hokkaido University for their kind help in my attempts to gain some understanding and insight into Japanese culture and how law is viewed in Japan; to James Anderson for his many suggestions and editorial help; and to Gordon Matei for his help in the research of this paper.

¹ *Constitution of Japan* (1947), Art. 20.

² *Wa kon yo sai*. See generally, G. B. Sansom, *The Western World and Japan* (1950) at 339-51 and 395-410; J. W. Hall, "Changing Conceptions of the Modernization of Japan" at 7, and M. B. Jansen, "Changing Japanese Attitudes Toward Modernization" at 43, both in M. B. Jansen, ed., *Changing Japanese Attitudes Toward Modernization* (1965).

Prevailing social power structures often appear as natural and inevitable, and history is generally interpreted to produce this impression. I do not, as some Marxists might, wish to attack this tendency, which seems to be an aspect of all social ideologies. I would, however, concur with the Marxists in their recognition of the importance of identifying contradictions in order to gain a fuller understanding of historical development.

All cultures contain historical contradictions. It is important to identify these in order to gain a fuller understanding of historical development. In particular, the nature of the relationship between diverse cultural elements is central to a proper understanding of the ethical and legal consciousness of a culture.³ If Japan has managed to reconcile the traditional spirit of its culture with western legal forms, it may well have a solution to problems which have long haunted the West. On the other hand, if the synthesis joins two contradictions, we might anticipate that certain aspects of traditional Japanese culture will be eroded as a result.

Another feature of the statue highlights this question. The head of the Buddha, unlike its western counterparts has no blindfold. On a conventional statue of Justice the scale symbolizes the formal, impartial nature of law, the sword the inevitability of the penalties and remedies prescribed by law following transgression against it, and the blindfold the exclusion of all factors, feelings, prejudices and emotions which deflect the full operation of the law.⁴ The meaning of the blindfold is implicit in the western maxim *fiat justitia, ruat coelum* (let justice be done though the heavens fall) or, in an earlier form, *ruat mundus* (though the world comes to ruin). The blindfold signifies that the consequences of strictly applying the law must be shut out of our vision lest they influence the path of justice. This opposition, which is posited between the operation of justice and its consequences, is alien to the Japanese. The unconstrained gaze of the

³ See text accompanying notes 7 and 8, *infra*.

⁴ There are, of course, many versions of the Statue of Justice. A particularly interesting example can be found in Cesare Ripa's seventeenth-century work on iconography, *Iconologia*. The figure is seated with the sword in one hand and the scales in her lap. In the background is the figure of King Zalencus and his son, each having one eye gouged out. The king had passed a particularly severe law against adultery which his son had broken. His commitment to justice allowed no way for the penalty to be avoided. The most which he could do within the confines of justice was to sacrifice one of his own eyes for one of his son's in order that his son would not be totally blind. The text states that, "She (Justice) is blindfolded, for nothing but pure reason ... should be used in making judgments." See C. Ripa, *Baroque and Rococo Pictorial Imagery*, trans. E. A. Maser (1971) illustration #120.

Buddha suggests that emotions such as compassion can be consistent with the rule of law.

Such a suggestion runs counter to fundamental assumptions within the western legal tradition, which are reflected not only in the symbolism of the traditional figures of Justice which adorn so many of the court rooms of the western world, but also in western religion, morality, philosophy, art and literature. These assumptions reflect a bifurcated view of justice and mercy. Mercy must function outside the legal system. Thus, judges cannot pardon. The prerogative of mercy belonged historically to the Crown, and is now exercised by the executive, its successor. The delegation to the Chancellor of the power to override the common law enabled a strong element of mercy to function in correlation with, but externally to, the law. When the office of the Chancellor evolved into the Courts of Chancery administering the law of equity, this element of mercy disappeared, so that in the mid-eighteenth century Dickens chose the Court of Chancery as the recipient of his savage attack on the mercilessness of the legal system.⁵

In the novel *Billy Budd*, Herman Melville has touched a chord in the western collective psyche, and provides us with a clear example of the consequence of this bifurcation of justice and mercy.⁶ The

⁵ C. Dickens, *Bleak House* (1853).

⁶ H. Melville, *Billy Budd, Sailor* (1924). *Billy Budd* has been discussed from several standpoints. See, for example, T. Stafford, *Billy Budd and the Critics* (1961); H. Franklin, "From Empire to Empire: *Billy Budd, Sailor*" in A. Lee, ed., *Herman Melville; Reassessments* (1984) at 199. The structure of the narrative of *Billy Budd* would indicate that Melville's primary artistic aim was to reveal the social mythology which masks the inability of law to combine justice with compassion. There are many other references to the tension between justice and mercy in the western literary tradition. A famous example is furnished by William Shakespeare in "The Merchant of Venice" Act IV, Scene i, lines 182-201:

The quality of mercy is not strained;
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest;
It blesseth him that gives and him that takes.
'Tis mightiest in the mightiest; it becomes
The thronèd monarch better than his crown.
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this scept'ed sway;
It is enthroned in the heart of kings,
It is an attribute to God himself,
And earthly power doth then show likest God's
When mercy seasons justice. Therefore, Jew,
Though justice be thy plea, consider this:
That, in the course of justice, none of us
Should see salvation. We do pray for mercy,
And that same prayer doth teach us all to render
The deeds of mercy. . . ."

story is set aboard a British warship at sea in 1797, when England was at war with revolutionary France. The plot contains three main characters: Billy Budd, first mate Clegg and Captain Devere. Billy Budd is a Christ-like figure who embodies goodness. Clegg is basically an evil man; Captain Devere is a kind and compassionate officer who runs his ship efficiently but humanely. The plot is simple, as befits these archetypal figures. Clegg, who is disturbed by Budd's inherent innocence and goodness, attempts to destroy him by accusing him of fomenting a mutiny. When confronted with this accusation in the presence of Clegg, Budd, whose only defect is that he is a stutterer, is unable to articulate his outraged denial. In frustration, he strikes Clegg with his fist. Clegg hits his head when he falls, and dies.

Killing an officer — indeed, merely striking an officer — was a capital offence in the British navy during this period. Yet, as Melville is at pains to point out, Billy Budd's moral guilt is minimal. He was accused of a crime which could cost him his life, and, given his stutter, was defending himself in the only way he could. Captain Devere is thus on the horns of an excruciating dilemma; he loves the beautiful and innocent Billy Budd as a son, but knows that if the law is not followed he will lose control of the crew. In the end Captain Devere obeys the law, does his "duty" and hangs Billy Budd. Although he is a good man, he cannot save Billy Budd; he cannot show mercy and still remain Captain. By having the officers of the court martial consider and eventually reject the various arguments which they themselves raise in attempting to save Billy Budd, Melville reveals two related, fundamental contradictions in the Judeo-Christian tradition, one pertaining to God, the other to law. God can be just, or He can be loving and merciful, but He cannot be both. Reflecting this dichotomy, the law can be either just or merciful, but not both. This contradiction between a God of justice and law and a God of love and mercy is reflected in the Judaic religious tradition in the dichotomy of "the Law and the Prophets". The law was administered by priests who taught duty to strict rules of obedience, while the prophets were the voice of compassion and righteousness, and were often critics of the law.⁷

The very strength of the Judaic tradition lay in the dialectical process which kept these contradictions in balance. There is always the danger that emotions will change. Love can turn to hatred and compassion to cruelty. The ties of the priests to the legal tradition

⁷ See A. Heschel, *The Prophets* (1962).

kept the prophetic tradition from the excesses which often accompany charismatic leadership, and kept it within a consistent and logical structure. The prophets, on the other hand, when acting as critics of the priests and the law, produced in ancient Israel one of the most humane systems of law that the world has ever seen.⁸

This dialectical tension is vividly reflected in the teachings of Jesus of Nazareth, the last and greatest in the line of prophets who constituted the prophetic tradition of Judaism. On the one hand he bitterly denounced the priests and lawyers, the servants of the law. On the other, he asserted that the law was not to pass away, but was to be fulfilled.⁹

Paul, the author of the greatest part of the body of scripture which makes up the New Testament, also devoted much of his thought and writing to the relationship between prophetic and legal justice. Paul attempted to solve the contradiction implicit in the concept of a God of compassion and a God of love by postulating the doctrine of the atonement whereby Jesus took upon himself all the sins (law breaking) of the peoples of the world and paid with his death the penalty of the law. Jesus' meeting the demands of the law allowed God to show compassion through forgiveness.

When Christianity was no longer a Jewish sect but had become a world religion in its own right, this belief in the reconcilability of prophetic justice with the law facilitated the move towards a unification of the church and state, which witnessed the end of the prophetic tradition.¹⁰

It is somewhat ironic that the most Christ-like figure to appear in the twentieth century is Mohandas Gandhi, a product of the eastern spiritual tradition who, in the manner of an Old Testament prophet, decried the injustice of a western Christian nation. A further irony is that Gandhi was a lawyer, and appeared to find no contradiction between his views of law and of compassion and mercy.

It is of value, in understanding the difference between Japanese and western legal consciousness, to contrast briefly the view of law implicit in *Billy Budd* with that which is implicit in an incident which Gandhi relates in his autobiography, concerning his early

⁸ See R. de Vaux, *Ancient Israel*, vol. 1 (1961) at 143-52; Y. Kaufmann, *The Religion of Israel* (1977) at 316-40.

⁹ See *The New Testament*, Matthew chs. 5 and 23.

¹⁰ See J. Danielou, "Christianity as a Jewish Sect" in A. Toynbee, ed., *The Crucible of Christianity* (1969) at 262-82, and J. H. Randall, *Hellenistic Ways of Deliverance and the Making of the Christian Synthesis* (1970) at 135-44.

years of legal practice in South Africa.¹¹ Gandhi tells of a dispute arising out of a complicated business transaction in which his client stood either to lose or gain a substantial sum of money. Gandhi soon realized that the technical law was all on his side, and that his client should be successful in any forthcoming law suit. However, he was cognizant of the fact that the parties to the suit were related and that both belonged to the same community. Also, if the case proceeded, both would suffer the costs of extensive litigation. He therefore persuaded the parties to submit the case to an arbitrator in whom they both had confidence. This was done and, as expected, his client won. Still Gandhi was not satisfied, because if his client were to seek the immediate execution of the whole award the other party would be put into bankruptcy. Gandhi pleaded with his client to spread the payments in modest amounts over a lengthy period of time. In the end, his client reluctantly accepted these arrangements and Gandhi was able to write that "both were happy over the result, and both rose in the public estimation." He then went on to say that "[m]y joy was boundless. I had learnt the true practice of law . . . I realized that the true function of a lawyer was to unite parties riven asunder."¹²

While the dialectical tension between law and feeling permeates western legal consciousness, no such contradiction is to be found in Gandhi's view of law. His view, in turn, seems very compatible with Japanese legal consciousness.¹³ Much has been written by both Japanese and non-Japanese about the unique perspective with which the Japanese view law.¹⁴ Their reluctance to litigate, their distaste

¹¹ M. K. Gandhi, *An Autobiography; The Story of My Experiments With Truth*, trans. M. Desai (1957) at 131-34.

¹² *Id.* at 134.

¹³ See for example, Y. Noda, "The Character of the Japanese People and Their Conception of Law" in H. Tanaka, ed., *The Japanese Legal System* (1976) at 301-10.

¹⁴ See for example, M. Yasaki, "Legal Culture in Japan, Modern-Traditional" (1985) *Archiv Fur Rechts-und Sozialphilosophie* 168; M. Yasaki, "Law and *Shakai-Tsunen* as a Legal Form of Consensus Idea" (1982) 29 *Osaka U.L.Rev.* 1; M. Yasaki, "Significance of 'Legal Consciousness' in Regard to Social Facts and Social Institutions" (1984) 31 *Osaka U.L.Rev.* 1; A. von Mehren, "Some Reflections on Japanese Law" (1958) 71 *Harv. L. Rev.* 1486; T. Kawashima, "Dispute Resolution in Japan" in A. von Mehren, ed., *Law in Japan* (1963) 41; D. F. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern* (1965); M. Maruyama, "Patterns of Individuation and the Case of Japan: A Conceptual Scheme" in Jansen, *supra*, note 2 at 489; T. Kawashima, "The status of the individual in the notion of law, right and social order in Japan" at 429, both in G. Moore, ed., *The Status of the Individual in East and West* (1968); J. Dator, "Measuring Attitudes Across Cultures" at 71 and T. Kawashima, "Individualism in Decision-Making in

for adversarial procedures, their avoidance of confrontation, their preference for mediation and their desire to make agreements only in general terms, leaving unforeseen contingencies to be worked out through consultation and negotiation, have been widely discussed and need not be elaborated upon here. An examination of this literature enables one to recognize that the maintenance of social harmony, reflected in warm human relationships, is of prime importance to the Japanese. To the Japanese, as to Gandhi, business relationships arise out of human relations. The aim of dispute settlement is the restoration of social harmony. This harmony rests in a sense of identity within a community, which is generated mainly by emotional means.¹⁵

Amae and Jibun

According to one of Japan's most eminent psychiatrists, Dr. Takeo Doi, "the chief characteristic of the Japanese . . ." is best expressed by the concept of *amae*. *Amae* "is a thread that runs through all the various activities of Japanese society . . . [and is the foundation of] the spiritual culture of Japan."¹⁶ It is clear from Dr. Doi's classical

the Supreme Court of Japan" at 103, both in G. Schubert & D. Danelski, eds., *Comparative Judicial Behaviour* (1969); C. Stevens, "Modern Japanese Law as an Instrument of Comparison" (1971) 19 Am. J. Comp. L. 665; R. Benjamin, "Images of Conflict Resolution and Social Control: American and Japanese Attitudes Toward the Adversary System" (1975) 19 J. of Conflict Resolution 123; Tanaka, *id.*; F. Upham, "Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits" (1976) 10 L. & Soc'y Rev. 579; Y. Noda, *Introduction to Japanese Law*, trans. A. Angelo (1976). For a contrary view see J. Halsey, "The Myth of the Reluctant Litigant" (1978) 4 J. of Japanese Studies 359. M. Galanter, in "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 U.C.L.A. Rev. 4 at 5, argues that "the familiar contention that American legal institutions are overwhelmed by an unprecedented flood of litigation which is attributable to the excessive litigiousness of the population" is not supported by the data.

¹⁵ T. Doi, *The Anatomy of Dependence*, trans. J. Bester (1973) at 76.

¹⁶ *Id.* at 26. While some writers and commentators have taken issue with Dr. Doi on various points, I have been unable to find any serious challenge to his book and its thesis. See for example T. Lebra, *Japanese Patterns of Behaviour* (1976) at 54, where the author states, "the role of expressing *amae*, called *amaeru*, must be complemented and supported by the role that accepts another's *amae*. The latter role is called *amayakasu*. Doi did not take into consideration the necessity of role complementarity between *amaeru* and *amayakasu*, perhaps because of the role asymmetry in the therapeutic relationship, where the therapist is inhibited from indulging the *amae* wish of the patient." Points such as these are matters of expansion rather than refutation. D. Mitchell, in *Amaeru* (1976) uses Dr. Doi's thesis to explain "The Expression of Reciprocal Dependency Needs in Japanese Politics and Law." While some have attacked this book for being simplistic or superficial, the criticism has generally not been of Doi's thesis, but of Mitchell's particular application of

study of the Japanese psyche, *The Anatomy of Dependence*, that *amae* is intimately related to the emotions.

Amae, according to the Foreword of *The Anatomy of Dependence*, "refers, initially, to the feeling that all normal infants at the breast harbor towards the mother."¹⁷ It is the noun form of the verb *amaeru* which is defined in the Foreword as follows:

It is the behaviour of the child who desires spiritually to "snuggle up" to the mother, to be enveloped in an indulgent love, that is referred to in Japanese as *amaeru* (the verb; *amae* is the noun). By extension, it refers to the same behavior, whether unconscious or deliberately adopted, in the adult. And by extension again, it refers to any situation in which a person assumes that he has another's goodwill, or takes a possibly unjustifiably optimistic view of a particular situation in order to gratify his need to feel at one with, or indulged by, his surroundings.¹⁸

The term *amae* is used to describe the feeling people have when they wish to be dependent upon and seek another's indulgence.¹⁹ Dr. Doi points out that there is no similar term to be found in European languages, but that *amae* means the same thing as was meant by Michael Balint when he termed the phrase "passive object love".²⁰ According to Balint, "all the European languages fail to distinguish between active love and passive love."²¹ Dr. Doi writes:

I believe that *amae* was traditionally the Japanese ideology — not in its original sense of "the study of ideas" but in its modern sense of a set of ideas, or leading concept, that forms the actual or potential basis for a whole social system — and still is to a considerable extent today.²²

it. For example, see H. Wagatsuma, Book Review (1979) 39 *J. of Asian Studies* 173, and E. Tsurumi, Book Review (1978) 51 *Pacific Affairs* 310. Of interest to Japanese readers will be H. Otsuka, T. Kawashima & T. Doi, *Amae to shakai kagaku* ('*Amae*' and Social Science) (1976) (as yet untranslated).

¹⁷ *Supra*, note 15 at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.*

²⁰ M. Balint, *Primary Love and Psychoanalytic Technique* (1965) at 56, 105, 108 and 233. Balint points out that it was Sandor Ferenczi who first coined the phrase and developed the idea of "passive object-love". For a comparison of the psychology of dependency in western culture see for example, J. P. Gurian & J. M. Gurian, *The Dependency Tendency* (1983); A. Memmi, *Dependence*, trans. P. Facey (1984); H. Parens & L. Saul, *Dependence In Man* (1971).

²¹ Balint states, "In one respect, however, all European languages are the same — again as far as I know them. They are all so poor that they cannot distinguish between the two kinds of object-love, active and passive." Balint, *id.* at 56.

²² *Supra*, note 15 at 57.

Dr. Doi goes on to state that he has become increasingly convinced "that what has traditionally been referred to vaguely as the 'Japanese spirit' or the 'soul of Yamato,' as well as more specific 'ideologies' such as emperor worship and respect for the emperor system can be interpreted in terms of *amae*."²³

Amae, according to Dr. Doi, is the major component of *ninjō* which he roughly translates into English as human feeling.²⁴ *Giri*, or social obligation, exists "in a kind of organic relationship" to *ninjō*. *Ninjō* occurs spontaneously in relationships such as those between parent and child or between siblings. *Giri*, which is found in the relationship between master and pupil, or between friends and neighbours, "continually aspires toward *ninjō*." *Giri*, states Dr. Doi, is the vessel while *ninjō* is the content.²⁵ He concludes:

It will be clear from the preceding that both *giri* and *ninjō* have their roots deep in *amae*. To put it briefly, to emphasize *ninjō* is to affirm *amae*, to encourage the other person's sensitivity towards *amae*. To emphasize *giri*, on the other hand, is to stress the human relationships contracted via *amae*. Or one might replace *amae* by the more abstract term "dependence," and say that *ninjō* welcomes dependence whereas *giri* binds human beings in a dependent relationship. The Japanese society of the past, in which *giri* and *ninjō* were the predominant ethical concepts, might without exaggeration be described as a world pervaded throughout by *amae*.²⁶

In chapter four of *The Anatomy of Dependence*, entitled "The Pathology of *Amae*", Dr. Doi describes some of the pathological states of mind which can arise among Japanese living within what he calls "[t]he world of *amae*".²⁷ Among these are *taijin kyōfu* (anxiety in dealing with other people),²⁸ *higaisha ishiki* (sense of being a victim),²⁹ and in particular, *jibun ga nai*, (to have no self).³⁰ It is the latter which is of particular jurisprudential interest because the concept of the self, or of the person, is of special significance in legal and political theory.

²³ *Id.*

²⁴ *Id.* at 33.

²⁵ *Id.* at 34. See also H. Minami, *Psychology of the Japanese People*, trans. A. Ikoma (1971) at 137-68; M. Masatsuga, *The Modern Samurai Society* (1982) at 89-92.

²⁶ *Supra*, note 15 at 35.

²⁷ *Id.* at 28-64.

²⁸ *Id.* at 104-27.

²⁹ *Id.* at 127-32.

³⁰ *Id.* at 132-41.

According to Dr. Doi, expressions such as *jibun ga aru* (to have self) and *jibun ga nai*, (to have no self) are probably peculiar to the Japanese. "The interesting question . . .", he states, "is why [the] Japanese [language] should go out of its way to remark on this presence or absence",³¹ since western languages, at least, contain no precise equivalent.³² "In the languages of the West the use of the first person pronoun is considered in itself adequate proof of the existence of a self."³³ These two Japanese expressions of self define the relationship of the individual to the group. "If the individual is submersed completely in the group, he has no *jibun*, . . . [but] an individual is said to have a *jibun* when he can maintain an independent self that is never negated by membership in the group."³⁴ Dr. Doi goes on to point out that an individual can also develop a sense of having no self as a result of being totally isolated from the group, and that some people so fear such a state of affairs that they

³¹ *Id.* at 133. Any people's collective view of the self is bound to be complex. This paper is attempting to focus only on a few aspects of the self from a comparative point of view. For a fuller discussion of the self in Japanese consciousness, see Minami, *supra*, note 25 at 1-33; C. Moore, ed., *The Japanese Mind* (1967); Masatsuga, *supra*, note 25 at 44-101; N. Hajime, "Consciousness of the individual and the universal among the Japanese" at 161; H. Ichiro, "The appearance of individual self-consciousness in Japanese religions and its historical transformations" at 227; F. Teshti, "The individual in Japanese ethics" at 301; K. Masaaki, "The status and role of the individual in Japanese society" at 361, and T. Kawashima, "The status of the individual in the notion of law, right, and social order in Japan" at 429, all in Moore, *supra*, note 14. See also R. Smith, *Japanese Society* (1983) at 68-105 and Lebra, *supra*, note 16 at 156-68.

³² A western example of the kind of emotion which would correspond to *amae* is to be found in the *New Testament*, in the First Epistle of Paul to the Corinthians. One translation reads:

I may speak in tongues of men or of angels, but if I am without love, I am a sounding gong or a clanging cymbal. I may have the gift of prophecy, and know every hidden truth; I may have faith strong enough to move mountains; but if I have no love, I am nothing. I may dole out all I possess, or even give my body to be burnt, but if I have no love, I am none the better. Love is patient; love is kind and envies no one. Love is never boastful, nor conceited, nor rude; never selfish, not quick to take offense. Love keeps no score of wrongs; does not gloat over other men's sins, but delights in the truth. There is nothing love cannot face; there is no limit to its faith, its hope and its endurance . . . In a word there are three things that last for ever; faith, hope, and love; but the greatest of them all is love. (*The New English Bible*, I Cor. 13:1-13)

In the traditional King James version of the New Testament, the Greek word *agape* is translated as "charity", a word that hardly conveys the true meaning of this passage, and is evidence of the fact that the English language does not contain a term adequate to this concept. One of the dictionary meanings of *agape* is "non-sexual love."

³³ *Supra*, note 15 at 133.

³⁴ *Id.* at 134.

will often put up with anything in order to remain within the group.³⁵

Dr. Doi concludes that "man cannot possess a self without previous experience of *amaeru*,"³⁶ at the same time noting that while submersion in the group may mean loss of the self it does not follow that one can produce a self by behaving selfishly and independently of the group. He further points out that while the problem of the development of the self "can be observed in a peculiarly clear form in the Japanese," and the awareness of having a self may be easier for the Westerner than for the Japanese, "in the West one finds a completely reverse phenomenon in which the individual while in his heart of hearts harboring an extremely complex feeling toward the 'absence of self,' or being in some cases aware, essentially, that he has no 'self,' behaves as though he does in fact have one."³⁷

In comparing the western psyche with the Japanese, Dr. Doi deals with the western pathology of alienation, a condition which "has its ultimate origin in the discovery that man was mistaken in believing . . . that he could stand on his own feet and be self-sufficient through reason alone."³⁸ "Men sense a drying-up of the springs of life, and in order to recover what has been lost they determine that they will return, as it were, to their naked selves, will live once more by feeling rather than reason. And in this new quest they are being led . . . to *amae*."³⁹ "When the infant is left by its mother," he writes, "it feels an uneasiness, a threat to its very life; and it seems likely that it is precisely this feeling that lies at the heart of what is described by modern man as 'human alienation.'"⁴⁰

There is no question that the idea and concept of individual freedom is a part of western consciousness, and that the demand for freedom is closely interrelated with the emphasis in western culture on individuality. Dr. Doi goes on to ask this penetrating question: "Is the freedom of the individual, that magnificent article of faith for the modern western world, really to be believed in, or is it merely an illusion cherished by one section of the population of the West?"⁴¹ He suggests that the incisive analyses of Marx, Nietzsche and Freud

³⁵ *Id.* at 138.

³⁶ *Id.* at 139.

³⁷ *Id.* at 140.

³⁸ *Id.* at 148.

³⁹ *Id.* at 149.

⁴⁰ *Id.* at 150.

⁴¹ *Id.* at 94.

have seriously undermined faith in freedom and that the West "as we see it today is caught in a morass of despair and nihilism."⁴² The western idea of freedom, if it is to mean something more than the simple gratification of individual desires, must entail "solidarity with others through participation" and must ultimately mean something very similar to the Japanese idea of *amae*.⁴³ He writes:

In short, despite the precedence he (Western man) gives in theory to the individual over the group, there must exist inside him a psychological desire to "belong". This is, in other words, *amae*. And this desire, one suspects, is gradually coming to the surface of the consciousness now that the Western faith in freedom of the individual is breaking down.⁴⁴

The "I" and the "We"

Psychoanalysis, the term coined by Freud, is concerned with the analysis of the soul, or what Jung termed the "self". The terms "psyche", "soul" and "self" mean much the same thing in psychoanalytic usage, and may be taken to be interchangeable.⁴⁵ It is not surprising that Freud produced an ego psychology, since the subjects of his analysis were psyches which developed in a western cultural context. This explains why the *ego* (Latin), *ich* (German) or the "I" (English) played such a prominent role in Freud's analysis of the self.⁴⁶ According to Freud, part of the ego resides in the unconscious, which justifies our postulating an "I-consciousness" and an "I-unconsciousness".⁴⁷ Jung, having delved into eastern religion, philosophy, art and mythology, developed the idea of the collective unconscious which he contrasted with the personal unconscious.⁴⁸ Dr. Robert Pos uses the term "the We-unconscious" instead of the term "collective unconscious". He contrasts this with the "I-unconscious".⁴⁹

⁴² *Id.* at 95.

⁴³ *Id.*

⁴⁴ *Id.* at 141.

⁴⁵ See B. Bettelheim, *Freud and Man's Soul* (1982) at 70-78.

⁴⁶ *Id.* at 53-56.

⁴⁷ See *Standard Edition of the Complete Psychological Works of Sigmund Freud*, "The Ego and the Id," vol. 19 (1961) 1 at 18; "New Introductory Lectures on Psychoanalysis," vol. 22 (1964) at 69-80.

⁴⁸ See generally, in *The Collected Works of C. G. Jung*, 2d ed., vol. 7 (1966) "On the Psychology of the Unconscious" 1 at 64-79, "The Relations Between the Ego and the Unconscious" 120 at 127-38. In vol. 9:1 of the same edition see "The Concept of the Collective Unconscious" 42-53.

⁴⁹ Dr. Robert Pos, Clinical Professor of Psychiatry at the University of British Columbia, and Director of Clinical Services of the Forensic Psychiatry Institute of British Columbia.

This then allows us to replace the *ego* or *ich* with the I-conscious. From Dr. Doi's analysis of the Japanese psyche it is clear that we need to add "We-conscious" if we are to have a psychoanalytic framework of analysis of the psyche which allows cross-cultural comparisons.

Dr. Doi's thesis is that "man cannot possess a self without previous experience of *amaeru*."⁴⁰ At the same time, however, he recognizes the importance of freedom and autonomy (which is a part of the spiritual legacy of western culture) for a richer and fuller development of the self. This is to say that a well-developed self should have both a strong I-consciousness and a strong We-consciousness. Keeping in mind the existence of the unconscious, we can use the following model to analyze the processes of identification and differentiation, in terms of which individuals develop their own sense of self:

<i>Differentiation</i>	<i>Identification</i>
I-conscious	We-conscious
I-unconscious	We-unconscious

The process of development of the self commences in infancy as the child starts to recognize its separateness from the mother. I-consciousness is produced by differentiating the self from the external world, including other persons. When a child individuates itself from its mother, it develops an awareness of gender differentiation which the child will later learn is culturally identified with its biological sex.⁴¹ As the child separates itself from its mother, it begins to learn that it is a member of a family. While identifying his or her self with the family, the child is differentiating itself from other persons, including its parents and siblings. In gender-polarized human societies, it is extremely difficult for any child to develop a sense of

⁴⁰ *Supra*, note 15 at 139.

⁴¹ See for example S. Bem, "Gender Schema Theory: A Cognitive Account of Sex Typing" (1981) 88 *Psych. Rev.* 354; M. Mahler, F. Pine & A. Berman, *The Psychological Birth of the Human Infant* (1975); J. Money & A. Ehrhardt, *Man and Woman, Boy and Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* (1974); A. Oakley, *Sex, Gender, and Society* (1972); R. J. Stoller, *Sex and Gender*, vol. 1; *The Development of Masculinity and Femininity* (1974); L. Duberman, *Gender and Sex in Society* (1975).

self without a distinct gender identification. Gender identification comes about through identification with the gender groupings of male and female. Thus I-consciousness and We-consciousness develop in harmony with each other. Differentiation from others takes place in terms of the varying sets of group identities, and therefore inevitably involves identification. Our sex, family, extended family, tribe, language group and nationality are all a part of our personal identity. The relationship between the "I" and the "We", therefore, is distorted when it is construed as a dialectic between two conflicting poles in terms of which we must strike a balance. There can be no "I" without a "We", nor conversely, a "We" without a set of "I's".

A strong sense of the "I" component is developed within people when they are allowed, encouraged and taught to be autonomous individuals, freely making their own choices and taking responsibility for them. The western tradition has always recognized the close link between freedom or liberty and responsibility.²² Taking responsibility for one's actions, however, means choosing those actions in terms of their possible effect on other people. A strong sense of the "We" is developed when a person receives love and support within the family, and co-operation, fellowship, good feeling and compassion from the group. At the same time, few people can develop a strong sense of the "I" without having a sense of appreciation and status within the group, since our evaluation of ourselves will generally reflect to some degree that of the group. It is, of course, possible to have a strong I-consciousness in conjunction with a very weak We-consciousness. Such persons will suffer from some form of pathology such as alienation. The psychopath who is incapable of empathy for anyone else and who judges all action only in terms of his or her own immediate wants or desires is a classic example.

There is little evidence of any physical difference between the brains of the various races of humanity. Rather, differences are best explained in terms of cultural experience. T. P. Kasulis writes,

the assumption that people in different cultures actually think differently in some inherent way is untenable . . . [T]he difference among traditions derives not from variance in inherent thinking patterns, but from differences in what is thought about. . . . In summation, there is no prima facie reason to abandon the hypothesis that the logical form of rationality is the same around the world. Rather, the divergence between cultures lies in the traditional concerns of rationality, and therefore, the experiences to which logic is applied. Human

²² S. Coval & J. C. Smith, *Law and Its Presuppositions* (1986) chs. 1-3; R. Wolff, *In Defence of Anarchism* (1970).

experience is too complex to be analyzed all at once. A tradition must be selective, choosing certain points to be examined first and others deferred until some later time. But once the initial topics are chosen, their complexity leads to ever further analysis and enrichment. New terms are developed and the answer to one question carries in its wake the beginnings of the next question. A tradition seldom has the leisure to return to those experiences initially bracketed from consideration. At the same time, in each culture certain forms of human experience come to be understood as being particularly profound or revealing. The experiences even become intensified as they are self-consciously named and analyzed. In short, each culture specializes, as it were, in the cultivation and analysis of particular human possibilities. This is why intellectual traditions diverge as much as they do.³³

To the degree that the East views the self differently than the West, that difference will be echoed in the networks of institutions and conceptual structures upon which various cultures have developed a view of the world:

[T]he Western mind is: analytical, discriminative, differential, inductive, individualistic, intellectual, objective, scientific, generalizing, conceptual, schematic, impersonal, legalistic, organizing, power-wielding, self-assertive, disposed to impose its will upon others, etc. Against these Western traits those of the East can be characterized as follows: synthetic, totalizing, integrative, non-discriminative, deductive, nonsystematic, dogmatic, intuitive, . . . nondiscursive, subjective, spiritually individualistic and socially group-minded, etc.³⁴

Within the eastern tradition, Buddhism, which has had a profound impact on the development of the Japanese psyche, has produced the most well-articulated doctrine of the self.³⁵ The Buddhist tradition recognizes the temporal, passing, impermanent and changing nature of the ego, and by so doing finds the true self through identification with universal oneness. According to the Lama Anagarika Govinda:

He who wants to follow the Path of the Buddha must give up all thoughts of "I" and "mine". But this giving up does not make us

³³ T. P. Kasulis, "Reference and Symbol in Plato's *Cratylus* and Kukai's *Shojijissogi*" (1982) 32 *Philosophy East and West* 393 at 404.

³⁴ "Lectures on Zen Buddhism" in D. Suzuki, E. Fromm & R. de Martino, eds., *Zen Buddhism and Psychoanalysis* (1960) 1 at 5. See also H. Nakamura, *Ways of Thinking of Eastern Peoples* (1964); F. S. C. Northrop, *The Meeting of East and West* (1946).

³⁵ See for example S. Picken, *Buddhism, Japan's Cultural Identity* (1982); H. Shinsho, "Buddhism of the One Great Vehicle (Mahayana)" at 33 and U. Yoshitomi, "The Status of the Individual in Mahayana Buddhist Philosophy" at 164, both in Moore, *supra*, note 31; S. Ando, *Zen and American Transcendentalism* (1970) at 7-52; Suzuki, *supra*, note 54 at 24-43.

poorer; it actually makes us richer, because what we renounce and destroy are the walls that kept us imprisoned; and what we gain is that supreme freedom, according to which every individual is essentially connected with all that exists, thus embracing all living beings in his own mind, taking part in their deepest experience, sharing sorrow and joy.⁶⁶

Govinda further states that "all individuals . . . have the whole universe as their common ground, and this universality becomes conscious in the experience of enlightenment, in which the individual awakens into his true all-embracing nature."⁶⁷ Kasulis writes, "the rejection of the self as an independent agent separate from the web of interconnected conditioned causes is called in Sanskrit the doctrine of *anatman* ('no-ego'; . . . *muga* in Japanese)."⁶⁸ The great Zen teacher Rinzai is reported to have related that "in this clump of raw flesh . . . there is a true person of no status continually entering and exiting (your sense organs)."⁶⁹

The Individual and the Community

Even a cursory examination of the major institutional and cultural streams of East and West reveals that the concept of the self in the West is very different from that in the East. The institutions and belief systems which have helped formulate I-consciousness/unconsciousness and We-consciousness/unconsciousness in the West, tend to be contradictory. The stress on individualism in western culture is a product of a belief system, a central feature of which is a set of fundamental or natural rights which guarantee or protect personal liberty by preventing wrongful interference. One of the most basic tenets of this set is the right of equality before the law. By assuming the existence of such a right, matters of sex, order of birth, family membership, race or skin colour become irrelevant for the purposes of our moral and legal rights and duties. From the moral point of view we are simply autonomous agents, from the political point of view we are merely citizens, and at law we are "legal" persons. In western law the legal person can be usefully conceived as a variable in a formulaic equation. Thus a contract can be conceived in the abstract as a legal relationship between any two persons, P₁ and P₂,

⁶⁶ Cited by N. Jacobson, *Buddhism and the Contemporary World* (1983) at 84.

⁶⁷ A. Govinda, *Creative Meditation and Multi-Dimensional Consciousness* (1976) at 10.

⁶⁸ T. P. Kasulis, *Zen Action Zen Person* (1981) at 44.

⁶⁹ *Mu i shin jin*, *id.* at 51. See also Suzuki, *supra*, note 54 at 32.

in regard to any particular pattern of behaviour not prohibited by law.⁶⁰

However, our gender identity, order of birth, family, colour and race are critical matters in formulating the We-consciousness which is an essential part of our concept of self. Thus the conceptual framework within which we formulate a part of our I-consciousness conflicts with the kind of conceptual framework within which we develop our We-consciousness.

The result is substantial dialectical tension within the western psyche. Consider, for example, the conceptual structure of fundamental rights and the corresponding idea of a social order based on a universal law of reason rooted in Stoicism and classical Roman law. This structure is in contradiction with the democratic view of law as reflecting the will of the majority which is to be normatively evaluated in terms of transcendental ideals of the good or the just rooted in turn in Platonic and Aristotelian ideas of the state. This fundamental conflict between individual rights and the will of the majority still permeates western law and politics.⁶¹ The debates between theorists such as Nozick and Rawls,⁶² Dworkin and Hart⁶³ or Hayek and Bay,⁶⁴ the dispute between judicial activists and conservatives,⁶⁵ the contrasts between formal justice and social or distributive justice,⁶⁶ and between liberty and equality;⁶⁷ and the

⁶⁰ See D. Derham, "Theories of Legal Personality" in L. Webb, ed., *Legal Personality and Political Pluralism* (1958) at 5; F. Lawson, "The Creative Use of Legal Concepts" (1957) 32 N.Y.U. L. Rev. 909 at 913-16.

⁶¹ J. C. Smith & D. N. Weisstub, "The Evolution of Western Legal Consciousness" (1979) 2 Int. J. of L. & Psych. 215; J. C. Smith & D. N. Weisstub, eds., *The Western Idea of Law* (1983) chs. 3 and 4.

⁶² R. Nozick, *Anarchy, State, and Utopia* (1974); J. Rawls, *A Theory of Justice* (1971).

⁶³ R. Dworkin, *Taking Rights Seriously* (1977); H. L. A. Hart, *Essays In Jurisprudence and Philosophy* (1983) at 49-87 and 123-58.

⁶⁴ F. Hayek, *The Constitution of Liberty* (1960), and *Rules and Order*, vol. 1 of *Law, Legislation, and Liberty* (1973); C. Bay, *From Contract to Community* (1978) at 29, and "Hayek's Liberalism: The Constitution of Perpetual Privilege" (1971) 1 *The Political Science Reviewer* 93.

⁶⁵ J. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 *Harv. L. Rev.* 129 at 143-44; L. Hand, *The Bill of Rights* (1958) at 11-15; A. Bickel, *The Least Dangerous Branch* (1962); C. McGlasky, "Judicial Review in a Democracy: A Dissenting Opinion" (1966) 3 *How. L. Rev.* 354; S. Halpern & C. Lamb, eds., *Supreme Court Activism and Restraint* (1982).

⁶⁶ For an example of an analysis of formal justice see J. C. Smith, *Legal Obligation* (1978) at 88-108 and 233-43. For an analysis of social or distributive justice, see for example D. Miller, *Social Justice* (1976); B. Ackerman, *Social Justice in the Liberal State* (1980); Rawls, *supra*, note 62. See also P. Ingram, "Procedural Equality" and P. Doy, "Procedural Equality: A Reply to

range of the political spectrum between the poles of statism and libertarianism:⁴⁴ these exemplify the bifurcated conceptual framework within which western legal and political institutions function. Within a truly consistent democracy the will of the majority rules supreme. Minority rights can have no meaning in the face of the "will of the people".

Utilitarianism, which postulates the ideal of the greatest good for the greatest number, is the natural ethical counterpart to democratic political theory. Given that good is taken to mean pleasure, and that the people concerned are the best judges of what pleases them, then law can be taken to be the will of the majority produced through the political legislative process. On the other hand, a theory of law from which a doctrine of fundamental rights can be derived entails a concept of law which is deduced from principles which exist independently of what people think about them. Thus, the institution of a democratically elected legislature limited by a bill of fundamental rights enforced by judicial review is not the product of a unified political and legal perspective. Rather it is a dialectical synthesis which allows us to continue to live with the contradictions, and to benefit from the energy which is a product of this dialectical tension.⁴⁵ Japan inherits these contradictions in its post-World War II Constitution.

Mr. Ingram" in S. Guest & A. Milne, *Equality and Discrimination: Essays in Freedom and Justice* (1985) at 39-59.

- ⁴⁴ Liberty and equality (in an egalitarian sense, as contrasted with the more formal concept of equality, as is entailed in the idea of equality before the law) are conversely related in that the more government controls the acquisition of goods and services in order to achieve an equitable distribution, the more it must interfere and regulate market transactions and individual consumption. On the other hand, the fewer restrictions placed by government on these economic processes, the greater will be the development of economic inequalities between citizens. See for example D. Raphael, *Justice and Liberty* (1980) at 57-73; J. Lucas, *On Justice* (1980) at 197-207.
- ⁴⁵ For a defence of a social order founded on the state, see M. Sandel, *Liberalism and the Limits of Justice* (1982); M. Sandel, "The Procedural Republic and the Unencumbered Self" in (1984) 12 *Political Theory* 91 at 92; Rawls, *supra*, note 62. For a defence of no state or merely a minimal state, see: Wolff, *supra*, note 52; Nozick, *supra*, note 62; M. Rothbard, *The Ethics of Liberty* (1982). See also W. Lang, "Marxism, Liberalism and Justice" in E. Kamenka & A. Tay, *Justice* (1979) at 116-48.
- ⁴⁶ See Coval & Smith, *supra*, note 52. T. Lowi's, *The End of Liberalism*, 2d ed. (1979) furnishes an analysis of the political process in the United States which allows one to follow this dialectic in American political life. The dialectic has taken a different course in Canada. In 1960 the Canadian Parliament passed the *Canadian Bill of Rights*, R.S.C. 1960, c. 44 as an ordinary act of the legislature. In *The Queen v. Drybones* [1970] S.C.R. 282, in a six to three judgment the Court took the position that the *Canadian Bill of Rights* gave the courts the power to declare an act, or part thereof, of Parliament to be invalid if it infringed a provision of the *Bill of Rights*. In *A.G. of Canada*

The philosophical, religious and spiritual traditions of the East, by viewing the ego as illusory, and by focusing on the relatedness of all persons and things, facilitates a strong We-consciousness and a weak I-consciousness in the formulation of a concept of the self. In the West the focus on individual agency with its related doctrines of autonomy, freedom and responsibility leads to a view of the self with a strong I-consciousness but a weak We-consciousness.

The illusory nature of freedom in the western tradition and the alienation which is characteristic of western man stems at least in part from the lack of an emotional foundation for We-consciousness in the West. This is illustrated by R. L. Rubenstein, in his brilliant but sadly neglected *The Cunning of History*, who argues that the holocaust was not an aberration of history resulting from a temporary madness of a particular set of people at a particular time, but rather "was an expression of some of the most significant political, moral, religious and demographic tendencies of Western civilization in the twentieth century."¹⁰ The bureaucratic process which produced the holocaust, according to Rubenstein, "can be understood as a structural and organizational expression of the related processes of secularization, disenchantment of the world, and rationalization."¹¹ "The culture that made the death camps possible," he writes, "was not only indigenous to the West but was an outcome, albeit unforeseen and unintended, of its fundamental . . . traditions."¹² The holocaust, slavery and the condition of industrial workers in nineteenth-century England are all examples of objectification of human beings. Rubenstein shows that in order to treat people as objects their humanity must first be denied; in other words, they must be excluded from our We-consciousness.

At an intellectual level the western legal and political traditions proclaim the equality and brotherhood of all mankind, but no strong emotional basis has evolved to sustain a We-consciousness which goes much beyond the immediate family. Examples from a variety of eras

v. *Lavell* [1975] S.C.R. 1349, the Supreme Court of Canada reversed itself on this point. The issue was finally resolved by political means with the adoption of the Canadian *Charter of Rights and Freedoms* as Part I of the *Constitution Act, 1982*. Even so, section 33 provides that Parliament or any provincial legislature can declare legislation operative notwithstanding sections 2 or 7 to 15 of the *Charter*, which contain most of the fundamental freedoms.

¹⁰ *The Cunning of History: The Holocaust and the American Future* (1978) at 6.

¹¹ *Id.* at 27.

¹² *Id.* at 31.

and cultures serve to demonstrate this. The Greeks failed to extend freedom and equality to their women and slaves.¹³ Classical Stoic Rome retained slavery and tolerated the most cruel abuses.¹⁴ The English tradition of liberty failed to prevent imperialism, and the Americans practiced cultural and sometimes even physical genocide on their aboriginal inhabitants.¹⁵ Also, the Americans maintained the institution of slavery in the South with laws which permitted and legalized extreme cruelty, in spite of the *Declaration of Independence* and the *Bill of Rights*.¹⁶ Slavery was not abolished in the United States until individuals, compelled by human compassion, created a groundswell of feeling which made political action necessary and possible. The advancement which the Black civil rights movement made in the late 1950s and early sixties resulted from a short-lived wave of compassion which led to concrete changes in the law. These facilitated further progress after the wave of emotion had ebbed. People who participated in the civil rights movement of that period still vividly remember the strong emotional bond which brought black and white together in marches and political protests. The song, "We Shall Overcome" became a focus for that feeling. Finally, notwithstanding the highest ideals of Marxist egalitarianism, millions of people have died in the *Gulag* slave labour camps of the Soviet Union,¹⁷ while in Cambodia, the Marxist Khmer Rouge slaughtered between one and three million of their own citizens.¹⁸

¹³ See for example P. Slater, *The Glory of Hera* (1968); S. Pomoroy, *Godesses, Whores, Wives and Slaves: Women in Classical Antiquity* (1975) at 57-57; W. Westermann, "Slavery and the Elements of Freedom in Ancient Greece" at 17; M. Finley, "Was Greek Civilization Based on Slave Labour?" at 53; R. Schlaifer, "Greek Theories of Slavery from Homer to Aristotle" at 93; and G. Vlastos, "Slavery in Plato's Republic" at 133, all in M. Finley, ed., *Slavery in Classical Antiquity* (1960).

¹⁴ *Institutes of Roman Law by Gaius*, trans. E. Poste (1904) at 37. Poste, in his commentary on the law relating to slavery, writes that "the condition of the slave was at its worst in the golden period of Roman history" and at 38 states that "Roman law to the end, unlike other legislations which have recognized forms of slavery, refused to admit any rights in the slave."

¹⁵ See for example D. Brown, *Bury My Heart at Wounded Knee* (1970).

¹⁶ W. Jordan, *The White Man's Burden* (1974) at 59-64, 81-83, 150-52; M. Tushnet, *The American Law of Slavery* (1981). Three classic studies of slavery in America are: F. Tannenbaum, *Slaves and Citizen: The Negro in the Americas* (1947); S. Elkins, *Slavery: A Problem in American Institutional and Intellectual Life*, 3d ed. (1976); D. Davis, *The Problem of Slavery in Western Culture* (1966).

¹⁷ See A. I. Solzhenitsyn, *The Gulag Archipelago*, vol. I (1974), vol. II (1975), vol. III (1978); A. Shifrin, *The First Guidebook to Prisons and Concentration Camps of the Soviet Union* (1980).

¹⁸ W. Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (1984) at 45-69.

By appealing to the deep spiritual roots of Hinduism, Islam and Christianity, Mohandas Gandhi, a single individual, generated an emotional wave which brought about the withdrawal of the British from India in a way that would not have been possible through force of arms or political manoeuvring.¹⁹ His Muslim friend and associate Abdul Ghaffar Khan used similar methods and social forces to lead 100,000 fierce Pathans, who in taking an oath of non-violence achieved power far beyond that which the possession of arms had given them.²⁰ The lesson of history is clear. Progress towards the goals of universal freedom and respect seldom goes beyond what can be achieved through an emotional sense of identity with others. Although the western legal and political tradition has broken conceptual barriers and paradigms which retarded the extension of the emotional sense of solidarity and identification which generates We-consciousness, this tradition in itself is seldom able to generate that emotion. This is so because the western social paradigm is, by its nature, an obstacle to We-consciousness. The twentieth century marks the westernization of the world: as non-western countries have industrialized to protect themselves and to compete, they have found it necessary to adopt western technology and western forms of social and political organization. Yet no other century has seen the slaughter, cruelty and violence which the twentieth century has produced.²¹

The western legal and political tradition has attempted to achieve a sense of community identification through transcendental ideals of

¹⁹ See for example: E. Erikson, *Gandhi's Truth* (1969); W. H. Shirer, *Gandhi* (1979); L. Collins & D. Lapierre, *Freedom At Midnight* (1976).

²⁰ E. Easwaran, *A Man to Match His Mountains* (1984).

²¹ G. Eliot, in *Twentieth Century Book of the Dead* (1972) at 211-34 estimates that approximately one hundred million people have been slaughtered as the direct result of official government action or decree. If one tries to duplicate his calculations, starting with the Turkish genocide of the Armenians at the beginning of the century, adding the casualties of World War I, and continuing through with the estimates of other wars, revolutions, slave labour and death camps, Eliot's startling figure appears to be fairly accurate. To dwell on one detail, the presence of torture tells a great deal about the nature of societies and states, and the relationship of the individual to the state. The revival of torture in the twentieth century and its widespread use by persons and institutions as an instrument of government also provides a good indication that western civilization has failed to develop strong emotional bonds between people. See for example the Amnesty International Report, *Torture in the Eighties* (1984), and E. Peters, *Torture* (1985) at 74-187. When we compare societies, nations and cultures, Japanese society, held together by the emotional bonds which are the product of the world of *amae* is truly a unique social phenomenon. And even if it is the case that the *burakumin* and Japanese residents of Korean ancestry have not been fully brought into the circle of *amae*, it still remains, in our fragmented world, a success yet to be achieved by other peoples.

morality, justice or goodness. Such ideological paths to community inevitably fail, since conflicting theories or views of what is the good, and the tendency of people to interpret the good or justice in terms of their own self interests, prevent a shared consensus regarding the ideals which the community should reflect. The inevitable failure of people to achieve their ideals even when a consensus can be reached tends to fracture rather than consolidate a sense of community. In any case, logic, argument and intellectualization cannot in themselves produce the emotional basis for the sense of *We-consciousness* which must exist for true community.

Nothing brings to our awareness more clearly the vast chasm between the ideals of western civilization and its realities than does the holocaust. This terrible event haunts the consciousness of western man because the holocaust marks the breaking of a "hitherto unbreachable moral and political barrier in the history of Western civilization".⁴²

There is no contradiction between *I-consciousness* and *We-consciousness* when the latter is based on emotional identification or feeling, since community based on feeling is consensual community and is therefore consistent with the autonomy of the individual. The dichotomy between individuality and community which plays such a major role in western political theory is a rather artificial distinction when we take into account that the very thought processes of consciousness which make the concept of the individual possible, entail language, which is a social phenomenon impossible outside of the context of a community. Part of the problem is the tendency to think of community only in political terms, so that communities not based on political organization are ignored. Consequently we only look for political solutions to social ills. The rich variety of communities and social practices which exist independently of the political process and which contribute greatly to human welfare tend to be discounted in academic kinds of analyses.

There is no contradiction between autonomy and the fundamental rights which furnish its necessary condition, and the resolution of disputes through mediation. It has been argued that traditional Japanese law and dispute resolution methods did not involve rights consciousness and consequently there is a discontinuity between the western legal system, which Japan has adopted in the process of modernization, and traditional Japanese dispute settlement mechan-

⁴² Rubenstein, *supra*, note 70.

lms.⁴² Much stress is put on the fact that Japan has far fewer lawyers per capita, fewer law suits and a greater tendency to use mediation over litigation, than is to be found in other countries having a western legal system. The prevailing view reflected in this literature is that the western legal tradition entails universal rules, while the Japanese legal tradition stresses the uniqueness of each particular situation, and therefore the uniqueness of the particular resolution of the dispute. The problem with this literature is that American legal consciousness is treated as representative of western legal consciousness, with the result that people fail to realize that rights consciousness does not necessarily entail litigiousness consciousness. The methods of dispute settlement are among the least important aspects of western law. Arbitration and mediation are becoming widespread in America as forms of dispute settlement, particularly in the areas of labour, commercial and matrimonial law. This experience reflects no basic discontinuities or contradictions. Western law is consistent with many different forms of dispute settlement mechanisms, including mediation.

That which makes western law truly unique is its individualistic concept of the self, and the idea of individual liberty which is derived from it.⁴³ Legalism or rulism can equally be a disease of non-western legal systems. China, for example, has gone through periods of extreme legalism.⁴⁴

Since autonomy entails no transcendental norms of social justice or the good other than those which are necessary to guarantee the freedom of action of each individual, to the extent that it is consistent with the freedom of action of others, it is inconsistent with what Professor Shklar calls "legalism" and what Professor Yasaki calls "rulism," which invites adversarial confrontation and litigation.⁴⁵ Also, there is no contradiction between autonomy and Buddhism. To respect the agency of people is to respect the uniqueness and spontaneous creativity of human life.

⁴² See *supra*, note 14 for a selection of articles discussing this debate.

⁴³ See in general F. S. C. Northrop, *The Complexity of Legal and Ethical Experience* (1959) at 106, 143-64 and 183-215; Smith & Weisstub, *The Western Idea of Law*, *supra*, note 61; J. C. Smith, "The Unique Nature of the Concepts of Western Law" (1968) 46 *Can. Bar Rev.* 191.

⁴⁴ See T. Ch'u, *Law and Society in Traditional China* (1965) at 226-79; *The T'ang Code*, trans. W. Johnson (1979).

⁴⁵ J. Shklar, *Legalism* (1964) at 1; M. Yasaki, "Legal Culture in Japan, Modern-Traditional" (Paper delivered at the 11th World Congress of the International Association for Philosophy of Law and Social Philosophy, Helsinki, 1983) [unpublished].

The idea of freedom, however, in the western legal and political tradition is very different from that of freedom in the Buddhist tradition. The western idea of freedom stresses freedom in relation to human action, and entails two types of liberty: freedom from wrongful interference with human action, and freedom to do what one wants to do so far as is consistent with the freedom of others from interference. The idea of freedom in the Buddhist tradition relates less to action itself, and more to freedom from illusory limitations which, if shed, would transform human actions.⁸⁷

Autonomy and fundamental rights, contrary to the view of the Marxists, do not necessarily entail a reification of the "I".⁸⁸ Compassion and feeling lead to seeing the "I" in the "We" and the "We" in the "I"; in other words, to a proper view of the self wherein the "I" and the "We" are in balance. The western juridical tradition defines the "I" in terms which are universal for all human beings,⁸⁹

⁸⁷ See N. Jacobson, *supra*, note 56 at 85-117. At 86-87, Jacobson describes the difference between the western concept of freedom and that which is implicit in Buddhism as follows:

The legacy of European learning impresses upon the minds of men and women everywhere the conclusions which a few tens of thousands — almost exclusively nonpigmented, male, middle-class, and Occidental — have found helpful in their drive for values. We of this universe are now confronted with the task of freeing life on this good earth from these assumptions and one-sided perspectives which have carried the baton of civilization during the last three hundred years, assumptions and viewpoints which have placed the fertility of human experience at large under a strange enthrallment to second and third-hand conclusions regarding the nature and meaning of life . . . The chief role of Buddhism now is to increase the freedom men and women can enjoy from the pathological compulsions of life. The Buddhist legacy is prepared to participate in opening the lives of millions to new flexibility in discovering the meaning of life, thus providing ways of curing people of the egocentricity and narcissism that mount to pathological heights of self-worship in some parts of the present world.

⁸⁸ K. Marx, "On the Jewish Question" in D. McLellen, ed. & trans., *Karl Marx Early Texts* (1971) at 104. Marx writes, "Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community." Marxists are correct in assuming that fundamental rights permit persons to be egoistic and selfish. However, it does not follow from this that egoism will be the inevitable result of recognizing fundamental rights. Nor does it follow that their denial removes a barrier to achieving community. The failure of communist political systems to eradicate egoistic man, so ably analyzed by Milovan Djilas in *The New Class* (1957), would indicate that the emotional foundations necessary for the sense of We-consciousness which is required for the development of a non-egoistic self, cannot be achieved through a political solution, whether of the right or left, libertarian or egalitarian.

⁸⁹ The western juridical tradition of the autonomy of the individual, equality before the law and law as the rule of reason rather than the will of individuals or any class of individuals, contains no meaning for social hierarchy. The dialectical tensions within the western legal and political traditions referred to in notes 61-69 *supra*, are a product of the contradiction between

and the Buddhist tradition reveals what is true or non-illusory or real within the "I" and furnishes another basis for universality in the oneness of all life. Just as there is no meaning in the western juridical tradition for social hierarchy, there is likewise no meaning for social hierarchy in the Buddhist tradition with its concept of the self as *mu i shin jin* — "true person without status".²⁰ Consequently, Buddhism is always found in conjunction with some other conceptual structure which can provide such a meaning. The concept of the true self is very similar if not almost identical in philosophical Hinduism and Taoism. Hinduism, however, derives meaning for social hierarchy from its stress on status and caste; Taoism coexisted with Confucianism which provided a basis for status and hierarchy; and Shintoism has served a similar function in Japan. Thus the eastern religious and political traditions contain a fundamental contradiction which, although different, runs parallel to a similar contradiction in the West.

Paternalism and Maternalism

Whether there is a contradiction between autonomy and *amae* is a difficult issue. Since in its narrowest usage in ordinary Japanese discourse, *amae* refers to the desire which a child has to cling to its mother, *amae* appears to represent a relationship where one wishes to lose autonomy by relying on a substitute mother figure.²¹ From this view *amae* points to dependency, whereas western culture stresses an autonomy based on equality between agents. The relationship between mother and child is very complex, however, and neither should autonomy and *amae* be posited as simple opposites. Both autonomy and *amae* presuppose certain psychological states of mind. According to Doi, *amae* also implies some awareness of individualism. The collectiveness which is so characteristic of Japanese society always co-existed with the ambition to be first, or outstanding, and it never denied the possibility of acting on one's own.²² If these states can be said to be consistent with each other, then it is highly likely that the concepts which presuppose them can also co-exist without contradiction. Therefore, to investigate the relationship between

the juridical paradigm and the political paradigm which was evolved by the Greeks in order to legitimize the continuation of human domination rendered illegitimate by the juridical paradigm.

²⁰ See *supra*, notes 36-39.

²¹ *The Kodansha Encyclopedia of Japan*, vol. 1 at 48.

²² See T. Doi, *Omote to ura* (Front and Back) (1985) at 33.

autonomy and *amae* it is necessary to explore the psychology underlying these concepts.

A particularly striking illustration of the psychological aspect of autonomy is provided by the oldest reference to freedom which exists in any written text. This is a Sumerian document *circa* 2350 B.C. The word which the Sumerians used to refer to the concept of freedom was *amargi*, which means literally "return to the mother".⁸³ The experts on ancient Sumerian culture admit that they have absolutely no idea why, when "we find the word 'freedom' used for the first time in man's recorded history", this particular figure of speech came to be used.⁸⁴

To understand why and how "return to the mother" came to mean freedom we would need to know what one was turning from in "the return". This first appearance of the word *amargi* was in a Sumerian document which "records a sweeping reform of a whole series of prevalent abuses, most of which could be traced to a ubiquitous and obnoxious bureaucracy consisting of the ruler and his palace coterie", and which also "provides a grim and ominous picture of man's cruelty toward man on all levels — social, economic, political and psychological".⁸⁵

What the turning was from is revealed by the context within which the word *amargi* or freedom appears; it was a turning from law and the authority of kingship. But what did the "return to the mother" consist of, and why was this state equated with freedom? An examination of the preliterate history of this area as reconstructed through archaeological evidence and the earliest recorded myths suggests an answer. The earliest Sumerians worshipped the Goddess Inanna.⁸⁶ Evidence suggests that women held a high status which was gradually lost with the development of patriarchy in the form of a transition to the worship of male gods, kingship and the rise of law. Throughout much of Europe and the Middle East (as well as many other parts of the world) are to be found numerous female figurines and sculpture, dating from the upper Paleolithic period into the Bronze Age, and even beyond, which suggest an age of matriarchal consciousness when a goddess was worshipped and

⁸³ S. Kramer, *The Sumerians* (1963) at 79.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ S. Teubal, *Sarah the Priestess: The First Matriarch of Genesis* (1984) at 77; E. Fisher, *Woman's Creation: Sexual Evolution and the Shaping of Society* (1979) at 267-80; W. Thompson, *The Time Falling Bodies Take To Light: Mythology, Sexuality, and the Origins of Culture* (1981) at 159-208.

women were held in high esteem and played an important, if not leading, cultural and societal role."⁹⁷

The archaeological evidence uncovered at the site of the ancient town of Catal Huyuk in Anatolia, for example, which covered approximately thirty-two acres and had a population of several thousand people, furnishes evidence of a period in which women were afforded a high status of such a nature as to be inconsistent with a patriarchal culture. For example, women and children were buried under the large central platforms of houses while men were buried in smaller corner spaces along with their hunting weapons.⁹⁸

Many of the ancient Japanese myths suggest that Japanese society was also probably matriarchal originally. These myths are to be found in the *Kojiki* and *Nihon Shoki*.⁹⁹ The first ruler of the world was the Sun Goddess Amaterasu Omikami, who was the direct ancestor of the first Emperor of Japan. The earliest indication of the existence of Japan in Chinese literature stated that the country was ruled by a female by the name of Himiko.¹⁰⁰ Itsumi Takamura studied matrimonial systems in ancient Japan and came to the conclusion that early Japan was matriarchal and matrilineal.¹⁰¹ Freedom as "the return to the mother" would mean, therefore, a return to *The Mother*, that is to matriarchal consciousness, which would mean a return from kingship to collective social order, from law to custom and from "masculine political power" to "feminine cultural authority".¹⁰²

Freud believed that the evolution of human culture followed a similar pattern to the evolution of the individual human psyche; consequently, human history can be interpreted in terms of the Oedipus complex.¹⁰³ Freud's theory of the Oedipus complex explains

⁹⁷ See in general, E. Neuman, *The Great Mother*, trans. R. Manheim, 2d ed. (1963); E. O. James, *The Cult of the Mother Goddess* (1959); M. Gimbutas, *The Goddesses and Gods of Old Europe* (1982); M. Stone, *When God Was A Woman* (1976).

⁹⁸ See J. Mellaart, *Catal Huyuk: A Neolithic Town in Anatolia* (1967). For a critique of Mellaart see I. Todd, *Catal Huyuk in Perspective* (1976). See also M. French, *Beyond Power* (1985) at 46; Thompson, *supra*, note 96 at 138-50.

⁹⁹ See S. Iida, ed., *Nihon shoki shinko* (New Lectures on Japanese Tales) vol. I (1936) 29-69.

¹⁰⁰ Chin Jin, ed., *Gishi wajin den* (Chinese Literature on Japan).

¹⁰¹ See I. Takamura, *Dokusei no kenkyu* (A Study on Matrilineage) (1938) and *Sho seikon no kenkyu* (A Study on Marriage as an Incorporation of the Groom to the Bride's Family) (1953).

¹⁰² Thompson, *supra*, note 96 at 149.

¹⁰³ S. Freud, "Totem and Taboo," *Standard Edition*, *supra*, note 47, vol. 13 (1964).

how the male child makes the transition from a continuity with and an affection for the mother, in which the child sees the father cast as a rival, to a positive identification with the father accompanied by a disparagement of women. In this way the age of matriarchal consciousness can be viewed as the parallel of the period of the male child's close identification with the mother, and the rise of patriarchy as the equivalent of the male child's shift of allegiance from the mother to the father. Freud himself did not take this view of matriarchy. He accepted that historically there had been such a period, but he believed that this was only a temporary development in the stages of patriarchy which arose after the killing of the father by the brothers when they renounced control over women in order to be able to live at peace with one another.¹⁰⁴ Some of Freud's staunchest supporters, however, would disagree with him on this question. N. O. Brown, for example, writes:

The proper starting point for a Freudian anthropology is the pre-Oedipal mother. What is given by nature, in the family, is the dependence of the child on the mother. Male domination must be grasped as a secondary formation, the product of the child's revolt against the primal mother, bequeathed to adulthood and culture by the castration complex. Freudian anthropology must therefore turn from Freud's preoccupation with patriarchal monotheism; it must take out of the hands of Jungian *Schwärmerei* the exploitation of Bachofen's great discovery of the religion of the Great Mother, a substratum underlying the religion of the Father — the anthropological analogue to Freud's discovery of the Oedipal mother underlying the Oedipal father, and comparable, like Freud's, to the discovery of Minoan-Mycenaean civilization underlying Greek civilization.¹⁰⁵

It is the fear of castration which spurs the shift from a positive view of the mother and a negative view of the father to a positive view of males and a negative view of females. The father is internalized in the form of the super-ego, and the Oedipus complex is transcended when the individual is able to escape the father complex by the development of a strong ego through the renunciation of illusion, and the acceptance of the reality principle. The development of the myth of the social contract to ensure equality between brothers after the killing of the primal father could then be said to correspond to the escape from the father complex as the male's own ego matures.

Eli Sagan, in his study of the complex cultures which bridge the

¹⁰⁴ *Id.* at 131.

¹⁰⁵ N. Brown, *Life Against Death* (1959) at 126.

gap between primitive societies and the archaic civilizations which are their successors, compares the development of these societies with the pre-Oedipal stages of the development of infants.¹⁰⁴ Using Margaret S. Mahler's three stages of the psychological birth of the self in the human infant: autism, symbiosis and separation and individuation,¹⁰⁵ Sagan shows that human societies themselves go through parallel processes, with comparable psychic trauma, when they separate from the kinship system as monarchy develops. He has thus developed a psychoanalytic social theory based on a triadic interrelationship between society, the family and the individual psyche.¹⁰⁶ His model is equally applicable to psychoanalytic jurisprudence.

Jerome Frank, among others, has explained law in Freudian terms as a father substitute.¹⁰⁷ Law can thus be viewed as the public projection of the super-ego. The individual male's escape from the father complex is facilitated by the creation of institutional substitutes, the primary one being the state. To the degree that people require father substitutes in the form of institutional domination, they still remain under the influence of the Oedipus complex.

Professor Takeyoshi Kawashima, relying in part on Frank's Freudian analysis of law, contrasts the western view, which he terms "paternalism", with that of the Japanese, which is paternalism moderated by the psychology of *amae* which he terms "maternalism". According to Professor Kawashima, this is the source of the Japanese dislike for the rigid application of rules and the desire to achieve social harmony through warm human relations.¹¹⁰ For him, at least, there appears to be no conflict between *amae* and autonomy. He writes that:

the Japanese traditionally expect that in principle social obligations will be fulfilled by a voluntary act on the part of the person under obligation, usually with particular friendliness or benevolence . . . The actual value of social obligation depends upon the good will and favour of the obligated person. . . .¹¹²

¹⁰⁴ E. Sagan, *At the Dawn of Tyranny: The Origins of Individualism, Political Oppression and the State* (1985).

¹⁰⁵ M. Mahler, F. Pine & A. Bergman, *supra*, note 55.

¹⁰⁶ *Supra*, note 106 at 348.

¹⁰⁷ J. Frank, *Law and the Modern Mind* (1930).

¹¹⁰ Otsuka, Kawashima & Doi, *supra*, note 16 at 146 and 188-92.

¹¹¹ T. Kawashima, "The status of the individual in the notion of law, right, and social order" in Moore, *supra*, note 14 at 430.

What *amae* and autonomy have in common, and what therefore makes them consistent with each other, is voluntariness.

Where a dependency relationship is maintained on the basis of human feeling, all of the parties to the relationship are in it of their own free will, given that some need makes one of them dependent upon the other. The persons who are dependent upon others retain their autonomy so long as the people upon whom they are dependent do not take advantage of their dependency to force them to act contrary to their will.

The maternal principle was first expounded by the pioneer of Japanese psychoanalysis, Heisaku Furusawa.¹¹² He describes the psyche of the Japanese male in terms of what he calls the "Ajase complex". Ajase was the prince of Osha Castle in ancient India. In the actual Buddhist text, the story is about a father and son relationship in which the son kills his father but is forgiven by his father from heaven. In the story as modified by Furusawa and Okonogi to match the Japanese psyche, Ajase was the son of King Binbashara who was converted to Buddhism by his wife Idake. Idake feared that the king might lose interest in her as her features were not as they used to be. She thought that the only way to guarantee his continued affection was to have a son. She was told by a prophet that a wizard living in the forest would die in three years time, and would be reincarnated as her son. As she was too anxious to wait three years, she contrived to cause the wizard's death and become pregnant. The prophet had also told her that the son would kill his father. Fearing the spite of the yet to be born wizard-son, and having second thoughts, she sought to abort the unborn child, which was later delivered in a tower. Ajase was lovingly raised by his parents and only discovered the secret of his conception and birth at maturity. After much agony of spirit caused by the loss of his idealistic view of his mother, Ajase decided to kill Idake. At the moment of formulating this resolution, Ajase was swept with guilt, causing him to shake with fever and to break out into malignant sores which produced a terrible smell. Because of the stench, everyone deserted him except his mother, who

¹¹² Heisaku Furusawa, *Zaitaku ishigi no niru*, (Two Kinds of Feeling of Guilt) (1931); S. Yamamoto & K. Okonogi, *Nihonjin no Shakai Byori* (Social Pathology of the Japanese) (1982) at 68-68. I am grateful to professor Yoshiyuki Matsumura who drew my attention the Ajase complex in his paper, "The Role of Law in Western and Eastern Societies" (unpublished). He there states that "this story of Ajase is similar to *mabuta no haha* (literally, 'mother of eyelids', meaning the mother from whom he has been separated since his childhood, a popular drama in Japan) and presents the original form of the common mother-child experience through which we Japanese must pass without fail to reach maturity."

forgave him for resolving to kill her. With a silent and loving devotion she nursed and cared for him. Ajase, now aware of his mother's sacrifice and suffering, in turn forgave her, and mother and son recovered their original oneness.

The Ajase complex does not seem to be an alternative to the Oedipus complex, but is rather a culturally different expression of it, in the sense that both represent in mythic form the painful process of genderization which humans endure in the passage from infancy to adulthood. The Ajase myth marks a reconciliation with the mother which is missing in the western form of the complex. The maternal principle, reflected in the permeations of *amae* through Japanese culture, is absent in the West.

Freud believed that since women do not experience castration anxiety, they maintain a pre-Oedipal attachment to their mothers and consequently do not fully develop super-egos. "I cannot evade the notion", wrote Freud, "that for a woman the level of what is ethically normal is different from what it is in men . . . they show less sense of justice . . . and are more often influenced in their judgments by feelings. . . ."¹¹³ The Swiss child psychologist Jean Piaget noted that boys displayed an inclination to follow rules, and a facility in their application, while girls tended to be more pragmatic and less inclined to follow rules slavishly in their games and behaviour.¹¹⁴ The Harvard psychologist, Lawrence Kohlberg, devised a scale of levels of moral development in terms of facility in the use of rules and logical consistency in reaching moral judgments, upon which he tested men and women, and concluded that women fell substantially lower on the scale.¹¹⁵ Carol Gilligan, a Harvard colleague of Kohlberg, confirms that there is a difference between the way boys and girls, and men and women, approach moral disputes and rules; however, in her study *In A Different Voice*, she strips away the aura of superiority which is given to the masculine mode.¹¹⁶

Gilligan, who worked with Kohlberg in some of his research with children, discusses a typical reaction of a boy, Jake, and a girl, Amy,

¹¹³ S. Freud, "Some Psychological Consequences of the Anatomical Distinction Between the Sexes", *Standard Edition*, *supra*, note 47, vol. 19 (1961) at 257-90.

¹¹⁴ J. Piaget, *The Moral Judgement of the Child* (1965), *Six Psychological Studies*, trans. A. Tenser (1967), *Structuralism*, trans. and ed. C. Maschler (1970).

¹¹⁵ L. Kohlberg, *The Philosophy of Moral Development* (1981); "A Cognitive Developmental Analysis of Sex-Role Concepts and Attitudes" in E. Maccoby, ed., *The Development of Sex Differences* (1966) at 82-173.

¹¹⁶ C. Gilligan (1982).

to a moral dilemma which Kohlberg posed to a group of eleven year olds to measure their moral development. The dilemma was whether a man who requires a drug to save his wife's life, and can not afford to purchase it, should steal it. Jake was clear that the man should steal the drug because a life was more valuable than property. Amy, on the other hand, considered neither property nor law, but was more concerned about the various human relationships which were involved in the situation. She responded, "if he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money." Gilligan comments,

seeing in the dilemma not a math problem with humans but a narrative of relationships that extends over time, Amy envisions the wife's continuing need for her husband and the husband's continuing concern for his wife and seeks to respond to the druggist's need in a way that would sustain rather than sever the connection.¹¹⁷

There would appear to be some striking similarities between the approach and attitude of the Japanese to dispute settlement and rules and that taken by women in the West, which seem to justify Kawashima's use of the term maternal principle and its connection to *amae*, in contrast to the paternal principle.¹¹⁸ The paternal principle dictates the obedience of an inferior in a hierarchical social order to a superior who has the authority to lay down rules for which obedience can be demanded as a duty. The maternal principle reflects the nurturing relationship whereby a dependent person can impose upon the love or emotionally-based good will of another for the satisfaction of a need. Each principle leads to a different form of We-consciousness. The paternal principle encourages individuals to define their selves in terms of their place in a hierarchical social order, while the maternal principle seeks a definition of the self in terms of relationships of dependency and mutual dependency. Autonomy, therefore, is inconsistent with the paternal principle, but consistent with the maternal. To the degree that *amae* represents the maternal principle, it is consistent with autonomy. When, however, paternalistic relations of domination are set in terms of *amae*, contradictions arise.

¹¹⁷ *Id.* at 25-32.

¹¹⁸ *Supra*, note 111.

All of this must inevitably lead to the conclusion that the contradiction in western legal consciousness between legal justice on the one hand, and mercy, love, emotion or what has been called prophetic justice in the Judco-Christian tradition, on the other, has its origins at least in part in gender bifurcation. Thus we can conclude that there is a fundamental relationship between western legal consciousness and the Oedipus complex. The identification of law with authority, authority with the father, and the father with the state, while at the same time identifying love, mercy and emotion with the mother, and excluding the mother from power, helps insure the separation of law and human emotion which is so characteristic of the western legal tradition.

The Ajase complex explains why the influence of *amae* permeates Japanese legal consciousness, rather than coalescing as a contradictory pole, as in the western tradition, even though Japan also has a patriarchal culture. In the Ajase complex the son returns to the mother. The reconciliation of the son to the mother is thus reflected in the particular view which the Japanese take of law, rules, justice and dispute settlement.

Freud, however, considered a return to the mother as an impediment to the development of the self. He viewed it as a form of wish-fulfillment which left one within the grips of the Oedipus complex, never able to transcend it. This accounts in part for his positive evaluation of the masculine and his negative evaluation of the feminine,¹¹⁹ and furnishes a possible explanation for the difficulty experienced by some Japanese in fully developing a sense of the self.

It would appear that this leaves us in something of a dilemma. The maternal principle, *amae*, or some similar emotional foundation for We-consciousness is a necessary condition for human freedom. If we attempt to meet the needs arising from our interdependency through the paternal principle, we lose much of our autonomy. If, on the other hand, we follow the maternal principle alone, there is a danger that the self will not fully mature.

¹¹⁹ See J. Van Hierik, *Freud on Femininity and Faith* (1982). In a brilliant analysis of the Oedipus complex, she shows that Freud's theories of gender, religion and the Oedipus complex are all interrelated and inseparable. Because females are already "castrated" since they lack a penis, there can be no fear of castration which will drive them through the complex. Rather they remain in a pre-Oedipal state which Freud equates with wish-fulfillment. Judaism is a more advanced religion because it renounces wish-fulfillment and is thus closer to the reality principle, while Christianity remains an expression of wish-fulfillment. Thus the asymmetry which Freud finds between male and female he finds also reflected in the contrast between Judaism and Christianity.

Reconciliation and Transcendence

The way out of this dilemma is through transcending the Oedipus and Ajase complexes. The Oedipus complex is fully transcended only when the gender gulf is healed within the individual psyche. Only then can the "I" and the "We" be in proper balance in a fully developed self. The male must return to the mother, but only after the "I" is strong enough that the centre of the self can withstand the loss of boundaries entailed in reconciliation with the feminine. Similarly, the Ajase complex can only be transcended when the return to the mother takes place after the self is strong enough to retain its boundaries. The Ajase complex produces the world of *amae* where We-consciousness is strong and I-consciousness is weak, a world of feeling with little autonomy. The Oedipus complex produces a world of authority and law, with little feeling, and where freedom is an illusion. So long as human emotions, qualities and abilities are bifurcated along gender lines, and the care and nurturing of children are left exclusively to women, we will be in the grips of these or similar complexes.¹²⁰

As stated by Sagan, "the development of the psyche is the paradigm for the development of culture and society."¹²¹ The psychological problems of the separation-individuation process of the individual psyche of the child unfolds in the context of a protective and nourishing mother who nevertheless represents "psychological death, the loss of boundaries"¹²² under the shadow of the paternal power of the father who exercises authority over both child and mother. It is in this context of authority, power and dependency that we must seek the keys to understanding the evolution of legal consciousness in both East and West.

For me, the Buddha of Justice found in the great hall of the Supreme Court Building symbolizes autonomy with feeling, and calls for a view of the self in which both I-consciousness and We-consciousness are strong and in balance. In assimilating fundamental rights Japan need not lose the traditional sense of *amae* which, according to Dr. Doi, is the core of the Japanese soul. Individuality should be possible without alienation. If, however, the entire western

¹²⁰ See D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976); N. Chodorow, *The Reproduction of Mothering* (1978); A. Rich, *Of Woman Born* (1976).

¹²¹ *Supra*, note 106 at 364.

¹²² J. Benjamin, "Shame and Sexual Politics" (1982) 27 *New German Critique* 151 at 155.

legal and political tradition is taken over, including the western views of substantive justice or transcendent goodness, along with western ideologies such as utilitarianism or Marxism, which reflect these ideals, then a dialectical tension will exist which will inevitably erode the sense of community which the Japanese presently enjoy.

The cultural bifurcation between East and West has its origins in a paradigmatic shift which took place in both cultures with the recognition that sensed experience is subjective; that is to say, relative to the observer. The shifts, however, went in opposite directions. In the East, the awareness developed that the sensed properties of objects such as colour, temperature, texture and so on were the products of human experience, so reality was sought in the recognition that the differentiations of experience were illusory and that only pure undifferentiated experience out of which the differences arose was real. This was the Brahman without differences in Hinduism, Nirvana in Buddhism, and the Tao in China.

The paradigmatic shift which gave birth to western culture occurred with the Greeks with the evolution of science, mathematics and philosophy. Unlike the East, which sought ultimate reality in terms of pure experience unadulterated by conceptual thought, the Greeks sought ultimate reality in terms of theoretical constructs of a cosmic order of universal law which they sometimes referred to as the logos. The success of the Greeks in mathematical astronomy, in the formulation of the laws of harmony in terms of mathematical relations, and the formulation of geometry into a logical deductive system culminating in *Euclid's Elements*, laid the foundation for their faith in reason, which faith took its ultimate form in Stoicism. It was Stoicism which gave birth to the western juridical tradition. The basic epistemological presuppositions of Stoic science and Stoic morals and law are thus much the same.¹²³

With the radical transformations in twentieth century physics, stemming in particular from Einstein's theories of relativity, Heisenberg's uncertainty principle, and Bohr's concept of complementarity, there appears to be a convergence between the views of ultimate reality of East and West. This convergence has been the subject matter of a spate of books in the last few years.¹²⁴

¹²³ See Smith, Smith & Weisstub and Northrop, *supra*, note 84.

¹²⁴ See Northrop, *supra*, note 54; F. Capra, *The Tao of Physics* (1975); M. Talbot, *Mysticism and the New Physics* (1981); G. Zukav, *The Dancing Wu Li Masters* (1979); H. Yukawa, *Creativity and Intuition* (1973); A. de Riancourt, *The Eye of Shiva* (1980).

It should be kept in mind that there is no single quantum view of reality, in that quantum physics does not give us "a single metaphor for how the universe actually works", in the way Newtonian physics did. In fact, a number of possible views of reality are consistent with quantum physics, and not all of these are consistent with eastern metaphysics. A number, however, are, including the most influential, called "the Copenhagen Interpretation", which came out of Niels Bohr's Copenhagen Institute.¹²⁵

The point I wish to make is that a convergence between the eastern and western world views has clearly started to take place, although some versions of each are more compatible than others. If a convergence between eastern and western metaphysics is possible, and this would certainly appear to be the case for some branches of western metaphysics, then a convergence should be possible between any moral or ethical theories which can be derived from them and which share similar basic presuppositions.

Legal and political theory contain both express and implicit ideas about the self. Our conceptions of the self are a product of our mental life. This being true, it is folly for legal and political theorists to ignore psychology, psychoanalysis and psychiatry.¹²⁶ Albert Einstein attested to the importance of psychoanalytic social theory for stable world political order when in 1932 he wrote to Sigmund Freud, seeking some solution, solace or hope in the face of his knowledge of the potential for the release of atomic energy, and the threat of impending war in Europe.¹²⁷ In response Freud wrote:

Our mythological theory of instincts makes it easy for us to find a formula for *indirect* methods of combating war. If willingness to engage in war is an effect of the destructive instinct, the most obvious plan will be to bring Eros, its antagonist, into play against it. Anything that encourages the growth of emotional ties between men must operate against war. These ties may be of two kinds. In the first place they may be relations resembling those towards a loved object, though without having a sexual aim. There is no need for psychoanalysis to be ashamed to speak of love in this connection, for religion

¹²⁵ See N. Herbert, *Quantum Reality* (1985).

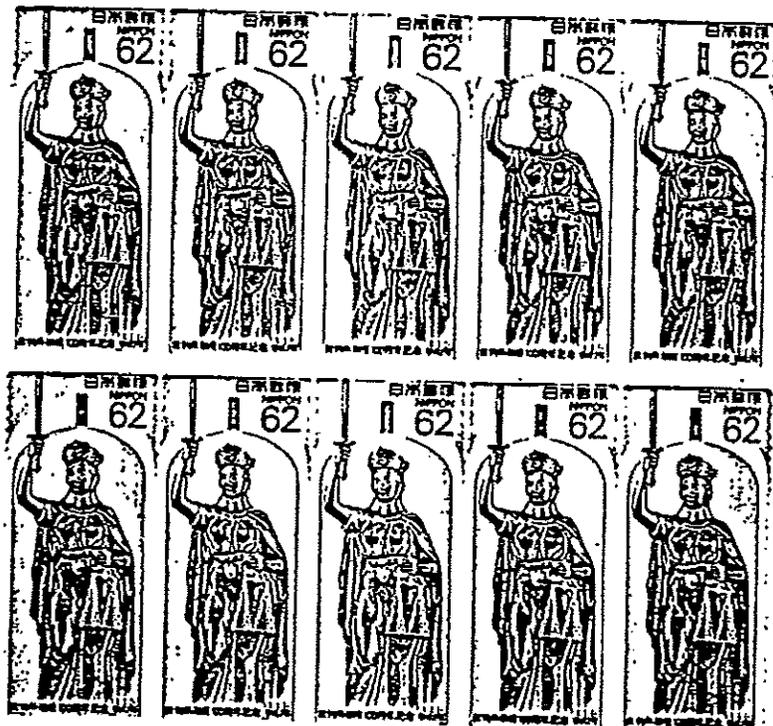
¹²⁶ See for example Smith & Weisstub, *supra*, note 61; J. C. Smith, "The Sword and Shield of Perseus: Some Mythological Dimensions of the Law" (1983) 6 *Int'l J. of L. & Psych.* at 235; "Gods and Goddesses of the Quadrant: Some Further Thoughts on the Mythological Dimensions of the Law" (1985) 7 *Int'l J. of L. & Psych.* at 219; E. Fromm, *Escape from Freedom* (1941); S. Milgram, *Obedience to Authority* (1974); M. Moore, *Law and Psychiatry* (1984).

¹²⁷ Letter from Einstein to Freud (30 July 1932) in "Why War", *Standard Edition, supra*, note 47, vol. 22 (1964) 194 at 199.

itself uses the same words: 'Thou shalt love thy neighbour as thyself.' This, however, is more easily said than done. The second kind of emotional tie is by means of identification. Whatever leads men to share important interests produces this community of feeling, these identifications. And the structure of human society is to a large extent based on them.¹³⁸

Freud's suggested solution to the problem posed by Einstein appears to correspond somewhat with the Japanese concept of *amae*. Thus the cure recommended by one of Japan's leading psychiatrists for the alienation suffered by western man, and the solution to war postulated by the greatest psychologist produced by the western world, also converge.

¹³⁸ *Id.* at 212. See also "Civilization and Its Discontents", *id.*, vol 21 (1961) ch. 5, 57 at 108-16.



Postage stamps issued to commemorate
the centennial of Japan's judiciary
1890 - 1990

I

The Post-War Court System as an Instrument
for Social Change

Yasuhei Taniguchi

In what follows, I shall first explain the pre-war Japanese court system and related institutions as a prerequisite for understanding the direction taken by the post-war reforms. Then I shall proceed to consider the impact of these judicial reforms on the post-war social change.

The Pre-War Court System and Related Institutions

CHARACTERISTICS OF THE PRE-WAR SYSTEM

The Organizational Dependence of the Judiciary. The court system developed under the Court Organization Law (Saibansho koseihō) of 1890 was largely patterned after that of Germany. The whole judiciary was made part of the Ministry of Justice (Shihōshō), which functioned as a branch of the executive, headed by the Minister of Justice. Thus, the judiciary branch of government in post-restoration Japan was not organizationally independent from the executive. Such incorporation of judiciary functions under a Ministry of Justice is still very common in European countries. The Meiji Constitution of 1889 did not provide specifically for judicial independence except in regard to the tenure of judges (Art. 58) and the principle that a judge must follow the law (Art. 57). Nevertheless, a judge's independence in deciding cases was well established vis-à-vis the executive power. It is fair to assume, however, that the judiciary remained in obscurity, hidden behind the powerful Ministry of Justice.

Limited Judicial Power. The power of the judiciary was limited in two important areas. First, it was not given power to exercise any control over legislation by judicial review. Therefore, judges were bound even by provisions of law which they considered clearly violated the Constitution. Correction of such legislation was left entirely to the political process,

which, in turn, did not characteristically function in a democratic fashion.

Another limitation was that administrative acts remained outside judicial review. Such power was given exclusively to a special organ called the "Administrative Court," which belonged to the executive rather than to the judiciary. It was staffed not with ordinary judges, but with administrators serving as judges, a system borrowed from France (cf. the Conseil d'Etat). The availability of the Administrative Court for redress was limited: it sat only in Tokyo; no appeal was allowed from its decision; and its jurisdiction was limited to five specifically designated categories of cases, such as cases involving taxation or public construction.

Hierarchy within the Judiciary. The judiciary was organized on four levels: the Grand Court of Judicature (Daishin-in), created in 1876 as the highest appellate court; the Court of Appeals (Kōsoin), as an intermediate appellate court; the District Courts (Chihō saibansho), as first-instance courts of general jurisdiction; and the Ward Courts (Ku saibansho), as first-instance courts of limited jurisdiction. The Grand Court of Judicature had about fifty judges, each of whom belonged to one of ten Chambers consisting of five judges. These Chambers were either criminal or civil, according to their specialty. Under certain conditions all civil and/or criminal Chambers had to be united for a decision. All of these judges were chosen from among lower court judges. It was the highest position obtainable as a judge. There was no recruitment from outside the judiciary. Its decision always was given *per curiam*, no dissenting opinion being published.

The Court of Appeals and the District Courts were also collegial courts. Only at the level of the Ward Court were there single judges. Ward Courts were not simply small claims courts. They had exclusive jurisdiction over bankruptcy, land registration, and noncontentious matters related to family law and succession.

Career Judiciary. Judgeships were career positions like other positions in governmental offices. Judges were paid no better than administrators of the same rank. Up until 1923, judges and procurators (presently public prosecutors) were recruited through a national examination held for that purpose. Applicants for private practice in law had to take a separate bar examination which was substantially easier. The system was later changed so that applicants for any one of these three legal careers had to take a uniform national examination called the "High Civil Service Examination—Judicial Section." After the examination, candidates for judgeships and procurator positions were separated from those aspiring to private practice and were trained an additional year and a half as judicial apprentices. After this training, a second examination qualified them to become either judges or procurators. Young judges

received further training as members of collegial courts and could expect gradual promotion upward, the most fortunate ones eventually reaching the bench of the Grand Court of Judicature. Judges, especially able ones, were transferred in the course of promotion from a court to the administrative section of the Ministry of Justice to engage in supervisory work or legislative work such as rulemaking and preparation of bills. They were sent back to a court after several years of these extrajudicial services. Most judges served until retirement age.

Strong Procuracy Attached to Courts. As noted, judges were recruited and trained together with prospective procurators. As a matter of fact, procurators were officers of the court. A "procurator," taken from the French *procureur*, was considered a guardian of social order and public good. Procurators not only brought criminal prosecutions before a court, but also controlled the police and even had theoretical power to watch over judges' work. Their office (Kenjikyoku) was attached to each court and was called, for example, the Kenjikyoku of the Tokyo District Court. It was always housed in the same building as the corresponding court. Thus, judges and procurators appeared similar in function to the laity. In the courtroom, the procurator sat on the elevated platform with the judge, while the defense counsel had to stay on the floor with the accused. Since the procuracy was a politically powerful organ, the more ambitious and elitist young men tended to aspire to become procurators rather than judges.

1926 - 112 - 93

OTHER FACTORS AFFECTING THE PRE-WAR SYSTEM * 12

The Weakness of the Barrister. Until 1923, any graduate of a national (then imperial) university's law faculty was eligible to practice law. Other graduates had to take a national examination for admission to the bar. From that year on, a uniform civil service examination was imposed even on those who wished to practice law, but unlike judges and procurators, they were allowed to practice immediately without any further training as apprentices. It was only in 1936 that a year-and-a-half apprenticeship was introduced as a requirement for admission to the bar. But those apprentices were not paid any salary, while judicial apprentices were paid by the State. It is evident that small importance was attached to the practicing bar. Bar associations were not independent and autonomous bodies, but under the close supervision and control of the Ministry of Justice and its powerful local agency, the Kenjikyoku.

The general attitude of the public toward litigation and practicing lawyers, as well as the relative weakness of the Japanese economy and the way business was conducted at the time, did not favor the practicing bar. It could not attract youth from among the social elite except for a period during the early Meiji era when some ambitious youth who had studied in

the United States and England endeavored in vain to build up a more prestigious Japanese bar. Lawyers' activities were mostly limited to representation of clients in court, where they were minor figures humbly submitting their pleas to dominant judges and procurators. On the whole, practicing at the bar fostered little concern, let alone enough ability or prestige, to bring novel social problems as issues to be presented at court or to fight for the cause of social justice through the judicial process.

Authoritarian Procedures. At the end of World War II, civil procedures were still regulated by the Code of Civil Procedures of 1890, and criminal procedures by the Code of Criminal Procedures of 1922. Both were based on German codes. Common to both was the leading role played by the judge and the relatively minor roles played by private parties, either the criminal defendants and their counsel, or the parties to civil actions with their lawyers, if any were used. For example, witnesses were questioned mainly by the judge. Lawyers had a right to question supplementarily, but they normally did not exercise this right, fearing that it might offend the judge. Since the judge had the power to conduct by his own motion whatever investigation he thought necessary, a natural tendency on the part of the parties and lawyers was to depend on the judge's initiative. In criminal cases, the role of the procurator was dominant. Most characteristic of pre-war criminal justice was the institution called the "preliminary hearing." Originated in France as "instruction," it was first adopted in Japan as early as 1881 in the French-style Code of Criminal Instruction (Chizaiho), and was kept on in the still French-style Code of Criminal Procedure of 1890, and was further maintained in the German-style Code of Criminal Procedure of 1922. The preliminary hearing was the proceeding whereby the "judge of instruction" examined the case, without the presence of a defense counsel, simply on the basis of the evidence provided by the procurator and, only if deemed necessary, further evidence gathered by the judge himself in order to decide whether the case was suitable for a formal prosecution. If he ruled for prosecution, the documents gathered were handed over to the sentencing court far before trial. This practice implied a continual danger of biasing the sentencing court against the accused.

The Weak Political and Social Status of the Judiciary and the Legal Profession as a Whole. From the early Meiji period on, the modern Japanese judiciary was not intended to become a strong locus of power. The most important incentive for creating a modern judicial system was to persuade foreign powers to abandon their extraterritorial privileges. The Ministry of Justice and the judiciary within it were considered secondary to the formation of policy or the exercise of state control. When the new Grand Court of Judicature was founded and one of the then top political

leaders, Iwakura, was asked to take the position of its president, he bluntly refused. For a considerable period, the judiciary could not be staffed by first-class candidates. Legend holds that the best graduates of Tokyo Imperial University's Law Faculty became administrators, the second best became professors, and the residue accepted judgeships. Very few even thought of becoming barristers. Under such conditions, the subordinate role of the judiciary was inevitable.

The public looked at the judiciary with awe rather than with respect or expectation. It was an institution that a good citizen should avoid. Disgust with legal practitioners and the process of litigation was a legacy of the Tokugawa regime that could not be easily removed, especially since the newer generation of leaders had no real intention to change such attitudes. It did not occur to judges or lawyers that the court and court procedure could become an instrument for significant social change.

Post-War Reforms

THE JUDICIARY UNDER THE NEW CONSTITUTION

Organizational Independence. Under the Constitution of 1946, the judiciary was separated from the Ministry of Justice and became an independent branch of government on a par with the Cabinet and the Diet. The judicial branch of government was now headed by the Supreme Court. Its Chief Justice was raised to a rank equal to that of the Prime Minister and the Chairman of the Diet. Administration of the whole court system became the responsibility of the Judicial Conference of the Supreme Court. Thus, the judiciary was made an autonomous organization, still controlled indirectly only by the legislature's power to allocate funds in the national budget and by the power reserved to the executive to appoint both Supreme Court justices and lower court judges.

A Unitary Judiciary and Abolishment of Administrative Courts. The post-war Constitution does not recognize any special administrative courts. All judicial power belongs to the Supreme Court and the lower courts subordinate to it. Accordingly, the pre-war Administrative Courts lost their constitutional basis and were abolished. Power to review any acts of administration became the province of the judiciary branch. The Family Court system was newly created, but not as special courts because the system was subordinate, as were all other lower courts, to the Supreme Court. Although many quasi-judicial bodies such as a Fair Trade Commission and a Labor Relations Commission were also created, their decisions were made subject to judicial review. A citizen's right to have any "legal controversy" resolved by the court system is constitutionally guaranteed.

The Power of Constitutional Review. This is probably one of the most significant post-war innovations brought in from American law. The judiciary is now given the power to review the constitutionality of legislation and any other state action. This power is vested not only in the Supreme Court, but also in all lower courts, the theory being that an unconstitutional law is to be considered null and void whenever an issue is brought to legal attention. The Supreme Court has exercised this power with much caution. While it has used all sorts of avoidance techniques in order to forego judgments on constitutional issues, nevertheless there have been certain decisions on important constitutional questions. The lower courts, in fact, have been more courageous in their decisions on pressing issues and have had some social impact, although most of their decisions have subsequently been reversed on higher appeal.

THE ROLE OF THE SUPREME COURT

Judicial and Administrative Functions. The Supreme Court is the highest appellate court, having no first-instance jurisdiction. Since it is the court of last resort for any constitutional question, an eventual appeal to the Supreme Court is always guaranteed. It serves also as the highest organ through which the entire judiciary is administered. The Ministry of Justice has no judicial function—rather it is principally concerned with law enforcement, as will be discussed in following chapters in this volume.

The judicial function of the Supreme Court is normally performed by a bench of five justices, called the "Small Bench." However, in cases involving constitutional questions and on other special occasions, fifteen justices are seated as the "Grand Bench." The justices are assisted by a group of judge-investigators (Saikōsaibansho Chōsakan), who are themselves experienced judges. There is suspicion that the current justices are much too dependent on these very competent helpers.

The administrative function of the Court belongs to the "Judicial Conference," which is assisted by a rather large subsidiary organization, the Secretariat of the Supreme Court. This organization is divided into several sections and many subsections, each headed by a judge and staffed by the administrative employees of the court.

The Justices. Unlike the former Grand Court of Judicature, the Supreme Court has only fifteen justices. They are appointed by the Cabinet without any right of approval by the Diet. In this sense, the Supreme Court can be said to be under the influence of the executive. Appointments, however, must be approved by the electorate. At the first general election after an appointment, the populace can vote for or against the appointment. If a majority votes against, the justice is removed from the office automatically. Such electoral review over appointment takes place every ten years thereafter. So far, no justice has been removed

from office in this way. Against-votes have rarely exceeded one percent.

Supreme Court justices are recruited from within as well as from outside the judiciary. The law provides that five of the justices need not be full jurists. At the time of the court's foundation, career judges, practicing lawyers, law professors, public prosecutors, and even nonjurists shared the bench. But the subsequent tendency has been to appoint more career judges. From the foundation of the Supreme Court till 1979, seventy-four justices have been appointed. Out of these, twenty-seven were judges from a lower court, eight were prosecutors, twenty-six were lawyers, seven were professors, three were diplomats, and three were administrators. Because the lawyers appointed tended to be older than the other appointees, they have served less time, and hence their relative presence has not been as large as it may look. At any rate, there are important differences from the practice of the former Grand Court of Judicature.

The Case Load of the Court. The Supreme Court is said to be suffering from an almost unbearable case load. The enormity of the task can be readily imagined if one considers that fifteen justices must now handle constitutional cases and administrative cases in addition to ordinary civil and criminal cases which were handled by the previous fifty justices of the Grand Court of Judicature. Except for criminal cases, there is no device similar to the American "certiorari" which screens undeserving cases. In 1980, the Supreme Court received 2,187 appeals in civil cases and gave a judgment in 1,522. In the same year, it received 2,409 criminal defendants on appeal and disposed of 2,300. With this heavy burden, the Supreme Court could not take time to consider constitutional or otherwise important issues in a satisfactory manner and had to rely heavily on the help of its judge-investigators.

THE LOWER COURTS

The District Courts remained more or less unchanged. The Courts of Appeals changed their name to the High Courts (Kōtō saibansho), but their function has not been greatly changed. The Family Court system is new. The Ward Courts became Summary Courts (Kan-i saibansho) and underwent functional changes. Here I shall consider only the Family Courts and the Summary Courts.

THE FAMILY COURTS

Jurisdiction. The Family Court has two divisions: the Juvenile Division and the Family Division. The Juvenile Division handles juvenile delinquency and is essentially a criminal court of a special character. The Family Division handles family conciliation and a variety of cases of a so-called noncontentious nature. The latter cases include the division of a decedent's estate among heirs, adjudication on support, declaration of

Incompetence and appointment of a guardian, permission to change a name, etc. But such contentious procedures as may occur in divorce or in the recognition of an illegitimate child must be dealt with formally by the District Court. Conciliation of family disputes is conducted by the conciliation committee, consisting of a judge and two conciliators, set up for each case. In 1981, 83,873 family conciliation cases were filed, and a successful conciliation was achieved in roughly 41 percent of the cases. Conciliation is not only popular but also a required prerequisite to any action involving domestic relations. One cannot go, for example, directly to the District Court to bring a divorce action without having gone through an unsuccessful attempt at conciliation in the Family Court.

Personnel. Family Court judges are ordinary judges having no previous special training. They are rotated periodically by transfer from other lower courts.

One important feature of the Family Court is that it is staffed with special Family Court Investigators (or Family Court Counselors, *Kateisaibansho Chōsakan*) who are trained in programs in sociology or psychology considered relevant to family and/or juvenile problems. This nonlegal professional resource makes the Family Court a unique institution. The investigators' task is to pursue investigation and give objective advice to the deciding judge or to the conciliation committee as well as to give counseling to the parties.

Family conciliators are part-time personnel and, unlike the civil conciliators described later, usually have no training in law. They are volunteers such as housewives, Buddhist priests, retired businessmen, and retired public officials. Originally some were considered to be too elderly, thus losing the confidence of the users. Retirement age recently was set at 70 to remedy this situation.

Procedure. Proceedings in the Family Court are informal and not open to the public. In its juvenile cases, it receives delinquent and pre-delinquent juveniles (under 20) sent from the Public Prosecutors' Office. It sends back to the Public Prosecutor those juveniles considered appropriate for a formal prosecution before a criminal court. Other juveniles are either sent to a Juvenile Home or put under the official supervision of a probation officer. The probation officers in turn put the juveniles under the direct attention of volunteers known as *hogoshi* (voluntary probation officers) (Wagatsuma and DeVos, 1983, Chapter 3).

Applications for a noncontentious adjudication of family matters are numerous (277,594 cases in 1981), but are disposed of swiftly (82.9 percent within a month). There is no formal trial. Parties are heard informally. In the conciliation proceeding the conciliation committee hears both parties together or one by one and proposes, if necessary, a

plan for settlement. Conciliation sessions normally are repeated several times until unreconcilability becomes apparent. Representation by a lawyer is allowed but not encouraged. Even if a lawyer is retained, the personal appearance of the parties is always required. The filing fee is nominal, and applications can be filed orally. Some courts are open in the evening. All in all, the Family Court is the most accessible and, accordingly, the most popular court in Japan.

SUMMARY COURTS

Jurisdiction. The Summary Courts may look like direct successors of the pre-war Ward Courts, but in fact they were intended to be a radically different court system. "Summary" is the translation of "kan-i," meaning simple and easy. The Summary Courts' jurisdiction is much narrower than that of the Ward Courts. Former bankruptcy power has gone to the District Court system. Noncontentious jurisdictions are the province either of Family Courts or District Courts. The Summary Courts can handle minor criminal cases and civil litigation involving lesser monetary amounts. Judicial power is limited to imposing fines or imprisonment up to three years only for certain designated crimes, and adjudicating civil cases involving less than 900,000 yen (raised in 1982 from 300,000 yen). Summary Courts handle most nonfamily civil conciliation cases under the Civil Conciliation Law of 1951. In 1980, 61,863 conciliation cases were brought to the Summary Courts (2,189 in District Courts). Successful conciliation was achieved in 55.7 percent.

Persannel. In addition to ordinary judges (including assistant judges with over three years experience), special "summary court judges" serve here. They are not full jurists, but are selected by a strict competitive examination from persons who have engaged in legal work for many years as court clerks, family court investigators, conciliators, prosecutor's clerks, etc. Therefore, they have considerably more experience than simply appointed lay judges, which do not exist in Japan.

Procedure. Summary Court procedure was made as simple and flexible as possible so that citizens could have daily disputes adjudicated with relative ease. But actual practice seems to have developed in a contrary direction. As far as civil cases are concerned, the function is similar to District Court procedures. An oral filing of complaint, though permitted by law, is hardly practiced. Judges and clerks, as well as lawyers, seem to feel more comfortable with a more complicated and dignified procedure. The recent increase of the jurisdictional limit to 900,000 yen has made it difficult for the Summary Courts to function as small claims courts for ordinary citizens. The trend seems to be returning toward the practices of the pre-war Ward Courts.

THE LEGAL PROFESSION

Unified Training for Prospective Judges, Public Prosecutors, and Practicing Lawyers. As before the war, a uniform national examination must be taken by all. But the further training of the candidates for these three branches of legal jobs is no longer separate. They all go through the same educational program at the Legal Research and Training Institute (Shihō Kenshūsho), which is under the administration of the Supreme Court. Training lasts for two years. The first and last four months are spent in the classroom, and the middle sixteen months in the field: eight months in civil and criminal courts, four months in the Public Prosecutors' Office, and four months in a lawyer's office. A second examination qualifies the candidates as full jurists eligible to be appointed as judges (assistant judges) or public prosecutors, or to be admitted to the bar for legal practice. The extreme difficulty of the legal examination is well known. Only about 500 out of almost 30,000 applicants pass each year. Out of 500 graduating from the Institute, seventy to eighty become assistant judges, thirty to forty become public prosecutors, and the rest become practitioners.

Post-war reform of legal education has not quite brought about a more unified legal profession as envisioned in the Anglo-American tradition. However, the more unified training program has had a considerable social impact. It has greatly raised the quality of the practicing bar. It has also fostered a mutual understanding between barristers and the judicial officialdom, so notably lacking under the separate pre-war training programs.

The New Role of Prosecutors. As a result of the organizational independence of the judiciary from the Ministry of Justice, the prosecutor's office was separated from the court and remained with the Ministry. At the same time, the power of the procurators was much curtailed. Their power is limited now to criminal investigation (supplemental to that of the police, over whom prosecutors no longer have any control) and prosecution of suspects before the court. The previous French style procurator has thus become a mere public prosecutor, although the Japanese title "kenji" has not been changed. The Procurators' Office, however, has become the Public Prosecutors' Office (Kensatsu-cho) and is no longer housed in the same building as the court.

The Judges. The independence of judges (and justices) is better guaranteed than before by the new Constitution. A judge's salary was drastically increased as compared with that of other civil servants, although the difference over the past thirty years has become progressively smaller. Judges are appointed for a term of ten years, a new system

introduced in the post-war reform. Whatever the legislative intention, it has not brought about the total independence of judges in a career judiciary, as I shall discuss later.

Young judges are first appointed as assistant judges for a ten-year term. As such they cannot decide cases alone. But special legislation has made exceptions. An assistant judge can decide alone after three years of experience in a Summary Court, and after five years he (or she) can function in the same capacity as a full judge with an approval of the Supreme Court—which approval is invariably given. That means that an assistant judge as young as twenty-nine can sit as a single judge in a District Court.

Lower court judges are recruited almost exclusively from fresh graduates of the Legal Research and Training Institute. The appointment of practicing lawyers to the bench occurred only in the early post-war period, although the practice is strongly advocated by Japanese bar associations. It is practically impossible because judicial positions, except on the prestigious Supreme Court, are not attractive enough for eligible practitioners, who in general earn substantially more than judges. Accordingly, the traditional career nature of the judiciary has been preserved except for the Supreme Court, for which outside appointment remains common. Young judges must go up the ladder by promotion, which is controlled by the Secretariat of the Supreme Court. There is a danger, therefore, that judges seeking a promotion will sacrifice judicial independence and make carefully noncontroversial decisions. The Supreme Court even has the power to refuse reappointment for a judge at the end of his or her ten-year term. Nonreappointment happened in 1971 to an assistant judge who was a member of the Communist-oriented Youth Lawyers' Association (Seihōkyō). This action caused a memorable social controversy. A judge's independence is not jeopardized by outside influences, but by stringent internal control. Bar associations have been voicing criticism of the "bureaucratization" of the Supreme Court and the judiciary in general. As already mentioned, the Supreme Court itself is under political influence in that its justices are appointed by the Cabinet and its budget is controlled by the Diet. Moreover, the Cabinet maintains its theoretical power to refuse the reappointment of lower court judges. Appointments and reappointments are made by the Cabinet from a list prepared by the Supreme Court. Although the recommendations of the Supreme Court so far has been followed by the Cabinet, the Cabinet remains aware of its power to reject. The Supreme Court's caution and self-restraint can be partially explained in this context.

The proportionate number of judges has not increased in any drastic way since the Meiji era, although the number of lawyers has (see Table 1).

Table 1

Year	Population (in thousands)	Civil Actions	Judges	Non-Summary Court Judges	Lawyers
1900	43,847 (100%)	585,355 (100%)	1,244 (100%)	—	1,590 (100%)
1925	59,737 (136%)	943,616 (161%)	1,116 (90%)	—	5,673 (357%)
1950	83,200 (190%)	794,655 (136%)	2,261 (182%)	1,533 (123%)	5,883 (370%)
1975	111,934 (255%)	1,376,470 (235%)	2,643 (212%)	1,864 (150%)	10,146 (638%)

An Independent and Autonomous Bar. Practicing lawyers and their organizations are no longer supervised by any governmental agency. Under the provisions of the Attorney Law of 1949, they enjoy full autonomy. According to that law, lawyers must belong to a local bar association. There is one bar association for each prefecture, except for Tokyo, which has three. Local bar associations are organized into a Japan Federation of Bar Associations. Absorbing the great majority of the graduates from the Legal Training Institute, bar associations in the larger cities and the Federation have become influential politically and socially.

As mentioned earlier, Japanese lawyers had minor social and political importance in the past. People did not accord them much respect. This condition started changing from the late 1950s on. Younger and more promising people began to become practitioners. Soon the judiciary began to experience some difficulty in finding a sufficient number of assistant judges because many eligible young graduates from the Institute chose to go to the bar. A solution was to increase the number of students at the Institute. The number has been increased gradually from 250 in the middle 1950s to the present 500. There has been an unprecedented improvement in the quality of practicing lawyers. Legal practice is now one of the most popular career goals of the better law students. The public attitude toward lawyers has also changed considerably. People now look at them with respect and recognize them as doing a socially useful job. The involvement of progressive lawyers in civil rights activities, pollution, and other social issues has certainly improved the public image of the bar as a whole.

Japan remains noted for its small number of lawyers. As shown in the above table, there are only a little more than ten thousand lawyers, two-thirds of them concentrated in metropolitan Tokyo, serving more than one hundred million people. But it should be mentioned that much legal work performed by lawyers in other countries is assumed in Japan by trained nonlawyers such as legal scribes, tax attorneys, corporate

personnel, etc. They can be called "quasi-lawyers." It certainly has been a way to reduce costs. There is fear that any further drastic increase in the number of lawyers could damage the now well established bar's present reputation.

PROCEDURAL REFORMS

Criminal Procedures. The post-war reform of criminal procedures has been most drastic. A new Code of Criminal Procedure replaced the old one; but it is not necessary to go into the details. The rights both of suspects and the accused have been enhanced. The notorious preliminary hearing was abolished, and an adversary system was introduced. With no previous knowledge of the presented case, the court considers only evidence presented by both parties at the trial. Since the prosecutor has discretion not to bring prosecution, and unsure cases are not normally prosecuted, most criminal trials result in a conviction. Moreover, since most defendants admit their crimes, the task of the defense counsel often is to plead for mitigation of punishment.

Civil Procedures. The Code of Civil Procedure has undergone only a few amendments, but their philosophical impact has been considerable. A basic change has been the introduction of adversary procedures. Pre-war civil procedures were already adversary in a sense, but the judge was expected to play the leading role. Post-war reforms have emphasized the parties' roles. The judge was deprived of power to initiate any examination of evidence by motion of the court. A witness must be questioned first by the party who called him or her, and then cross-examined by the adversary party. Although there was no written amendment to this effect, it was believed that the judge should not exercise the so-called clarification right to make any suggestions to the parties to present further allegations or to produce added evidence. In considering this last point, the Supreme Court has changed its view and now declares that the proper exercise of such power is the judge's duty. One fact is clear: post-war reforms have offered a more important role and an expansion of activities to the practicing bar.

Administrative Litigation Procedure. Under the pre-war system, relief from any illegal act of the administration could be obtained, in limited circumstances, from an Administrative Court. Now relief is directly available through a lower court. In order to better regulate procedures in such cases, there is the Administrative Litigation Procedure Law of 1962, which is an amendment of the previous law of 1948. There are three principal kinds of administrative litigation recognized by the Law: "attacking action," "party action," and "taxpayer's action." Attacking action (*kokoku soshu*) is the most popular procedure, through which one seeks either to have an administrative act or decision set aside or declared

void, or administrative inaction declared illegal. An attacking action can be brought to the District Court or to the High Court in certain categories of cases by any citizen whenever he has "legal interest" to do so. What constitutes a legal interest has been the main issue of discussion. "Party action" can be brought to court by a governmental employee for payment of his salary, for example. Such cases are far less numerous than attacking actions.

A large number of administrative litigations were processed during the early post-war period in response to problems raised by post-war land reform. Ever since, the number has been stable at around 1,000 per year. In 1981, out of 763 administrative litigations brought to the District Courts, 655 were attacking actions (539 seeking the setting aside of an administrative decision), 25 were party actions, and 80 were taxpayer's actions. The most numerous kinds of attacking action are those which attack decisions of the Patent Office and those involving tax problems. Recently, many administrative litigations have involved legally difficult and politically and socially controversial issues, such as the use of injunction against excessive noise at an international airport, the construction of a nuclear power plant, etc. These actions have attracted much public attention.

The procedures involving administrative litigation are a modification of civil procedures. Even if an action is instituted to attack an administrative act, the relevant administrative agency is not prevented from proceeding to enforce it. But the court may order a suspension of the act if necessary. Such suspension is automatically removed when the Prime Minister files an objection to it. This is the way in which the law balances the powers of the two branches. Judgment is binding not only on the defendant administrative agency, but also on other agencies. This is an exception to the rule that a judgment binds only the parties to the action.

The Social Impact of the Post-War Court System

BACKGROUND CONDITIONS

No social change can be brought about by a single causal agent. Social change is a more complicated phenomenon than that. Even if the reform of a court system could be considered one of the major causes of a particular social change, it is difficult to determine how much it alone affected the society. It is also difficult to distinguish cause and result. What looks like a cause can in fact be a result of something else. In considering the social impact of court reform, the very limited effectiveness of the court system as an instrument for social change should be kept in mind. There are three basic reasons for such

limitations

Firstly, the judicial machinery can be set in motion only when someone comes to the court to do so. The courts are responders rather than initiators. Passivity characterizes the courts in comparison with other branches of the government. Curiously, social change can occasionally be brought about by not using the court machinery at all. For example, the general reluctance to prosecute for certain forms of abortion (a crime under the Japanese penal code) may have contributed to considerable change in Japanese society by decreasing the birth rate and increasing the proportion of small families. But this result is rather due indirectly to the policy of the police department, a part of the executive. The function of criminal justice is thus always dependent on the policy of the executive. Not pursuing such issues, we limit the scope of our consideration to the civil side, where private initiative determines the use or nonuse of the judicial machinery. Whether a person decides to go to court or not depends on many factors.

It is generally admitted that the Japanese do not like to bring a lawsuit. The number of lawsuits is certainly much less than in the United States, Germany, or France. It could be a result of the nonlitigious character of the Japanese people. Professor Haley (1978) doubts this, however, and has proposed the hypothesis that the Japanese are as litigious as other people, but are only prevented from bringing suit because of their difficult court system. Another possible explanation could be that the total number of disputes in Japanese society is less than elsewhere, although the degree of litigiousness is similar. Whatever the correct answer may be, the Japanese do resort to the court. But there are at least three barriers to overcome.

The first barrier is psychological. It originates from the feeling of discomfort most people have with a dispute. Because of such discomfort, one tries not to recognize even the existence of the dispute. But when a grievance passes a certain bearable point, one takes an action to seek relief, such as bringing a suit to court. Perhaps this mechanism is common to all cultures. If the Japanese are different, their bearable point may be higher than elsewhere. But the psychological barrier seems to become lower in Japan in a number of situations—notably, where a grievance is shared by many others and an action for relief can be taken collectively; where a grievance is directed against an impersonal body like the government or a corporation; and where the process of resolving the grievance does not imply too much direct confrontation.

The second barrier is economic—namely, the availability of money and the time needed to go to court. This barrier becomes a particularly prohibiting factor when the result of an action cannot be clearly foreseen.

The third barrier is the availability of proper legal service. Good legal service is essential in a difficult case. Therefore, this barrier is low for a simple case. When we consider the social impact of court actions, this barrier is very important, because socially influential cases normally involve novel questions of law and complicated questions of fact. Only an imaginative and energetic legal service can engage such purposes. In large cases the task can be accomplished through a concerted effort of many lawyers.

Secondly, the judicial machinery can work only according to the law. Procedure and substance are both regulated by law. If there is no procedure to attain an objective, no relief can be attempted. It would have been just a waste of time under the Meiji Constitution to seek relief from unconstitutional legislation, because there was no procedure for the constitutional review of legislation. In addition to the available procedure, there must also be a proper substantive rule of law which permits particular relief. This poses a more subtle problem because there are always subtle possibilities as well as definable limits in legal interpretation. A judge's responsiveness to subtle questions of interpretation varies. It is inevitable that his conclusion will be affected by unique features of personality and background. The legitimacy of his conclusions could be derivative of the independence of his mind as well as the procedural due process he observed.

Thirdly, the judicial proceeding is intended, as a rule, to affect only the parties to it. If so, any social change cannot be expected from it, because a social change is something that affects everybody in a society. But the fact is that there can be some de facto effect of a court proceeding upon others, even the society generally. When a provision of law is declared unconstitutional, it is likely to be deleted voluntarily by the legislature. Even if an action is lost, the very fact of bringing the action to court can trigger the political process to remedy the situation. Such results do not occur automatically. Certain efforts must be made to mobilize machineries for social change in connection with a court action, such as a community movement, a labor movement, the mass media, etc. Such de facto social effects will be greater when the number of persons involved in a court proceeding is large. The strategy of so-called mass action aims at this. All this shows that a court action as such can have little, if any, social impact.

SOME REFLECTIONS ON NEW INSTITUTIONS

Taking these conditions into account, I shall proceed to evaluate how the post-war reforms of the court system could and did work to bring about social changes during the past thirty years. I begin with some of the new institutions.

Family Court. This court, particularly its Family Division, succeeded in removing some of the aforementioned barriers by making itself very accessible to citizens. It is said that when asked about the location of the courthouse in town, an ordinary citizen would be likely to indicate the Family Court rather than the District Court. The Family Court was founded at the same time as the promulgation of the radically progressive new family laws. The court was instrumental in having the ideals of the new family laws permeate the citizenry. Family conciliation was utilized to educate the people, so to speak. It was also a convenient device by which the court could itself avoid a socially inadequate result of the new laws. Taking the middle way became possible in conciliation, whereas in a decision the result would of necessity be for one side or another. Interestingly enough, the institution of conciliation promoted a social change intended by the substantive rules of the new family laws and, at the same time, mitigated any adverse effects. Moreover, many disputes which would have been resolved previously within a family—for example, through the assertion of paternal or joint family authority—have been brought to conciliation because the family is no longer capable of performing such a function, especially once legal support of such authority is withdrawn. In this sense, Family Court conciliation has constituted a useful tool of conflict dissolution in a changing society.

Summary Court. This new court could have become a significant instrument for consumer justice. But, as explained before, it failed to make itself sufficiently accessible to ordinary citizens by removing some of the barriers to accessibility mentioned earlier. Small grievances of consumers are now better processed by consumer centers often run by local (city or prefecture) governments. Such contact costs nothing, and is rapid and effective, too.

The civil conciliation taking place in Summary Courts has in general been successful. These processes are not a post-war institution, but were started in the 1920s in order to cope with the social changes occurring after the First World War in such matters as housing disputes, agricultural tenancy disputes, and family disputes. Their contemporary function should not be ignored.

Conciliation prospers in the Summary Court, but also has been utilized successfully in some extrajudicial institutions, such as the local and central Pollution Control Commissions, the Labor Relations Commission, and the Construction Disputes Dissolving Commission. These are areas where the substantive law is not yet firmly established and where a case-by-case consideration is highly needed.

At one time, civil conciliation within Summary Courts had to assume the task of trying a large amount of traffic accident cases. By now

these cases are not particularly numerous, because the substantive rules governing fault have been relatively well established through previous courts' decisions. Now traffic accident disputes can be better settled in an Automobile Accident Disputes Settlement Center, an extralegal private organization. Such utilization again demonstrates how conciliation is only partially processed in legal institutions and how social change is only indirectly influenced by court procedures.

The Supreme Court and Constitutional Review. By its very nature, a constitutional decision should have great social and political impact. In fact, the labor movement, for example, has been much affected by the Supreme Court's decisions on whether or not public employees have a right to strike. It first upheld the constitutionality of a restriction on strikes, then loosened its attitude, and finally went back to the original strict position. There are only nine or ten occasions on which the Supreme Court has held a State act, including legislation, unconstitutional. But what kind of social change eventuated from each of them is a good question. Some decisions have not even been followed by legislative action. A 1973 decision holding unconstitutional a Penal Code provision punishing patricide more severely than normal homicide was unpopular among the members of the Liberal Democratic Party, and no amendment or deletion of the provision has been made. A 1976 decision held unconstitutional the way voting districts were organized because the weight of each vote differed very much from district to district. But this decision did not nullify the result of the particular election attacked by the plaintiff.

Constitutional decisions upholding the constitutionality of given laws are numerous. They have frequently approved the present state of affairs as meeting the constitutional standards. These decisions are more or less conservative politically (for example, decisions upholding restrictions on demonstrations) as well as socially and culturally (for example, decisions on obscenity). The Supreme Court has not had the occasion to respond to the constitutionality of progressive acts passed by the legislature, a situation most unlikely to change, given the generally conservative orientation of the Liberal Democratic party.

However, it must be admitted that the very institution of constitutional review has brought about one major social change, a society has been developing in which the constitutionality of legislation and other State acts can be discussed freely before a court of law. Constitutional norms have become the norms of positive law. And here we should not overlook the role of an active bar which has presented those issues to the court, removing the legal service barrier of the private parties.

The Supreme Court has been more innovative in nonconstitutional matters. It has issued a series of decisions protective of the socially weak, restricting the landlord's right to rescind the lease of a house, protecting the interests of an unregistered wife, interpreting against the language of an Anti-Usury Law on the payment of interest as part of principal, relieving the victims of medical malpractice by lessening the burden of proof, etc. In criminal cases, it has several times exercised its exceptional power to reverse conviction on the ground of an error of facts. Whether these rather liberal decisions could have come out from the highest pre-war court or whether they are really a result of the post-war reform of the court cannot be answered.

Administrative Litigation. Here main issues center around the proper relation between judicial power and that of the executive. Courts have often refrained from giving any relief, saying that the attacked act of an administrative agency falls within the proper discretion of the agency, thereby upholding the validity of the act. Courts have also dismissed many attacking actions by saying that there is not yet an administrative act vulnerable enough in its application to become a proper target of an attack. This has been particularly detrimental to plaintiffs, given Japanese administrative practice, which more often takes the form of informal "administrative guidance" rather than a formal administrative order or a clearly identifiable act of administration. But probably the most controversial issue in this area is the problem of standing to sue: the question of whether a particular plaintiff has sufficient legal interest to attack a particular administrative act. Courts have been rather restrictive, generally requiring actual harm to the plaintiff's interest specifically protected by law. This doctrine has limited the availability of judicial relief in the environmental field. Many actions have been brought attacking a grant of license to build a power plant or petrochemical plant, for example, by the residents nearby. The well-known Osaka Airport case (see Chapter 2) raised the issue of whether residents can enjoin the operation of an airport, a public agency. Osaka High Court granted such an injunction, but the Supreme Court reversed it, saying that an injunction is too much judicial interference with administrative power.

Here again, one thing cannot be disputed: the new institution of administrative litigation has brought about a society in which an act of administration can be attacked by the persons affected. Such a general rule was lacking under the pre-war system. And again we must also think about the bar's ingenious activities on behalf of this law despite the conservative disposition of the Supreme Court.

The New Position of the Practicing Bar. This leads me to the last, but not the least, important point I would like to make: the role of the bar in

social change. As suggested earlier, this kind of caption would have been almost, if not totally, irrelevant under pre-war conditions. Today the bar's initiative in socially important problem areas cannot be passed over without mention.

Perhaps the first notable success of trial lawyers was in pollution cases. These cases were originally instituted by a group of leftist lawyers with a strong political motive to use litigation as a tool to make known the vices of the capitalistic economy, to attack the government policy of expanding the economy, to organize pollution victims politically, etc. But the problems so utilized were real and also came to attract the attention of politically "neutral" people. Such politically neutral lawyers soon became sympathetic to the causes and came to consider "public interest" activities as a normal part of their professional concern. A host of litigations followed, involving a "right to sunshine," a "right to a healthy environment," or a "right to seashore," as well as product liability of drugs, medical malpractice, and other consumer issues. There is no longer any inhibition on the part of practicing lawyers to raise novel questions of law and to attempt to persuade the courts in what some consider aggressive moves. Such activities are reported daily in newspapers or other mass media. In pre-war times, newspapers only reported criminal cases that attracted public attention. Nowadays they are more concerned with civil cases. Whether this is a result of a general social change or a cause of further social change is a difficult question. Most likely an interactive process is involved. One can be sure that the practicing bar has become instrumental in utilizing the open forum of the court as a means of directing change. This has been made possible by the increased freedom of action as well as the higher status afforded the bar, which have resulted from the post-war reforms affecting the bar and the standards of legal education.

REFERENCES

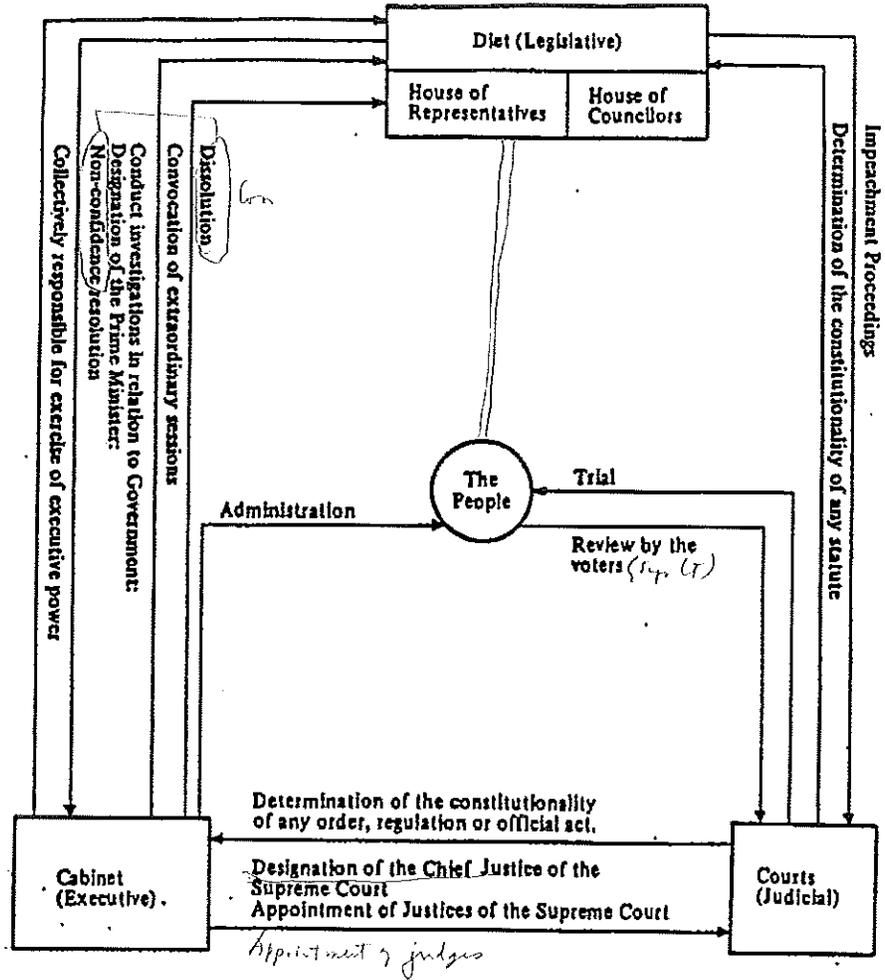
- Haley, John O. "The Myth of the Reluctant Litigant." *Journal of Japanese Studies*, 4:2 (1978), 345-370.
- . "The Politics of Informal Justice: The Japanese Experience, 1922-1942." In Abel, Richard L., ed., *The Politics of Informal Justice*. Academic Press, 1982.
- Kitagawa, Zentaro. "Resonance Theory—A Tentative Approach to the Dispute Settlement Mechanism." In Lüke, Gerhard et al., eds.,

- Rechtsvergleichung, Europarecht und Staatenintegration.* Carl Heymanns, 1983.
- Kojima, Takashi, and Yasuhei Taniguchi. "Access to Justice in Japan." In Cappelletti, Mauro, ed., *Access to Justice*, vol. I, book 2. Giuffrè-Sijthoff, 1978.
- Taniguchi, Yasuhei. "Extra-judicial Dispute Settlement in Japan." In Kötz, Hein, and Reynald Ottenhof, eds., *Les Conciliateurs, la Conciliation, une Etude Comparative.* Economica, 1983.
- Taniguchi, Yasuhei. "Legal Education at the Legal Training and Research Institute: An Introduction, 25 Jiyū to Seigi 7 (1974)." As translated in Henderson, Dan F., and John O. Haley, *Law and the Legal Process in Japan.* Seattle: University of Washington Press, 1978.
- Wagatsuma, Hiroshi, and George A. DeVos. *Heritage of Endurance.* Berkeley: University of California Press, 1983.



2

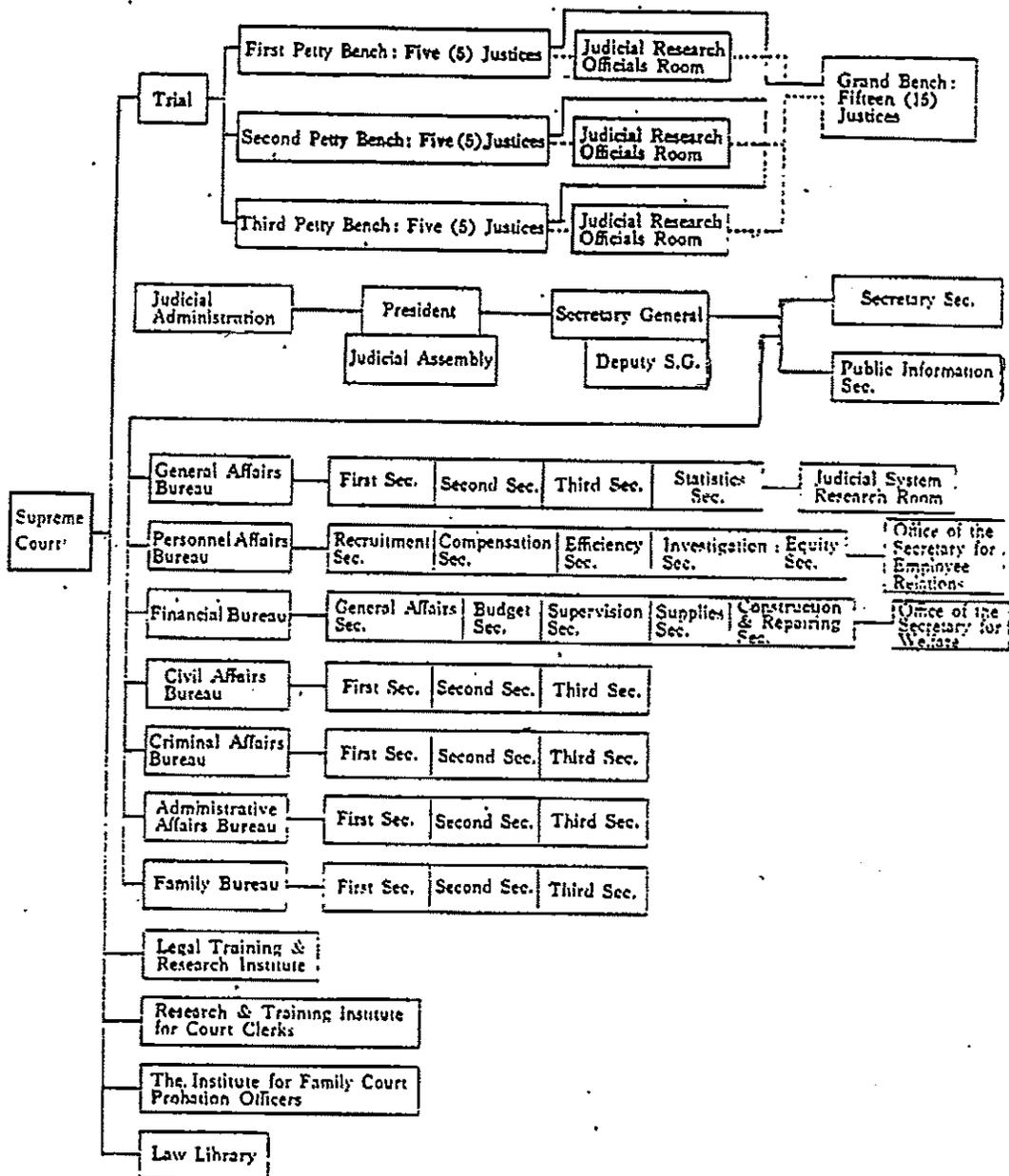
Supreme Court of Japan, Justice in Japan (1978)



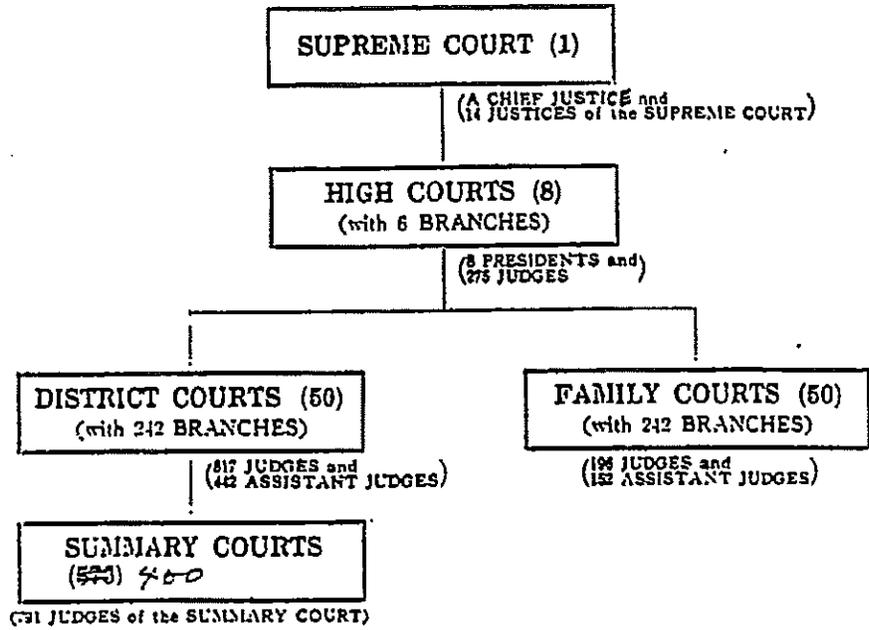
Fixed Number of Judges and Supporting Personnel (1975)

Classification	Number
Chief Justice of the Supreme Court	1
Justice of the Supreme Court	14
President of the High Court	8
Judge	1,288
Assistant Judge	594
Judge of the Summary Court	791
Court Clerk	6,582
Family Court Probation Officer	1,517
Court Stenotypist X	935
Court Secretary	6,972
Bailiff	1,883
Other	3,806
Total	24,391

Organization Chart of the Supreme Court

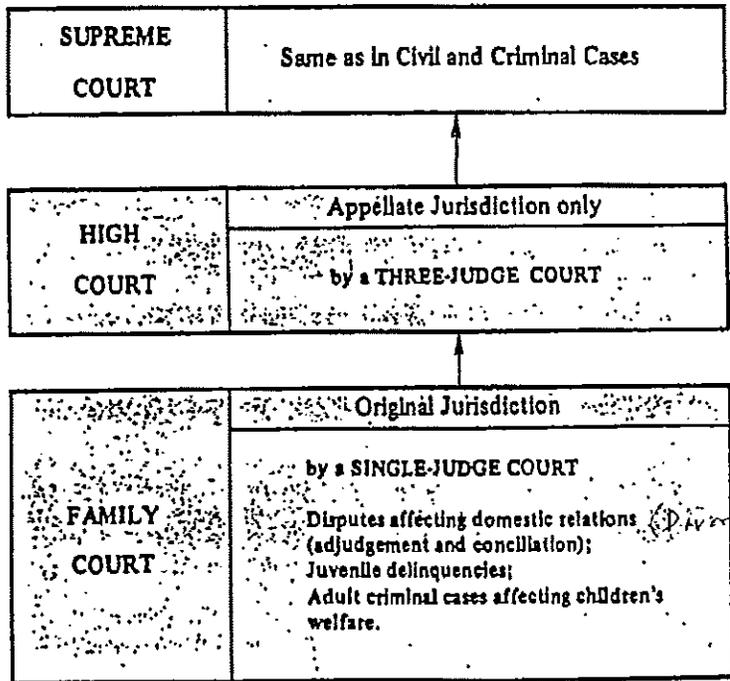


Court Organization Chart



Jurisdiction and Procedure of Japanese Courts III

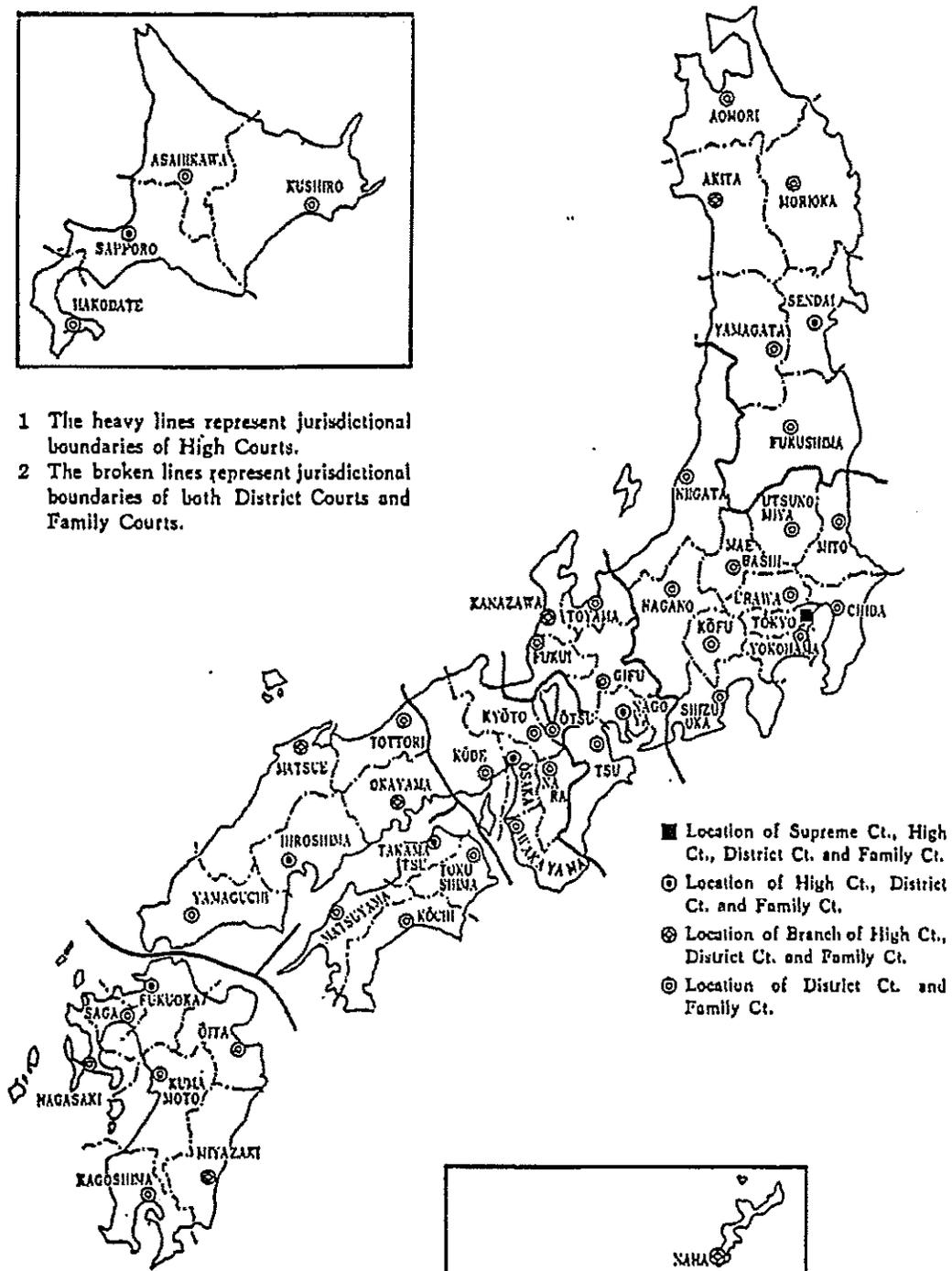
FAMILY CASES



Note: A direct appeal may be made to the SUPREME COURT from a judgment of the FAMILY COURT in which the court decided unconstitutionality of law, ordinance, etc.



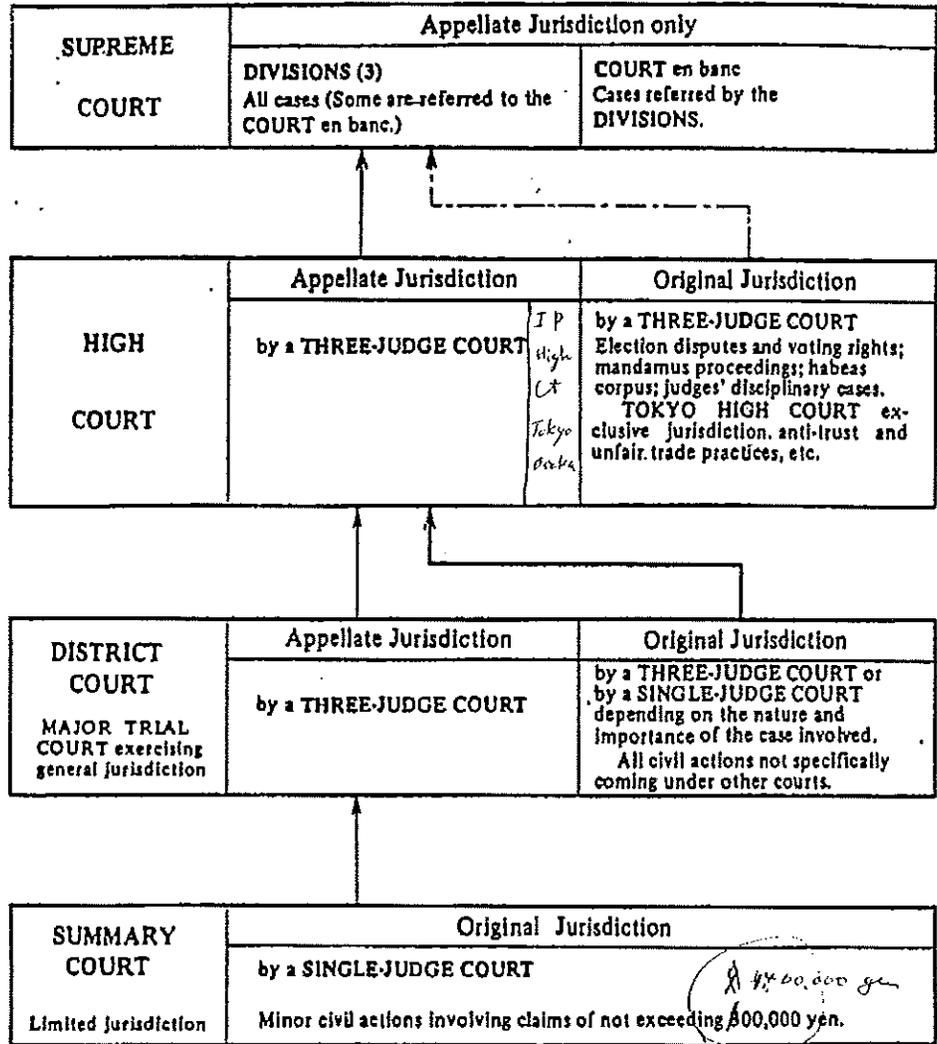
- 1 The heavy lines represent jurisdictional boundaries of High Courts.
- 2 The broken lines represent jurisdictional boundaries of both District Courts and Family Courts.



9

Jurisdiction and Procedure of Japanese Courts I

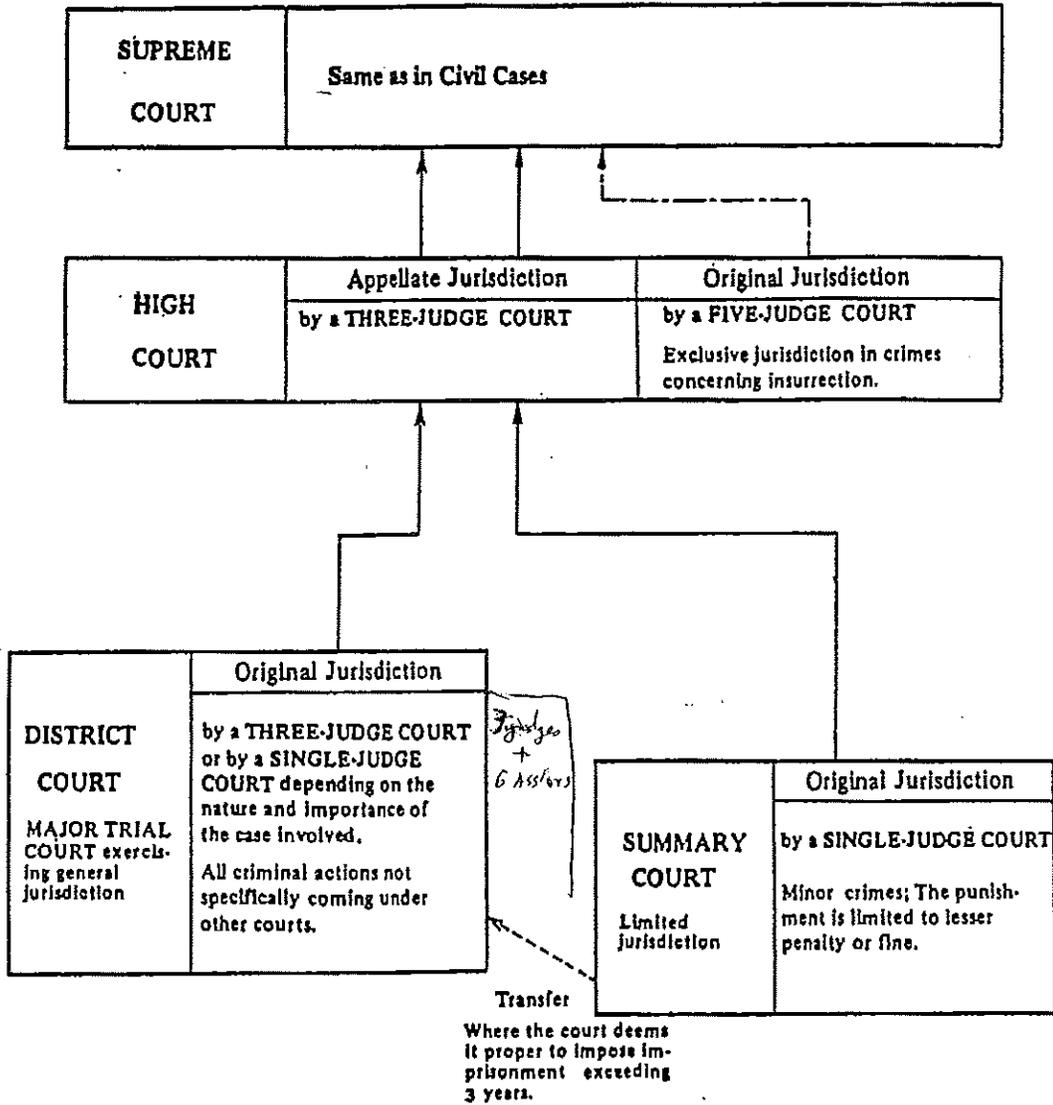
CIVIL CASES



- Note: 1) Where both parties agree, a jumping appeal may be made from a judgment of the SUMMARY COURT to the HIGH COURT or from a judgment of the DISTRICT COURT to the SUPREME COURT.
- 2) Where a SUMMARY COURT case involves constitutional questions, a special appeal may be made from a judgment of the HIGH COURT to the SUPREME COURT.

Jurisdiction and Procedure of Japanese Courts II

CRIMINAL CASES



Note: A direct appeal may be made to the SUPREME COURT from a judgment of the DISTRICT COURT or the SUMMARY COURT in which the court decided unconstitutionality of law, ordinance, etc.

Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue

By SETSUO MIYAZAWA*

This symposium issue is a product of the symposium “Successes, Failures, and Remaining Issues of the Justice System Reform in Japan” held at the University of California, Hastings College of the Law on September 7-8, 2012.¹ As the main planner of the symposium, I would like to briefly explain its background and the structure of this symposium issue.

* Professor of Law, Aoyama Gakuin University Law School; Visiting Professor of Law, University of California, Hastings College of the Law; Professor Emeritus, Kobe University; LL.B., LL.M., S.J.D., Hokkaido University; M.A., M.Phil., Ph.D. in sociology, Yale University. The author wishes to express deepest appreciation to the decision of *Hastings International and Comparative Law Review (HICLR)* to publish this symposium issue and its enormous assistance provided to the contributors of this symposium issue. The author also wishes to express his gratitude to its editors for their patience and assistance provided to him. The author is solely responsible for any error.

1. The author is most grateful to Chancellor and Dean Frank H. Wu, Academic Dean Shauna Marshall, Associate Academic Dean for Global Studies Joel Paul, then Associate Dean for Research Evan Lee, and Associate Professor Keith J. Hand of the University of California, Hastings College of the Law for their decision to host the symposium; and to Michael A. Kelly, Esq., the Egusa Foundation for International Cooperation in the Social Sciences, Tomio Narita, Esq., Simmonds & Narita LLP, and the Arseny & Olga Kovshar Private Charitable Foundation for their generous contributions to the symposium. The author also would like to gratefully mention that the Collaborative Research Network 33 on East Asian Law and Society of the Law and Society Association provided assistance with publicity and that *HICLR* provided personnel to carry out the symposium. Additionally, Mei Cooley of UC Hastings skillfully handled and coordinated all the logistical tasks.

I. Road to the Establishment of the Justice System Reform Council

The Japanese government established the Justice System Reform Council (JSRC) in July 1999, and the JSRC presented its recommendations for a comprehensive reform of the justice system to Prime Minister Jun'ichiro Koizumi on June 12, 2001. Calls for systemic reform of the justice system were not new, but earlier reforms in the 1960s to the 1990s were either failures or very minor, mainly due to resistance or internal conflicts within the legal profession, which used to control the policy-making process of the justice system.² The recommendations of the JSRC were so comprehensive that they could be considered as the third major series of reforms of the modern legal system in Japan, following the first wave of major reforms in the late 19th century and the second major wave of reforms introduced after World War II.³

The immediate momentum which led to the establishment of the JSRC was the product of *Keidanren* (the Japan Business Federation). *Keidanren* is a national organization which represented over 100 industry associations and over 800 large corporations in the policy-making process in postwar Japan. It provided stable support to the Liberal Democratic Party (LDP) which controlled the government for most of the period between 1955 and 2009,⁴ and, consequently, the LDP usually accommodated *Keidanren* interests.

Keidanren's interest in justice system reform was preceded by its movement for administrative reform in the 1960s to the 1990s. Administrative reform sought deregulation of business activities as well as the increased transparency and legal accountability of administrative agencies. To this end, a series of new policies and legislation was introduced by the government in the 1980s and 1990s.⁵ Reform of the justice system and legal profession became

2. Setsuo Miyazawa, *Law Reform, Lawyers, and Access to Justice*, in JAPANESE BUSINESS LAW 39, 47-49 (Gerald Paul McAlinn ed. 2007). The legal profession is divided into three groups which are represented by their respective organizations. They are prosecutors represented by the Ministry of Justice (MOJ), judges represented by the General Secretariat of the Supreme Court, and practicing attorneys represented by the Japan Federation of Bar Associations (JFBA).

3. For a historical overview of the first and second waves of major reforms, see Miyazawa, *supra* note 2, at 40-47.

4. The LDP regained the control of the government in 2012.

5. On transparency and administrative reform, see Katsuya Uga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law and*

the next target for reform because more accessible and competent justice system and legal profession were necessary to promote and protect interests of private parties.⁶

Keidanren issued its "Opinions on the Reform of Justice System" on May 19, 1998.⁷ This proposal indicated that as Japan changes from an economy and society dependent upon state administration to a society with a free and fair market, companies and individuals will be required to behave according to the principles of "self-responsibility" and "transparency." Therefore, *Keidanren* argued that the strengthening of the justice system as a fundamental part of the infrastructure of the economy and society is an immediate priority. The proposal also noted that the judicial infrastructure currently does not possess personnel and institutional capabilities that can be effectively used by people and companies.

Keidanren proposed a series of reforms. First, the number of judges should be increased. Second, judges should be appointed from among practicing attorneys.⁸ Third, while legal education had been historically provided by undergraduate nonprofessional law faculties,⁹ graduate professional law schools should be established. Fourth, considering the concentration of practicing attorneys in large cities, the monopoly of legal services by attorneys should be

Tom Ginsburg, *The Politics of Transparency in Japanese Administrative Law*, in DANIEL H. FOOTE, *LAW IN JAPAN: A TURNING POINT*, 276, 303 (2007).

6. See Miyazawa, *supra* note 2, at 49-51.

7. Keizai dantai rengokai (経済団体連合会) [Japan Business Federation] [Keidanren], *Shihō seido kaikaku ni tsuite no iken* (司法制度改革についての意見) [Opinions on the Reform of the Justice System] May 19, 1998, available at <http://www.keidanren.or.jp/japanese/policy/pol173.html> (last visited Feb. 16, 2013).

8. In Japan, those who aspire to be a judge, a prosecutor, or a practicing attorney must first pass the National Bar Examination and, then, receive training as a judicial trainee at the Legal Training and Research Institute managed by the Supreme Court. A vast majority of judges are initially appointed as an assistant judge immediately after completing traineeship and promoted to the full judgeship after completing a ten-year term as an assistant judge. This system is called a career judiciary. On the administrative control of Japanese judges, see Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* 263-81 (Philip S.C. Lewis ed., 1994). There had been proposals to reform this bureaucratic structure of the judiciary by appointing judges from among practicing attorneys. This system is called *hoso-ichigen* or unified legal profession.

9. On the history of legal education in Japan, see Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (Yves Dezalay and Bryant G. Garth eds., 2002).

abolished. Fifth, the pace of civil litigation should be sped up, ADR and international arbitration should be strengthened, and the capabilities of courts and judges in intellectual property should be strengthened.¹⁰

While *Keidanren* was preparing its proposals, LDP's Special Research Committee on the Justice System conducted a series of hearings beginning in June 1997. Many government agencies, interest groups, and individuals presented their views, including the Supreme Court, the Ministry of Justice (MOJ), and the Ministry of Education, Culture, Sports, Science and Technology (MEXT). The Committee announced its report "Firm Guidelines for the Justice System of the 21st Century" on June 16, 1998.¹¹ While LDP's report mentioned the concept of "*wa*" (harmony) which would not require much use of law, litigation, and legal profession and took a more "law and order" tone in its section on criminal justice, its dominant tone and specific proposals were very similar to the *Keidanren* proposals.

These proposals by *Keidanren* and the LDP created a political opportunity for other groups which had unsuccessfully proposed reforms in the past. Most notably, the Japan Federation of Bar Associations (JFBA) had long proposed to appoint judges from among practicing attorneys, reintroduce jury trials in a purer form,¹² extend the system of state-appointed attorneys from the post-indictment stage to the investigation stage, and increase state support to the civil legal aid system. The JFBA initially hesitated to participate in the political process of justice system reform because it was likely to increase the number of practicing attorneys and to reduce the monopoly they enjoyed. But eventually, the JFBA decided to participate in the political process and seek realization of its long-held proposals. Thus, the justice system reform became a

10. This is a selective list. There were other reform proposals.

11. Jiyū minshutō shihō seido chōsa kai hōkoku (自由民主党司法制度調査会報告) [Liberal Democratic Party, Justice System Research Committee Report], 21seiki no shihō no tashikana shishin (21世紀の司法の確かな指針), [Firm Guidelines for Justice in the 21st Century], June 16, 1998, available at http://www.veritaslaw.jp/ronbun_doc/20090929133643_1.pdf#search='21%E4%B8%96%E7%B4%80%E3%81%AE%E5%8F%B8%E6%B3%95%E3%81%AE%E7%A2%BA%E3%81%8B%E3%81%AA%E6%8C%87%E9%87%9D' (last visited Feb. 16, 2013).

12. A limited form of jury trials was conducted in Japan from 1928 to 1943. See Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 22 (Arthur Taylor Von Mehren ed. 1963).

national agenda.

In this environment of the rising expectation for justice system reform, the government decided to establish the JSRC. The government presented the Act to Establish the Justice System Reform Council to the Diet (Japanese Parliament) on February 5, 1999, and the Diet passed it on June 30, 1999. The Act went into effect less than a month later on July 27, 1999, and the JSRC was established on the same day.

Article 2 of the Act set forth the mandate of the JSRC. "The Committee shall clarify the roles the justice system should play in our society in the 21st century and conduct investigation and deliberation on the realization of a justice system more accessible to citizens, citizens' participation in the justice system, the shape of legal profession and the enrichment and strengthening of its functions, and other fundamental measures required for the reform of the justice system and its foundations." Given the political process preceding this Act, the mandate of the JSRC was fairly clear in spite of this abstract language - the JSRC was expected to produce recommendations on a more user-friendly judicial system, public participation in the administration of the judicial system, and an expanded and more competent legal profession.

Independence of the JSRC from the legal profession was a major consideration because the MOJ, as well as the Supreme Court and the JFBA, were part of the subjects for reform. Unlike previous committees on issues of the justice system, the JSRC was not established under the MOJ. Instead, the JSRC was established directly under the Cabinet. For the same consideration, a majority of the JSRC's 13 members were appointed from outside legal academia and the legal profession. They included: three senior members of the legal profession (a former chief judge of a high court, a former head of a high prosecutor's office, and a former JFBA president); three law professors (one each in constitutional law, civil procedure, and criminal procedure); two business people (one each representing *Keidanren* and the Tokyo Chamber of Commerce); the president of the Federation of Private Universities; a professor of accounting; the president of a major foundation (the Nippon Foundation); one representative each from the largest labor organization (*Rengo* or the National Confederation of Private-Sector Trade Unions) and a consumer organization (*Shufuren* or the Federation of Housewives); and a novelist. Koji Sato, a former professor of constitutional law at Kyoto University, was selected as

the Chairperson of the JSRC at its first meeting. Sato had long been involved in administrative reform.

A matter of concern was the Secretariat established under the JSRC. While JSRC members were to work on a part-time basis, members of the Secretariat were to work full-time, collect information, and prepare deliberations of the JSRC. The Secretary General was a prosecutor seconded from the MOJ, and other members were also seconded from various government agencies and the JFBA.¹³ Some observers were concerned with the possibility of the Secretariat controlling the deliberation of the JSRC and leading them to take a conservative implementation of its mandate. Partly based on this fear, a watch dog monthly journal was published to closely monitor, comment on, and, if necessary, criticize the JSRC.¹⁴

II. Recommendations by the Justice System Reform Council

Deliberation of the JSRC was remarkably open to the public for a government committee. Minutes were quickly uploaded to its website,¹⁵ and outside observers could express opinions, present relevant information, and make proposals throughout its deliberation. The pace of deliberation was also fast. At its ninth meeting on December 21, 1999, the JSRC put together a document entitled "The Points at Issue in the Justice System."¹⁶ The JSRC asked the following question to itself, indicating the relationship between the preceding administrative reform and this justice system reform:¹⁷

13. Shunsuke Marushima, the keynote speaker of our symposium, was a senior member of the Secretariat.

14. Gekkan shihō kaikaku (月刊司法改革) [Journal of Judicial Reform in Japan] was published by Gendai Jinbunsha (現代人文社) from October 1999 to September 2001. This author was an editor.

15. It still exists. See <http://www.kantei.go.jp/jp/sihouseido/> (last visited Feb. 16, 2013).

16. Shihō seido kaikaku shingikai (司法制度改革審議会) [JSRC], Shihō seido kaikaku ni mukete (ronten seiri) (司法制度改革に向けて—論点整理—) [Points at Issue in the Justice System] [hereinafter *The Points at Issue*] Dec. 21, 1999, available at <http://www.kantei.go.jp/jp/sihouseido/pdfs/1221ronten.pdf> (last visited Feb. 16, 2013). The official English translation is available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html (last visited Feb. 16, 2013). Quotations in the text are from the English translation.

17. Unless otherwise noted, the indented quotations hereinafter are taken from the official translation of the JSRC final report. See *infra* note 23.

Now, it is one hundred years since the compilation of the Civil Code and fifty years since the enactment of the Constitution of Japan. Why is it now that the fundamental justice reform to redefine the administration of justice is instituted as one of the major supports to reconstruct "Our Country and Its Shape" after the administrative reform?

The JSRC answered the question in the following statement:

It is because we feel keenly that it is difficult for us to have an extensive view of the 21st century society without facing head on at the fundamental issue which we have carried with us for one hundred and thirty years since the beginning of the modern age; that is, what must we do to make the law of a nation flesh and blood of "Our Country and Its Shape"?¹⁸

These statements imply that the JSRC thought that the law of Japan had not yet become "flesh and blood" of the country in spite of the history of 130 years of the modern legal system in Japan. One may be surprised by this thought if one takes a formalistic concept of the rule of law,¹⁹ because an elaborate system of statutes had existed and a highly centralized, closely coordinated judiciary had applied them. However, the JSRC took a more substantive concept of the rule of law as indicated in the following statement:

This time of undergoing immense reform, the concept of the rule of law that all the people are equal under the law, and the substantial significance of administration of justice . . . that a fair third party shall make a decision based upon a fair and clear legal rule are never emphasized too much. . . .²⁰

"All the people" in this statement includes the government; the JSRC recognized the need to make the government more legally accountable and to make the judicial system a fairer third party to apply clearer legal rules. In other words, the JSRC was going to make proposals to move from the rule *by* law²¹ where the justice system functioned essentially as an administrative instrument of the government to the rule of law where private parties can use the justice system to promote and protect their interests against the

18. Both quotations are from the last paragraph of Chapter II, Section 1 of *The Points at Issue*, *supra* note 16.

19. On formalistic and substantive concepts of the rule of law, *see* Chapters 7 and 8 of BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

20. Last paragraph, Chapter I, Section 2 of *The Points at Issue*, *supra* note 16.

21. On the concept of rule by law, *see* TAMANAHA, *supra* note 19, at 92-93.

government.

The JSRC also defined the role of the legal profession in stating that “[l]ike medical doctors who are indispensable for people’s health-care service, administration of justice (the legal profession) should play the role of the so-called ‘doctors for the people’s social life.’”²² This implied a view that the legal profession should become more readily available and useful in a wider range of areas in social life and in all corners in the country. The JSRC concluded this document by presenting a list of issue items for its deliberation. This list was a declaration of JSRC’s intention to make proposals for a truly comprehensive justice system reform.

The JSRC spent the next 54 sessions to solidify those items. The JSRC held four public hearings in four major cities in 2000, conducted six field visits to central and local courts, prosecutor’s offices, and bar associations in 1999 and 2000, and visited the United States, Germany, France, and the United Kingdom in 2000. The JSRC finally presented its 118-page report subtitled “For a Justice System to Support Japan in the 21st Century” to Prime Minister Junichiro Koizumi on June 12, 2001.²³

Excluding the Introduction and Conclusion, the report was divided into the following five chapters:

Chapter I. Fundamental Philosophy and Directions for Reform of the Justice System

Chapter II. Justice System Responding to Public Expectations

Chapter III. How the Legal Profession Supporting the Justice

22. Second paragraph, Chapter I, Section 2 of The Points at Issue, *supra* note 16.

23. Shihō seido kaikoku shingikai (司法制度改革審議会) [JSRC], Shihō seido kaikaku shingikai ikensho - 21seiki no nihon wo sasaeru shihō seido (司法制度改革審議会意見書-21世紀の日本を支える司法制度-) [Report of the JSRC - A Justice System for Japan in the 21st Century], June 12, 2001, available at <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/pdf-dex.html> (last visited Feb. 16, 2013). The official English translation entitled *Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century* - is available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (last visited Feb. 16, 2013). Statistical and other materials used by the JSRC for its deliberations are available in the CD-ROM appendix of ジュリスト (Jurist), No. 1208 (2001), a semimonthly law journal in Japan. Daniel H. Foote, a presenter at our symposium and a contributor to this symposium issue, prepared the English translation. Without his heroic effort, it would be nearly impossible to attract international attention to this comprehensive reform of the Japanese justice system. Quotations in the text are from this English translation, sometimes in abridged forms. The English translation has no page numbers.

System Should Be

Chapter IV. Establishment of the Popular Base of the Justice System

Chapter V. Promotion of this Reform of the Justice System

At the beginning of Chapter I, the JSRC summarized its task by asking the question: "How must various mechanisms comprising the justice system and the legal profession, which serves as the bearer of that system, be reformed so as to transform the spirit of the law and the rule of law into the 'flesh and blood' of Japan?", and clearly recognized the relationship of justice system reform with preceding reforms by the following statement:

Japan, which is facing difficult conditions, has been working on various reforms, including political reform, administrative reform, promotion of decentralization, and reforms of the economic structure such as deregulation. What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country. This reform of the justice system aims to tie these various reforms together organically under "the rule of law" that is one of the fundamental concepts on which the Constitution is based. Justice system reform should be positioned as the "final linchpin" of a series of various reforms concerning restructuring of "the shape of our country."

In Chapter I, Part 3, the JRSC defined the three pillars of justice system reform. They are (1) "a justice system that meets public expectations," (2) "the legal profession supporting the justice system," and (3) "establishment of the popular base." As described above, the structure of the report reflected these three pillars.

The first group of recommendations addressed the justice system itself. For civil justice, the JSRC stated:²⁴

- With regard to litigation, the aim is to reduce the current duration of proceedings by about half by enhancing the content of proceedings, with the intention that users can obtain proper, prompt and effective remedies. For that purpose, planned

24. The rest of this section is a revised version of Miyazawa, *supra* note 2, at 56-61.

proceedings shall be promoted by making it compulsory to confer to set a proceeding plan, and the process to collect evidence shall be expanded.

- For cases requiring specialized knowledge, the court-appointed expert witness system shall be improved and a new system in which experts participate in the legal proceedings shall be introduced.

- For lawsuits relating to intellectual property rights, the processing system of specialized departments at both the Tokyo and Osaka District Courts shall be further reinforced so that those departments function substantially as patent courts.

- Measures to reinforce response, such as introduction of labor conciliation, shall also be taken for labor-related cases, which have been increasing remarkably in number, mainly for individual labor-management related cases.

- The functions of the family court and the summary court shall be reinforced by readjusting their jurisdiction, etc.

- In order to secure the effective realization of rights, new measures to improve the civil execution system shall be introduced.

- In order to expand public access to justice, efforts should be made to reduce the costs that users bear, to expand civil legal aid, and to reinforce access points that comprehensively offer information on the justice system.

- Efforts should be made to expand and vitalize alternative dispute resolution (ADR), with the intention that the people can choose from among diversified dispute resolution methods according to individual needs.

- Based on the recognition that the role to be played by the justice system takes on even greater importance in the context of a system of separation of powers, or checks and balances, it is necessary to aim at reinforcing the judicial-check function vis-à-vis the administration.

For criminal justice, the JSRC stated:

- In order to further reflect the people's sturdy social common sense on the content of trials, a new system shall be introduced for certain serious cases, under which the general public will participate in deciding cases together with judges.

- In order to reinforce and speed up trials, from the viewpoint of reinforcing the arrangement of the issues and expanding the disclosure of evidence that contributes to that arrangement, a new

preparatory proceeding shall be established and clearer rules relating to disclosure of evidence shall be established, and the holding of trial sessions on consecutive days shall be made the basic principle.

- From the standpoint of securing fairness of criminal justice, in order to effectively secure the suspects' and defendants' rights to receive assistance of defense counsel, the public defense counsel system for these people shall be established.

- Concerning how the institution of public prosecution should be... a system of giving legally binding force to specific resolutions by the Inquests of Prosecution shall be introduced so as to reflect popular will more directly.

- In order to ensure that questioning of suspects is conducted in a proper manner, a system shall be introduced establishing a duty to make written records of conditions of the questioning.

The second group of recommendations dealt with the legal profession. The JSRC stated:

- With regard to the number of legal professionals, the aim is to achieve 1,500 successful applicants for the existing national bar examination in 2004, and, while keeping watch over the progress of establishment of the new legal training system, to increase the number of successful applicants for a new national bar examination to 3,000 per year in about 2010.

- With regard to the system for legal training, in order to secure legal professionals with suitable quality to undertake the administration of justice in the 21st century, the system shall not consist of selection based upon the "single point" of the national bar examination. Rather, a system for legal training shall be established that consists of a "process" that organically connects legal education, the national bar examination, and apprenticeship training. As the core of the system, graduate schools specialized in training of legal professionals (hereinafter referred to as "law schools") shall be established.

- With regard to the lawyer system, public access to lawyers shall be expanded by strengthening the work structure of lawyers, including reinforcing legal consultation activities, making lawyers' fees clearer and more rational, and strengthening expertise, taking into account the needs of society. In addition, measures shall be taken to drive home and improve legal ethics, such as making disciplinary procedures clearer, prompter, and more effective.

- With regard to the public prosecutor system, from the

standpoint of securing public trust in the strictness and fairness of public prosecution, measures to reform the consciousness of public prosecutors shall be taken, such as thoroughgoing review of the human resources and education systems. This includes having public prosecutors spend time working at places where they can learn the sense of the general public. Also, a system shall be established that can reflect the voices of the people with regard to the administration of the public prosecutors offices.

- With regard to the judge system, measures shall be taken to diversify sources of supply for judges, such as promotion of appointment of lawyers as judges and reform of the assistant judge system, which includes establishment of a system to institutionally secure that assistant judges accumulate diverse experience as legal professionals in various positions other than as judges. In addition, a system shall be established in which organizations reflecting public views participate in the process of appointing judges and a system shall be established to secure transparency and objectivity of personnel evaluation.

The third group of recommendations concerned the popular base for the justice system. The JSRC stated:

- As a new system for popular participation in litigation proceedings which constitute the core of the justice system, a new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding the cases autonomously and meaningfully.

- In the civil procedure, for cases that require specialized knowledge, a system shall be introduced in which experts become involved in all or part of trials and support judges.

- The existing participation systems shall be expanded, such as by giving legally binding force to certain resolutions by Inquests of Prosecution and by expanding the court councilor system as a part of reinforcement of the function of the family court accompanying transfer of jurisdiction for actions related to personal status.

- A system to reflect public views on procedures for appointment of judges and a scheme to further reflect public views on administration of the courts, the public prosecutors' offices and the bar associations shall be introduced.

- Coordination of conditions to make such participation in the administration of justice effective shall be promoted, such as realization of an easily understandable system of justice including

adjustment of the basic laws, reinforcement of legal education and promotion of information disclosure relating to the administration of justice.

The main body of the report consisted of an elaboration on these recommendations. Some sections are more elaborate than others, and signs of compromise with those who wanted to keep the status quo were everywhere. Moreover, the JSRC did not touch on some important issues. The most conspicuous example is criminal investigation. Criminal investigations consisted of lengthy detentions, heavy reliance on confessions, interrogations without the presence of a defense lawyer, and a lack of audio-video recordings of interrogations.²⁵ These practices had been criticized as the causes of false accusations. While a series of recent cases have created strong criticism and a special panel of MOJ's Legislative Council is now discussing the introduction of mandatory electronic recording of interrogations,²⁶ the problem had long been recognized and reform proposals had been made before the establishment of the JSRC. Nonetheless, the JSRC merely recommended requiring interrogators to keep written records of conditions of interrogation.

The JSRC also failed to notice some developments which would have impacted the implementation of recommendations. The most serious development was the rise of the victim rights movement. It demanded the right of victims and their representatives to actively participate in criminal trials, question the defendants, and recommend a sentence.²⁷ While the National Association of Crime

25. For a general description of the legal system on criminal investigation in Japan, see SETSUO MIYAZAWA, *POLICING IN JAPAN: A STUDY ON MAKING CRIME* 16-25 (Frank G. Bennett, Jr. & John O. Haley trans. 1992).

26. *Judicial System Reform*, THE JAPAN TIMES, July 10, 2011 (a special panel of MOJ's Legislative Council on June 29, 2011, started discussions on the reform of criminal procedure, with electronic recording of interrogations as a major issue); *Opinion: Improving Japanese Justice*, THE JAPAN TIMES, Jan. 8, 2013 (demanding electronic recording of the whole process of interrogation). Electronic versions of both articles are available on LEXIS/NEXIS (last visited Feb. 17, 2013).

27. See Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 (1) PUNISHMENT & SOCIETY 47 (2008); David Johnson, *Early Returns from Japan's New Criminal Trials*, THE ASIA-PACIFIC JOURNAL (Sept. 7, 2009), http://japanfocus.org/-david_t_johnson/3212 (last visited Feb. 17, 2013); Shigenori Matsui, *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, 13 ASIAN-PAC. L. & POL'Y J. 54 (2011). See also Hiroshi Fukurai, *A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L &

Victims and Surviving Families (NAVS) was established in January 2000 with a phenomenally successful first symposium which immediately attracted attention from conservative politicians and the media, and NAVS' agenda had included such a right for active participation in criminal trials, the JSRC failed to pay any attention to what might result in criminal trials which would have both lay judges and victim participants.

Nevertheless, this was the first time that major reforms were successfully proposed by a government committee as national policies. This included a large increase in the number of legal professionals, a fundamental change in legal training system, and the introduction of lay judges. This was clearly a major achievement. The consensus was that it was largely due to the composition of the JSRC, where representatives of the judiciary, the public prosecutor, and the bar were in the minority; and the one for the bar was actually most progressive among the 13 members.

JSRC's recommendations on June 12, 2001, were enthusiastically supported by the media. All of the four major national dailies published summaries of the recommendations and commentaries on the following morning.²⁸ Most of them followed up those articles with editorials urging the faithful implementation of the recommendations. The headlines of those editorials were "Will They Meet the Deadline: Law Schools" (これで間に合いますか 法科大学院),²⁹ "Justice System Reform: Changing Attitudes of Legal Profession Is the Priority."

COMP. L. REV. 517 (2013).

28. See, e.g., *Saiban e no shimin sanku unagasu shihō seido kaikaku shingikai ga ikensho* (裁判への市民参加促す司法制度改革審議会が意見書) [Citizens' Participation in Litigations Urged: The JSRC Presented Its Opinions], ASAHI SHIMBUN, June 13, 2001 (available on the online database *Kikuzo II Visual* (last visited Jan. 12, 2013)); *Shihō seido kaikaku shingikai-saishū iken - 21seiki no shihō no sugata ha* (司法制度改革審議会・最終意見 21世紀の司法の姿は) [Final Opinions of the JSRC: What Is the Shape of the Justice System in the 21st Century?], MAINICHI SHIMBUN, June 13, 2001 (available on the online database *Mainichi News Pack* (last visited January 30, 2013)); *Saiban jinsokuka he gutaizō-shihōshin ga saishū iken* (裁判迅速化へ具体像 司法審が最終意見) [Concrete Images for Speedier Litigations: The JSRC Presented Final Opinions], NIHON KEIZAI SHIMBUN, June 13, 2001 (available on the online database *Nikkei Telecon 21* (last visited Feb. 8, 2013)); *Shihō seido kaikaku shingikai ikensho no yōten (kaisetsu)* (司法制度改革審議会意見書の要点(解説)) [Main Points of the Final Opinions of the JSRC (Commentary)], YOMIURI SHIMBUN, June 13, 2001 (available on the online database *Yomidasu Rekishikan* (last visited Feb. 8, 2013)). The newspaper articles in the rest of this paper can be found in the online databases mentioned here.

29. ASAHI SHIMBUN, June 27, 2001.

(司法制度改革 法曹人の意識変革が先決だ),³⁰ "Tackle the Justice System Reform with the Entire Cabinet" (司法改革へ内閣挙げた取り組みを),³¹ and "Justice System Reform: Crucial Moment for Realizing 'User-Friendliness.'" (司法制度改革 「身近さ」の具体化へ正念場だ).³² The justice system reform, thus, set sail with great fanfare.³³

III. Return of the Old Policy-Making Process³⁴

A. Bureaucracy for Implementation

I concluded a paper I published in 2001 with a statement that "Details still remain undecided. Much will depend on the legislative process that is expected to commence very soon."³⁵ The process for implementing the recommendations of the JSRC was initiated by the establishment of the Office for the Preparation of the Promotion of Justice System Reform (the Preparation Office) under the Cabinet. The main function of the Preparation Office was to draft the Law on the Promotion of Justice System Reform (the Promotion Law) and to prepare for the establishment of the Headquarters for the Promotion of Justice System Reform (the Promotion Headquarters) that would be headed by the Prime Minister.

The establishment of the Preparation Office marked the return of a legislative process that is dominated by the MOJ. A prosecutor was appointed to head the Preparation Office. The Office had approximately 30 members that included several members who were temporarily assigned from various government agencies and the JFBA, but the majority of members were prosecutors and judges. In other words, the implementation of the reforms was largely placed in the hands of judicial bureaucrats who themselves were the

30. MAINICHI SHIMBUN, June 17, 2001.

31. NIHON KEIZAI SHIMBUN, June 13, 2001.

32. YOMIURI SHIMBUN, June 13, 2001.

33. For a comprehensive analysis of the process of the justice system reform up to this point, see Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 1 ASIAN-PAC. L. & POL'Y J. 89 (2001).

34. This section is a revised and partly abridged version of Miyazawa, *supra* note 2, at 61-74. For a general analysis of the situation soon after the start of implementation, see Daniel H. Foote, *Introduction and Overview: Japanese Law at a Turning Point*, in FOOTE, *supra* note 5, at xix-xxxix.

35. Miyazawa, *supra* note 33, at 121.

main targets of the proposed reforms.

The Preparation Office did not limit its activities to the drafting of the Promotion Law and the preparation of the Promotion Headquarters. Although the Promotion Headquarters was to become the main agency for designing the details of the reforms, the Preparation Office proceeded to start discussions about substantive policy matters with various government agencies and outside organizations that were related to each reform item. Furthermore, the Preparation Office took the position that it was not required to open its policy-making process to the media and the public, because its policy-making process should be the same as that of every other policy-making processes in government agencies in Japan.

The Preparation Office succeeded in obtaining a higher status and more power than existing government agencies that were more directly related to particular issues. This was evident in the designing of a new system for the production of legal professionals, including the core reform issue of establishing graduate professional law schools.³⁶ Since the policy-making process on this issue was a typical example of implementation processes of JSRC recommendations, this and the following subsections will provide some details about it.

Since the JSRC recommended that new graduate professional law schools be established as part of the university system covered by the Law on School Education, the MEXT assigned the matter to its Central Education Council soon after the presentation of the JSRC recommendations to the Prime Minister. The Ministry's Sub-council on Universities established the Committee on Graduate Professional Law Schools (the Law School Committee) on June 15, 2001, only three days after the presentation of the JSRC recommendations.

The Law School Committee included 16 prominent members. Seven law professors were appointed to the Committee. Two other academics on the Committee were the president of Hitotsubashi University, who was an economist; and a professor from the National Institution of Academic Degrees, who was a specialist in higher education. A member was included from each of the MOJ,

36. See generally Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 S. TEX. L. REV. 419 (2002); Setsuo Miyazawa, *Education and Training of Lawyers in Japan: A Critical Analysis*, 43 S. TEX. L. REV., 491 (2002); James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303 (2004).

the judiciary, and the JFBA. Three members were appointed to represent end-users of legal services, including a vice president of *Rengo*, the largest labor organization, who was also a former JSRC member; a legal commentator from *Nihon Keizai Shimbun*, the top economic newspaper; and the head of the legal department of Toyota.

Establishing of the new system for the production of legal professionals included the following four main issues: (1) standards for the chartering of new graduate law schools; (2) a system of and standards for the accreditation of graduate law schools that have been chartered; (3) a proposal for a new National Bar Examination; and, (4) a new apprenticeship training system.

At its first meeting on August 31, 2001, however, the Law School Committee decided to limit its scope to the chartering standards, much simpler and more abstract than the accreditation standards. It even announced that the Preparation Office should decide the details of the legal education standards for chartering. In doing so, the Committee referred the more substantial question of the content of the new legal education system to the closed process dominated by judicial bureaucrats.

In the meantime, the Promotion Law was enacted on October 30, 2001. The Promotion Law stipulated that the government had the responsibility to draw up the Plan for the Promotion of Justice System Reform (the Promotion Plan) by a Cabinet decision and to take whatever legal, financial, and other measures that are necessary to implement concrete policies within the three-year period during which the Promotion Law remained effective.

The Promotion Headquarters was formed on December 1, 2001, and the Prime Minister became its nominal head. All the cabinet members also became members, including the Justice Minister and the Chief Cabinet Secretary as the vice heads. The real work was to be carried out by its Secretariat (the Promotion Secretariat), established as the successor of the Preparation Office. The new Promotion Secretariat had some 50 members. The Secretary General was a former judge who transferred to the MOJ as a prosecutor in the middle of his judicial career. The majority of staff was prosecutors and judges who were temporarily assigned to the Secretariat. Under the Secretariat, ten Deliberative Committees

(*kentokai*) were formed, each in charge of details of one area.³⁷ Some observers expressed a concern that a Secretariat staffed mainly by mainstream prosecutors and judges would largely try to implement the JSRC recommendations at the lowest possible level.

The Advisory Council (the Promotion Advisory Council) was established to advise the Promotion Headquarters. It had eight members. Since the Prime Minister was expected to attend some of its meetings, it was widely expected that the Promotion Advisory Committee would try to oversee the Secretariat.

B. Politics over Implementation of the JSRC Recommendations

Another complication that had not existed during the term of the JSRC was the aggressive involvement of LDP politicians. The continuous control of the government by the LDP since 1955, except the period between 1993 and 1996, had led to the development of a policy-making system that allowed intervention by LDP politicians at the stage between the preparation of a policy by respective government agencies and the final adoption of the policy by the Cabinet. The central forum for political intervention is the LDP Policy Affairs Research Council (the LDP Council), which is divided into several divisions each of which roughly corresponds with a ministry in the government. LDP politicians who represent the interests of respective ministries or concerned pressure groups, commonly called "*zoku*" (tribes), try to exert their influence to promote, block, or modify proposed policies affecting their respective constituencies. Among these divisions, the Research Council on the Judicial System had jurisdiction over judicial reform, and its Subcommittee on the System of Training of Legal Professionals, Legal Education, and Qualifying Examination started to meet in March 2002. LDP politicians in the Subcommittee were called *homu-zoku* (judicial tribe).

37. Those areas were: labor disputes; access to justice; ADR; arbitration; administrative litigation; public participation in the administration of justice and criminal justice; publicly funded criminal defense system; internationalization; education and training of legal professionals; and, legal professionals. Each Deliberative Committee had eleven members. Their minutes are still *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/index.html> (last visited Feb. 18, 2013). Daniel H. Foote was a member of the Deliberative Committee on the education and training of legal professionals. Satoru Shinomiya, Esq., a member of the one on the public participation in the administration of justice and criminal justice which designed the *saiban-in* system, attended our symposium.

These developments alerted progressive observers. Therefore, the same group of scholars who had earlier published a monthly magazine³⁸ started a new bimonthly magazine in May of 2002.³⁹ Around this time, the four major national dailies also published editorials which criticized the downgrading of many aspect of the new system, particularly the reform of legal education; examples of their titles were “Don’t Forget the Starting Point of the Reform: Law Schools” (改革の原点を忘れるな 法科大学院),⁴⁰ “Law Schools: The Justice System Reform Is Endangered?” (法科大学院これでは司法改革が危ない),⁴¹ “Don’t Allow Emasculation of Law Schools” (法科大学院の骨抜きを許すな),⁴² and “Law Schools: The Entire Legal Profession Should Seek to Realize Meaningful Contents” (法科大学院 法曹界あげて実ある内容めさせ).⁴³

C. Politics of the Reform of Education and Training of Legal Professionals

Reform of the system for the education and training of legal professionals was the first priority of the Promotion Secretariat because the JSRC deemed it the basis of the entire judicial reform agenda. New laws and regulations were enacted in the fall of 2002 in order for new graduate law schools to be established in April of 2004.⁴⁴ The political process relating to this issue had reached a conclusion in August of 2002, ahead of all the other reform issues. As explained above, the establishment of a new system for the production of legal professionals included the following four main items: (1) standards for chartering new law schools; (2) the system and standards for accreditation of law schools that have already been chartered; (3) a new National Bar Examination; and, (4) a new system of apprenticeship training.

The design of the new National Bar Examination became the

38. Gekkan shihō kaikaku (月刊司法改革) [Journal of Judicial Reform in Japan], *supra* note 14.

39. Its title was カウサ(Causa). This author was a member of the editorial board and wrote several articles for KAUSA. This bimonthly was closed in April 2004.

40. ASAHI SHIMBUN, Aug. 26, 2002.

41. MAINICHI SHIMBUN, June 17, 2003.

42. NIHON KEIZAI SHIMBUN, Feb. 2, 2002.

43. YOMIURI SHIMBUN, Oct. 13, 2002.

44. A Japanese academic year starts in April and ends in March, with summer, winter, and spring recesses interspersed.

most politically contentious issue in the debate over the reform of the system of education and training of legal professionals. The central subject of the debate was not the new examination itself, but the Preliminary Examination for those who want to take the new examination without going to a law school.

The MOJ initiated the debate. On the one hand, the JSRC proposed an exception to the requirement of a degree from a law school to sit for the examination for those who cannot afford to go to a law school, or for those who do not need to go to a law school because of their practical experience in law-related jobs. However, the MOJ argued that such limitations were impossible to design. Several members of the Law School Committee of the Central Education Council of the MEXT criticized the MOJ's position, as did members of the Advisory Committee of the Promotion Headquarters.

Yet, the MOJ and the Promotion Secretariat argued that their proposal would not violate the JSRC proposal because applicants' financial conditions and practical backgrounds could still be examined in the Preliminary Examination itself. They also argued that since the Preliminary Examination could be designed to test whether applicants have the same level of legal knowledge as that of law school graduates, their proposal would not violate the ideal presented by the JSRC.

Many observers believed that the MOJ and the Promotion Secretariat took such a position because they wanted to maintain the importance of the bar exam itself and with it, the power of the Ministry. The Deliberative Committee on Education and Training of Legal Professionals never published a formal report on this issue. It simply stopped discussion on the Preliminary Examination after June 2002, leading many observers to believe that the MOJ prevailed in this debate. Some observers believed that *homu-zoku* politicians contributed to this result through lobbying for the interest of the cram school industry.

The old Bar Examination would be gradually narrowed in the five-year transition after 2006. Much, therefore, depended on the implementation of the old and new Bar Examinations by the new National Bar Examination Committee (the Examination Committee). While the old Examination Committee consisted of only three members, with one each from the MOJ, the judiciary, and the JFBA, the JSRC proposed to expand it to include law professors and public

members. The idea was that such an expanded Examination Committee might not be as easily dominated by the MOJ and the judiciary, as was the case under the old system. Still, uncertainty remained.

After the political process strongly influenced by LDP politicians described above, the Cabinet approved on October 18, 2003 the establishment of graduate professional law schools in 2004 and immediately presented legislation designed to accomplish this to the Diet. In April of 2004, graduate professional law schools were ready to open their doors. One of the laws amended to make this possible is the Law on School Education. The amendment had two main purposes. One was to introduce the concept of professional schools as a new category of graduate programs at Japanese universities. Law schools would exemplify this plan. The other purpose was to introduce the concept of accreditation. The Education Minister would certify accreditation organizations, and more than one accreditation organization might exist in each field. Universities and colleges would be required to receive periodic accreditation. The accreditation system for law schools would exemplify this requirement. The introduction of graduate professional law schools, therefore, represents a major change in Japanese higher education as well.

The introduction of the new graduate law school system also entailed the passage of a law concerning coordination between law schools and the National Bar Examination. The provisions regarding the role of the Justice Minister *vis-à-vis* the Education Minister in chartering and accreditation were even more important. The Justice Minister may present opinions to the Education Minister regarding chartering standards and accreditation organizations; the Justice Minister may request the Education Minister to take measures against a law school; and, the Education Minister may seek consultation with the Justice Minister regarding the National Bar Examination.

Another law that was amended was the Court Act. The amendment reduced the length of judicial traineeship to one year, for those who pass the new National Bar Examination and to one year and four months for those who pass the old National Bar Examination.

The most crucial issue for the successful development of law schools and the new system for training legal professionals based on

law schools was the administration of the new National Bar Examination and the Preliminary Examination. If the new National Bar Examination was administered as a competitive examination with a limited quota or if the Preliminary Examination passed a large number of applicants who simply do not want to go to a law school, law schools would have no future. The amended and new laws regarding law schools did not have any provisions on how these two examinations should be administered.

After the highly politicized policy-making process described above, the MEXT issued the standards for chartering new law schools in March of 2003, and the Diet passed the law to allow incumbent judges and prosecutors to become faculty members at law schools while maintaining their status. Main features of new law schools were the following:

- (1) The standard term of study at a law school is three years, but a law school may also have a two-year program.⁴⁵
- (2) LSAT-type aptitude test was introduced for law school applicants. The MEXT authorized two organizations, and law schools may choose any of them.
- (3) A minimum of twelve full-time faculty members is required; fifteen to one student/faculty ratio must be maintained. However, one-third may be counted also as full-time faculty members at undergraduate law faculties and academic graduate schools of law until 2013. The teaching load of such double-counted faculty members might be simply doubled.
- (4) 20% of full-time faculty members must have a practical experience of more than five years, and a system was established to allow incumbent judges and prosecutors to become full-time faculty members while maintaining their status. Faculty members from practice may be counted as full-time faculty members even when their teaching load is much smaller than regular faculty members.

45. Three-year program was considered a standard program, but law schools were also allowed to have a two-year program for those who have already acquired a high level of legal knowledge which does not require taking courses in the first year. This two-year program was widely considered a compromise for those who wanted to maintain undergraduate law faculties. In contrast, the new legal education system in Korea required the universities which were authorized to open a post-graduate profession law school to close its undergraduate law faculty. See, Setsuo Miyazawa, Kay-Wah Chan, & Ilhyung Lee, *The Reform of Legal Education in East Asia*, 4 ANN. REV. L. & SOC. SCI. 333, 354 (2008).

(5) The law school should be independent from the undergraduate law faculty in the same university. However, it may be established within the existing academic graduate school of law.⁴⁶

(6) 30% of students must be graduates of non-law undergraduate programs or those who have social experiences. But the definition of social experience is determined by each school.

(7) The curriculum should not be limited to the subjects included in the bar exam, but rather it should consist of not only basic doctrinal courses, but also courses providing bases for legal practice (e.g., professional ethics), courses on theories of law (e.g., the sociology of law) and related disciplines (e.g., political science), and courses on advanced or applied fields of law (e.g., intellectual property law).

(8) 93 credits or more should be required for the completion of three year programs; 63 credits or more are required for two year programs.

(9) The degree of *Homu Hakushi* or J.D. will be awarded for those who complete the program.

(10) Every law school must receive accreditation every five years. The MEXT authorized three accreditation organizations, and law schools may choose any of them.

Applications were made in June of 2003 to the MEXT for 72 law schools. In spite of the stringent requirement of student-faculty ratio of 15 to one, 68 out of 72 applicants succeeded to obtain chartering by the MEXT. Since the 70 to 80% bar passage rate expected by the JSRC implied approximately 4,000 entering students, this unexpectedly large number of students worried many observers about the passage rate that would be much lower than the expected one.

The MEXT certified the Ministry-related National Center for University Entrance Examinations (NCUSS) and the JFBA-related Japan Law Foundation (JLF) as organizations to administer LSAT-type aptitude tests.⁴⁷ They administered the first exams in August 2003. In 2004, six more schools were approved, and the authorized

46. An academic graduate school of law designed to train legal academics is usually attached on top of an undergraduate faculty of law. Naturally a law school which established as part of an academic graduate school of law would have a closer relationship with the undergraduate law faculty on the basis of which the academic graduate school of law is established.

47. They are now merged.

number of entering students reached 5,825.⁴⁸

Finally, the significance of the sheer number of nearly 6,000 students each year should be considered. As described above, the JSRC noted that "it is necessary to note that securing 3,000 successful candidates for the national bar examination annually is a goal to be achieved 'deliberately and as soon as possible,' and this number does not signify the upper limit." Law schools can produce 3,000 successful candidates when they graduate nearly 6,000 students in 2007. Still the passage rate would be only roughly 50%. That is substantially lower than 70 to 80% expected by the JSRC.

D. Immediate Crisis of the Law School System

Law schools faced an enormous roadblock early in their existence. That was the policy of the MOJ regarding the new National Bar Examination. The National Bar Examination Committee decided (1) to pass 900 to 1,100 in the new Examination in 2006 and (2) to pass approximately twice as many in the new Examination in 2007. Since approximately 2,200 students were expected to graduate in 2006 from two-year programs, the pass rate in that year was expected to reach 50%. Adding those who would fail in 2006 to graduates from both three-year and two-year programs in 2007, the pass rate would go down to nearly 30%.

These developments quickly had a strong chilling effect on potential applicants to law schools, particularly graduates of non-law undergraduate faculties and working people. The number of people who took the NCUEE LSAT, for instance, declined from 35,499 in 2003, to 21,298 in 2004, 17,791 in 2005, and 16,630 in 2006. The proportion of LSAT-takers with an undergraduate law degree increased from 58.4% in 2003, to 62.1% in 2004, 67.4% in 2005, and 68.5% in 2006. The proportion of law school entrants with an undergraduate law degree increased from 65.5% in 2005 to 70.1% in 2005, and 70.7% in 2006, while the proportion of entrants with work experience declined from 48.4% in 2004 to 37.3% in 2005, and 33.3% in 2006.⁴⁹ All in all, the pool of potential applicants radically

48. For general analyses of the situation around that time, see Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, in *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA* 107 (William P. Alford et al., eds. 2007); Foote, *Introduction and Overview: Japanese Law at a Turning Point*, *supra* note 34.

49. For these statistics, see Eri Osaka, *Debate over the Competent Lawyer in Japan: What Skills and Attitudes Does Japanese Society Expect from Lawyers?*, 35 *INT'L J. SOC. L.*

shrunk, and the diversity of student body also shrunk. This shift particularly strongly impacted a small number of law schools that had admission policies to attract non-law graduates and working students.

Under these extremely unfavorable developments, the first new National Bar Examination was administered on May 19-23, 2006. 2,087 candidates completed the examination, and 403 takers, or 19.3%, were eliminated without grading their essay questions because of their low scores in multiple choice part. The final result of the first examination was published on September 21, 2006. Of the total 2,087 graduates of two-year programs who took the exam, 1,009 passed, with the passing rate of 48.3%.

What has happened since then? Daniel H. Foote will explain it in detail in his contribution to this symposium issue, along with his analysis of the closely-related issue of the size of the legal profession, particularly the number of practicing attorneys.

IV. Unrecognized Tenth Anniversary

Except the new law school system which has continued to face an increasingly worsening crisis under the low and declining bar passage rate and with the introduction of the Preliminary Examination in 2011 which allows passers to take the Bar Examination without graduating from a law school, the justice system reform has ceased to attract media attention. Part of this may be because other reform items were far less controversial or many of them have been satisfactorily implemented. Whatever the reasons, the tenth anniversary of the JSRC recommendations on June 12, 2011, met with little fanfare and was nearly totally unrecognized by the media.

The only exception among the four major national dailies was *Asahi Shimbun*. First, it published a full-page article which reviewed ten major points of reform, with an interview of Koji Sato, former JSRC Chairperson.⁵⁰ This article reviewed (1) the *Saiban-in* system,

1 (2007).

50. *Mijikana shihō e mosaku tsuzuku - kaikakushin ikensho kara 10nen* (身近な司法へ模索続く 改革審意見書から10年) [Continuing Groping for a User-Friendly Justice System: Ten Years Since the JSRC Opinions], *ASAHI SHIMBUN*, June 7, 2011. For an overview of most of the reviewed points, see, Miyazawa, *supra* note 2, at 74-89.

(2) the Japan Legal Support Center (nicknamed *Hō-Terasu*),⁵¹ (3) education of legal profession and law schools, (4) labor conciliation, (5) judicial appointment, (6) provision of state-appointed attorneys at the investigation stage, (7) expansion of ADR, (8) administrative litigation, (9) the Intellectual Property High Court, and (10) binding force of the Inquest of Prosecution.

Second, *Asahi* published a series of five articles, each of which focused on one item.⁵² The featured topics were (1) positive impacts of the increased number of practicing attorneys, particularly in areas which used to have no or only a very small number of lawyers, including a story about a small city in north-east Japan which was heavily damaged by the tsunami on March 11, 2011, (2) contrasting trends of labor conciliations and formal civil litigation, (3) administrative litigation, (4) provision of state-appointed attorneys at the investigation stage, and (5) in-house lawyers of companies and local governments and the crisis of the law school which produced such lawyers.

Third and finally, *Asahi* capped these articles with an editorial.⁵³ The editorial stated that in contrast to the highly successful Saiban-in system, the new system of training of legal professionals is bumping into a thick wall, criticized lawyers who oppose further increase of lawyers for their selfishness, and expressed a hope that a new committee appointed by the government will engage in a rich discussion which goes beyond selfish interests and motives.⁵⁴

Asahi's evaluation may be summarized in the following way:

(1) Practicing attorneys: The policy to increase the number of new lawyers has had a positive impact to increase lawyers working in small towns, particularly those jurisdictions of branch district

51. See JAPAN LEGAL SUPPORT CENTER, <http://www.houterasu.or.jp/en/index.html> (last visited Feb. 18, 2013); Miyazawa, *supra* note 2, at 84-86.

52. *Shihō wa ima - kaikaku no 10nen (1)-(5)* (司法はいま 改革の10年(1)-(5)) [The Justice System Now: Ten Years of Reform (1)-(5)], ASAHI SHIMBUN, June 6-10, 2011.

53. *Shihō kaikaku 10nen - jidai ninau sou dou sodateru* (司法改革10年次代担う層どう育てる) [Ten Years of Justice System Reform: How Should We Rear the Next Generation of Lawyers?], ASAHI SHIMBUN, June 14, 2011.

54. *Asahi* also published interviews of three people, a lawyer who worked in a jurisdiction of a branch district court which had only one lawyer before his arrival, the JFBA president who defended JFBA's current proposal to reduce the number of new lawyers in terms of the interest of citizens, and Daniel H. Foote who argued that Japan still needs a wider variety of lawyers. See *Shihō kaikaku-sono saki wa* (司法改革 その先は) [Justice System Reform: What Lies Ahead?], ASAHI SHIMBUN, June 14, 2011, morning.

courts which used to have no or only one lawyer (called “zero-one” areas). JFBA’s program to provide financial assistance to lawyers going to law offices in such areas (called *Himawari Kōsetsu Jimusho*) and law offices of the Japan Legal Support Center (nicknamed *Hō-Terasu*) operated by government budget have contributed to such a result. However, just having one lawyer in such an area is not enough, while there are also needs for better access to lawyers in urban areas from indigent people, including temporary workers and foreigners.

(2) *Hō-Terasu*: It was established as a nation-wide organization which provides the public with information about sources of legal assistance, administers civil legal aid and state-appointed criminal defense lawyers, provides legal assistance to crime victims, and provides legal services in depopulated areas. It has increased its law offices with full-time staff attorneys, and the number of callers for information and the application to civil legal aid have been increasing. However, it still needs to improve its public recognition.

(3) Law schools: Law schools have had a positive impact to increase the number of lawyers who go into new practice settings, including corporate legal departments and local governments. However, too many law schools were established, and, as a result, the bar passage rate has declined to 20 to 30%. Restructuring of the system is inevitable.

(4) Judicial training and appointment:⁵⁵ The system to give opportunities to incumbent judges to work outside the judiciary has spread, but the appointment of practicing attorneys as judges has been very limited, with only one in 2010.⁵⁶

55. Lower court judges are appointed by the Cabinet on the basis of the list of candidates prepared by the Supreme Court for a term of ten years (Article 80 (1), Constitutional Law of Japan). It is widely believed that the Cabinet makes appointments totally according to the list. Supreme Court’s General Secretariat used to have a total monopoly of the authority to nominate judicial candidates. Following recommendations by the JSRC, the Advisory Committee on the Nomination of Lower Court Judges was established in 2003; the General Secretariat now has to obtain advisory opinions from the Committee before making final nomination to the Cabinet. Also following JSRC recommendations, a system was introduced in 2005 to give opportunities to assistant judges to work outside the judiciary in the middle of their ten-year term. Still another reform about judges following JSRC recommendations is to increase transparency of the system of evaluating incumbent judges, by allowing judges, among other things, to request a written evaluation to the superior. See Miyazawa, *supra* note 2, at 86-89.

56. For an overview of the court system and different types of judges, see, Gerald Paul McAlinn, *Introduction: Japan*, in McAlinn, *supra* note 2, at 30-38.

(5) Intellectual Property High Court: The Intellectual Property High Court was established in 2005 as a special branch of the Tokyo High Court with sole jurisdiction to review decisions of the Japan Patent Office (JPO) and to decide appeals to district court decisions in patent or other technical IP cases.⁵⁷ The rate of overturning JPO decisions is increasing, and the business community has welcomed it.

(6) Administrative litigation: The provision about standing in the Administrative Case Litigation Act was slightly liberalized in 2005. While there have been some cases which seem to indicate its positive impact, the overall number of administrative litigation has not increased.

(7) Labor conciliation: The Labor Conciliation Procedure was introduced in 2006 as an ADR annexed to a district to handle disputes between workers and employers. The case is handled by a panel of a judge and two conciliators. Settlement is tried first, and, if the parties cannot settle, the panel will propose a resolution, and it will be finalized if both parties accept. Users are mostly satisfied, and the number of cases has been increasing.

(8) Enhancement of ADR: An act to promote the use of ADR was enacted in 2006, and the system by which the government accredits appropriate organizations as ADR providers was introduced. While the number of such provided reached nearly 100 in 2011, they have not yet been well used.

(9) Expansion of the provision of state-appointed criminal defense lawyers:⁵⁸ Free defense lawyers were available only after indictment before the reform. In 2006, provision of state-appointed defense lawyers was expanded to cover suspects of relatively serious crimes after the judicially authorized detention which usually occurs 72 hours after arrest, and it was expanded to cover detained suspects less serious crimes in 2009. The number of suspects who had a lawyer increased ten times from 2007 to 2010. However, this has created a problem that interview rooms at police stations where suspects are detained are crowded by lawyers, and lawyers often have to wait their turn.

(10) Binding force of decisions by the Prosecution Inquest

57. See Edward S. "Ted" Johnson, Jr., *Intellectual Property and Licensing*, in McAlinn, *supra* note 2, at 372-73.

58. See Miyazawa, *supra* note 2, at 75.

Board: Prosecution Inquest is the system where eleven randomly-selected local voters review a prosecutor's decision not to indict in a case. While its decision was totally advisory before the reform, it became binding in 2009 once the Board twice decided that the suspect should have been indicted by eight or more votes. Practicing attorneys are appointed as special prosecutors in such cases. There had been four such decisions by June 2011, including the one against Ichiro Ozawa, a powerful politician, but no one had been convicted. There is a criticism of the system for allowing public sentiments to overturn prosecutor's decision. The propriety of the system will be questioned if acquittals continue.

(11) *Saiban-in* system: 11,889 people served as *saiban-in* from August 2009 to March 2011. More than 95% responded after their service that it was a worthwhile experience. Review of the system is to be conducted after three years of operation. Exclusion of sex offenses and drug offenses and the liberalization of *saiban-in*'s duty of confidentiality are likely to be among the issues to be discussed.

These *Asahi* articles certainly provide useful information and perspectives to review the first ten years of justice system reform initiated by the JSRC. However, they are not enough. No other media outlet paid serious attention and no law school, nor academic association held a symposium. *Keidanren* seemed to have totally forgotten the role it played ten years ago, and, most of all, the Japanese government has shown no interest to conduct a comprehensive review of the reform.

This situation was extremely unfortunate because, as I have explained above, JSRC's recommendations included a wide range of reform proposals which might affect many aspects the people, society, and country of Japan. The tenth anniversary was an ideal occasion to examine successes, failures, and remaining issues of the justice system reform in Japan. There was a dire need to fill this vacuum.

V. The Symposium

Under the new Chancellor and Dean, Frank H. Wu, the University of California, Hastings College of the Law started to strengthen its ties with East Asia and to enhance its offerings in East Asia. The establishment of the East Asian Law Program was a vital

step in that direction.⁵⁹ I thought that a symposium on justice system reform would provide an ideal occasion to inaugurate the program, and leaders of the College accepted my proposal.

The symposium was planned with a full-day formal program on Friday, September 7, 2011, and a half-day informal program on Saturday, September 8, 2011. In addition to a keynote speech, the formal program on September 7 was divided into four major areas of reform: (1) legal education and legal profession; (2) courts and judges; (3) civil justice and ADR; and (4) criminal justice. General comments were added at the end. On the morning of September 8, a presentation on judicial appointment and evaluation was placed at the beginning, and a free discussion with spontaneous comments filled the rest of the morning. I was to take the role of moderator on both September 7 and 8.

We were extremely fortunate to have Shunsuke Marushima, Esq., as the keynote speaker. A practicing attorney with an experience of 35 years by the time of the symposium, interspersed with roles of public service, he was intimately involved in the justice system reform in Japan, particularly as a senior staff member of the Secretariat of the JSRC in 1999-2001 and as the Secretary General of the JFBA in 2008-2010. He is currently a board member of the Nuclear Damage Liability Facilitation Fund (原子力損害賠償支援機構) which was established by the Japanese government in August 2011 in the wake of the disaster at the Fukushima Daiichi Nuclear Power Plant on March 11, 2011, and a member of the Judicial Training System Review Committee (法曹養成制度検討会議) established under the MOJ in August 2012, just a few days before the symposium. We were grateful to him for his speech as well as candid comments throughout the symposium, all based on his personal experience. Professor Hiroshi Fukurai kindly provided interpretation. Kozo Yabe, Esq., and Akiko Kawakatsu, Esq., kindly helped Mr. Marushima as his interpreters for discussion throughout the symposium.

Each session on the four selected areas consisted of an invited speaker and a discussant selected from among faculty members of the University of California, Hastings College of the Law. The

59. See *University of California Hastings College of the Law East Asian Law Program*, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, <http://www.uchastings.edu/academics/study-abroad-exchange/docs/UC%20Hastings%20East%20Asian%20Law%20Current.pdf>.

invited speakers and the general discussant were all top scholars in Japanese or East Asian legal studies. We were very honored and proud to have them. Following was the structure of the symposium.

September 7, 2012.

Morning:

Introduction: Setsuo Miyazawa, Professor of Law, Aoyama Gakuin University; Visiting Professor of Law, University of California, Hastings College of the Law.

Keynote Speech: Shunsuke Marushima, practicing attorney; former senior staff member of the JSRC; former Secretary General, JFBA. (In Japanese; consecutive interpretation was provided by Professor Hiroshi Fukurai, Professor of Sociology, University of California at Santa Cruz)

Session 1: Legal Education and Legal Profession.

Speaker: Daniel H. Foote, Professor of Law, University of Tokyo.

Discussant: Richard Zitrin, Lecturer in Law; University of California, Hastings College of the Law.

Afternoon:

Session 2: Courts and Judges.

Speaker: Tom Ginsburg, Leo Spitz Professor of International Law and Professor of Political Science, University of Chicago.

Discussant: Dorit Rubinstein Reiss, Professor of Law, University of California, Hastings College of the Law.

Session 3: Civil Justice and ADR.

Speaker: Mark Levin, Professor of Law, University of Hawai'i William S. Richardson School of Law.

Discussant: Eric Sibbitt, Adjunct Professor of Law, University of California, Hastings College of the Law.

Session 4: Criminal Justice.

Speaker: Hiroshi Fukurai, Professor of Sociology, University of California at Santa Cruz.

Discussant: Keith J. Hand, Associate Professor of Law, University of California, Hastings College of the Law.

General Comments: Frank K. Upham, Wilf Family Professor of Property Law, New York University.

September 8, 2012.

Morning: Informal Session.

Presentation: Judicial Appointment and Evaluation.

Speaker: Takayuki Ii, Associate Professor of Law, Hirosaki University.

Free Discussion.

VI. This Symposium Issue

Although a videotaping of the formal program on September 7 can be seen online,⁶⁰ the symposium would not produce much impact on the analysis of justice system reform in Japan by a broad range of scholars in the future unless papers are published on the basis of it. This symposium was also too precious to finish without publications because this was the first comprehensive symposium on justice system reform in Japan and the group of scholars who got together there was truly distinguished.

Fortunately, *HICLR* had agreed at the planning stage of the symposium that it would publish a symposium issue. I was most grateful to its editors. In addition to an English translation of Mr. Marushima's keynote speech by Professor Fukurai, I asked Professors Foote, Ginsburg, Levin, Fukurai, Upham, and Ii to write an article or a note based on their respective presentation or comments. Furthermore, while he was a discussant, I asked Professor Sibbitt to write a paper because he is himself a Japanologist. All of them graciously accepted my request. Six scholars eventually submitted their contributions.

After Mr. Marushima's keynote speech, the articles and comments are arranged thematically. The two articles on legal education reform by Professors Foote and Sibbitt come first, and they are followed by Professor Ii's article on the reform of judicial appointment and evaluation of incumbent judges. Professor Levin's paper on civil justice comes next, and Professor Fukurai's paper on citizen participation in the administration of justice is placed at the end of the substantive part of this symposium issue. Professor Upham's general comments conclude the symposium issue.

Mr. Marushima's keynote speech, "Historical Genealogy of Japan's Judicial Reform: Its Achievements and Challenges,"

60. The formal program on September 7 was completely videotaped, and it can be seen at <http://hastingsmedia.org/Downloads/japan/>.

provides us with a concise overview of justice system reform in Japan, from its historical background, to its present difficulties under the fading interest of the public and the government. His speech points out all the major items to be discussed.

Professor Foote's article, "The Trials and Tribulations of Japan's Legal Education Reforms," is truly a *tour de force* and, with no doubt, the most detailed account of the legal education reform in Japan, either in English or otherwise. Throughout the article, his deep and broad involvement in the reform process both as a member of various government committees and as the only American full-time professor at a top Japanese law school provides information and insights unavailable elsewhere. He also discusses the debate over the number and roles of lawyers as one of the crucial issues which has and will affect the direction of legal education in Japan. He discusses many positive contributions of the new law school system most of which are unknown to the public and policy-makers. His view about the future of the law school system was fairly pessimistic before learning the results of the 2012 preliminary examination. It has become more pessimistic after learning the results. This article will instantly become essential reading for anyone who wants to discuss the legal education reform in Japan.

Professor Sibbitt's article, "Adjusting Course: Proposals to Recalibrate Japan's Law Schools and Bar Exam System," is a crisp presentation of proposals to save the law school system and realize its original aspirations. Probably not too surprisingly, his proposals resemble many of the proposals from progressive reformers in Japan⁶¹ and the basic features of the new law school system Korea introduced after learning the tribulations of the Japanese reform.⁶² With those proposals, Professor Sibbitt's article nicely complements Professor Foote's article.

Though fairly short, Professor Ii's article, "Japan's Judicial System May Change, But Its Fundamental Nature Stays Virtually the Same?: Recent Japanese Reforms on the Judicial Appointment and Evaluation," is probably the first English-language paper about the reform of judicial appointment and evaluation of lower court judges in Japan that is easily accessible outside Japan.⁶³ He states

61. See Kawabata & Miyazawa, *supra* note 36; Miyazawa, Chan & Lee, *supra* note 45, at 344-46.

62. See Miyazawa, Chan & Lee, *supra* note 45, at 353-55.

63. Professor Foote earlier published a much longer article on this and related

that many JSRC proposals were systematically altered or removed in the process of rule-making and implementation, and, as a result, there remains virtually an unchanged system of institutional authority wielded by the Supreme Court and the judiciary as a whole. He concludes this article by presenting two possible scenarios for the future, both positive and negative.

Professor Levin's paper, "Circumstances That Would Prejudice Impartiality: The Meaning of Fairness in Japanese Jurisprudence," looks at a concept which is discussed less often in the context of civil justice, than in the context of criminal justice, namely the concept of procedural fairness or due process. He points out that the 1996 revision of the Code of Civil Procedure incorporated that concept in its Article 2 and analyzes judicial disqualifications to find out how it has been treated. Unfortunately, relevant published decisions are scarce. He contemplates, however, a decision handed down by the Supreme Court in 2011, which was the 10th anniversary of the JSRC report, and a few other cases suggest a possibility of the concept playing increasingly more visible role in Japanese jurisprudence.⁶⁴

Professor Fukurai's article, "A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation," is another *tour de force* in this symposium issue. He not only discusses the *saiban-in* system and the reform of the Prosecution Review Commissions (Prosecution Inquest) *per se*, but also analyzes a broader range of criminal justice issues in light of potential impact of the *saiban-in* system. Furthermore, he goes beyond criminal justice and discusses possibility to introduce lay adjudication into civil and administrative cases. This will serve as an ideal starting point for any scholar who wants to conduct a comprehensive study of the implications of citizen participation in justice system as a whole.

topics in a Japanese journal. See Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HOSHAKAIGAKU [THE SOCIOLOGY OF LAW] 128 (2007).

64. Professor Levin and his colleague have compiled a comprehensive bibliography about the implementation of JSRC recommendations. I am most grateful to their great work. See, Mark A. Levin and Adam Mackie, *Truth or Consequences after the Justice System Reform Council: An English Language Bibliography from Japan's Millennial Legal Reforms*, 14 ASIAN-PAC. L. & POL'Y J. (forthcoming April 2013).

Finally, Professor Upham's comment, "Japanese Legal Reform in Institutional, Ideological, and Comparative Perspective," provides us with an opportunity to analyze the Japanese situation from a broader or higher vantage point. Many authors writing about the justice system reform in Japan are actually participants of its political process, one way or another; at this symposium, Mr. Marushima, Professor Foote, Professor Ii, and myself, for instance, have been certainly so. People like us may tend to look at the scene from one's vantage point on the ground level and may fail to perceive a larger picture. Professor Upham's masterful comment is refreshing and stimulating. He presents three points. The first point is institutional: in a democratic country, there should be no surprise that social progress proposed by some elite can be aborted by other people who wanted to maintain their comfortable *status quo*. This point invites us to conduct political analyses of the forces and mechanism which worked in the process of success or failure of specific reform proposals. It also raises a conceptual question of whether the policy-making process can be considered democratic if those people protecting their vested interests have privileged positions and more or less control the policy-making process. The second point is ideological: increasing lay participation in the administration of justice may be contrary to the goal of the justice system reform to promote the rule of law in Japan. This point invites us to examine in what sense the JSRC used the concept of the rule of law and whether we accept it or not.⁶⁵ The third point is comparative: while legal reformers outside the United States often take procedural justice embraced in the United States as their own ideal, the United States has failed miserably in substantive justice, so that reformers in other countries like Japan should be careful not to lose substantive justice. This point is probably most profound. Is trade-off between procedural justice and substantive justice inevitable? To use the term repeated by the JSRC, what "shape of our country" do we want?

Of course, no single symposium can possibly cover all the relevant issues of a broad social phenomenon like the justice system reform in Japan. Still, I hope that this symposium issue will become an indispensable source of reference for any scholars and students who want to investigate it by themselves and inspire more and better investigations.

65. For my view, see *supra* note 19 and accompanying text.

The Trials and Tribulations of Japan's Legal Education Reforms

By DANIEL H. FOOTE *

I. Introduction

A sense of momentum accompanied the start of Japan's new legal education system in the spring of 2004. Less than three years had passed since the Justice System Reform Council (the Reform Council) issued its final report in June 2001, proposing a major

* Professor of Law, The University of Tokyo. I have been involved in debates and activities relating to Japan's legal education reforms since the late 1990s, including serving as a member of the Expert Consultation Committee on Legal Training, Headquarters for Promotion of Justice System Reform (2002-04); an expert member of the Subcommittee on Law Schools, Committee on Universities, Central Council on Education, Ministry of Education, Culture, Sports, Science and Technology [MEXT] (2001-05); a member of the Advisory Council on Law School Accreditation, National Institution for Academic Degrees and University Evaluation (2003-present); a member of the Citizens' Council, Japan Federation of Bar Associations (2004-present); and a member of various working groups and committees relating to legal education reform for the University of Tokyo and the Japanese Association of Law Schools. As should be evident from the contents of this article, the views expressed herein are my own and should not be attributed to any other persons, bodies or entities.

Portions of my research were supported by the following grants, for which I wish to express my gratitude: the Egusa Foundation; the Japan Society for the Promotion of Science (JSPS), Grant-in Aid for Scientific Research, Base Studies C (Reexamination of the Substance and Process of Justice System Reform); and JSPS, Grant-in-Aid for Scientific Research, Base Studies A (Japanese Law and the Development of Law in East Asia). I would also like to express my thanks to Miyazawa Setsuo and other participants in *Successes, Failures, and Remaining Issues of the Justice System Reform in Japan*, UC Hastings College of the Law; Murayama Masayuki; Kent Anderson; Robert B Leflar; Lawrence Repeta; Luke Nottage; Gerald McAlinn and Herbert Kritzer for their comments on this paper. I am also grateful to the many colleagues, students, and participants in so many other conferences and endeavors from which I have learned more about legal education and the reform process.

Note regarding name order: For citations in footnotes to works published in English, I have used the name order that appears in the publication. Otherwise, for Japanese names, I have followed the order normally used in Japan: i.e., family name first, followed by given name.

restructuring of Japan's legal training system centered on a new tier of graduate level law schools.¹ And less than a year and a half had elapsed since the details of the law school system were decided and enabling legislation passed.² Despite the tight timetable, sixty-eight law schools were ready to commence operations in 2004, having arranged facilities, assembled faculty, developed curricula, and taken all the other steps required to complete the chartering process; and six additional law schools undertook operations the following year.

It would be a major overstatement to suggest faculty members unanimously supported the reforms. At a number of institutions, pockets of committed faculty members seized the opportunity to push for innovative reforms. On the whole, however, most traditional faculty members were at best lukewarm, and in some cases quite hostile. Yet most of the doubts were voiced only in private.³ In the run-up to the start of the new system, university after university hosted its own symposium, trumpeting the mission of the new law school it was planning to open. At the same time, behind closed doors many professors voiced skepticism about the new system,⁴ but few went public with their opposition to the

1. SHIHŌ SEIDO KAIKAKU SHINGIKAI (司法制度改革審議会) [Justice System Reform Council], SHIHŌ SEIDO KAIKAKU SHINGIKAI IKENSHO - 21 SEIKI NO NIHON O SASAERU SHIHŌ SEIDO (司法制度改革審議会意見書 - 21世紀の日本を支える 司法制度) [REFORM COUNCIL RECOMMENDATIONS] [Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the Twenty-First Century], June 12, 2001, available in Japanese at <http://www.kantei.go.jp/jp/sihouseido/report-dex.html>; available in English at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>. Quotes contained herein are from the English version. That version is not paginated separately, however, so the page cites are to the original Japanese version.

2. Hōkadaigakuin no kyōiku to shihō shikentō to no renkeitō ni kansuru hōritsu (法科大学院の教育と司法試験等との連携等に関する法律) [Act concerning Law School Education and its Connection to the Bar Exam, etc.], Act No. 139 of 2002.

3. At the time, when I asked why this was the case, one response I received was that faculty members feared getting on the bad side of officials of MEXT, which was assumed to be strongly in favor of the new law school system. My own speculation was that, early in the process, most observers probably assumed this reform proposal, like others in the past, would not be implemented in any event, so there was no point in risking offending anyone by taking a public stand in opposition. Thereafter, momentum built so quickly that it might have seemed pointless to oppose the plan publicly.

4. The reasons were varied. At a broad level, some questioned whether there was a need to reform the existing system at all; or, if so, whether there was a need for such dramatic restructuring; or why the United States was selected as a model.

reform plans. Notwithstanding the concerns, universities – and one bar association – rushed to open new law schools, based on a variety of motivations.⁵ At the time, the metaphor that came to mind was of a train leaving the station. Institutions raced to get on board, out of fear they would be left behind if they missed the initial opportunity.

Whatever the inner feelings of faculty members, interest among potential students was high. Together, the law schools had a total official capacity of 5,590 in 2004, rising to 5,825 in 2005.⁶ They were flooded with applicants. Nearly 73,000 candidates applied for admission in 2004.⁷ That number presumably reflected considerable

More concrete objections included the views that the Socratic method was designed for the precedent-based common law system but was not suited to Japan's Continental law based system, interactive teaching methods would not function well in Japan because Japanese students are not accustomed to voicing their opinions in front of others, and one-way lectures are much more efficient for teaching law. Another objection was that the introduction of the new system would necessitate revamping teaching materials and teaching methods, and would entail tremendous time and energy.

5. For the universities that traditionally had produced large numbers of legal professionals, establishing law schools was taken as a given. For the next tier of universities, which produced some legal professionals and aimed at producing more, the new system represented an opportunity. Some viewed the law school as an essential element of an image as a full-service university. Some regional universities viewed opening law schools as almost a civic obligation, aimed at providing opportunities for local residents to enter the legal profession without having to move away and, at the same time, aimed at strengthening the local legal profession. A few institutions, including the Daini Tokyo Bar Association, opened law schools to promote a certain vision of legal education. Despite the high initial cost of establishing law schools and high ongoing costs resulting from strict faculty-student ratios and other requirements, some institutions presumably felt that, over time, the law schools would generate profits, on the assumption that the Reform Council's reference to a 70 to 80% bar examination pass rate for law school graduates, as discussed in text at note 112 *infra*, would assure a steady flow of applicants.

6. Hōkadaigakuin no nyūgakuteiin no suii (Heisei 24nen 4gatsu tsuitachi genzai) (法科大学院の入学定員の推移 (平成24年4月1日現在)) [Shifts in Enrollment Capacity of Law Schools (as of Apr. 1, 2012)] [Shifts in Enrollment Capacity], *in materials compiled for Hōsō yōsei seido kentōkaigi* (法曹養成制度検討会議) [Expert Advisory Council on the Legal Training System] [Expert Advisory Council on Legal Training], Sankō shiryō 2, Hōkadaigakuin ni tsuite (Heisei 24nen 10gatsu 30nichi kōshūn) (参考資料2, 法科大学院について (平成24年10月30日更新)) [Reference Material 2, Regarding Law Schools (updated Oct. 30, 2012)], at 65, available at <http://www.moj.go.jp/content/000103612.pdf> (last visited Nov. 29, 2012).

7. These and the other statistics on numbers of applicants, entrants, and competition rates contained in this paragraph, and nonlaw and *shakaijin* entering students in the next paragraph, are available at Shiganshasū-nyūgakushasūtō no suii (Heisei 16nendo – Heisei 24nendo) (志願者数・入学者数等の推移(平成1

pent-up demand from those who had harbored hopes of entering the legal profession but had long since given up the thought of passing the existing, hyper-competitive bar exam (for which the passing rate hovered under 3%). Demand remained robust in the following years, as well, with over 40,000 applicants each year through 2007. These figures resulted in competition rates for admission of 13/1 for 2004 and between 6.9/1 and 7.8/1 in years 2005 through 2007. For 2004, the number of entrants exceeded the total official capacity of the law schools, with 5,767 students enrolled. Enrollment remained high thereafter, as well, with 5,500 to 5,800 new entrants from 2005 and through 2007.

Notably, in the early years demand for admission was strong not only among recent graduates of the undergraduate law faculties (commonly referred to as *hōgaku kishūsha*, 法学既修者, or just *kishūsha*) but among graduates from other faculties (*hōgaku mishūsha*, 法学未修者, or simply *mishūsha*) and among those who had gained real-world experience (*shakaijin*, 社会人). *Shakaijin* comprised almost half the entering class in 2004 and over a third in 2005 and 2006; nonlaw graduates comprised over a third in 2004 and nearly 30% each of the following two years.⁸

For applicants and students in the early years, the excitement was genuine. Part of that excitement undoubtedly stemmed from rhetoric regarding the projected pass rate on the new bar exam. Language in the Reform Council's recommendations implied that the pass rate for those who successfully completed study at law schools would be in the 70% to 80% range.⁹ Accordingly, those who gained admission to law school in the first year or two were optimistic about their future prospects. Another factor underlying student interest was the teaching methods. Many students found the small classes, interactive teaching, and other aspects of the new

6年度~平成24年度)) [Shifts in Numbers of Applicants, Entrants, etc. (2004-2012)] [Shifts in Applicants], in 2 Regarding Law Schools, *supra* note 6, at 177-79.

8. The figures for *shakaijin* and nonlaw graduates are not exclusive; presumably there is a fair amount of overlap. The "nonlaw" designation requires further explanation. The *mishūsha* category includes some law graduates, as well as nonlaw graduates. Some law schools insist all students enroll for three years, regardless of their undergraduate programs. In other cases, law graduates either chose to spend an extra year at law school or were not able to qualify for the two-year program. Some sets of statistics list only *mishūsha*, without identifying their undergraduate majors. Others, including the figures relied on here, identify whether students graduated in law or in other fields.

9. See text at note 112 *infra*.

law schools much more stimulating than the large, doctrine-centered, one-way lecture classes that predominated in existing legal education.

The Ministry of Education, Culture, Sports, Science and Technology (MEXT) threw its support behind the new law schools, which it viewed as a central element in its vision for a new tier of graduate schools for training¹⁰ in the professions.¹¹ The Ministry of Justice (MOJ) and the Japanese judiciary also offered their support, which included providing prosecutors and judges to teach at the law schools. In an especially noteworthy development, the organized bar also pledged its support. At an extraordinary meeting of the general assembly of the Japan Federation of Bar Associations (JFBA) held on November 1, 2000, the JFBA leadership pushed strongly for a resolution to endorse the vision of the new system for legal education, the outlines of which the Reform Council already had laid out.¹² The resolution explicitly mentioned expansion in the size of the legal profession as one element of the reforms; and the reasons offered in support of the resolution specifically referred to the Reform Council's call to increase the annual number of bar passers from 1,000, where it stood in the year 2000, to 3,000.¹³ The resolution drew heated debate, and attendance

10. Training was the dominant focus of MEXT's vision for the schools. An early proposal by the relevant MEXT committee would have excluded research entirely from the law school mission. See MEXT, Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education], Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin bukai (法科大学院部会) [Subdivision on Law Schools], 7th Session, Dec. 11, 2001, Shiryō 2-2, Hōkadaigakuin no setchikijuntō ni tsuite/ron ten o han'ei shita kosshi (an) ni tsuite (資料2-2, 法科大学院の設置基準等について/論点を反映した骨子(案)について) [Material 2-2, Regarding Establishment Standards, etc., for Law Schools/Regarding the Gist of Issues (Draft)], available at http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo4/005/gijiroku/011202/011202b.htm.

11. MEXT's categorization of professional graduate schools also includes schools in the fields of business, accounting, public policy, public health, and other fields. MEXT, Senmonshoku daigakuin ichiran (Heisei 24nen 4gatsu genzai) (専門職大学院一覧(平成24年4月現在)) [List of professional graduate schools (as of April 2012)], available at http://www.mext.go.jp/a_menu/koutou/senmonshoku/08060508.htm (last visited Oct. 5, 2012).

12. For a discussion of that meeting, by a lawyer who has been deeply involved in the legal education reform process, see Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 SO. TEX. L. REV. 419, 429-30 (2002).

13. Nihon bengoshi rengōkai (日本弁護士連合会) [Japan Federation of Bar Associations] [JFBA], Rinji sōkai - Hōsō jinkō, hōsō yōsei seido narabi ni shingikai e no yōbō ni kansuru ketsugi (臨時総会・法曹人口、法曹養成制度並びに審

at the extraordinary general meeting was high. Of the slightly over 17,000 lawyers registered as of 2000, nearly 11,000 voted, either in person or by proxy.¹⁴ Despite bitter opposition, the resolution passed with over a two-thirds' majority, 7,437 to 3,425.¹⁵ Notwithstanding this seemingly strong endorsement by the nationwide bar, opposition to the new system, and especially to the increase in the size of the bar, remained strong, particularly in local areas. Even in those areas, however, in many cases members of the bar have taught courses or otherwise have been supportive of the local law schools.

To be sure, many concerns and much uncertainty surrounded the new legal training system. Yet the fears were accompanied by considerable hope and excitement.

As of this writing in late 2012, eight and a half years later, the mood is decidedly darker. Five of the 74 law schools have closed or merged, or will do so in the near future, and have stopped accepting new students.¹⁶ Most other law schools have reduced capacity. As a result, the total official capacity of the law schools as of April 2012 was 4,484,¹⁷ down over 40% from the peak. Demand for those spots has dropped even more. Only 18,446 candidates applied for admission in 2012,¹⁸ down nearly 75% from the 2004 peak. The resulting competition rate for admission was just 4.1/1 for 2012; and at thirteen law schools the competition rate was under 2/1. The total number of entrants also has declined dramatically, with just

議会への要望に関する決議) [Extraordinary General Assembly Meeting - Resolution concerning the Size of the Legal Profession, the System for Legal Training, and Requests to the Advisory Council] [JFBA 2000 Resolution], Nov. 1, 2000, available at http://www.nichibenren.or.jp/activity/document/assembly_resolution/year/2000/2000_4.html.

14. Membership in the JFBA is compulsory for registered lawyers in Japan, 弁護士法 [Lawyers Act], Act No. 205 of 1949, art. 8.

15. KOBAYASHI MASAHIRO (小林正啓), KONNA NICHIBENREN NI DARE GA SHITA? (こんな日弁連に誰がした?) [Who Turned the JFBA into This?] (Heibonsha shinsho (平凡社新書), 2010), at 212.

16. See, e.g., NIHON KEIZAI SHINBUN, WEB VERSION, *Surugadai, hōkadaigakuin no boshū teishi, nyūgakusha gekigen, 13nendo kara, ruikai 5kōme* (駿河台大, 法科大学院の募集停止, 入学者激減, 13年度から, 累計5校目) [Surugadai University to Suspend Recruitment for Law School, Entrants Down Dramatically, from 2013 Academic Year, 5th School to Do So], July 6, 2012, available at http://www.nikkei.com/article/DGXNASDG0604L_W2A700C1CR8000/ (last visited Nov. 7, 2012).

17. Shifts in Enrollment Capacity, *supra* note 6.

18. Shifts in Applicants, *supra* note 7, at 177.

3,150 new entrants in 2012,¹⁹ down over 45% from the peak. Thus, notwithstanding the great reduction in capacity, only about 70% of the available seats were taken. The decline in *shakaijin* and nonlaw graduates also has been striking. In 2012, *shakaijin* comprised under 22% of the entering class, nonlaw graduates under 19%²⁰ (and since those categories are not exclusive, it is safe to assume overlap).

Although MEXT has been heavily involved in the push for further consolidation and other measures to reform the law school system, that Ministry continues to express its fundamental support for the law school system.²¹ The MOJ and judiciary continue to provide prosecutors and judges to teach at the law schools, and provide indirect support by hiring graduates. In many respects, the organized bar also has provided valuable support for the new law school system throughout its existence. The Japan Law Foundation (JLF), a research body established primarily under the auspices of the JFBA,²² developed one of the two alternative law school aptitude tests (with the JLF test becoming the sole law school aptitude test in 2011) and established one of the three alternative law school accreditation bodies (all three of which continue to survive, with law schools given the choice of which to use).²³ Many lawyers teach clinical and other practice-related courses at law schools across Japan; and many local bar associations have supported the educational activities of law schools. Moreover, the JFBA has

19. *Id.* at 178.

20. *Id.* at 178-79.

21. See, e.g., Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education (MEXT)], Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin tokubetsu iinkai (法科大学院特別委員会) [Special Committee on Law Schools], Hōkadaigakuin kyōiku no saranaru jūjitsu ni muketa kaizen hōsaku ni tsuite (teigen) (法科大学院教育の更なる充実に向けた改善方策について (提言)) [Regarding Plans for Improvement Aimed at Further Strengthening Law Schools (Proposal)] [Special Committee 2012 Proposal], July 19, 2012, available at http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo0/gijiroku/_icsFiles/afieldfile/2012/07/24/1323733_15.pdf (last visited Nov. 5, 2012).

22. Other affiliated organizations include the Japan Institute of Certified Public Accountants and associations for certified public tax accountants, patent attorneys, and shiho-shoshi lawyers (traditionally referred to in English as “judicial scriveners”). In a reflection of the central role of the JFBA, though, the Foundation’s official name in Japanese, translated literally, is JFBA Legal Research Foundation (日弁連法務研究財団).

23. For a discussion of the three accreditation bodies, see Daniel H. Foote, *Internationalization and Integration of Doctrine, Skills and Ethics in Legal Education: The Contrasting Situations of the United States and Japan*, 75 HŌSHAKAIGAKU 125, 170-73 (2011).

undertaken serious efforts to expand the market for legal services and to assist law school graduates in finding employment.

In other respects, however, the stance of the organized bar has shifted sharply. The greatest shift relates to the number of bar passers. As discussed in more detail later,²⁴ within just a few years after the new system began, the JFBA backed off from its support for the proposed expansion to 3,000 passers per year, first moving to a “go slow” stance, and then, more recently, advocating a rollback in the number of passers, from the 2,000 level, first reached in 2008 and maintained every year since, to just 1,500 per year or even fewer. In its battle over the size of the legal profession, the JFBA has undertaken attacks on law schools and other aspects of the new legal training system, with some bar leaders calling for a thorough reexamination of the entire system.

Presumably influenced in part by the organized bar’s highly coordinated attacks, some politicians and business leaders also have voiced concerns over the new legal education system; and, by reporting on these criticisms, the mass media have helped spread the image of a system in crisis. In response to the calls for reexamination, in May 2011 a new body, charged with undertaking a comprehensive review of the legal training process, was established under the auspices of the Cabinet Secretariat, the MOJ and MEXT, among other ministries. As with the Reform Council, a majority of the members of that body, the Forum on Legal Training, came from outside academia, and a majority from outside the legal profession.²⁵ In August 2012, the Forum, with four added members,²⁶ was reconstituted as the Expert Advisory Council on the Legal Training System, under the auspices of the Ministerial Level Conference on the Legal Training System. The Ministerial Conference’s charge calls for it to reach “a certain level of

24. See text at notes 185-202 *infra*.

25. See, e.g., Hōso no yōsei ni kansuru fōramu (法曹の養成に関するフォーラム) [Forum on Legal Training], Kōseiin meibo (Heisei 5gatsu tōka genzai) (構成員名簿 (平成24年5月10日現在)) [List of Members (as of May 10, 2012)], in Forum on Legal Training, Ronten seiri (torimatome) (論点整理(取りまとめ)) [Summary of Main Issues], May 10, 2012, at 43, available at <http://www.moj.go.jp/content/000101333.pdf> (last visited Nov. 28, 2012).

26. See Expert Advisory Council on Legal Training, Kōseiin meibo (Heisei 24nen 10gatsu 30nichi genzai) (構成員名簿 (平成24年10月30日現在)) [List of Members (as of Oct. 30, 2012)], available at <http://www.moj.go.jp/content/000103614.pdf> (last visited Nov. 4, 2012).

conclusions" (一定の結論) by August 2, 2013,²⁷ so the Expert Advisory Council is expected to issue its conclusions by sometime in the spring of 2013.

As if these challenges were not enough, the new legal education system is faced with yet one more major challenge: the recent introduction of an alternative route for entry into the bar, the so-called preliminary bar exam, otherwise known as the "law school bypass."²⁸ In its first year, 2011, that bypass was a rather narrow path; in 2012 it became somewhat wider. If it continues to grow and becomes a major artery it will likely spell doom for most of Japan's remaining sixty-nine law schools.

Thus, for those involved with Japan's law schools, the optimism of 2004 has given way to considerable anxiety. This article seeks to explain how Japan's legal education system reached the current situation and, risky as the task is, seeks to offer some thoughts on where the system is headed.

II. Historical Background

In order to appreciate what the reforms were intended to accomplish and the challenges they have faced, it is important to understand the setting in which they arose. To that end, this section first examines the prior legal training system and then considers the two major concerns the reforms were designed to address: quantity - the size of the legal profession - and quality.

27. See Hōsō yōsei seido kankei kakuryō kaigi ni tsuite (法曹養成制度関係閣僚会議について) [Regarding the Ministerial Level Conference on the Legal Training System], Cabinet Decision of Aug. 21, 2012, art. 4, available at <http://www.moj.go.jp/content/000101374.pdf>.

28. For a more detailed examination of the preliminary exam and its likely impact, see text at notes 118-120, 145-148, 232-235 *infra*.

A. Pre-2004 Legal Training System²⁹

It is frequently said that the prior system of legal education consisted of two major components: undergraduate law faculties and the Legal Training and Research Institute (LTRI). Two other elements also deserve mention: the bar examination and examination preparatory schools.

In the prior system, undergraduate law faculties³⁰ constituted the largest formal category of legal education. Law traditionally has been regarded as one of the most prestigious undergraduate disciplines in Japan. Prior to the start of the new system, one hundred universities had undergraduate law faculties, which together enrolled over 45,000 students per year.³¹ At many universities, the law faculty included one or more other disciplines.³² Even at faculties that combined law with other disciplines, students typically have been divided into tracks, with courses in law dominating the curriculum for those in the law track.

The undergraduate programs typically began with one to one and a half years of general liberal arts education, with the remainder of the four-year program focused on law or the other specified disciplines.³³ Nearly all the faculty members who taught law had

29. For an examination of the new system written shortly after it took effect, with a comparison to the prior system, see Daniel H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, AUSTRALIAN J. ASIAN L., Vol. 7, No. 3, at 215 (2006). For a detailed examination of the prior legal training system, see Kahei Rokumoto, *Legal Education*, in LAW IN JAPAN: A TURNING POINT (Daniel H. Foote ed., Univ. of Washington Press, 2007), at 190. For a contemporaneous account as of the early 1960s, see Hakaru Abe, *Education of the Legal Profession in Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY (Arthur Taylor von Mehren ed., Harvard Univ. Press, 1963), at 153. For a thoughtful recent examination of the reforms, with references to much additional commentary, see Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEG. EDUC. 3 (2012).

30. Despite similarities, the "faculty" concept differs greatly from the "department" or "major" concept at U.S. colleges and universities. At most Japanese universities, from the time of entrance students are admitted to a specific faculty; each faculty sets its own curriculum, and, especially for the discipline-specific education that occupies most of the last two and a half or three years of undergraduate studies, the dividing lines between faculties tend to be quite rigid.

31. Rokumoto, *supra* note 29, at 206.

32. Historically, at the University of Tokyo and a few other leading universities a major objective was training future government officials. In keeping with that background, law and political science have been combined in the same faculty at many universities. Other universities combined law and economics in the same undergraduate faculty, or included law along with other social science disciplines.

33. For a more detailed examination of undergraduate legal education, see

spent their entire careers in the world of legal academics. Very few legal academics in Japan had undertaken advanced study in fields other than law, and even fewer had experience in legal practice. Most, following graduation from undergraduate programs in law, had served as research fellows (*joshu*, 助手 or, following a recent change in terminology, *jokyō*, 助教), or had pursued postgraduate study of law in M.A. or Ph.D. programs, in which the dominant focus was on academic research in a specific field of law. This approach resulted in a high level of compartmentalization between fields; in the words of the chair of one of the advisory councils on which I sat, in Japan one typically is not regarded as a “professor of law,” but rather as a professor of a specific field of law, such as “professor of commercial law” or “professor of civil procedure.”

As taught at the law faculties, legal education emphasized theory. In the Japanese context, the term “theory” continues to signify mainly the mastery of legal doctrine. At most universities, undergraduate legal education also contained various courses in fields that are referred to in Japanese as “foundational” (*kiso hōgaku*, 基礎法学), a term that roughly corresponds to perspectives-type offerings in the United States and includes courses such as jurisprudence, sociology of law, legal history, and comparative law. With rare exceptions, virtually no attention was paid to training in practice-related skills. Moreover, except in the case of a handful of the top-rated universities, very few of the graduates actually entered the legal profession or the bureaucracy. Most entered companies.

The legal profession in Japan is formally regarded as consisting of judges, prosecutors, and practicing attorneys. These constitute the so-called “three branches of the legal profession” (*hōsō sansha*, 法曹三者). In addition, Japan has several categories of so-called “quasi-legal professionals,” including judicial and administrative scriveners, patent attorneys, and licensed tax accountants, which require separate licenses.³⁴ Moreover, it is accepted that working in a company legal department does not constitute the practice of law for purposes of the Lawyers Act,³⁵ and most members of company

Rokumoto, *supra* note 29, at 191-99.

34. See DAN FENNO HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* (Univ. of N. Carolina Press, 1973), at 178-85.

35. Bengoshihō (弁護士法) [Lawyers Act], Act No. 205 of 1949. Restrictions on unauthorized practice are contained in article 72 of the Act.

legal departments are not licensed lawyers.³⁶

To become a member of the legal profession, one must have passed the bar examination and then successfully completed the apprenticeship training program conducted through the LTRI. The exam, which was administered by the MOJ and offered once per year, focused primarily on candidates' mastery of doctrine in the core fields of civil, commercial, criminal, and constitutional law, and civil and criminal procedure.³⁷ Examiners were drawn from scholars specializing in those fields, along with judges, prosecutors, and practicing lawyers. Candidates were expected to demonstrate their understanding of leading academic views, as well as the statutes and judicial interpretations. The exam consisted of three stages, multiple choice, essay, and oral exams, with candidates screened out after each stage. In part as a device for eliminating large numbers of candidates through the more easily administered multiple choice test, that exam included puzzle-type questions, in which, for example, candidates had to reassemble sentences in the proper order, filling in blanks with the appropriate words or phrases to construct a valid legal proposition.³⁸

Under the prior system, passing the bar exam was a daunting step. The exam was open to anyone who had completed at least two years of college; and even those who had not gone to college could qualify by passing a separate exam.³⁹ The number of people who wanted to enter the legal profession was high. By 1970 the number of bar exam takers had reached 20,000, and it remained well over that level every year thereafter. The number of passers, in contrast, was sharply limited. Until 1991 the number of passers was capped at approximately 500 persons per year. Thus, competition was fierce. From the late 1960s on, the pass rate hovered between 1.5% and 3%.⁴⁰ After 1991 the number of passers gradually increased, but

36. See HENDERSON, *supra* note 34, at 178-79.

37. For a more detailed discussion of the bar exam, see Rokumoto, *supra* note 29, at 199-200.

38. For an archive of questions on the old bar exam, see Hōmushō (法務省) [Ministry of Justice] [MOJ], Dainijishiken shiken mondai-shiken kekkatō (第二次試験試験問題・試験結果等) [Questions, Results, etc., for the Second Stage Examination], available at http://www.moj.go.jp/jinji/shihoushiken/shiken_dainiji_shiken.html, and follow links to the exams for each year (containing multiple choice exam questions for 1996-2010, essay questions for 2002-2010).

39. See Rokumoto, *supra* note 29, at 199.

40. See *id.*, Table 8.2, at 213-14.

so too did the number of takers. As of 2003, the number of passers still was under 1,200. That year over 45,000 candidates sat for the bar examination; the pass rate was under 2.6%.⁴¹

The “stars” in the prior system – the candidates most coveted by the judiciary, procuracy, and leading law firms – were those who went to the top universities and passed the bar exam on their first or second try, ideally while still in college. Even as of 1961, this was unusual. That year, only 65 of 333 passers (under 19%) had qualified while still attending university; and the median passing age was 27.1.⁴² In later years, it became even rarer for candidates to pass at an early age. In 1986, for example, of the nearly 24,000 people who took the bar exam, only one passed on the first try and only thirty-seven more on the second.⁴³ In 1989, when four passed on the first try and twenty-three on the second, the passers’ median age reached an all-time high of nearly 29, and on average they had taken the bar exam for over six and a half years.⁴⁴

The difficulty of the bar exam relates to another component of the prior system: examination preparatory schools. As it became common for successful applicants to spend several years cramming for the bar exam, most began to utilize prep schools, where the focus was squarely on the bar exam subjects and test taking techniques. According to a survey of those who passed the bar exam in 1999, all but one of the 626 respondents had utilized prep schools.⁴⁵ Fully

41. See Kyū shihō shiken dainijishiken shutsuganshasū-gōkakashasūtō no suii (旧司法試験第二次試験出願者数・合格者数等の推移) [Shifts in the Numbers of Applicants, Passers, etc., on the Second Stage of the Old Bar Examination], in *materials compiled for Expert Advisory Council on Legal Training*, *supra* note 6, 3 Shihō shiken-shihō shūshū ni tsuite (司法試験・司法修習について) [Regarding the Bar Exam and Apprenticeship Training] [Regarding the Bar Exam], Material 2, available at <http://www.moj.go.jp/content/000104499.pdf> (last visited Dec. 6, 2012).

42. See Abe, *supra* note 29, at 162.

43. See Rokumoto, *supra* note 29, Table 8.2, at 214, and Table 8.3, at 217.

44. See MOJ, Heisei 14nendo shihō shiken dainijishiken kekka ni tsuite (平成14年度司法試験第二次試験結果について) [Regarding the Results on the Second Examination of the 2002 Bar Examination], http://www.moj.go.jp/jinji/shihoushiken/press_021113-1.html (containing statistics for selected years from 1989 through 2002).

45. See Shihō seido kaikaku shingikai jimusōkyoku (司法制度改革審議会事務総局) [General Secretariat, Justice System Reform Council], Hōsō yōsei seido kaikaku no kadai (法曹養成制度改革の課題) [Issues for Reform of the Legal Training System], <Sankō shiryō>, Shiryō 7, Juken no tame no yobikōtō no riyō jōkyō ni tsuite (<参考資料>, 資料7, 受験のための予備校等の利用状況について) [<Reference Materials>, Material No. 7, Regarding Circumstances of Use of Bar

two-thirds had attended prep schools for at least three years, and over one-quarter for more than five years. Ten percent attended the schools nearly every day; an additional 48% attended at least a few days per week. Thus, prep schools represented an important, but relatively hidden, aspect of the legal training process. As these figures also suggest, a substantial majority of the successful applicants devoted themselves to preparing for the exam, without entering regular employment.⁴⁶

For those who passed the exam, the final stage of training was so-called apprenticeship training conducted through the LTRI, which lay under the authority of the Supreme Court.⁴⁷ Although academics gave occasional guest lectures, the LTRI faculty was drawn from the three branches of the profession. Training through the LTRI was focused primarily on practice-related skills, with heavy emphasis on litigation and trial skills, as well as judging and criminal prosecution. Until 1999, the training period was two years. Candidates spent the first four months at the LTRI itself, primarily studying five subjects: civil judging, criminal judging, civil lawyering, criminal defense, and prosecution. Candidates spent the next sixteen months in actual apprenticeship training, with four-month rotations (field placements) in each of four separate practice settings: civil division and criminal division of a court, prosecutors office, and law firm. Following the field placements, all candidates returned to the LTRI for four more months of instruction in practice-related skills. In 1999, when the number of bar exam passers was first increased to 1,000, the training period was reduced to eighteen months. Otherwise, however, the content remained nearly the same, with each of the four-month blocks being shortened to three months. The last step in LTRI training was a final examination administered by the Examination Committee of the Supreme Court, consisting of day-long exercises in each of the five core subjects, in which the candidates were required to draft judgments or other documents based on rather extensive files distributed on the day of the exam, as well as oral exams in each of those five subjects.

Examination Preparatory Schools, etc.], distributed at the 14th session of the Reform Council, March 2, 2000, *available at* Shihō seido kaikaku shingikai zenkiroku (司法制度改革審議会全記録) [Full Records of the Justice System Reform Council], 1208 JURISUTO (2001), Furoku (付録) [Supplement] [Reform Council Supplement] (CD-ROM).

46. See Rokumoto, *supra* note 29, at 214.

47. For a more detailed discussion of LTRI training, see *id.* at 200-05.

Virtually all candidates passed, although those who failed one or more subjects were given the opportunity to take make-up exams for those subjects.

B. Major Concerns

For both sets of concerns expressed by the Reform Council, over quantity and quality, the historical roots date back decades. Those historical roots have influenced the design and progress of the reforms and the debates surrounding the new system, so it is useful to review the historical background briefly.

1. Quantity

In the prewar period, separate examinations were conducted for judges and prosecutors, on the one hand, and for practicing lawyers, on the other.⁴⁸ From 1893 on, after passing the qualifying examination judges and prosecutors were required to complete apprenticeship training, in a system administered by the MOJ; and, as fledgling government officials, they were paid stipends by the state during the training period. A system of apprenticeship training was not established for lawyers until 1933 and never went into full operation before World War II began. That training was administered by the bar associations and was unpaid.⁴⁹

A central feature of the postwar reforms was the introduction of unified apprenticeship training through the LTRI for all three branches of the profession, with authority for the training shifted to the Supreme Court. For both the Supreme Court and MOJ, the LTRI proved to be a valuable vehicle for socialization of new entrants into the profession and for imparting a shared set of norms and values, as well as for screening and recruiting new judges and prosecutors. For the bar, establishment of the LTRI held great symbolic significance, sending a message that lawyers were of equal status to judges and prosecutors. That equality in status resulted in a material benefit: *all* candidates received monthly stipends from the state during their apprenticeship training, regardless of whether they entered the judiciary, procuracy, or bar. Furthermore, the

48. Until the 1920s, graduates of the law faculties of the University of Tokyo and other imperial universities were exempted from the examination requirement for entry into the bar. See Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61, 70 (1956).

49. See *id.* at 75-77.

establishment of the LTRI effectively established a cap on the number of lawyers and thereby largely insulated them from competition.

Over time, the view gradually gained strength that Japan's legal profession was too small. A prominent early expression of that view came from the Provisional Justice System Investigation Committee [Investigation Committee], a 20-member advisory council to the Cabinet established in 1962 and chaired by University of Tokyo Professor Emeritus Wagatsuma Sakae.⁵⁰ The Committee was charged with investigating a broad range of matters relating to the justice system; but a major impetus for its creation was concern over the judiciary's difficulty recruiting judges, which was leading to delays in processing litigation. In its final report, issued in 1964, the Committee recommended raising salaries for judges and prosecutors.⁵¹ With regard to the size of the legal profession, the Investigation Committee expressed the view that "as the economy grows and society progresses, lawsuits will become more numerous and more complicated and . . . the roles played by lawyers in legal lives of the people will expand dramatically. In turn, as the legal profession grows in size, people's legal consciousness will rise."⁵² While the views of individual members on the appropriate size of the legal profession varied widely,⁵³ the Investigation Committee

50. For a summary of the Provisional Justice System Investigation Committee, including the enabling legislation and the Committee's own summary of the main points of its recommendations (which were issued in August 1964), see Rinji shihō seido chōsakai ni tsuite (臨時司法制度調査会について) [Regarding the Provisional Justice System Investigation Committee], Sankō shiryō (参考資料) [Reference Materials] for Meeting No. 2 of the Justice System Reform Council, Sept. 2, 1999, available at <http://www.kantei.go.jp/jp/sihouseido/dai2kai-append/husamura3.html>. The Investigation Committee was composed of seven Diet members, three members from each of the three branches of the profession, and four others (two academics, a business leader, and a bureaucrat).

51. See Rinji shihō seido chōsakai (臨時司法制度調査会) [Provisional Justice System Investigation Committee], Rinji shihō seido chōsakai ikensho (臨時司法制度調査会意見書) [Recommendations of the Provisional Justice System Investigation Committee] [Investigation Committee Recommendations], August 1964, reprinted as special supplement to HOSŌ JIHŌ, Vol. 16, No. 8 (1964); available in part at <http://www.moj.go.jp/content/000036339.pdf>.

52. *Id.* at 123-24.

53. At one end was the opinion that the size of the legal profession should be tripled at least, based on the view that there were substantial unmet needs already and that the needs would further increase as people's legal consciousness rose, to the opinion that, at least outside the major urban areas, the legal services market already was saturated and suddenly adding more lawyers would result in over-

concluded that the size of the legal profession was “substantially inadequate” even as of 1964 and called for gradually raising the size of the profession.⁵⁴ Other recommendations included an expansion in areas of practice for lawyers (e.g., to advising legislative and administrative bodies and private industry);⁵⁵ taking steps to remedy the over-concentration of lawyers in major cities;⁵⁶ and increased emphasis on legal ethics.⁵⁷

The Committee's recommendations, and the concerns that inspired them, had some impact. Salaries for judges and prosecutors were raised, and the difficulties over recruitment dissipated. The number of bar passers also rose, from 380 in 1961, the year before the Committee was formed, to 508 in 1964, when the Committee issued its recommendations, and to a peak of 554 in 1966.⁵⁸ Yet most of the other recommendations went unheeded. Of especial note with respect to the concern over quantity, for nearly two and a half decades thereafter the number of passers never again reached the 1966 peak. Between 1966 and 1990, the population of Japan rose by nearly 25%, to over 123 million.⁵⁹ The increase in economic activity was even more dramatic; during that same period, nominal GDP rose over 11 times, real GDP by nearly 4 times.⁶⁰ In contrast, from 1967 till 1990 the number of bar exam passers remained steady, ranging from a low of 446 to a high of 537.⁶¹

It is frequently said that the number of passers could not be increased further due to the limited capacity of the LTRI facilities.

capacity and disorder in the legal profession. *See id.* at 124.

54. *See id.* at 123. In that connection, while stating that “the appropriate size for the legal profession in Japan is not something that can easily be determined,” the Committee cited comparative statistics on the *per capita* size of the legal professions in the United States, England, West Germany, and France, and observed that, “in comparison to other nations, the size of the legal profession in Japan is extremely small.” *Id.*

55. *See id.* at 125.

56. *See id.* at 75, 77-78.

57. *See id.* at 75, 78-79.

58. *See Rokumoto, supra* note 29, Table 8.2, at 213-14.

59. *See* STATISTICS BUREAU, MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS (JAPAN), JAPAN STATISTICAL YEARBOOK 2013, Chapter 2, Table 2-1(B), available at <http://www.stat.go.jp/english/data/nenkan/1431-02.htm> (last visited Nov. 29, 2012).

60. *See* Lawrence H. Officer & Samuel H. Williamson, *What Was the Japan GDP Then?*, MeasuringWorth, 2011, <http://www.measuringworth.com/japandata/>.

61. *See Rokumoto, supra* note 29, Table 8.2, at 213-14.

Yet steadfast opposition by the bar was a major factor. As is typical for bar associations throughout the world,⁶² the Japanese bar has strongly resisted increases in the size of the legal profession, offering a wide range of rationales. Many of those rationales, including assertions that expanding the lawyer population would result in lower quality and declines in ethics, are common refrains elsewhere. One of the more characteristically Japanese rationales is the view that the limits on the size of the legal profession enable lawyers to undertake social reform efforts. According to this view, lawyers are able to take on low-paying or *pro bono* activities because of their earnings from paying clients in civil cases, and increased competition would deprive them of such opportunities.⁶³

After the Provisional Investigation Committee issued its report in 1964, most aspects of justice system reform were left to discussions among representatives of the three branches of the profession. In 1970, the Committee on Legal Affairs of the Upper House of the Japanese Diet adopted a resolution stating: "Matters related to justice system reform should be achieved based on consensus by the three branches of the legal profession."⁶⁴ With this effective veto power in hand, the bar was well positioned to resist calls for increasing the size of the profession. Truth be told, though, pressure to increase the size of the bar was muted through the 1970s and early 1980s. Consumer groups and other movements occasionally voiced concern over the difficulty of obtaining effective legal representation; but there was little public clamor for raising the number of lawyers. Throughout that period, moreover, most business leaders tended to view lawyers as adversaries, so, if anything, business opposed increases in the size of the bar.

In the late 1980s the situation began to shift. This time, the MOJ was having difficulty recruiting new prosecutors. The MOJ felt one of the reasons was that, by the time candidates passed the bar exam, they were likely to have debts, family commitments, or other obligations that would lead them to opt for private practice in law firms rather than pursue a career as a prosecutor, which entails transfers throughout Japan every two or three years. To meet this

62. See, e.g., Richard L. Abel, *Revisioning Lawyers*, in *LAWYERS IN SOCIETY: AN OVERVIEW* (Richard L. Abel & Philip S.C. Lewis eds., Univ. of California Press, 1995), at 1, 2-5, 13.

63. See, e.g., KOBAYASHI, *supra* note 15, at 56-58.

64. Quoted in *id.* at 118.

perceived problem, in discussions at the Three Branches of the Legal Profession Consultation Committee, which met from 1988 to 1991, the MOJ, with the support of the Supreme Court, pushed for a preferential quota for young exam takers.⁶⁵ The JFBA strongly opposed this proposal, and as a compromise, representatives of the three branches agreed on an increase in the number of passers from the prevailing level of 500 passers per year to 700, with a pledge to monitor results to see whether the proportion of younger passers increased.⁶⁶

As it turned out, the proportion of younger passers did rise somewhat,⁶⁷ but that did not end pressure to raise the size of the legal profession. In 1991, the Legal Training Reform Consultation Council, charged with reexamining the bar exam and the entire legal training process, was established under the auspices of the MOJ. The Council included academics, a journalist, and representatives of business, labor, and a consumer group, as well as the three branches of the profession.⁶⁸ Over opposition by the bar, an "overwhelming majority" of the Council agreed on the need for a "major increase" in the size of the legal profession, specifically identifying four areas of unmet needs: (1) high levels of unrepresented parties even in existing litigation; (2) the need for representation in smaller matters, which lawyers were unwilling to handle; (3) needs for legal services in small cities and towns, where very few lawyers practiced (with the Council expressly finding that the root cause was not lack of demand, but lack of access); and (4) increasing needs for lawyers in fields other than litigation, such as preventive lawyering and provision of legal advice.⁶⁹ It bears note that by this time, some business leaders had come to appreciate the role lawyers could play as advisors and business facilitators.⁷⁰ In its final report, issued in late 1995, the Council recommended a prompt increase in the number of bar passers to 1,000 per year; an intermediate-term target of 1,500 per year to be achieved in the near future; a shortening of

65. *See id.* at 54-56.

66. *See id.* at 78.

67. *See, e.g.,* MOJ, *supra* note 44 (statistics from 1989 through 2002).

68. *See* Gotō Hiroshi (後藤博), *Hōsō yōsei seidotō kaikaku kyōgikai no kyōgi no keii ni tsuite* (法曹養成制度等改革協議会の協議の経緯について) [Regarding the Circumstances of the Deliberations of the Legal Training Reform Consultation Council], 1084 JURISUTO 33, 34 (1996).

69. *Id.* at 34-35.

70. *See, e.g.,* KOBAYASHI, *supra* note 15, at 98-100.

the length of apprenticeship training; and certain changes to the bar exam.⁷¹

The bar continued to resist adamantly.⁷² In December 1994, as it became increasingly clear the Council would recommend a major rise in the number of passers, the JFBA leadership convened an extraordinary general meeting, at which it sought approval for an action plan endorsing a "substantial" increase in the number of passers – reportedly with the figure of 1,000 per year in mind. The proposal met fierce opposition, with opponents insisting 700 per year should be the absolute limit, and later calling for a compromise at 800 passers per year.⁷³ In October 1997, the JFBA accepted what the Council had proposed nearly two years earlier: a prompt move to 1,000 passers, a future target of 1,500, and a shortening in the LTRI term.⁷⁴ By then, though, the JFBA's continued recalcitrance had cemented the view among many observers that decisions over the size of the bar and other matters related to justice system reform could not be left to the profession.⁷⁵

2. Quality

Concerns over the quality of legal training also date back decades. Writing in the early 1960s, Abe Hakaru, who was then President of the LTRI, raised a number of issues. With respect to undergraduate legal education, one concern was that "the content of the law has become more complex and varied" but the length of time devoted to study of law had decreased.⁷⁶ In consequence, there was too much to cover and too little time. As other issues, Abe pointed to the tendency of university education to focus on academic theory, "particularly that of the professor lecturing,"⁷⁷

71. See Gotō, *supra* note 68, at 37. For the full text of the final report, see Hōsō yōsei seidō kyōgikai (法曹養成制度等改革協議会) [Legal Training Reform Consultation Council], Ikensho (意見書) [Statement of Views], Nov. 13, 1995, reprinted at 1084 JURISUTO 57 (1996).

72. To be sure, the bar was not monolithic in its opposition. Many lawyers at large firms, for example, had come to recognize the need for more lawyers in order to adequately staff teams to handle major international transactions.

73. See KOBAYASHI, *supra* note 15, at 94.

74. See *id.* at 121.

75. For a detailed examination of the debates within the bar and the impact of the bar's recalcitrance on outside opinion, see *id.* at 80-118.

76. Abe, *supra* note 29, at 161.

77. *Id.* at 160.

with little attention to the facts of cases and little in the way of practical training; the dominance of the one-way lecture method; and the lack of much discussion of "the social background."⁷⁸ With respect to the bar exam, even as of the early 1960s Abe noted "undesirable consequences" of the years of intensive study many candidates invested. "It is certainly true," he wrote, "that this laborious preparation for the [bar] examination enlarges to some degree the student's knowledge of law, but one may doubt whether it actually assists the development of either a good legal sense or a capacity for legal thinking."⁷⁹ Furthermore, he observed, given "the tendency to concentrate on courses preparatory to the examination at the sacrifice of courses in social sciences and the liberal arts,"⁸⁰ "students are deprived of a grounding in general culture and other social sciences."⁸¹ Nor did the LTRI escape criticism. While noting that "the demand for lawyers to perform preventive and advisory functions is gradually increasing," Abe conceded that the LTRI was "extremely weak" in those fields, instead continuing to emphasize only litigation and trial skills.⁸²

In the mid-1960s, the University of Tokyo Faculty of Law undertook a thorough reexamination of its undergraduate program in law. In 1967, that Faculty proposed extending the term of study required for graduation from four to five years, with the principal reason reportedly being the desire to give students "more time to digest the knowledge made available and to cultivate further the attitude of studying and thinking for themselves."⁸³ While phrased in terms of student mastery of the attitude of intellectual self-reliance, in this proposal one can again see the common complaint of too much to cover and too little time.

By the time the Three Branches of the Legal Profession Consultation Committee and the Legal Training Reform

78. *Id.*

79. *Id.* at 162.

80. *Id.*

81. *Id.* at 163.

82. *Id.* at 177.

83. Rokumoto, *supra* note 29, at 207, quoting Tanaka Hideo (田中英夫), *Tōkyō daigaku hōgakubu no kyōikukeikaku saikentō ni tsuite* (東京大学法学部の教育計画再検討について) [On the Reexamination of the Educational Program of the Faculty of Law, The University of Tokyo], in TANAKA HIDEO (田中英夫), *EIBEI NO SHIHŌ* (英米の司法) [The Judicial Systems of England and the United States] (Tokyo: Univ. of Tokyo Press, 1973), at 572, 584.

Consultation Council undertook their deliberations in the late 1980s and early 1990s, the impact of the low passing rates on the bar exam, the years of cram study undertaken by many exam takers, and the heavy reliance on examination preparatory schools had become serious concerns. Critics worried that the combination of these factors was resulting in exam-centered tunnel vision and an overly narrow legal profession.⁸⁴

III. The Reforms⁸⁵

A. Recommendations of the Justice System Reform Council

In 1999, deliberations over justice system reform were entrusted to the Reform Council, an advisory council appointed by the Diet and reporting directly to the Cabinet. Notably, only three of the thirteen Reform Council members came from the legal profession.⁸⁶ In its final recommendations, issued in June 2001, the Reform Council identified strengthening the legal profession – the “human base” of the justice system – as one of the three “pillars” of reform.⁸⁷ In fact, at the implementation stage, the Headquarters for Justice System Reform placed legal training first on the agenda.

Characterizing “the way of thinking that . . . the number of successful candidates on the national bar examination is a matter to be decided by deliberation among the three branches of the legal

84. Tokyo lawyer Yanagida Yukio offered another noteworthy critique of Japanese legal education in the leading law journal *Jurisuto* in 1998. Yanagida observed that Japanese undergraduate legal education was not well suited either for those who did not enter the legal profession or for those who did. Nor, in his view, was LTRI training adequate for the needs of Japan's legal profession. Based on his own experiences as a visiting professor at Harvard Law School, Yanagida proposed a new model based largely on that School's model. See Yanagida Yukio (柳田幸男), *Nihon no atarashii hōsō yōsei shisutemu – Hābādo rō sukūru no hōgaku kyōiku o nentō ni oite* (日本の新しい法曹養成システム—ハーバード・ロースクールの法学教育を念頭において) [A New Legal Training System for Japan – With Legal Education at Harvard Law School in Mind], 1127 *JURISUTO* 111 (1998), 1128 *JURISUTO* 65 (1998).

85. For early discussions of the reform process, by two very knowledgeable informers, see Kawabata, *supra* note 12; Setsuo Miyazawa, *Education and Training of Lawyers in Japan – A Critical Analysis*, 43 *SO. TEX. L. REV.* 491 (2002).

86. See REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, Appendix (list of members). The other members were three legal academics, two nonlaw academics, two business leaders, a labor union leader, a consumer organization leader, and a novelist.

87. See *id.* at 9, 11-12.

profession" as "already a relic of the past," the Reform Council stated, "The essential task is to secure and improve, both in quality and in quantity, the legal profession needed by the people of Japan."⁸⁸ With regard to quantity, the Council characterized the Japanese legal profession as "extremely small" and concluded, "It is clear that substantially increasing the size of the legal profession is an urgent task."⁸⁹ In reaching this conclusion, the Council expressed the view that the legal profession was too small to "respond adequately to the legal demands of society."⁹⁰

As one example of the unmet needs, the Reform Council highlighted "the necessity to redress the imbalance in lawyer population across geographical regions."⁹¹ The Provisional Investigation Committee had noted the same concern in 1964. If anything, the problem had gotten worse in the intervening years. As of 1964, 65% of all practicing lawyers were members of the local bar associations in just four cities: Tokyo, Yokohama, Osaka, and Nagoya.⁹² By 2001, that proportion had risen to over 70%.⁹³ The Reform Council captured the concern over lawyer scarcity well with the phrase "zero-one regions," using that phrase as shorthand for regions having either no lawyers at all, or just one lawyer. As of 2000, of the 253 court districts in Japan, 72 were zero-one districts. More strikingly, out of 3,371 registered cities and towns in Japan, 3,023, or nearly 90 percent, were zero-one regions.⁹⁴

Making comparative reference to the size of the legal profession in the United States, Britain, Germany and France, the Reform

88. *Id.* at 58.

89. *Id.* at 56.

90. *Id.*

91. *Id.* at 57.

92. See Shiryō 14, Bengoshikaibetsu kaiinsū no suii (資料14, 弁護士会別会員数の推移) [Material 14, Shifts in the Numbers of Members, by Bar Association], Sankō shiryō (参考資料) [Reference Materials] for Aug. 8/9, 2000, concentrated session of the Justice System Reform Council.

93. See JFBA, BENGOSHI HAKUSHO (弁護士白書) [White Paper on Lawyers], 2003 ed. (2003), at 21.

94. See Shiryō 4, Bengoshi to shihō shoshi no chiikiteki bunpu (jimusho no fuzaihiiki no kazu no hikaku (Shingikai jimusōkyoku) (資料4, 弁護士と司法書士の地域的分布 (事務所の不在地域の数の比較) (審議会事務局)) [Material 4, Regional Breakdown of Lawyers and Shiho Shoshi (Comparison of Numbers of Regions Without Offices) (Reform Council Secretariat), Material for Aug. 8, 2000, Session of Reform Council, reprinted in Reform Council Supplement, *supra* note 45.

Council set specific targets for the number of bar exam passers: 1,200 in 2002, 1,500 in 2004, and 3,000 by around 2010. According to the Council's calculations, if those targets were met, the number of legal professionals in active practice would reach 50,000 by 2018.⁹⁵ That in turn would place Japan's *per capita* legal profession at approximately the same level as that of the lowest of the comparables cited, France (albeit still only at France's level as of the date of the statistics cited, 1997). The Reform Council stressed that the 3,000 figure was not a cap, closing with the following sentence: "[S]ecuring 3,000 successful candidates for the national bar examination annually is a goal to be achieved 'deliberately and as soon as possible,' and this number does not signify the upper limit."⁹⁶

With regard to quality, the Reform Council expressed rather lofty expectations. According to its recommendations, "The legal profession bearing the justice system of the 21st century [must] be equipped with such basics as rich humanity and sensitivity, broad education and expertise, flexible mentality, and abilities in persuasion and negotiation. It will also need insight into society and human relationships, a sense of human rights, knowledge of up-to-date legal fields and foreign law, an international vision and a firm grasp of language."⁹⁷ As if this list were not long enough, in subsequent pages of its recommendations the Council stated that the legal profession should embody the following qualities: specialized legal knowledge; creative and critical thinking ability; capacity for legal analysis geared to solving real-world problems; broad and diverse backgrounds; mastery of basic practice skills and the ability to link theory and practice skills organically; basic understanding of cutting-edge legal fields; a sense of responsibility to society; and high ethical standards.⁹⁸

The Council voiced great pessimism about the possibility of satisfying these needs either by simply increasing the number of bar exam passers or reforming undergraduate legal education, while leaving the basic structure unchanged.⁹⁹ The Council characterized "conventional legal education at universities" as "not necessarily

95. REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 57-58.

96. *Id.* at 58.

97. *Id.* at 56.

98. *See id.* at 63-64.

99. *See id.* at 61-62.

sufficient in terms of either basic liberal arts education or specialized legal education," and further noted the absence of professional training.¹⁰⁰ The Council also expressed deep concern over the impact of the low pass rates on the bar exam. "Amid the increasingly fierce competition to pass the bar examination," the Council stated, "students have become increasingly dependent on preparatory schools." This had resulted in what the Reform Council referred to as the "double school" phenomenon, in which college students divided their attention between university and preparatory school, and the "university flight" syndrome, in which students ignored their university classes in order to concentrate on studies at the preparatory schools.¹⁰¹

For the vast majority of those who sought to enter the legal profession, the prior system almost mandated a form of tunnel vision. Candidates' efforts - and, in turn, the training offered by the preparatory schools - were narrowly focused on the subjects covered by the bar exam and on test-taking techniques. When coupled with the relatively limited range of subjects tested on the bar exam, the heavy emphasis on doctrine, and the puzzle-like form some questions had taken, the system seemed geared to producing narrowly-focused candidates who had spent years concentrating on a limited range of legal subjects - quite the opposite of the broad, well-rounded, and diverse legal profession envisioned by the Reform Council.¹⁰²

The Reform Council summed up its views as follows:

[I]n order to overcome the problems of the current system . . . , it is essential to develop a new legal training system not by focusing only on the "single point" of the national bar examination but by organically connecting legal education, the national bar examination, and apprenticeship training as a "process" As the core of the new system, it is considered to be important and effective to establish law schools, . . . providing education especially for training legal professionals¹⁰³

100. *Id.* at 61.

101. *Id.*

102. It goes without saying that the prior system also resulted in a significant drain of societal resources. For decades, thousands of talented and highly committed individuals had spent many years of their lives cramming for the bar exam, with the great majority failing in the end.

103. REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 62.

The Reform Council then set forth a rather detailed outline of the legal training system it had in mind.¹⁰⁴ The law school model it proposed bore many similarities to the U.S. system. Law school was to be a graduate-level professional school consisting, in principle, of a three-year term.¹⁰⁵ To ensure diversity, students were to come from a broad range of academic disciplines and to include people with real-world experience.¹⁰⁶ To enhance critical analytical skills, creativity, and skill in advocacy, law school classes were to be kept small, with extensive use of interactive discussions rather than one-way lectures.¹⁰⁷ Education was to bridge theory and practice; to that end, the curriculum was to include practice-oriented education and the faculty was to include substantial numbers of members with broad professional experience.¹⁰⁸ In the future, moreover, faculty members responsible for courses in the core fields were expected to be qualified as legal professionals.¹⁰⁹

To ensure the quality of the law schools and the education they provide, the law schools would need to obtain initial certification through a chartering process and undergo regular reaccreditation.¹¹⁰ To ensure student commitment and attainment, strict grading and evaluation standards were to be utilized.¹¹¹ At the same time, to afford students the ability to devote themselves to their studies at law school rather than feel compelled to spend much of their time attending preparatory schools, the law schools were to provide "thorough education such that a significant ratio of successful

104. *See id.* at 63-70.

105. *See id.* at 65.

106. *Id.* at 65-66.

107. *See id.* at 66-67.

108. *See id.* at 66-69.

109. *See id.* at 68-69.

110. *See id.* at 70. As later decided, law schools must obtain reaccreditation every five years by one of three separate accreditation bodies. *See* Gakkō kyōiku hō (学校教育法) [School Education Act], Act No. 26 of 1947, art. 109(3); Gakkō kyōiku hō sekōrei (学校教育法施行令) [School Education Act Enforcement Ordinance], Government Ordinance No. 340 of 1953, art. 40. The accreditation bodies also conduct annual reviews of certain key data. *See, e.g.,* Daigaku hyōka-gakui juyō kikō (大学評価・学位授与機構) [National Institution for Academic Degrees and University Evaluation] [NIAD-UE], Hōkadaigakuin hyōka kijun yōkō (法科大学院評価基準要綱) [Outline of Standards for Law School Evaluation], Oct. 2004 (Sept. 2010 revision), at 47 (Chapter 3, Standard 7), available at http://www.niad.ac.jp/ICSFiles/afieldfile/2010/09/30/no6_2_kijyunyūkōu_22.pdf.

111. *See* REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 67.

graduates (e.g., 70% to 80%) can pass the new bar exam."¹¹²

Without offering a detailed blueprint, the Reform Council recommended a new bar exam be designed, taking into account the educational programs offered by the law schools. As one possible approach, the Reform Council suggested the use of questions similar to "performance exams" in the United States, in which candidates would be provided a "long period of time," given "cases composed of diversified and complex facts, not necessarily bound by the traditional subject categories," and "required to demonstrate how to solve problems, how to prevent conflicts, how to design plans, and the like."¹¹³

One further point bears note. The Reform Council explicitly recommended that there be no fixed limit on the number of law schools. In addition to diversity among students, diversity among law schools would be welcomed. The Reform Council encouraged each law school to establish its own identity and "foster diversified legal professionals of the type it regards as ideal," and stressed that any law school meeting the minimum standards for chartering and accreditation was to be recognized.¹¹⁴ This stance was in keeping with the principles of "fairness, openness, and diversity," which the Reform Council proclaimed as lying at the heart of its vision.¹¹⁵ The difficulty of drawing lines may also have come into play. The Reform Council made specific reference to the goal of achieving broad geographical distribution of law schools throughout Japan, and it seems highly likely that universities with strong ties to politicians would have raised a clamor if they had been excluded.

B. U.S.-Style System?

Given the above characteristics, many Japanese refer to the law school system as a U.S.-style system. Even as envisioned by the Reform Council, though, the new system differed from the U.S. system in many fundamental respects. The new law schools were engrafted on to the existing system, with both the LTRI and the undergraduate law faculties remaining in place. The strong support for the LTRI by all three branches of the legal professions ensured its survival. And, given the very large number of undergraduate law

112. *Id.*

113. *Id.* at 72-73.

114. *Id.* at 70.

115. *Id.* at 69-70.

faculties and the training they provided to tens of thousands of students who went on to a wide range of careers, the Reform Council expressly supported their continued role. Despite the Council's pronouncement that the term for the law schools "in principle" would be three years, those who had already completed undergraduate law programs could qualify for a "shortened" two-year term;¹¹⁶ and, since law faculties had been the traditional undergraduate choice for those seeking a career in law, it was inevitable that, at least initially, the two-year program would be the norm at many law schools.

The bar exam represented another major difference between the Reform Council proposal and the U.S. model. Despite the Reform Council's firm calls for substantial increases in the number of passers, complete with concrete numbers and timelines, and its reference to a pass rate of 70% to 80%, the reality is that even under the Council's proposal the number of passers would be capped, so the pass rates would be dependent on the number of law schools and graduates.

Two other aspects of the bar exam bear note. In part to reduce pressure on pass rates from the proliferation of repeat bar exam takers, and in part to avoid the waste of resources from people spending many years cramming for the exam, the Reform Council proposed a limit of, e.g., three tries, on the number of times candidates could take the bar exam.¹¹⁷ Furthermore, in response to charges that, whereas the existing bar exam was open to anyone, the new system would limit entry into the legal profession to those who could afford the time and money required for law school,¹¹⁸ the Reform Council recognized an exception to the requirement that candidates complete law school, stating that: "Proper routes for obtaining the qualification of legal professional should be secured for those who have not gone through law schools for reasons such as financial difficulty or because they have sufficient practical

116. *Id.* at 65.

117. *Id.* at 72.

118. As noted earlier, see text at notes 42-46 *supra*, while the prior system technically was open to anyone, in actual practice the bar exam was such a high barrier that, apart from a handful of exceptionally talented candidates (or exceptionally talented test-takers), the great majority of those who ultimately passed the bar exam took several years to do so. For them, the process entailed not only the direct cost of preparatory schools but the opportunity cost of devoting years to preparation.

experience in the real world.”¹¹⁹

As Kawabata Yoshiharu, a lawyer who has been deeply involved in the reform process, observed, the latter provision (which resulted in the so-called law school bypass) was inserted under pressure from the then-ruling Liberal Democratic Party (LDP). As he explained, after the Reform Council issued an interim report setting out the basic parameters of the proposed law school system, “some parties asked the [LDP] to prevent the emergence of a new system of law schools.” He continued:

Those parties included bar exam preparatory cram schools with a direct interest in maintaining the present legal education and training system, those who strongly believe in deregulation, people who insisted [on expanding the number of passers much more rapidly], legal scholars who want to maintain their positions as professors at undergraduate law faculties and focus on research rather than teaching, and lawyers who opposed a large increase in the population of legal professionals.¹²⁰

In response to calls such as these, the LDP insisted that, apart from law schools, an alternative route for qualifying for the bar examination should be maintained; and the Reform Council complied in its final report.

C. Subsequent Adjustments

Following the issuance of the Reform Council's recommendations, various other bodies undertook further deliberations and concrete planning. These included, with respect to the overall scheme, the Expert Consultation Committee on Legal Training, under the Headquarters for Promotion of Justice System Reform;¹²¹ with respect to the law school system, the Subcommittee on Law Schools, Committee on Universities, Central Council on Education, under MEXT;¹²² and, with respect to the bar exam, the

119. REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 73.

120. Kawabata, *supra* note 12, at 430-31.

121. Hōsō yōsei kentōkai (法曹養成検討会) [Expert Consultation Committee on Legal Training] [Kentōkai]. For the announcement of that Committee's establishment, see Shihō seido kaikaku suishin honbu jimukyoku (司法制度改革推進本部事務局) [Secretariat, Headquarters for Promotion of Justice System Reform], Kentōkai no kaisai ni tsuite (検討会の開催について) [Regarding Establishment of Expert Consultation Committees], Dec. 17, 2001, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/kaisai.html>.

122. Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education],

National Bar Examination Administration Commission, attached to the MOJ.¹²³

While largely following the blueprint laid out by the Reform Council, these and other bodies refined and adjusted the recommendations in various ways. Some of the more notable adjustments are as follows: To eliminate ambiguity and protect against backsliding, concrete numerical standards or targets were established for, e.g., percentage of nonlaw and *shakaijin* students (30% target, with special duty to justify if below 20%);¹²⁴ maximum class size (80 students, with limited exceptions);¹²⁵ percentage of full-time faculty members with at least five years of practice experience (20%);¹²⁶ etc. To help ensure the law schools would develop an ethos of training for the profession, and not slip back into the traditional focus almost entirely on theory, provisions were included to mandate that law schools be independent from the law faculties,¹²⁷ including limitations on the percentage of shared faculty members. To ensure the quality of the faculty, an evaluation process was established, focused not only on the adequacy of the faculty as a whole, but on the suitability of each individual faculty member for the specific courses he or she was scheduled to teach (based on factors such as number of years of prior experience

Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin buhai (法科大学院部会) [Subdivision on Law Schools].

123. MOJ, Shihō shiken kanri iinkai (司法試験管理委員会) [Bar Examination Administration Commission], established pursuant to Shihō shiken hō (司法試験法) [Bar Examination Act], Act No. 140 of 1949, art. 12 (prior to amendment by Act No. 138 of 2002). As of January 1, 2004, this Commission was replaced by Shihō shiken iinkai (司法試験委員会) [Bar Examination Commission], established pursuant to Bar Examination Act (as amended by Act No. 138 of 2002), art. 12.

124. See Kentōkai, Daisansha hyōka (tekikaku nintei) kijun no arikata ni tsuite (iken no seiri) (第三者評価 (適格認定) 基準の在り方について (意見の整理)) [Regarding the Standards for Third Party Evaluation (Suitability Determination) (Summary of Views)], Mar. 28, 2002, at 2 (item 3), available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryou5.pdf>. This stipulation was later included in a Ministerial Notice issued by MEXT. See Senmonshoku daigakuin ni kanshi hitsuyō na jikō ni tsuite sadameru ken (専門職大学院に関し必要な事項について定める件) [Matters Stipulated with respect to Essential Items for Professional Graduate Schools], MEXT Ministerial Notice No. 53 of 2003 [MEXT Notice 53], art. 3.

125. See Kentōkai, *supra* note 124, at 4 (item 6).

126. See MEXT Notice 53, *supra* note 124, art. 2, para. 3. For this purpose, the phrase “full-time” (*sennin*, 専任) was further defined to include practitioners teaching at least six credit hours per year.

127. See, e.g., NIAD-UE, *supra* note 110, at 34 (Chapter 2, Standard 9-1-1).

teaching the course in question, number of publications in the field, etc.).¹²⁸

One important set of debates related to the curriculum. The Reform Council had announced broad principles regarding the curriculum and had recommended the establishment of minimum standards for required subjects, but had stressed that, "in terms of actual subjects to be taught and their contents, the originality and diversity of inventive efforts by each law school shall be respected."¹²⁹ The bodies involved in subsequent planning endorsed the same policy of specifying minimum standards only, with law schools to be given freedom to decide other matters regarding the curriculum.¹³⁰ But views differed on what the minimum standards should be.

Concrete curricular planning was entrusted to working groups for each of the main fields of law. With the exception of the group considering practice-related subjects, these groups consisted largely of traditional legal academics in the respective fields. Imbued as most were with the belief that a key problem with existing legal education was that there was too much to cover and too little time, the groups proposed extensive curricula for each of their respective fields. The original proposals from the three groups responsible for the fields of civil (including civil law and procedure and commercial law), criminal (criminal law and procedure), and public law (constitutional and administrative law), which are the core subjects tested on the bar exam, would have amounted to a total of some eighty required credit hours in just the first two years of law school.¹³¹ After the respective groups cut "as far as they possibly

128. See *Senmonshoku daigakuin setchi kijun* (専門職大学院設置基準) [Standards for Establishment of Professional Graduate Schools], MEXT Ministerial Ordinance No. 16 of 2003, art. 5 (requirement for evaluation of faculty members). See, e.g., NIAD-UE, *supra* note 110, at 30 (Chapter 2, Standard 8-1) (regarding certification of faculty member suitability), 44 (Chapter 3, Standard 4) (regarding process for evaluating faculty member suitability).

129. See REFORM COUNCIL RECOMMENDATIONS, *supra* note 1, at 66.

130. See *Kentōkai, Hōkadaigakuin no daisansha hyōka (tekikaku nintei) no arikata ni tsuite (iken no seiri)* (法科大学院の第三者評価(適格認定)の在り方について(意見の整理)) [Regarding Third Party Evaluation (Suitability Determination) for Law Schools (Summary of Views)], Mar. 28, 2002, available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryou4.pdf>.

131. See *Hōkadaigakuin ni okeru kyōiku naiyō-hōhō ni kansuru kenkyūkai* (法科大学院における教育内容・方法に関する研究会) [Study Group on Educational Content and Methods for Law Schools], *Hōkadaigakuin ni okeru minjihō karikyuramu no arikata* (moderuan) (法科大学院における民事法カリキュラムの

could," the minimum required standards still called for fifty-four credit hours in those courses,¹³² and authorized law schools to increase the overall required credits for those three broad fields by up to 15%.¹³³ This meant that well over half the ninety-three credit hours required for completion of law school must be allocated to those subjects; and, as a practical matter, many law schools used the option of imposing additional credit requirements for those fields, meaning those courses occupied two-thirds of the standard overall course load.

When I argued that these "bare bones" standards still seemed excessive, leaving too little room for courses in other fields, clinics, or the types of innovative programs the law schools were expected to establish, Japanese observers assured me that, rather than serving as a minimum floor, in the Japanese context the standards would have much greater significance as a cap. If these standards did not exist, they warned, many law schools would devote even larger proportions of the curriculum to required courses in the bar exam subjects. As those comments reflect, from the outset knowledgeable Japanese observers recognized that the content of the bar exam would drive much of law school education.

Concrete planning for the bar exam followed the Reform

あり方【モデル案】) [Civil Curriculum for Law Schools (Proposed Model)], 3-1. Karikyuramu no zentaizō (3-1.カリキュラムの全体像) [3-1. Overall Picture of Curriculum], Apr. 24, 2001, available at http://warp.ndl.go.jp/info:ndljp/pid/286794/www.mext.go.jp/b_menu/shingi/chousa/koutou/003/toushin/010401/minzi/031.htm (for Civil Law, Commercial Law, and Civil Procedure, 38 to 44 total proposed required credits in first two years); Hōkadaigakuin ni okeru keijihō karikyuramu no arikata (moderuan) (法科大学院における刑事法カリキュラムのあり方【モデル案】) [Criminal Curriculum for Law Schools (Proposed Model)], 3 Karikyuramu no zentaizō (3.カリキュラムの全体像) [3. Overall Picture of Curriculum], Apr. 24, 2001, available at http://warp.ndl.go.jp/info:ndljp/pid/286794/www.mext.go.jp/b_menu/shingi/chousa/koutou/003/toushin/010401/keizi/03.htm (for Criminal Law and Criminal Procedure, 22 total proposed required credits in first two years); Hōkadaigakuin ni okeru kyōiku naiyō-hōhō (kōhō) no arikata ni tsuite (法科大学院における教育内容・方法(公法)のあり方について) [Regarding the Educational Content and Methods for Law Schools (Public Law)], 2-1 Karikyuramu no zentaizō (2-1カリキュラムの全体像) [2-1 Overall Picture of Curriculum], Oct. 26, 2001, available at http://warp.ndl.go.jp/info:ndljp/pid/286794/www.mext.go.jp/b_menu/shingi/chousa/koutou/003/toushin/011001/02-1.htm (for Constitutional Law and Administrative Law, 14 total proposed required credits in first two years).

132. See *Kentōkai*, *supra* note 124, at 6-7 (item 8).

133. See, e.g., NIAD-UE, *supra* note 110, at 7 (Chapter 2, Standard 2-1-5) (authorizing increase of up to eight additional required credits, in addition to minimum of 54 required by the basic standards).

Council's lead in limiting the number of times candidates could take the exam, to three tries within five years after completion of law school.¹³⁴ In terms of content, however, the design for the new bar exam consisted of relatively modest refinements to the existing exam, rather than the full-fledged redesign hinted at by the Reform Council. The oral exam was eliminated, but the multiple choice and essay portions were retained.¹³⁵ In the multiple choice stage, the number of puzzle-type questions was greatly reduced. Essay questions typically included detailed fact patterns, calling for application of law and procedure in concrete situations,¹³⁶ with relatively little focus on academic theory as such, as had been common on the old bar exam.¹³⁷ Notwithstanding the Reform Council's explicit suggestion that the new bar exam might utilize a performance test-type approach, the exam does not include professional skills. While the Expert Consultation Committee called for further consideration of that approach, the National Bar Examination Administration Commission chose not to include such questions. The use of performance test-type questions evidently was rejected as being infeasible.

The core subjects tested on the new bar exam remained essentially the same as for the old exam: civil law, commercial law, and civil procedure in the civil sphere; criminal law and criminal procedure in the criminal sphere; and constitutional and administrative law in the public law sphere.¹³⁸ In connection with the Reform Council's suggestion that the exam might include questions "not bound by the traditional subject categories," it was agreed that within the civil, criminal, and public law spheres respectively, questions might involve a mix of the specific subjects

134. See Kentōkai, *Shin shihō shiken no arikata ni tsuite (iken seiri)* (新司法試験の在り方について (意見整理)) [Regarding the New Bar Examination (Summary of Views)], March 28, 2002, at 2 (item 4), available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryou6.pdf>.

135. See *id.* at 1-2 (item 3).

136. For an archive of questions on the new bar exam, see MOJ, *Shihōshiken no jisshi ni tsuite* (司法試験の実施について) [Regarding the Implementation of the Bar Examination], available at http://www.moj.go.jp/jinji/shihoushiken/jinji08_00025.html, and follow links to the exams for each year.

137. For an archive of questions on the old bar exam, see MOJ, *supra* note 38 (containing multiple choice exam questions for 1996-2010, essay questions for 2002-2010).

138. See Bar Examination Act, *supra* note 123, art. 3.

within those spheres,¹³⁹ but broader combinations – such as, for example, questions including elements from both criminal and administrative law, or commercial law and constitutional law – were rejected. These, too, were deemed infeasible, with one reason being that it would be difficult for the bar examiners – who include academics specializing in the respective fields – to compose and grade such questions.¹⁴⁰ Even the modest change to allow mixed questions within the respective spheres did not survive for long. Although the rules still permit mixed questions to that limited extent, in 2010 the Bar Examination Commission expressed its sympathy for the difficulty bar examiners were having in creating such questions and approved a shift to three questions in the civil sphere and two each in criminal and public law, with no requirement for use of any mixed questions.¹⁴¹ As a major bar exam prep school was quick to point out, this in effect signaled a return to the pattern of separate questions centered on each of the seven core subjects.¹⁴²

Despite repeated pleas, the inclusion of legal ethics also was rejected, with a variety of rationales offered for why inclusion would not be appropriate.¹⁴³ In addition to the seven core required

139. See, e.g., Kentōkai, Summary of Minutes for 8th Session, June 4, 2002, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai8/8gaiyou.html>.

140. See, e.g., Kentōkai, Minutes for 5th Session, March 7, 2002, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai5/5gijiroku.html>.

141. See Shihō shiken iinkai (司法試験委員会) [Bar Examination Commission], Minutes for 65th Meeting, April 28, 2010, available at <http://www.moj.go.jp/content/000053035.pdf>.

142. See Sorimachi Katsuhiko no rīgaru danku (反町雄彦のリーガルダンク) [Sorimachi Katsuhiko's Legal Dunk], *Shihō shiken iinkai kaigiroku* (司法試験委員会会議録) [Record of the Meeting of the Bar Examination Commission], July 6, 2010, https://blogs.yahoo.jp/sorimachi_katsuhiko/2604455.html. For a more detailed analysis of the shift in stance, see JFBA, "Heisei 23nen shinshihō shiken no jisshi nitteitō ni kansuru iken boshū no jisshi ni tsuite" ni taisuru ikensho (「平成23年新司法試験の実施日程等に関する意見募集の実施について」に対する意見書) [Statement of Views with respect to "Invitation for Public Comment regarding Dates, etc., for the 2011 New Bar Examination"], July 6, 2010, available at <http://www.moj.go.jp/content/000052998.pdf> (expressing concern that the shift in number of questions and time allotments signaled a retreat from use of questions spanning fields or incorporating both substantive law and procedure).

143. The rationales shifted over time. One objection was that issues of ethics are too abstract and subjective to be amenable to testing. At the other extreme was the argument that ethics questions were likely to test only rote memorization. A third was that the study of professional responsibility in Japan was not sufficiently well developed to be amenable to inclusion yet. See, e.g., Kentōkai, Summary of Minutes

exam subjects, however, candidates were required to select one "elective" subject from among eight choices.¹⁴⁴ In another telling reflection that Japanese observers understood the impact the bar exam would have on law school education, when the relevant committees were considering what elective subjects to include, academics from a wide range of fields undertook lobbying campaigns to have their fields listed.

Another major debate relating to the bar exam concerned the so-called bypass, through which candidates could qualify for the legal profession without attending law school. As noted earlier, the Reform Council indicated that this alternate route to qualification should be provided "for those who have not gone through law schools for reasons such as financial difficulty or because they have sufficient practical experience in the real world."¹⁴⁵ When the relevant follow-up committees considered this issue, though, they concluded that it would be impractical to establish appropriate standards for assessing financial hardship or prior experience. Instead, they decided to institute a preliminary exam, open to anyone, designed to assess whether the applicants had attained the same level as those who had completed law school.¹⁴⁶ The preliminary exam would not commence until 2011, however. For the period between 2006 (when the first cohort of law school students graduated¹⁴⁷) and 2010, the old bar exam and the new bar

for 3rd Session, Feb. 5, 2002, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai3/3gaiyou.html>; Summary of Minutes for 6th Session, March 28, 2002, available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/yousei/dai6/6gaiyou.html>.

144. The choices are: Labor Law, Insolvency, Intellectual Property, Economic Law, Taxation, Environmental Law, Public International Law, and Private International Law. See, e.g., MOJ, Heisei 25nen shihōshiken ni kansuru Q&A (平成25年司法試験に関するQ&A) [FAQ regarding the 2013 Bar Examination], Question No. 3, available at http://www.moj.go.jp/jinji/shihoushiken/shiken_shinshihou_shikenqa.html.

145. See text at note 119 *supra*.

146. The Expert Consultation Committee noted the difficulty in setting standards to evaluate hardship and experience. As a possible alternative, that Committee suggested that the contents and methods for the preliminary examination might be adjusted "so as not to impair the principle that the new system is to be centered on law schools." See Kentōkai, *supra* note 139, at 2-3 (item 6). In the end, the Bar Examination Administration Commission elected not to impose any limits on eligibility based on hardship or experience. See Bar Examination Act, *supra* note 123, art. 5.

147. Technically, in Japan the word "graduation" (*sotsugyō*, 卒業) is used for undergraduate programs; the word "completion" (*shūryō*, 修了) is used for

exam would run in parallel, with the number of passers on the old bar exam gradually decreasing.¹⁴⁸ The preliminary exam, it was decided, would go into operation only after the old exam was phased out.

The LTRI was retained. To accommodate the increased number of apprentices, the term was shortened from eighteen months to one year and the structure of the program revised considerably. Of the one-year term, two months are spent in training at the Institute itself, the other ten months in rotations of two months each at five placements: civil and criminal division of court, prosecutors office, law firm, and a so-called "elective" placement, in which apprentices can choose from a range of options (including labor, intellectual property, insolvency, and family law, or elect further experience in one of the four standard tracks).¹⁴⁹ The stipend system had been slated to switch to an interest-free loan system from the LTRI class entering in late 2010. After bitter opposition by the JFBA,¹⁵⁰ the stipend system was extended for one additional year; the loan system took effect from late 2011.¹⁵¹

IV. Challenges Facing the New System

As the above summary reflects, the new system faced many challenges. To implement the legal training reforms, a vast range of

graduate-level programs, including the new law schools. I have chosen to use "graduation" and "graduates" as the more natural expressions in English.

148. See *Shihō seido kaikaku suishin honbu komon kaigi* (司法制度改革推進本部顧問会議) [Advisory Council, Headquarters for Justice System Reform], Material No. 8 for 4th Session, May 16, 2002, *Shihō shiken no shikumi* (司法試験の仕組み) [The Structure of the Bar Examination], available at <http://www.kantei.go.jp/jp/sihouseido/komonkaigi/dai4/4siryous.pdf>.

149. For an overview of the new LTRI system, see *Saikō saibansho* (最高裁判所) [Supreme Court (Japan)], *Shin shihō shūshū no gaiyō* (新司法修習の概要) [Overview of the New Apprenticeship Training], May 25, 2011, reprinted in *Regarding the Bar Exam*, *supra* note 41, Material 37.

150. See, e.g., JFBA, Website: *Shihō shūshū kyūhisei no iji o* (司法修習給費制の維持を) [For Maintaining the Stipend System for Legal Apprentices], <http://www.nichibenren.or.jp/activity/training/kiyuu-hiseizi.html>. The JFBA framed its opposition primarily in terms of the financial burden on apprentices and their duty to devote their entire time to study. It may be more than coincidental, however, that the financial burdens for the Government of Japan related to the stipend system served as a barrier to substantial increases in the number of apprentices.

151. See *Saibanshohō* (裁判所法) [Courts Act], Act No. 59 of 1947 (as amended), art. 67-2.

matters needed to be addressed, both nationwide and at the individual law schools. At each level, the tasks were further complicated by the need to coordinate with existing bodies and programs. From the start, for example, law schools faced issues regarding how to coordinate their programs with undergraduate law programs, and how to integrate nonlaw graduates with law graduates. The continued existence of the LTRI raised other coordination matters, including deciding what types of practice-related education should be conducted at each stage. Needless to say, funding implications affected nearly every aspect of the system.

The goal of the reforms went far beyond simply seeking to change the structure of Japanese legal education. At a more fundamental level, the reforms sought to change thinking patterns: for legal education and, more broadly, for the legal profession itself. For faculty members, the reforms sought to change the prevailing mindset with regard to educational methods, from one-way lectures to interactive give-and-take, and with regard to educational content, from a heavy focus on mastery of doctrine to education bridging theory and practice. For students, the reforms sought to instill an ethos of being active participants in the educational process, rather than passive learners. For legal education and the profession as a whole, the reforms sought to promote openness and diversity.

Among the many challenges facing the new legal education system, it is perhaps this shift in mindset that was the most daunting. For those involved in the system, though, by far the gravest concern related to the bar exam. Despite the rhetoric, from the outset it was obvious the passing rate would fall well below the 70% to 80% level. With a continued cap on the number of bar exam passers but no cap on the number of law schools, the 70% to 80% pass could be achieved only if the number of law schools remained small. Yet by early in the deliberation process it had become clear many institutions were planning to establish schools. Thus, while some students in the first year or two evidently were attracted by the rhetoric (including students who gave up secure jobs), from the outset faculty members and other informed observers were well aware such high passing rates were unachievable.¹⁵²

For the administration and faculty of Japanese law schools, concerns over the impact of the bar exam were exacerbated by the

152. See, e.g., Foote, *supra* note 29, at 237-38.

specter of the law school bypass, especially after it was announced that the preliminary exam would be open to everyone. In what may prove to be a prescient observation from late 2002, well over a year before the new system started, Miyazawa Setsuo wrote: "The most dangerous scenario [for the new law schools] is that the bypass through the preliminary examination will be made larger than the route through the law schools It remains to be seen whether and how universities will succeed in preventing such scenarios through their efforts in the next few years."¹⁵³ As Miyazawa's comment reflects, the scheduled 2011 start date for the preliminary exam loomed large, placing even greater pressure on law schools to prove their value by that date. At least at the start, though, law schools could take some comfort in the expectation that, before the preliminary exam started, the number of passers was to have reached 3,000. That still would not be sufficient to achieve a 70% to 80% pass rate; but, with under 6,000 students per year and likely attrition along the way, one might have expected that considerably over half the law school graduates would pass the exam within their allotted three tries. Or so we thought at the time.

V. Early Returns: Achievements of the New System

Despite the many challenges, the new system achieved many successes. One broad set of achievements related to educational methods. As mandated by the governing standards, faculty members have utilized interactive methods rather than simply relying on one-way lectures. While to some faculty members "interactive" evidently means little more than the recitation method, in which students are expected to recite the correct answer when called upon,¹⁵⁴ many other faculty members have developed highly

153. Miyazawa, *supra* note 85, at 498.

154. A worrisome warning sign of this tendency came at a symposium in mid-2001 sponsored by JFBA, aimed at providing helpful lessons on interactive teaching methods prior to the advent of the new law school system. For one of the "model" classes presented that day, the faculty member had assigned a long list of questions to the students in advance, and the class consisted entirely of a recitation of their answers, read from scripts the students had prepared in advance. JFBA, Hōkadaigakuin setsuritsu-un'ei kyōryoku sentā (法科大学院設立・運営協力センター) [Center for Cooperation in Law School Establishment and Operation], Symposium: Hōkadaigakuin, Moderu kariikyuramu no kōsō to jikken (法科大学院、モデル・カリキュラムの構想と実験) [Law Schools: Conceptions and Experiments in Model Curriculum], Apr. 14, 2001 (Bengoshi kaikan, Tokyo).

effective teaching styles, in which they push students to probe and to think for themselves. As this reflects, fostering critical thinking has been given considerable weight.

Moreover, in what I regard as a very important development, more attention has been given to teaching itself. This was especially true in the first few years of the new system, when many faculty members were still struggling with the question of what was meant by "the Socratic method" or "interactive teaching." At that time, faculty members frequently shared personal experiences and ideas. And, in what was a novel development for many Japanese universities, law schools also established systems for course evaluations by students. The establishment standards require law schools to undertake systematic efforts aimed at improving teaching methods;¹⁵⁵ and, to ensure that requirement is followed, the accreditation bodies mandate steps such as peer review programs, student evaluations, and faculty development workshops.¹⁵⁶ Given this prod, most law schools still undertake all of those measures. Now that faculty members feel they have adjusted to the new teaching methods and curriculum, however, at many schools those programs have become little more than a formality.

Another set of achievements relates to students. At least initially, one of the most notable student-related developments was the law schools' ability to attract students with diverse educational backgrounds and life experiences. Sadly, in a point to which I will return in more detail below, over time that achievement has eroded.¹⁵⁷

A number of other student-related achievements remain intact. Before the new law schools started, many Japanese professors voiced the belief that Japanese students would be reluctant to express their views in front of others and were skeptical about whether students would participate in class. Those doubts have largely been laid to rest. Just as in the United States, some Japanese students are shy about speaking publicly, but many others have

155. Pursuant to the overall governing standards for establishment of professional graduate schools issued by MEXT, accreditation bodies must certify that the schools undertake faculty development efforts. See *Senmonshoku daigakuin setchi kijun* (専門職大学院設置基準) [Establishment Standards for Professional Graduate Schools], MEXT Ministerial Ordinance No. 16 of 2003, art. 11.

156. See, e.g., NIAD-UE, *supra* note 110, at 21-22 (Chapter 2, Standard 5).

157. See text at notes 239-40 *infra*.

welcomed the opportunity to take part actively. Another stereotype was that Japanese students do not study hard and frequently skip class. That stereotype certainly has been laid to rest. Part of the reason for the continued high levels of student commitment presumably is compulsion, through the strict grading standards followed by Japanese law schools (and monitored by the accreditation system). I like to think the high levels of student commitment relate at least in part to the sense that the interactive classes at law schools are more stimulating than the one-way lectures of the past.

Attention to practice constitutes another important achievement. Mastery of doctrine remains at the heart of Japanese law school education. Yet, in contrast to traditional undergraduate legal education, law schools have paid considerable attention to education that bridges theory and practice, with extensive use of actual cases and incorporation of practice-related perspectives even in the core doctrinal courses. Law schools also have developed a wide range of practice-related courses. As mentioned earlier, the governing standards require that at least 20% of faculty members have significant practice experience (so-called practitioner-teachers, 実務家教員).¹⁵⁸ At many law schools, practitioner-teachers and traditional “researcher-teachers” (研究者教員) collaborate on some courses. In addition, many law schools have encouraged researcher-teachers to become members of the bar and obtain practice experience themselves.¹⁵⁹ Moreover, a majority of Japanese law schools have established legal clinics, some of which are quite extensive.¹⁶⁰

In keeping with the Reform Council’s expressed desire that law schools should develop their own identities, many law schools

158. See text at note 126 *supra*.

159. Under a subsequently revised provision of the Lawyers Act, full-time faculty members who had taught law at recognized law faculties for at least five years were entitled to apply for qualification as lawyers, without passing the bar exam. See MOJ, Bengoshi shikaku nintei seido (弁護士資格認定制度) [Certification System for Qualification as Lawyers], April 6, 2012, available at http://www.moj.go.jp/housei/gaiben/housei07_00004.html (last visited Nov. 4, 2012).

160. For a detailed examination of the development of clinics at Japanese law schools, see Shigeo Miyagawa, Takao Suami, Peter A. Joy & Charles D. Weisselberg, *Japan’s New Clinical Programs: A Study of Light and Shadow*, in *THE GLOBAL CLINICAL MOVEMENT* (Frank S. Bloch ed., Oxford Univ. Press, 2010), at 105.

established specialized programs. In their mission statements,¹⁶¹ over half the law schools highlighted a commitment to international matters. Others proclaimed their commitment to a wide range of fields, including intellectual property, taxation, company legal affairs, human rights, welfare law, and ethics, with specialized programs in such fields at many schools.¹⁶²

In a report issued in April 2009, the Special Committee on Law Schools, established under the auspices of MEXT, undertook an evaluation of the state of law school education. As concerns, the Committee found that “one segment” of law school graduates “has not attained sufficient understanding of the fundamentals of core fields of law and has not sufficiently mastered ability in legal thinking,” “one segment of graduates has not attained sufficient ability in logical exposition,” and “the content of legal skills education is uneven from law school to law school.”¹⁶³ On the whole, however, the Committee praised the law schools highly. “Looking at the new law school system as a whole,” the Committee concluded, “in the great majority of law schools establishment of an educational program that bridges theory and practice is proceeding steadily, so as to fulfill the functions anticipated by the . . . reforms.”¹⁶⁴ Based on evaluations by instructors at the LTRI, who were in position to observe apprentices who had entered through both old and new systems, the Committee reported:

[I]n terms of aptitude and ability judicial apprentices who have completed law school education not only are, overall, not inferior to judicial apprentices of the past, but excel in the following respects:

161. See, e.g., KAWAI JUKU RAISENSU SUKŌRU & KYŌDŌ HENSHŌ SENTĀ (河合塾ライセンススクール&共同編集センター), HŌKADAIGAKUIN PĀFEKUTO GAIDO 2007/2008 (法科大学院パーフェクトガイド2007/2008年版) [Perfect Guide to Law Schools, 2007-2008 edition] (2007).

162. See *id.*

163. Chūō kyōiku shingikai (中央教育審議会) [Central Council for Education], Daigaku bunkakai (大学分科会) [University Division], Hōkadaigakuin tokubetsu iinkai (法科大学院特別委員会) [Special Committee on Law Schools], Hōkadaigakuin kyōiku no shitsu no kōjō no tame no kaizen hōsaku ni tsuite (hōkoku) (法科大学院教育の質の向上のための改善方策について(報告)) [Regarding Ameliorative Measures to Improve the Quality of Law School Education (Report)] [Special Committee 2009 Report], April 17, 2009, at 1, available at http://www.mext.go.jp/component/b_menu/shingi/toushin/_icsFiles/afieldfile/2009/04/20/1261059_1_1.pdf.

164. *Id.*

- (a) Possess self-initiated, enthusiastic commitment to learning.
- (b) Have mastered methods for learning, and have high ability to conduct research on legal materials
- (c) Excel in communication ability and presentation ability.
- (d) Have achieved a definite understanding of the social mission the legal profession should discharge, through learning related to legal ethics, etc.
- (e) Possess learning related not only to the core fields of law, but to a broad range of other fields valuable for practice, such as intellectual property and financial law.¹⁶⁵

In 2012 the Special Committee on Law Schools issued another evaluation of law schools. This time, citing assessments by "members of the legal profession and a broad range of others who have connections with legal practice," the Committee reiterated strengths such as self-initiated commitment to learning, high ability in legal research, ability in legal drafting, and excellent communication skills, and added, "the principles of developing a legal profession strong in both quantity and quality, at which the new legal training system is aimed, are being realized."¹⁶⁶ The report noted numerous other strengths, as well, including skills in identifying and adjusting relevant interests and ability in logical persuasion. The report went so far as to state that, through education "strongly focused on bridging theory and practice," conducted in "small classes . . . in a highly interactive manner," the law schools are achieving a shift away from the large lecture approach and "have great significance as a leading model for university reform."¹⁶⁷

VI. Trials and Tribulations

Given these achievements, why all the hand wringing over the state of Japan's legal education reforms? More pointedly, if these positive assessments are accurate, why have applications and enrollments dropped so dramatically?

As the Special Committee on Law Schools observed in its 2012 report, there is very little public awareness of the merits of the new system. Indeed, as the first of its recommended steps for

165. *Id.*

166. Special Committee 2012 Proposal, *supra* note 21, at 1.

167. *Id.*

improvement, that Committee highlighted the need for an active public relations campaign to raise awareness of the achievements of law school education.¹⁶⁸ Who might orchestrate such a PR campaign is another matter. The most logical choice would seem to be the Japan Association of Law Schools;¹⁶⁹ but unless conducted skillfully, a campaign by that Association, or by individual law schools themselves, likely would be dismissed as self-serving. Yet not only has there not been a meaningful campaign to promote awareness of the merits of law schools, the legal education reforms have been subjected to considerable negative publicity, including criticisms orchestrated by the JFBA.

Presumably, the lack of public recognition regarding the strengths of law school education, coupled with the negative publicity, constitute part of the reason for the declines in applications and enrollment. For those considering law school, though, it seems likely that, rather than views about the nature of law school education itself, concerns over economic prospects play the key role in deciding whether to apply and enroll. In this connection, the cost of law school and the shift from the stipend to the loan system for LTRI apprenticeship training likely have had some impact. There can be little doubt that two other factors are even more important: prospects for future employment and, above all, concerns over passing the bar exam.¹⁷⁰ These factors, in turn, tie into debates over the future of Japan's legal profession and pitched battles over the size of the legal profession. To a great degree the law schools find themselves as pawns in these debates and battles.

With respect to perceptions of future prospects, three themes are deeply interconnected: the number of bar exam passers and

168. *Id.* at 12-13.

169. Hōkadaigakuin kyōkai (法科大学院協会) [Japan Association of Law Schools]. See, e.g., <http://www.lawschool-jp.info/about.html>.

170. For a detailed recent analysis of the decline in applicants, see Tokushū, *Henshūbu kikaku: Dēta de miru "hōsō shigansha no gekigen" – utsu te ha aru no ka?* (特集, 編集部企画: データで見る「法曹志願者の激減」 – 打つ手はあるのか?) [Special Issue, Prepared by the Editorial Staff: "The Dramatic Decline in Applicants for the Legal Profession" as Viewed through Data - Can Anything Be Done?], NIBEN FRONTIER, Dec. 2012 Issue, at 19 (2012). That analysis identified the low pass rates on the bar exam as the most important reason for the decline; but the article, which appeared in the monthly journal of the Daini [Number Two] Tokyo Bar Association, could not resist placing the blame squarely on the law schools, with the characterization: "the low pass rates resulting from the out-of-control proliferation (乱立) of law schools," *id.* at 25 (emphasis added).

resulting pass rate; the battle over the size of the legal profession; and the debate over the direction of demand for legal services. The following section addresses those themes in order.

A. Bar Exam Statistics

The new bar exam commenced in 2006. For the first three years the number of passers rose steadily. In 2006, when only *kishūsha* – law graduates in the shortened two-year course – were eligible, 1,009 passed.¹⁷¹ In 2007, when the first cohort of *mishūsha* joined, 1,851 passed; and, in 2008, 2,065 passed.¹⁷² Through 2010, the old bar exam was conducted in parallel with the new bar exam; and, while the number passing the old exam gradually declined, fairly sizeable numbers of candidates passed the old exam those three years, as well. Thus, the total number of bar passers rose from 1,558 in 2006 to 2,209 in 2008;¹⁷³ and, given the steady increases up to that point, it seemed as though the target of 3,000 passers-by 2010 might be reached. Then the number of passers hit a plateau. Between 2009 and 2011, the number of passers on the new bar exam fluctuated between 2,043 and 2,074, and the overall number of passers declined, to just 2,069 in 2011.¹⁷⁴ (In 2012, the number rose slightly, to 2,102, of whom 58 had qualified through the preliminary exam bypass route.¹⁷⁵)

The pass rates on the new bar exam have never come close to the 70% to 80% figure mentioned by the Reform Council. In 2006, when only *kishūsha* were eligible, the overall pass rate was 48.25%.¹⁷⁶ That year, out of 44 law schools with 10 or more graduates taking the exam, only 15 achieved pass rates over 50% (topped by Hitotsubashi University School of Law, at just over 83%).¹⁷⁷ The following year, when the *mishūsha* cohort joined and the first group of repeaters sat for the exam, the overall pass rate dropped to

171. See Regarding the Bar Exam, *supra* note 41, at 7.

172. See *id.*

173. See *id.* at 5, 7.

174. See *id.* Even though the old bar exam had been phased out by 2011, six of the 2010 candidates had passed all but the oral exam portion. Following standard practice, they were permitted to retake the oral exam in 2011, and all six passed.

175. See *id.* at 7.

176. See *id.*

177. See *id.* at 25.

40.2%.¹⁷⁸ As the number of exam takers and repeaters increased in subsequent years, the pass rate plummeted, reaching a low of 23.5% in 2011 before rising slightly, to 24.6% for law school graduates, in 2012.¹⁷⁹ In 2012, graduates of only four of the 74 law schools had pass rates over 50% (again led by Hitotsubashi, at 57%), and only thirteen had pass rates over 30%. At the other extreme were twenty schools with pass rates under 10%.¹⁸⁰

Another troubling development is the wide disparities in pass rates between *mishūsha* and *kishūsha*. In 2007, the first year in which a *mishūsha* cohort sat for the bar exam, the pass rate for *kishūsha* was 46% and that for *mishūsha* 32.3%.¹⁸¹ In every year since then, the pass rate for *kishūsha* has been about twice that for *mishūsha*; in 2012 the respective pass rates were 36.2% for *kishūsha* and 17.2% for *mishūsha*.¹⁸² The *mishūsha/kishūsha* categories are not identical to the nonlaw faculty graduates/law faculty graduates categories. Approximately 10% of the *kishūsha* are graduates of faculties other than law. Among the *mishūsha*, the proportion of law faculty graduates is much more prominent, at nearly two-thirds.¹⁸³ When broken down by categories, the pass rates for nonlaw faculty graduates are not so much lower than for law graduates; 35.8% for nonlaw and 40.8% for law graduates in the *kishūsha* category, and 18.6% and 19.5% respectively in the *mishūsha* category.¹⁸⁴ Nonetheless, the nonlaw graduates in the *kishūsha* category presumably either have studied law on their own or worked in law-related fields; for those who have not had much contact with law previously, the odds are steep.

B. Battle over the Size of the Legal Profession

Without access to confidential information, one cannot say for certain why the number of bar exam passers stalled after 2008. It hardly seems coincidental, though, that by then the JFBA had begun to mount a vigorous counteroffensive regarding the size of the legal

178. See *id.* at 7.

179. See *id.* at 30, 31 (including those who qualified through the preliminary exam, the overall pass rate in 2012 was 25.1%).

180. See *id.* at 31.

181. See *id.* at 51.

182. See *id.* at 51-52.

183. See *id.*

184. These percentages were calculated from the statistics contained in *id.*

profession.

As mentioned earlier, before the new legal training system started, the JFBA leadership was supportive, and the JFBA membership endorsed the reforms, including the expansion in the size of the legal profession. Even then, however, there was considerable dissension within the bar. As the reality of competition began to hit, backlash by the bar intensified. The size of the legal profession became a dominant issue in the biennial elections of the JFBA president; and successive JFBA administrations undertook a steadily escalating campaign to limit the rise in the size of the legal profession. The JFBA has issued several proposals on the issue, including "urgent proposals" in 2008 and again in 2011. The bar has utilized glossy brochures and has undertaken appeals to the mass media and lobbying campaigns to politicians, as well as making its case forcefully in presentations to the various bodies and advisory councils that have been considering legal training and related issues. Not surprisingly, the campaign has made selective use of data, at times bordering on demagoguery and fear mongering.

The JFBA stance on the size of the profession gradually hardened. An explanatory statement specifically referring to the 3,000 passer target accompanied the resolution adopted in 2000 endorsing the Reform Council's vision.¹⁸⁵ In looking back through the minutes of the Citizens' Council to the JFBA, as late as 2007 "access to justice" remained a major topic. By 2008, the tenor had changed. The 2008 Urgent Proposal continued to proclaim JFBA support for the Reform Council vision, stating: "This Federation firmly supports the basic ideal of justice system reform to have law and justice reach to every corner of society." But the proposal then proceeded to demand "careful deliberation regarding the quantitative goals themselves" and "a 'pace-down' in the increase in the size of the legal profession for the time being."¹⁸⁶

In another proposal the following year, the JFBA again affirmed its "active support" for the reforms and pledged to "continue to exert our utmost efforts toward the achievement of a legal profession 50,000 strong [the number specifically referred to by the

185. See JFBA, *supra* note 13.

186. JFBA, Hōsō jinkō mondai ni kansuru kinkyū teigen (法曹人口問題に関する緊急提言) [Urgent Proposal regarding the Problem of the Size of the Legal Profession] [2008 Urgent Proposal], July 18, 2008, available at <http://www.nichibenren.or.jp/library/ja/opinion/report/data/080718.pdf>.

Reform Council, not as the ultimate target, but as its projection for the year 2018], so as to assure the number of legal professionals needed by the people of Japan.”¹⁸⁷ In the next paragraph, though, the proposal characterized “the new legal training system” as “not yet in a mature state,” and asserted that “concerns regarding the quality of new entrants into the legal profession have been expressed from all quarters.”¹⁸⁸ It went on to propose that “for a number of years from and after [2009], the determination of the passers on the bar exam should be undertaken carefully and strictly, with the current number of passers as the target,” with a footnote reciting the numbers of passers in 2007 and 2008, 2,099 and 2,209 respectively.¹⁸⁹

By the time of the 2011 Urgent Proposal, the JFBA flatly declared that the Reform Council’s reference to 3,000 passers by the year 2010 “lacks validity,” proposed a “further pace-down,” and called on the government and other relevant bodies “to reduce substantially” the number of passers.¹⁹⁰ In March 2012, the JFBA issued yet another proposal, declaring the 3,000 passer goal “unrealistic,” calling for its “thorough reconsideration,” and demanding a prompt reduction in the number of passers to 1,500 per year, with the possibility of further reductions in future years. In that proposal, the JFBA even included projections based on a rollback to just 1,000 passers per year (showing that at that level Japan’s legal profession would peak at the 49,000 level in 2043 and then begin to decline).¹⁹¹

The rationales for limiting the size of the profession also evolved over time. An early line of resistance amounted, essentially, simply to the observation that competition within the

187. JFBA, *Tōmen no hōsō jinkō no arikata ni kansuru teigen* (当面の法曹人口の在り方に関する提言) [Proposal regarding How the Size of the Legal Profession Should Be for the Time Being], March 18, 2009, at 1, available at <http://www.nichibenren.or.jp/library/ja/opinion/report/data/090318.pdf>.

188. *Id.*

189. *Id.*

190. JFBA, *Hōsō jinkō seisaku ni kansuru kinkyū teigen* (法曹人口政策に関する緊急提言) [Urgent Proposal regarding the Policy on the Size of the Legal Profession], March 27, 2011, available at <http://www.nichibenren.or.jp/activity/document/opinion/year/2011/110327.html>.

191. JFBA, *Hōsō jinkō seisaku ni kansuru teigen* (法曹人口政策に関する提言) [Proposal regarding the Policy on the Size of the Legal Profession], Mar. 15, 2012, available at <http://www.nichibenren.or.jp/activity/document/opinion/year/2012/120315.html>.

legal profession was becoming more severe.¹⁹² While many lawyers undoubtedly viewed that development with great concern, standing alone that observation did little to persuade nonlawyers that limitations were needed.¹⁹³ Other rationales included the argument that there were so many new entrants senior lawyers no longer could provide adequate mentoring¹⁹⁴ and that the increases would result in excessive competition, which in turn would lead to a decline in ethics.¹⁹⁵ Another early set of arguments was that recent bar passers were having difficulty finding employment, so the number of passers should be capped.¹⁹⁶ That argument might have some merit as a ground for limiting the number of law school students in the first place (and, indeed, has been reconfigured in much that way since). As initially formulated, though, it seemed rather insensitive to characterize an effort to limit graduates' chances on the bar exam as an expression of concern for *their* well-being.

Another set of contentions relates to the inadequacy of efforts to achieve other reforms endorsed by the Reform Council. These include, for example, recommendations for substantial increases in the numbers of judges and prosecutors, as well as lawyers. As the JFBA has pointed out, the number of lawyers rose 70% in the decade from 2002 to 2012, but the numbers of judges and prosecutors increased by only 24% and 23% respectively.¹⁹⁷ A further matter that galls many Japanese lawyers is the so-called *hōsō ichigen* (法曹一元) issue. That phrase, which translates roughly to "legal profession unification," is shorthand for a U.S.-style judiciary, in

192. See, e.g., JFBA, Shimin kaigi (市民会議) [Citizens' Council], Minutes, Session 18, May 15, 2008, at 25-26 (comments of Vice President Murayama Akira (村山晃副会長)), available at http://www.nichibenren.or.jp/library/ja/judicial_reform/data/shiminkaigi18.pdf.

193. See, e.g., *id.* at 29-30 (comments of Council Chair Nakagawa Hidehiko (中川英彦議長)).

194. Whether senior members of the bar had in fact provided adequate mentoring to young lawyers in the past was not specifically addressed.

195. The assertion of declining ethics seems somewhat ironic, given the MEXT Committee's findings that law school graduates were more attuned to issues of professional responsibility and ethics than those who had passed the old exam.

196. See, e.g., Shimin kaigi, Minutes, Session 18, *supra* note 192, at 9-11 (comments by Vice President Murayama).

197. See Expert Advisory Council on Legal Training, Session 2, Sept. 20, 2012, Shiryō 6, Nihon bengoshi rengōkai teishutsu shiryō (【資料6】日本弁護士連合会提出資料) [Material 6, Material Submitted by JFBA], available at <http://www.moj.go.jp/content/000102272.pdf>.

which judges are appointed from the ranks of experienced lawyers rather than being recruited directly into the career judiciary upon completion of LTRI apprenticeship training. Such a judiciary has long been a cherished goal of the Japanese bar.¹⁹⁸ The 2000 JFBA resolution endorsing the justice reform plans made specific reference to achievement of *hōsō ichigen* as one of the reasons for the bar's support; and some subsequent attacks on the increase in the size of the legal profession have cited the *hōsō ichigen* issue, implying that the bar was misled into supporting the increased number of passers by the false expectation of achieving *hōsō ichigen* in return.¹⁹⁹ Yet, given the limited connection of *hōsō ichigen* to the primary motivation for opposition to the increases in the size of the legal profession, concern over competition, it is doubtful whether achievement of that goal would have made much practical difference to the debate over lawyer population.²⁰⁰

The most potent arguments for limiting the number of bar exam passers fell into two major categories: the view that the market for legal services already was oversaturated and there was insufficient demand to support more lawyers (discussed in Subsection VI(C) below), and the argument that the new legal training system had resulted in a decline in quality. While the JFBA has referred to other

198. For a detailed examination of the *hōsō ichigen* debate, see KOBAYASHI, *supra* note 15, at 155-83, 206-12. In fact, the *hōsō ichigen* issue was the object of heavy debate during the deliberations of the Provisional Justice System Investigation Committee in the early 1960s. That Committee concluded that introduction of such a system was unfeasible at the time, in part because the legal profession was too small to support a move to recruit judges exclusively from among experienced lawyers. See Investigation Committee Recommendations, *supra* note 51, at 13-48. The bar's anger over this issue reportedly was the reason for the JFBA's disavowal of the Investigation Committee Recommendations and its unwillingness to cooperate in a consultation council with the two other branches of the legal profession, established pursuant to those Recommendations, for many years thereafter (although it seems likely that another factor was the Committee's call for a substantial increase in the size of the legal profession, justified in part by reference to the *hōsō ichigen* issue). See KOBAYASHI, *supra* note 15, at 160.

199. See, e.g., KOBAYASHI, *supra* note 15, at 167-73, 206-12; Kuboi Kazumasa (久保井一匡), *Chokusetsushugi/kōtōshugi o kōtai saseru na* (直接主義・口頭主義を後退させるな) [Do Not Let The Principles of Directness and Orality Regress], RONKYŪ JURISUTO 02 (Summer 2012), at 99 (2012).

200. Even if the *hōsō ichigen* concept had been adopted, it is questionable whether enough lawyers would have been willing to join the judiciary. The justice system reforms included an effort to revitalize a program for mid-career appointments of lawyers to the judiciary, but very few lawyers have pursued appointment. See Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HŌSHAKAIGAKU 128, 135-36 (2007).

asserted deficiencies, such as unevenness in skills training at law schools, inadequacy of the shortened LTRI apprenticeship training, and inability to provide sufficient on-the-job training to the new entrants,²⁰¹ the centerpiece of its indictment of law school education has rested on a narrow definition of quality as, in essence, mastery of legal doctrine. In its 2008 Urgent Proposal, for example, the JFBA warned: "Of the many elements of the skills that make up lawyer quality, the decline in quality noted [here] relates to the skill of basic legal knowledge and legal understanding. To take the first step on the road to the legal profession, this constitutes the minimum that is absolutely essential."²⁰² The evidence offered was mostly anecdotal, selectively utilizing material such as the assessment by LTRI instructors, mentioned earlier, that "one segment" of law school graduates "has not attained sufficient understanding of the fundamentals of core fields of law." The JFBA allegations of lower quality conveniently ignored the highly positive overall tone of the assessment by LTRI instructors, including their reports that passers of the new exam were superior to passers of the old exam in communication skills and several other concrete respects. Nonetheless, the image of declining quality took hold. And, as discussed in Section VII below, the contentions of lower quality, coupled with the narrow definition of quality utilized, have had a serious impact on legal education.

C. Demand for Legal Services

Perhaps the most difficult question in connection with the future of Japanese legal education and the legal profession relates to demand for legal services. What makes this especially difficult is that it involves two very different sets of assumptions.

One view, held by those pushing to limit the number of passers, sees the Japanese legal profession as likely to continue to play largely the same roles in the future as it has in the past, primarily centered on litigation, with only gradual expansion into other roles. Those who hold this view also tend to view demand for lawyers

201. See, e.g., JFBA, *Hōsō jinkō seisaku ni kansuru kinkyū teigen, Kanren shiryō* (法曹人口政策に関する緊急提言、関連資料) [[Urgent Proposal regarding the Policy on the Size of the Legal Profession, Related Materials] [Related Materials], March 2011, available at http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_shiryō.pdf.

202. 2008 Urgent Proposal, *supra* note 186.

even for litigation-related matters as relatively limited. Accordingly, they foresee at most limited increases in demand.

The second view, which was held by the Reform Council (and by the Legal Training Reform Consultation Council, in its final report of 1995²⁰³), anticipates a major expansion in demand. That view sees great unmet needs for lawyers in Japanese society, even in their traditional role as representatives for litigation; it sees involvement in ADR and other forms of dispute resolution as a natural extension of the traditional roles; and it envisions lawyers as assuming many other roles, including taking in-house positions at corporations, working for governmental bodies and NGOs, and advising businesses and individuals on a wide range of matters.

The Reform Council recognized that the size of the legal profession should be based on the needs of Japanese society (as opposed to being set by the legal profession itself). Yet, insofar as the Council envisioned an expansion of the legal profession into new geographical areas, new legal fields, and new roles, it could not simply look to past experience within Japan in order to assess the needs. The market for legal services in Japan, after all, had developed based on a system in which the number of new lawyers had been capped at the same level for over 25 years, and had only gradually increased over the prior decade. For the expanded roles envisioned by the Reform Council to take root, changes in mindset would be needed on both sides: the consumers of legal services and the legal profession itself. And it would inevitably take some time for a new model of legal practice and new market equilibrium to take hold. It is presumably for reasons such as these that the Reform Council referred to the "zero-one regions" and introduced comparisons from foreign nations, as proxies for assessing future needs.

The use of the foreign comparisons, however, left the Reform Council open to the JFBA charge that Japan is unique and Japanese needs cannot be judged based on comparisons with other nations. And the reference to the zero-one regions gave the JFBA the opening to declare victory with regard to the issue of lawyer scarcity when the last of the "zero" judicial districts was eradicated and only a handful of districts remained with just one lawyer.²⁰⁴

203. See text at note 69 *supra*.

204. See, e.g., JFBA, Related Materials, *supra* note 201, at 15-16 (Shiryō 22, Bengoshi zero-wan chiiki no kaishō (資料22, 弁護士ゼロ・ワン地域の解消)

Symbolic measures and rhetorical flourishes aside, the basic question of how many lawyers society needs inevitably involves subjective judgments. Among those who favor limiting the number of lawyers, some view the small size of the legal profession and relatively weak demand as praiseworthy: reflections of Japan's deep commitment to harmony and consequent low need for lawyers. Many others, though, including many of the lawyers who have been involved in the debate over the size of the legal profession, feel differently. They wish there were more demand, and typically feel there should be more demand, but do not believe the demand will be forthcoming.

As this reflects, within the Japanese bar there is widespread, albeit by no means universal, agreement that there remain many unmet needs for legal services.²⁰⁵ Needs continue to exist even with respect to the traditional role of Japanese lawyers as representatives in litigation. There may not be any more "zero" court districts (although there surely are still many cities and towns with no lawyers), but studies of rural regions have found that lawyer scarcity remains a serious concern, with many legal needs going unmet.²⁰⁶ The extent of unmet need was brought home rather dramatically by the 2011 Great East Japan Earthquake and resulting disaster, including the meltdown at the Tokyo Electric Power Company (TEPCO) nuclear power plant. For claims for compensation for nuclear power-related damages, filed with a specialized ADR Center established to handle such claims, for the first several months under 20% of claimants were represented by counsel; and the low level of representation led to delays and difficulty in processing of claims.²⁰⁷

There is also fairly broad recognition of a continued and expanding need for lawyers serving other roles. Some of the major categories of perceived need include business advising, including

[Material 22, Eradication of the Zero-One Lawyer Regions)].

205. See, e.g., JFBA, Shimin kaigi, Minutes, Session 19, at 25-26 (comments of Secretary-General Marushima Shunsuke (丸島俊介事務総長)), available at http://nichibenren.or.jp/library/ja/judicial_reform/data/shiminkaigi19.pdf.

206. See, e.g., Takayuki Ii, *Young Migrants from Big Cities: Measures for Dealing with the Shortage of Legal Services in Japan*, 27 Z. JAPAN. R./J. JAPAN. L. 59 (2009).

207. See Suzuki Isomi & Ono Yasuhito (鈴木五十三 & 尾野恭史), *Genshiryoku songai baishō funsō kaiketsu sentā no mōshitate gaikyō to shinri no kadai* (原子力損害賠償紛争解決センターの申立て概況と審理の課題) [The General Situation of Claims at the Nuclear Power-Related Damage Claim Resolution Center and Issues for Hearings], NIBEN FRONTIER, Oct. 2012, at 24-25.

in-house legal staff; full-time or part-time legal staff for governmental and administrative bodies; NGOs; and preventive lawyering and advising for individuals.²⁰⁸ Moreover, there is rather widespread recognition of the need for lawyers in various specialized fields, including labor, consumer, welfare/eldercare, and health law.²⁰⁹

Even if needs do exist, however, a second critical question is whether those affected will utilize legal professionals. Two initial aspects of that issue are whether the potential consumers of legal services will even recognize their concerns as being legal in nature, and, if so, whether they will appreciate that lawyers can help resolve the concerns. Those who are optimistic about rising demand for legal services anticipate increased recognition of need as new patterns of access and utilization develop; skeptics are dubious. A further important aspect is the ability and willingness of consumers to pay for the legal services, or, in the alternative, access to other funding sources. A recent conversation with a leading lawyer representing claimants in the nuclear-related ADR proceedings offers a vivid example of the difficulties Japanese lawyers may face in changing consumers' attitudes toward payment for legal services. He reported having reached an initial agreement with claimants that they would pay the team of lawyers representing them 5% of awards received from TEPCO. When the ADR Center subsequently issued a standard calling on TEPCO to pay lawyers representing claimants an amount equivalent to 3% of recognized awards, though, the claimants balked at paying the lawyers the additional 2%. One would hope that, as the Japanese public becomes more aware of the value of the services lawyers offer, this type of resistance will fade. Still, it is presumably for reasons such as this that lawyers push for expansion in civil legal aid and place considerable hope in provisions included in many recent automobile insurance and other insurance policies authorizing payment of lawyers' fees.²¹⁰

In connection with the debate over new roles for lawyers,

208. See, e.g., Forum on Legal Training, Summary of Main Issues, *supra* note 25, at 1-3.

209. See, e.g., *id.* at 3-4.

210. See, e.g., *Minji shihō gurando dezain shinpojiumu (jō)* (民事司法グランドデザイン・シンポジウム (上)) [Civil Justice Grand Design Symposium (Part 1)], 982 NBL 24, 28 (2012).

changes in the mindsets of both lawyers and consumers are essential preconditions for significant expansion in hiring patterns. The accepted interpretation of the Lawyers Act is that members of corporate legal departments and legal specialists in other organizations need not be licensed legal professionals; and that interpretation is so deeply rooted a change seems highly unlikely. Thus, in filling those positions, the corporations and other organizations understandably will want to know what it is that law school, LTRI training, and the lawyer license add.²¹¹ Potential hiring by governmental bodies and administrative agencies faces another complicating dynamic: In the past, those bodies have tended to view lawyers as enemies, and vice versa. Overcoming that adversarial mindset represents another barrier.

Proponents of both points of view can point to data from the five years since the first law school graduates entered the market to support their positions. The JFBA has assembled, and publicized in numerous formats, data to show the market for legal services is over-saturated and cannot absorb the large numbers of lawyers entering practice every year.²¹² A more specific contention is that, despite the assiduous efforts of the JFBA in placement, finding jobs for new lawyers has become more and more difficult.²¹³ Now that nearly all the former zero-one districts have at least two lawyers, the bar has implied that what were once areas of lawyer scarcity no longer need more lawyers. In recent years, an increasing percentage of those completing LTRI apprenticeship training do not register with a bar association right away; it is assumed that most of them still have not located jobs.²¹⁴ A considerable number of new lawyers

211. Presumably, the corporations and organizations also will consider what the candidates might have gained if they had spent the same period of time on the job.

212. See, e.g., JFBA, Related Materials, *supra* note 201. For an examination of various aspects of this issue, see *Tokushū 1* (特集1) [Special Topic 1], *Shinjin bengoshi no shūgyō jōkyō* (新人弁護士の就業状況) [Employment Circumstances of New Lawyers], JIYŪ TO SEIGI, Vol. 63, May Issue, at 8-36 (2012).

213. See Tsujikawa Masato, Takahashi Tarō & Fujimoto Yasunari (辻川正人, 高橋太郎 & 藤本和也), *Shinki tōroku bengoshi no shūshoku jōkyō to Nichibenren no kore made no torikumi* (新規登録弁護士の就職状況と日弁連のこれまでの取組) [Employment Circumstances of Newly Registered Lawyers and the Efforts of JFBA Until Now], JIYŪ TO SEIGI, Vol. 63, May Issue, at 14 (2012).

214. *Id.* at 14-17. Among passers of the new bar exam who completed LTRI training in 2010, 11% did not immediately register for a bar association; in 2011, 20.1% did not register immediately. By two months later, the non-registered were down to 5% and 7.2%, respectively. By six months later, only 2.6% of the 2010 cohort remained unregistered; comparable figures were not available for the 2011

commence practice as sole practitioners right from the start; in the view of the JFBA, this is mainly because they have not been able to find jobs with existing firms.²¹⁵ Moreover, for new lawyers who do find jobs with existing firms, pay levels have been falling.²¹⁶

In terms of other indicia of demand, the JFBA also points to data showing that, after peaking in 2003, the total number of civil and administrative cases filed in Japanese courts has fallen substantially.²¹⁷ Nor, proponents of the restrictive view would assert, can one expect increases in other types of legal jobs to absorb all the new entrants into the legal profession. While hiring of lawyers by corporations, governmental bodies and other organizations may have risen, the number of lawyers employed in those settings remains modest, and there is little reason to expect major increases anytime soon.²¹⁸

Those who view the Japanese legal services market as in transition to a new equilibrium, with greater demand, would utilize much of the same data but interpret it differently. Even before turning to the data, though, advocates for this view might note how unfortunate it was that the Lehman shock and global downturn in legal hiring hit just as substantial numbers of graduates from the new law schools were beginning to enter the market, observe that Japan is not alone in experiencing a downturn in hiring of lawyers, and express hope the downturn proves to be relatively short-lived.

cohort. In addition to those who could not find jobs, the unregistered group includes persons who secured jobs that did not require (or, in some cases, did not permit) bar membership.

215. See *id.* at 17-18. For the new bar exam passers who completed LTRI training in 2011, 2.4% fell in this category. Approximately the same percentage had done so in 2009 and 2010, as well.

216. See Fujihara Yasuo (藤原靖夫), *Shin63ki bengoshi no shūgyō jōkyō ni tsuite* (新63期弁護士の就業状況について) [Regarding the Employment Circumstances of Lawyers from the New 63 Term Cohort], *JIVŪ TO SEIGI*, Vol. 63, May Issue, at 8, 9 (2012).

217. The reference in the text is to cases at all levels of courts, including summary courts. There has been an increase in the number of civil cases filed in district courts since 2005; but the JFBA explains that the increase is mainly attributable to a wave of consumer loan cases, demanding repayment of excessive interest charges, stemming from a series of Supreme Court cases clarifying the rights of borrowers, and warns that the peak in those cases has now passed. See *e.g.*, JFBA, Related Materials, *supra* note 201, at 11 (Shiryō 16, Kabaraikin henkan seikyū soshō no dōkō (資料16, 過払金返還請求訴訟の動向) [Trends in Lawsuits Demanding Return of Overpayments]).

218. Tsujikawa et al., *supra* note 213, at 18-19.

As to the data, proponents of the new equilibrium view might observe that every year since 2008 the JFBA has been saying the market is over-saturated and has been predicting the coming year would be the one in which large numbers of new lawyers went unemployed, yet the market has continued to absorb nearly all the new entrants every year.²¹⁹ True, many of the new entrants have not been able to obtain the jobs they desired, many have taken longer to find jobs than they expected, and a fair number are under-employed; but, despite the rhetoric, unemployed LTRI graduates remain rare. And, the optimists might say, while many members of the new cohorts of lawyers have faced struggles, their efforts have helped develop new niches and expand the market for legal services, and, at the same time, have improved access to legal services. A prominent example, the proponents of this view might suggest, is the extent to which new cohorts of lawyers have undertaken practice in what heretofore were areas of lawyer scarcity. In those regions, many residents had fallen prey to usurious interest rates charged by consumer loan companies, and lawsuits related to those cases have helped sustain lawyers during the startup period. But as those lawyers settle and develop ties, it seems likely they will help achieve greater recognition for the value of legal advice and pave the way for further expansion of the market for legal services.

Those who foresee expanded roles for lawyers might also point with hope to the data on hiring of lawyers by corporations and governmental bodies. While the number of licensed lawyers holding in-house positions within Japanese companies remains relatively modest, with just 667 total as of December 2011, the rate of increase has been dramatic, with the number up more than ten times since 2001, when only 64 licensed lawyers worked in-house.²²⁰ Notably, much of that increase has come about through hiring of lawyers directly upon their completion of LTRI training, with about 60 new lawyers hired each year by Japanese companies since 2008.²²¹ The number of licensed lawyers employed by national or local governmental bodies is even smaller, with fewer than 200 full-time lawyers in such positions as of early 2012 (most in fixed term appointments). Here again, though, there has been more than a ten-

219. *See id.* at 15.

220. *See id.* at 18.

221. *See id.*

fold rise over the past decade. (In contrast to the situation for in-house lawyers at companies, most of these positions have gone to lawyers with considerable experience.)²²² And, gradually, other organizations are beginning to show interest in hiring lawyers.

The significance of the rise in employment of lawyers by corporations and governmental bodies may go beyond the numbers themselves. The pattern signals a shift away from the traditional law firm-based litigation-centered practice to new types of positions that involve much more preventive lawyering, strategic planning, and even policymaking and legislative drafting. This is precisely the sort of expansion in roles the Reform Council envisioned; and as these hiring trends develop, they may pave the way for a reconception of the role of the Japanese legal profession.

As Richard Abel has observed, legal professions throughout the world typically have proven more adept at holding down the supply of legal services than in increasing demand for legal services.²²³ To the JFBA's credit, at the same time it has been mounting a fierce counter-offensive to keep the supply of lawyers down, it has provided new entrants with assistance in finding jobs.²²⁴ Those involved in these placement efforts are sincere and dedicated, and their efforts have borne fruit. It is in part thanks to their outreach efforts that more corporations and governmental bodies are hiring lawyers. That said, it may well be that the new entrants will be even more creative than their predecessors in exploring new territory and pioneering new roles for the legal profession. The new entrants are not so habituated to traditional practice patterns and assumptions; a considerable number have prior experience in business or other organizations; and quite a few are, at least figuratively, hungry.

VII. Implications for Law School Education

The legal profession requires a broad range of qualities and skills. As the profession enters new fields and takes on new roles,

222. *See id.* at 18-19.

223. *See, e.g.,* Abel, *supra* note 62, at 5-8; Richard L. Abel, *England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors*, in *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* 23, 38-48 (Richard L. Abel & Philip S.C. Lewis eds., 1988); Richard L. Abel, *United States: The Contradictions of Professionalism*, in *id.* at 186, 189-200, 212-18.

224. *See, e.g.,* Tsujikawa et al., *supra* note 213.