Overhauling the Judicial System: Japan's Response to the Globalizing World

Kahei Rokumoto

I. INTRODUCTION

Economic globalization that started in the late 1980s has produced some adaptive changes in the legal systems in the West, as exemplified by the reforms of the legal profession in Britain and France. Its impact has been felt even more strongly in the Far Eastern legal systems, faintly evoking the reminiscence of the historic Western impact that brought the modern era to this part of the world a century and a half ago. Fundamental judicial reforms are presently being made both in the People's Republic of China and the Republic of (South) Korea. Japan, which has experienced a somewhat more stable and steady development of a legal system of the modern Western type than her two neighbors, is no exception. An ambitious project of restructuring the whole justice system started in 1999 in Japan.

To be more specific, in July 1999, the Justice System Reform Council (JSRC or "The Council") was established directly in the Cabinet led by the Prime Minister. Two

years later, in June 2001, the Council duly submitted to the Prime Minister its final report, The Opinion of the JSRC,[1] containing a comprehensive package of reform proposals. The government promptly reacted to the report by legislating The Law for Promotion of Justice System Reform (JSR) in December 2001, and by setting up the Headquarters for Promotion of Justice System Reform[2] in the Cabinet. The Cabinet in its turn adopted the Plans for the Promotion of Justice System Reform in March 2002. Both the Supreme Court and the Japan Federation of Bar Associations (JFBA) issued outlines of their own respective reform plans following the reform guidelines set by the legislation. Thus, the formal plan for "the justice system reform" was released for implementation.

This is in itself a complex package containing many particular reform projects, and is accompanied by a series of related reforms of the other aspects of the legal system, thus forming a vigorous current of justice system reform in a broader sense. Taken as a whole, it purports to radically restructure the legal profession, court administration, judicial procedures, and legal educational institutions, thereby affecting a wide range of the inherited practices and the vested interests of the bar associations, the courts, and the university law faculties. If completed as planned, it will alter the legal culture of Japan dramatically. Characteristically, careful steps were taken to consult and enlist the cooperation of all those actors in arriving at a definitive set of reform plans. In fact, this is a major political event that goes well beyond the legal world.

At the time of this writing, many of the planned reforms have been completed and some new arrangements are already in place, but some other reforms are still at their preparatory stage. In any event, it is still too early to assess the effects of this enterprise as a whole. The purpose of this paper is to provide for the Western reader a provisional report on this époque-making event, explaining its setting, its political and social background, and some of its main contents.

---

1 *Shihô Seido Kaikaku Shingi-kai ikensho* [Opinion (or the Final Report) of the Justice System Reform Council] (2001). An English version of the full text of this report is available at <*http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.*> and under <*http://www.moj.go.jp*> (hereinafter cited as JSRC (2001)).

2 These Headquarters were closed upon completion of their mission in December 2004 and were succeeded by a Cabinet Bureau for the Promotion of Justice System Reform. At the same time, the Conference for the Implementation of Justice System Reform was established in the Ministry of Justice, and the Forum on Judicial Reform was formed jointly by the Supreme Court, the Japan Federation of Bar Associations (JFBA), and the Ministry of Justice.

II. LEGAL SYSTEM FOLLOWING THE CONTINENTAL MODEL

1. Court System

Since the beginning of the modern state in the *Meiji* Period (1868-1912), the legal system of Japan has been constructed on the Continental model, basically the German, and partly the French model. Accordingly, the court system of Japan is made up of three levels of ordinary courts, in accordance with the "three instance principle" that was adopted in that period. After the defeat in the Second World War, the legal system was fundamentally reconstructed in the democratizing reforms under the present Constitution of 1947, which prescribes a democratic polity based on the principles of people's sovereignty and basic human rights under the rubric of symbolic emperorship.

Today the Japanese court system is made up of the Supreme Court, eight high courts,[3] 50 district courts, and 50 family courts at the same level as district courts. In each prefecture there is one district court and one family court; both district courts and family courts have some branch courts to cover remote areas within their respective jurisdictions; each district court has within its jurisdiction a number of summary courts with cases of limited jurisdiction. Thus, the judiciary is made up of a large number of courts and their judges spreading across the country forming a large hierarchical organization with the Supreme Court at the top. The Supreme Court, in its capacity as the court of final instance, has the function of overseeing and unifying the judgments of lower courts as well as the power of "judicial review" of all statutory laws, governmental acts, and judicial pronouncements according to the Constitution.

2. The Legal Profession and Its Historical Background

The Japanese legal profession is divided into three branches: judges, prosecutors, and practicing attorneys.[4] In the modern Japanese tradition, they constitute three different occupations, but sociologically speaking they also form a kind of dual status structure: judges and prosecutors are viewed as holders of governmental power and enjoy elevated status and prestige, whereas practicing attorneys cast themselves in the role of defending small people's rights against the oppressions of the government and other power holders, and sometimes call themselves "lawyers in the opposition camp." This de facto bifurcation, somewhat reminiscent of the French situation, has its roots in the ways in

---

3 High courts ordinarily deal with appeal cases as the second instance. In cases which start in a summary court, a high court may hear the case as the final instance. Recently (starting in 2005), a special court of appeal specialized in intellectual property was created within the Tokyo High Court to hear all the appeal cases involving a matter of this kind.

4 Besides these three professions designated in the Law of Legal Examination (Article 1), often called *hôsô*, there are other law-related professions, such as Legal Scrivener, Patent Attorney, Tax Attorney, and Public Accountant, which are sometimes referred to collectively as "quasi-lawyers." They are qualified to provide law-related services in the legally prescribed areas of their respective competence.

which the legal profession was created after the modernizing revolution of the *Meiji* Restoration that started in the 1850s.

For the early *Meiji* leaders who had just succeeded in dismantling the weakened feudal regime in their struggles to achieve unity and independence for the nation, the first requirement was to establish a strong executive power, capable of leading the collective efforts to industrialize and modernize the country. The creation of the judicial branch was only the product of a series of concessions which the ruling oligarchy had to make to the dissenting minority that quickly emerged within the ruling elite.

One can imagine what a difficult task it must have been to create a new legal profession, equipped with the knowledge and skills that was required for administering a legal system of the Western type appropriate to a modern state, and in addition to that of instituting courts embodying the ethos of autonomous judgment passed by an independent judge. Governmental law schools were established and gradually a state examination system was established. Private law schools followed. But priority was given first to producing able government officials who could continue the mission of nation building; and second to educating prosecutors, responsible for maintaining order in society, and judges, responsible for interpreting and applying the laws made by the government. The task of producing and providing private attorneys of high quality to defend the rights of individual citizens and to promote private initiatives in business and other areas had only low priority. This basic stance persisted for a long time thereafter, and remained even after the democratizing reforms of 1945, by which the position of private lawyers was made formally equal to those of prosecutors and judges for the first time.

3. The Legal Examination

Under the present system, the key element in the process of qualifying lawyers is the Legal Examination (LE, *shihô shiken*), which is held once a year, separately from the examination for the higher civil service. Virtually all the applicants for the Legal Examination have an undergraduate degree in legal studies earned in a university, even though this degree is not legally required for taking the LE. Principal bearers of legal education are the university law faculties which usually offer not only courses in various fields of law (positive law courses), but also courses in the basic science of law as well as those in political science and economics. There is no limitation as to the age of the applicant or the number of times the applicant repeats the test.

After passing the Legal Examination, the would-be lawyers are required to spend another one-and-a-half years – it was a two-year course until 1999 – at the Institute for Legal Research and Training (ILRT), participating in a practical training program taught by those judges, prosecutors, or practicing attorneys who temporarily serve as ILRT instructors. Upon passing the final examination at the institute, the student is qualified to become a lawyer, and is to choose at this point to become either a judge – an assistant judge specifically – a prosecutor, or a practicing attorney.

Graph 1

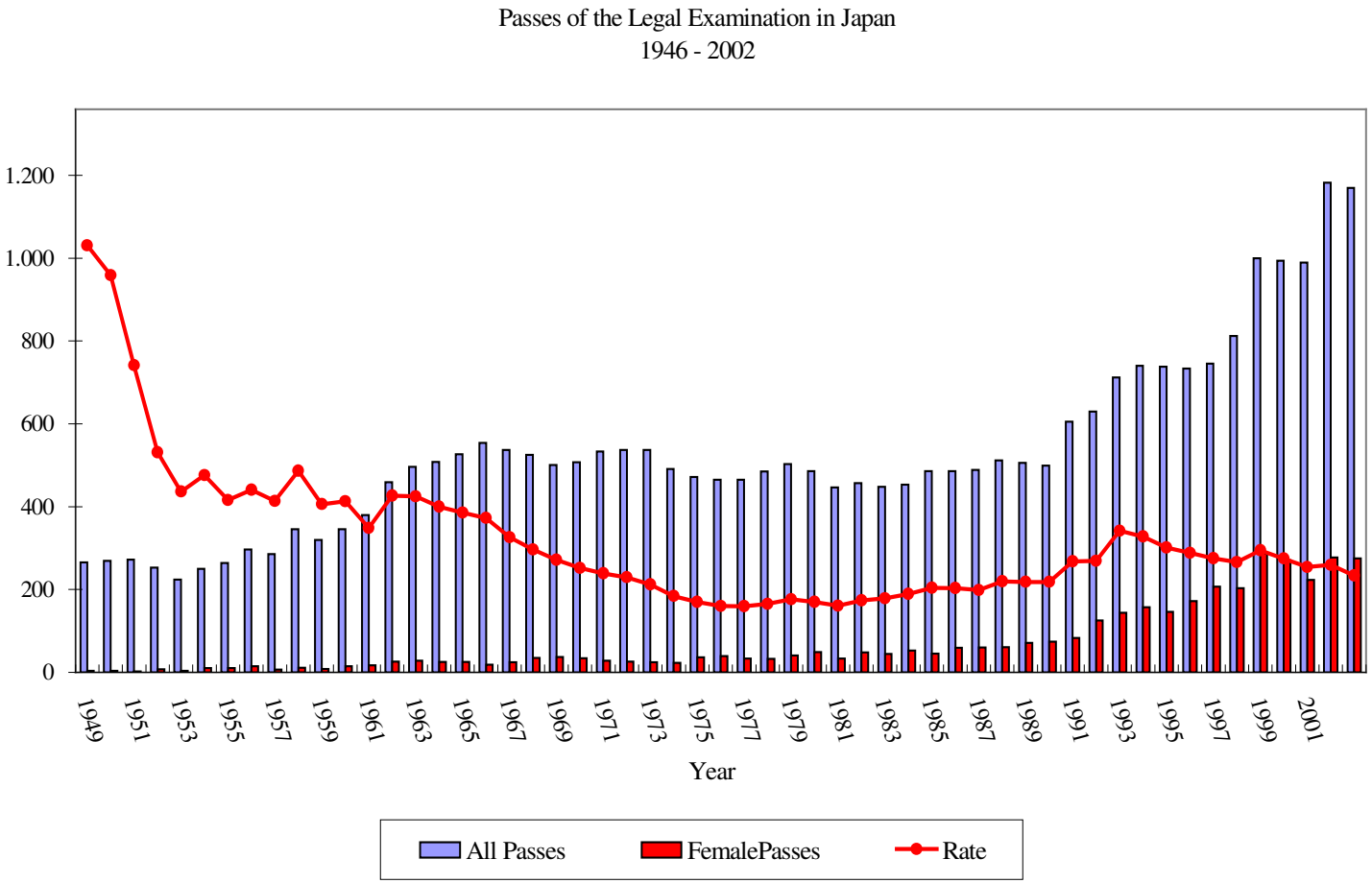

Passes of the Legal Examination in Japan
1946 - 2002
1.200
1.000
800
600
400
200
0
1949
1951
1953
1955
1957
1959
1961
1963
1965
1967
1969
1971
1973
1975
1977
1979
1981
1983
1985
1987
1989
1991
1993
1995
1997
1999
2001
Year
All Passes
FemalePasses
Rate

Table 1

YEAR	APPLICANTS	ALL PASSES	PASSES (MALE)	PASSES (FEMALE)	PASS RATE	RATE (FEMALE)
1949	2570	265	262	3	1031	1,13
1950	2806	269	266	3	959	1,12
1951	3668	272	270	2	742	0,74
1952	4761	253	246	7	531	2,77
1953	5136	224	221	3	436	1,34
1954	5250	250	240	10	476	4,00
1955	6347	264	254	10	416	3,79
1956	6737	297	283	14	441	4,71
1957	6920	286	280	6	413	2,10
1958	7109	346	335	11	487	3,18
1959	7858	319	311	8	406	2,51
1960	8363	345	330	15	413	4,35
1961	10909	380	363	17	348	4,47
1962	10762	459	433	26	427	5,66
1963	11686	496	468	28	424	5,65
1964	12698	508	483	25	400	4,92
1965	13644	526	501	25	386	4,75
1966	14867	554	536	18	373	3,25
1967	16460	537	513	24	326	4,47
1968	17727	525	490	35	296	6,67
1969	18453	501	464	37	272	7,39
1970	20160	507	473	34	251	6,71
1971	22336	533	505	28	239	5,25
1972	23425	537	511	26	229	4,84
1973	25339	537	513	24	212	4,47
1974	26708	491	468	23	184	4,68
1975	27791	472	436	36	170	7,63
1976	29088	465	426	39	160	8,39
1977	29214	465	432	33	159	7,10
1978	29390	485	453	32	165	6,60
1979	28622	503	463	40	176	7,95
1980	28656	486	437	49	170	10,08
1981	27816	446	413	33	160	7,40
1982	26317	457	409	48	174	10,50
1983	25138	448	404	44	178	9,82
1984	23956	453	401	52	189	11,48
1985	23855	486	441	45	204	9,26
1986	23904	486	427	59	203	12,14
1987	24690	489	429	60	198	12,27
1988	23352	512	451	61	219	11,91
1989	23202	506	435	71	218	14,03
1990	22900	499	425	74	218	14,83
1991	22596	605	522	83	268	13,72
1992	23435	630	505	125	269	19,84
1993	20848	712	568	144	342	20,22
1994	22554	740	583	157	328	21,22
1995	24488	738	592	146	301	19,78
1996	25454	734	562	172	288	23,43
1997	27112	746	539	207	275	27,75
1998	30568	812	609	203	266	25,00
1999	33983	1.000	713	287	294	28,70
2000	36203	994	724	270	275	27,16
2001	38930	990	767	223	254	22,53
2002	45622	1.183	906	277	259	23,42
2003	50116	1.170	895	275	233	23,50

The Legal Examination is notorious for its stringency. As is shown in *Graph 1* and *Table 1*, every year more than 30,000 people take the examination. In 1999, one thousand people passed the examination: the pass rate was less than three percent. The applicants take the test an average of five times before passing, making the average age of the admitted lawyers about 27 years old. Most applicants attend commercial cram schools for most of the period spent in preparation for the LE, paying high tuition fees. In recent years, complaints began to be heard from the instructors at ILRT that the quality of the students was rapidly deteriorating under the influence of the cram school education, which is dedicated single-mindedly to mastering technical skills for succeeding in the written tests. This situation of the Legal Examination has been a main target of persistent, severe criticism and formed a major force that resulted in the present justice system reform.

III. THE JUSTICE SYSTEM REFORM COUNCIL (JSRC)

Coming back to our main subject, the law establishing the Justice System Reform Council of 1999 defined the Council's mission as "to research and deliberate on the fundamental measures necessary to reform the judicial system and its infrastructure arrangements by defining the role of the administration of justice in Japan in the 21st century" (Article 2(1)).[5] The Minister of Justice added a comment to the effect that in the 21st century, Japanese society will become more complex, varied, and international. Deregulation and other reforms will transform our society from one of the "advance-control type" into one of the "post-check type," and these changes will make the role of administration of justice more crucial than ever. Parliament followed by passing a resolution supplementing the main statute to ensure that the following issues would be taken up by the Council:

(i) "judicial appointment system on the basis of unity of the legal profession" (see later for the meaning of this concept);
(ii) "reinforcement of the legal profession in its quality and quantity";
(iii) "public or lay participation in the administration of justice";
(iv) "the relationship between human rights and criminal justice."

The Council was empowered to request submissions and to question representatives from the relevant Ministries and other administrative organs, as well as from the Supreme Court and the JFBA. In order to prevent any single Ministry from controlling the Council's deliberations, the law created a special secretariat for the Council composed of bureaucrats recruited from several Ministries. The Parliamentary resolution mentioned above also urged the Council to make all the details of its deliberations

5 This sentence is cited on the first page of the final report of the Council, JSRC (2001), *supra* note 1, 1).

publicly accessible. All these features were new to the Japanese process of public policymaking; as a result, the Council possessed exceptional status and authority.

Thirteen members of the Council were approved by the Parliament and appointed by the Cabinet. These appointees included five academics from two national universities and three private universities. The Council had only three members appointed from the legal profession, a former President of the JFBA, a former Chief High Court Judge, and a former Chief Prosecutor of a High Prosecution Office. Of the remaining five members, two represented business, one labor, one housewife's associations, and one was a writer. Professor *Kôji Satô*, a passionate constitutional law specialist from Kyoto University, presided over the Council deliberations.

After its inauguration in July 1999 the Council met 35 times, held a number of public hearings at various locations around the country, and made a few study tours to Europe and America. Based on careful and intensive work, the Council made public an interim report at the end of November 2000, and finally arrived at its final report, entitled "Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century," in June 12, 2001.[6]

Early on, in November 1999, a list of specific tasks of the Council had been compiled on the basis of its preliminary discussions and made public by the Council President, and thereafter the Council deliberations were conducted according to this comprehensive agenda. This agenda covered both the "institutional infrastructure" and the "human infrastructure" of the justice system. The main topics addressed in the agenda included: expansion of the size of the legal profession; establishment of a new Japanese-style law school; reform of the judicial appointment system; introduction of lay participation in judicial decision making; and reform of the criminal justice process.

IV. THE POLITICAL AND SOCIAL BACKGROUND OF THE REFORM

1. Prior Reform Efforts

As can be seen from the topics cited above, this comprehensive reform agenda announced such a substantial overhaul of the justice system of Japan that one would be justified to ask why the Japanese justice system was in need of such extensive revisions. Skeptic observers even wondered and still are not quite convinced that all these projected actions are really going to happen.

As a matter of fact, fundamental reform of the Japanese legal profession and legal education was, in the eyes of the concerned legal academics, a task that was long overdue. A multipartite study committee similar to the 1999 Council was set up in 1962 to examine the problems involving "the lawyer population" and the system of judicial appointment. These issues inevitably led the 1962 committee to look into the problems

6 *Supra* note 1.

of the Legal Examination as well as those of legal education. The committee conducted a comprehensive survey of the various issues raised and as a result recognized some serious shortcomings of the justice system, but could not reach a decision to take any definitive step to address them. The committee's final opinion presented two competing views on the state of the legal profession and concluded that the system of appointing all regular judges from the ranks of practicing attorneys – what is called "the principle of unity of the legal profession" – was desirable, but not yet feasible in view of the undeveloped state of the bar.[7]

Thus, no decisive measures were taken and, as years went by, the situation even worsened. More recently, in 1991, a partial reform was attempted by means of an amendment to the Legal Examination Law introducing a kind of quota for younger applicants (*i.e.*, those who have taken the LE not more than three times), so that it may become easier for this group of applicants to pass, but this was not a measure to solve the fundamental problems. By contrast, the JSRC of 1999 can be regarded as a second, serious offensive, addressing comprehensively the same basic issues that were raised forty years earlier and have persisted ever since.

2. *General Crisis of Governance*

Underlying this resurgence are general political currents that started a little before 1990, the time when the present Emperor's era of *Heisei* began. It was around this time that a feeling started to spread that the overall Japanese system of organizing and governing society was facing a deep crisis. This crisis was triggered by failures in the economy that were becoming apparent against the backdrop of the continuing depression, representing the first deadlock experienced by the postwar Japanese economy: banks and securities companies went bankrupt, a previously unheard-of event. Enormous amounts of public money had to be spent to cover up slack or corrupt business operations at a time when the perpetual financial deficit of the government cast dark clouds over the future security of individual citizens of a rapidly ageing society that enjoys the world's longest life expectancy. A long series of political scandals were revealed involving leading politicians, high governmental officials, and corporate executives. These events exposed Japan's "iron triangle" to the public eye, and made it clear that the renowned "Japan Incorporated led by bright bureaucrats" was no longer working. Moreover, at the international level, all of these domestic events coincided with the end of the Cold War and the onset of the globalization of the economy, making it even more imperative for Japan to refurbish its governance system in order to make its policies more universally open and competitive, and its decision-making processes more effective, efficient, and transparent to the outside.

---

7 *Cf.* RINJI SHIHÔ SEIDO CHÔSA-KAI, *Ikensho* [The Opinion of the Ad Hoc Committee for the Investigation into the Judicial System] (1964).

The sense of crisis came to be shared by politicians across party lines as well as by the mass media, and serious reform attempts began to be made. A series of political reforms was made (*e.g.*, the shift to a small electoral districts system) in order to make the parliamentary system function more effectively. Administrative reforms were introduced to make administrative processes more transparent and fair to the citizens. Fundamental restructuring of the relationship between the national government and local governments was launched to make the latter more autonomous and independent from the former. As shown in the Justice Minister's remark cited at the outset, "deregulation" as well as the resulting "post-check-type society" based on the operation of explicit legal rules, rather than on the implicit understandings and expectations of the parties directly involved, have become popular political catchwords.

Thus, reform of the justice system, the third component of the overall governmental structure, was now in order. Alerted by the famous catch phrase coined by an attorney member of the council – "the twenty percent justice system"[8] – public opinion gradually recognized that we have been investing too little in the judicial branch of our government. At the same time, the general system crisis had called for fundamental reorientation of educational systems as well, as part of the overall restructuring: the Ministry of Education, which oversees the funding of national as well as private universities, was planning to adopt the model of independent administrative agency to Japanese universities. For progressively minded academics, bureaucrats, and lawyers who had been impatiently watching the dragging movements in the reform of the legal profession and the Legal Examination, this political situation offered a golden opportunity that could not be missed. In short, it may be said that there was a conversion of political forces and intellectual ideas.

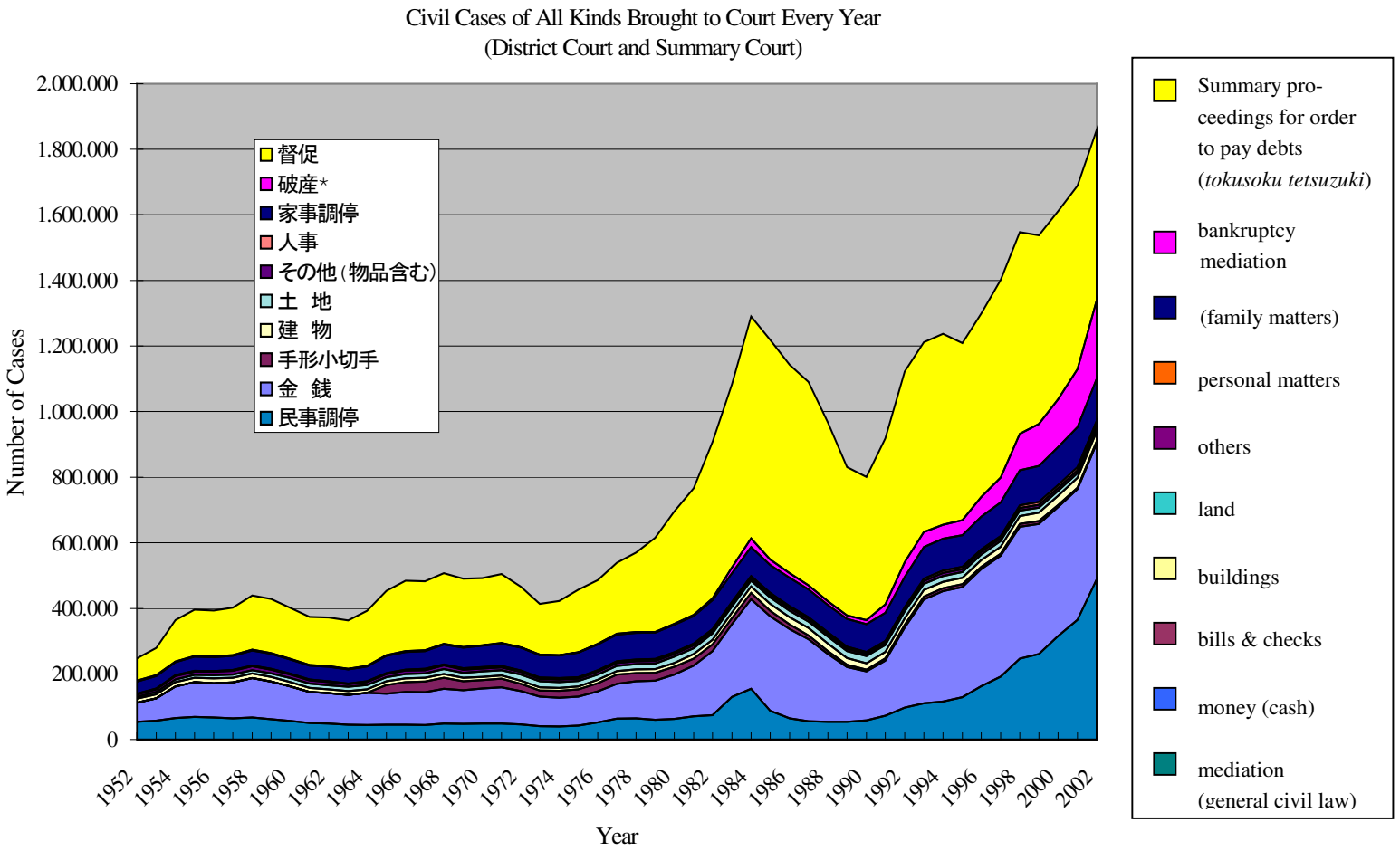
3. Transformation of Japanese Society

It should also be pointed out from the wider viewpoint of the sociology of law that during the past 50 to 60 years, Japanese society has slowly but steadily been transforming. The mid-1970s appears to have been the turning point. For instance, if we look at the caseloads of civil courts for the three decades following World War II,[9] they remained flat relative to the growth in population; however, in the mid-70s they started to increase rather steeply. After showing a deep trough around the bubble of 1990, the

8 That is to say: "The judicial branch that forms one of the three main pillars of government has been allotted a cheap 20 percent of public money and so little attention."

9 For the overall picture of the growth of the civil caseloads over the decades, see *Graph 2*. For a more systematic discussion of the available empirical data concerning the businesses of civil and criminal justice machinery in today's Japan, *cf.* K. ROKUMOTO, *Nihon no hô to shakai* [The Law and Society in Japan] (Tokyo 2004) 197-280.

Graph 2


Civil Cases of All Kinds Brought to Court Every Year
(District Court and Summary Court)
Number of Cases
2.000.000
1.800.000
1.600.000
1.400.000
1.200.000
1.000.000
800.000
600.000
400.000
200.000
0
1952
1954
1956
1958
1960
1962
1964
1966
1968
1970
1972
1974
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998
2000
2002
Year
督促
破産*
家事調停
人事
その他（物品含む）
土　地
建　物
手形小切手
金　銭
民事調停
Summary pro-ceedings for order to pay debts (*tokusoku tetsuzuki*)
bankruptcy mediation
(family matters)
personal matters
others
land
buildings
bills & checks
money (cash)
mediation (general civil law)

caseloads rapidly climbed up again, overtaking the prior highest point that had been marked in 1985. A German comparative legal historian wrote: "For the first time in history, Japanese civil caseloads are taking the same course as in Western nations,"[10] although the absolute number of litigated cases remained far below the level of the West. The crime rate also started to show a continuous trend of growth in the same period. The crime clearance rate has been remarkably high in modern Japan compared with other nations, but it has been decreasing in recent years. Also, with the advent of organized drug dealings and the growth of offenses related to international traffic, the Japanese criminal legal system is facing formidable challenges.

Japanese society, which had been characterized as homogeneous and conflict-free, is now rapidly becoming heterogeneous in terms of cultures, views, and values, and has come to show many indications of new and growing kinds of legal demand. The divorce rate is increasing, and the number of wills made by individual property owners is growing. Even schools and teachers as well as hospitals and doctors are being sued. Disputes over dismissals and sexual harassment are also daily events. People bring large-scale lawsuits against big companies for damages caused by air and water pollution, harmful drugs, and fraudulent marketing techniques, just like in any other industrialized country.

It is particularly important to note that there has also been an enormous amount of concern in the business world. Large business organizations now face daily the danger of being sued for damages or of having their executives indicted for illegal activities. Thus, Japanese business people today have finally come to realize the importance of the judicial system for maintaining a social order based on universally applicable rules of law, which is a basic precondition for a prosperous economy. They realize that in a globalizing economy, business can no longer be successfully conducted in the traditional ways that relied on personal trust and governmental protection. The business elite recognizes the need to have a more efficient judicial system to solve issues clearly and speedily and more competent lawyers, not only to represent them in courts, but also to negotiate their contracts and to advise them on corporate management and investment matters. In addition, local governments of prefectures, cities, and towns around the country are increasingly aware of the need for having legally trained personnel as they experience greater autonomy.

In spite of the celebrated non-litigious culture based on the key concept of "harmony," which by the way has by no means lost its persistent force, Japan has now reached the stage where its social structures and social environment demand a new level of legalization of the mechanisms of social order. That is the general societal background underlying the unprecedented political urgency of the cry for strengthening the justice system, the long-neglected branch of Japan's governance structure.

---

10 C. WOLLSCHLÄGER, Historical Trends of Civil Litigation in Japan, Arizona, Sweden and Germany: Japanese Legal Culture in the Light of Judicial Statistics, in: Baum (ed.), Japan: Economic Success and Legal System (Berlin 1997) 89-142, 133.

4. Key Players

Apart from the legal academics, who played important roles as authoritative critics and as members of numerous deliberative councils and committees, we can discern the following five major player groups in this political drama of justice system reform.

(i) Business Elite

First, there is the business elite organized into such powerful pressure groups as the *Nippon Keidanren* (former *Keidanren*) [Japan Business Federation] and *Keizai Dôyûkai* [Japan Association of Corporate Executives]. The leaders representing these organizations began around 1990 to advocate radical restructuring of the legal profession as well as of the governmental structures along the broad ideological lines of neo-liberalism. Active and direct involvement of the business elite constitutes a crucial element that distinguishes the present justice system reform from any other previous attempt at judicial reform.

(ii) Politicians

Second, to respond to the critical situation described above, the governing Liberal Democratic Party (LDP) established in 1996 its own Special Research Committee on Judicial Reform, which demanded a radical expansion of the legal profession and various other reform measures. The LDP politician who had been serving as the chair of this committee, himself a qualified lawyer, was subsequently appointed as the Minister of Justice in the summer of 2000.

(iii) Bureaucrats

Third, the Ministry of Justice has been the driving force behind the various actions directed to the reform. This must be understood against the historical background of the Japanese legal system, discussed earlier, which was originally created under the aegis of the Justice Ministry of the Meiji Era. The high-ranking officials involved in the preparatory works for the present JSR are prominent prosecutors who are assigned to posts in the Justice Ministry in accordance with the customary career pattern of prosecutors. However, those people appear to hold a stronger sense of mission and a wider view of public interest than the members of the legal profession; their concern goes beyond the organizational self-interests of the organization from which they come, the Prosecution Office.

(iv) The Judiciary

Fourth, judges belong to the organization called the judiciary, made up of the hierarchy of courts with the Supreme Court at the top. The Supreme Court, which is responsible for running the Institute for Legal Training and Research (ILTR) which is in charge of training all the future lawyers of the three branches of the legal profession, shared with the Prosecution Office apprehensions regarding the recently diminishing number and

quality of those newly qualified young lawyers who aspire to the two public branches of the legal profession. However, the Supreme Court, which has always faced criticism concerning the judges' passive and timid stance in their exercise of judicial rule-making powers, especially with respect to judicial review, remains, on the whole, in the position of a watchful follower in the matter of judicial reform.

(v) The Bar

Fifth, practicing attorneys are the main targets of the judicial reform as well as being indispensable bearers of any reform. The Japan Federation of Bar Associations (JFBA) has traditionally taken the stance of an eternal opposition party, so to speak. It has enjoyed the privilege of saying "No, but…" to almost any reform proposal made by the government, or by the other camps within the legal profession, to change the status quo. Thus, the efforts led by the Justice Ministry in the latter half of the 1980s to increase the number of passes in the Legal Examination met with tenacious resistance from the JFBA, and only succeeded in producing minimal and stepwise increases from 500 to 1000.

V. RESHAPING THE LEGAL PROFESSION

1. The Scarcity of Attorneys

Let us now turn to some of the contents of specific reform proposals put forward by the Council. The most fundamental issue of the JSR was the shortage of lawyers, especially of private attorneys. The number of lawyers in private practice has been substantially increased in recent years to 18,290 lawyers in the year 2000 and 21,174 in 2004.[11] However, these are very small numbers compared with the other highly industrial countries. Relative to the size of the general population, the number of attorneys per 100,000 persons in 1990 was 230 for the U.S., 120 for England, and 100 for France; the same rate in Japan in 2000 was a mere 14.[12]

In addition, those private attorneys are heavily concentrated in large industrial centers. It is to be noted that Japanese attorneys are licensed to practice in any geographical area or, for that matter, to appear before any court within Japan. Nearly half of all attorneys practice in Tokyo and another 18 percent in Osaka or Nagoya. If we combine the prefectures directly adjacent to those three metropolitan centers (because many attorneys residing in the former areas practice in the courts located in the latter),

---

11 For the long-term trend of the slow increase of the lawyers of the three branches, see *Table 2* and *Graph 3*.

12 In absolute terms, in the United States in 1990 there were 450,000 attorneys in private practice, and another 116,000 lawyers employed by government or private companies. In the same year the English solicitors counted 55,000 and 6,500 barristers, and in France (before the "grande fusion" of 1992) the qualified lawyers under diverse titles totaled 55,000.

Graph 3

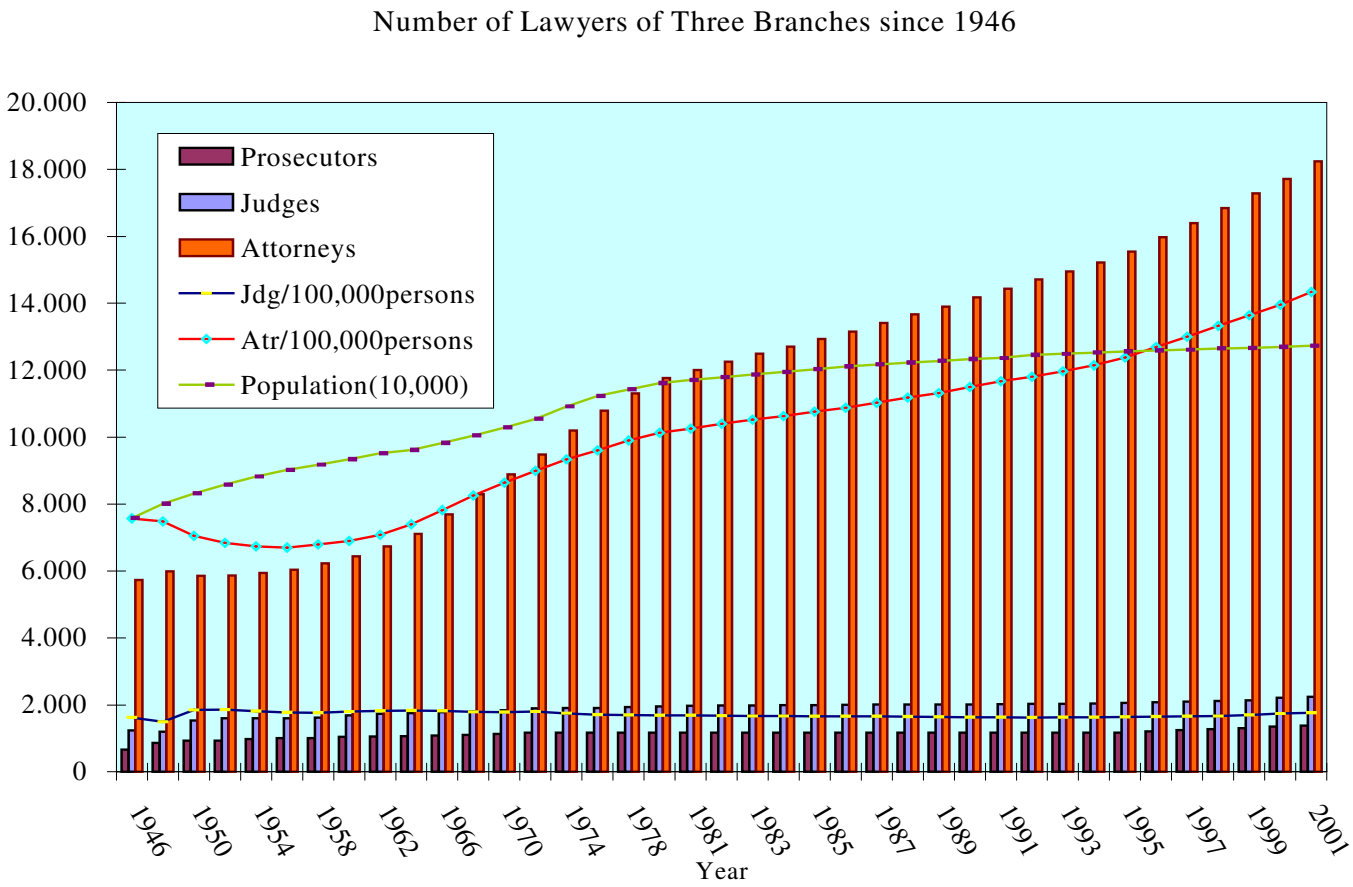

Number of Lawyers of Three Branches since 1946
20.000
18.000
16.000
14.000
12.000
10.000
8.000
6.000
4.000
2.000
0
Prosecutors
Judges
Attorneys
Jdg/100,000persons
Atr/100,000persons
Population(10,000)
1946
1950
1954
1958
1962
1966
1970
1974
1978
1981
1983
1985
1987
1989
1991
1993
1995
1997
1999
2001
Year

Table 2 Number of Lawyers
1890-2001

YEAR	PROSE-CUTORS	JUDGES	ATTOR-NEYS	ALL LAWYERS	JUDGES/ 100,000 PERSONS	ATTORNEYS/ 100,000 PERSONS	POPU-LATION (10,000)	POLULATION
1890	481	1.531	1.345	3.357	3.837,1	3.370,9	3.990	39.900.000
1892	482	1.532	1.423	3.437	3.782,7	3.513,6	4.050	40.500.000
1894	383	1.221	1.562	3.166	2.967,9	3.796,8	4.114	41.140.000
1896	383	1.221	1.578	3.182	2.907,8	3.758,0	4.199	41.990.000
1898	473	1.244	1.464	3.181	2.901,1	3.414,2	4.288	42.880.000
1900	473	1.244	1.590	3.307	2.837,6	3.626,8	4.384	43.840.000
1902	363	1.208	1.727	3.298	2.686,8	3.841,2	4.496	44.960.000
1904	374	1.197	1.908	3.479	2.594,8	4.136,1	4.613	46.130.000
1906	379	1.179	2.027	3.585	2.506,9	4.310,0	4.703	47.030.000
1908	401	1.239	2.006	3.646	2.583,4	4.182,7	4.796	47.960.000
1910	390	1.125	2.008	3.523	2.287,5	4.083,0	4.918	49.180.000
1912	390	1.129	2.036	3.555	2.232,5	4.026,1	5.057	50.570.000
1914	386	898	2.256	3.540	1.725,9	4.336,0	5.203	52.030.000
1916	389	903	2.665	3.957	1.688,2	4.982,2	5.349	53.490.000
1918	478	1.004	2.947	4.429	1.834,5	5.384,6	5.473	54.730.000
1920	570	1.134	3.082	4.786	2.047,3	5.564,2	5.539	55.390.000
1922	578	1.150	3.914	5.642	2.023,2	6.886,0	5.684	56.840.000
1924	574	1.155	5.485	7.214	1.979,4	9.400,2	5.835	58.350.000
1926	564	1.121	5.936	7.621	1.862,1	9.860,5	6.020	60.200.000
1928	656	1.245	6.304	8.205	2.005,8	10.156,3	6.207	62.070.000
1930	657	1.249	6.599	8.505	1.955,5	10.331,9	6.387	63.870.000
1932	628	1.345	7.055	9.028	2.041,3	10.707,2	6.589	65.890.000
1934	648	1.370	7.082	9.100	2.023,9	10.462,4	6.769	67.690.000
1936	648	1.391	5.976	8.015	1.998,9	8.587,4	6.959	69.590.000
1938	686	1.470	4.866	7.022	2.084,2	6.899,2	7.053	70.530.000
1940	734	1.541	5.498	7.773	2.158,3	7.700,3	7.140	71.400.000
1942	625	1.581	5.231	7.437	2.186,7	7.235,1	7.230	72.300.000
1944	610	1.188	5.174	6.972	1.609,8	7.010,8	7.380	73.800.000
1946	668	1.232	5.737	7.637	1.625,3	7.568,6	7.580	75.800.000
1948	857	1.197	5.992	8.046	1.494,4	7.480,6	8.010	80.100.000
1950	930	1.533	5.862	8.325	1.842,5	7.045,7	8.320	83.200.000
1952	930	1.595	5.872	8.397	1.858,8	6.843,0	8.581	85.810.000
1954	980	1.597	5.942	8.519	1.809,8	6.733,9	8.824	88.240.000
1956	1.000	1.597	6.040	8.637	1.771,1	6.698,5	9.017	90.170.000
1958	1.000	1.617	6.235	8.852	1.762,2	6.794,9	9.176	91.760.000
1960	1.044	1.687	6.439	9.170	1.806,0	6.893,3	9.341	93.410.000
1962	1.059	1.730	6.740	9.529	1.817,6	7.081,3	9.518	95.180.000
1964	1.067	1.760	7.108	9.935	1.830,3	7.391,8	9.616	96.160.000
1966	1.082	1.787	7.687	10.556	1.818,3	7.821,5	9.828	98.280.000
1968	1.097	1.803	8.293	11.193	1.794,0	8.251,7	10.050	100.500.000
1970	1.132	1.838	8.888	11.858	1.786,2	8.637,5	10.290	102.900.000
1972	1.173	1.900	9.483	12.556	1.802,3	8.995,4	10.542	105.420.000
1974	1.173	1.905	10.197	13.275	1.745,3	9.342,2	10.915	109.150.000
1976	1.173	1.912	10.792	13.877	1.702,4	9.609,1	11.231	112.310.000

(Table 2 cont.)

YEAR	PROSE-CUTORS	JUDGES	ATTOR-NEYS	ALL LAWYERS	JUDGES/ 100,000 PERSONS	ATTORNEYS/ 100,000 PERSONS	POPU-LATION (10,000)	POLULATION
1978	1.173	1.935	11.308	14.416	1.693,5	9.896,7	11.426	114.260.000
1980	1.173	1.956	11.759	14.888	1.684,3	10.125,7	11.613	116.130.000
1981	1.173	1.970	12.002	15.145	1.682,9	10.252,9	11.706	117.060.000
1982	1.173	1.976	12.251	15.400	1.676,3	10.392,8	11.788	117.880.000
1983	1.173	1.983	12.486	15.642	1.670,7	10.519,8	11.869	118.690.000
1984	1.173	1.992	12.701	15.866	1.667,2	10.630,2	11.948	119.480.000
1985	1.173	2.001	12.937	16.111	1.664,2	10.759,3	12.024	120.240.000
1986	1.173	2.009	13.159	16.341	1.659,6	10.870,7	12.105	121.050.000
1987	1.173	2.017	13.412	16.602	1.657,8	11.023,3	12.167	121.670.000
1988	1.173	2.017	13.674	16.864	1.649,8	11.184,4	12.226	122.260.000
1989	1.173	2.017	13.900	17.090	1.642,8	11.321,1	12.278	122.780.000
1990	1.173	2.017	14.173	17.363	1.636,4	11.498,5	12.326	123.260.000
1991	1.173	2.022	14.433	17.628	1.635,0	11.670,6	12.367	123.670.000
1992	1.173	2.029	14.706	17.908	1.628,8	11.805,7	12.457	124.567.000
1993	1.173	2.036	14.953	18.162	1.629,6	11.968,3	12.494	124.938.000
1994	1.173	2.046	15.215	18.434	1.633,3	12.146,2	12.527	125.265.000
1995	1.173	2.058	15.540	18.771	1.638,9	12.375,6	12.557	125.570.000
1996	1.208	2.073	15.973	19.254	1.647,1	12.691,2	12.586	125.859.000
1997	1.242	2.093	16.398	19.733	1.659,0	12.998,1	12.616	126.157.000
1998	1.274	2.113	16.853	20.240	1.670,7	13.325,5	12.647	126.472.000
1999	1.304	2.143	17.283	20.730	1.691,8	13.644,4	12.667	126.667.000
2000	1.345	2.213	17.707	21.265	1.743,5	13.950,6	12.693	126.926.000
2001	1.375	2.243	18.246	21.864	1.762,1	14.334,1	12.729	127.291.000

we see two-thirds of all lawyers in those areas. At the other extreme, there are three prefectures that have only 40 lawyers or fewer each. In terms relative to the general population, while Tokyo has 71 lawyers per 100,000 inhabitants and Osaka has 29, more than half of the 47 prefectures have only five lawyers or fewer per 100,000 persons; a third of the total population of the whole of Japan lives in those latter areas. Moreover, in each prefecture, lawyers' offices are concentrated in the capital city, where a district court and prefecture office are located. Of all the 50 prefectures, those where a high court is seated, *i.e.*, Tokyo, Osaka, Nagoya, Fukuoka, Hiroshima, Sendai, Sapporo, and Takamatsu, are the most-favored locations for practicing lawyers. In the other areas there are scarcely any attorneys; in other words, there are vast areas in which virtually no lawyer is available to serve the legal needs of the inhabitants.

This situation clearly gives Japanese practicing attorneys a strong monopoly over the supply of legal services and their price. Over the years, it has become a matter of course that lawyers do not accept cases of small claims. Undesirable work, such as petty crimi-

nal defense, tends to be left to inexperienced young lawyers or elderly ones who take many cases through the state-provided counsel scheme. In the rural areas where lawyers are scarce, the proportion of older lawyers is substantially higher than in large cities. It is also clear that overloaded counsels hinder speedy and effective handling of court proceedings. Around 1990 the government started to increase the amount of public money spent on the legal aid scheme (see later), and for criminal defense, bar associations began to set up a scheme of duty solicitor based on the English model, but in both cases these efforts highlighted the acute problem of lawyer shortage in the rural areas.

2. A Reform Package

The JSRC in its 2001 Opinion intended to give a final solution to the shortage of lawyers with a plan for tripling the size of the legal profession to at least come close to the level comparable to France in 15 years' time. To achieve this goal, it is necessary to increase the number of people who attain qualification as lawyers each year. However, this was not possible as long as the nature of the Legal Examination remained as it was, and a fundamental change in LE in turn calls for a fundamental change in legal education. In fact, what was put forward by the JSRC was a reform package covering all these three areas with the introduction of the Japanese-style law school as its centerpiece. In more concrete terms, the council proposed (1) to increase the number of passes in the Legal Examination from 1,000 to 3,000 a year (in 15 years' time), (2) to introduce a new Japanese-style law school, and (3) to change the nature of the LE in accordance with those two reform plans. A plan to produce 3,000 qualified lawyers instead of 1,000 each year will require the ILRT to expand its financial and physical capacities as well as its teaching staff. These changes combined will produce a net increase of practicing attorneys of 2,500 per year, so that it will take a little longer than 15 years to triple the present size of the bar.

The most formidable target of reform was the bar. In the autumn of 2000 the Council announced that it had now reached a consensus among its members in recommending the introduction of a law school system proposed under the motto for the lawyer-qualifying system reform: "from selection at a point to selection based on process," coupled with an outcome target of producing 3,000 lawyers each year. The Council president declared that this conclusion would be included in its interim report to be issued shortly, and that this portion should be regarded as final for the Council. He urged the government to begin preparations necessary for the law school system to start to operate in the year 2004.

On November 1, 2000, faced with overwhelming political pressure for reform, the Japan Federation of Bar Associations (JFBA) held its extraordinary general meeting to decide on a resolution supporting this scheme. This meant a bold leap from the JFBA's own previous resolution of just three years previous to accept the increase of the number of passes in the Legal Examination to just 1,000. The draft resolution prepared

by the Federation's executive committee also included, among other items, a demand that the assistant judgeship should be abolished, that judges should be appointed principally from the ranks of practicing attorneys and lawyers (such as those who work for the government), and that judges' promotion and the other processes related to personnel administration of the judiciary should be made more transparent and objective.[13] The draft resolution further included a demand to introduce a jury system in criminal trials, particularly for serious offenses. Rumors went around that the resolution might be defeated. However, when the lid of the Pandora's box was removed, the resolution was adopted by an overwhelming majority of 7,400 over 3,400 votes. Apparently, the Japanese bar had also been undergoing a change.[14]

3. Reform of Legal Education

University law faculties constitute the mainstay of legal education in Japan. In modern Japanese tradition, the law faculty is usually composed of a political science department as well as of the law department, and its curriculum includes courses in economics as well as in political science, and also some fields of "the basic science of law," such as legal history, comparative law, philosophy of law, and sociology of law. Law faculties have traditionally attracted the best students inclined to social studies or humanities who wish to attain leadership positions in government, business, or law. Above all, the faculties of national universities have traditionally considered themselves responsible for educating good bureaucrats, who play principal roles in policy making and execution as well as in legislation for the nation. As a result, these institutes are concerned with generalist education rather than practical education, such as professional training for lawyers. Supposedly, the Confucian adage, "the gentleman is not a vessel" was the original motto.

Presently there are about 30 law faculties or law departments housed either in national or municipal universities. In addition, there are about 65 private university law faculties. The total number of law students is about 45,000 per year. To take the example of the University of Tokyo Law Faculty, the long-established patterns were

---

13 For the problematic of the judiciary that lies behind these demands, see section VII.1. later.

14 The bar was polarized in its politics. Within its internal decision-making processes, a well-organized group of ideologically left-wing lawyers was accusing the innovative urban elite lawyers of serving the interests of big business organizations at the expense of individual citizens and of disregarding the danger of creating many lawyers of low professional and ethical quality. The left-wingers seemed to be acting in an unholy alliance with those veteran lawyers who practice in rural prefectures scarcely populated by lawyers and who have nothing to lose in maintaining their present comfortable positions and in postponing the influx of younger competitors. From the socio-legal point of view, these circumstances may partly explain the fact that the Federation leadership advocated acceptance of legal education reforms necessary for the expansion of the bar, while at the same time vehemently urging reforms of the judiciary, their institutional opponent within the legal profession.

that among the 650 students,[15] about 100 became bureaucrats and 150 or so passed the Legal Examination. The rest found a job with a private company.

The Council proceeded with care to reflect and integrate the views and situations of the university law faculties, which are the principal agents of legal education and are to bear the burden of building, at their own risk, a totally new system to accomplish their mission. Already around the time when the Council deliberations started, a study group of law professors was convened by the Education Minister to discuss the issues of legal education reform, and, subsequently as the Council deliberation progressed, this body was succeeded by another one, an advisory committee to the Council set up in the Ministry of Education. The latter consisted of law professors, members of the legal profession, and officials of the two ministries concerned. These procedures apparently helped a great deal to ensure that the final opinions of the Council would reflect the views of the persons directly in touch with the realities of today's university education.

As soon as the Council Opinion was finalized in 2001 and was enshrined in the new law for the realization of the reform plans as a whole, the Law School Law (Law on the Linkage between the Graduate Law School Education and the Legal Examination) was passed in Parliament in December 2002 to lay the legal foundation for the law school system. The Legal Examination Law as well as Courts Law and School Education Law were all amended to correspond to the various changes to be introduced on account of the new law school system.

VI. INTRODUCTION OF THE GRADUATE SCHOOL OF LAW

1. Japanese-Style Law School

As already indicated, at the center of the JSR program stands the new institution called the Graduate School of Law (*hôka daigaku-in*). The idea of introducing law schools following the American model was first put forward by a progressively minded attorney who had personal experience with the law school education in the United States. Academics followed with their own visions of law school, to which they attached the modifier "Japanese-style." According to this latter idea, the law school education would normally follow the undergraduate education in a law faculty, and a law school education would be a prerequisite, in principle, for taking the Legal Examination. In addition to the preservation of the undergraduate education at the law faculty, the practical training course at the Institute for Legal Research and Training would also be retained.

15 The number of student seats has been substantially reduced in more recent years.

2. The New System of Recruiting and Educating Lawyers

The main features of the new law school system that was introduced by these legal measures may be summarized as follows:

(i) The law school with a graduate course of three years is an institution for advanced professional training, inserted between the undergraduate legal education and the ILRT as a core institution in the formation of the legal profession.
(ii) Law schools may be established by existing universities or some other organizations not related to any university, such as a local government or a bar association, to be acknowledged by the Ministry of Education and subsequently subjected to further accreditation by a third party.
(iii) The law school education must provide practical legal knowledge and skills to serve as a bridge between the academic studies of law and the practical legal world. With this regard, law schools are required to have a certain quota of instructors who have experience as judges, prosecutors, or attorneys. Further,
(iv) the motto of "equality, openness, and variety" must guide the admission policy of law schools as well as their educational programs. Law schools are required to emphasize the educational method that is based on two-way communications in small-sized classes and to have an adequate number of teaching staff relative to students (at least 1 to 15). They are also required to have in their student body 30 percent or more persons who have either practical job experience or a degree in a non-legal field.
(v) As to the Legal Examination, the reformed Legal Examination, called the New Legal Examination (NLE), must change its character to become organically linked to the education and training to be obtained in law schools. The NLE will start to be held in 2006 when the first classes of law school students graduate, but will continue to operate side-by-side with the old LE until 2010. This is a transitional measure, but even after 2010, yet another examination called the Preliminary Legal Examination (PLE) will be added to enable those who have not had a chance to enter law schools to take the NLE.

The Council proposal foresaw that the existing law faculties or law departments would establish separate graduate law schools with a regular three-year program, which is meant for students who have not studied law. A two-year program will be offered to those students who have an undergraduate law degree. (This latter case is treated as an "option" in the official language; however, it is considered a standard case rather than an exceptional one.) In addition, it was considered possible that bar associations or municipal governments might establish law schools, and that a number of law faculties, private or national, could cooperate to form a consortium to maintain a law school. The proposal avowedly was based on the expectation that 70 to 80 percent of the graduates of accredited law schools, in the aggregate, would yearly pass the Legal Examination.

Accordingly, the Legal Examination should change its character to become a test for ascertaining successful completion of the law school education. On the assumption that 3,000 students will be qualified each year, law schools, in the aggregate, would have to accommodate a total of 4,000 to 6,000 students per year. This projection appeared to imply a total number of 40 to 50 law schools around the country, not many more. These new arrangements would entail a major restructuring of the university legal education and inevitably also of its organizational bases, the law faculties.

3. Opening of New Law Schools

The proposal for establishing a particular law school was to be approved by the Ministry of Education. Seventy-two law schools were proposed in 2003, each with its own special emphasis in the educational program while purporting to fulfill the basic requirements imposed by the law. In April 2004, about 65 law schools, recognized by the Ministry of Education, began providing instruction for a total of 6,000 students. The largest ones had 300 and the smallest ones had 30 students. These law schools will subsequently be subject to periodic accreditation to be conducted by an independent body (still to be put in place) on the basis of their performance.

In this way, the first steps have been taken that would purportedly transform not merely the legal education but also the entire legal profession. But it should be noted that there are many problems to be solved. For example, the number of admitted law schools and the number of students accommodated by them considerably exceed the numbers originally contemplated by those who expected that about 70-80 percent of graduates would pass the Legal Examination under the target number of 3,000 successful candidates in the New Legal Examination. Therefore, it is feared that there will be fierce competition not only among the students but also among the newly established law schools, as those law schools that fail to record a sufficiently high success rate in the NLE will face the danger of losing prestige and eventually going out of business. On the other hand, while NLE will be given side-by-side with the old LE for the transition period of five years, it is left open to what proportion the graduates of law schools will be represented in the 3,000 candidates who actually attained qualification in either of the two examinations. Also, it is still unclear what will be the nature and content of the New Legal Examinations that is meant to select the candidates “not at one point in time but by the process” of law school education.

Another concern relates to the need to correct the geographical distribution of attorneys. As the total number of attorneys increases, it may be expected that some of the newly admitted lawyers will settle in localities where attorneys are scarce. However, this may well end up being only wishful thinking on the part of the reform-minded observers. In the absence of any special measure taken to ensure that the distribution of lawyers around the country will be more balanced, the increase that has already been effected in the last decade, as mentioned above, has not reversed the pattern of young

lawyers concentrating in the more attractive metropolitan centers; on the contrary, it appears that the increase in the total number is only intensifying the geographical concentration of lawyers.

VII. Other Major Reforms

Increasing the lawyer population is at the center of the justice system reform and the introduction of a law school system is an indispensable corollary to it. This is because the expansion of the legal profession is a logical prerequisite for improvements of many other aspects of the justice system. In fact, as mentioned at the outset, the JSR project contains many other important reforms of the justice system of Japan. In the remainder of this paper, I will briefly discuss three further reforms that are of vital importance for the justice system – *i.e.*, those concerning the judiciary, the administration of justice, and the delivery of legal services – and will enhance the significance of law and the legal system in the life of Japanese people.

1. Reform of the Judiciary

An important cluster of reforms relates to the judiciary. In the year 2000 there were about 2,100 regular judges and assistant judges, and this number was also to be increased. The Council recommended a substantial increase in the number of judges as well as the number of court clerks to enhance the efficiency and effectiveness of the judicial work. Accordingly, the number of posts of assistant judges (fresh recruits from the ILRT) has been increased stepwise over the last few years, but a sudden increase in the youngest group of judges is obviously undesirable; also following the Council Opinion, the Supreme Court started to vigorously encourage private attorneys to apply for regular judgeship posts.

However, the focal point of the persistent criticisms directed against the judiciary is the career judge system itself. In Japan the career of regular judges[16] begins when they are appointed to assistant judgeship straight from the Institute of Legal Research and Training (ILRT). After five years, they are allowed to sit alone on the bench, and after another five years they may be appointed as regular, full-fledged judges. The appointment is for the term of 10 years and may be renewed on application, which is normally granted subject to the mandatory retirement age of 65. However, this reappointment is not automatic; there are some rare cases where an assistant judge or a judge is refused reappointment. Throughout their career on the bench, judges are transferred every three years or so from court to court around the country. At each transfer, judges are selectively promoted and go up the career ladder that consists of a hierarchy of courts of

16 The Supreme Court Justices constitute a different category. Incidentally, their age limit is 70.

different levels and importance, step by step just like ordinary bureaucrats. This career system is administered by the secretariat of the Supreme Court. Article 76(3) of the Constitution declares: "Judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws." Article 48 of Courts Act provides that judges shall not be transferred to another post against their will. Nonetheless, judges regularly receive offers for moves from the Supreme Court and normally accept them.

This kind of career judgeship appears to be uniquely Japanese in the sense that it does not exist either in Germany or France, and is undoubtedly the product – probably the inevitable outcome – of the historical processes, briefly discussed earlier, by which the legal profession was created and developed with emphasis on the judicial officers of the state. It may be said that as a result of this tradition Japan has succeeded in creating judges who are well qualified, possess high standards of honesty and impartiality, and can be distributed around the country in a geographically even fashion. The result is an independent and autonomous judiciary for the organization as a whole, but manned by judges who look more like bureaucrats than independent judges. Judges have often been criticized for being passive and removed from the reality of the world; moreover, young judges are sometimes accused of being immature in their knowledge of the practical world and in their judgment. Also, while these judges are not overly dogmatic, they do tend to lean toward formal correctness and to lag behind the changing values of society in their evaluation of substantive policy issues. These features of judges' positions do not enhance the image of judges in the eyes of those members of the public who have had the opportunity of coming in close contact with the realities of the court business.

The Council Opinion of 2001 contained a series of further recommendations touching upon some of the alleged shortcomings of the traditional system of recruiting, evaluating, and promoting judges. For example, the Council recommended that judges be recruited from a wider variety of sources than hitherto and that they be given opportunity to have some experience with other occupations such as those in business, journalism, and government while they are at the level of assistant judges. Also, concerning the personnel evaluation of judges, the Council required that "appropriate mechanisms should be established for the purpose of securing transparency and objectivity as much as possible, by making clear and transparent who should be the evaluator and the standards for evaluation" (JSRC (2001), Chapter III, Part 5, Section 3). Accordingly, a new set of rules for the evaluation process was introduced by a Supreme Court Rule in 2004, in which the primary responsibility for evaluation is clearly assigned to the chief judge of each court and the standards of evaluation are set forth, such as the ability to handle and dispose of the cases in court, general capabilities and abilities necessary to conduct the duties of judges, etc. The content of evaluation may be disclosed to the judge in question upon the latter's request and may be challenged in an internal complaint process.

Perhaps the most important institutional change that has occurred in the judiciary as a result of the JSR may be the introduction in 2003 of the Advisory Committee for Nomination of Judges for appointment or reappointment of the "lower courts," *i.e.*, the courts of all levels other than the Supreme Court. The Council Opinion said: "In order to reflect the views of the people [*i.e.*, the general public] in the process whereby the Supreme Court nominates those to be appointed as lower court judges, a body should be established in the Supreme Court, which … selects appropriate candidates for nomination" (JSRC (2001), Chapter III, Part 5, Section 2). It also required that this body should be "enabled to substantially exercise its own judgments concerning the selection of appropriate candidates" and that "due care must be taken so that there is no fear of interference with the independence of judges, such as by excluding the contents of individual judgments from the scope of review." The Advisory Committee consists of eleven members, five of whom are appointed from the three branches of the legal profession and six from law professors and other persons with relevant knowledge and experience. Upon request of the Supreme Court with a list of candidates for nomination, the Committee collects information about the candidates' professional records and other relevant information by means of the submissions from the candidates themselves. In addition, it may make enquiries with the designated bodies representing the court, the prosecution, and the bar, and also be assisted by the local committee set up in each high court jurisdiction. The Committee makes recommendations to the Supreme Court with the results of its deliberations about the suitability of the candidates for nomination.

2. *Lay Participants (*saiban-in*) in Criminal Trial*

A second major change that has already been achieved in the JSR is the introduction of a kind of lay judge system in the administration of criminal justice, called "the *saiban-in* system." This reform obviously affects many other aspects of the criminal procedure and its significance must be understood in the context of the long-standing problem concerning the operation of the Japanese criminal justice system.

In Japan only a prosecutor can bring a suspect before the court for a criminal act. Prosecutors are governmental officers, belonging to the governmental agency called the Public Prosecutor's Office and formally act under the ultimate control of the Ministry of Justice. An important feature of the Japanese criminal justice system is that the prosecutors have discretion to prosecute a case or not to prosecute a suspect even if there is evidence that the latter has committed a crime; they are allowed by law "not to institute a prosecution, when they think that prosecution is not necessary, considering the offender's character, age, and personal circumstances, as well as the gravity of the crime, extenuating circumstances, and the views and attitudes of the offender after the crime" (Criminal Procedure Act, Art. 248).

As a result of this discretionary process of prosecution, of all the suspected cases referred to prosecutors by the police each year (about 2.2 million in the year 2002),

about 40 percent are disposed of informally without prosecution (either by a decision "not to prosecute" or by a decision "to suspend prosecution"), and another 40 percent are disposed of by the uncontested summary procedure; the number of formally indicted cases remain at a fairly constant level of 100,000 cases, although this figure has been growing in more recent years. The conviction rate of the criminal defendants in formal court is, as is well known, extremely high with 99.9 percent.[17]

American-style plea bargaining is not an option at present in Japan; the Constitution stipulates that no person shall be convicted or punished in cases where the only proof against him is his own confession (Art. 38(3)), and even if the accused has fully admitted to the crime, there must be a trial in open court to examine that and other evidence in order to determine guilt. In over 90 percent of the trial cases, the defendant has made a confession during the interrogation. The prosecution produces a protocol consisting of a detailed narrative statement, signed by the suspect, which describes the circumstances and motives of the crime. The defendant is subject to cross examination in court, of course; in rare occasions the defendant contests the authenticity of the confession in court. But in normal cases it is the protocol that persuades the judge who may examine it in detail at his own desk.

There is no doubt that the informal processes of police or prosecution interrogation of suspects (which no outside person is allowed to attend) which form the basis for the prosecutorial exercise of discretion contribute to the selection of the cases which the prosecutor is sure to win in court. In any event, those practices of the Japanese criminal justice have been the target of both praise and criticism. On the one hand, they undoubtedly allow a flexible and lenient, perhaps paternalistic, and efficient treatment of suspects and light offenders, contributing to the solution as well as to the prevention of crimes. On the other hand, the prosecutor's competence not to prosecute inevitably means that the prosecutor may set free those persons who have probably committed a crime. The critics maintain that this way of administering prosecutorial discretion amounts to usurping the power to determine the guilt from the judge in open court, replacing it with bilateral processes closed to public eyes.

The (JSRC) Council Opinion of 2001 touched on those features in discussing the needs of reform of the criminal justice system in various ways. For example, the Council pointed out the need to speed up trials, to take measures necessary to ensure that trials are held over consecutive days rather than at customary intervals of several weeks, and to introduce "a new preparatory procedure presided over by the court… to sort out the contested issues and to establish a clear plan for the proceedings in advance of the first trial date" (JSRC (2001), Chapter II Part 2.ss 1). It also deemed necessary to improve the trial procedures to realize the principles of directness and orality, *i.e.*, "the

17 This is an exceptionally high rate, compared with England's (crown court) 76 percent and France's 95 percent. In the United States (federal courts) the conviction rate is said to be about 85 percent.

principles that the court itself should decide the case by directly examining evidence and witness testimony, as well as hearing the oral arguments of both parties in open court," while warning against excessive reliance on confession and written evidence thereof.

The *saiban-in* system is a form of popular participation in the administration of justice, somewhat similar to the French jury system and justified by the Council primarily in terms of enhancing the people's understanding and support of the justice system and thus putting the justice system on a firmer popular base. But its effects obviously spread right through the wide range of important reform issues concerning the criminal trial and its procedures. In fact, the Council's critical observations about the practice patterns of criminal justice mentioned above are made with explicit reference to the implication of the anticipated introduction of the *saiban-in* system.

In 2004 this new system was formally instituted by the Law Concerning the Participation of *saiban-in* in the Administration of Criminal Justice and will begin to operate in 2009. A preparatory period of five years was considered necessary before the actual operation for widely disseminating among the people the knowledge about the nature and significance of this system, and also for the courts and the members of the legal profession to develop suitable attitudes and abilities as well as to set up the necessary physical and institutional arrangements.

The *saiban-in* system will be applied to the criminal cases of first instance involving serious crimes. The lay judges (*saiban-in*) are selected for each case on a lottery basis from among those who hold the right to vote. The bench will consist of six lay judges and three professional judges, and all the lay judges will have equal rights with the professional judges in asking questions during the trial, in participating in deliberations, and in voting for a majority verdict on the guilt as well as on the sentence, except that no verdict may be made without the concurrence of at least one professional judge and at least one lay judge.

3. The Japan Legal Assistance Center

A third area in which major reforms have been hitherto achieved in the JSR is that of access to justice by the general public. In Japan the system of legal aid on both civil and criminal sides has traditionally been only poorly developed. On the civil side, the Legal Aid Association (LAA), a charitable corporation established by the JFBA in 1952, has been offering means-tested legal aids for court cases on a loan basis; it expanded its program to include free legal advice in 1974 and pre-litigation assistance (for settlement and advice) in 1993. The bulk of the LAA annual fund has been provided by the repayment of former aid recipients (out of the money recovered from their opponents), donations made by their attorneys, and grants from the bar associations; the administrative work of LAA has been largely done by the employees of local bar associations.

The government started to grant a small amount of subsidies in 1958, and began to increase the amounts substantially since the 1980s. Finally, the first Civil Legal Aid Law was enacted in 2002 which declared civil legal aid a governmental responsibility. The government then designated the LAA as its agent, and began to increase its subsidies on a large scale, without changing the basic nature of civil legal aid as a loan and without providing funds for administrative costs. In 2003 the total budget of the LAA was a little over 10 billion yen, of which 35 percent constituted the government fund and 48 percent the repayment; the number of court cases covered was about 113,000.

The JSRC Opinion of 2001 urged the expansion of civil legal aid and also recommended the consideration of a new form of organization to bear this task in a comprehensive manner, taking into account the reforms of criminal legal aid. It also recommended the introduction of a civil cost allocation regime in the civil procedure law to have the losing party bear a portion of the lawyer fees as being included in the costs of litigation. However, the legislative effort to implement this latter proposal was defeated in the subsequent political processes.

On the criminal side, since the end of the World War II Japan has had the system of a state-provided defense counsel administered by the court, which is anchored in the provision in the Constitution: "At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State" (Article 37(3)). In certain cases of serious crime, court cannot even be opened without a defense counsel. A state-provided counsel is used in about 70 percent of the district court cases and 85 percent of the summary court cases. However, this system is available only after the suspect has been indicted, and not in the preceding stage where the suspect is subjected to stringent police and prosecutorial interrogations. Since the early 1990s, local bar associations have developed their own system of providing counsel for the arrested and detained suspects modeled after the British system of duty solicitor; however, this is not financed publicly, but by the donation of the attorneys themselves. The JSRC recommended that the state should install a pre-indictment counsel system to take over the burden from the bar, and that this new system should be administered in close coordination with the existing state-provided counsel system for the post-indictment stage.

In early 2004 Prime Minister *Koizumi* announced a vision of a "judicial assistance network" to be borne by a national legal aid organization that would be newly introduced. This idea was materialized through the work of the Headquarters of Justice System Reform in the Comprehensive Legal Assistance Law of 2004, which stipulates that this new organization, a state-funded independent administrative agency called "Japan Judicial Assistance Center (JJAC)," should administer not only the existing civil legal aid, but also the state-provided defense counsel coupled with the pre-indictment counsel. The principal job of this new organization is to hear and sort out clients' problems, give information as to the organs suitable to provide the substantive legal assistance (such as attorneys, various advice centers, and so on), and make appropriate

referral services. Its special mission is to extend access to the justice system to the people, including those who live in remote areas scarcely populated by attorneys. Accordingly, in addition to its regional offices located in each of the 50 prefectures around the country, it will have many access points to cover those remote areas; it will employ a number of attorneys as its own staff members to cover those areas; and it may refer clients not only to qualified attorneys and public advice bureaus, but also to judicial scriveners.[18]

This spectacular organization, loaded with a bundle of multiple, heterogeneous works, is planned to be installed in early 2006 and start to operate later in the same year. Its future road does not appear to be easy, but this innovation clearly marks a turning point in the modern history of the Japanese justice system.

18 The Judicial Scrivener Law was amended in 2002 to expand the competence of judicial scriveners to enable certified scriveners to represent clients in court in civil cases that come under the jurisdiction of the summary court and to give advice in civil cases of value within a certain maximum.

ZUSAMMENFASSUNG

Seit einigen Jahren sind in Japan umfangreiche Reformen der Justiz und der Juristenausbildung im Gange. Der Autor erläutert, welche Reformen bereits durchgeführt wurden, welche noch bevorstehen, und welche möglichen Änderungen derzeit darüber hinausgehend diskutiert werden. Zudem erklärt er die Gründe und Motive für die Reformen und beschreibt die gesellschaftlichen Rahmenbedingungen, unter denen die Reformen zustande kamen.

*Das ursprüngliche japanische Rechts- und Justizsystem sowie das System der Juristenausbildung wurden in der Meiji-Zeit nach dem Modell der kontinentaleuropäischen Rechtsordnungen, vor allem nach dem Vorbild in Deutschland gestaltet. Aufgrund der politischen Ziele der damaligen japanischen Regierung wurde bei der Juristenausbildung die Hauptaufmerksamkeit auf die Ausbildung von Verwaltungsbeamten sowie von Richtern und Staatsanwälten gelegt, die ebenfalls im weiteren Sinne als Verwaltungsbeamte angesehen wurden. Dagegen hatte die Ausbildung von hochqualifizierten Rechtsanwälten zur Verteidigung und Verfolgung privater Rechte nur geringe Bedeutung. Diese Ausrichtung blieb auch durch die demokratischen Reformen unmittelbar nach dem Zweiten Weltkrieg weitgehend unangetastet. Die bisherige Juristenausbildung in Japan sieht eine zentrale Justizprüfung (*shihô shiken*) vor, die alle angehenden Juristen bestehen müssen, um im folgenden in das Referendariat aufgenommen zu werden, das vor allem an einem speziell hierfür eingerichteten Ausbildungsinstitut in Tokyo (*shihô kenshû-jo*) stattfindet. Die meisten der Prüflinge haben vorher ein Studium an einer juristischen Fakultät abgeschlossen, was allerdings keine Voraussetzung für die Teilnahme an der Prüfung ist. Das Referendariat dauert heute eineinhalb Jahre. Mit dessen Abschluß erwerben die Referendare die (Voll)Juristenqualifikation (*hôsô shikaku*), die sie zum Beruf des Richters, Staatsanwalts und Rechtsanwalts befähigt. Die Erfolgsrate bei der bisherigen zentralen Justizprüfung war außerordentlich gering und lag im Jahre 1999 bei etwa 3 %. Trotz dieses rigiden Auswahlverfahrens gab es in den letzten Jahren immer häufiger Beschwerden der Ausbilder am Referendarausbildungsinstitut über die mangelnden Fähigkeiten der Referendare, was vor allem auf den Einfluß der Ausbildung durch private Repetitorien zurückgeführt wurde.*

Nach Maßgabe der Vorschläge des eigens eingerichteten Ausschusses zur Reform des Justizsystems, der von 1999 bis 2001 tagte, wurden in Japan zahlreiche Reformen in der Justiz und in der Juristenausbildung beschlossen. Als zentrale Vorhaben wurden von dem Reformausschuß die Erhöhung der Zahl und der Qualität der Juristen, die Einführung einer neuartigen japanischen „Law School", die Reform des Auswahlverfahrens für den Zugang zu den Juristenberufen im Staatsdienst sowie die Reform des Strafverfahrens unter Beteiligung von Laienrichtern genannt.

Die Reform der Justiz und der Juristenausbildung wird als eine dritte Phase der staatlichen Reformen angesehen, nachdem bereits in den 1990er Jahren eine Reihe von tiefgreifenden Reformen in der Verwaltung und im politischen System auf den Weg

gebracht worden war. Die Reformen insgesamt haben unter anderem ihre Ursache in einem generellen Vertrauensverlust in das politische und ministerialbürokratische System nach Zusammenbruch der sogenannten „bubble economy“ *Ende der 1980er Jahre. Als weitere Faktoren sind die Veränderung der wirtschaftlichen Rahmenbedingungen durch die zunehmende Globalisierung der Wirtschaft sowie das sich nach und nach durchsetzende Konzept der Deregulierung anzusehen. Im Bereich der Justiz stellt unter anderem die deutliche Zunahme der Zivilgerichts- und Strafverfahren in den letzten Jahren einen bedeutenden Grund für die Durchführung von Reformen dar. Hinzu kommt, daß die japanische Gesellschaft auf dem Weg zu einer sehr viel heterogeneren Gesellschaft als in der Vergangenheit ist und daß man in Japan die große Rolle erkannt hat, die dem Recht unter solchen Umständen bei der Bewältigung von gesellschaftlichen Konflikten zukommt. In diesem Zusammenhang wird es auch als notwendig erachtet, die Zahl der Juristen zu erhöhen, sowohl in der Funktion als Richter und Staatsanwälte, als auch die Zahl der Rechtsanwälte. Besonders in der Provinz wird die sehr geringe Zahl der Rechtsanwälte als großes Problem angesehen (2/3 der derzeitigen Rechtsanwälte sind in den Ballungszentren Tokyo, Osaka und Nagoya konzentriert). Aufgrund der geringen Zahl der Rechtsanwälte hat sich ein stark nachfragelastiger Markt entwickelt, der dazu führt, daß weniger attraktive Mandate (Fälle mit geringen Streitwerten und der Strafverteidigung bei Kleinkriminalität) von den Rechtsanwälten nur widerwillig übernommen werden und die Rechtssuchenden so häufig Schwierigkeiten haben, qualifizierte Anwälte zur Wahrnehmung ihrer Rechte zu finden.*

Auf lange Sicht (15 Jahre) ist die Verdreifachung der Zahl der Juristen geplant. Dazu soll schrittweise die Zahl der Prüflinge, die die Justizprüfung bestehen, auf 3000 pro Jahr erhöht werden. Die fachspezifische Ausbildung zur Vorbereitung auf dieses Examen wird künftig den 2004 eingeführten Graduiertenstudiengängen an eigens dafür eingerichteten Law Schools übertragen. Somit wird die universitäre Ausbildung besser als bisher mit der praktischen Juristenausbildung verknüpft. An der neuen Staatsprüfung dürfen künftig nur noch Absolventen einer Law School teilnehmen. Bis 2010 wird die alte Justizprüfung allerdings für eine Übergangszeit noch neben der neuen ausgerichtet. Ein bereits jetzt erkennbares Problem des neuen Ausbildungssystems liegt darin, daß von dem zuständigen Ministerium wesentlich mehr Law Schools mit wesentlich größeren Studentenkontingenten zugelassen wurden als zunächst vermutet. Dies wird die Erfolgsquote der Absolventen bei der Justizprüfung deutlich unter die Planzahlen drücken, was sowohl für die Studenten als auch für Law Schools, die zu wenig erfolgreiche Absolventen vorzuweisen haben, zu Schwierigkeiten führen wird.

Bei der Neueinstellung und Erhöhung der Zahl der Richter wird das neue Auswahlverfahren wesentlich transparenter sein, und zudem werden auch Qualifikationen und Erfahrungen der Bewerber jenseits der Prüfungsnoten berücksichtigt. Diese Reform folgt den Klagen über eine gewisse Weltfremdheit mancher Richter. Darüber hinaus wird auch die Abschaffung des Systems des Berufsrichters für die Zukunft generell diskutiert.

Das Strafverfahren wird künftig unter Beteiligung von Laienrichtern stattfinden, und der japanische Staat hat sein Budget für die Bereitstellung von Gerichts- und Prozeßkostenhilfe sowie von Verteidigern im Strafverfahren deutlich erhöht.

(Zusammenfassung durch d. Red.)