

## A Public Policy Perspective on Judicial Reform in Japan

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*“Understanding the policy process requires a knowledge of the goals and perceptions of hundreds of actors throughout the country [...] when most of those actors are actively seeking to propagate their specific ‘spin’ on events.”*

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### I. INTRODUCTION

On June 12, 2001, the report of the Justice Reform Council (hereafter the Council or JRC) was presented to Prime Minister Jun’ichiro Koizumi.<sup>2</sup> Only three days later, the cabinet decided to pay full attention to the reforms and to draft bills to realize the objectives of the JRC. In the report, the Council called for, among other things, increasing the number of successful candidates to the legal profession, the establishment of specialized professional law schools, as well as more swift legal proceedings and an expansion of access to courts. The report also proposed measures to ensure sufficient pluralism in the justice system, including the expansion of the pool from which judges would be nominated and the introduction of popular participation in criminal trials.

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1 P.A. SABATIER, The Need for Better Theories, in: Sabatier (ed.), *Theories of the Policy Process: Theoretical Lenses on Public Policy* (Denver 1999) 4.

2 See <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/index.html> (accessed June 20, 2007).

Politicians' expectations for the judicial reform were high and ambitious. In his policy speech in May 2001 Koizumi stated that "it is imperative that we reform our judicial system so that we can make the transition to an 'after-the-fact check and relief society' based firmly on clearly established rules and the principles of self-responsibility."<sup>3</sup> A few years later, there are indications that the reforms indeed had at least some of the desired impact. Media coverage on the judicial system in Japan suggests some effect of the reform, with headlines such as "Increasing Normative Consciousness" (*takamaru kihan ishiki* 高まる規範意識) and "Expanding Responsibility and Increasing Litigation" (*hirogaru seki'nin, fueru teiso* 広がる責任・増える提訴).<sup>4</sup> Scholars have used words such as "radical," "epoch-making," or "fundamental" when assessing the judicial reform based on the report of the JRC in 2001.<sup>5</sup>

How could such drastic reforms be possible in a context of conservative and closed judicial policymaking controlled by the Supreme Court, the Japan Federation for Bar Associations, and the Ministry of Justice? Policymaking concerning the administration of justice in postwar Japan had been dominated by the discussion on the need to increase access to the courts and how to do so. Reforming the bar exam, unification of the legal profession, and reforming the Supreme Court to solve judicial backlog were recurring themes in judicial policymaking. Although often demanded by various groups inside and outside the judiciary, reform on these themes had been incremental at best.

Yet, the reform of 2001 marks a spectacular punctuation in this otherwise incremental evolution. It was thorough and comprehensive and the "first fundamental change since the Judicial Reform just after World War II."<sup>6</sup> Why did reform of the administration of justice finally happen *then* and not earlier? Shozo Ota suggests that this was caused by the advent of new actors in the policy venue in the 1990s.<sup>7</sup> Before the 1990s, business leaders and LDP had been rather indifferent to the judicial system "since it has been totally irrelevant to Japan's economy and policy making."<sup>8</sup> When deregulation in the economic hardship of the 1990s engulfed Japan, the judiciary became relevant to the business world. This in turn resulted in the major business organizations and the LDP joining the policy venue for policymaking in the judicial field. However, it takes more than some new actors joining the venue to explain reform. In this contribution we will argue that changes in the public understanding of the policy issue also played a crucial role in the radical departure from the past. We will describe the process of policy change

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3 The Japan Times, 8 May 2001.

4 Nikkei Shinbun, 12 December 2006.

5 S. MIYAZAWA, The Politics of Judicial Reform in Japan: The Rule of Law at Last? in: Asian-Pacific Law & Policy Journal 2-2 (2001) 89.

6 I. SATO, Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law, in: Social Science Japan Journal 5-1 (2001) 71.

7 S. OTA, Reform of Civil Procedure in Japan, in: The American Journal of Comparative Law 49-4 (Autumn 2001).

8 OTA, *supra* note 7, 583.

as a complex process that gradually builds up from a situation of relative stability to drastic policy change. This process has been identified in narratives of policymaking in the U.S. and was recently also broadened to other countries. Among the most promising models in this field is that of Bryan D. Baumgartner and Frank R. Jones, which they describe as the “punctuated equilibrium” model.<sup>9</sup>

Baumgartner and Jones started from the “simple observation that political processes are often driven by a logic of stability and incrementalism, but occasionally they also produce large scale departures from the past.”<sup>10</sup> Their analyses focus on a long period of time (usually several decades) and pay particular attention to “policy images”: widely accepted and generally supportive images of a policy that consist of a mixture of empirical information and emotive appeal.<sup>11</sup> Moreover, they look at a variety of what they call “policy subsystems” (policy networks, policy communities, iron triangles...) all dealing in parallel with their own respective policy issues. One policy venue can take authoritative decisions and limit access to decision making in policy in one field. These policy venues are normally fairly stable, because they are supported by a policy image that justifies the power of those in the policy venue.<sup>12</sup> A case in point is the Japanese justice system before the 2001 reforms. The dominant policy image was that informal dispute resolution better suits Japanese culture and that the number of lawyers can therefore remain limited. This reinforced policymakers to perpetuate a severe bar examination. It is useful to note that such stability is not absolute. There were occasional and incremental changes to slightly increase the number of successful candidates. Thus, even in a situation of equilibrium, communities of specialists are constantly dealing with issues and proposing alternatives to existing policy.

According to Baumgartner and Jones, a policy equilibrium can be punctuated in different ways: the policy venue can change by inclusion of new actors; the policy image can change, *e.g.*, following an expansion of the issue; and the macro-political attention for an issue can increase. These ways, needless to say, are interrelated and form the conditions for reform.

These mechanisms of change are at work in a broader process of change that also deserves clarification. The issues treated by policy specialists in a certain field can only ‘catch fire’ when they come into the spotlights of macro-politics for various reasons

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9 F.R. BAUMGARTNER / B.D. JONES, *Agendas and Instability in American Politics* (Chicago 1993) 155.

10 J.L. TRUE / B.D. JONES / F.R. BAUMGARTNER, *Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking*, in: Sabatier (ed.), *Theories of the Policy Process* (Denver 1999) 97.

11 TRUE *et al.*, *supra* note 10, 161-162.

12 This is explained by referring to mechanisms of negative feedback: “self-correcting, or homeostatic processes, leading to steady equilibrium-type behaviours over time” (F.R. BAUMGARTNER, *Punctuated Equilibrium Theory and Environmental Policy*, in: Repetto (ed.), *Punctuated Equilibrium and the Dynamics of U.S. Environmental Policy* (New Haven 2006) 27.

such as scandals or a major change in another field. But issues can also change in a less dramatic way “by relatively minor events that add up over longer periods of time.”<sup>13</sup> Typically, issues that rise on the agenda are often linked to new actors who join the venue and bring the issue to the attention of the public or media. Those newcomers often are proponents for change. Small, endogenous conflicts over the appropriate image can also result in shifts of attention and make the issue spill over to the macro-political level.<sup>14</sup> Media coverage can reflect the change of a policy image. Once the issue catches fire, it dominates the agenda, expansion is unstoppable, and the monopoly and therefore the partial equilibrium are challenged.<sup>15</sup>

Several articles have been written on the policy process of legal reform in Japan. It was explained how policymaking in the field of judicial administration works. Yet, these studies typically look only at the 2001 reform and do not take into account the longer postwar developments and dynamics in which stability in the administration of justice was maintained. Most policy models are designed to explain stability *or* change. Stability *and* change are part of the same story and one cannot be explained without the other. The model we will propose encompasses both and emphasizes two elements of the policy process: issue definition and agenda setting.<sup>16</sup> We will explain how the administration of justice in Japan was defined in public discourse in different ways at different periods and when and how issues related to the administration of justice rose and fell on the public agenda. This article therefore seeks to offer a better model for explaining the overall dynamics in the process of judicial reform in Japan.

The article consists of three main sections. First, we will describe the policy monopoly as a mutually reinforcing relationship between venue and image. Then we will describe how attempts to reform justice administration failed mainly due to lack of interest at the macro-political level. Finally, we will study the path to reform and the reasons why the reform of judicial administration did take place in 2001.

## II. ADMINISTRATION OF JUSTICE AND POLICYMAKING IN POSTWAR JAPAN: A POLICY MONOPOLY

The first period in the policy subsystem of justice administration could be described as a policy monopoly, *i.e.*, a mutually reinforcing relationship between a policy venue and the policy image that supports the power of those in the policy venue. We will discuss each in turn.

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13 TRUE *et al.*, *supra* note 10, 160.

14 P. JOHN, *Analysing Public Policy* (London 1998) 177.

15 JOHN, *supra* note 14, 178.

16 TRUE *et al.*, *supra* note 10, 97.

### 1. *The Three Parties in the Legal Profession*

The three parties in the legal profession, represented by the Supreme Court, the Ministry of Justice, and the Lawyers Association, were the main actors in the administration of justice in postwar Japan.

The constitution of Japan became effective on May 3, 1947. It established the separation of power between the various branches of government. Article 76 stipulates that the judiciary exercises the “whole judicial power” and Article 77 gives rule-making power for judicial administration to the Supreme Court.<sup>17</sup> Yet, at the same time, the constitution gives power to the Diet and Cabinet to appoint judges and allocate funds from the national budget to the judiciary. It has been suggested that this may be a threat to judicial independence when the ruling party remains in power for a long time, as is the case in Japan with the Liberal Democratic Party retaining a firm grip on power since 1955.<sup>18</sup> The Supreme Court has been reluctant to exercise judicial review of the government’s administrative action. Percy Luney states that this reluctance may have its origin in a sense of unity with the government or “may be the product of the desire to avoid confrontations that may jeopardize the status and prestige of the judiciary.”<sup>19</sup>

Although the Ministry of Justice was coordinating the relationship between the Supreme Court and the political leaders of Japan, it was clearly doing that less prominently than before the Second World War. In prewar Japan, most ministers of justice were former prosecutors, and reports suggest that hierarchy among the three judicial professions was strict: the prosecutors at the apex, followed by the judges and, in the lowest position, the lawyers.<sup>20</sup> This was also reflected in the top positions of the bureaucrats in the Ministry of Justice, which were exclusively reserved for prosecutors. After 1947, the judges became the new apex of the administration of justice, but rapidly encountered barriers to the efficient and effective administration of the judiciary. For example, they did not have the administrative experience to secure budget and personnel allocations. They needed to consult with more experienced bureaucrats and soon established a lasting consulting relationship with the ministry. Most importantly, communica-

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17 See P.R. LUNEY, *The Judiciary: Its Organization and Status in the Parliamentary System*, in: *Law and Contemporary Problems*, 53-1 (Winter 1990) 135-162.

18 LUNEY, *supra* note 16, 141. The debate on whether the Supreme Court is independent from pressure from the LDP is well analyzed in: F.K. UPHAM, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, in: *Law & Social Inquiry* 2005, 421-455. The two views in Upham’s article are on the one hand Mark Ramseyer’s, who defends the view that the Supreme Court is an agent of the LDP, and on the other hand John O. Haley’s, defending the integrity of the apex of Japanese judiciary.

19 LUNEY, *supra* note 17, 154.

20 I. SABURÔ, *Shihô-ken dokuritsu no rekishi-teki kôsatsu* [A Historical View on the Independence of Justice] (Tokyo 1962). A brilliant analysis of the independence of justice and the power of the prosecutors was done by Taichiro Mitani. See T. MITANI, *Kindai nihon no shihô-ken to seito: baishin-sei seiritsu no seiji-shi* [Justice and Political Parties in Modern Japan: A Political History of the Jury-System] (Tokyo 1980).

tion with the Ministry of Justice is done by the secretary-general of the General Secretariat of the Supreme Court (*Saikô Saiban-sho jimu sôchô* 最高裁判所事務総長) in charge of leading the day-to-day administration of the Supreme Court.<sup>21</sup> Together with the Chief Justice of the Supreme Court (*Saikô Saiban-sho chōkan* 最高裁判所長官), this person is very powerful in deciding on justice administration in postwar Japan.

The Ministry of Justice (*Hōmu-shō* 法務省), which had supremacy in judicial administration, initially was not pleased with the postwar structure of the administration of justice. Discord and tension characterized the initial period of the postwar relationship between the Supreme Court and the Ministry of Justice. Within the ministry, the administrative vice-minister (*jimu jikan* 事務次官) is the main actor in policymaking. *Jimu jikan* is the highest-ranking position among career civil servants in a ministry and hence is regarded as the substantively most powerful figure in the ministry, more powerful in many instances than the minister. The administrative vice-minister in the Ministry of Justice controls the personnel decisions within the office of the prosecutors. He is therefore very powerful. Almost all administrative vice-ministers come from the prosecutor's office and will return to it after their usual two-year term is finished. Unlike in the other ministries, the administrative vice-minister position is not a final step in a career and the administrative vice-minister's 'cohort' (those who started their career at the same time as the vice-minister) will not resign from their positions as is done in other ministries. The position of administrative vice-minister is seen as a stepping stone to the more important position of public prosecutor general or superintendent public prosecutor. The general rule is that the administrative vice-minister is a promotion from the director of the Criminal Affairs Bureau or the chief public prosecutor of the Tokyo District Public Prosecutor's Office. The vice-minister needs to be able to counter the political motivations of the Minister of Justice when deciding on personnel matters and plays a very important role of mediator between the interests of the Minister of Justice and those of the public prosecutors. Various reports exist of conflicts between the Minister of Justice and the administrative vice-minister on important appointments, and all were decided in line with the administrative vice-minister's ideas.<sup>22</sup> The importance of the appointments to the public prosecutor's office comes to the fore in political scandals where the public prosecutors need to be ready even to investigate and if necessary indict top politicians. Susumu Inaba, who was the Minister of Justice at the time of the Lockheed scandal, was surprised at the power of the prosecutors he did not hesitate to label "demonic" (*mamono* 魔物).<sup>23</sup> Even former Prime Minister Kakuei Tanaka, who was feared by all politicians, was apprehended by the powerful prose-

21 M. KOYAMA *Sengo bengoshi-ron josetsu* [Introduction to the Postwar Discourse on Lawyers], in: K. Miyakawa / K. Nasu *et al.* (eds.), *Henkaku no naka no bengoshi: sono rinen to jissen, jō* [Lawyers Amidst Change: Principles and Practice, Volume One] (Tokyo 1992) 72.

22 S. SETO, *Jimu jikan kenkyū: Hōmu-shō* [Research on the Administrative Vice-Minister: The Ministry of Justice], in: *Gekkan Kankai* (November 1982) 66-75.

23 SETO, *supra* note 22, 70.

cutors. The administrative vice-ministers are the ‘gatekeepers’ of judicial integrity in the prosecutor’s office in Japan and hence wield important power, even against the will of politicians.<sup>24</sup>

Yet, senior bureaucrats within the Ministry of Justice are not the only players in the policy venue concerning “justice administration.” The Cabinet Legislative Bureau (*naikaku hōsei-kyoku* 内閣法制局) was established in its actual form in 1962 and resorts under the authority of the Prime Minister.<sup>25</sup> Its task is to “examine the bills, government ordinances and treaty proposals submitted by the Cabinet and to report to the Cabinet as well as to add the required corrections” (Art. 3, part 1 of the Cabinet Legislation Bureau Establishment Act<sup>26</sup>). Between 1947 and 2001, bills initiated by the Cabinet amounted to 57.9 percent and bills initiated by members of parliament amounted to 42.1 percent of the total number of bills. However, the likelihood of a Cabinet-initiated bill to become law is much higher (85.2 percent) than a bill initiated by a member of parliament (14.8 percent).<sup>27</sup> The formal role of this bureau is mostly dedicated to form and not to content, but actually the bureau screens the proposals on conformity with the legal system and “if it concludes that it is not conform, asks the ministries to rewrite the bill [...]. In this way the Japanese bureaucrats control firmly the three powers including the judiciary. This is the main reason why the bureaucracy sticks out.”<sup>28</sup>

The main opponent for the ministry and the Supreme Court in the field of judicial policymaking is the Japan Federation of Bar Associations (*Nippon Bengo-shi Rengō-kai* 日本弁護士連合会 or *Nichiben-ren* 日弁連, hereafter JFBA). The JFBA was established in 1949, and with the help of the lawyers working for the Allied Powers in Japan could secure their independence according to the Lawyers Law<sup>29</sup> of 1949. The purpose of the JFBA is to act “as a source of protection of fundamental human rights and to strive for the realization of social justice” (Article 2, Articles of Association) and “in view of the purpose and duties of attorneys, to govern matters relating to the guidance, liaison and supervision of all attorneys and bar associations in order to maintain their dignity and improve and advance the work of attorneys” (Article 45, Paragraph 2 of the Lawyers Law).<sup>30</sup> In order to accomplish these aims, the JFBA stressed that stability of revenue for the lawyers was to be secured, and that therefore competition between lawyers had to be avoided. For that reason, the JFBA was opposed to increasing access

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24 SETO, *supra* note 22, 70.

25 On the Cabinet Legislation Bureau, see I. IWAO, *Iken shinsa-sei to naikaku hōsei-kyoku* [Judicial Review and the Cabinet Legislative Bureau], in: *Shakai Kagaku Kenkyū* 56-5 (March 2005) 81-108.

26 *Naikaku hōsei-kyoku setchi-hō*, Law No. 252/1952, last amended as Law No. 33/1969.

27 K. MASUYAMA, *Gikai seiji to nihon seiji: Giji un'ei no keiryō seiji-gaku* [Parliamentary Government and Politics in Japan: Polimetrics of Parliamentary Procedures] (Tokyo 2003) 32.

28 K. IGARASHI / A. OGAWA, *Gikai* [The Diet] (Tokyo 1995) 72.

29 弁護士法, *Bengo-shi-hō*, Law No. 205/1949, last amended as Law No. 50/2006.

30 Website of the Japan Federation of Bar Associations:  
<http://www.the.JFBA.or.jp/en/about/index.html> (3-7-2007).

to the bar and to giving up the monopoly on the legal profession.<sup>31</sup> Qualification screening for candidates for admission to the bar and disciplinary power also involved the JFBA and was no longer only in the hands of the state, as was the case before 1949. Compared to that period, status distinction between judges, prosecutors, and lawyers became less pronounced due to the unification of the examination and training for lawyers, prosecutors, and judges. With this newfound independence and status, the JFBA lobbied for reforms in Japan's administration of justice. From the 1950s it wanted to reform the organization of the Supreme Court, and then it defended a proposal for unified judicial appointments (*hōsō ichigen* 法曹一元) so that more magistrates would be recruited from lawyers. Disagreements on these issues between the JFBA on the one hand and the ministry bureaucrats and court officials on the other made reform in the administration of the judicial system very difficult.<sup>32</sup> *Figure 1* represents the position of these three actors.

Thus, judicial policymaking in Japan abounded with many policy ideas, but with little possibility for these ideas to rise to the macro-political agenda. Even in those cases where an issue rose on the political agenda, it fell quickly and never really caught fire. The JFBA encountered difficulties in breaking through the established pattern of policymaking, but at the same time reinforced it by being very conservative in its approach to issues such as opening access to the bar. The specialists in the committees, namely representatives of lawyers, judges, bureaucrats, and academics in the judicial policy

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31 KOYAMA, *supra* note 21, 48.

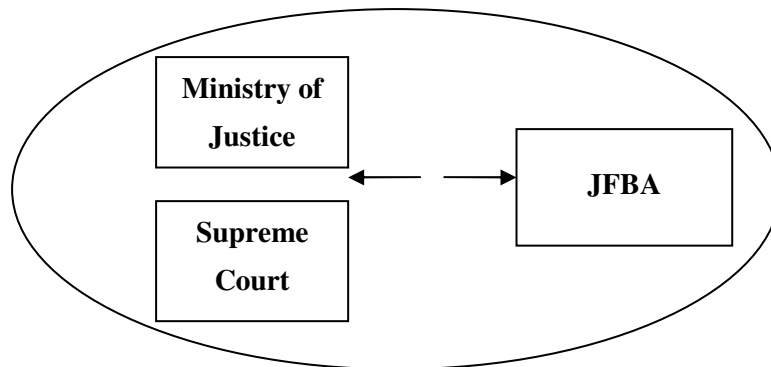
32 The backlog in cases at the Supreme Court was the reason why the JFBA wanted to reform the Supreme Court. In 1951, the number of unhandled cases at the Supreme Court amounted to 7,477 cases, which threatened the efficient functioning of justice. The JFBA wanted to double the number of Supreme Court judges to 30 and to have more small benches so that more cases could be handled. The Supreme Court did not agree with this plan and drafted their own counter-proposal which stated that the number of judges should decrease and that the cases that should be handled by the Supreme Court should be restricted so that lower courts could deal with them. The proposals by the JFBA also resulted in debate in the media and in the parliament. Though the bill that resulted from a compromise between the Supreme Court and the JFBA was not approved by the Diet, it was obvious that the policy proposals by the lawyers reached the political agenda relatively easily. In the same period, in the second half of the 1950s, the JFBA proposed another reform to realize the unification of the legal profession. Backlog in the Supreme Court was not the only thorn in the side of the lawyers; criticism on the lack of common sense of judges was also voiced by lawyers and media alike. The JFBA wanted to change the existing system conceived to recruit people and train them for the magistracy. They claimed that judges and prosecutors should also be recruited from among lawyers with realistic and pragmatic experience, and only by securing this system would the "democratization of justice" (*shihō no minshu-ka* 司法の民主化) be realized, according to the JFBA argument. Unfortunately this claim was unrealistic because the number of lawyers was far from sufficient to provide the inflow to the courts and the JFBA did not want to increase the number of lawyers. Leading lawyers in the JFBA in the first decennium after its creation actually were already important lawyers before the Second World War. These included Chūzaburō Arima, Hachirō Okuyama, Chūzō Nagano, Tsuyoshi Mano, Takeo Shimada, and Tsuyoshi Kaino.



venue, continued to propose reforms without any substantial result. The political process in the field of Japan's judiciary was driven by a logic of stability.

Figure 1:

The venue for judicial policymaking in Japan



## 2. Reluctant Litigants?

The equilibrium was not only maintained by the impasse in the policy subsystem dealing with the administration of justice, but also by the lack of political will at the macro-political level to change the policy image. As explained by Baumgartner and Jones, policy images tend to be related to the core political values of a country and can be communicated directly and understood easily by the public. They are a mixture of empirical information and emotive appeal.<sup>33</sup> When a single image is widely accepted and generally supportive of the policy, it is often associated with a successful policy monopoly, which means that the subsystem is dominated by one single interest.<sup>34</sup> The discourse that prevails at a certain period will support or challenge the policy venue. We would argue that the discourse on “Japanese uniqueness” played a crucial role in the policy image that supported the policy monopoly in the judicial policymaking of post-war Japan.

As summarized by Tamotsu Aoki, in the 1960s and 1970s the Japanese public was confronted with cultural arguments explaining how different Japan was from other societies.<sup>35</sup> This particularly occurred in the wake of the rapid economic development of Japan after the Korean War and the search inside and outside Japan for the causes of the “miracle.” These messages were reflected in literature on the specificity of Japanese

33 TRUE *et al.*, *supra* note 10, 101-102.

34 TRUE *et al.*, *supra* note 10, 99-101.

35 T. AOKI, *Nihon bunka-ron no hen'yō, sengo nihon no bunka to aidentiti* [The Changes in the Theories on the Japanese Culture: Culture and Identity in Postwar Japan] (Tokyo 1996).

society – labeled *nihon jinron* 日本人論 or “theory on the Japanese” – of which many became bestsellers in Japan. It defined the way the people in- and outside Japan thought about stereotypical differences between Japan and its main point of reference, namely the United States. Chie Nakane paved the way in 1964 for a widely supported image of cultural uniqueness by publishing her book *The Discovery of the Japanese Social Structure*,<sup>36</sup> followed in 1967 by an even bigger best seller, *Human Relations in a Vertically Structured Society: A Theory of a Homogenous Society*.<sup>37</sup> Nakane argued that the homogenous groups were the core of Japanese society and proposed the idea of group-ism (*shūdan shugi* 集団主義). A flood of publications in the same trend followed, and some of those were translated into English. The general image in those publications was supported by the political and bureaucratic leaders. Naohiro Amaya, a former high-level bureaucrat of the Ministry of International Trade and Industry (hereafter MITI), for example, in an article on the Antimonopoly Law in Japan, commented: “Today, as in the old days, the basic unit of Japanese society is not ‘atomistic’ individuals, but ‘molecule-like’ groups.[...] The fundamental ethic which supports a group has been ‘harmony.’”<sup>38</sup> Positive messages by political leaders to the Japanese public were frequent. Prime Minister Masayoshi Ohira, to mention another example, proclaimed at the end of the 1970s that “culture would take the place of economics and the rationalistic urbanization and materialistic civilization of Western style modernization would be replaced by the Japanese-style welfare state.”<sup>39</sup>

Interestingly the interests of various parties within the policy venue of justice administration were supported by different elements from the *nihon jinron* discourse. In the field of Japanese law, the same type of discourse prevailed. The difference between the U.S. and Japan in terms of the number of lawyers was, according to various scholars introducing Japanese law in English, related to cultural differences. Yoshiyuki Noda and Takeyoshi Kawashima are famous for their sometimes misunderstood views.<sup>40</sup> Kawashima in 1963 wrote that “the specific social attitudes towards disputes are reflected in the judicial process. Japanese not only hesitate to resort to a lawsuit but are also quite ready to settle an action already instituted through conciliatory processes during the course of litigation.”<sup>41</sup> It was easy to understand Kawashima’s explanation of a cultural uniqueness of legal thinking in Japan in the context of the broader discourse which prevailed in- and outside Japan. At the same time, it indeed was more advantageous to

36 C. NAKANE, *Nihon-teki shakai kôzô no hakken* [A New Light on the Typical Japanese Social Structure] (Tokyo 1964).

37 C. NAKANE, *Tate-shakai no ningen kankei: Tan’itsu shakai no riron* [Human Relations in a Vertically Structured Society: A Theory of a Homogenous Society]. (Tokyo 1967).

38 N. AMAYA, Strange Ideas on the Antimonopoly Law, in: Japan Echo 8-1 (1981) 96-102.

39 Asahi Shinbun, 25 January 1979. Cited in: A. GORDON, *Postwar Japan as History* (Berkeley 1993) 72.

40 Y. NODA, *Introduction au droit Japonais* [Introduction to Japanese Law] (Paris 1966).

41 T. KAWASHIMA, Dispute Resolution in Contemporary Japan, in: A.T. von Mehren (ed.) *Law in Japan: The Legal Order in a Changing Society* (Cambridge 1963) 41-59.

settle through conciliation procedures because of the availability of mediators, the speed of mediation, and the relatively low cost. To put it (too) bluntly: the choice was rational, but the explanation was cultural. Politicians cultivated this image. Judges were put under pressure to subscribe to the harmonious society image by promoting conciliation as a means of resolving cases; if they failed to do so, they faced sanctions such as assignment through the General Secretariat of the Supreme Court to some unimportant administrative post or court.<sup>42</sup>

The policy image reinforced the power of those in the policy venue. The rhetoric of a culturally exceptional and successful informal approach to dispute resolution and law kept the number of lawyers at a low level, thus maintaining the power of the happy few within the venue.

In sum, the gridlock in the policy venue with various actors who could not agree on the content of change on justice administration was reinforced by the macro-political discourse that prevented the rule of law from taking hold in Japanese society. In other words, justice administration was not a main concern of citizens or of political decision makers.

### III. A FIRST ATTEMPT AT REFORM: THE EXTRAORDINARY COMMITTEE FOR INVESTIGATION OF THE JUDICIAL SYSTEM (1962-1964)

In May 1962, the Extraordinary Investigative Council of the Judicial System (*Rinji Shihô Seido Chôsa-kai* 臨時司法制度調査会, hereafter the Council) was established after intense lobbying by the JFBA acting for judicial reform. The JFBA wanted to realize the unity of the legal profession. The courts and the bureaucrats were not favorable to this idea but agreed to participate in the discussions of the Council because they wanted to solve other problems, such as that of judicial backlog, the lack of prosecutors, and better payment.<sup>43</sup> The Council was established by the Cabinet by means of a law that reflected the high expectations in a successful reform.<sup>44</sup> The discussions lasted for two years and resulted in an extensive report (*rinshi iken-sho* 臨司意見書) that was presented to the Prime Minister on August 28, 1964.

The president of the Council, Tokyo University professor Sakae Wagatsuma, had a hard time finding common ground between the lawyers defending unification of the legal profession and the bureaucrats opposed to it. The main objection was that before even thinking about unification, it was necessary to adjust the judicial organization so that “the population in the legal profession would greatly increase, so that the geo-

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42 LUNEY, *supra* note 17, 155.

43 KOYAMA, *supra* note 21, 53.

44 Participating in the Extraordinary Council were four members of the Lower House, three members of the Higher House, three judges, three prosecutors, three lawyers, as well as four academics.

graphical balance would be established and that the public confidence in the lawyers could be won.”<sup>45</sup> Other issues were also discussed and reported, such as the system of judges, lawyers, and prosecutors; the bar examination; the legal profession in general; the remuneration of judges and prosecutors; the transfer of judges; and procedural matters. All issues were treated and reflected in the 1964 report by the Council. Some of the members stressed the need to double the number of successful candidates to the bar, but Takeo Shimada, one of the leading lawyers in the Council, dismissed the idea right away.<sup>46</sup> The report did not recognize the need for the immediate unification of the legal profession and this resulted in a heated debate at the JFBA about support for the conclusions of the Council. In the end, the JFBA decided to oppose the report in its totality. Because of this opposition by the lawyers and the macro-political lukewarm attitude toward judicial reform, it was virtually impossible to realize judicial reform. This proposal ended in failure resulting from “a series of bitter confrontations between court officials and private attorneys, and partly because of the negative attitude to reform of successive governments.”<sup>47</sup> In other words, the policy image was not changed and the issue remained confined within the borders of the judicial policymaking subsystem.<sup>48</sup> The main reason why reform could not happen in this stage was the lack of macro-political interest combined with the failure to agree on a reform plan between the main actors in the venue.

#### IV. INCREMENTAL CHANGES IN THE 1970s

While the two decades immediately following the Second World War mainly saw tensions between the main institutional actors of the policy venue, the second half of the 1960s started seeing tensions growing not only between the institutional actors, but also within these organizations.<sup>49</sup>

After the decision of the JFBA to challenge the report, tension between the rather conservative, older members of the association and younger lawyers escalated and first resulted in an adjustment of the rules to appoint the JFBA president. The president had been appointed behind closed doors by senior members. In 1966, the younger members succeeded in altering this system into the direct election of the president. The younger and more activist lawyers within the JFBA increased their influence. This was the precursor for change toward a more radical activism by the JFBA lawyers opposed to the bureaucracy in their claim to be defenders of human rights in opposition to state interests.

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45 KOYAMA, *supra* note 21, 56.

46 KOYAMA, *supra* note 21, 60.

47 I. SATO, *supra* note 6, 75.

48 JOHN, *supra* note 14, 177.

49 KOYAMA, *supra* note 21, 69-70.

Several events triggered increased tension between lawyers and bureaucrats in the policy subsystem in the second half of the 1960s and the beginning of the 1970s. In two judgments rendered in October 1966 and April 1969, the Supreme Court of Japan took an unprecedented position by reducing the scope for punishment imposed on the workers who participated in strikes waged by the Japan Postal Workers' Union<sup>50</sup> and the Japan Teachers' Union.<sup>51</sup> Specifically, it stated that strikers can only be punished if the strikes were political in nature, accompanied by violence, or had a serious effect on the way of life of the people.<sup>52</sup> The judgment stated that it is therefore wrong in principle to apply the penal provisions of the Postal Service Law against the postal workers who participated in a strike or the Local Public Service Law against teachers who joined a strike.<sup>53</sup> Lower level courts also started ruling in favor of pollution victims defended by activist lawyers.<sup>54</sup> In the atmosphere of the time the Young Lawyers Association (*Seinen Hôritsu Kyôkai* 青年法律協会) was set up by members of the legal profession who opposed the anticommunist ideology.<sup>55</sup> It had been established in 1954 but saw a peak in its membership in the beginning of the 1970s when 1,500 lawyers, 230 judges, 250 scholars and intellectuals, and many more trainees from the Japan Research and Training Institute were formally registered.<sup>56</sup> Percy Luney explains that "the *Seihô-kyô* was a prominent organization in the early environmental pollution litigation in Japan. The success of this litigation and its widespread publicity revealed to the LDP and conservative elements of the government bureaucracy the true potential of an independent judiciary in bringing about social change."<sup>57</sup>

The majority of the judges in the Supreme Court were said to be liberal but this did not please the ruling LDP party, which established a working group to analyze how control on the judiciary could be tightened. They were helped by tensions within the court. The leader of the conservative justices in the Supreme Court, Chief Justice Kazuto Ishida and Seiichi Kishi, secretary general of the General Secretariat of the Supreme Court, stressed the importance of maintaining the independence of justice.<sup>58</sup> They demanded that all judges formally quit membership from *Seihô-kyô* and waited for the retirement of liberal justices in the Supreme Court so as to be able to replace them

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50 Supreme Court, 2 April 1969, Hanrei-shû 23-5, 305.

51 Supreme Court, 26 October 1966, Hanrei-shû 20-8, 901.

52 KOYAMA, *supra* note 21, 60-62.

53 <http://www.gyosei-i.jp/page017.html> (4-7-2007).

54 P.R. LUNEY / K. TAKAHASHI (eds.) Japanese Constitutional Law (Tokyo 1993) 141.

55 LUNEY, *supra* note 17.

56 LUNEY, *supra* note 17, 156.

57 LUNEY, *supra* note 17, 156. Pollution victims sought relief in courts after long and fruitless efforts to find relief outside the court. Lawyers who were member of the Young Lawyers Association represented these victims of pollution, and judges who were members or at least sympathetic to the ideas of the Association rendered decisions in favor of the victims.

58 Ishida Kazuto was known for his hard-line stance against liberal-leaning judges during a time when the court often fell into turmoil over cases pertaining to the activities of leftists.

with conservative justices.<sup>59</sup> In 1970, Beer reflects on the year and explains that “whether Japan was turning a corner toward political interference with judicial independence was a serious concern of legal and judicial circles at year’s end.”<sup>60</sup> This development was labeled by the JFBA as the “crisis of the judiciary” (*shihô no kiki* 司法の危機), while the court replied that the real crisis was caused by the activist stance of the JFBA.<sup>61</sup>

The walls between the various groups in the justice policy subsystem were high and compromise hard to find. There was an increasing opposition against the policy monopoly by activist lawyers as defenders of the human rights of “victims of modernization.” Dissatisfaction with a limited rule of law in Japan was voiced by lawyers and by the people who were defended by those lawyers. Media took up these issues for sure, but the LDP was still keeping things as they are, helped by the economic growth and increasing wealth. The Supreme Court strengthened the status quo by the conservative turn in order to counter lawyers’ activism. This prevented change and reinforced the existing power equation in the judicial policy subsystem.

This context of limited, incremental change increasingly contrasted with the broader changes in society that seemed to call for changes in the judiciary and particularly an expansion of the capacity of the judicial system. Japan had become the second largest economy in the world. Increasing ownership of cars resulted in car accidents that had to be dealt with. In the 1970s Japan recorded on average 600,000 accidents a year for a total of about 10,000 cases that could be handled by the lawyers connected to the JFBA.<sup>62</sup> Additional new problems caused by pollution, medical malpractice, dysfunctional medicines, and the like resulted in an increase of conflicts that could not be handled by the limited number of lawyers. Arbitration and mediation centers were established and challenged by lawyers because they experienced this as a threat to their monopoly on the legal profession.<sup>63</sup> The JFBA guided the discussion, which focused on an efficient role in a changed society to be played by lawyers. It was stated that in order to respond to the needs of the citizens, lawyers should also be more active outside the court. In a survey in 1980, 77.7 percent of the workload of lawyers still consisted of civil litigation, but in 1991 this amount had dropped to 56.5 percent.<sup>64</sup> Little opportunity for reform existed due to a standstill in the judicial policy subsystem and due to the strong economic performance of Japan, which demotivated political parties and the public to challenge the policy image. The 1970s were the era of Kakuei Tanaka, one of the strongest LDP leaders who oversaw strong electoral successes for his party. No viable alternative party

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59 M. KOYAMA, *supra* note 21, 73-74.

60 L.W. BEER, Japan Turning the Corner, in: *Asian Survey* 11-1 (January 1971) 74-85.

61 J. NOMURA, *Nihon no bengoshi* [Japanese Lawyers] (Tokyo 1992) 98.

62 KOYAMA, *supra* note 21, 87.

63 KOYAMA, *supra* note 21, 87-88.

64 KOYAMA, *supra* note 21, 90.

emerged and “Japan as Number One”<sup>65</sup> was holding strong. Even former Harvard president Derek Bok lamented that Japan was fortunate to have so few lawyers.<sup>66</sup> This started to change in the 1980s.

## V. THE PATH TOWARD PUNCTUATION

### 1. *Seeds of Change in the Bubble Years*

While economic prosperity was a reason for stability in the 1960s and 1970s, it now in the 1980s created a different dynamic. Two crucial factors can be identified. First, there was a domestic atmosphere favorable to reform as exemplified by the Nakasone discourse. All of this was reinforced by the advent of critical media. Second, there was pressure from abroad. The U.S. increased pressure to level the trade balance, on the one hand by asking for measures by the Japanese authorities to appreciate the value of the yen, and on the other hand by asking for measures to remove non-tariff barriers. We will discuss each of these two factors in turn.

Yasuhiro Nakasone became Prime Minister in 1982 after an unexpected win in the race to the presidency of the LDP. Nakasone’s election came at “an opportune moment in terms of national mood.”<sup>67</sup> The Japanese economy was performing well and growing steadily and competition with the U.S. was developing in favor of Japan. In November 1984 the newspaper *Asahi* even concluded on base of a “Survey of Japanese Character” that the Japanese were extremely self-confident compared to the West.<sup>68</sup> Pyle concludes that “the mood of the nation was therefore in many respects ripe for Nakasone’s message.”<sup>69</sup> Nakasone’s message was new in both content and style. As for the latter, he had the ambition to talk directly to the Japanese people. The media played an important role and paid daily attention to administrative reform.<sup>70</sup> The content of Nakasone’s message was a commitment to a transformation of society toward the idea of self-direction or self-determination. This concept contrasts with the more passive attitude of the developmental state fitting in the cultural model that had been the prevailing policy image in postwar Japan.<sup>71</sup> Nakasone was determined to create a new national consensus

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65 E. VOGEL, *Japan as Number One: Lessons for America* (Cambridge 1979).

66 “Japanese Legal Education Undergoing Radical Transformation,” News Bureau University of Illinois at Urbana-Champaign, 13 November 2003. See: <http://www.news.uiuc.edu/news/03/1113japanlaw.html>

67 K.B. PYLE, *In Pursuit of a Grand Design: Nakasone betwixt the Past and the Future*, in: *Journal of Japanese Studies: Special Issue on the Trade Crisis 13- 2* (Summer 1987) 251.

68 PYLE, *supra* note 67.

69 PYLE, *supra* note 67, 252.

70 D.S. WRIGHT / Y. SAKURAI, *Administrative Reform in Japan: Politics, Policy, and Public Administration in a Deliberative Society*, in: *Public Administration Review* 47-2 (March-April 1987) 130.

71 Pyle labels this a “new liberal nationalism.” See PYLE, *supra* note 67, 261.

to replace the Yoshida Doctrine, which involves placing the highest priority on the development of the economy while keeping a low profile on international politics and security issues. The Yoshida Doctrine had dominated politics in Japan since the end of the Second World War and Nakasone had always regarded it as passive and demeaning. He wanted Japan not only to be an economic power, but also a prominent political actor in the world.<sup>72</sup> He ambitiously said that he wanted to realize the third major reform in Japan after the Meiji Restoration and the postwar reforms.<sup>73</sup> A crucial technique in his entrepreneurial policymaking was the appointment to *ad hoc* deliberative councils (*shingi-kai* 審議会) of prominent academics, opinion leaders, and businessmen favorable to his own views. *Ad hoc* deliberative councils are traditionally the councils in a ministry where policymaking is done and these councils were composed of bureaucrats; agendas are set by them and conclusions drafted by them. By handpicking the members of councils, Nakasone could increase the power of non-bureaucrat members in the policymaking process. He wanted, so he said, to “take my case directly to the Japanese people.”<sup>74</sup> He used the deliberative councils to realize his policies effectively and frequently appeared on television to explain his policies in simple terms.<sup>75</sup> A strong case in point is the so-called *Rinchô* or the Second *Ad Hoc* Administrative Council on Administrative Reform. This committee was established in March 1981 and would eventually turn out to be Nakasone’s stepping stone to leadership of the party and therefore to the position of the Prime Minister.<sup>76</sup> Nakasone hand-picked the members of the *Rinchô*, including the chair Toshio Doko, a well-respected businessman personally committed to administrative reform. That appointment turned to be a crucial factor in the success of the *Rinchô*. “He has been the public leader, promoter, activist, and advocate, appearing on television, in the press, and before numerous public groups and forums.”<sup>77</sup> Both Nakasone at the macro-political level and Doko at the level of the policy subsystem were able to convey the message to the Japanese public. This resulted in high support for Nakasone’s policies as reflected in the Asahi Shinbun polls for 1985. As written by Tomohito Shinoda, the time was ripe for reform. Most important for our purposes is that *Rinchô*’s report resulted in the political support and leverage for the political leaders to pursue reform in other fields. Nakasone had broken with the past and decided to establish committees for implementing reform under his personal supervision and not, as was usual, under the supervision of the ministry.

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72 PYLE, *supra* note 67, 253.

73 PYLE, *supra* note 67, 258.

74 G.R. PACKARD, The Dimensions of Nakasone’s Triumph, in: New York Times, 16 July 1986.

75 M. MURAMATSU, In Search of National Identity: The Politics and Policies of the Nakasone Administration, in: Journal of Japanese Studies: Special Issue: A Forum on the Trade Crisis 13-2 (Summer 1987) 312.

76 *Rinchô* is the abbreviation of *Rinji Gyôsei Chôsa-kai* (臨時行政調査会).

77 WRIGHT / SAKURAI, *supra* note 70, 129.



There was definitely a spillover of these wider changes to the field of judicial policy-making. Analogous to Doko's leadership in *Rinchô*, reports can be read of leaders of councils for judicial reform with strong leadership. Shozo Ota, for example, reports on the reform of the Code for Civil Procedure. The Deliberative Council on the Legal System was established at the Ministry of Justice in 1990. Heading the sub-committee on civil procedure in the Council was Tokyo University professor Akira Mikazuki whose "leadership was extraordinary compared to other deliberative councils."<sup>78</sup> Important is that Mikazuki understood that reform could only be effective if the hostility between the bar and the ministry was overcome, and he searched for agreement of the bar on all issues discussed in the sub-committee.<sup>79</sup> This meant an important difference from previous situations when the hostility between the ministry of justice and the bar was emphasized and reflected in the decision-making process. As the policy venue had been monopolized by the court, the ministry, and the bar, it was very difficult to reach a compromise and hence real judicial reform could not take place. The Nakasone approach changed this. The monopoly was now challenged by increasing direct control by the Prime Minister and by active leadership by business leaders and academics in the policy subsystem.

The atmosphere favorable to reform was reinforced by the advent of the critical media in Japan. One of the most important changes in the second half of the 1980s was the increasing importance of television in politics. Critical news programs on commercial television like TV Asahi's program called News Station (first broadcast in 1985) challenged the positive perception of the bureaucracy and its legitimacy as a major political force. This program "brought a combination of entertainment and cynical commentary to the news, a sharp contrast to NHK's factual news primarily about government bureaucracy."<sup>80</sup> Ellis Krauss concludes that the NHK news, *i.e.*, the main TV news on the public broadcaster, "helped to legitimate the role, efficacy and capacity of the national bureaucracy as a central positive symbol to Japanese citizen into the postwar democratic state."<sup>81</sup> This changed. The media paid increasingly more attention to individual leaders. A case in point is the enhanced coverage of the Prime Minister during electoral campaigns. The critical reports in the Japanese media since the end of the 1980s resulted in attention for many scandals involving the bureaucracy. These scandals resulted in a series of court cases and consequently in increased attention from the media on those cases. The increasing attention by the media for litigation is also reflected in the Japanese Newspaper Digest (*Shinbun Daijesuto* 新聞ダイジェスト). In 1989, this

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78 S. OTA, Reform of Civil Procedure in Japan, in: *The American Journal of Comparative Law* 49-4 (Autumn 2001) 567.

79 OTA, *supra* note 78, 568.

80 E. KRAUSS / B. NYBLADE, 'Presidentialization' in Japan? The Prime Minister, Media and Elections in Japan, in: *British Journal of Political Science* 35 (2005) 357-368.

81 E. KRAUSS, *Broadcasting Politics in Japan: NHK and Television News* (Ithaca 2000) 265-266.

monthly magazine that collects all important newspaper articles in the major Japanese newspapers added a section titled “Litigation” (*saiban* 裁判). This indicates increasing attention among politicians and the public for the judicial system.

Exogenous forces also pushed for reform. At the end of the 1980s the Structural Impediment Initiative, or informal negotiations between the governments of the U.S. and Japan, took place to resolve the imbalance in trade between both countries. The U.S. government argued that the Japanese market was too closed and that tariff and non-tariff barriers had to be removed. Japan agreed, mainly to avoid a situation where the U.S. would apply Super Section 301 on Japan. This provision of trade law was passed by Congress in 1988 to urge the administration into tougher action against other countries’ allegedly unfair trading practices. Japan agreed to take steps in six traditional business practices.<sup>82</sup> Implementing changes like the enforcement of the Antimonopoly Act, the dismantling of the distribution system, and exclusive business practice would also bring about the need for more lawyers and legal activity.<sup>83</sup>

We can indeed observe a spillover from the change discourse in the 1980s in Japanese politics and media to the three main actors in the policy subsystem in the judicial field. It was known that the Ministry of Justice badly needed to secure high quality recruits for prosecutorial positions and had a hard time doing so because of the difficulty for sufficient young people to pass the bar exam. It framed that need in general terms so as to make it acceptable for the public. The head of the Personnel Department of the Justice Minister, for example, defended the need to reform the bar exam as a “need to produce lawyers who can cope with the increasing complexity and internationalization of Japanese society.”<sup>84</sup> In order to realize its aims, the Ministry of Justice established an “Informal Committee on Fundamental Problems of the Legal Profession” (*Hôsô Kihon Mondai Kondan-kai* 法曹基本問題懇話会) in 1987.<sup>85</sup> Several problems were linked. The JFBA did not want to increase the number of successful candidates for the bar exam, officially because they wanted to preserve quality. The JFBA considered the real problem of justice in Japan their career-long isolation and lack of mobility between the three judicial professions. Hence, the JFBA’s priority in judicial reform was to introduce the possibility for lawyers to become magistrates (*saiban-kan nin’yô seido* 裁判官任用制度). Incremental changes were waged within the traditional policy venue. Intense

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82 M. MATSUSHITA, *International Trade and Competition Law in Japan* (Oxford 1993) 200-201. These six areas were the pattern of savings and investment; the use of law; the distribution system; exclusive business practices; ‘keiretsu’ relationship; and the price mechanism.

83 M.W. PUNKE, *Structural Impediments to US-Japanese Trade Law: The Collision of Culture and Law*, in: *Cornell International Law Journal* 23 (1990) 55.

84 HÔMU DAIJIN KANBÔ JINJI-KA [Personnel Department, Office of the Minister, Ministry of Justice], *Shihô shiken o kangaeru: kihon shiryô-shu* [Considering the Reform of the National Bar Examination: A Collection of Basic Information] 8 (1987). Cited in: S. MIYAZAWA, *supra* note 5, 91.

85 K. SATO / M. INOUE / M. TAKESHITA, *Shihô seido kaikaku* [Reform of the Judicial System] (Tokyo 2002) 3.

consultation was organized between the president of the Bar Association, Kohei Nakabo; the secretary general of the Supreme Court's Administrative Office, Bitoku Kawasaki; and Yasuchika Negoro, who was the administrative vice-minister of the Ministry of Justice.<sup>86</sup> In 1991, the National Bar Examination Act was amended and resulted in increasing the number of successful candidates to the bar from 500 to 600 in 1991 and to 700 in 1993. Still the pass rate for the bar exam remained low and only moved from 2.18 percent in 1990 to 2.68 percent in 1991.<sup>87</sup> The same year the possibility for lawyers to become judges or prosecutors was introduced but actually from 1991 to 2001 only 57 lawyers were admitted to the magistracy.

## 2. *Further Pressure for Change in the 'Lost Decade'*

Scholars have labeled the 1990s in Japan 'the lost decade.'<sup>88</sup> These years of a severe economic crisis reinforced the calls for change. This paragraph will describe the effects of the crisis on the macro-political level and then focus on its impact on the judicial policy subsystem.

The economy was experiencing its worst crisis with an expensive yen, record high unemployment, and unprecedented numbers of corporations facing bankruptcy. This was combined with political fragmentation. The strength of the LDP waned and the opposition was able to form a cabinet for the first time since 1955. The traditional iron triangle weakened and the power equation was no longer monopolized by business, bureaucrats, and LDP. Other parties, new ideologies, and public opinion came to play a more prominent role in decision making in Japan. Decision making that had been decentralized to the subsystem of the iron triangle now became more dynamic and more prominent. The bursting of the bubble and the consequent economic crisis caused a political mobilization that advanced the issue of judicial reform on the governmental agenda, increasing attention for it at the level of the macro-political system.<sup>89</sup> This resulted in the decision in 1999 to establish the Judicial Reform Council (JRC). How can we explain this political mobilization and the promotion of the issue to the agenda of the macro-political system?

Economic liberalization in Japan in the 1990s led to new entrants in a previously sheltered economy. It is reported, for example, that between 1980 and 1996, forty-five trade agreements were concluded with the U.S.<sup>90</sup> The need for a change in the legal

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86 Y. MIYAMOTO, *Saiban-kan seido kaikaku katei no kenshō* [Validating the Process of the Reform of the System of the Judges], in: *Gendai Hōgaku* 9 (March 2005) 113.

87 D. CHOI/K. ROKUMOTO (eds.), *Korea and Japan: Judicial System Transformation in the Globalizing World* (Seoul 2007) 49.

88 H. YOSHIKAWA, *The Lost Decade* (Tokyo 2002).

89 TRUE et al, *supra* note 10, 103.

90 D. KELEMEN/E.C. SIBBITT, *The Americanization of Japanese Law*, in: *U. Pa. J. Int'l. Econ. L.* 23 (2002) 299.

system in Japan was also felt domestically because of the economic hardship, but also because of the increasing political pluralism. The short-lived anti-LDP coalition succeeded in enacting a new election law in 1994 that resulted in increasing unpredictability of electoral outcomes. This in turn increased political concerns about having sufficient legal means to prevent one political party from controlling policymaking.

With the collapse of the iron triangle in policymaking in Japan, political parties, LDP included, had an interest in the formalization of mechanisms of bureaucratic control. Interestingly, this reregulation in actual practice coincided with an official discourse that emphasized deregulation (*kisei kanwa* 規制緩和). The latter discourse was of central importance in the 1990s and resulted in the enactment of various laws that would strengthen the rule of law.<sup>91</sup> One prominent example is the enactment of the Product Liability Act<sup>92</sup> in July 1994.<sup>93</sup> Before 1994, government and business leaders alike did not favor legislation on product liability because they feared a cascade of litigation and because bureaucracy was informally monitoring the severe product standards. With the liberalization of trade, the subsequent influx of foreign products and companies, and the new political pluralism it was felt that consumers should be protected in a formal way.<sup>94</sup>

In line with these developments, the traditional allies of the LDP started to focus attention on the judicial system. The Japan Association of Corporate Executives (*Keizai Dōyū-kai* 経済同友会) published a report in 1994 demanding drastic judicial reforms to help solving the most important legal issues resulting from the economic crisis. The title of the report was “Modern-Day Japan’s Pathology and Remedies: For a Society for the Individual” (*Gendai nihon shakai no byōri to shohō: Kojin o ikasu shakai no jitsugen ni mukete* 現代日本社会の病理と処方 – 個人を活かす社会の実現に向けて). The well-known president of the association, Yoshihiko Miyauchi, advocated the further realization of deregulation and at the same time he stressed the importance of “strengthening the function of law” (*hō no kinō kyōka* 法の機能強化). His presence in the media pushed this issue further on the agenda. The ‘remedies’ proposed by Miyauchi included increasing the number of lawyers, giving access to the bar to administrators and company employees with significant experience in the legal field, and establishing a governmental committee that would further decide on the needed judicial reforms. Thus,

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91 The Administrative Procedures Act enacted in 1993 aimed at codifying the use of administrative guidance and the procedures for licensing. The Disclosure of Information Act was adopted in 1999 and allows individuals to request government information and established judicial procedures when government denied access. Reform of the Civil Procedure Code in 1996 aimed at more efficient and fair resolution of claims in the court system. Another example is the enactment of the Product Liability Act in July 1994.

92 製造物責任法, *Seizō-butsu seki'nin-hō*, Law No. 85/1994.

93 L. NOTTAGE, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (New York 2004).

94 See T.L. MADDEN, *An Explanation of Japan’s Product Liability Law*, *Pacific Rim Law & Policy Journal* 5-299 (1996) and A. MARCUSE, *Why Japan’s New Products Liability Law Isn’t*, *Pacific Rim Law & Policy Journal* 5-365 (1996).

the policy subsystem for policymaking in the judicial field was, at least temporarily, expanding.

Meanwhile, inside the policy venue of judicial administration an entrepreneur was emerging using the broader fruitful environment to propose change. Kohei Nakabo became president of the JFBA in the beginning of the 1990s and published three important manifestos that highlighted the problems of the administration of justice in Japan. The JFBA appealed for an “open justice closer to the people” (*kokumin ni mijikana hirakareta shihô* 国民に身近かな開かれた司法) and called for more respect for human rights and for judicial review. Nakabo’s influence on public attention for the reform can be compared to what Doko did for administrative reform.<sup>95</sup> Attention for legal reform was present due to the eruption of the economic crisis and the need for lawyers to solve the problems with corporations, as well as because of the pressure by the U.S. to take measures so that U.S. companies could become operative in Japan. An illustration of the latter is the request to intensify the implementation of the antimonopoly law in Japan.

Facing these endogenous and exogenous forces, decision makers at the macro-political level paid more attention to policy proposals for justice reform in Japan. Yet, the policy proposals themselves still mainly originated in the policy subsystem and were discussed in the Three-Party Committee on the Legal Profession (*Hôsô Sansha Kyôgikai* 法曹三者協議会). The Ministry of Justice remained the dominant actor in these discussions, succeeding in focusing the reform discussion primarily on the issue of increasing the number of successful candidates for the bar and the duration of the practical training. Other issues such as the restructuring of the ministry or the courts were left aside. Meanwhile the media were arguing more loudly for a need for additional reforms in the justice system and uneasiness was voiced with the slow pace of reform.<sup>96</sup> In 1994 a group within the JFBA opposed the JFBA board’s decision in the Three-Party Committee of the Legal Profession to increase the number of successful applicants to 1000. The JFBA faced a deep internal crisis over this issue, and the impasse between the major actors crystallized over the problem of increasing the budget for accommodating 1000 apprentices in the Legal Research and Training Institute. The Ministry of Justice did not want to negotiate over the budget with the Ministry of Finance and instead wanted to shorten the training period so that the same budget would be sufficient to train more lawyers.<sup>97</sup> Setsuo Miyazawa observed that “the JFBA was pressed against the wall; it desperately attempted to find a way to realign its battle plan and to shape its own future.”<sup>98</sup> The venue for the reform of the judicial field had slightly changed toward

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95 Nakabo was long known for his active support in landmark cases and became famous in the 1970s when he defended victims of one of the most dramatic pollution cases, the Morinaga Arsenic Milk Poisoning Incident.

96 T. SHIGEAKI, *Tenkô-ki no nihon-hô* [Japanese Law at a Turning Point] (Tokyo 2000) 237.

97 S. MIYAZAWA, *supra* note 5, 93-94

98 S. MIYAZAWA, *supra* note 5, 95.

more agreement on judicial policy between the members of the policy venue. The Ministry of Justice now could take on board the JFBA, which became very active in proposing policies.

This period was important for two reasons: the expansion of the venue and the preparation of the policy proposals that would constitute the new policy image related to justice administration.

### 3. *Moving from the Subsystem to the Macropolitical Agenda (1997-1999)*

All the preparatory work came to an intermediary conclusion in 1997 when the *Keizai Dôyû-kai* published its second report, again calling for swift judicial reform. The new policy image of deregulation, crisis, and scandals within the traditional iron triangle attracted new participants advancing their case and provided new opportunities for policy entrepreneurs. Indeed, between 1997 and 1999, the discussion on legal reform in Japan was done mainly in entities outside the traditional judicial policy subsystem.

In 1997 the LDP had regained power, though in coalition with two other parties. Ryutaro Hashimoto was the new Prime Minister. He had been the minister in charge of administrative reform in the Nakasone cabinet in the 1980s and had to cope with the worst economic crisis in decades. Hashimoto proposed “comprehensive reforms in six areas” (*rokudai kaikaku* 六大改革) and proved very decided on the rapid and swift realization of those reforms. In the media, “reform” or “*kaikaku* 改革” became a fashionable concept and was seen as a symbol for the new Japan in which the individual could play a substantial role. Osamu Watanabe explains that a “neo-liberal vision of reform policy [...] became the new orthodoxy among business leaders and the LDP in the 1990s.”<sup>99</sup>

The *Keizai Dôyû-kai* published its own report asking for legal reform to match the deregulatory reforms by the government.<sup>100</sup> Interestingly, it was not the Ministry of Justice but the MITI that established a Research Committee on the Legal System related to Business (*Kigyô Hôsei Kenkyû-kai* 企業法制研究会). The latter was later integrated into the MITI Deliberative Committee on Industrial Structure (*Sangyô Kôzô Shingi-kai* 産業構造審議会). MITI proposed a “comprehensive reform of the judicial system to ensure business compliance with the legal rules of a market economy.”<sup>101</sup> In May 1998, the powerful Japan Federation of Economic Organizations (*Keidan-ren* 経団連) called in its report for drastic reform of the judicial system by measures such as expanding the legal profession, recruiting judges differently, and creating new legal education. The

99 W. OSAMU, *Shin-jiyû shugi senryaku toshite no shihô kaikaku, daigaku kaikaku* [Judicial Reform and Educational Reform as a Neo-liberal Strategy] in: *Hôritsu Jihô* 72 (2000) 10-24. Cited in I. SATO, *Judicial Reform in the 1990s*, in: *Social Science Japan Journal* 5-1 (2002) 77.

100 The report was published in January 1997 and titled: “Towards the Adjustment of the Legal System for Companies Responding to Globalization” (*Gurôbaru-ka ni taiyô suru kigyô hôsei no seibi o mezashite*).

101 MIYAZAWA, *supra* note 5, 100.

LDP also joined the debate and published its own report soon after the Keidanren's, in June 1998. It called for more and better lawyers and magistrates, the creation of law schools, the introduction of a jury system, an increased budget for the judiciary, etc. This "guideline for the judicial system in the twenty-first century" pushed the issue of judicial reform forward on the macro-political agenda. Setsuo Miyazawa confirms that "a comprehensive reform of the entire judicial system has suddenly become a top priority in national politics."<sup>102</sup> In July 1999, the Judicial Reform Council was established after a bill to that extent was accepted by the Diet.

#### VI. PUNCTUATION ACHIEVED: POLICY CHANGE IN 1999-2001

Prime Minister Keizo Obuchi succeeded Hashimoto and pursued the politics of judicial reform as a spill-over from the politics of administrative reform.<sup>103</sup>

The Judicial Reform Council (JRC) was established in 1999 under direct control of the Cabinet and not as usual under control of the Ministry of Justice. It was mandated by the Diet to present a report to the Prime Minister within two years. What was even more remarkable was the composition of the JRC. It had a strong leadership in the person of Koji Sato, a reform-minded constitutional scholar of Kyoto University appointed by the Prime Minister to chair the JRC. In fact, the proposal to nominate him as a chair was formulated in the first session of the JRC and it came from Kohei Nakabo, who thus countered the secretariat of the JRC, controlled by the bureaucracy.<sup>104</sup> Kohei Nakabo was probably the best known of the 13 members of the JRC. His fame reached unprecedented height at the time of the *Jûsen* scandal in which, as an attorney, he did not fear taking on traditional powerhouses such as organized crime, banks, and the bureaucracy.<sup>105</sup> He became the face of the reform council and could ensure that traditional players in the policy subsystem in the judicial field would not monopolize the path of judicial reform. Representatives in the JRC representing the prosecutors and the court were actually retired members and as such not bound by their hierarchy. Representatives of the end users of the judicial system – business, labor, and consumers – were also given a voice in the JRC together with Ayako Sono, a writer critical of the JFBA. The JRC became the new center of the policy venue in the judicial field for at least two years. It embodied the new image of a comprehensive reform for a society based on the rule of law.

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102 MIYAZAWA, *supra* note 5, 101.

103 Most of the explanation of the Judicial Reform Council is based on the very clear and detailed explanation by Miyazawa Setsuo. See: MIYAZAWA, *supra* note 5, 106-110.

104 MIYAZAWA, *supra* note 5, 110.

105 See C.J. MILHAUPT / M.D. WEST, *Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules* (Oxford 2004) 73-109.

The JRC was indeed able to achieve unprecedented results as framed in its final report to the Prime Minister on June 12, 2001. The main issues in the report can be narrowed down to the following items. First, law schools would be introduced in Japan and they would become the main mechanism to educate future lawyers, prosecutors, and judges. The underlying idea was that a more practical and broad approach to legal education would help the legal professionals to perform better.<sup>106</sup> A second important proposal was to gradually increase the number of legal professionals by allowing more candidates to the bar so that active lawyers would reach a number of 50,000 in 2018. This would double the actual figure.<sup>107</sup> On the condition that the lawyers would really spread over the country (and not remain concentrated in the largest cities as is currently the case), the higher number of lawyers would improve the access to the law and provide information to citizens on the formal legal procedures. This was thought to be necessary to restore the confidence of citizens in the formal legal procedures. Third, the recruitment and appointment of magistrates would be different because lawyers would be able to move to the magistracy after having served as a lawyer. Fourth, the proposal also aimed at establishing a popular base for the judicial system by installing a jury system in serious criminal court cases. Finally, the JRC proposed revitalizing Alternative Dispute Resolution mechanisms before and during lawsuits. This was mainly to cope with the judicial backlog, but of course it also fitted nicely in Japan's cultural preference for these mechanisms. The government issued a statement immediately after receiving the report by the JRC to swiftly "tackle the issue of the realization of the judicial reform by fully respecting the opinion of the JRC."<sup>108</sup> In contrast to previous attempts to reform the judiciary in Japan, by July 2001 the government had already established the "Judicial Reform Promotion Committee" (*Shihô Kaikaku Suishin-shitsu* 司法改革推進室) to prepare the specific legislation and to take measures to establish new institutions fitting the reform proposals. The "Three Acts Concerning Law Schools" (*Hôka daigaku-in kanren sanhō* 法科大学院関連3法) was the first legislation on judicial reform that passed the extraordinary parliamentary session in the fall of 2002. Other legislation followed rapidly, including the "Law on Speedier Court Proceedings"<sup>109</sup> passed in May 2003 and the partial reform of the Civil Procedure Law in July 2003.

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106 D.H. FOOTE, Japanese Justice System Reform in Comparative Perspective, in: *Hô-shakai-gaku* 58 (2003) 204-234.

107 THE JUSTICE SYSTEM REFORM COUNCIL, Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21<sup>st</sup> Century (<http://www.kantei.go.jp/foreign/judiciary/2001>) (12 June 2001).

108 S. OKAWA, *Shihô kaikaku, Nichi-benren no nagaku konnan-na tatakai* [Judicial Reform, The Long and Difficult Struggle by the JFBA] (Tokyo 2007) 214.

109 裁判の迅速化に関する法律, *Saiban no jinsoku-ka ni kansuru hōritsu*, Law No. 107/2003.

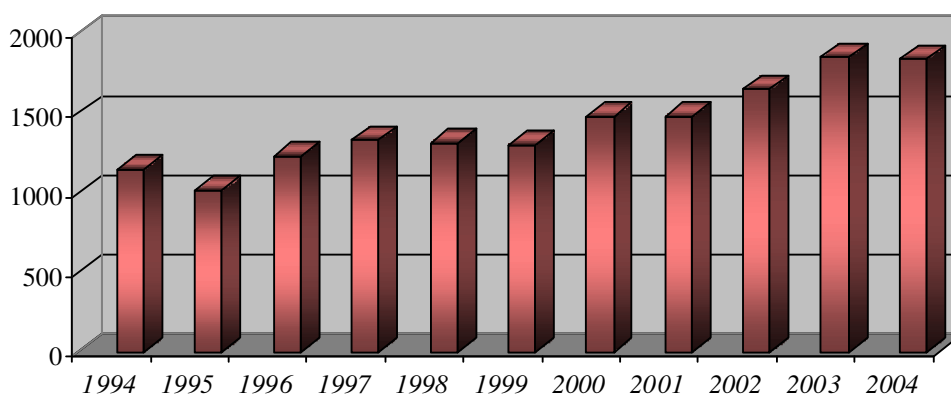


Also, the law on the “Lay Assessor System”<sup>110</sup> was approved in parliament by all political parties in May 2004. This system proposed a ‘jury’ with six lay judges and three professional judges who would together judge the most severe criminal cases. This system will be implemented from May 2009 and will be one of the most challenging of all judicial reforms in postwar Japan.

These and several additional proposals are now being implemented, and already the law schools in Japan are delivering their first graduates. The media is paying increasing attention to the judicial system and is preparing citizens for the introduction in 2009 of the jury trial in serious criminal cases.<sup>111</sup> The amount of litigation has been increasing (see *Figures 2* and *3*) and the claim for easy access to legal advice and services is louder. On October 2, 2006, the services of the Japan Legal Support Centre (*Nihon Shihô Shi'en Sentô* 日本司法支援センター) or Law Terrace (*Hô Terasu* 法テラス) became available to everyone, including those involved in civil cases or those who have been arrested in criminal offenses. An estimated 1.2 million people per year are expected to consult with the centre.<sup>112</sup>

*Figure 2:*

Administrative Court Cases  
(1994 – 2004)



*Source:* Statistics from the Supreme Court of Japan  
([http://www.courts.go.jp/about/siryojinsoku/hokoku/02/pdf/113\\_146.pdf](http://www.courts.go.jp/about/siryojinsoku/hokoku/02/pdf/113_146.pdf))

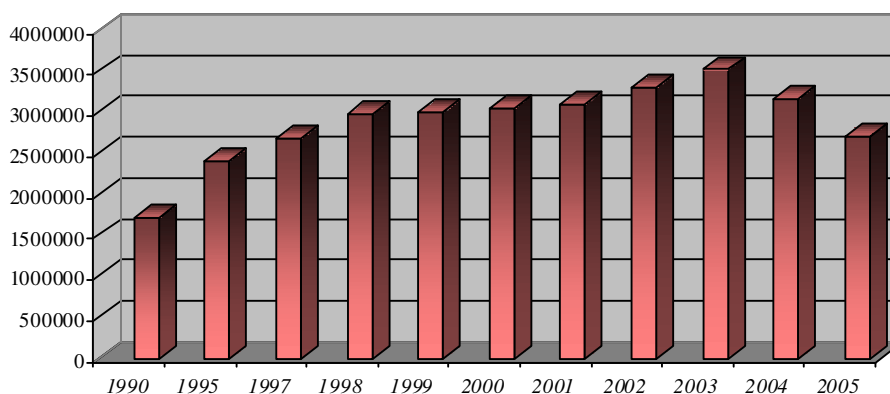
110 裁判員の参加する刑事裁判に関する法律, *Saiban-in no sanku suru keiji saiban ni kansuru hôritsu*, Law No. 63/2004.

111 The Japan Times, 22 May 2007.

112 “Editorial,” The Japan Times, 18 October 2006.

*Figure 3:*

Overall Number of Civil and Administrative Court Cases  
(1990 – 2005)



Source: Statistics from the Supreme Court of Japan  
(<http://www.courts.go.jp/sihotokei/nenpo/pdf/DMINI-1.pdf>)

The reforms that resulted from the JRC proposals indeed constitute fundamental changes in the judicial system in Japan. However, questions remain whether the aim of the reform, *i.e.*, improving the quality of the justice system and enhancing public trust in it, is being realized. Concerning the Japan Legal Support Centre, for example, one might wonder whether the appointment by the centre of lawyers may be unfair to defendants and suspects because the centre falls under jurisdiction of the Ministry of Justice. Moreover, the JRC predicted that 70 percent of law school students would pass the bar exam, but in 2006 only 48.2 percent, in 2007 only 40.2 percent, and in 2008 no more than 32.9 percent actually did pass the bar exam. In addition, prosecutors are unwilling to disclose documents needed for clinical courses that might improve training in the law schools.<sup>113</sup> Thus, the gap between the aim and the reality of the law schools turns out to be fairly wide and might undermine the lasting effect of the most important reform in modern Japanese judicial history. There is a risk that, after a brief period of heavy punctuation, the old equilibrium might be restored rather than a new equilibrium being established. Other evidence pointing in that direction is the decreasing number of new court cases in 2004 and 2005 after a long period of remarkable increase as can be seen in *Figure 2* and *Figure 3*.

<sup>113</sup> The Japan Times, 4 November 2006.

## VII. CONCLUSION

The reform of the judicial system at the start of the 21<sup>st</sup> century is a major event in contemporary Japan, mainly because it presents a case where various actors within the country managed to get sufficient support to establish new legal institutions. The fact that the pressure occurred within the country is a major departure from previous reforms in the 19<sup>th</sup> century and those immediately following the Second World War. It is too early to evaluate the effects of the reform process, but there are some preliminary indicators. The number of successful candidates to the bar is certainly not matching the initial expectations, and even before the implementation of the lay judge procedure many voices are calling for postponing the start of this system or even abolishing it. Yet, as a process, the reforms can already be called successful because the media are showing an unprecedented interest in the judicial field and citizens are more and more aware of their position as legal subjects. The latter is an important indicator of change in the relation between the state and its citizens.

Yet, these musing about the long-term impact of the reforms are in fact beyond the scope of this article. The article has focused on the period preceding the actual reform, attempting to show how policy change in the field of judicial administration in Japan came about through an interaction between the policy venue and policy image. Initial attempts at change in the 1960s and 1970s did not produce any significant change because of a lack of political interest. The 1980s saw the first signs of real change, further reinforced after the collapse of the economic bubble in 1990. Yet it took another decade before the expansion of the policy venue and the concomitant collapse of the traditional policy image resulted in punctuation and actual policy change at the end of the century.

This exploratory case study suggests that policy models such as that developed by Baumgartner and Jones (“punctuated equilibrium”) are useful for understanding the dynamics of law in Japan. Further empirical research on the functioning of the various actors in the policy venue related to justice administration and more systematic theoretical framing of the empirical data will help to more systematically “test” the punctuated equilibrium theory and to situate these findings in a broader context both within Japan and in an international comparative perspective.

## ZUSAMMENFASSUNG

*Im Juni 2001 stimmte die japanische Regierung einem umfangreichen Plan zur Reform des japanischen Justizsystems zu. Er umfasst u.a. die Einrichtung spezialisierter Law Schools, die Beschleunigung von Gerichtsverfahren, eine Ausweitung des Zugangs zu den Gerichten und die Einführung von Bürgerbeteiligung bei Strafprozessen. Zwar waren ähnliche Konzepte jahrzehntelang im Umlauf – jedoch ist es das erste Mal, dass ein so umfassender Plan einen solch starken Rückhalt findet, und dass ernsthafte Versuche zu seiner Umsetzung unternommen werden. Dieser Artikel versucht zu erklären, warum das Reformpaket Zustimmung fand: Warum war die Reform von 2001 erfolgreich, während viele frühere Reformvorschläge scheiterten? Teilweise lässt sich dies mit dem Auftreten neuer Akteure im politischen Umfeld erklären. Jedoch war dieser Faktor nur Teil eines sehr viel komplizierteren und langfristigeren Änderungsprozesses, der von einer Situation relativer Stabilität allmählich zu einem drastischen Kurswechsel führte. Der vorliegende Beitrag erklärt diesen Prozess insbesondere anhand des von Baumgartner und Jones entwickelten analytischen Parameters eines „punctuated equilibrium“ (durchbrochenen Gleichgewichts) als eine Interaktion zwischen politischen Leitbildern und dem politischen Umfeld. Entsprechend der Logik des Modells verwendet der Beitrag einen langfristigen Ansatz, ausgehend von der Stabilität in den sechziger und siebziger Jahren über zunehmende, aber weitgehend erfolglose Änderungsversuche in den achtziger und neunziger Jahren hin zum Umbruch und dem aktuellen Richtungswechsel im Jahr 2001.*

*(Übersetzung durch die Red.)*