

ABHANDLUNGEN / ARTICLES

Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan ?

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- I. Electoral Reforms
- II. Legal Profession and Legal Education
- III. Corporate Governance

Four years ago at a conference on Change, Continuity, and Context: Japanese Law in the Twenty-First Century at the University of Michigan School of Law, I suggested that despite a decade of major legal reforms, doubts remained as to whether the Japanese legal system was on the verge of transformational change.¹ Both the pace and the scope of legal reform since that conference have been even greater. Yet the doubts have also grown. Let me begin by reviewing some of the best-known legal reforms of the past dozen years. My 2001 list began with the new mixed electoral system under the 1994 election amendments.² It continued with the 1997 and 1998 banking and capital market reforms for Japan's "big bang,"³ the 1993 administrative procedure act,⁴ the 1994

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- 1 The title of the paper was "Japanese Law in Transition?" It is available as a faculty working paper at <<http://law.wustl.edu/Academics/Faculty/Workingpapers/index.html>>.
 - 2 The first of a series of revisions amending the Public Office Election Law (*Kôshoku senkyo-hô*), Law No. 100, 1950, was Law No. 2, 1994. The amendment replaced the single non-transferable vote (SNTV) system with a mixed-member majoritarian (MMM) system, described in greater detail below. Law No. 2 was followed by Laws No. 4, 10, 47, 104 and 105, all enacted in 1994.
 - 3 For a sample of comments and more provocative studies on various aspects of the financial reforms over the past decade, see Note (J.C. WILEY), Will the 'Bang' Mean 'Big' Changes to Japanese Financial Laws?, in: *Hastings International & Comparative Law Review* 22 (1999) 379; H. KANDA, Securitization in Japan, in: *Duke Journal of Comparative & International Law* 8 (1998) 359; E.T. PATRIKIS, in: *Brooklyn J. Int'l L.* 24 (1998) 577; Note (B.A. POMPER), in: *Cornell International Law Journal* 28 (1995) 525; C.P.A. JONES, Japanese Banking Reform: A Legal Analysis of Recent Developments, in: *Duke Journal of Comparative & International Law* 3 (1993) 387; C.J. MILHAUPT, Financial Reform in Japan: Recent Legislation Leaves Some Issues Unresolved, in: 14 *East Asia Executive Reports* (No. 12) 9 (December 1992); Y. MIWA, *Kin'yû seido kaikaku no seijikeizaigaku* [Political economy of financial system reform], in: Takarazuka / Ikee (eds.), *Kin'yû riron to seido kaikaku* [Financial theory and institutional reform] (Tokyo 1992) 307-341.
 - 4 *Gyôsei tetsuzuki-hô*, Law No. 88/1993, translated into English by M.A. LEVIN, in: *Law in Japan* 25 (1995). For an English language analysis, see L. KÖDDERITZSCH, Japan's New Administrative Procedure Act: Reasons for Its Enactment and Likely Implications, in: *Law in Japan* 24 (1994) 105.

products liability law,⁵ the 1996 code of civil procedure,⁶ the Freedom of Information Act,⁷ major amendments of Japan's antitrust law,⁸ New legislation had consolidated and changed the names of some of Japan's principal ministries and administrative organs.⁹ Since 2001 the list has expanded to include major changes in Japanese company law,¹⁰ the restructuring of legal education,¹¹ and as we speak the introduction of a system of lay judges (*saiban'in*) in the adjudication of serious crimes.¹²

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- 5 *Seizōbutsu sekinin-hō*, Law No. 85/1994. For translation and critical commentary, see T.L. MADDEN, An Explanation of Japan's Product Liability Law, in: Pacific Rim Law & Policy Journal 5 (1996) 299 and A. MARCUSE, Why Japan's New Products Liability Law Isn't, in: Pacific Rim Law & Policy Journal 5 (1996) 365.
- 6 The new Code of Civil Procedure (*Minji soshō-hō*, Law No. 109/1996) is perhaps better described as a revision rather than a reform. The new code was designed as a linguistic updating of the code to make it more accessible to contemporary readers. The new version made hardly any substantive changes. Among the few was to be a broadening of discovery. However, whatever the intended changes may have been, in light of the Supreme Court's decision in *K.K. Fuji Bank v. Maeda*, Minshū 53 (Sup. Ct., 2nd P.B., November 12, 1999) 1787, denying discovery of a bank memo evaluating a loan application as an "internal" memo under CCP article 220 (4)(c), the most significant preexisting limits on discovery appear to remain. Recent research by Tom Ginsburg and Glenn Hoetker suggests that the reforms may have influenced in some fashion a rise in litigation. See T. GINSBURG / G. HOETKER, The Unreluctant Litigant? An Empirical Analysis of Japan's turn to Litigation. Unpublished working paper dated 30 April 2004.
- 7 For a detailed discussion of the statute and local government experience with similar disclosure requirements, see L. REPETA, Local Government Disclosure Systems in Japan (NBR Executive Insight No. 16, October 1999).
- 8 See J.O. HALEY, Antitrust in Germany and Japan: The First Fifty Years, 1947-1998 (Seattle 2001) 52-63, for a brief description of all amendments of the Antimonopoly Law (The Law concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade (*Shiteki dokusen no kinshi oyobi kōsei kakuho ni kansuru hōritsu*), Law No. 54/1947, through 1999. The most significant of the recent amendments were the elimination of the international contract reporting and review requirement and the easing of the prohibition against holding companies.
- 9 The number of ministries has been reduced to ten with consolidation of Home Affairs and Posts and Telecommunications into a new Ministry of Public Management, Home Affairs and Posts and Telecommunications, of Labor and Health and Welfare as the Ministry of Health, Labor and Welfare. A new Ministry of the Environment was created, and two ministries were reorganized and renamed – the Ministry of Education as the new Ministry of Education, Culture, Sports, Science and Technology and in the new Ministry of Economy, Trade and Industry.
- 10 Major company law reforms began with amendments in 1999 (Law No. 125/1999) and continued with subsequent legislation. In 2000 the Ministry of Justice requested that its Legislative Council (*Hōsei Shingikai*) review the issues and recommend comprehensive reforms. In October 2003 the Council's Company Law Subcommittee of the issued a report calling for major reforms over five years for the modernization of Japanese company law. The Ministry of Justice followed with a detailed explanation of past efforts and proposals for future reforms. Both reports are available in Japanese in supplementary materials for Jurisuto (No. 1267). Issue No. 1267 is dedicated a discussion of the proposals. For an English language summary, see <<http://www.moj.go.jp/ENGLISH/CIAB/jc101-1.html>>.

Although debate over the need for and effect of these reforms will continue, few question their ostensible significance. Nonetheless patterns of political and institutional organization and behavior endure. Continuity persists at a deeper, more profound level. I have long identified the weakness of law enforcement and the concomitant tendency to rely on the didactic effect of legal rules and a variety of extralegal, informal and community mechanisms for their enforcement as fundamental features that, at least to me, characterized the postwar legal system and seemed likely to persist.¹³ Rather than repeat my argument, here I would like instead to examine the effect (or likely effect) of much touted changes in three areas that either have already taken place or are being planned. First, I will review the results thus far of the electoral reforms. Second I will examine what appear to me to be extent and foreseeable consequences of changes that are taking place in the legal profession and in legal education. Finally, I would like to return to the issue of corporate governance and organizational autonomy. My conclusion, however, remains as before. Once again, I do not find fundamental change. The reforms in these three areas have left untouched basic structural arrangements that appear to be the critical determinants of distinctively Japanese patterns of political, legal and organizational behavior. Japanese politics remains highly personal and local. Political parties remain unusually incoherent and organizationally weak. The legal profession also remains a highly desirable, elite occupation with a greater degree of individual autonomy than most other career opportunities. Legal education may become broader and more professional but seems at least as apt to replicate the existing emphasis of private *juku* on examination-taking skills. Finally, after a decade of much-touted corporate restructuring, no change is apparent in the basic structure of employment for nearly all medium and large private and public organizations in Japan. Entry-level hiring continues to be the norm and centralized personnel offices the prevailing practice. External markets for experienced managers have yet to develop. We may someday speak of these as the years of a Heisei Renewal but I still very much doubt that we will see it as the era of the Heisei Transformation.

11 For English language discussion of the reforms in legal education and their background, see special symposium issue of the Asian-Pacific Law & Policy Journal, June 2001, at <<http://www.hawaii.edu/aplpj/main/archives.html>>. For more critical and recent views, see K. 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 and J.R. MAXEINER / K. YAMANAKA, The New Japanese Law Schools: Putting the Professional into Legal Education, in: Pacific Rim Law & Policy Journal 13 (2004) 303.

12 Legislation for *saiban'in* – usually translated as lay judges or “assessors” – to participate in trials involving serious crime is currently pending in the Diet.

13 See, e.g., J.O. HALEY, Authority Without Power: Law and the Japanese Paradox (New York 1991). For a recent restatement of this view, see J.O. HALEY, Revisiting the Asian State: Japan Weak State, Vital Industries, in: Boyd / Ngo (eds.), Asian States: Beyond the Developmental Perspective (London 2004).

I. ELECTORAL REFORMS

In January 1994 after four decades of debate, the first of a series of electoral reforms the Diet amended the Public Office Election Law¹⁴ replacing the former system of multi-member districts with single nontransferable votes (SNTV) by a mixed-member majoritarian (MMM) system in which 300 winner-take-all single member districts were combined with 200 (later reduced to 180) seats allocated by proportional representation from 11 regional blocks.¹⁵ The new system was challenged in a number of cases under various provisions of the constitution but upheld in a trio of related *en banc* decisions handed down on November 10, 1999.¹⁶

The reforms were not the cause but the consequence of the 1993 Lower House elections and a series of events that had occurred during the preceding months. Continuing political scandal and disaffection both within and among the political factions that comprised the Liberal Democratic Party (LDP) had led core groups of reformers out of the LDP to form new political alliances. The formation of the New Japan Party by Morihiro Hosokawa in 1992 exemplified the fragmentation. By mid-July 1993 the LDP had lost its majority as a result of these defections. On the eve of national elections Masayoshi Takemura had led one group out of the LDP to form the New Party Harbinger (*Sakigake*) followed by the Hata-Ozawa faction to form the Renewal Party.¹⁷ In the elections of July 18, 1993, the LDP actually gained one seat. Nonetheless the LDP remained with only a plurality. For the first time since the LDP formation in 1955 the party could not form a government.

The electoral winners of 1993 were the LDP defectors. On the eve of the Lower House elections they held 46 seats. They won 103. The losers were the Socialists. In the prior 1990 elections the Socialists had won 136 of 512 seats. In mid-July 1993 they held 134 of the 497 non-vacant seats. In the aftermath of the 1993 elections, however, they held only 70.¹⁸ Today, and two national elections later (1996 and 2000), the Socialist party has been reduced to only six of 480 seats. (The loss of seats by the Communist Party has been less dramatic. The party held 16 seats prior to the 1993 election and holds 9 today.) In the 1996 elections the LDP regained seats but still failed to win a majority in either house. By September, however, a sufficient number of defectors

14 See *supra* note 2.

15 See S.R. REED / M.F. THIES, *The Causes of Electoral Reform in Japan, and The Consequences of Electoral Reform in Japan*, in: Shugart / Wattenberg (eds.), *Mixed-Member Electoral Systems: The Best of Both Worlds?* (Oxford and New York 2001) 152-72; 380-404.

16 Yamaguchi, et al. v. Tokyo Prefectural Election Commission, Minshû 53 (Supreme Court, G.B., November 10, 1999) 1441; Okura, et. al. v. Central Election Administration, Minshû 53 (Supreme Court, G.B., November 10, 1999) 1577; Koyama, et al. v. Tokyo Prefectural Election Commission, Minshû 53 (Supreme Court, G.B., November 10, 1999) 1577.

17 REED / THIES, *supra* note 15, 165-67.

18 *Id.*, Table 7-2, 167.

having returned to the fold the LDP once again became the majority party. The elections of 2000 sent a mixed message. The LDP in a coalition with the *Kōmeitō* coalition retained the majority but lost votes and seats to the Democratic Party of Japan (DPJ), which has emerged in the wake of the reforms to replace the Socialists as the LDP's principal opposition. Today the LDP holds a majority with 242 of 477 members of the Lower House. The DPJ and affiliated Club of Independents hold 178 seats. The *Kōmeitō* is third in strength with 34 seats. The reforms thus may be leading Japan gradually to a more viable two party system,¹⁹ but to date has produced little change, except perhaps the nearly complete elimination of any progressive-left opposition. (Keep in mind that the decline and fall of the Socialist Party began before the reforms.) The LDP thus rules as before with its only current opposition an ideological hodge-podge of LDP defectors and a few moderate-left Socialists or Democratic Socialists.

National politics remain highly personal. Incumbents and the sons and daughters of prominent politicians seem to win perhaps more often in Japan than even in the United States.²⁰ Despite the strengthening of the Prime Minister's Office, at the Party itself remains weak at both the local and national level. Personal networks trump both party and national connections. And conservatives rule. Some Socialist Party members have joined the DPJ, but to the extent that its members share any ideological preferences, they appear to be centrist. Indeed, LDP Prime Minister Junichiro Koizumi remains the leading advocate for significant regulatory reform. All progressive-left party seats combined amount to barely 3% of the Lower House.

A primary aim of the reforms was a political system with effective party rivalry. The adoption of the MMM system was intended to end single party rule but also to preclude the instability of a multiparty system. Effective party rivalry with political continuity is generally understood to mean a two or three party system in which each is not only capable of forming a government but, at least occasionally, actually does so. Hence, since the November 2003 Lower House elections, the question now being asked is whether DPJ has truly emerged as a viable opposition party. Again, doubts persist. The party itself was formed in 1996 by 57 parliamentarians, mainly former members of the Socialist and *Sakigake* parties. They were joined in 1998 by members of three new parties that had been formed following the break up of the Renewal Party (*Shinshintō*). The DPJ thus comprises a rather odd assortment of former LDP and Socialist members with little in common but political self-interest. The DPJ is certainly no more coherent as a political party than the LDP. Having lost the initiative for reform to Koizumi, its

19 See, "Conclusions", in: Reed (ed.), *Japanese Electoral Politics* (London and New York 2003) 194-195.

20 Although written before the 1994 reforms, for an insightful study of the advantages incumbents enjoy, see S.R. REED, *The Incumbency Advantage in Japan*, in: Somit / Albert et al. (eds.), *The Victorious Incumbent: A Threat to Democracy?* (Aldershot and Dartmouth 1994) 278-302.

members may be forced to become voices of conservative reaction rather than more progressive transformation.

II. LEGAL PROFESSION AND LEGAL EDUCATION

Like the anticipated effects of electoral reform, changes in the legal profession and legal education for some portend transformational influence.²¹ Over the past decade both the number of lawyers in active practice and the demand for entry into the profession by elite law faculty graduates have increased. The Japanese bar has grown and many new firms – many the affiliates of major American, British and even German international law offices – now occupy posh suites in the newest commercial centers of downtown Tokyo. *Martindale-Hubbell* also lists nearly 60 unaffiliated Japanese law offices with at least aspirational interest in international practice. Most appear to be new, having been established within the past decade, and small with fewer than a dozen lawyers. However, the size of some major Japanese law firms has grown. At least three Tokyo firms today comprise well over 100 attorneys.²² One can nevertheless question the significance of these trends. All of Japan's largest law firms were created by consolidation not natural growth. In 2002 Nagashima and Zaloom identified Mori Hamada & Matsumoto, Nagashima Ohno & Tsunematsu and Nishimura & Partners as Japan's largest firms, each with over a hundred lawyers. The first was the product of the merger of Mori Sogo and Hamada & Matsumoto. Similarly the second was formed by the merger of Nagashima Ohno with Tsunematsu, Yanase & Sekine. The third, Nishimura & Partners, merged with the Tokiwa Sogo Law offices in 2004. Today the list would also include the Asahi Koma Law Offices, formed in July 2002 with the consolidation of the Asahi Law Office (itself established in 1993 with the merger of Tokyo Yaesu Law Office and Masuda & Ejiri) with Komatsu, Koma & Nishikawa, as well as the Baker & McKenzie affiliated Tokyo Aoyama Aoki Law Office, which resulted from the merger of the Tokyo Aoyama Law Office and the Aoki & Nomoto Law Office.²³ These

21 C.J. MILHAUPT / M.D. WEST, *Law's Dominion and the Market for Legal Elites in Japan*, in: *Law and Policy in International Business* 34 (2003) 451, 492.

22 NAGASHIMA / YASUHARU AND ZALOOM / E. ANTHONY, *The Rise of the Large Japanese Business Law Firm and its Prospects for the Future*, presented at a symposium held at Seattle, Washington, August 22-24, 2002, honoring the late Dan Fenno Henderson. Entitled "Law in Japan: At the Turning Point", the symposium was sponsored by the Tokyo law firm of Nagashima, Ohno & Tsunematsu and the University of Washington Asian Law Center. They identified Mori Sogo, Nagashima Ohno & Tsunematsu and Nishimura & Partners as the three firms with over a hundred lawyers.

23 Aoki & Nomoto was the oldest international law firm in Japan. It began in 1897 as the law office of Nicholas William McIvor, a former U.S. Consul-General in Yokohama. James Lee Kauffman joined McIvor in 1913. McIvor died in 1915, Kauffman continued to practice in Tokyo until 1926 when he returned to the United States, maintaining, however, the Tokyo

firms all reflect a recent trend toward concentration of international and commercial practice among older and well-established law offices. Were we to look at only these firms we might conclude that Tokyo has fewer firms but not necessarily more lawyers. Such conclusions err, however. Indeed, as noted, new, small firms continue to proliferate, very much in the traditional Japanese fashion as younger lawyers continue to leave larger firms to form their own offices once they have acquired the needed skills and garnered a viable client base.²⁴

So too the demand to become a lawyer is strong. But has it become significantly stronger? In fact as the number of legal apprentices (*shihō shūshū-sei*) at the Legal Research and Training Institute (*shihō kenshūjo*) has increased, the number of applicants has also risen. The continuity of this pattern is evident from the fact that the annual percentage of admitted applicants has varied little over the past half century. Since 1953 the percentage has hardly varied, decreasing steadily from 4.4 percent in 1953 to a low of 1.5 percent in 1976. As the number of undergraduate law students and legal apprentices increased so did the number of applicants. Not until the late 1990s, however, did the number of applicants begin to exceed the peak reached in the mid-1970s.

Milhaupt and West see this recent increase as a sign of preference, that more graduates of Japan's elite university law faculties seek to become lawyers rather than bureaucrats. Perhaps. But for those who have had the choice, the numbers have not changed. Only a tiny fraction – less than 5 percent even in the early 1950s – have ever chosen to enter any career other than to be a judge, prosecutor or attorney at least immediately after graduating from the Institute.²⁵ As opportunities to become a lawyer have increased so too, perhaps, have an increasing number of law graduates from the elite universities decided to take a chance and devote the time and energy to prepare for the national judicial examination (*shihō shiken*) for admission to the Institute. Yet for those who pass the preference for a legal career has been constant.

Then there are the new graduate level law schools (*hōka daigakuin*). In June 2001 the Justice System Reform Council (*Shihō Seido Kaikaku Shingikai*) recommended the establishment of postgraduate, law schools for training those who wished to enter the legal professions as lawyers, judges, or prosecutors by April 2004. The recommendation was accepted. In April 2004, 68 new law schools opened their doors to approximately

firm McIvor & Kauffman. In 1951 Kauffman recruited John B. Christensen, a recent Yale Law School graduate with Japanese language competence, to join the firm. In 1963 the firm was renamed McIvor, Kauffman & Christensen. Kauffman died in Tokyo in 1968. The firm was again renamed in 1985 to Aoki, Christensen & Nomoto.

24 Chie Nakane noted this pattern of lawyer behavior as a contemporary illustration of traditional artisan and farmer household practice in her seminal work, *Tate-shakai no ningen-kankei – tanitsu-shakai no riron* (Tokyo 1967), translated into English as “Japanese Society” (Berkeley and Los Angeles 1970), see p. 48.

25 See, e.g., SHIHŌ KENSHŪ-JO, *Shihō shūshūsei binran* [Legal apprentice handbook] (Tokyo 1993) 53-56.

5,770 newly admitted students.²⁶ Several schools offered night classes and degree programs for part-time students, targeting potential students seeking a career change. I am told by colleagues in Japan that the number turned out to be quite large. Few, however, were current or former government employees. Instead most were corporate managers seeking alternative careers or, as part-time students, to enhance their professional skills and perhaps future choices.

Two and three years hence the first classes of these students (2 years for an expected 2,000 law faculty graduates and 3 years for about 1,000 non-law university graduates) will have completed the prescribed course of study. Upon graduation they will sit for the new (but as yet undetermined) entrance examinations for the reconstituted one year LRTI apprenticeship program. Current plans limit the combined classes of legal apprentices to 3,000. Thus only half of the initial two classes of law school graduates will pass the exam and have the opportunity to become lawyers, judges, or prosecutors. Each year as those who failed on their first attempt try again – those who fail will have one second chance – the number of applicants will presumably increase by about a third and the percentage of those who are successful will correspondingly decrease. Already some schools have failed to attract the number of students they anticipated. Those who have the largest percentage of failed applicants are thus bound to suffer even more. For the schools and the universities or other organizations (at least one bar association) who support them financially, survival will surely depend on producing graduates who pass the new national examination for admission to the Institute. The first order of business for law school administrators and faculty will be to ensure their students are equipped to do well on the examination. The consequences seem inexorable. Instead of a new era of American-styled law schools, as many anticipate or hope,²⁷ these new schools are far more apt to become examination preparatory schools – new, expensive, university-run *juku*. We must wait to see what the new LRTI entrance examination will cover to determine what subjects will be taught but still the new schools are apt to prove to be a colossal waste of resources. Japan will require a year more of formal legal education than any country on the globe, the only likely gain to be greater proficiency in taking examinations. New York and California bar examiners beware!

I may be wrong. Perhaps the law school graduates – at least those who fail – will discover new and better opportunities in the corporate world or in government. Companies may end up preferring them over the university law faculty graduates with less specialized (examination preparatory or not) legal education. They may do better on the national civil service examination than those with a mere baccalaureate degree in law. If so, the schools may survive and even begin to offer a broader selection of course and

26 See “Colleges Hope New Law Schools Will Boost Student Numbers”, The Japan Times, March 31, 2004, <<http://www.japantimes.co.jp/cgi-bin/getarticle.p15?nn20040331b1.htm>> (last visited 4/1/2004).

27 See *supra* note 11.

seminars designed more for those who will enter corporate and government service rather than the more narrowly defined avenues of legal practice of the prototypical Japanese attorney. Such a trend would indeed presage real – perhaps even transformational – change as envisioned by Milhaupt and West. It would require a demand for specialized corporate managers and government officials, for persons with legal expertise rather than generalists to be trained in-house. And with that demand would come a market for experienced lawyers with corresponding competition and career mobility.

III. CORPORATE GOVERNANCE

Finally, we come at least to the company law reforms and corporate governance. Studies of comparative corporate governance have become a kind of cottage industry. They pop up here, there and everywhere. I hesitantly join the crowd. In a recent conference presentation, I examined the remarkable stability of Japanese patterns of career employment and corollary restriction of external markets for experienced workers and managers in both the public and private sectors and their effects.²⁸ Again we have major legal reforms. In the words of one observer, the 1990s brought more separate corporate law revisions than any other period of Japanese history – the changes in 2001–2002 are arguably the most ambitious and comprehensive in over fifty years.²⁹ Others can detail the content of these reforms far better than I. The only point I wish to make is whatever their ostensible scope or design, the fundamentals of Japanese corporate governance have not changed. Large, publicly held Japanese corporations continue to be controlled by career managers who view themselves as the primary stakeholders and actively prevent shareholders from exercising either rights of control or claims to their residual share.

Several caveats should be noted. Most Japanese companies are closely held. Until the postwar period as Blakemore and Yazawa noted in their 1953 article anticipating the failure of the late Occupation legal reforms designed to ensure shareholder democracy and recent research by Miwa and Ramseyer confirms,³⁰ Japanese companies were either family owned, as in the case of even the largest *zaibatsu* conglomerates or closely held with a small cohort of individual shareholders who often had provided the initial

28 Japanese Perspectives, Autonomous Firms and the Aesthetic Function of Law, in: Hopt / Wymeersch / Kanda / Baum (eds.), *Corporate Governance in Context: Corporations, State, and Markets in Europe, Japan and the US* (London 2005, in print).

29 L. NOTTAGE, *Japan, Inc Goes Global: The Overhaul of Japanese Corporate Law*, in: CCH *Asiawatch Newsletter* No. 56 (February 2003).

30 See Y. MIWA / J.M. RAMSEYER, *Corporate Governance in Transitional Economies: Lessons from the Prewar Japanese Cotton Textile Industry*, in: *Journal of Legal Studies* 29 (2000) 171.

capital.³¹ The large, publicly held corporation with widely dispersed ownership is therefore a postwar phenomenon.

Moreover, until the mid-1980s the percentage individual ownership of stock in listed companies was in continuous decline.³² This trend ended in 1985 with approximately 20 percent of the total stock of all publicly traded companies held by individuals. Shareholding by foreign corporate and individual investors, never more than 5 percent prior to 1980, rose and fell in the early 1980s but increased steadily from 1990 to 2000 also apparently stabilizing – at least momentarily – at around 20 percent of total shareholdings. Institutions, such as mutual funds and pension funds, holding shares on behalf of individual investors, do not hold a significant percentage of shares. Investment and annuity trusts in combination account for less than 10 percent of all shares held. Although the percentages fell in the late 1990s, still financial institutions (banks and insurance companies) and other corporations today continue to hold over 50 percent of all shares of publicly listed firms.³³

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- 31 T.L. BLAKEMORE / M. YAZAWA, Japanese Commercial Code Revisions Concerning Corporations, in: American Journal of Comparative Law 2 (1953) 12, 18. Yazawa was one of Japan's leading postwar commercial law scholars. Blakemore, a close friend of Yazawa from the late 1930s, had been the principal American lawyer involved in the Occupation's basic legal reforms. They were both highly critical of Lester N. Salwin, an Illinois lawyer responsible for drafting Japan's antitrust statute as well as the author of the Occupation's company law reforms. For Salwin's considerably more sanguine views, see S.L. SALWIN, The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals, in: Georgetown Law Journal 50 (1962) 478.
- 32 See L. REPETA, Declining Public Ownership of Japanese Industry: A Case of Regulatory Failure?, in: Law in Japan 17 (1984) 153, reprinted in J.O. Haley (ed.) Law and Society in Contemporary Japan (Dubuque, IA, 1988) 113-38; *Zenkoku shōken torihiki-jo* [National Securities Exchanges] (June 20, 2004) 4. See also S. NESTOR / J.K. THOMPSON, Corporate Governance in OECD Economies: Is Convergence Under Way? (OECD Paper, January 1, 2001) 4, <<http://www.oecd.org/dataoecd/7/10/1931460.pdf>> (as of October 4, 2004).
- 33 Japan, it might be noted, is the only East Asian nation in which a significant percentage of publicly listed corporation have widely dispersed ownership See I.C. NAM / Y. KANG / J.-K. KIM, Comparative Corporate Governance Trends in Asia, in: Zhuang / Juzhong et al. (eds.), Corporate Governance and Finance in East Asia (Manila 2000) 85-119. The authors analyze data from Claessens, Stijn, Fan. Joseph, P.H., and Lang, Larry H.P., Ownership Structure and Corporate Performance in East Asia (Washington, D.C.: World Bank, mimeo, October 1998). The Claessens data shows that except for Japan and Korea less than 3 percent of all publicly traded corporations are widely held. In every country except Japan (13.1%) and the Philippines (41.3%), more than 50% of these were family-controlled (with a 10% shareholding cutoff). Excluding state-controlled corporations and those with at least a 10% equity stake by widely held financial institutions or other widely held corporations, nearly all publicly traded corporations are family owned or controlled. Nam and his co-authors believe, however, that the Claessens study actually understates the extent of family control. For example, their data does not disaggregate corporate shareholding in family-controlled pyramidal conglomerates. For South Korea Claessens and his colleagues found that only 14.3 percent of 345 publicly traded companies were widely-held (at a 10% ownership concentration cutoff) with nearly 68 percent – including all *chaebol* conglomerates –

To understand the forces that dictate how institutional investors behave, we turn to the employment structure for most if not all non-family-owned firms. All share a common basic structure: entry-level hiring coupled with a central personnel office staffed by senior career manager with full responsibility for the recruitment, training, assignment and promotion of career staff. Entry level hiring, however, leaves only limited opportunities for exit. Thus, as Gilson and Roe point out,³⁴ the benefits of job security become less significant than the consequences. Managers locked into a firm when they are hired in their 20s are compelled to view their own career interests as inexorably tied to the firm's success. The interest of the organization thus subsumes that of the individual manager. The results are well documented. In competitive industries career workers work hard, often at significant personal sacrifice, for the firm.

The implications for corporate governance are two-fold. First, managerial employees who have long sacrificed for a firm and whose economic future would be bleak outside of the firm are even more less likely to acknowledge shareholder rights to control or residual claims. Equally if not more significant, these attitudes are shared by the managers of the shareholding companies and financial institutions. The Japanese firm thus tends to become a perpetual entity with control exercised in fact by career managers who themselves are encased in similar organizational structures and share interests and values similar to those in firms whose shares they vote. Such shared interests and attitudes help explain the failed attempts by shareholders to force firms with excessively large cash reserves like the now fabled Tokyo Style.³⁵ The results include the absence of any market for control and the perpetual Japanese firm.

Despite extraordinary pressures for corporate restructuring, no fundamental change has taken place. New hiring of core employees may be reduced. The percentage of part-time workers (still mostly women) may have increased. Early retirement of core employees may be promoted. Out-sourcing of production may have increased. Yet firms continue to hire core managers as generalists upon university graduation, centralized personnel offices persist, career employment remain the norm, and external markets for experienced managers hardly exist.³⁶

family owned or controlled.

34 R.J. GILSON / J.R. MARK, Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance, in: Columbia Law Review 99 (1999) 508.

35 "Rare Proxy Battle Aims to Redress Japanese Capitalism," (P. LANDERS), in: The Wall Street Journal, May 15, 2002, pp. A1, A12-A13.

36 See OECD, *Economic Survey Japan 2005* at <http://www.oecd.org/document/61/0,2340,en_2649_201185_34274621_1_1_1_1,00.htm>. For the most recent labor statistics, see <<http://www.stat.go.jp/english/data/roudou/index.html>>. See also K. ARIGA / G. BRUNELLO / Y. OHKUSA, *Internal Labor Markets in Japan* (Cambridge 2000), esp. chapter 5, pp. 121-168; H. SATO, *Human Resource Management Systems in Large Firms*, in: Sako / Sato (eds.), *Japanese Labour and Management in Transition: Diversity, Flexibility and Participation* (London 1997) 104-129; A. HOLZHAUSEN, *Japanese Employment Practices in Transition: Promotion Policy and Compensation Systems in the 1990s*, in: *Social Science*

To conclude, the legal reforms of the past decade may well usher in an era that we will someday recall as the Heisei Renewal but we seem quite unlikely to view these years as the prelude to a Heisei Transformation.

A POSTSCRIPT :

I intentionally choose not to deal with the normative issue. Whether a Heisei Transformation would benefit Japan is a separate question. My reason is simple. It all behooves an American law professor who enjoys the material and social benefits of elite status in a society that is far more needful of transformational change than Japan to suggest that Japan change. We spend far more on health, education, safety and government than Japan. Yet the average American is not as healthy, as well educated, nor as safe as the average Japanese. We have more and perhaps better lawyers but that has not prevented over 20 times as many of our fellow inhabitants on a per capita basis to be imprisoned. Nor do we have safer cars or factories. Our economy may be growing faster than Japan's but Japanese are proving to be even more innovative and our economic inequality is much greater and appears to be increasing. We may have a two-party system, but we have also developed an increasingly divisive, partisan political culture that impedes our capacity to fashion sound policy in nearly every field.

ZUSAMMENFASSUNG

Seit über einem Jahrzehnt vollzieht sich in Japan eine Reihe grundlegender rechtlicher Reformen, die das Wahlrecht, die Institutionen des Finanzmarktes, das Verwaltungsverfahren, das Zivilprozeßrecht, sowie die Wettbewerbspolitik und Produkthaftung und nicht zuletzt das Gesellschaftsrecht betreffen. Die Liste der Reformprojekte umfaßt ferner die geplante Einführung von Laienrichtern (saiban'in) für schwere Strafdelikte und die Errichtung von law schools nach US-amerikanischem Vorbild. Der Beitrag befaßt sich eingehend mit dreien dieser legislativen Reformen und den damit einhergehenden Veränderungen: erstens dem Wahlrecht, das es den Parteien seit dem Jahre 1994 nur noch erlaubt, einen Kandidaten je Wahlbezirk aufzustellen, dessen Stimme auch nicht übertragbar ist, zweitens dem Berufsstand der Juristen und der juristischen Ausbildung, sowie drittens dem Jahrzehnt gesellschaftsrechtlicher Reformen. Der Autor vertritt die Ansicht, daß keine dieser drei Reformen bislang zu bedeutenden gesellschaftlichen Veränderungen im Lande geführt habe und daß dies auch für die

Zukunft nicht zu erwarten sei. Aus diesem Grunde haben die Reformen, wie im Titel des Beitrages angedeutet, die in sie gesetzten Erwartungen einer grundlegenden, breiten gesellschaftlichen Erneuerung oder gar Umwandlung bislang nicht erfüllt.

Die Wahlrechtsreform wurde im Nachgang zur Parlamentswahl des Jahres 1993 in Kraft gesetzt, in der die Liberaldemokratische Partei (LDP) entgegen allen Erwartungen einen Sitz hinzugewann. Gleichwohl reichte dies nicht zum Erhalt der Mehrheit aus, da die LDP zuvor die Zahl der Sitze drastisch reduziert hatte. Die eigentliche Bedeutung der Wahl des Jahres 1993 liegt indes weniger im Scheitern der LDP, ihre Mehrheit zu sichern, als vielmehr in der buchstäblichen Auslöschung der sozialistischen Partei. Zwei Jahre später hatte sich die LDP wieder erholt und ist seither an der Macht, wenn auch zunächst nur mit dem, was von der Sozialistischen Partei übriggeblieben war (die sich in Sozialdemokratische Partei umbenannt hatte), und seit dem Jahre 2000 mit der Komeito.

Die Reform des Wahlrechts hat wenig Veränderung gebracht. Zur Bildung einer nennenswerten fortschrittlichen Oppositionspartei ist es nicht gekommen. Auch wenn es erste Anzeichen für eine Entwicklung hin zu einem Zweiparteiensystem gibt, decken doch die drei zur Zeit größten Parteien weiterhin das ideologische Spektrum der früheren LDP ab. Die japanische Innenpolitik ist weiterhin stark personengebunden, und lokale Interessengruppen haben nach wie vor maßgeblichen Einfluß. In der Regel gewinnen diejenigen, die bereits einen Sitz haben, die Wahlen.

Ebensowenig lassen sich die jüngsten Veränderungen beim Berufsstand der Juristen, insbesondere die Entstehung von Anwaltssozietäten mit über 100 Rechtsanwälten, und die Neuordnung der Juristenausbildung als Ausdruck oder Vorboten grundlegender gesellschaftlicher Wandlungen interpretieren. Bei genauer Betrachtung zeigt sich, daß die neuen großen Sozietäten in Tokyo lediglich durch Zusammenschlüsse bereits existierender Kanzleien entstanden sind; keine von ihnen hat sich durch internes Wachstums entwickelt. Zudem ist die überwiegende Mehrheit aller japanischen Rechtsanwaltssozietäten weiterhin klein. Das tradierte Muster von langsam wachsenden Sozietäten, die sich aufspalten, wenn sie die Größe von einigen Dutzend Anwälten erreichen, ist nach wie vor intakt. Selbst die drei oder vier größten Kanzleien setzen sich aus nur wenigen langjährigen Partnern zusammen, während die Mehrzahl angestellte Rechtsanwälte sind, die eigene Sozietäten gründen, wenn sie genügend Berufserfahrung gesammelt und Kontakte hergestellt haben. Im übrigen gibt es auch keine Anzeichen dafür, daß ich, wie gelegentlich behauptet wird, der Berufsstand der Juristen einer neuen allgemeinen Popularität erfreuen würde. Die Zahl derjenigen, die sich für die Juristenlaufbahn entscheiden, ist im Verhältnis zu der Zahl derjenigen, die letztlich zur Berufsausübung zugelassen werden, konstant geblieben.

Auch die neuen „law schools“ scheinen sich nicht der allgemeinen Erwartung gemäß zu entwickeln. Zwar ist die Zahl der law schools mit mehr als 60 relativ groß, aber die einzelnen Schulen unterliegen starken Beschränkungen bezüglich der Größe der

Fakultäten und der Anzahl der Studenten. Angesichts der Tatsache, daß das zentrale staatliche Legal Training and Research Institute (Shihô Kenshû Sho) weiterhin besteht und daß auch an den Zulassungsquoten festgehalten wird, auch wenn die Quote auf etwa 3.000 pro Jahr erhöht ist, stehen die neuen law schools in einem intensiven Wettbewerb um die Studenten mit der Folge, daß sie mit einiger Wahrscheinlichkeit zu teuren „Pauk“-Anstalten werden.

Schließlich gibt es auch keine Anzeichen dafür, daß die zahlreichen Reformen des japanischen Gesellschaftsrechts zu einer Veränderung bei der Corporate Governance japanischer Unternehmen geführt haben oder führen werden. Die Mehrzahl der japanischen Unternehmen befindet sich weiterhin im Besitz von Einzelpersonen oder von Familien oder wird zumindest von diesen mehrheitlich kontrolliert. Auch die wenigen großen Publikumsgesellschaften sind nach wie vor durch die gleichen Beschäftigungsstrukturen gekennzeichnet, wie sie für praktisch alle mittleren bis großen öffentlichen und privaten Organisationen in Japan typisch sind. Die meisten Mitarbeiter werden wie bisher unmittelbar nach dem Abschlußexamen eingestellt, während für Seiteneinsteiger kaum Chancen bestehen. Entsprechend gibt es keinen Markt für erfahrene Führungskräfte, denen lediglich der Karriereweg innerhalb des Unternehmens offensteht. Der Verfasser argumentiert, daß als Ergebnis eine institutionelle Dynamik zu beobachten ist, in der die kollektiven Interessen von Karrieremitarbeitern an einer langfristigen Sicherung ihrer Positionen unausweichlich jeden Versuch zum Scheitern verurteilen, eine „Aktionärsdemokratie“ einzuführen oder das bisherige Modell der Corporate Governance in anderer Weise zu ändern.

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