

Japan's New Law Schools: The Story So Far

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*We're on the road to nowhere
Come on inside
Takin' that ride to nowhere
We'll take that ride*

– The Talking Heads –

If one was to choose background music for the Japanese law school system at the start of 2009 it is hard to think of a better song than the one above. A mere five years after schools first opened their doors, the entire system faces the specter of a brutal down-sizing and the potential frustration of their very purpose for existing.

It was not supposed to be like this. The 68 law schools that started teaching in 2004 (subsequent additions raised the total to 74) were supposed to change the way Japanese lawyers, judges and prosecutors were trained. They were supposed to mark the end of an age when people studied at cram schools to memorize arcane test-taking techniques in order to pass the highly competitive Japanese bar exam (pass rate 1-3%). This intense level of competition created an environment in which devoting time to any subject other than law was unlikely to be rewarded, and a legal profession trained through a perpetual cycle of cramming and regurgitation for standardized exams. By copying the U.S. graduate professional school model, law schools were supposed to attract into the legal profession mid-career individuals with a wide variety of work experience, as well as graduates from disciplines other than law (which remains a popular area of undergraduate study). Coupled with a dramatic (compared to the old system) increase in the number of people allowed to pass the bar exam, the law schools were also supposed to eliminate the sorry class of people who spend much of their productive adult lives studying for and repeatedly failing the bar exam.¹

* Readers should understand that this is not intended as a cite-heavy overview of the developing history of the law school system, but rather as an editorial rant based on the author's personal experience as a professor at a Japanese law school, as well as a participant in innumerable symposiums, seminars, meetings and other forums at which the current status and future prospects of the system have been discussed. The views in this article are those of the author alone and should not be attributed to any organization or institution with which he is affiliated.

1 There are any number of excellent pieces about the new law school system and legal education in Japan, though I particularly recommend the following work as an insightful

Naturally, many of the new law schools sought to differentiate themselves through unique course offerings and specialist curricula. However, one thing that was clear from Ministry of Education, Culture, Sports, Science and Technology (“MEXT”) guidance and accrediting body standards was this: law schools are (were?) *not* supposed to teach to the bar exam. The Socratic Method and small classes were supposed to be used to encourage students to think about the law rather than just remember what important people said about it. Anything that smacked of law schools teaching test-taking techniques, whether within the context of regular classes or offered as an “extracurricular” option, was taboo.

The problem, however, is that for something that now requires an investment of 2-3 years of time and tuition, the pass rate for the “new” bar exam is still quite low. The class of 2006, the first to graduate, had it lucky – in its first year the “new” bar exam had a pass rate of about 48%.² As with the old system, the bar exam pass rate is derived primarily from the ratio of the number of people taking the exam to the number of people allowed to pass, rather than being the product of an objective minimum passing score. Thus, each subsequent bar exam saw a new graduating class competing with an ever-increasing number of repeat-takers for a gradually expanding number of passing slots. This dynamic has driven pass rates down to 40% in 2007 and 33% in 2008. This decline, coupled with a legal restriction by which law school graduates are only allowed to sit for the exam three times during the five years following graduation,³ has made

discussion of the problems facing the system even at the planning stage: KOICHIRO FUJIKURA, Reform of Legal Education in Japan: The Creation of Law Schools without a Professional Sense of Mission, in: *Tulane Law Review* 75 (2001) 941.

- 2 They also had an advantage in that only graduates of two-year programs sat for the first “new” bar exam. Takers in subsequent years thus have had to compete with larger graduating classes that include those from three-year programs as well as repeat takers.
- 3 This seemingly pointless cruel restriction probably has its roots in the desire of the Ministry of Justice (“MOJ”) to increase the pool of young bar passers available to become prosecutors (one result of the highly competitive nature of the exam being that many passers were people in their late twenties or thirties who passed after five or more attempts and were probably too old (not to mention in debt and jaded) to consider a career as a government lawyer). The MOJ wanted to simply increase the number of bar passers and adopt a “three strikes” rule. That the three strikes rule has been adopted as part of the law school system is sometimes explained as being intended to encourage people who cannot pass the bar exam to get on with their lives and do something else. However, in the worst-case scenario a law school student may discover that up to twelve years of legal studies (four years undergraduate, three years law school plus up to five years of studying for the bar exam) will have been potentially rendered pointless. Here it is worth noting both that this study is only “pointless” if the graduate does not benefit from it in other aspects of his life or career, and that some law school graduates have successfully joined government agencies or corporate legal departments without passing the bar exam. However, since virtually all law schools have branded themselves as places where judges, lawyers and prosecutors are trained, those graduates who do not succeed in joining one of these vocations risk being branded as failures by default.

preparing for and taking the bar exam both the central goal of as well as a source of tremendous stress for many law students almost from the day they enter. Furthermore, because law schools may not teach test-taking techniques, some law school students also go to *juku* cram schools, just like under the old system.⁴

As for the number of people passing each year, it is still a function of the number of people allowed to enter the Supreme Court's Legal Research and Training Institute (the "LRTI") each year for a course of study whose completion is required in order to qualify as a judge, prosecutor or lawyer. For decades the LRTI had an annual intake of 500 bar passers. This number has been gradually increased and until recently, as part of the "legal reform" of which the law schools are supposedly a pillar, the goal was to have 3,000 passing the bar each year by 2010. This number, while higher, remains completely artificial and is apparently derived from a vaguely articulated goal of having a legal-professional-to-general population ratio comparable to France. It does not seem to have been a numerical target burdened by any deep inquiry into the actual need for legal services on the part of the Japanese population in general.

The problem is that in an uncharacteristic burst of apparent free-marketism, the MEXT allowed far more law schools to be created than was originally planned.⁵ The result was too many graduates competing for a fixed number of passing slots, and the declining pass rates described above rather than the planned rate of 70-80%. As we shall see, this is important to bear in mind when looking at some of the criticism to which the law schools are now subject.

Barely had the first graduating class – the class of 2006 – graduated and completed their one-year course at the LRTI before a hue and cry arose. There were too many new lawyers hitting the job market. Did Japan need this many? How could the quality of legal services be preserved in the face of heightened competition among lawyers?⁶ Should Japan become a lawyer-infested litigation hell-hole like the United States? At the same time, the media started to report that some of the law school graduates who passed the new "easier" exam were not all of the best quality. According to some press ac-

4 Some law school students may cut classes in order to attend cram school sessions. Since their immediate goal in going to law school is to pass the bar exam this may, paradoxically, be a completely rational choice given that law schools will not teach them test-taking techniques. However, if such students are able to pass the bar exam with minimal law school attendance and (one hopes) correspondingly poor law school grades, the entire purpose of the law school system comes into doubt. This may explain the odd focus of some accrediting bodies on law school class attendance.

5 I have been told by a number of sources that as originally planned there were to be about 20 law schools at the nine leading national universities, two or three of the top private universities and several other regional national universities. There is an interesting and highly political theory as to why this plan was abandoned, leading to the current crop of 74 institutions, but I cannot in good conscience describe it without more verification than I have been able to obtain to date.

6 Economic theory is generally not taught at law schools or tested on the bar exam.

counts, some entrants into the LRTI could barely even read a statute book!⁷ The LRTI graduation exam, once a mere formality, has also duly seen a dramatic increase in people who fail and have to stay on for further studies. Recently, the usually reticent Supreme Court of Japan went so far as to publish a list of graduation exam “failing answers.”⁸

What seems to have been missing from any analysis by the media of the criticisms it has dutifully repeated, is that virtually all of it originates from interested parties. In other words, to the extent the critics are either judges, prosecutors or other career legal bureaucrats, they are people who passed a much more competitive exam and may have an interest in distinguishing themselves from the upstart newcomers. Criticism from bar associations is further suspect in that lawyers have for decades enjoyed a market for legal services in which an artificial scarcity has prevailed; that some have an interest in forestalling increasing competition should also be obvious. This is not to say that their criticism is completely unwarranted – the simple fact may be that Japan does not need as many lawyers as the law schools are trying to produce.

Rarely mentioned in the debate over the quality of the law schools has been the quality of the legal profession before they came into existence. It is simply taken as a given that those who passed the old exam are of a higher quality. That they may also be incapable of properly evaluating the quality of people trained in a different fashion from themselves is, to my knowledge, almost completely absent from the media debate over the quality of law school graduates.

With the press increasingly looking at the law school system as a bit of a fiasco for which the MEXT is implicitly responsible, the MEXT has responded by calling for improvements. On September 30, 2008, an advisory body to the MEXT issued an Interim Report by a panel of experts (primarily professors at law schools and law faculties) on the problems of the law school system. The list included a variety of problems and suggestions, some obvious, some dubious, others fanciful.⁹ Needless to say, the fact that

7 It is worth noting that it is convenient for the government agencies involved that the supposedly poor quality of some of the entrants to the LRTI and the increase in people failing the LRTI graduation exam are both due to failings in the law school system. The alternative explanation would of course be that the government-administered bar examination is failing to screen out unsuitable candidates, and that the LRTI is not instructing its trainees adequately in whatever subjects they are supposed to be learning from their training there.

8 These include failing to adequately consider alibis or believing only one party's assertions, criticisms which some might argue are applicable to the current judicial system as it is run by people who passed the old exam.

9 *Hôka daigaku-in kyôiku no shitsu no kôjô no tame no kaizen-saku ni tsuite (chûkan matome)* [Regarding measures for the improvement of the quality of law school education (interim report)] (Sept. 30, 2008) (hereinafter, “Interim Report”). In the “fanciful” category, this author includes the recommendations regarding the problem some law schools have in attracting qualified instructors. While the law schools at private universities in particular have provided a doubtless welcome new retirement slot for former judges and prosecutors as well as law professors at national universities (which have comparatively lower manda-

anyone at the MEXT even thinks that it is possible to evaluate the quality and value of a graduate law school education less than two years after the first law school class has graduated¹⁰ suggests that many institutions are doomed to become glorified exam prep-schools.¹¹ The potential longer-term value of a law school education beyond the exam is, it seems, irrelevant.

One could be forgiven for thinking that the Interim Report was a mere formality full of foregone conclusions and intended as a pretext for MEXT administrative guidance.¹² Within three weeks of the Interim Report having been issued, law school deans started being summoned by the MEXT to explain their plans for improvement, including plans for reducing class sizes. That three weeks is an impossibly short period of time for a Japanese academic institution (indeed, any academic institution) to come up with a plan for fundamental reform is hopefully obvious. Possibly the most important thing for the MEXT is not so much what law schools do about their education, but that through mergers, winding-up and reductions in class sizes, there is a collective and substantial reduction in the number of people graduating from law schools. Just doing this will increase the pass rate on the bar exam, removing a major source of criticism of the law school system. A reduced quantity will equal a higher quality!

tory retirement ages), the bar exam dynamics may render the prospect of teaching at a law school unappealing to many younger scholars, particularly those in subjects tested on the bar exam. This is because law school students want a standardized curriculum focused on the bar, and are not only probably uninterested in whatever particular special expertise a professor may have, but may actually resent too much coverage of this area if it takes time away from other aspects of the subject that are likely to be tested on the bars. Furthermore, there is likely to be an increasing compliance burden on law school professors associated with meeting MEXT and accrediting body requirements putatively aimed at “improving” the quality of law school instruction. While many law schools have full-time faculty members that are “double-counted” (*i.e.*, they are listed as being full-time faculty of both their university’s undergraduate law faculty and law school), this is supposed to end by the year 2013. Given these factors and the shaky prospects for survival at some schools, it is questionable how many faculty members who are given the choice would choose to remain on the law school faculty. Notwithstanding these dynamics, the Interim Report suggests that by greater coordination between a university’s law school and its graduate faculty of law, law school graduates who pass the bar can somehow be enticed to return for a Ph.D. followed by a career as a law school professor. Some law school graduates may choose this path, though it is difficult to imagine the number being large.

- 10 And only one year after the first class of students in three-year programs, which would include many of those who entered law school after working or from non-law undergraduate disciplines.
- 11 Even if one were to accept that the new bar exam was both itself problem-free and an adequate measure of the quality of law school education, it is difficult to see how only three exam’s worth of results could possibly comprise an adequate data set on which to formulate improvements to said education.
- 12 This panel of experts met six times between March and September of 2008 to discuss various aspects of the problem. Given that the panel supposedly “discussed” the Interim Report the same day it was released to the press by MEXT, one cannot help but conclude that at least some of the panel’s discussions were also mere formalities.

It is for this reason that a great deal of the criticism of the law school system is unfounded. If the system had developed as planned, with about 20 law schools, those schools could be educating law school students exactly the same way they are now without any criticism, simply because the bar exam pass rate would be 70-80%, also as planned.

Even before the MEXT decided to step in and force the issue by pressuring law schools to decrease their class sizes, it always seemed obvious that a market equilibrium would develop between the number of people graduating from law school and the number of people allowed to pass the bar exam. This would be achieved by some schools shutting down and others reducing class sizes out of necessity. Whether this equilibrium would be a pass rate of 70-80% or some other number is uncertain, but it would doubtless have to be higher than the current 33% in order for law school to be an attractive prospect even for talented applicants.¹³ If market forces were going to settle the problem of the bar exam pass rate, however, those law schools that had either the pass rates or the financial resources necessary to survive the bloodbath would have been able to preserve their founding ideals, hopefully without having adopted too many bad habits focused on passing the bar exam.

As we have seen, however, market forces are not allowed to work in setting the number of people allowed to practice law.¹⁴ On this subject, the next hurdle that the law schools will have to face is recent demands from Japanese bar associations that the number of passers not be increased to the planned 3,000 a year, but restrained at a significantly lower number. *Nichibenren*, the Japanese federation of lawyers, has reportedly agreed upon a recommendation that the number of bar passers be restrained

13 That said, under the old system a market equilibrium developed around a pass rate of 1-3%. The law school system, however, requires a greater fixed investment in time and tuition from applicants than the old system, where exam takers had more flexibility to structure their studies around work or other commitments.

14 On the subject of the market of lawyers, there is a long-running debate which connects the question of how many new lawyers there should be every year (*i.e.*, how many people pass the bar exam), what sort of legal services the people of Japan need, and the role of the law school system in training the lawyers who will provide these services. What is fascinating about discussions along these lines (which, in the experience of the author, always take place in forums that are blissfully free of input from actual users of legal services) is that they completely ignore the existence of several other licensed, solicitor-like professions which provide a variety of documentation and other legal services short of representation of clients in connection with litigation (for a discussion of some of the "other" Japanese legal professions, *see, e.g.*, RICHARD MILLER, *Apples v. Persimmons: The Legal Profession in Japan and the United States*, in: *Legal Education* 39 (1989) 27. In fact, Japanese lawyers have a much smaller field of services in which they enjoy a legal monopoly, and as their numbers increase, they will probably have to compete in some areas with these "other" legal professions, most of which are easier to join and involve lower entry costs. That this dynamic is almost universally ignored in the debate over the number of lawyers is itself fascinating.

at 2009 levels (2,100-2,200 passers per year).¹⁵ If these recommendations are adopted, whatever equilibrium would otherwise have been achieved will have to be reset at a lower number of law schools and law school students.

In addition to a possible reduction in the annual number of bar passers – one of the fundamental assumptions on which many law schools were founded – yet another hurdle awaits. Rather than being phased out immediately, the “old” bar exam (which can be taken without going to law school, though some passers may be law school students before their graduation) is being phased out gradually, with fewer and fewer people being allowed to pass until its last sitting in 2011. However, it is being replaced by a so-called “preparatory” exam (*yobi shiken*) to be implemented starting in the same year. Passers of this exam (expected to number 50 per year) will be able to sit for the bar exam without graduating from law school. Since the bar exam is already effectively a test of law school education, it is unclear what the substantive difference between the *yobi shiken* and the bar exam will be. Effectively it will be an exam that qualifies passers to sit for another exam on substantially the same subject matter, an odd thing indeed.

Although the preparatory exam is apparently intended to ensure that avenues of entry into the legal profession remain open for brilliant people without financial means, given that some law schools are effectively giving their educations away for free to talented students and offering interest-free tuition loans to many others as part of an effort to increase their bar passage statistics, this explanation rings hollow. More likely, the *yobi shiken* should be seen as a compromise for (and possibly the triumph of) people who didn’t want the law school system in the first place.

The combination of the “old” bar exam and the *yobi shiken* will probably result in a caste system developing within the legal professions, with those who did it the “hard way” without going to law school being regarded as the “true” legal elite.¹⁶ Whatever its intent, the *yobi shiken* represents another challenge for the law schools, since the truly talented may not bother to apply, or if they pass the test while still in school, they will drop out and study for the bar exam by themselves. In any case, it is unlikely to be good for law school enrollment figures, which are already falling off dramatically.¹⁷

15 *Hôsô gôkaku “nen 2200nin teido”*: *nichiben-ren 3000nin keikaku shûsei he an* [“About 2200 per year” bar passers: *Nichibenren to propose amendments to 3000 passers plan*], *Asahi Shinbun* (Feb. 8, 2009).

16 The creation of such an elite from whose ranks top judges and prosecutors can be chosen might even be a hidden agenda of the *yobi shiken* system. Although this author does not subscribe to it, a conspiracy theory can even be derived from the *yobi shiken* system – that it is intended to assure a steady supply of young, brilliant judges and prosecutors who will join the legal bureaucracies untainted by whatever liberal notions of law might otherwise be learned at a law school.

17 According to the Interim Report, the number of people applying for law schools dropped by 5,652 in 2008, compared to the prior year. The number of people taking the Japanese equivalent of the U.S. LSAT exam has also experienced double-digit declines.

What does the immediate future hold for the law school systems? There are suggestions in the press that the Ministry of Justice should get more involved in the law school system.¹⁸ If things progress in that direction, historians may look at the law school system as a classic example of a Japanese *nawabari arasoï* (turf battle). What having even more direct government involvement in the teaching of law will mean to Japan as a free society will remain to be seen.¹⁹

In the meantime, at the behest of the government, a number of law schools are participating in an analysis of the correlation between law school grades and bar exam performance. It is likely that such an analysis will be expanded to cover most or all law schools. If this happens, there will come into existence a body of data showing the correlation between law school grades and bar performance on a school-by-school basis. It may even be possible for schools to analyze the correlation between bar performance and grades on a subject-by-subject basis. From here it is not a large step to individual professors being evaluated by how their teaching correlates to the performance of their students on the bar exam. Depending upon how far the law schools cooperate in this exercise, it may mark the end of whatever higher ideals were intended to be realized through their creation. Law schools will become places dedicated to preparing students for the bar exam and not much else. Whether this will be a good thing for law school students, the legal profession or the users of legal services in general, does not seem to matter any more.

ZUSAMMENFASSUNG

Nur fünf Jahre nach ihrer Einführung droht den japanischen Law Schools ein massiver Rückbau, und es besteht die Gefahr, dass sie ihrer ursprünglich vorgesehenen Aufgabe einer umfassenden juristischen Ausbildung verlustig gehen. Das japanische Erziehungsministerium hat, aus welchem Grund auch immer, wesentlich mehr Law Schools akkreditiert, als ursprünglich vorgesehen war. Das hat dazu geführt, dass die Erfolgsquote beim Aufnahmeexamen für das zentrale Juristenausbildungsinstitut anstelle der geplanten 70-80 % lediglich bei knapp über 30 % liegt. In der augenscheinlichen Annahme, dass mit einer Verringerung der Studentenzahl automatisch eine qualitative Steigerung einhergeht, übt das Ministerium derzeit erheblichen Druck auf die Law Schools aus,

18 *Hôka daigaku-in: Bappon kaikaku, hômusho ga shudo o* [Law Schools: The Ministry of Justice should take the lead in radical reform], Asahi Shinbun (Jan. 31, 2009).

19 Article 23 of the Japanese Constitution states that "Academic freedom is guaranteed." This author has never heard or seen this basic freedom mentioned in the context of the demands being made by the MEXT or other government agencies upon Japanese law schools regarding their class size or the content of their education.

ihre Studentenzahl drastisch zu verringern, um so der ursprünglich avisierten Erfolgsquote näher zu kommen. Da zudem eine Untersuchung über das Verhältnis der Abschlüsse an den Law Schools und dem Erfolg bei der Aufnahmeprüfung läuft, steht zu befürchten, dass diese sich über kurz oder lang auf die Vorbereitung für diese Prüfung konzentrieren werden, obwohl ursprünglich eine der wesentliche Akkreditierungsvoraussetzungen darin bestanden hatte, gerade keine derart enge Examensvorbereitung zu betreiben.

(Die Redaktion)