

Reformist Conservatism and Failures of Imagination in Japanese Legal Education

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I. INTRODUCTION

"When carrying out reform, there can be no great reform unless one sets out an ideal situation stating the contours of what one wants to achieve. When Jack Welsh was appointed the top manager of General Electric, he began with these words: "Reform from within an organization inevitably becomes bureaucratic. Preoccupation with detail makes it impossible to achieve major reforms. We have to discuss those reforms which those outside [the organization] see as necessary". I have always thought that these observations are correct. Likewise, reform of [Japan's] national universities will end up being small-scale if it extends only as far as people within the universities tampering with the system, due to vested interests."

I. NAKATANI, *Jugyôryô 300-man-en de Hâbado to Kyôsô Seyo* [Compete with Harvard, Setting Tuition Fees at 3 million!], *Ronza* 32 [February 2000], 32-33.

"We suffer in the law from a failure of imagination."

J. M. RAMSEYER, *Products Liability Through Private Ordering*,
144 U. PA. L. REV. 1823, 1823 (1996).

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Iwao Nakatani attracted much media attention in mid-1999 when he accepted an offer from Sony Corporation to become one of its (now many) outside directors. He was then professor of business administration in a venerable and highly-regarded national university in Tokyo, Hitotsubashi University. He had been told by the authorities that because of the legislative prohibition on such civil servants holding another regular job, he would have to elect between keeping his academic post, and taking up the offer from Sony. To the surprise of many academics, Nakatani chose Sony. He resigned from Hitotsubashi, and instead took a professorship at a private institution nearby, Tama University. (The latter's new president is Australian Gregory Clark, head-hunted recently from another venerable institution in Tokyo, Sophia or Jôchi University.) Belatedly, the government has committed to allowing national university staff to serve as outside directors (but not as regular directors), "on certain terms".¹

More generally, these developments indicate the pressure for reform of Japan's university system, especially its national universities, which has built up in the last few years. The primary force for change has been a proposal to subject national universities to the regime of "independent administrative agencies" (*dokuritsu gyôsei hôjin*) enacted in mid-1999.² Behind that initiative lies the government's policy of cutting back Japan's

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- 1 *Kigyô Yakuin to Kengyô Mitomeru* [Allowing Company Directorships and Multiple Jobs], *Nikkei Shimbun*, November 17, 1999, at 1. Early in 1999, the government was reported to be investigating the possibility of allowing university staff to serve as officers of "technology transfer corporations", which national universities can establish under legislation introduced in August, 1998. The possibility of serving also on boards of normal companies was deferred for further study. Apparently, the National Personnel Office opposed taking that next step, because of incidents like the arrest in August, 1998, of a former Nagoya University Medical Faculty professor on corruption charges regarding the development of new drugs. See *Kigyô Yakin Kengyô OK* [OK on Working Currently On Company Boards], *Yomiuri Shinbun*, January 25, 1999, at 10. Extensive media coverage of the incident involving Prof. Nakatani in mid-1999 prompted the government to rethink.
 - 2 Much debate has followed in the Japanese media. However, very little has been written yet in English. A rare exception is the following overview: "The Education Ministry is planning to give Japan's 99 state-run universities and colleges more freedom in deciding matters of personnel and evaluation of research and education as part of a sweeping reform, ministry officials said Monday. Education Minister Akito Arima, a former president of the University of Tokyo, presented the plan Monday to the presidents of the national universities and colleges gathered in Tokyo. The reform is part of a plan to change the universities' and colleges' status to 'independent administrative institutions' modeled after the British agency system adopted in the late 1980s. The ministry says each university's autonomy and independence will be increased through the reform, as restrictions by the government on their management in such areas as organization and budget will be relaxed. Under the plan, the minister of a new education ministry to be created after January 2001 will be required to take account of the views of state-run universities and colleges in mapping out management policy, and to appoint and dismiss the heads of universities based on the universities' proposals. It also proposes that a panel to be set up at the new ministry to assess the efficiency of education and research at universities and colleges should carry out its appointed task following evaluation by a third-party body to be established in April next year. State universities and colleges will continue to use their land and buildings but whether they will

bureaucracy, which has already involved merging central government departments and realigning their relationship with local authorities.³ Specifically, in the wake of the final report presented by the Administrative Reform Deliberative Council in late 1997, the government now aims to cut back the number of civil servants by 25 percent over the next decade. With 135,000 employed in state-run educational institutions, a large majority of which work in Japan's 99 national universities, the latter will have to be subjected to cutbacks if this sort of objective is to be achieved. Besides such demands for greater efficiency, amidst Japan's ongoing economic recession, concern is growing about the lack of transparency and accountability in universities.⁴ This is underpinned by enactment of a new Official Information Act, applicable to national universities (in their present form) when it comes into effect by May, 2001.⁵ These developments have prompted quite widespread debate about what Japanese society, now and in the foreseeable future, can expect of its university system.⁶ Nonetheless, there is considerable resistance to change from regional universities, which will find it harder to compete in such a new environment compared to the larger national universities

be given the rights to independently set tuition fees and establish funds based on profits earned by sales of school property will be further studied, according to the plan. The education reform comes against the background of administrative reform bills passed by the Diet in July aimed at cutting costs and the number of central government employees by 25% in 10 years. The ministry's plan, however, says national school staff should retain their status as central government employees. The ministry will discuss the reform with the Japan Association of National Universities, the government and the ruling Liberal Democratic Party before officially deciding on its policy to make state colleges independent administrative institutions by April next year, the officials said." Ministry eyes giving state colleges more freedom, *Japan Economic Newswire*, September 19, 1999 (available through LEXIS in the ASIAPC library).

- 3 An early and perceptive overview of the background to the initiative was published in one of Japan's most widely read law journals in June, 1999: TOKIYASU FUJITA, *Kokuritsu Daigaku to Dokuritsu Gyōsei Hōjin Seido* [National Universities and the Independent Administrative Agency System], 1156 *Jurisuto* 109 (1996). See also MASASHI SEKIGUCHI, *Kokuritsu Daigaku no Dokuritsu Hōjin-ka* [Turning National Universities into Independent Administrative Agencies], *Nishi Nihon Shinbun*, September 11, 1999, at 4.
- 4 Editorial, *Kara o Yaburu Kikkake ni* [A Chance to Break Open the Shell], *Asahi Shinbun*, September 16, 1999, at 5.
- 5 TSUNEHARU YONEMARU, *Jōhō Kōkai Hō 2-jō – Taishō Kikan to Bunsho no Teigi* [Article 2 of the Information Disclosure Law: Institutions Covered and Definitions of Documents], 1156 *Jurisuto* 34, 35 (1996). See generally NARUFUMI KADOMATSU, *The New Administrative Information Disclosure Law in Japan*, 8 *ZJapanR* 34 (1999).
- 6 See also, e.g., KINYA ABE, *Daigaku, Kaigo, Kōji Kyōiku ... Kokumin no Shiten de Kaikaku o* [Reform Universities, Care, School Education from the Citizens' Perspective], *Kumamoto Hinichi Shinbun*, January 7, 2000, at 7; *Daigaku no Taishitsu Tenkan Isogō* [Speed Up the Transformation of Universities], *Nishi Nihon Shinbun*, January 5, 2000, at 1; AKIRA MORITA, *Kokuritsu Daigaku Koso, Shutaiteki Kaikaku-an Shimesu* [National Universities, Above All, Should Present Their Own Reform Proposals], *Asahi Shinbun*, September 30, 1999, at 4; MASAOKI HONMA, *Kenkyū Kyōiku no Jiyū Sokonau* [Loss of Freedom in Research and Teaching], *Asahi Shinbun*, August 31, 1999, at 5.

(especially former imperial universities).⁷ The latter have been able to develop more critical mass through close connections with the Ministry of Education (*Monbushô*) and other sources of funding. More generally, as indicated by the opening quote taken from a recent essay by Professor Nakatani in one of Japan's widely read weekly magazines, there is real concern that major reform will not eventuate in national universities.

The same is true of reform discussions and initiatives regarding law faculties recently, especially in Japan's national universities.⁸ From its inception over a century ago, legal education in Japanese universities has been conducted at the undergraduate level. Allowing students to take many non-law subjects especially in earlier years, the focus has been more on producing generalists than practicing lawyers (*bengoshi*).⁹ That is related to the post-War policy of making the national bar examination (*shihô shiken*) extremely difficult.¹⁰ Those passing the examination can enter the government-funded Legal Research and Training Institute (*shihô kenshû-jo*, "LRTI"); and graduates of its

7 *Shikin Kakusa - Chihô no Fuan Ôkiku* [Variations in Funding: Big Concerns from the Regions], *Tokyo Shinbun*, February 16, 2000, at 26 (Part 5 of a useful seven-part series on turning universities into independent administrative agencies).

8 For a summary of present initiatives and thinking in major law faculties, albeit focused mainly on Tokyo University, see the special issue *Hôshô Yôsei to Hôgaku Kyôiku* [Legal Education and Training Legal Professionals], 1168 *Juristo* 8-71 (1999).

9 For a very helpful review of developments before and after World War II, see SETSUO MIYAZAWA (with HIROSHI OTSUKA), Legal Education and the Reproduction of the Elite in Japan, 1/2 *APLPJ* 1 (1999; this and other articles from the new *ASIA-PACIFIC LAW & POLICY JOURNAL* are downloadable in full text from <http://www.hawaii.edu/aplpj/>). The authors stress continuities in this focus, and argue that it has served to reproduce power elites in Japan through to the present day. However, they concentrate primarily on how this has occurred through Tokyo University Law Faculty. Further, even that institution is not monolithic, as shown by its recent appointment of a second professor from abroad, Daniel Foote. Rather than the now rather dated analytical framework proposed by C. W. MILLS, *The Power Elite* (1956), a more promising approach to analyzing such contemporary developments (and the transformations in social elites through Japanese law faculties more generally) may be the focus on processes and socio-legal fields proposed by recent sociologists such as PIERRE BOURDIEU (beginning with, e.g., *The Force of Law: Towards a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (1987)). Nonetheless, Miyazawa and his collaborators provide valuable background information on legal education in Japan over the last century, including many statistics. There is otherwise remarkably little writing in Western languages on Japanese legal education. Early exceptions were the overview provided by YASUHEI TANIGUCHI, Legal Education in Japan, in *Law and Technology in the Pacific Community* 298 (Philip C.S. Lewis ed., 1994); and an interesting snapshot of legal education at Tôhoku University provided by REMBERT SÜSS, *Das Studium der Rechtswissenschaften in Japan – Eindrücke eines deutschen Dozenten* [The Study of Law in Japan: Impressions of a German Lecturer] 1 *ZJapanR* 92 (1996). More recently, briefly surveying Japanese legal education and proposing reforms along U.S. lines, see also MARK LEVIN, Legal Education and the Next Generation, 1/2 *APLPJ* 3 (1999); YUKIO YANAGIDA, A New Paradigm of Legal Training and Education in Japan, 1/2 *APLPJ* 3 (1999).

10 MARK LEVIN has translated data taken from 1132 *JURISUTO* 80 (1998), Applicants and Acceptance Statistics for Japan's Legal Training and Research Institute: 1949-1998 (<http://www.tuj.ac.jp/lrtistat.html>).

program may be accepted for a career as a judge or public prosecutor, although most become *bengoshi*. As well as the bar examination pass rate being restricted, to around 500 each year, it has been based on a narrow range of subjects. There were best prepared for by rote-learning and other techniques, which even law students at leading law faculties tended to learn instead at private cram schools (*yobikô*). However, in the 1990s agreement was reached to raise the pass rate first to 700, and (since 1999) to 1000 each year.¹¹ It is likely to rise further, to around 1500 by 2005 or so, as discussion intensifies since the late 1990s on widespread reform of Japan's system of administration of justice (*shihô kaikaku*).¹² Law faculties, even in national universities, therefore are proceeding to develop more courses for students wanting to pass the now easier bar examination. This trend is most striking among law faculties in the larger national universities, especially the former imperial universities, which will probably be the main institutions permitted by *Monbushô* to develop two or three year post-graduate programs for such students — the “law school” concept discussed *infra* (Parts II.2. and III.1.). This will mean competing with the *yobikô*, hitherto largely treated with disdain. Nonetheless, the

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- 11 *Saita no 1000-nin Gôkaku* [Record 1000 Pass], *Yomiuri Shinbun*, November 30, 1999, at 38 (with average age of those passing down to 26.82, and 287 women). An excellent analysis of the contents and procedures involved in the bar examination, and reform discussions which got underway in earnest in 1988, is provided in ANJA PETERSEN, *Das erste japanische juristische Staatsexamen und dessen aktuelle Reformdiskussion* [The first bar examination in Japan, and contemporary debates on reforming it], 1 *ZJapanR* 32 (1996). Those familiar with legal education and training in Germany will note similarities with the system there, especially education at an undergraduate level followed by a training period at government expense to qualify as lawyer, judge, or prosecutor. But some key differences are apparent, especially the relative difficulty of the “first” bar examination (needed to get into the training phase) and the relative easiness of the “second” (to finish that phase).
- 12 The Japan Federation of Bar Associations (*Nichibenren*) has traditionally been the most reluctant of key policy-makers (others are the Supreme Court and the Justice Ministry) in permitting an expansion in numbers passing the bar examination — some would say, to protect the cartel effects generated by such a restriction. However, top officials within *Nichibenren*, interviewed in late 1999, now seem resigned to such a further increase over the medium term. And the pass rate may rise even further. After all, well before the further changes in the late 1990s, the Justice Ministry initially suggested raising it to 2,000-3,000, a notion shared by some well-known academics. See PETERSEN, *supra* note 11, 41, 47 note 1. Much of the pressure for widespread changes in administration of justice (especially civil matters), and increasing numbers of legal professionals, comes from the business sector, which now faces an increasingly complex legal environment both in and outside of Japan. See generally TOSHIMITSU KITAGAWA & LUKE NOTTAGE, *Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects* (paper presented at the conference on “The Emergence of an Indigenous Legal Profession in the Pacific Basin” at Harvard Law School, December 11-14, 1998). For a useful summary of the main issues already being discussed, or likely to be discussed, in the newly established Deliberative Council for Reform of the System of Administration of Justice (*Shihô Seido Kaikaku Shingi-kai*), see the proceedings of a special colloquium, “*Shihô Seido Kaikaku no Shiten to Kadai* [Topics and Perspectives on Reforming the System for Administering Justice]” 1167 *Jurisuto* 52 (1999).

strategy makes some sense as Japanese society continues to age rapidly, creating pressure for student numbers to fall, and given the above-mentioned pressures for reform in universities more generally.

However, this article will argue that such changes in legal education, being discussed and implemented in Japanese law faculties at present, are unconvincing. They also miss a rare opportunity for more widespread reform. One particular difficulty facing law faculties in this process is precisely that they are populated mainly by *jurists*. And Mark Ramseyer, cited at the outset, is not the only one to have pointed out that jurists tend to lack imagination. His colleague at Harvard, Roberto Unger, made the same point around the same time, albeit from a very different theoretical standpoint (critical legal theory, rather than law and economics).¹³ Difficulties are compounded in Japan, where many law faculties are hidebound by bureaucratic organization.

Accordingly, this article begins by trying to exercise some imagination.¹⁴ Rather than focusing on the here and now, such as the rights and wrongs of the latest proposals from *Monbushô* and other policy-makers, or what other law faculties are doing, Part II considers what the legal landscape in Japan might look like twenty years hence.¹⁵ This long-term perspective aims to provide fresh ideas and prompt further discussion, so that large-scale reform will not be stifled in the way feared by Nakatani and others.

Part III then focuses on two particular concerns regarding the reform initiatives so far. The first relates to the emerging consensus, at least among “leading” national universities, that several years of further legal education need to be added to the existing three of four year program (Part III.1.). This brings extra costs and other problems, which have not been fully considered. The inspiration is primarily the U.S., and to a lesser extent countries like Germany. Yet the experience especially in New Zealand and other Commonwealth countries shows that it is possible to train students to be effective lawyers with only a few years of — admittedly, challenging — undergraduate legal education. A second concern is the fixation with getting these students to pass the bar examination (Part III.2.). A more important challenge and focus for reform discussions — at least for the “leading” law faculties in Japan which are leading those discussions — should be to develop world-class inter-disciplinary research and teaching. That should train legal professionals in a broad sense, and indeed future leaders in Japanese and global society. In the light of these two major problems, Part III.3. con-

13 ROBERTO MANGABEIRA UNGER, *What Should Legal Analysis Become?* 18-23 (1996).

14 See also LUKE NOTTAGE, *Sozôryoku o Hatarakaseyô* [*Let's Use Our Imagination*], 1170 *Jurisuto* 148 (2000).

15 It is no longer enough to think or talk of “the twenty-first century”. That has already started as you read this article, and so it does not necessarily stretch the imagination enough. A year like 2020 does that more effectively, yet is not too far into the future to make events then totally unpredictable or irrelevant — hopefully, most of us will still be around then! Incidentally, an international conference on “Leading the Law and Lawyers in the New Millennium @2020” will be held in Singapore from April 10-12, 2000 (millenium_law@sal.org.sg).

cludes with some thoughts about what may happen to Japanese law faculties over the next decade or so. Overall, moreover, the analysis in Part III suggests that a deep-rooted conservatism dominates reform discussions and initiatives in Japan. Such “reformist conservatism” may well be related to other tendencies in Japanese law and society, since they contrast for instance with the “conservative reformism” characteristic of New Zealand.

Nonetheless, the combined inertia generated by universities as large bureaucracies, and the world of the law, is apparent in countries like New Zealand too.¹⁶ This suggests more universal problems in trying to reform legal education, especially within universities. The following analysis therefore may provide insights into countries presently considering large-scale reforms to both universities and legal education, such as Germany, although further comparative research is urgently required. Arguably, a key focus already should be always on establishing effective *processes* for maintaining and managing reform over the longer term, not just on substantive objectives and strategies. Part IV ends briefly with some further thoughts along these lines.

II. JAPAN’S LEGAL LANDSCAPE IN 2020?

Two decades hence, two features are likely to stand out in Japan’s legal landscape. First, the number of *bengoshi* should be close to the current number of students entering Japanese law faculties: around 40,000.¹⁷ As Richard Abel has shown in countries as

16 See LUKE NOTTAGE, *Nyûjirando no Hôgaku kyôiku ni okeru Hoshutekina Kaikaku-shugi* [Conservative Reformism in New Zealand Legal Education], 6 *Gekkan Shihô Kaikaku* 61, 62, 65-66 (2000).

17 In 1992, for example, around 37,500 entered separate law faculties as day students (with 4,000 entering evening programs), although another 45,000 or so entered faculties which incorporate law department or sections with other departments (e.g., economics or arts). See MIYAZAWA, *supra* note 9, Table 10. For some recent projections as to future *bengoshi* numbers, compare, e.g., KAZUHIRO NAKANISHI, *Hôsô Jinkô Zôka Mondai no Genzai to Kadai* [Issues and Present Situation regarding Increasing the Legal Profession Population], in *Saiban o Kaeyô* [Let’s Change Court Processes] 196, 199-200 (YOSHITOMO ÔDE et al. eds., 1999). Readers can attempt their own arithmetic. For instance, there were 17,142 *bengoshi* registered in Japan as at March, 2000. About 550 were expected to register in April, 2000; then 750 more in October, 2000, (out of the 1000 LRTI graduates), bringing the total to around 18,400. On average about 75% of LRTI graduates have become *bengoshi* in recent years (telephone interview with the Information Dept. of the *Nichibenren*, March 9, 2000). Accordingly, even if the number permitted to pass the bar examination (the vast majority of whom go on to the LRTI) thereafter remains 1000 per annum, the number of *bengoshi* should increase by 750 each October thereafter, giving 33,400 in 2020. Further, as mentioned above (*supra* note 12), it is likely that the passing rate will rise further. If increased to 1500 per annum from 2005, for instance, this will produce 39,025 *bengoshi* in 2020. (Of course, if such increases lead to greater competition and significantly lower fees and incomes for this generation of *bengoshi*, a higher proportion of LRTI graduates may try to become judges and prosecutors; but that depends on whether the Japanese state will allot

diverse as the US and the UK,¹⁸ large-scale relaxation of control over the supply of lawyers tends to have far-reaching and widespread implications throughout the legal system. This appears to hold for New Zealand as well, and Japan should be no exception. Indeed, many Japanese commentators and policy-makers appear to acknowledge this, but without articulating assumptions or considering all the follow-on effects.

Secondly, ongoing developments in Information Technology (IT) will dramatically change the legal world by 2020. Several years ago now, Richard Susskind outlined some of the existing and foreseeable changes in the United Kingdom, drawing also on pioneering developments in the U.S. These are likely to become increasingly important for Japan as well.¹⁹ Yet current reform discussions have neglected the likely broader relationships between IT innovation and legal practice, legal education, and political processes in contemporary democracies.²⁰ This failure of imagination becomes particularly conspicuous, when we appreciate that developments in IT mesh closely with some of the follow-on effects from rapid expansion in *bengoshi* numbers.

1. *Transformations in the Legal Profession*

By 2020, the administration of justice in Japan should be reconfigured by transformations in the legal profession. The first major change to be expected is that much more legal work will be proactive rather than reactive. For some time now, commentators have been arguing that this is or should be occurring in Japan.²¹ The possibility becomes very real now first in light of Japanese corporations' ongoing attempts to strengthen their legal departments, including the incorporation of IT such as intranets.²²

sufficient budget to meet such demand.) Revealingly, former *Nichibenren* President Kôhei Nakabo is reported to have argued before the Deliberative Council for Reform of the System of Administration of Justice that the number of *bengoshi* should rise to between 50,000 and 60,000, putting Japan's per capita ratio on a par with jurisdictions like France: see More Lawyers Wanted, Japan Times, February 24, 2000, at 3.

18 RICHARD ABEL, *The Legal Profession in England and Wales* (1989); American Lawyers (1989). For a sustained analysis of the differences between U.S. and English Law, see PATRICK ATIYAH & ROBERT SUMMERS, *Form and Substance in Anglo-American Law* (1987); RICHARD POSNER, *Law and Legal Theory in England and America* (1996); and LUKE NOTTAGE, *Form, Substance and Neo-Proceduralism in Comparative Contract Law: Law in Books and Law in Action in New Zealand, England, the US and Japan* (Ph.D. in Law thesis submitted to Victoria University of Wellington, September 2, 1999).

19 See generally RICHARD SUSSKIND, *The Future of Law: Facing the Challenge of Information Technology* (1996; 1998 revised paperback ed.); LUKE NOTTAGE, *The Future of Law, Legal Education and Practice in Japan*, [1998/5] Web Journal of Current Legal Issues <<http://webjcli.ncl.ac.uk/1998/issue5/nottage5.html>>.

20 Comparative theoretical and empirical research is now underway on those broader relationships, funded by the International Communications Foundation (ICF) in Tokyo. See <<http://www.law.kyushu-u.ac.jp/~luke/cyberproject.html>>.

21 See, e.g., RYÔ HAMANO, *Japanese Lawyers in Transition*, 49 *Rikkyo Hôgaku* 495 (1998).

22 This and related hypotheses are being tested in the ICF funded collaborative research

That piggybacks on the growth of electronic data interchange (EDI),²³ and now electronic commerce more generally, affecting entire organizations or corporate groups. Their outside legal advisors must and can match these technological developments, especially as more and more begin to compete in providing business law advice. But market incentives paralleled by technological developments also will push the legal advisors of the future, called “legal information engineers” by Susskind, to provide more proactive advice to individuals, organizations, government agencies, and so on.

As advisors become literally enmeshed in their clients’ everyday operations and longer term planning, moreover, they will need to draw on a broader array of skills and expertise. “Multi-disciplinary practices” very probably will be the norm, not the exception, by 2020. But they may not be colossal “firms” like the biggest law offices in the world nowadays.²⁴ Nor will they resemble even the largest accountancy firms, some of which are moving into provision of legal services.²⁵ The emergence of mega law firms, at least, arguably was related to the technique developed in the early 1970s of assigning multiple junior lawyers to one more senior one, to make better use of the latter’s human capital.²⁶ However, even with the technology of the late 1990s, those sort of economies should be achievable through looser forms of networking. Rather than more mega law firms, certainly by 2020 we should see sometimes large but often transitory *networks* of legal information engineers.²⁷

project mentioned *supra* (note 20). *See generally* TOSHIMITSU KITAGAWA & LUKE NOTTAGE, *supra* note 12.

- 23 *See generally* CASLAV PEJOVIC, Legal Challenges in the Implementation of Electronic Data Interchange in International Trade, 65/1 *Hōsei Kenkyū* 348 (1998).
- 24 Incidentally, the biggest since 2000 grew from an English firm, Clifford Chance. *See* ROBYN MCARTNEY, “A Global Law Firm” [October 1999] *New Zealand L.J.* 350.
- 25 *See* NOZOMU OHARA, *Kokusai-ka to Shihō – WTO Taisei-ka no Bengoshi Gyōmu ni kansuru Kisei Kanwa o Chūshin to shite* [Administration of Justice and Internationalization: Focusing on Deregulation of Lawyers’ Services under the WTO Framework], in 21 *Seiki Shihō e no Teigen* [Proposals for the Administration of Justice in the 21st Century] 112, 120-123 (SETSUO MIYAZAWA et al. eds., 1998).
- 26 *See generally* MARK GALANTER, Law Abounding: Legalization Around the North Atlantic, 55 *Mod. L. Rev.* 1 (1992). *But see* STEPHEN FRANKS, Has the Brand ‘Lawyer’ Lost its Special Value?, [January 2000] *Council Brief* 5. A former partner in one of New Zealand’s largest law firms, newly elected to Parliament, Franks agrees that the legal profession is likely to be dominated by inter-disciplinary firms; but believes that they (especially the big transnational accountancy firms) will continue to develop as the main “screening” or “branding” institutions, instead of universities and the like. Even if this is so, however, it remains to be whether that role will enough to secure the continued growth of mega firms, even in the new IT environment.
- 27 Other New Zealand lawyers are already showing how this can be done. *See, e.g.*, WENDY LONDON, Lawyer on the Go, 535 *Lawtalk* 10 (2000; with a longer version published in the *International Lawyers Newsletter*); and my own work over April – September, 2000, much of it transnational “legal information engineering” (<http://hb6.seikyō.ne.jp/home/kimono/newcontacts.html>). (Articles cited herein from *Lawtalk*, the journal of the New Zealand Law Society, are freely available in full text through <http://www.nz-lawsoc.org.nz/lawtalk/>).

These will be able to cross national boundaries, not just disciplinary boundaries, even more readily than law firms today in many parts of the world. To facilitate this, we can expect growing mutual recognition of professional qualifications. This has been largely achieved already not only within customs unions such as the E.U., but also in looser free trade zones like that between New Zealand and Australia since 1982.²⁸ By 2020, is it too farfetched to imagine that Japan and South Korea may have agreed on mutual recognition of qualifications to practice as a lawyer? Or even to practice as a legal information engineer in a multi-disciplinary practice? Interestingly, multilateral initiatives already underway have focused on mutual recognition of accountancy qualifications, and already it seems likely that this will provide the framework for the legal profession.²⁹

Flexible networks bringing together a broader array of experts in more proactive work, less subject to the vagaries of intense bursts of work required of today's more "reactive" lawyers, should result in a more diverse legal profession in other ways. Even without the startling developments in IT which we witness today, a rapid opening up of the numbers admitted to legal practice has led recently to a much stronger presence by women even at higher levels of the legal profession. New Zealand has just appointed its first woman Chief Justice, for example; but Bertha Wilson C.J. headed the Supreme Court of Canada in the 1980s, and the newly appointed Chief Justice is Beverley McLachlin.³⁰ So when there is talk of "part-time judges" nowadays in New Zealand, for instance, it is closely related to gender issues, in sharp contrast to the discussion in Japan so far.³¹ The greater presence of women judges and lawyers also underpins the concerns about "women's access to justice", evidenced by detailed reports in the 1990s

Lorenz Ködderitsch has suggested to me that lawyers (especially senior partners in large firms) may prefer real-time interaction (especially with in-firm junior lawyers) in order to get prompter legal advice. Related to this is whether looser networks can generate sufficient trust in those called upon to provide advice. However, advanced IT usage generally should result in much faster provision of legal advice, while we can expect the emergence new means of creating trust in a "virtual" environment (*see, e.g.*, the feedback mechanism successfully developed even for a popular internet auction service:

<<http://pages.ebay.com/services/forum/feedback.html>>). These are other issues now being explored in the ICF funded collaborative research project mentioned *supra* (note 20).

28 *See, e.g.*, DAVID PIDGEON, Internationalization of Legal Practice, 529 Lawtalk 18 (18 October 1999); ROBERT CHAMBERS, MRA and the Profession, [February 1999] 33.

29 *See* OHARA, *supra* note 25.

30 The newly elected President of the NZ Law Society is also a woman, although another (now a High Court Judge) was President already from 1991-1994: 529 Lawtalk 1. On gender changes in the legal profession more generally, *see, e.g.*, JOHN HAGAN & FIONA KAY, Gender Inequality in Law: Problems in Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions, L. & Soc. Inq. 681 (1998).

31 *Compare, e.g.*, ROWENA LEWIS, The Case for Part-Time Judges, 510 Lawtalk 9 (April 6, 1999) with HIDEKI AKIGA, *Hijô-kin Saiban-kan Seido no Dônyû o* [Introduce a System of Part-Time Judges], in 21 *Seiki Shihô e no Teigen* [Proposals for the Administration of Justice in the 21st Century] 88 (SETSUO MIYAZAWA et al. eds., 1998).

from law reform bodies throughout the Commonwealth.³² By contrast, contemporary discussions about judicial reform and access to justice in Japan remain too abstract. Rather than talking about “citizens” access to justice, attention should be focused on problems faced by women or foreigners. In twenty years, with a more diverse legal profession, such issues certainly will be on the agenda.

This diversity also has potentially far-reaching implications for legal ethics as taught and practiced in Japan. Even the substantial increases already agreed for the numbers passing the bar examination will undermine the existing approach to legal ethics. This has been characterized by broadly worded Rules, a reliance on learning by osmosis from a small band of colleagues, and limited instruction at the LRTI.³³ Anyway, the Institute’s long-term future is already shrouded in uncertainty. For instance, as the number of those passing the bar examination has risen to 1000 each year, the training period centered on the LRTI has been shortened from two years to eighteen months. Further contractions can be expected as the number of those passing continues to rise, if only due to budgetary constraints. If universities begin to compete in providing more “practice-oriented” courses and programs, moreover, the LRTI’s future role may come under even greater pressure.

More generally, lawyers and their law firms will need to find a new balance between the demands placed on them as key actors in a fundamentally normative environment, on the one hand; and as service providers in an increasingly competitive market, on the other.³⁴ As the latter aspect becomes more apparent, another implication — not yet imagined in Japan, it seems — is that law society membership may become voluntary. That possibility remains very real in New Zealand, for instance, despite the recent election of a Labor Party led coalition.³⁵ Generally, compulsory membership is seen as risking inefficiency. But another factor has been that large law firms have developed their own sources of legal information. They object to their compulsory membership fees being used to fund Law Society Law Libraries used by small firms and individual practitioners — often, indeed, their competitors. This factor may be, or become, relevant in other countries too, including Japan, although it may also lose significance if legal information becomes more widely available thanks to ongoing developments in IT. In a more market driven environment, however, the future of law societies them-

32 See, e.g., New Zealand Law Commission, *Women’s Access to Legal Services* (NZLC SPI, 1999; downloadable from http://www.lawcom.govt.nz/pub_index.html); Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (ALRC 69, 1994, available through <http://www.austlii.edu.au/au/other/alrc/publications/>).

33 See generally S. A. LEONARD, *Attorney Ethics and the Size of the Japanese Bar* [January-March 1992] *Japan Quarterly* 86.

34 For a typically thoughtful discussion of this tension, see, e.g., TAKAO TANASE, *Bengoshi Rinri no Gensetsu Bunseki* [Analysis of Discourse on Legal Ethics], 68/1-4 *Hanrei Jihô* (1996).

35 See, e.g., IAN HAYNES [then NZLS President], *Open Letter to New Zealand Law Society Practitioners, “Law Practitioners’ Act”* (October 20, 1999).

selves will need to be reassessed. Their current role in setting and regulating ethical standards cannot be guaranteed.

Finally, consider what the functions of adjudicators may be by 2020. Because IT will have subjected many mundane legal tasks to “expert systems” or file management systems, the possibly fewer disputes that do arise, requiring reactive rather than proactive thinking, will tend to involve “supra-system” difficulties.³⁶ Judges will have to develop the ability to think at this more abstract level. That may be best fostered by training them in legal philosophy, comparative law, or even mathematics. At least it suggests caution about proposals for *hōsō ichigen* (“unifying the profession”, specifically by encouraging experienced *bengoshi* to become judges).³⁷ Many proposals turn on the assertion or assumption that this is needed to make Japanese judges more able to appreciate specific social or business environments, and to follow the nitty-gritty of everyday legal tasks.

2. Implications for Legal Education

If even some of the above-mentioned transformations in the legal profession are real possibilities over the next few decades, imagine some implications for legal education. In Japan, proposals for reform increasingly seem to be influenced primarily by U.S. or German models.³⁸ Both assume the necessity of lengthier education to develop “lawyerly” skills to take into legal practice. Under the German model, at least four and often five years is required to obtain one’s degree, meaning in effect that the latter is recognized as a **Masters’** degree. Under the U.S. model, four years of undergraduate study majoring in other disciplines is followed by three years of J.D. postgraduate study in law. Particularly because the latter phase can allow for ongoing interdisciplinary study, as discussed *infra* (Part III.2.), the U.S. model may be more suited to the training of “legal information engineers” in multi-disciplinary practices, who may one day become judges adjudicating supra-systemic problems from a broad vantage point.

However, another even more suitable model is conceivable. Why not actively promote double undergraduate degrees, one majoring in law and one in at least one other discipline?³⁹ Many students have chosen this option in New Zealand and Australia, for instance, since the 1980s. Those graduating with double degrees gain an

36 See, e.g., NOTTAGE, *supra* note 19; *supra* note 14, 150 note 15.

37 See, e.g., the special issue in 51/1 *Jiyū to Seigi* 50-89 (2000).

38 See, e.g. *Hōsō Yōsei Seido Kaikaku to Hōgaku Kyōiku no Kadai* [Issues in Legal Education and Reforming the System for Training Legal Professionals] (KYŌTO DAIGAKU DAIGAKU-IN HŌGAKU KENKYŪ-KA, ed. 1999).

39 Note, however, that Hitotsubashi University announced plans for a tie-up with other national universities in Tokyo, an aim of which is reported to facilitate cross-crediting of courses at the various institutions: *Kokuritsu Go-daigaku Rengō Kessei e* [Towards Concluding a Federation of 5 National Universities], *Nikkei Shinbun*, November 4, 1999, at 1.

edge over those just majoring in law, amidst increasing competition to be hired by a good law firm. They also are better equipped to move into neighboring areas of work, such as accountancy or business consultancy, more like legal information engineering. Ultimately, should they want to become the judges of the future, they may retain a distinct advantage over those who have only studied law. At the least, the New Zealand and Australian experience shows that it is not necessary for law faculties to train students for five or six years, just to become an effective practicing lawyer. The discussion and changes made so far in Japan tend to that conclusion not only because of a fixation on German or US models. One also gets the distinct impression that they follow from taking the easy way out, namely just adding a few more postgraduate programs to existing structures: an aspect of “reformist conservatism” discussed *infra* (Part III.1.). What should be more boldly addressed is the much bigger issue of tangible objectives for the initial three or four years of university education. Again, New Zealand and Australian law faculties have been able to improve their undergraduate programs to provide *both* professional and generalist education.⁴⁰

Some thoughtful commentators in Japan have considered this option, only to dismiss it primarily on basis that the Japanese bar examination will never become easy enough for the majority of law students to pass.⁴¹ Yet that argument is based on a surprisingly narrow definition of “professional” legal education, namely one centered on training those wanting to become *bengoshi*, judges, or prosecutors. As shown by the “thought experiment” *supra* (Part II.1.) about likely transformations in the legal landscape in Japan, its law faculties should consider how to educate “legal” professionals in a much broader sense. And already, of course, there exist many “lawyer-substitutes” in Japan: patent attorneys, tax attorneys; new generations of judicial and administrative scriveners (surely likely to take full advantage of developments in IT), para-legals, and so on. The current fixation on reform directed towards training students to become *bengoshi*, or to pass the bar examination, therefore seems remarkably short-sighted.⁴²

40 To be sure, at least in New Zealand, this multiple focus has diminished in the 1990s, with greater emphasis arguably being put on more professional subjects. Yet this is probably due primarily to the government’s policy over this period of encouraging high school graduates to go on to study at universities, funding them depending on student numbers while lowering funding overall. Universities have had to cut costs, but also raise fees charged to students. The immediate response has been for law faculties to offer courses which promise more immediate “return” to students, most of which are the more “professional” ones. See NOTTAGE, *supra* note 16; BARRY P. ROSER, A Sketch of New Zealand Universities and Recent Tertiary Reforms, III International Higher Education Research (Hokkaidô University) 105 (1999). On the development of legal education in Australia, and particularly on further reorienting it away from a narrow focus on reactive lawyering, see, e.g., Australian Law Reform Commission, Review of the Adversarial System of Litigation: Rethinking Legal Education and Training (ALRC IP 21, 1997).

41 See, e.g., YANAGIDA (*supra* note 9, 21-22); MIYAZAWA (*supra* note 9, 28).

42 But see, e.g., TAMOTSU ISOMURA & TAKEHISA NAKAGAWA, *Kôbe Daigaku ni okeru Hôgaku Kyôiku Saihen no Kôzô* [The Structure for Realigning Legal Education at Kobe University],

Other failures of long-term vision are apparent too. Where, for instance, are the proposals to set up new Chairs in legal ethics or in “IT and Law”?⁴³ Why is there no stress laid on simultaneously promoting teaching in the fundamentals of law (*kiso-hô*), such as legal sociology, and inter-disciplinary approaches more generally? Are law faculties going to try to promote more diversity in their staff (beginning with more female professors and tenured professors from abroad, for instance),⁴⁴ to match growing diversity expected among their students and those graduating with professional qualifications? Also of concern is that we no longer hear much about “internationalization” of Japanese universities, and law faculties in particular, compared even to the 1980s. Talk then may have been a fad; but the relative silence now is deafening, considering the way the world continues to change around us. Admittedly, some of the new postgraduate courses established recently are aimed at educating students for positions as “international civil servants”.⁴⁵ But where is the follow-through on efforts in the late 1980s and early 1990s to train law students for the world of trans-border commercial transactions, for instance? Perhaps that world appears to be shrinking, particularly given Japan’s protracted recession throughout the 1990s. But from a longer term perspective, this needs attention too.

Further, even to promote better “practical” skills in a narrow sense, is it enough just to hire lawyers or other professionals on a part-time basis for periods only of a few years? Or should the long-term objective be that a significant proportion of all tenured faculty have had considerable experience as some sort of “legal information engineer”?

1168 *Juristo* 58, 59, 62 (1999). It is ironic that issues regarding education and training of these many “lawyer-substitutes” is mostly being ignored by Japanese law faculties, even during the present reform discussions. Although casual commentators from abroad still occasionally focus on the role and numbers of *bengoshi*, when talking or writing about Japanese law and society, most have finally appreciated that this focus is too narrow, thanks largely to the efforts of scholars like DAN HENDERSON (most recently: *The Role of Lawyers in Japan*, in *Japan: Economic Success and Legal System* 27 (Harald Baum, ed. 1997)). On training of paralegals, compare, e.g., Legal Executive Certificate Emphasizes Practical Skills, 528 *Lawtalk* 8 (1999) with “*Pararigaru*” (*Bunya-sei – Ikkyû Hisho*) *no Yôsei to Katsuyô* [Training and Using “Paralegals” (Specialisation/First-class Secretaries)] 50/10 *Jiyû to Seigi* 163 (1999).

43 Exceptionally, YANAGIDA (*supra* note 9, 27) suggests briefly that Japanese universities teach more about the use of IT. Yet this proposal is only for a new undergraduate “liberal arts” curriculum, which would not focus on law; that focus would follow in a new post-graduate “law school” dedicated to training practicing lawyers, along U.S. lines.

44 At Kyûshû University, for instance, 40 percent of law students are women; but there is only one woman (an associate professor in politics) out of over sixty Law Faculty staff — eight of whom were added in calendar 1999. Most of these were hired on short-term contracts, of whom most were foreign academics. The Faculty has yet to appoint a foreign academic on a tenured basis. However, both problems were highlighted in a recent (voluntary) outside review : see <<http://www.law.kyushu-u.ac.jp/review.html>> at ...

45 See, e.g., *Tôhokudai - Hôsô Yôsei Kôsu Shinsetsu* [Tohoku University: Newly Established Courses for Training Legal Professionals], *Yomiuri Shinbun*, August 31, 1999, at 1.

Many US law schools have a combination of both, namely dozens of “adjunct professors” (mainly practicing lawyers), but also many tenured or tenure-track professors with strong backgrounds in legal practice in a broad sense (before or in parallel with their academic appointments). The adjunct professor system has generated considerable debate, however.⁴⁶ Will it really be enough to treat those brought in for the crucial task of training the next generation of lawyers, in Japan, like a few more part-time lecturers (*hijō-kin kōshi*)? Also, rather than just bringing in staff from the outside, Japanese law faculties should consider sending their academics out to work in court, law firms or corporate legal departments, for instance on sabbatical. That is surely more consistent with developing more “professional” education than continuing the long-established practice of one or two years’ of study abroad, mainly at the heavy expense of taxpayers in Japan. Japanese law faculties also will need to think much harder about how to engage their students with the world of legal practice, through clinical programs, internships and so on. Developments in IT, and experiments in more and more law schools, add a world of possibilities both for practical skill training and legal education more generally.⁴⁷

Experiments and transformations over the next decades — hopefully involving more diversity in teachers, techniques, and subjects — deserve a supportive environment. One aspect is training or continuing education for university teachers and administrators themselves. Another is more feedback from students. So far, many in Japanese law faculties seem to have seen this more as a threat. But properly institutionalized course evaluations by students, for instance, represent an important opportunity for self-improvement. They also can help uncover and monitor broader trends among students, and hence the world beyond the doors of Japanese law faculties. To be sure, a partial substitute is offered by the results achieved by graduates from particular law faculties in professional examinations, but that provides only a rough measure in comparison with course evaluations. Even better may be to unleash market forces through initiatives such as making national universities independent administrative agencies. In particular, allowing universities to carry over profits generated into ensuing fiscal years can provide further unique incentives encouraging law faculties to innovate and diversify, rather than just to “follow the leaders”. This can help them anticipate and keep pace with the major changes expected by 2020.

46 See, e.g., MARCIA GELPE, Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors, 25 WM. Mitchell L. Rev. 193 (1999).

47 See, e.g., NOTTAGE, *supra* note 19.

III. REFORMIST CONSERVATISM IN JAPANESE LEGAL EDUCATION

By this stage, readers may well conclude that I suffer from an overactive imagination. As indicated above, however, many of these ideas about practice and legal education in 2020 are prompted by developments around the world, either in place already or expected in the near future. In that sense, particularly because I draw mostly on countries like New Zealand which I know best, perhaps Part II above still reveals a *lack* of imagination.

Part III now turns to some particular problems with the emerging consensus on reforming Japanese law faculties, at least the “leading” ones: the “law school” concept of adding a few years of legal education on top of the existing four years (Part III.1.), and the idea that law faculties should concentrate on “practical training” needed to help their students pass the bar examination (Part III.2.). My criticism of the latter proposal, which risks not equipping graduates with the broader skills required of tomorrow’s legal information engineers, is partly based on by my expectations regarding developments in the legal profession and in IT (Part II.1. *supra*). Yet it also involves broader concerns, such as what else legal education at universities should be aiming at, with which readers may sympathize even if they are not convinced by my views on future developments in the legal profession, generally or in Japan. Similarly, my criticism of the former proposal, increasing the number of years of legal education at universities, addresses broad issues such as the extra cost involved. Ultimately, moreover, both problems uncover a strong conservative orientation in the present Japanese legal education reform process: “reformist conservatism”.

1. *Adding Years of Legal Education in “Law School”?*

The present trend to reform legal education primarily by adding further years of legal education is disturbing first because it ducks the far greater challenge of revitalizing the existing undergraduate program in Japanese law faculties. Adding on a few more years looks suspiciously like a soft option. It is easy to implement because it does not really disturb the structures and vested interests involved in teaching and administering for the first three of four years. In particular, it minimizes the potential for personal conflict. A cynic might add that it promises, at least superficially, some proof to outsiders that “reform” is being undertaken. And this sort of partial reform, superimposed on — but not disturbing — existing structures, has characterized other areas of society and the economy in post-War Japan.⁴⁸ The problem is that this sort of approach is only really

48 One example is the way in which Nippon Steel diversified into areas in which the company had no experience, primarily to continue employing workers who would otherwise become redundant due to restructuring in steel production. See TAKEO HOSHI, *Japanese Corporate Governance as a System*, in *COMPARATIVE CORPORATE GOVERNANCE* 847, 861 (Klaus H. Hopt et al., eds. 1998).

possible in a growing economy, in which people are generally happy and confident about their lot and that of the next generations, and in which they trust their leaders and time-honored practices. Japan's stagnant economy over the last decade, along with growing distrust of bureaucrats and politics,⁴⁹ mean that it will increasingly have to make hard choices in reform initiatives. That is, Japan will have to reallocate existing resources, even if it means some painful "restructuring" and consequently more social tension. Those affected by these processes will require no less of reform in universities, including law faculties.

The second and perhaps most serious difficulty with the strategy of just adding several years of legal education onto the existing three or four years is the extra cost involved. For national universities, much of these costs will have to be borne by the state. But Japan is strapped for funds due to a decade-long recession, and the population is aging rapidly. In addition, seeking more funding by charging students higher fees for these extra years of legal education may hold little attraction for students themselves.⁵⁰ Again, the ongoing economic recession makes this particularly significant, as it affects their opportunities for part-time work during or leading up to study, as well as support available from their families. Further, there is almost no discussion yet directed at making available scholarships or a scheme of loans directly to students, for instance.⁵¹ Anyway, financial institutions in Japan remain notoriously weak, creating a severe credit crunch. They would need considerable persuasion, and financial incentives, to risk precious funds in lending to students to help finance an increasingly expensive legal education.

Further, for financial institutions and even law students themselves (or their families) the extra cost involved in adding years of legal education is particularly problematic precisely because of the existing and expected increases in those passing the bar examination. Those increases follow from pressure from business circles, concerned about the high cost of lawyers as well as their inadequate skills.⁵² Surely, as the number of lawyers entering legal practice over the next few decades doubles, the fees each will be able to earn will come down. In some countries, rapid increases in lawyer numbers have been paralleled by high fee earning potential; but this has been for lawyers able to join and work in large, elite law firms. Such firms have yet to emerge in

49 See, e.g., "Seiji ni Henka o" 82% [82% Call for "Change in Politics"], *Asahi Shinbun*, January 5, 2000, at 1.

50 Annual fees charged at national universities are around Yen 500,000; private universities charge about double. Living away from home, as may happen increasingly since not all national universities will be allowed to create a "law school" or extra post-graduate program, will add about Yen 2,000,000 per annum.

51 However, surely a sign of changing times already, Kitakyûshû City has just agreed on an ordinance to offer a subsidy to families with tertiary students in which the main breadwinner has been "restructured": *Risutora Katei ni Shôgakkin* [Scholarships for Families Affected by Restructuring], *Asahi Shinbun*, February 5, 2000, at 1.

52 KITAGAWA & NOTTAGE, *supra* note 9.

Japan, of course.⁵³ It seems risky for students, or their families or financial institutions, to bet that this will happen in the foreseeable future.

In any event, there is no guarantee that the additional years of legal education will result in law students passing the bar examination in the first place. The risk is particularly high given that almost all “leading” law faculties in Japan are proposing new courses aimed at passing the examination, which of course heightens competition. Those making little effort to reform undergraduate programs have additional problems of credibility: why can students there expect now to pass the bar exam in six years, when they have not been able to do so in four years? Further, it seems that law faculties hope to be able to obtain control over bar examination content. That is far from certain, however, and it will surely not favor a particular university — representatives from all major law faculties surely would have to be involved, and each would then ensure that changes to content do not harm their students’ relative chances of success.⁵⁴

In short, ignoring the extra costs involved for students and others appears a typical example of a deep-rooted public sector mentality: “Who cares about extra costs, if the taxpayer pays most of them? Who cares, if it does not matter much whether this law faculty’s new course attracts students in the first place (we will get state funding, anyway, at least in the short run); and whether our graduates actually pass the bar exam?”⁵⁵ The current reform process therefore seems “supply-side” driven (“what shall we law faculties offer?”), rather than “demand-side” oriented (“what do law students or their employers want and need, now and in the foreseeable future?”). In this respect, it is extraordinary that there still have been almost no empirical studies as to attitudes and expectations of law students themselves,⁵⁶ nor of potential employers and other likely future users of their services.

A third and related concern is precisely the fact that there has emerged such a strong consensus about the need to add extra years of university education, despite the above-mentioned likely disadvantages with this strategy. There may well be advantages; but often they are not well articulated, and alternatives are therefore ignored. For instance, one driving force behind extending the period of legal education seems to be that

53 See generally HAMANO, *supra* note 21.

54 As in New Zealand’s Council of Legal Education. See NOTTAGE, *supra* note 16. Note that a proposal to allow Japanese law faculties to “recommend” 1000 bright students for preferential entry into the LRTI were made as far back as 1988; but came to naught. See PETERSEN, *supra* note 11, 40.

55 One irony over the last year or so, in the light of the government’s policy of *reducing* the number of civil servants, is that major national law faculties have successfully applied to *Monbushô* for rapid *increases* in the number of academic staff (see, e.g., *supra* note 44). The fears of smaller, regional universities (*supra* note 7) therefore seem to be well founded.

56 A rare exception, but driven by broader concerns, is the recently published study by TAKAO TANASE: *Hôsô Shikô to Hôgaku Kyôiku – Kyôdai Hôgakubu-sei no Ishiki Chôsa kara* [Training Legal Professionals and Legal Education: Survey of Consciousness of Kyôto University Law Faculty Students], 145 HÔGAKU RONSÔ 1 (1999).

graduates, especially those who do pass the bar examination, still lack “maturity”. The evidence for that remains anecdotal, however.⁵⁷ Even if it can be shown systematically that Japanese law students, even the highly motivated and intelligent ones that currently pass the bar examination, lack basic “maturity”,⁵⁸ it need not follow that they should spend more time at law school. If the real problem is unawareness of contemporary society or business practices among those who go on to a career as a judge, for instance, then a better solution may be to improve the systems for selecting judges (e.g., *hōsō ichigen*) or for training them (including “continuing education”). Yet law faculties are not coming out with such alternative proposals in the context of proposals to reform legal education, at least in their written public statements. Instead, these statements are converging on the need to extend the period of legal education, without adequately considering alternatives.

Another deep-rooted factor probably underlies this: pressure to lock-step with other “leading” national universities. Again, part of the reason for such pressure is the public sector mindset. Because national universities do not have to make profits, they have few incentives to innovate in their reform efforts.⁵⁹ Because they still rely on year-by-year funding directly from the government, and cannot retain profits, they focus more on the short-term rather than the long-term. However, since even private universities are not coming up with many distinctive proposals for reforming legal education, there may be other reasons for not innovating more. On the one hand, there may be greater risk averseness among Japanese decision-makers generally, compared to counterparts overseas. There may also be more concern for maintaining one’s status, with extra years of legal education seen increasingly as part of the definition of a “leading” university. On the other hand, maybe Japanese law faculties just share the seemingly universal failures of imagination characteristic of large bureaucracies, and the way in which jurists think about “law”.

57 At least at Kyūshū University, for instance, I have been impressed by the maturity of many of my undergraduate students from 1997-1999. Maybe this was a biased sample — that is, I attracted a disproportionate number of “mature” students — but that just reinforces the need to do some empirical research on this point as well.

58 This notion probably indicates more about the ethnocentrism and power of the professors, than anything about the students. As put eloquently by two French sociologists: “Defined by their lesser knowledge, students can do nothing which does confirm the most pessimistic image that the professor, in his most professional capacity, is willing to confess to; they know nothing; and they reduce the most brilliant theories to logical monstrosities or picturesque oddities, as if their only role in life was to illustrate the vanity of the efforts which the professor squanders on them and which he will continue to squander, despite everything, out of professional conscience, with a disabused lucidity which only redoubles his merit.” PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, Introduction: Language and the Relations to Language in the Teaching Situation, in *Academic Discourse* 1, 6-7 (Pierre Bourdieu et al. eds., Richard Teese trans. 1994).

59 Tsukuba University President EZAKI has made the same point. See Editorial, *supra* note 4.

2. *Focus on the Bar Examination?*

A second disturbing feature of the present discussion is the focus on reform initiatives, for instance by adding several years of legal education, to increase the numbers of graduates passing the bar examination. To be sure, in the short run, the existing and expected increases in the pass do create a new opportunity for law faculties. Yet those increases are only the tip of much broader transformations in Japan's social, economic, and legal infrastructure. At present, businesses and citizens indeed may want more lawyers and judges to enforce their rights in courts, or in their "shadow", and the state may want more prosecutors to deal with the growing complexity of social and business relations in Japan. But they also need those able to plan transactions, and order relations between the state and individual citizens, so that problems do not get anywhere near courts. Existing and foreseeable developments in information technology will further fuel the demand for a more pro-active legal profession, bringing together extended and dynamic networks of legal professionals in a very broad sense (*supra* Part II.1.). Japanese law faculties should already be introducing reforms to meet the need for these professionals, establishing for instance special programs in intellectual property, tax law, international business transactions, and so on.

Further, they should focus on training Japan's future leaders generally, not just in the law. This is what Japan's leading law faculties have tended to do, of course, with many graduates making their careers in business, politics, and as civil servants.⁶⁰ They should not now throw the baby out with the bath water, and encourage their most promising students to devote their talents to studying for the bar examination during an extra few years of law school.⁶¹ Rather, they should reform their courses, programs, administra-

60 See MIYAZAWA, *supra* note 9.

61 In a report presented following an intensive course on "Commonwealth Law" taught at Kagoshima University on 26-28 January 2000, which included class discussion of legal and professional education in Japan compared with that in various Commonwealth countries (England, Australia, Canada, New Zealand), one — clearly mature! — student wrote (originally in Japanese): "I think Japanese legal education is lacking in ... practical orientation. When law students begin study, they think "let's get stuck into the law", but they apparently feel that lectures slowly become less attractive. This is not just a question at the level of students selfishly saying that "there are problems with lectures of the professors". I think it arises because they start to doubt "whether they will be able to use the legal knowledge which can be acquired". The high barriers to making law part of one's future career cause this degeneration in the will to study law, and result in students becoming discouraged. I hope that henceforth the universities can construct an environment in which legal knowledge can be linked to legal work, with law students equaling legal practitioners." Given the content of my course, and that it was held in a small regional national university, it is apparent that this student was thinking of practical training at universities in a much wider sense than just passing the bar examination. If her view is widely shared among students, which I suspect is so, it seems important that "practical training" be given a broad interpretation (not focused on passing the bar examination) to ensure that as many students

tive structures and so on to better train their students for a wide range of leadership positions in Japan. Like training legal information engineers, this should involve a much greater dedication to interdisciplinary study, at both undergraduate and postgraduate levels. Again, Japanese law faculties have a latent advantage in this respect, in that they have long included political scientists as well as jurists. So far, there has been little collaboration in research, let alone teaching.⁶² Now is a perfect opportunity to reverse that factionalism and, further, to reach out to work with those in other disciplines such as economics or sociology. To best develop this potential, they should also work closely with other universities both in Japan and abroad, attracting international students and sending their own students abroad. To ensure their own courses reach global standards, Japanese law faculties could subject themselves to external review for accreditation by organizations based abroad.⁶³

Japan's leading universities have a particular responsibility in these respects. After all, in the United States, the "top-tier" law schools are characterized precisely by a dedication to path-breaking interdisciplinary research, and to being international centers of learning.⁶⁴ They know that they will attract the best students, and that these students will be able to pass the bar examination with only minimal help from the law schools. Hence they adopt a more practical approach in first-year or core courses, but then leave it to students (usually with a few months' training from a cram school) to prepare for and pass the bar examination. The top law schools can then move on to more interdisciplinary and challenging courses, which can prepare students also for a broad range of careers and positions of leadership.⁶⁵ To be sure, the top law schools can do this because the bar examinations in the US remain much easier than that in Japan. But as the latter continues to become easier to pass, it should become more and more periphe-

as possible retain and develop a sense of the relevance of what is taught in Japan's law schools of the future.

- 62 For instance, Kyūshū University Law Faculty offers an LL.M. program in International Economic and Business Law and a M.Phil. program in Comparative Studies of Politics & Administration in Asia. Both are taught in English; but they do not allow cross-crediting.
- 63 Already, for instance, Victoria University of Wellington's Law Faculty has undergone a review by the American Bar Association (<http://www.abanet.org/legaled/Abarole.html>): see Law School News, [November 1999] Council Brief 5. So has Dōshisha University in Kyōto. Temple University: School of Law in Philadelphia provides a Law Program at their Tokyo campus which is ABA accredited both as overseas semester for J.D. students and as a part-time LL.M. program. Loyola University School of Law, New Orleans, operates a summer program at Dōshisha University in Kyōto which is also accredited by the ABA.
- 64 See FRANK UPHAM, "Current Issues and Trends in American Legal Education" (Paper presented at the Kyūshū University Law Faculty Symposium, "Daigaku Kyōiku to Hōritsu Jitsumu-ka Yōsei ni kansuru Renzoku Shimupojiumu [Ongoing Symposium on Legal Education and Training Legal Practitioners]", Fukuoka, December 13, 1999).
- 65 The tradition of grooming law students for public service, at least, goes back more than two hundred years. See PAUL D. CARRINGTON, *Moths to the Light: The Dubious Attractions of American Law*, in *Festschrift für Bernhard Grossfeld zum 65. Geburtstag* 129, 133 (Ulrich Huebner & Werner Ebke, eds. 1999).

ral to leading Japanese law faculties. They too should be judged on their ability to produce world-class interdisciplinary research, and training of new professionals and leaders for the 21st century. Japanese law faculties also should be able to leave preparation for the bar examination primarily to the students themselves, with minimal help (probably in their first few years at university, possibly with a few outside cram school courses); or to “second-tier” or even “third-tier” law schools — as in the U.S., for instance. If the leading Japanese law faculties do not position themselves in this way, and instead focus increasingly on “black-letter law”, where can world-class interdisciplinary research and teaching take place in Japan?

3. *Possible Medium-Term Developments*

A major problem for leading Japanese universities in trying to mimic the focus of the top US law faculties, however, is cost: the latter charge huge fees.⁶⁶ These must pay for professors who can impart both practical legal skills (so academic salaries have to bear some relation to law firm salaries), and knowledge of other disciplines (so e.g. a teacher of corporate governance might have to be paid enough to be lured away from a lucrative job as a securities analyst). American students incur these fees because they can always go into a very well-paid job at an elite law firm upon graduation, and pay off their loans within a few years. Although this sort of system may evolve in Japan over the longer term,⁶⁷ it is difficult to see it happening soon. The challenge therefore remains: to devise a system of legal education which does not cost too much, yet can adequately train students for jobs as legal professionals both in the narrow sense (passing a bar examination) and a broader sense (as “legal information engineers”) or as future leaders. In other words, how can legal education be reformed to cost-effectively train *both* practitioners and generalists, teaching both “black-letter law” and interdisciplinary approaches to law in society?

Along these two dimensions, the emerging direction of reform in Japan seems problematic, as described above. Simply adding extra years at a new “law school” ignores the problem of cost. Focusing on training legal professionals, in a narrow sense, risks missing important opportunities to realize the potential for world-class interdisciplinary research and teaching in Japanese law faculties. The former aspect suggests considerable conservatism generally. The latter may be tied to a resilient formalist streak in

66 Similarly focusing on problems of cost and the balance between practical and interdisciplinary study in top law schools in the U.S., but without drawing express implications for Japan, is the recent article by Tokyo District Court Judge TASURO MAEGIWA, *Beikoku no Rosukuru ni okeru Hôsô Yôsei no Genjô to Mondai-ten* [Problems and Present Situation in Training Legal Professionals in U.S. Law Schools], 1169 *Jurisuto* 89 (1999).

67 However, NAKATANI (opening quote, *supra*) has recently proposed charging very high fees precisely to create truly world-class business schools in Japan.

Japanese law itself, despite its overall more substantive orientation.⁶⁸ In any event, reform of Japanese law faculties by adding an extra few years of “law school” aimed at passing the bar examination seems likely to prove unsustainable. Nonetheless, like the Titanic, it seems too late now for Japanese universities and policy-makers to change course. Of course, even if the law school programs do not really succeed — and even if they do — undergraduate legal education will remain a distinctive feature in Japan. Yet an important opportunity for fundamental rethinking and reform at that level is being lost by the present preoccupation with adding extra years of legal education.

Many thoughtful legal academics in Japan might agree with these conclusions. So far, however, such views have been rarely expressed in public. One rationale for this, put to me privately, is that the mere fact of change should be significant, by getting people (even within universities) to think through the issues. Further, even if the law school reform does not work well or at all, Japan may still have enough resources to fall back on to try for better reforms. I agree that initiating and maintaining a *process* of change can be just as important, sometimes more important, than the success or failure of *substantive* outcomes (a point developed further in Part IV *infra*). This depends on the circumstances, however, and for Japan I remain less sanguine about the economy, demographics, and citizens’ satisfaction with social leaders or universities generally.⁶⁹ In addition, the longer the focus of reform remains on the “law school” proposal, the more difficult it may become to retain and prepare university researchers and teachers able to initiate and implement the next phase of reform. Thus, the much bigger task involved in reorienting both undergraduate and postgraduate legal education in Japan, to achieve a cost-effective and sound balance of practical and interdisciplinary education and research, should involve a next generation of reformers as soon as possible.

Anyway, in view of the flaws in the law school concept, one possibility over the next decade is that some leading Japanese law faculties *will* go the way of the top-tier US law schools. Extra years even in “law school” then may gradually becoming less preoccupied with training students to pass the bar examination, and focus more on educating more generally a broader array of future leaders in Japanese society. A focus on the bar examination would be left to lower-tier law faculties. However, this will depend first on the examination continuing to become much easier. It also may well lead to a very high cost structure in the leading law faculties, with private universities taking the lead but at least some national universities able to follow.

A second possibility is that some universities will try to compete for more students by aiming to train them to pass the bar examination in a total of four years, for instance, rather than six years. Again, private law faculties are likely to do this first; but if they clearly succeed, national universities will be forced to adapt too. This also depends on just how easy the bar examination becomes. But contemporary legal education in New

68 See generally NOTTAGE, *supra* note 18.

69 See, e.g., *supra* notes 49 and 51.

Zealand and other Commonwealth countries suggests that it is perfectly feasible to train students in four years (in fact, often effectively two years) to meet the needs of today's legal practice. The problem with this in New Zealand, and potentially also in Japan, is that it risks not adequately preparing students to become *tomorrow's* lawyers (or legal information engineers) and *tomorrow's* leaders.⁷⁰

IV. CONCLUSIONS

This analysis may seem to paint a rather gloomy picture of ingrained conservatism within reform of legal education in Japan. On the one hand, there remains an urgent need for long-term vision, followed by an imaginative analysis of implications, as attempted in Part II *supra*. On the other hand, Part III revealed obvious problems in the current law school reform, which suggest various types of conservatism. Yet conservatism in legal education reform is also apparent in countries like New Zealand, despite its tradition of "socio-legal experimentation".⁷¹ That may reinforce the point made by Nakatani about the more universal problems of trying to implement reform in big bureaucratic organizations like universities; and the point made by Ramseyer and Unger about the lack of imagination peculiar to the legal world.⁷² No doubt it also says something about the power relations and other sociological aspects to relationships between students and university academics.⁷³ These more theoretical implications deserve further examination in broader comparative context.

Already, to keep monitoring and striving to overcome such challenges, it seems important that the reform of legal education be treated and debated as a continuing *process*, not a one-off event. Legal academics and other policy-makers for legal education should not become fixated on devising and immediately implementing the optimal *substantive* solution. Probably more important is fashioning new mechanisms to generate and monitor a broad range of innovations, underpinned by long-term as well as short-term imagination.

Many mechanisms are conceivable in Japan. One would be to involve in the debate and decision-making the university support staff as well academics. Younger Japanese academics on or recently returned from sabbatical abroad, rather than those already promoted to professorships (and hence, traditionally, committee memberships), should also be allowed to participate more. Perhaps most importantly, Japanese law faculties should listen carefully to law and other students, their families, their alumni, and potential employers or users of their graduates. All should participate in or at least

70 See NOTTAGE, *supra* note 16.

71 *Id.*

72 See UNGER, *supra* note 13; and the opening quotes.

73 See BOURDIEU et al., *supra* note 58.

influence both the generation of new ideas and objectively monitoring of the path of reform.

Generally, as suggested by the opening quote from Nakatani, it is essential that “outsiders” are involved as much as possible. Yet attracting and keeping outsiders may be the most difficult challenge facing any law faculty. When Victoria College Law Professor Robert McGechan visited Harvard Law School half a century ago, for instance, one of the first things which caught his eye in the staff common room notice-board was a quotation from Saint Benedict placed there by Dean Prosser:⁷⁴

If any pilgrim monk come from distant parts, if with wish as a guest to dwell in the monastery, and will be content with the customs which he finds in the place, and do not perchance by his lavishness disturb the monastery, but is simply content with what he finds, he shall be received, for as long as a time as he desires. If, indeed, he finds fault with anything, or expose it, reasonably, and with the humility of charity, the Abbot shall discuss it prudently, less perchance God had sent him for this very thing. But, if he have been found gossipy and contumacious in the time of his sojourn as guest, not only ought he not to be joined to the body of the monastery, but also it shall be said to him, honestly, that he must depart. If he does not go, let two stout monks, in the name of God, explain the matter to him.

74 Cited in R. O. MCGECHAN, *A New Zealander’s Comments on American Legal Education*, 5 *J. Leg. Educ.* 286, 286 (1953; reprinted in 30 *Victoria U. L. Rev.* 389 (1999)).