The Descent of Civil Execution Institutions in Japan

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I. INTRODUCTION

The weakness of civil enforcement in Japan has been a persistent talking point since Professor *Haley* published his classic articles on the subject in 1978 and 1982.[1] Nonetheless, it has not been until Japan's serious economic downturn in the 1990s that scholars writing in English have begun substantiating Professor *Haley's* claim in detail, and working through its implications. And not a moment too soon, one might add, since Japan is now undertaking reforms that will seriously alter Japan's enforcement landscape over the next decade.

Apart from the task of confirming that enforcement is in fact weak in at least some fields of civil justice in Japan, there are two aspects to the scholarly endeavor. One is to identify the side effects of weak enforcement in a systematic way. The other is to explain the underlying cause of the weakness itself. The first task has been joined by Professors *Milhaupt* and *West*,[2] in a recent study which sets out to prove the proposition that organized crime "firms" within society compete with state institutions for the supply of enforcement and dispute resolution services. In other words, when courts and their agents are weak (as in Japan), the *demand* for the enforcement services of underworld gangs will be strong. The article is based on statistical evidence from postwar Japan, but the authors' point is directed, particularly, at countries undergoing the transition from a directed to a market-oriented economic model. Their advice is straightforward: a smart reformer will adopt a strategy of co-option, encouraging underworld gangs to serve the state system of enforcement, before he will attempt to suppress them outright through the force of criminal sanctions.

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1 J. HALEY, The Myth of the Reluctant Litigant: 4 J. Japanese Stud. 359 (1978); J. HALEY, Sheathing the Sword of Japanese Justice: An Essay on Law Without Sanctions: 8 J. Japanese Stud. 265 (1982).

2 C.J. MILHAUPT / M.D. WEST, The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime: 67 U. Chi. L. Rev. 41 (2000).

Milhaupt and *West* are not primarily concerned with the second question, of why Japan's enforcement systems are weak in the first place. Their assumption appears to be that states which declare private property rights often neglect to provide adequately for their enforcement. In the case of Japan,

> "The expansion of property rights accompanying [Japan's] two phases of wholesale institutional transformation [in the Meiji and postwar eras] was not matched by the development of complementary enforcement mechanisms."

However,

> "[t]his gap did not prove to be wholly problematic, of course, as Japan's subsequent economic success attests."

A cynic might suggest that this view is premised on a questionable optimism; surely, if Japan was able to fuel a 100-year press in economic development without attending seriously to the enforcement of property rights, there must be keen interest in exactly how the feat was accomplished.

One important area of enforcement activity that *Milhaupt* and *West* identify is eviction work. In Japan, this is carried out by officers known as *shikkô-kan*, the execution officers of a Japanese court (previously known as *shikkô-ri* and *shittatsu-ri*). These are public officials whose duties include the service of court papers, execution requiring the seizure of movable property, and the eviction of occupants from immovable property. They also conduct judicial auctions under the supervision of the court. They may retain helpers, but they cannot charge others with enforcement work; they must go to the site on the day and seize the relevant goods, or induce the occupant of the target property to vacate. Because evictions, in particular, must be organized and executed by a *shikkô-kan*, their character in law and practice – their numbers, the mode of their selection, the scope of their authority, their relationship to courts and to creditors – is critically important to the functioning of the execution system.

This Article examines the historical genesis of the *shikkô-kan*. As *Milhaupt* and *West* note, these officers were thin on the ground at the time of their writing.[3] This Article, through an examination of the historical development of this institution, pursues the question of how *shikkô-kan* service came to be so seriously understaffed. One of the facts that will emerge is that the bottleneck in the enforcement of evictions that *Milhaupt* and *West* assert is limited to the period covered by their data. In this field of enforcement activity, staffing weakness has been the result of a conscious policy choice made in, and limited to, the postwar period. The implications of this fact for today's countries in transition will be considered in the conclusion.

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3 They indicate that there were 521 *shikkô-kan* working in Japan as at 1 January 1997. *Id.* at 60, citing F.G. BENNETT, Civil Execution in Japan: the legal economics of perfect honesty: 177 *Hôsei Ronshû* 1 (1999).

II. THE EARLY EXECUTION ESTABLISHMENT

The original civil execution officers in Japan, known as *shikkô-ri*,[4] were introduced by the Imperial Order of 4 May 1886 that created the first national system of courts in the imperial era.[5] This brief order provides that the *shikkô-ri* are to be responsible for delivering documents issued by the court, and for enforcing court orders. It is completely silent on the method of their appointment and terms of employment. The position is said to have been modeled on either the Prussian post of *Gerichtsvollzieher*, or the French *huissier* from which the former was derived.[6] It may therefore be that, like their Continental counterparts, they worked on a commission basis.

In any case, in the *Shittatsu-ri* Act of 1890,[7] the title of these officers was changed from *shikkô-ri* to *shittatsu-ri*, and the details of their position were spelled out in greater detail. They were to be selected from among those passing a special examination. On behalf of a party, they could be charged with the delivery of notices, the conduct of voluntary auctions, or the preparation of objections to registration. In response to an order from the court or the prosecutor's office, they could be charged with delivering documents and goods, extracting fines and fees, seizing and selling goods subject to attachment, or with executing orders of the court.[8]

Unlike today's officers, the *shittatsu-ri* were permitted to appoint deputies to perform executions in their stead. Deputies needed to have *shittatsu-ri* examination, to have been apprenticed as *shittatsu-ri* for at least 3 months, to have passed the court clerk's examination or, in a catch-all category, to have been approved for deputization by a judge.[9]

The *shittatsu-ri* system established by the 1890 legislation lasted without major change until the end of the Second World War. The *shittatsu-ri* were somewhat more plentiful than the *shikkô-kan* of today; the Ministry of Justice figures presented in *Table 1* (see opposite page) imply that their average population between 1927 and 1936 was about 630 nationwide.[10] The power of appointing *shittatsu-ri* resided in the Home Minister,[11] who was permitted to devolve the authority for making appointments to

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4 In *Tokugawa* and early *Meiji* times, the execution of court orders in civil cases was apparently left to village headmen to sort out. J. TERADA, *Shikkô-ri seido*, in: *Minji soshô-hô kôza* 1068-69 (1955).

5 *Saibansho kansei* Artt. 7 and 39 (*Sokurei* No. 40/1886).

6 TERADA, *supra* note 4, at 1067-70.

7 This was a big year of law reform, which ushered in the Courts Act, *Saibansho kôsei-hô,* Law No. 6/1890, and the Civil Procedure Act, *Minji soshô-hô,* Law No. 29/1890.

8 *Shittatsu-ri kisoku* Artt. 2 and 3 (Law No. 51/1890).

9 *Shittatsu-ri kisoku* Art. 11.

10 Dividing the average total number of cases handled by the average caseload per officer returns this figure. Note that this had nothing to do with execution manpower in the imperial era since, as noted, the *shittatsu-ri* had the power to appoint deputies.

11 *Shihôshô daijin*.

Table 1

Year	*Officers*	*Old*	*New*	*Service*	*Lawsuits*
1927-1936	630	170394	627648	2266599	
1955	328	178642	298201	1031037	417000
	335	199569	295885	999063	415000
	339	205307	314291	1048057	419000
	349	238191	352503	1144333	449000
	352	268089	359718	1082746	435000
1960	354	279288	347098	1121748	413000
	349	292625	317001	1224049	388000
	343	304705	302684	1382956	383000
	345	307474	280354	1302875	375000
	334	308493	286842	1083135	404000
1965	330	312391	312334	993980	461000
	341	325295	314169	897511	488000
	361	343859	302773	861629	502000
	368	359997	314399	771801	525000
	360	365523	300336	659646	505000
1970	354	362568	290976	617022	506000
	354	349008	289614	512870	512000
	356	336000	259474	414367	418000
		300371	208194	316073	438000
		259078	217551	265472	445000
1975		222672	244875	227478	477000
		214081	265032	216201	505000
		195908	306840	176834	562000
		183034	328184	158245	590000
		171670	343203	153129	626000
1980		162692	369575	141224	716000
		163814	398493	101231	782000
		168846	441041	98829	920000
		160415	363950	91140	1074000
		165006	426594	89465	1267000
1985		175535	464154	50006	1207000
		176975	483598	35159	1138000
		163995	517143	26212	1085000
		152730	480000	20000	961000
		123644	412611	18949	826000
1990		90933	332631	16538	792000
		73278	322062	16512	891000
		74409	351836	18897	1063000
		84358	375645	19201	1146000
		87667	386633	16918	1173000
1995		89034	402135	14517	
		87274	403097	12495	
	521	74777	387964	10989	

Source: C. WOLLSCHLÄGER, Historical Trends in Civil Litigation in Japan in the Light of Judicial Statistics, in: Japan: Economic Success and Legal System (H. BAUM ed., 1997)

the head justice in each of the district courts. As this arrangement suggests, appointments were made on a jurisdiction by jurisdiction basis; a *shittatsu-ri* was appointed to serve within the area covered by a specific district court. Their offices (referred to by the same name as the officials themselves) were not located inside the court, but in a separately established office. The separation in space reflected a separation in function and in status; unlike other publicly appointed officials, the *shittatsu-ri* were not paid a salary. Instead they undertook work on behalf of judgment creditors under a form of quasi-private contract,[12] and unless their income fell below a specified support threshold they earned their keep entirely from commissions. This arrangement, like other aspects of the *shittatsu-ri* system, closely followed Continental institutions of that time. But it was not adopted blindly.

The drafting committee responsible for the Code of Civil Procedure of 1890 engaged in a fierce debate over the terms on which the new *shittatsu-ri* officers should be retained. The scholars drafting the code initially proposed a salaried position. Upon receiving this, some members of the committee suggested that a commission-based system (following the then-existing French and Prussian models) be adopted instead. Their concern – a salutary reminder to anyone tempted to doubt the intention behind the *Meiji* legal reforms – was that these officers *should be given strong incentives to enforce judgments under the new law*. Proponents of a salaried position argued that the more mercenary commission-based system would lead to abusive over-reaching, and bring the legal system into disrepute among the general population. Opinions divided, but when the matter was put to a vote, the commission-basis camp won the day.[13]

Other features of the *shittatsu-ri* system further promoted the aggressive enforcement of judgments. Civil execution against goods requires fast action in any country; Japanese procedural law permitted judgment creditors to submit petitions for enforcement against goods directly to the *shittatsu-ri* once judgment had been obtained.[14] A judicial warrant of execution was required only for execution against immovables and choses in action, which were, however, easier to trace because subject to public registration. Japan was not unusual in this regard, but it is worth noting that such provisions scrupulously track the creditor's interest.

Most telling, however, is the atmosphere of competition that permeated the *shittatsu-ri* system. Where more than one officer was appointed to work within a given jurisdic-

12 See TERADA, *supra* note 4, at 1087-89.

13 Summary drawn from TERADA, *supra* note 4, at 1070. The remainder of this section relies heavily on the same source, which appears in an advanced text on civil procedure used in the 1950s.

14 A judgment was not, and is not today, always required. Debtors could consent in advance to execution under a lending agreement confirmed by a public notary *(kôshô-nin).* For the modern provision supporting this practice, see *Kôshônin-hô* (Law No. 53/1908, as amended by Law No. 40/2000); *Minji shikkô-hô* Art. 22 (Law No. 4/1979, as amended by Law No. 130/1998).

tion, they shared the same quarters.[15] But judgment creditors were permitted to assign their collection matters to a specific *shittatsu-ri* if they wished. Officers were prohibited, in principle at least, from cooperating in enforcement work; so although their numbers were limited, those in more populous jurisdictions were nonetheless placed in a position of direct competition with one another. Furthermore, each was permitted to sub-contract his work to deputies, who carried the same authority as the *shittatsu-ri* themselves, and for whose acts the *shittatsu-ri* were held directly accountable.[16]

The system thus introduced fulfilled the entire expectations of the committee that drafted the legislation. The new officers were indeed aggressive in their enforcement of court judgments. And they were indeed reviled by the general population.

In this, as in many other areas of Japan's nascent legal system, there was soon talk of reform. In 1925, the Home Ministry convened an Investigative Committee on the Revision of the Compulsory Execution and Auction Acts, and supplied it with some of its own complaints about the operation of the then-existing system.[17] Whatever problems had been identified, the committee did not seem to feel root and branch reform was in order. A report emerged in 1931, among the recommendations of which was that:

> "Execution work should be [kept] separate from the court, and passed to a special agency established for this purpose. But the position of the *shittatsu-ri* should remain as it is at present."

A subcommittee subsequently considered concrete options, such as the creation of an Execution Bureau, and merger of the *shittatsu-ri* into the courts (this option was ultimately adopted, some 30 years later). But like a number of other proposals for legislative reform in this period, the work of the committee was overtaken by events, and lay dormant until after the war.

Following the war, the title of the execution officers was changed (from *shittatsu-ri* to *shikkô-ri*, and powers of appointment were devolved formally to the district courts.[18] Their activities were gradually brought under closer supervision.[19]

Apart from these changes, the system was left untouched, but the economic position and quality of the *shikkô-ri* service was said to decline in the immediate postwar period. The closer supervision to which officers were subjected may have been part of the reason for this, but the commission system was probably the leading factor; during the

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15 Like police serving at a modern *chûzai-sho*, collection officers were required to live on the premises.

16 The relationship between English sheriffs and their bailiffs is similar to this arrangement. See WIGAN / MESTON, Mather on Sheriff and Execution Law 43-44 (3rd ed., 1935).

17 This committee and its report are referred to in TERADA, *supra* note 4, at 1096-97.

18 *Saibansho-hô* Art. 62 (1 and 2) (Law No. 59/1947, as amended by Law No. 142/2000).

19 See, *e.g., Shikkô-ri kantoku kisoku* (Supreme Court Regulation No. 10/1954), reproduced in: *Shikkô-ri shitsumu gaiyô* (*Saikô Saibansho jimusô-kyoku* ed., 1954) (providing for the appointment of a supervising judge in each district court with powers of investigation and a duty to audit the books of the *shikkô-ri* twice in each year).

struggle to reconstruct the nation's war-torn infrastructure, litigation rates declined, and resistance to civil execution increased.[20] Dependent as they were on commissions, the *shikkô-ri* found it hard to make a living, and most found themselves relying on the minimum payment provided to them by the state in the event of a shortage of commission work.[21] With the recovery of the economy, their business appears to have returned, but concern over inefficiency and corruption in the execution system had begun to mount in official circles.[22] In 1950, the Supreme Court convened an internal committee of judges to investigate, which ultimately forwarded its findings to the Law Reform Committee,[23] requesting a formal response on the question of revision of the *shikkô-ri* system. This was followed by a consultative exercise led by the Ministry of Justice, the results of which were published in November of 1955. After this point the sources fall silent for a decade, but a full-scale overhaul of the staffing of the service took place in 1966, with the passage of the *Shikkô-kan* Act.[24] This has been followed, over time, by a series of reforms designed to combat abuses in the execution process.

Reform of the execution process, then, has been an active part of the law reform agenda in Japan for several decades. Nonetheless, as will be explained below, the economic loss from execution racketeering was likely *aggravated* by the new *Shikkô-kan* Act. The following Section reviews available information on the pre-1966 execution service, and the Section after offers a model for the relationship between the official civil enforcement service and the underworld within the execution process. Together, these attempt to explain why the reform process began by taking what appears, at first inspection, to have been a pronounced step backward.

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20 See, *e.g.*, statement of Professor ONOGI, responding for *Ôsaka daigaku hôkei gakubu,* in: *Shikkô-ri seido kaizen ni kansuru ikenshû* 52 (1955):
"In part because the housing situation is currently so desperate that it cannot be managed as a *legal* problem, in eviction cases, particularly against residential properties, even though the plaintiff wins the lawsuit, the practical impossibility of enforcing the court's order has led to the attitude that 'Even though you've lost in court, you're best off sticking it out and staying put.' This attitude has an unfortunate impact on the authority of the courts and the esteem in which they are held, and undermines the law."

21 Professor KOYAMA, responding for *Hokkaidô daikaku hôkei gakubu* in *Id.*:
"In 1932, the commission income of the *shikkô-ri* [sic] was very good. At that time, there probably wasn't anyone who considered introducing a salary-based system. In 1949, the commission income of *shikkô-ri* was very bad. The average commission income was a bit lower than the minimum base salary for public officials, and clearly below the minimum level for the payment of the state supplement."

22 Further details on the problems that raised concern are considered below. See notes 36-43 and accompanying text.

23 *Hôsei shingi-kai.*

24 *Shikkôkan-hô* (Law No. 111/1966, latest amendment by Law No. 151/1999).

III. PROBLEMS OBSERVED IN 1954

Legal institutions react to corruption in much the same way that a civilized person reacts to a personal affront; if the underlying tension can be dispelled without comment, that is all to the good. Only when the badgering becomes persistent enough to interfere with the normal flow of conversation is the challenge openly acknowledged and faced down. In 1954, under the bland title of "A Collection of Opinions on the Subject of the Reform of the *Shikkô-ri* System",[25] the Japanese legal establishment stooped to take up the glove.

A set of queries was put to district courts, public prosecutor offices, *shikkô-ri*, the bar associations (including the Japan Federation of Bar Associations), and university law faculties. Respondents were asked to comment on a series of issues relating to reform of the execution system:

- the position of the *shikkô-ri* within the administrative framework
- of the civil justice system;
- the scope of duties appropriate to the *shikkô-ri*;
- the status of the *shikkô-ri* as public officials under the new Public
- Officials Act;[26]
- the method of paying *shikkô-ri* for their services;
- the availability and use of deputies;
- other comments.

In the report, the responses from lawyers and participating university law faculties on these issues are reproduced verbatim; responses from other institutions are reported in edited form. The report provides an invaluable, multi-faced window on the nature of the problems in civil execution as perceived at that time.

References in the report to the precise shortcomings of the execution system tend to be oblique or truncated, but the return from the *Meiji* University Faculty of Law and Economics is reasonably clear. Responding to the question concerning deputies, the faculty states:

> "There should be careful reflection on the present system of execution assistants. It is not going too far to say that this system is the cause of much of the misunderstanding surrounding the position of the *shikkô-ri*.
>
> The process is as follows. The *shikkô-ri*, in carrying out civil executions, often need to call on workers to transport goods and the like; and so it has become a standard practice to retain people in the conduct of execution. And it has become practice to retain these workers as assistants (as provided under Code of Civil Procedure Art. 537). These workers have become professionalized, and persons with a certain

25 *Shikkô-ri seido kaizen ni kansuru ikenshû, supra* note 20.
26 *Kokka kômuin-hô* (Law No. 120/1947, latest amendment by Law No. 32/2001).

> disagreeable aspect[27] have come to gather at the offices of the *shikkô-ri* in search of work. The *shikkô-ri*, with a hard-hearted task on their hands, have come to realize that by making use of the disagreeable aspect of these persons, they can clear up cases more rapidly."[28]

This passage tells us that the *shikkô-ri*, driven by commission incentives, made effective use of their separate premises, their relative independence from court supervision, and their freedom to retain deputies.[29] We are not told whether the "disagreeable persons" referred to here sported body tattoos or lacked one or more digits of the left hand. But the report tells us enough to conclude that they were marginal persons with little (mainstream) reputation to lose, and possessing the authority that travels with a veiled threat of violence. They were generally despised; and abuses by these deputies were one of the principal problems that motivated the review of the then-existing *shikkô-ri* system.

The overall result of the consultation exercise is summarized in *Table 2* (see opposite page). The division of opinion over whether the system of deputies should be retained is instructive. The highest percent of support was voiced by the *shikkô-ri* themselves (at 35%), while 30% of bar associations also favor its retention; these are the groups which benefited most directly from a rigorous execution system (and had the least to lose, it should be said, in reputational terms).[30] The system was most strongly opposed by judges and public prosecutors, presumably because of their stake in the public image of the legal system as a whole, and their responsibility for enforcement of the criminal law.

The ultimate result of reform efforts was the *Shikkô-kan* Act of 1966, which remains in force today. The commission system was retained intact, but the selection process changed dramatically; apart from giving civil execution officers a new title, the new Act

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27 The Japanese here is a delightfully delicate euphemism: *"Isshu no konomashikazaru fun'iki wo motta mono."*

28 Response of *Meiji daigaku hôgakubu,* in: *Shikkôri seido kaizen ni kansuru ikenshû*, *supra* note 20, at 85. (This passage is followed by the recommendation that, in the interest of improving the legal consciousness of the population, the professional deputies should be replaced by ordinary citizens drafted in, as a matter of civic duty, to assist in civil executions in their neighborhoods. This suggestion is less bizarre than it may at first appear, given the traditional mechanisms of neighborhood discipline on which the maintenance of order depended in pre-modern Japan. The Ministry of Justice, to its credit, did not act on this no doubt well-intentioned proposal.)

29 TERADA, *supra* note 4, at 1096, also suggests that the separate-office arrangement gave the *shikkô-ri* an unwonted degree of independence that made it difficult for their betters to educate them in the appropriate manner of conducting their trade.

30 A majority of *shikkô-ri* came out in favor of abolishing the system, but there are grounds for doubting this return; the weak position of the *shikkô-ri* in the exercise is exemplified by the fact that, alone among the five groups consulted, their opinions are reported almost entirely as bare statistics. For all the disparaging remarks made by others about their abilities, they surely had enough intelligence to tell which way the wind was blowing.

Issue	*Position*	*Rate of Agreement*						
		Courts	*Shikko-ri*	*Univer-sities*	*Bar Association*		*Prose-cutor*	*Average*
					Nat'l Fed'n	*Indiv. Assns*		
Position of the *shikko-ri*	Status quo	(22) 21%	(13) 27%	(4) 44%	No	(6) 20%	(2) 5%	(47) 20%
	Execution under the sole control of the court	(44) 42%	(14) 29%	(4) 44%	Yes	(22) 73%	(6) 16%	(90) 39%
	Execution under the sole control of an execution office of the court	(11) 10%	(5) 10%	None	No	None	None	(16) 7%
	Execution under the sole control of the shikkouri	None	(5) 10%	None	No	(1) 3%	(1) 3%	(7) 3%
	Place shikkouri under the control of an administrative agency	(1) 1%	None	(1) 11%	No	None	(20) 54%	(22) 10%
Duties	Status quo	(38) 36%	(21) 43%	(2) 22%	No	(14) 47%	(7) 19%	(82) 35%
	Restrict to execution matters	None	None	(1) 11%	No	(2) 7%	(5) 14%	(8) 3%
	Exclude service of process matters	(25) 24%	(12) 24%	(5) 56%	Yes	(5) 17%	(12) 32%	(59) 26%
	Need for special execution office for labor matters	(6) 6%	(2) 4%	None	No	(5) 17%	(1) 3%	(14) 6%
	Need for special execution office for family matters	(15) 14%	(1) 2%	None	No	(5) 17%	(2) 5%	(23) 10%
Status	Status quo	(8) 8%	(9) 18%	None	No	(6) 20%	(2) 5%	(25) 11%
	Full public servant	(68) 64%	(29) 59%	(9) 100%	Yes	(20) 67%	(28) 76%	(154) 67%
Pay	Status quo	(10) 9%	(16) 33%	(1) 11%	No	(7) 23%	(4) 11%	(38) 16%
	Salary	(51) 48%	(17) 39%	(8) 89%	Yes	(11) 37%	(26) 70%	(113) 89%
	Salary plus commission	(13) 12%	(5) 10%	None	No	(11) 37%	(2) 5%	(31) 13%
Supporting actors	Provide for execution agents	(14) 13%	(17) 35%	(2) 22%	--	(9) 30%	(6) 16%	(48) 21%
	Eliminate execution agents	(60) 57%	(23) 47%	(5) 56%	--	(9) 30%	(13) 35%	(110) 48%

Table 2 : Figures in parentheses show the number of responses. Percentage figures show the proportion of responses in that category against total returns within the column. Source: *Shikkô-ri seido kaizen ni kansuru ikenshû* 136-137 (1955).

continued the process of bureaucratization that had been initiated by the tightening of court supervision in 1954. The *shikkô-kan* were moved from their separate residential premises to new offices inside the district courts themselves. A system of training was introduced, and the "quality" of officers was raised through a more rigorous selection process. The former requirement that applicants pass "an examination on the relevant law" was replaced by an examination and interview, the examination portion of which could be waived for applicants who are judicial clerks (*shoki-kan*). Under the new regime, only applicants of Civil Service grade 7 staff or above and 40 years of age or older were qualified to apply. This mode of selection would remain in effect for 33 years.

The most important change, however, was the elimination of the deputy system; as public officials, the new *shikkô-kan* were not permitted to delegate their functions to others. At a stroke, the new legislation thus produced a substantial drop in manpower.

IV. MODELING INCENTIVES

Below, I attempt to explain what was wrong with the pre-1966 execution engine, and what the effect of reform was on the execution process, by considering how creditors, debtors and enforcement officers might best have sought to maximize their respective benefits from the system. The reader is cautioned that much of the discussion in this section is entirely speculative; direct evidence of secret bargains and underground activities is hard to come by under any circumstances, and in this case, many of the institutions under discussion no longer exist, or have radically transformed over time. The best comfort I can offer to the reader is that the model applied by *Milhaupt* and *West* tells us to expect the behavior that I outline here: if the state does not monopolize enforcement services, private entrepreneurs will compete with an alternative service.

V. THE PROBLEM IN 1954

The most frequently cited problem in the 1954 survey is the intervention of outside middlemen.[31] The establishment view of such middlemen was (and is) that they are parasites on the execution process who extract revenues that should legally be available to the creditor, the debtor, or their lawyers. This is bound to be the view of anyone imbued with allegiance to the legal order, but properly speaking the relationship is one of partial symbiosis; in the context of an underpaid official execution establishment,[32]

31 Termed *toritate-ya* in all references I have seen circa 1955. Later appellations referring to middlemen of various types involved in the execution process include *keibai burôkâ*, *keibai-ya*, *sen'yû-ya*, and *songiri-ya*.

32 That is to say, an execution establishment that is not sufficiently well-paid, either by the state or by creditors, to have an incentive to drive out competitors and maintain a monopoly in enforcement services.

such interlopers help support the private law system by providing additional execution manpower.

With respect to goods, the "debt recovery racketeers" competed on speed in the clearance, particularly, of corporate inventories.[33] As such they are in head-to-head competition on quality (*i.e.* speed) with the official execution establishment, and they would likely have simply won the race on most occasions.

The "auction racketeers" (*keibai-ya*) are a different matter. These specialize in registered assets, title to which must, in most cases, be transferred through official procedures. Until 1979, the most common form of security interest in immovable property (hypothec, *teitô-ken*) was enforced by sale at a public auction at which the bidders appeared in person. This made it relatively easy for an inner circle of auction racketeers to communicate threats against competing bidders, drive down public auction prices, and turn a profit by reselling properties on the open market.[34]

The "symbiotic" aspect of the auction racketeer's work would arise after sale. The most common security interest in immovable property in Japan is the hypothec. From the inception of the Civil Code until 1998, the holder of a hypothec under Japanese law had no right to immediate possession, even in the event of default. The eviction remedy was available only to the holder of legal title to the property, which meant that purchasers at auction were left with the task of evicting tenants and owners in possession after completing the purchase. Given that eviction proceedings were uncertain and costly in time (because of the scarcity of *shikkô-ri*), a bidder who could (shall we say) induce the occupants to leave voluntarily would enjoy an extra profit from his purchase. And when middlemen carried out self-help evictions (or negotiated a voluntary surrender of possession on the basis that they might do so), they released time to the *shikkô-ri* that they could spend on other, less awkward cases.

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33 A common method of offering movable property as security in Japan is the "title transfer security interest" (*jôto tanpo*). This has an effect similar to so-called *Romalpa* reservation of title clauses at English law, but can be created in favor of a lender who had no preexisting interest in the property concerned. Because the creditor obtains title in advance under such an agreement, a forcible recovery of possession does not raise problems of conflicting ownership. The act of seizure itself may well, of course, constitute a breach of the criminal law.

34 For a discussion of bidding processes before and after the Civil Execution Act of 1979, see BENNETT, Clash of the Titles: Japan's Secured Lenders Meet Civil Code Section 395: Netherlands J. Int'l L. 281 (1990). A sealed bidding system was introduced in 1979, and strategies for intimidating competing bidders have adjusted accordingly. See, generally, N. HAYASHI ET AL., *Dou haijo suru: shikkô bôgai* (1996). The brokerage pattern is well-recognized. Its impact on the value of security is one of the points commonly covered in empirical studies of mortgage execution. See*, e.g.*, H. IGUCHI, *Fudôsan keibai jiken to sono mondaiten*: 738 *Hanrei Taimuzu* 21 (Dec. 12, 1990); *Tôhoku minji shikkô kenkyû-kai, Fudôsan shikkô (tsuiseki chôsa)*: *Hanrei Taimuzu* 27 (Jan. 1, 1992); M. TAKESHITA, *Jittai chôsa kara mita fudôsan keibai*, in: *Fudôsan shikkô-hô no kenkyû* 373 (1977); T. NAKANO / T. KURITA, *Fudôsan keibai no jitsumu: Ôsaka saiban in okeru shôwa 47 nen-do no jôkyô*: 91 *Ôsaka Hôgaku* 179 (1974).

This is not to suggest that middlemen provided these services efficiently or in accordance with commonly accepted notions of fair play. If a "disagreeable aspect" can make evictions easier, it can equally well make them more difficult. A middleman obtaining possession before auction could resist eviction, offering to clear out immediately in exchange for a payment from the auction purchaser. This would lead to delay if the value of resistance (to the middleman) is greater than the value of enforcement (to the *shikkô-ri* or to another middleman). If the presence (or absence) of such persons in occupation can be known before auction, the auction price of that property would be affected accordingly. But the auction prospectus did not provide this information to bidders until recently, with the result that bidders discounted *all* properties according to the risk that an opportunistic occupant might exist. This was nice work indeed; and the *shikkô-ri*, who controlled access to the auction premises and had a close working relationship with the middlemen, would almost certainly have had their share of it.

The economics of the official and the black market execution sectors were clearly perceived by the drafters of the 1954 survey response from *Sendai* High Court prosecutors' office. Anticipating *Milhaupt* and *West* by 45 years or so, they proposed that execution racketeers be co-opted through the introduction of a licensing system.[35] Others, including (unsurprisingly) the *shikkô-ri* themselves, proposed increasing salaries or fee rates (which would have had the effect, under the rules of the time, of expanding manpower in the service), as the best way of combating the malaise of corruption and delay. As we have seen, an altogether different strategy was ultimately adopted.

VI. IMPACT OF THE 1966 LEGISLATION

The 1966 reform attempted to have it both ways. By moving *shikkô-kan* inside the physical premises of the court and denying them the independent power of drafting in deputies, it sought to jettison the "disagreeable persons" who had become an embarrassment to the execution process. The recruitment of persons of "better quality" was aimed at clinching this change in the culture of the service. On the other hand, by retaining the commission system, it was thought that officers would still have strong incentives to vigorously enforce judgments of the court.

It is unlikely that litigants were able to have it both ways. That said, the judicial statistics by themselves are open to multiple interpretations. Roughly speaking, enforcement activity shadows fluctuations in litigation rates, both before and after 1966. The carry-over of enforcement matters from one statistical year to the next does rise following 1966, but then declines in nearly every year for 20 years, despite the impressive rise in the volume of litigation between 1973 and 1987. This could mean that the efficiency

35 Responses from prosecutors' offices in: *Shikkô-ri seido kaizen ni kansuru ikenshû, supra* note 20, at 131.

of the enforcement system improved steadily, as low-quality pre-1966 staff were replaced with high-quality post-1966 staff. It could also mean that creditors learned not to send difficult collection matters to the newly unresponsive *shikkô-kan*, and instead either diverted such cases to underworld enforcers, or simply gave up.

As noted by *Milhaupt* and *West*, it appears that both private eviction work and obstruction of evictions continued to provide employment in the Japanese economy.[36] But immovable property is the bright side of the story; given their small numbers and their reliance on commissions, we should expect *shikkô-kan* to steer clear of execution matters that involve a significant risk of failure.[37] The seizure of movables, because it requires speedy and aggressive action to compete successfully with the "private sector", involves a particularly high risk of failure. A Japanese judge writing in a leading law journal as recently as 1994 stated that were it not for middlemen willing to purchase movable property (goods) at auction and resell them to the original owner at a 100% to 300% markup over the (heavily discounted) sale price, that part of the execution system would cease to function altogether.[38] Given the good health of Internet auction business in Japan,[39] it is difficult to interpret this as general aversion used goods or auctions. It is more likely to reflect the fact that the goods of real value – the warehouse inventories of failed manufacturing, wholesale and retail businesses – are not finding their way into the court's auction system at all.

V. CONCLUSION

There can be little doubt that the 1966 *Shikkô-kan* Act and the staffing policy in the decades following its introduction made execution less certain, and thereby both aggravated the tendency toward rent-seeking obstruction of execution (particularly in eviction matters), and boosted the demand for illegal enforcement services. The reduction in enforcement strength may have been costly, but it has also, in a certain respect, succeeded remarkably well. Prosecutors, judges and law faculties expressed particular concern in the 1954 survey over the disrepute into which corruption in the auction process had drawn the legal system. By forcing the *shikkô-ri* to jettison their support network and by bringing them within the judicial fold, the courts dissociated themselves from the quandaries engendered by under-subsidized enforcement. The problems continue to exist,[40] but the blame for them came to be laid on forces that lurk beyond the

36 Concerning the legal foundations and strategies of "occupation racketeers", see BENNETT, *supra* note 34.

37 The commission payable for failed executions is much lower than that for cases successfully cleared up.

38 *Shikkô-kan ni josei ga natte morau tame no zentei jôken*: 1042 *Jurisuto* 2 (April 1, 1994).

39 See <*http://auctions.yahoo.co.jp/*>.

40 See, *e.g.*, HAYASHI, *supra* note 34.

boundaries of the legal system. The courts, for their part, received double plaudits, being credited on the one hand with conducting trials that promote settlement in the way that trials should, and on the other with permitting alternative methods of dispute settlement to survive in the wider society. Recent history has not been so kind in its evaluation, however. The vulnerability of Japan's lightly-staffed civil execution establishment was revealed by the collapse of Japan's bubble economy, and criticism both within and without Japan has mounted. In response, a number of important changes have been introduced specifically to address issues discussed in this Article. The Supreme Court amended the rules for the selection of *shikkô-kan* in June of 1999. The regime described above, under which only civil servants of grade 7 or above were eligible to apply, has been softened again, to a requirement that applicants "satisfy a standard to be established by the Supreme Court, as persons with many years of experience in legal affairs".[41] Following this loosening of the entry requirements, a further revision of regulations introduced the position of "supervising *shikkô-kan*" in each District Court.[42] The courts are preparing themselves to manage an expansion of manpower.

The bench has also been whittling away the legal underpinnings of enforcement obstruction. In a widely publicized case, the Supreme Court handed down a judgement on 24 November 1999 which has a considerable impact on the position of "occupation racketeers".[43] At the time of the decision, the recently established position of the Supreme Court had been that the holder of a hypothec (*i.e.* a mortgagee) under Japanese law is not permitted to petition for vacant possession against a short-term tenant on economic grounds; that is a task for the purchaser, after they have acquired full title to the property.[44] In the 1999 case, the Court reversed its earlier decision, holding that the mortgagee may petition directly for vacant occupation, as necessary to protect the value of his security interest. The decision sent a clear signal that the improvement of enforcement mechanisms is now a high priority for the Japanese court system.

As for what this experience has to say to today's countries in transition, the message is that history matters. When Japan replaced the property law of the local fief with that of the nation-state, there was no international monetary system or aid network; the stakes were therefore high and the margin for error slim. Because property rights were important to governance, Japan introduced a carefully designed regime for enforcing them. Because vigorous enforcement was needed, execution officers (*shittatsu-ri* and their successors) were paid on a commission basis. Because the demand for enforcement services was known to vary over time, officers were allowed to appoint deputies according to need. Because qualified applicants were not always available, the minimum standards for selection were set low. Because property rights were more important

41 Supreme Court Regulation No. 6/1999.
42 Supreme Court Regulation No. 10/2001.
43 Decision of the Supreme Court, 24 November 1999.
44 Decision of the Supreme Court: *Minshû*, vol. 45 no. 3 p. 268 (22 March 1991).

than the niceties of procedure, officers were permitted to set up their offices where they chose and to operate them with a minimum of interference.

The *shittatsu-ri* service delivered aggressive enforcement. But it also exhibited a tension between the publicly accepted rules for the delivery of justice and the commercial pragmatism of execution officers. In a later, more refined time, this tension threatened the legitimacy and governance of legal institutions, and law-makers responded by abolishing deputies, raising the qualification bar and stiffening judicial supervision. The former deputies, cast off by the formal legal order, were skilled competitors in the emerging black market for enforcement services. The long apprenticeship of their trade in the service of the state helps to explain the clarity of the data available to *Milhaupt* and *West*. But more important, it raises a question over the very mechanism of enforcement substitution that they observe. If Japan's private enforcement sector was incubated under official supervision, the systematic private enforcement of property rights may not have been a wholly spontaneous social phenomenon. If so, the risk of leaving enforcement to later – an experiment which Japan clearly did not attempt – may be far greater than their study suggests.

ZUSAMMENFASSUNG

Der Beitrag befaßt sich mit der historischen Entwicklung des Systems der Zwangsvollstreckung in Japan und untersucht die Frage, warum dieses bislang so ineffizient geblieben ist. Der Verfasser greift dabei auf wichtige Vorarbeiten zu diesem Thema zurück, unter anderem von Autoren wie Haley und Millhaupt / West, die zwar auf die Probleme des staatlichen Systems der Zwangsvollstreckung in Japan hingewiesen haben, letztlich aber die Ursachen hierfür nicht zu klären vermochten. Demgegenüber versucht der Autor diesen Punkt auf einer historischen Analyse aufbauend zu klären.

In der Meiji-Zeit sei zum ersten Mal ein umfassendes staatliches System der Zwangsvollstreckung eingerichtet worden. Darin hätten Gerichtsvollzieher zunächst auf Kommissionsbasis gearbeitet und seien befugt gewesen, Helfer zu ernennen. Das System habe sich zwar einerseits als sehr effektiv erwiesen, andererseits seien jedoch die Staatsbediensteten bei der Vollstreckung der Gerichtsurteile teilweise so rigoros vorgegangen, daß sie in der Gesellschaft einen schlechten Ruf gehabt hätten.

In der Nachkriegszeit hätten kleinere Reformen dazu geführt, daß die Gerichtsvollzieher nach und nach unter stärkere Kontrolle der Distriktgerichte kamen. Unabhängig davon aber habe sich ihre wirtschaftliche Position wegen des Kommissionssystems und der allgemein schwachen Wirtschaftslage in Japan verschlechtert. Dies habe zu einer Verschlechterung des Systems insgesamt geführt, denn die Gerichtsvollzieher und ihre selbstbestellten Helfer seien dazu übergegangen auch illegale Methoden bei der Vollstreckung anzuwenden, um ihr eigenes Einkommen zu sichern. Auch eine große Reform

des Systems im Jahre 1966 habe keine Lösung des Problems gebracht, sondern die Schwierigkeiten sogar noch verschärft. Die Gerichtsvollzieher seien fortan nicht mehr in der Lage gewesen, die Vollstreckung effizient durchzuführen. Dies habe dazu geführt, daß immer mehr Vollstreckungsgläubiger es unterließen, ihre Forderungen einzutreiben, oder aber sich der Dienste von Gangstersyndikaten bedienten.

Die Ineffizienz des gegenwärtigen Systems der Zwangsvollstreckung in Japan läge in einer historischen Fehlentwicklung begründet, weshalb dessen gesetzliche Grundlage reformiert werden müsse.

(die Red.)